IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 72796/16
and 42 other applications

BETWEEN:

KAMURAN AKIN
AND OTHERS
Applicants

- and -

TURKEY
Respondent

WRITTEN SUBMISSIONS OF

THE TURKEY HUMAN RIGHTS LITIGATION SUPPORT PROJECT

I. Introduction

1. These submissions are made by the Turkey Human Rights Litigation Support Project (the "Intervener") pursuant to the leave granted by of the European Court of Human Rights (the "Court" and the "ECtHR") on 19 November 2021, in accordance with Rule 44§3 of the Rules of the Court.

2. The applications concern eighty-one academics who, together with others, signed a 'Petition for Peace' in January 2016 criticising the Turkish government's actions during security operations in south-eastern Turkey (they are publicly referred to as the 'Academics for Peace'). The academics were prosecuted, dismissed from academic institutions, and banned from public service under state of emergency legislation in Turkey as a result of their endorsement of the petition.

3. Drawing on its expertise as an organisation specialising in international human rights law and the human rights situation in Turkey, the Intervener will address one of the central issues arising in these applications: the availability and effectiveness of domestic remedies in the context of the application of emergency measures in Turkey. In doing so, Part II of these submissions provide a brief background about the issue. Part III focuses on the right to an effective remedy and the extent to which the Inquiry Commission on the State of Emergency Measures (the "Commission") ensures necessary guarantees. Finally, Part IV considers whether it is possible to remedy any shortcomings of the Commission in subsequent appeal proceedings before designated administrative courts or the Turkish Constitutional Court (the "TCC").

II. Background: State of emergency measures in Turkey and their application to the 'Academics for Peace'

4. During the state of emergency, the Turkish government adopted a series of unprecedented emergency measures such as the dismissal of approximately 130,000 public service workers from public offices by executive emergency decrees including thousands of academics.[1] 406 academics who signed the 'Petition for Peace' were among those dismissed.[2]

5. Academics were also accused of disseminating propaganda in support of the Kurdistan Workers Party ("the PKK"), pursuant to Article 7(2) of Law no. 3713 on Prevention of Terrorism for signing the petition. However, the majority of them were retried and/or acquitted by the criminal courts of first instance[3] following the TCC's judgment in the case of *Zübeyde Füsun Üstel and Others*.[4] In this judgment, the TCC concluded that the content of the petition did not praise, justify, or incite violent methods or terrorism, but rather called for the end of conflict and violence and respect for human rights, thus the applicants' right to freedom of expression had been violated.[5]

III. The right to an effective remedy and the remit of the State of Emergency Inquiry Commission

3.1. Right to an Effective Remedy

6. The obligation to exhaust domestic remedies under Article 35§1 of the European Convention on Human Rights (the "Convention") requires applicants to make normal use of remedies which are available and

[1] "Amnesty International, Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers", 25 October 2018, https://www.amnesty.org/en/documents/eur44/9210/2018/en/ ; see the Inquiry Commission on the State of Emergency Measures, Activity Report, 2020, p. 1: https://soe.tccb.gov.tr/Docs/SOE_Report_2020.pdf ("By the Decree laws published within the scope of state of emergency, a total of 131,922 measures were taken, and 125,678 of them are procedures concerning the dismissal from public service").

[2] Human Rights Foundation of Turkey Academy, 'Academics for Peace: A Brief History, 11 January 2016-15 March 2019, p. 17, available at https://www.tihvakademi.org/wp-content/uploads/2019/03/AcademicsforPeace-ABriefHistory.pdf.

[3] Frontline Defenders, Request for Retrial of an Academic for Peace Turned Down by an Istanbul court, 8 November 2019, https://www.frontlinedefenders.org/en/case/judicial-harassment-academics-peace.

[4] Turkish Constitutional Court, *Zübeyde Füsun Üstel and Others*, App no. 2018/17635, 26 July 2019.

[5] Ibid para. 127.

sufficient in respect of their Convention grievances.[6] Nevertheless, there is no obligation to have recourse to remedies which are inadequate or ineffective.[7] In fact, the exhaustion rule is based on the assumption, reflected in Article 13, that the domestic legal order will provide an effective remedy for violations of Convention rights.[8]

7. The case law of the ECtHR provides that a remedy that needs to be exhausted within the meaning of Article 35§1 must be timely, accessible, and effective in law and in practice. Thus it must provide for the right to apply to an appropriate, independent and effective national authority with the power to deal with the substance of the complaint, order cessation of the violation and provide reparation.[9] Although the remedy may not in all circumstances have to be judicial, "judicial remedies ... furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13".[10] Non-judicial remedies must "offer sufficient procedural safeguards for the purposes of Article 13",[11] consistent with an effective challenge which offers "adequate guarantees of independence and impartiality".[12] The effectiveness of a remedy does not depend on the certainty of a favourable outcome, but it must offer a reasonable prospect of success.[13] Thus to be considered effective, decisions of the independent decision-maker must, of course, be implemented.[14]

8. The right to an effective remedy should also be applicable at all times including national state of emergency and even after derogation, independent and impartial courts must continue functioning without interference, overseeing the necessity of the emergency measures in question.[15]

3.2. The establishment, role and functioning of the State of Emergency Inquiry Commission

9. Addressing the state of emergency measures introduced in 2016, the Venice Commission recommended the creation of an *ad hoc* body tasked with examining individual cases of dismissals of public officials and other associated state of emergency measures, while highlighting that: "[t]his body should be independent, impartial and be given sufficient powers to restore the status quo ante, and/or, where appropriate, to provide adequate compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body." [16]

10. Acting on the Venice Commission's opinion, Turkey established the Inquiry Commission on the State of Emergency Measures by Emergency Decree Law No. 685, dated 23 January 2017.[17] Under Article 2(1) of the Decree Law, the Commission's mandate is primarily to review decisions on dismissals of public sector workers from public service, pursuant to state of emergency decree laws taken on the grounds of

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[6] ECtHR, *Gherghina v. Romania* (dec.) [GC], App.no. 42219/07, 9 July 2015, para 84.
[7] Ibid para 85.
[8] ECtHR, Practical Guide on Admissibility Criteria, para. 87 (updated on 1 August 2021), https://www.echr.coe.int/pages/home.aspx?p=caselaw/analysis/admi_guide.
[9] ECtHR, *Hatton v. the United Kingdom*, App no. 36022/97, 8 July 2003.
[10] ECtHR, *Klass and Others v. Germany*, App no. 5029/71, 6 September 1978, para. 67.
[11] ECtHR, *Chahal v. United Kingdom* [GC], App no. 70/1995/576/662, 15 November 1996, para. 155.
[12] ECtHR, *Al-Nashif v. Bulgaria*, App no. 50963/99, 20 June 2002, para.133; see also *M. and Others v. Bulgaria*, App no. 60 41416/08, 26 July 2011.
[13] ECtHR, *Costello-Roberts v. UK*, App no. 89/1991/341/414, 25 March 1993, para. 40.
[14] ECtHR, *Wille v. Liechtenstein* [GC], App no. 28396/95, 28 October 1999, para. 75.
[15] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and 73 Lawyers, p. 884, https://www.ohchr.org/Documents/Publications/training9chapter16en.pdf ; on role of the justice sector in states of emergency, see also UN Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/ HRC/35/31 (2017), paras. 102-103.
[16] Venice Commission Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup 49 of 15 July 2016, CDL-AD(2016)037, 12 December 2016, para. 160.
[17] This provision of Emergency Decree No. 685 was ratified by Turkey's Parliament as part of Law No. 7075, published in the Official Gazette on 1 March 2018. This Law was then amended on 25 July 2018 with Law No. 7145. For English version of Law No. 7075, see the Inquiry Commission on the State of Emergency Measures, Activity Report, 2020, pages 62-71, https://soe.tccb.gov.tr/Docs/SOE_Report_2020.pdf.

alleged membership of, or some connection or contact with, terrorist organisations or other groups "engaging in activities against the national security of the State".[18] Appeals against the Commission's decisions can be made to specially designated Ankara Administrative Courts.[19]

11. The Intervener has carried out research to assess whether the Commission offered an effective remedy within its mandate to challenge measures adopted during the state of emergency. In October 2019, it published its report "Access to Justice in Turkey? A Review of the State of Emergency Inquiry Commission" (the "TLSP 2019 report").[20] These written comments are based on this research report, complemented by additional research carried out since the publication of our report. In the light of this research, the Intervener submits that there are a number of factors which show that the Commission demonstrably fails to meet the elements required for an effective remedy according to international law. First, the composition of the Commission raises serious questions about its independence and impartiality. Second, the Commission has not been able to issue its decisions in a timely manner. Third, the Commission's examination of applications has revealed several serious shortcomings. Finally, the remit of the Commission's decisions is overly restricted. These points are addressed further in the following sections.

(i) The composition of the Commission – questions about its independence and impartiality

12. According to the ECtHR's case law, the "authority" referred to in Article 13 need not necessarily be a judicial institution in the strict sense or a tribunal within the meaning of Articles 6§1 and 5§4 of the Convention.[21] However, the authority's powers and the procedural safeguards that it affords are taken into account in order to determine whether the remedy is effective.[22] In this regard, it is crucial that non-judicial "authorities" are independent and procedural safeguards are afforded to applicants.[23] The authority in question should meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13.[24] In determining whether a body can be considered to be "independent", the ECtHR has had regard, inter alia, to the following criteria: (i) the manner of appointment of its members (ii) the duration of its members' term of office; (iii) the existence of guarantees against outside pressures; and (iv) whether the body presents an appearance of independence.[25]

13. In light of these fundamental standards, as noted in the TLSP 2019 Report, the composition of the Commission raises serious questions about its independence and impartiality. First, the Commission is comprised of seven members, five of whom are appointed by the President (before the 25 July 2018 amendment in Law No. 7075, the Prime Minister), the Minister of Justice and the Minister of the Interior. The remaining two members are appointed by the Council of Judges and Prosecutors (*Hakim ve Savcılar*

[18] Emergency Decree Law No. 685 on the Creation of the Inquiry Commission, published in the Official Gazette no. 29957, dated 23 January 2017.
[19] Article 11 of Law No. 7075.
[20] TLSP, Access to Justice in Turkey? A Review of the State of Emergency Inquiry Commission, October 2019, https://static1.squarespace.com/static/5b8bbe8c89c172835f9455fe/t/5e13373ddbd43712f438077a/1578317708753/State+of+Emergency+Commission+Report+Edited+Version+final.pdf.
[21] ECtHR, *Golder v. the United Kingdom*, App no. 4451/70, 21 February 1975, para. 33; *Klass and Others v. Germany* (n 10), para. 67; *Rotaru v. Romania* [GC], App no. 28341/95, 4 May 2000, para. 69; *Driza v. Albania*, App no. 33771/02, 13 November 2007, para. 116.
[22] ECtHR, *Klass and Others v. Germany* (n 10), para. 67; *Silver and Others v. the United Kingdom*, App nos. 5947/72, 6205/73, et al. 7052/75 para. 113 (b); *Kudła v. Poland* [GC], App no. 30210/96, 26 October 2000, § 157; *Mugemangango v. Belgium* [GC], App no. 310/15, 10 July 2020, para. 67.
[23] ECtHR, *Chahal v. the United Kingdom*, App no. 22414/93, 15 November 1996, paras. 152-154; *De Souza Ribeiro v. France* [GC], App no. 22689/07, 13 December 2012, para. 79.
[24] See, ECtHR, *Khan v. the United Kingdom*, App no. 35394/97, 12 May 2000, paras 45-47).
[25] ECtHR, *Kleyn and Others v. the Netherlands* [GC], App nos. 39343/98 and others, 6 May 2003, para. 190.

Kurulu, "the HSK"). However, the HSK cannot be said to be independent of the executive, as the Minister of Justice is its president, the Deputy Minister of Justice is a member of it, and four other members are also appointed by the President. As the findings of the Venice Commission on the independence of the judicial system in Turkey confirm (also relied on by this Court in *Selahattin Demirtaş v. Turkey (no. 2)*),[26] the composition of the HSK is "extremely problematic" because the President who had the power to appoint six members of the Council[27] is "not a neutral branch of power but belonged to a political faction", and his party has enjoyed a majority in Parliament.[28]

14. Moreover, significant numbers of cases brought to the Commission concern dismissals from the same government authorities which appoint the members of the Commission: 3,342 officials were dismissed from the then Prime Minister's Office; 4,235 officials from the Ministry of Justice; 24,031 officials from the Ministry of Interior; and 3,886 officials from the HSK.[29] Whereas the President (formerly the Prime Minister), the Minister of Justice and the Minister of Interior are among the government officials who signed and legally authorised state of emergency decrees.[30] This degree of executive control over appointments to the Commission and the strong connection between the appointing authorities, the decree laws and the dismissal decisions under the Commission's review raise serious questions about the Commission's independence.

15. Furthermore, the existing safeguards concerning the duration of term of office of the Commission members are also problematic. The term of office of the Commission members is simply subject to the period of existence of the Commission. Article 3 of Law No 7075 states that the Commission members are appointed for two years - any extension of their term requires a new procedure of appointment and members who have previously held office may be reappointed. Law No. 7075 sets out the tenure and rights of the Commission members, according to which they can be dismissed before their terms of office expires, in six situations.[31] Two of those conditions raise serious questions: first, members of the Commission may be dismissed simply when they are accused of committing crimes against state security[32] or crimes against the constitutional order.[33] The relevant regulation does not require a conviction, merely the instigation of an investigation can be used as a ground for dismissal. Second, Commission members may be dismissed if they have a 'connection' or 'links' with groups or organizations deemed to have engaged in activities contrary to the national security. Thus, members of the Commission may be dismissed for the same reasons and under the same circumstances as the applicants in the cases which they examine.[34]

[26] ECtHR, *Selahattin Demirtaş v. Turkey* (no. 2) [GC], App no. 14305/17; 22 December 2020, para. 434.
[27] Supreme Council of Judges and Prosecutors (HSYK) was replaced by Council of Judges and Prosecutors (HSK) after the 2017 constitutional amendment.
[28] See n. 26.
[29] See n. 20.
[30] Article 104 of the Constitution -before the constitutional amendments of April 2017- provided that the Council of Ministers, including the Minister of Justice and Interior, together with the then Prime Minister had the authority to adopt Emergency Decree Laws during the State of Emergency. See also Kerem Altıparmak, "Is the State of Emergency Inquiry Commission, established by Emergency 14305/17Decree 685, an effective remedy?", 23 February 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943518.
[31] See Article 4(1) of Law No. 7075.
[32] Turkish Criminal Law, Law No. 5237, Article 302: "Provocation of war against the State."
[33] Ibid., Articles 309, 310, 311, 312, 313, 314, and Article 315 of the Turkish Penal Code, no.5237.
[34] The Commission members may be dismissed based on vague allegations of having a "link" with terrorist organisations as similar to the applicants who applied to the Commission due to their dismissal from public offices by emergency decrees based on their alleged links with the terrorist organisations. See Article 4 (1-e) of Law no 7075.

(ii) The failure of the Commission to examine the applications in a timely manner

16. As this Court states in its case law, a remedy which will not bear fruit in sufficient time is inadequate and ineffective.[35] Yet, the latest statistics that have been provided by the Commission show that the process before the Commission takes a considerable length of time with a significant number of applications being dismissed. Accordingly, a total of 126,758 applications had been lodged with the Commission as of 28 October 2021. The Commission had delivered 118,415 decisions in these applications. While it had granted - in other words overturned the dismissals in - 15,050 applications, it dismissed 103,365 of them, finding the subsequent dismissal decisions lawful (a more than 87% rejection rate). There were 8,343 applications still pending before the Commission at the time the statistics were made public.[36]

17. In particular, according to information accessible to the Intervener, the Commission delivered its first decision in the applications from the 'Academics for Peace' in October 2021. As of 12 November 2021, the Commission had reportedly rejected more than 70 applications submitted by the signatory academics.[37] This shows that it took the Commission almost five years from its establishment to conclude applications of the academics and reject them, despite the TCC's July 2019 judgment finding a violation of their right to freedom of expression.[38] In the view of the Intervener, this time frame is excessive and as discussed under *sections 4.1. and 4.2.*, has to be taken together with the passage of time before administrative courts and TCC, adding further delay in these proceedings.

(iii) The lack of procedural safeguards in the Commission's examination of applications

18. In accordance with this Court's case law, the powers of the "authority" referred to in Article 13, and the procedural safeguards that it affords, should be taken into account in order to determine whether the remedy is effective.[39] The research by the Intervener establishes that there are a number of important procedural shortcomings in the Commission's examination of applications. As a dismissal in accordance with the Emergency Decree Laws is not treated domestically as an ordinary disciplinary or criminal process, the procedural rights of those who were dismissed were restricted or limited in the following ways:[40]

19. First, many decisions of the Commission reviewed by the Intervener show that no individualised reasoning was provided for the dismissals. Thus, the applicants have faced real difficulties in making meaningful and targeted submissions when filing an application to the Commission against the measures imposed on them. Many applicants were not aware of what information had been relied on by the authorities and therefore what information was being examined by the Commission, nor were they able to engage with the Commission to obtain this information.[41] As a result the applicants have been, in effect,

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[35] ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, App no. 12742/87; 29 November 1991, para. 47; *Payet v. France*, App no. 19606/08, 20 January 2011, paras 131-134.

[36] The State of Emergency Inquiry Commission, public announcement of 28 October 2021, https://ohalkomisyonu.tccb.gov.tr/.

[37] Euronews, OHAL Komisyonu, 'Barış Akademisyenleri'nin göreve iade için yaptıkları başvuruları reddetti', 12 November 2021, https://tr.euronews.com/2021/11/12/ohal-komisyonu-bar-s-akademisyenleri-nin-goreve-iade-icin-yapt-klar-basvurular-reddetti.

[38] Turkish Constitutional Court, *Zübeyde Füsun Üstel and Others*, App no. 2018/17635, 26 July 2019, para. 127.

[39] ECtHR, *Klass and Others v. Germany*, para. 67; *Silver and Others v. the United Kingdom*, App nos. 5947/72, 6205/73, et al. 7052/75 para. 113 (b); *Kudła v. Poland* [GC], App no. 30210/96, 26 October 2000, § 157; *Mugemangango v. Belgium* [GC], App no. 310/15, 10 July 2020, para. 67.

[40] Under ordinary legislation, a public servant can be dismissed following a disciplinary investigation. Broad defence rights, similar to those available under criminal law, are recognised under administrative law in such cases. However, the dismissals during the State of Emergency were unprecedented, as they did not follow this ordinary path, even for civil servants who do not exercise sovereign power of the state. See also The Council of Europe Commissioner for Human Rights, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, Doc. CommDH(2016)35, 7 October 2016, para. 28; Venice Commission, Opinion on Emergency Decree Laws N°s 667-676 (n. 16), (They criticise the sweeping nature of these dismissals in the absence of the ordinary procedural safeguards, and without any objective or reasonable grounds).

[41] TLSP 2019 Report (n. 20), pp. 14-16; Amnesty International, (n. 1), p.16.

forced to speculate about the reasons for their dismissals and strive to prove that they have no links with any proscribed groups or organisations.[42]

20. Second, according to the relevant regulations, the Commission only examines applications on the basis of written documents in the case file, with no possibility of holding an oral hearing and without communicating these documents to the applicants to give them a chance to reply or, if necessary, submit their own evidence.[43] It should be noted that the Commission is permitted to request information from many different institutions (including the Ministry of Interior, the Ministry of Justice, and governors) on whether the applicants had any links with terrorist organizations, and such institutions are obliged to submit the information requested to the Commission, including intelligence material (without prejudicing state secrecy).[44] Many of the decisions examined by the Intervener show that in its decisions, the Commission relies heavily on intelligence information, confidential witness statements, witness statements from former colleagues, or even research notes on a person's social environment, as the evidentiary basis on which to reject the applications.[45] This poses serious questions as to the compatibility with the applicants' right to "access and examine evidence", "defend themselves in person" and "challenge such evidence by examining witnesses at an oral hearing".[46] This also shows a clear systematic failure in the Commission's system to respect the principle of "equality of arms" under Article 6 of the Convention.[47]

21. Third, the decisions of the Commission reviewed by the Intervener also illustrate that in many applications, despite the applicants having been acquitted in the criminal proceedings against them, the Commission still rejected the applications on account of their alleged links with terrorist organisations. The Commission appears to have applied a 'loyalty' obligation of public officials without objective criteria for a balanced assessment and fair opportunity for a subsequent defence, which does not comply with the standards set by the ECtHR.[48] This practice also goes against the Venice Commission's opinion recommending that dismissal of public officials should only be ordered on the basis of a combination of factual elements which clearly indicated that the public servant had acted in a way which objectively cast serious doubts on his or her loyalty to the democratic legal order.[49]

22. Finally, this lack of procedural safeguards and other factors elaborated under *sections 3.2.(i), 3.2.(ii), and 3.2.(iii)* above resulted in the rejection of more than 100,000 applications by the Commission. As indicated in the TLSP 2019 Report, in its decisions dismissing the applications, the Commission deems everyday life practices illegal, it takes into account things allegedly done by the applicants even before they were appointed as public service workers and it fundamentally lacks any effort to collect and evaluate evidence in favour of the applicants. Moreover, these decisions are based "on abstract and non-legal grounds such as 'social environment knowledge', 'intelligence information', as well as subjective opinion and information from secret witnesses, all of which has deepened concerns over the reliability of the Commission's decisions."[50]

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[42] Ibid.

[43] Emergency Decree Law No. 685, Article 9. Official Gazette, From the Prime Minister's Office: Rules and Procedures in Relation to the Workings of the State of Emergency Inspection Commission, 12 July 2017, Article 14.

[44] Procedures and Principles Regarding the Operation of the State of Emergency Inquiry Commission, published in the Official Gazette no. 30122, dated 12 July 2017, Article 12.

[45] TLSP 2019 Report (n. 20), p. 15.

[46] See ECtHR, *Hermi v. Italy*, App no. 18114/02, 18 October 2006, para 58-59 and *Sejdovic v. Italy*, App no. 56581/00, 01 March 2006, paras. 81 and 84.

[47] See ECtHR, *Regner v Czech Republic,* App no. 35289/11, 19 September 2017.

[48] See, ECtHR, *Sõro v. Estonia*, App no., 3 September 2015; Oleksandr Volkov v. Ukraine, App. no. 21722/11, 9 January 2013, para. 181. See also TLSP 2019 Report (n. 20), pp. 17-21.

[49] Venice Commission Opinion on Emergency Decree Laws Nos.667-676 (n. 16), para. 131.

[50] E.g. Having a bank account at a certain bank; having graduated from, or sent one's children to, certain schools; memberships to certain trade unions; having stayed in certain dormitories, TLSP 2019 Report (n. 20), pp. 27-31, 42, 43.

(iv) The restricted remit of the Commission's decisions

23. The restricted remit of the Commission's decisions also raises serious questions about its effectiveness as a domestic remedy. As underlined by this Court, to be effective, a remedy must be capable of directly providing redress for the impugned situation.[51] Under the law applicable to the Commission, if an application succeeds before the Commission, it does not lead to the direct annulment of the dismissal.[52] In other words, although such a decision will include a determination that the initial procedure was unlawful, the Commission does not have power to annul decisions. The decision needs to be referred back to the public institution from which the applicant had been dismissed. Then, that public institution needs to take a separate decision as to whether to reinstate the applicant to his or her former position. Although the relevant law may allow for an applicant's reappointment, it also imposes several restrictions on certain groups of public officials, including dismissed academics.[53] In particular, academics cannot be reappointed to the institution where they last worked, and priority must be given to reinstating them to institutions based outside Ankara, Istanbul and Izmir and to academic institutions established after 2006.[54] Accordingly, it cannot be said that the Commission possesses the full remedial capacity to undo the violation or its effects (*restitutio in integrum*) for the academics who were dismissed from their university posts by the emergency decree laws, as they cannot be reinstated at their former universities.

24. Moreover, although the Commission decisions can include a determination that the initial procedure was unlawful, the law does not give the Commission power to examine whether applicants' fundamental rights, such as Article 8, Article 10 or Article 11 of the Convention, were violated. Nor does the Commission have the power to award any compensation for an unlawful dismissal.[55] Article 9 of Law no 7075 states that following the examination of documents in the file, the Commission may grant or dismiss the applications. Moreover, Article 10 of the same law provides that applicants may not claim for compensation on account of being dismissed from public service. Considering that many applicants allege to have been subjected to violations of various provisions of the Convention as a result of their dismissal by emergency decree laws - some of which have been also recognised by the International Labour Organization in a recent decision -.[56] the Commission does not have adequate powers to provide full reparation.

IV. Judicial Review of decisions made by the Commission

4.1. Administrative Courts

25. The research carried out by the Intervener indicates that the abovementioned shortcomings of the Commission process are not adequately remedied through the appeal procedure before the administrative courts. Judicial review of Commission decisions is regulated by Article 11 of Law No. 7075 which requires the referral of such applications to the Ankara Administrative Courts designated by the HSK

[51] *Pine Valley Developments Ltd and Others v. Ireland*, Commission decision, 1989.
[52] Article 10 of Law no. 7075, adopted 1 February 2018, and Law no.7145, adopted 25 July 2018, amending Emergency Decree Law No. 685.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] See International Labour Organization, Decision concerning the Reports of the two Committees set up to examine the representation alleging non-observance by Turkey of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Termination of Employment Convention, 1982 (No. 158), GB.341/INS/13/5/Decision, 24 March 2021: the ILO found, among other things, that the applicants' right to freedom of association was violated, in particular, the Committee acknowledged that some workers who had been dismissed by the Emergency Law Decrees, suffered from reprisals and retaliatory acts for their membership in dissolved unions by the Emergency Decree Laws, and that a full, independent and impartial review was not made to determine whether they had carried any unlawful activity that would justify their dismissal (para. 31), https://www.ilo.org/gb/GBSessions/GB341/ins/WCMS_776590/lang--en/index.htm.

(as of the date of this submission, court nos. 19-22 and 24-28).[57] In turn, appeals against the decisions of these administrative courts are dealt with by the Regional Administrative Court (nos. 13 and 14).[58] These administrative courts are exclusively responsible for reviewing Commission decisions.[59] The Intervener addresses below four important areas of concern about the administrative court proceedings.

26. First, as it is the HSK which designates the courts that are competent to review the Commission decisions, this raises questions about the issue of executive influence and its obvious implications for independence and impartiality.[60] The legitimate concerns as regards the HSK's independence from the executive are set out above in *Section 3.2. (i)*.[61]

27. Second, the effectiveness of the designated administrative courts is questionable considering the large number of Commission cases which have been rejected and been brought before the administrative courts. As stated above in paragraph 16, as of 28 October 2021, the Commission has rejected 103,365 applications out of the 118,415 (more than an 87% rejection rate).[62] This effectively means that more than 100,000 cases have had to be taken to a very small number of administrative courts which are designated only in the Ankara province to hear appeals. Although the number of designated administrative courts has been increased from two initially to nine currently,[63] the statistics show that these courts have still faced a significant caseload. Notably, between 2018 and 2020, while a total number of 91,051 cases dismissed by the Commission were appealed to the designated Ankara Administrative Courts, those courts delivered 50,228 decisions in total, meaning that the total number of cases carried over to 2021 was at least 40,823.[64] Accordingly, the 'Clearance Rate'[65] (one of the indicators to assess court efficiency according to the European Commission for the Efficiency of Justice ("CEPEJ")), of the designated Ankara courts between 2018 and 2020 was only 55%. The rate therefore remained well below 100%, meaning that these courts were able to resolve fewer cases than the number of incoming cases, which appears to have created further backlogs.[66]

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[57] HSK first selected Ankara 19th and 20th Administrative Court as the courts exclusively responsible courts for reviewing the Commission's decisions, and they started functioning on 28 November 2017. Then, the number of administrative courts were increased to nine with the establishment of Ankara 21st, 22nd, 24th, 25th, 26th, 27th, and 28th Administrative Court by 17 July 2020

[58] See Ankara Regional Administrative Court, Decision of work division, 18 January 2021, pp. 7-8: https://www.hsk.gov.tr/Eklentiler/files/Ankara%20B%C3%B6lge%20%C4%B0dare%20Mahkemesi%20%C4%B0%C5%9F%20B%C3%B6l%C3%BCm%C3%BC%20Karar%C4%B1_%2018_01_2021.pdf

[59] Article 11 of Law no. 7075, adopted 1 February 2018, amending Emergency Decree Law No. 685.

[60] TLSP 2019 Report (n. 20), p. 22; Kerem Altıparmak (n. 30).

[61] See *Selahattin Demirtaş v. Turkey* (no. 2) [GC] (n. 26), para. 434; See also International Commission of Jurists, "Justice Suspended: Access to Justice and the State of Emergency in Turkey" (2018): https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-_ENG.pdf (The ICJ also argues that it is of particular concern that the Ankara Administrative Courts Nos. 19, 20, 21 and 22 were designated as the courts competent to hear appeals from the Commission's decisions by the HSK, in its formation following the constitutional reform, because the administrative courts may therefore lack independence).

[62] See n. 36.

[63] See n. 57.

[64] 2018 Activities Report of Ankara Regional Administrative Court and Associated Administrative and Tax Courts; 2019 Activities Report of Ankara Regional Administrative Court and Associated Administrative and Tax Courts pp. 40, 41, 130, https://www.memurlar.net/common/news/documents/912452/2019.pdf; 2020 Activities Report of Ankara Regional Administrative Court and Associated Administrative and Tax Courts p. 37, https://rayp.adalet.gov.tr/Resimler/23/dosya/2020-faaliyet-raporu10-03-202109-36.pdf.

[65] Clearance rate = (resolved cases / incoming cases) *100. European Judicial Systems CEPEJ Evaluation Report, 2020 Evaluation cycle (2018 data), Part 1, Tables, graphs and analyses, p. 107,

[66] See European Judicial Systems CEPEJ Evaluation Report, 2020 Evaluation cycle (2018 data), Part 1, Tables, graphs and analyses, p. 107. CEPEJ developed two performance indicators to assess court efficiency at the European level: Clearance Rate. and Disposition Time. According to the CEPEJ, when they are examined together, they "present an overall picture of the judicial efficiency in a particular judicial system".

28. In these circumstances, it is not feasible for the administrative courts to issue their decisions in a timely manner. Also, according to the official statistics, the average length of proceedings before the first instance administrative courts has increased considerably. Indeed, when the statistics for 2019 and 2020 are compared, the average length of proceedings went up from nearly one year to two years and two months before the Ankara 19th Administrative Court, from ten months to two years and three months before the Ankara 20th Administrative Court, from eight months to one year and five months before the Ankara 21st Administrative Court, from nine months to one year and two months before the Ankara 22nd Administrative Court and from six months to one year and three months before the Ankara 24th Administrative Court.[67]

29. Moreover, as it appears that the administrative courts also reject the large majority of the cases brought before them, the length of proceedings are further increased because the majority of the applicants whose cases are dismissed need to appeal again to the Ankara Regional Administrative Court, then possibly to the Supreme Administrative Court depending on the outcome and then finally to make an application to the TCC.[68] Accordingly, more than five years after the dismissals, these applicants are still in the process of appealing these decisions before the administrative courts and then may also be required to make an application to the TCC.

30. Third, the decisions reviewed by the Intervener indicate that the designated administrative courts have adopted a pattern similar to the Commission and continue to rely solely on 'evidence' produced by the administrative authorities which are behind the dismissal decisions, without carrying out a proper and detailed examination of evidence submitted by the applicants, and without an effective judicial review that respects the necessary procedural safeguards. In 21 decisions of the Ankara Administrative Courts that were examined for this research, the courts relied heavily on the assessments of the Commission and the reports and documents submitted by the state authorities (e.g. intelligence information, anonymous witness statements, witness statements from colleagues, information file prepared by the applicant's institution, opinion by the superior/institution and information from 'social circles'). Based on these, the appeals against the Commission's decisions were rejected. The same evaluation is valid for the Ankara Regional Administrative Court of Appeal. The Intervener obtained 20 decisions from the regional appeal court. Accordingly, the court turned down the appeal requests of the plaintiffs in all of these by simply indicating that the decisions of the Ankara Administrative Courts were lawful. Similar to the procedure before the Commission, the applicants could not examine witnesses before the administrative courts in these cases.

31. Finally, the administrative courts, in practice, do not provide the applicants with the opportunity to challenge the lawfulness of the initial dismissal based on emergency decrees. In other words, the courts can only review the question whether or not the Commission's decisions were justified, rather than examining whether the initial dismissal was lawful or not. Furthermore, as discussed above in relation to the Commission, the applicants cannot claim any compensation for the violation of their rights.[69]

[67] See 2019 Activities Report of Ankara Regional Administrative Court and Associated Administrative and Tax Courts, pp. 78 and 80; 2020 Activities Report of Ankara Regional Administrative Court and Associated Administrative and Tax Courts, pp. 62-63. As the Ankara Administrative Courts nos. 25, 26, 27 and 28 were established later, they did not deliver and decisions in 2019. According to the available data, in 2020, the length of proceedings is 318 days before the Ankara 25th AC, 26 days before the Ankara 27th AC and 160 before the Ankara 28th AC.

[68] 21 decisions were obtained by the TLSP, and the administrative courts rejected applicants' cases in all of these decisions. As the decisions of the administrative courts are not public, the ones reviewed in the course of this intervention were accessed directly through lawyers, NGOs or applicants.

[69] See Article 10 of Law no. 7075, adopted 1 February 2018, amending Emergency Decree Law No. 685.

4.2. Turkish Constitutional Court

32. Shortly after the declaration of the state of emergency and initial emergency measures, the TCC was inundated with thousands of applications stemming from them. It declared thousands of these individual applications inadmissible[70] on the ground that the applicants should have first exhausted all other available domestic remedies.[71] This was followed by the TCC's decisions rejecting challenges brought by the main opposition party against the emergency decrees both before they were approved by the parliament[72] and afterwards.[73] Moreover, the TCC found that it had no jurisdiction to review the constitutionality of the emergency measures under Article 148 of the Constitution. In the view of the Intervener, these decisions were not in line with the TCC's previous jurisprudence because in 2003, the court ruled that measures which were not relevant to, or strictly required by, a state of emergency could not be regulated by an emergency decree as that decree could not be called a "state of emergency decree". Hence, these measures were subjected to constitutional review. [74]

33. Similarly, the TCC has rejected several applications concerning the ineffectiveness of the domestic remedies, including the Commission and administrative courts, in respect of the dismissals of academics by emergency decree laws.[75] The TCC did not provide any reasoning for not examining the applicants' claims about the ineffectiveness of the Commission and the administrative courts and invoked the same generalised reasoning used in its inadmissibility decisions mentioned in the above paragraph.

34. Finally, in the course of the research carried out for this submission, the Intervener could not identify a single case in which the processes before the Commission, the designated Ankara Administrative Courts, the Ankara Regional Administrative Court and the Supreme Court of Appeal had all been completed. Information accessible to the Interveners also shows that as of 6 December 2021 the TCC had not delivered a single judgment on the merits of an individual application by public service workers directly dismissed by emergency decree laws, after applying to the Commission and subsequent administrative court review procedures. This is a striking indication of the excessively lengthy time needed for the exhaustion of all administrative and judicial procedures in order to lodge an individual application to the TCC. With the extremely low acceptance rate of the Commission -and the administrative courts adopting a similar approach- the Interveners note that, more than five years after the initial dismissals took place, there are about 100,000 people in Turkey who are still trying to pursue domestic remedies in their search for justice as regards their dismissal.

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[70] See the press release of the TCC dated 4 August 2017 explaining that 70,711 applications concerning complaints related to administrative acts arising from the Emergency Decree Laws: https://www.anayasa.gov.tr/tr/duyurular/ohal-kanun-hukmunde-kararnameleri-ile-yapilan-islemler-ve-ohal-kapsaminda-yapilan-idari-islemlere-yonelik-bireysel-basvurular-hakkinda-basin-duyurusu/.

[71] See TCC, Remziye Duman decision, no: 2016/25923, 20 July 2017.
In a press announcement made on 4 August 2017, it was stated that 70,771 applications had been made to the TCC regarding measures taken under the state of emergency decrees and the administrative actions carried out within the scope of the state of emergency all of which would eventually be found inadmissible: TCC, https://www.anayasa.gov.tr/tr/duyurular/ohal-kanun-hukmunde-kararnameleri-ile-yapilan-islemler-ve-ohalkapsaminda-yapilan-idari-islemlere-yonelik-bireysel-basvurular-hakkinda-basin-duyurusu/, 4 August 2017.

[72] Arguing that it had no jurisdiction on reviewing constitutionality of the emergency measures under Article 148 of the Constitution, e.g. judgment no 2016/159 on the file no 2016/166, 12 October 2016; judgment no 2016/160 on the file no 2016/167, 12 October 2016; judgment no 2018/191 on the file no 2018/114, 25 September 2018.

[73] Arguing that the arguments put forward by applicant did not provide enough ground to nullify the laws challenged and that the procedure in which the laws were adopted did not violate the Constitution, e.g. judgment no 2018/48 on the file no 2018/42, 31 May 2018; judgment no 2018/54 on the file no 2018/48, 31 May 2018.

[74] See TCC, application no. 2003/28, decision no. 2003/42, 22 May 2003.

[75] See TCC, Hülya Dinçer, decision no: 2017/13720, 3 August 2017. See also the decisions in applications nos. 2017/13201, 24 July 2017; 2017/12688, 24 July 2017. See for more detail under "*the restricted remit of the Commission's decisions*" p. 9.