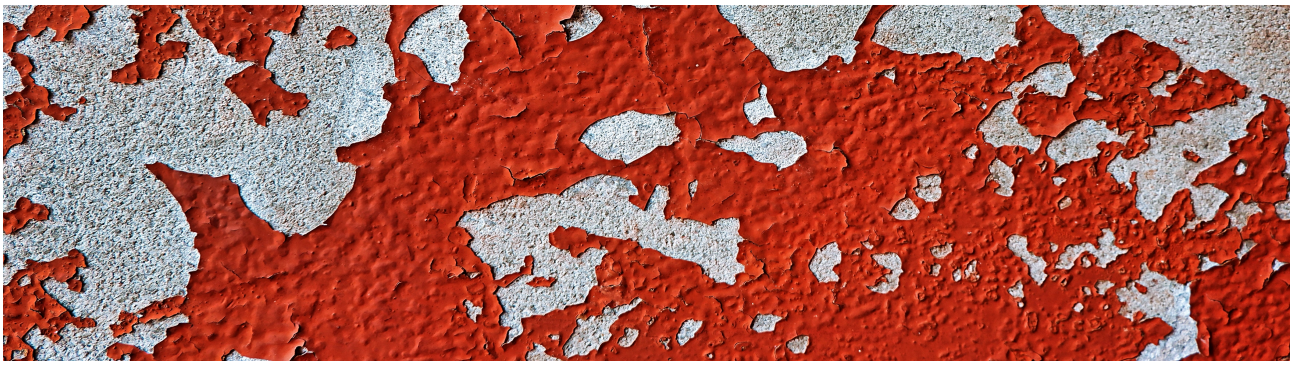
Access to Justice in Turkey? A Review of the State of Emergency Inquiry Commission

| Turkey Human Rights Litigation Support Project |



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A. Introduction[1]

Following the military coup attempt on 15 July 2016 a state of emergency was declared in Turkey for a three-month period.[2] Over the next two years, the state of emergency was renewed a total of seven times, finally coming to an end on 19 July 2018. During this time, numerous emergency measures were adopted, a number of which have since been enshrined in anti-terror legislation.[3] The effect of this has been the "legal normalisation" of emergency measures, and in practice an effective continuation of the state of emergency.[4] In the context of the state of emergency:

- More than 30 emergency decrees were issued;[5]
- More than 100,000 people were dismissed from public offices;[6]
- 270 students were expelled;
- 2,761 newspapers, television companies, associations, foundations and companies were closed.[7]

The state of emergency also witnessed the replacement of elected mayors and deputy mayors of municipalities with unelected trustees; an increase in the arbitrary use of pre-trial detention; heightened restrictions on access to a lawyer for those in pre-trial detention; the weakening of safeguards against torture and ill-treatment; the mass cancellation of passports for those accused (as well as their spouses) of membership of, or connection with, terrorist organisations; the revocation of citizenship; and the censoring of critical media outlets.[8]

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1 This report was co-authored by Şerife Ceren Uysal, Sanya Karakaş and Professor Philip Leach with the support of the Turkey Litigation Support Project Team. Research was conducted by Şerife Ceren Uysal. It is an edited version of the report published in October 2019.

2 The decision of the Council of Ministers, 21 January 2019, published in the Official Gazette, numbered 2016/9064, http://www.resmigazete.gov.tr/eskiler/2016/07/20160721-4.pdf.

3 Law No.7145, "On the Amendment of Some Laws and Emergency Decrees, published in the Official Gazette on 25 July 2018.

4 Human Rights Watch, "Turkey: Normalizing the State of Emergency," 20 July 2018, https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency.

5 For more information and the relevant decisions and resources see: "State of Emergency in Turkey A Collection of Available Resources, Reports, Case Law, and other Relevant Materials," 21 August 2018, https://www.mdx.ac.uk/__data/assets/pdf_file/0033/485574/State-of-Emergency-in-Turkey-FINAL.pdf.

6 Amnesty International, "No End in Sight: Purged Public Sector Workers Denied a Future in Turkey", 22 May 2017, https://www.amnesty.org/download/Documents/EUR4462722017ENGLISH.PDF

7 State of Emergency Inquiry Commission, "State of Emergency Inquiry Commission Activity Report 2018," 28 January 2019, https://ohalkomisyonu.tccb.gov.tr/docs/OHAL_FaaliyetRaporu_2018.pdf.

8 Nils Muižnieks, Council of Europe Commissioner for Human Rights, "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey", CommDH (2016) 35, 7 October 2016, p.5-8; Office of the United Nations High Commissioner for Human Rights, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January-December 2017", March 2018, p.9-12; Amnesty International, "Weathering the Storm: Defending Human Rights in Turkey's Climate of Fear", 26 April 2018, p.4,

In the first months of the state of emergency, it was not clear what legal remedies were available to challenge these measures, nor were any details concerning possible remedies included in the decrees. This lack of clarity - for both applicants and lawyers - about which legal route to follow in order to exhaust domestic remedies was heavily criticised by Council of Europe institutions.[9] The then Council of Europe Commissioner for Human Rights, Nils Muižnieks, for instance, stated that "[t]he lack of clarity and widespread confusion as to the remedies available to the persons concerned, or the lack thereof, was another element damaging the rule of law."[10]

This heightened pressure resulted in the Government's adoption of Emergency Decree Law No. 685, dated 23 January 2017, which established the State of Emergency Inquiry Commission ("the Commission"). The Commission was established to review complaints concerning measures taken pursuant to state of emergency decree laws, namely, the dismissal of civil servants and dissolution of entities, media outlets and associations (for which there are no other judicial remedies).[11] Appeals against the Commission's decisions can be made before specially designated Administrative Courts in Ankara.[12]

Upon commencing operations, the Commission was inundated with applications. By 3 May 2019, the number of applications submitted to the Commission was 126,120.[13] On 5 September

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https://www.amnesty.org/download/Documents/EUR4482002018ENGLISH.PDF; Human Rights Watch, "World Report 2019, Events of 2018", Chapter: Turkey, pg. 588, https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf.

9 Opinion on Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, Opinion No. 865 / 2016, CDL-AD (2016)037, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e.

10 Nils Muižnieks, Council of Europe Commissioner for Human Rights, Annual Activity Report 2016, pg. 18, https://rm.coe.int/168070ad23.

11 Emergency Decree Law No. 685 on the Creation of the Inquiry Commission, Published in the Official Gazette no. 29957, dated 23 January 2017, ARTICLE 2: "(1) The Commission shall carry out an assessment of and render a decision on the following acts established directly through the decree-laws under the state of emergency: a) Dismissal or discharge from the public service, profession or organization being held office. b) Dismissal from studentship c) Closure of associations, foundations, trade unions, federations, confederations, private medical institutions, private schools, foundation higher education institutions, private radio and television institutions, newspapers and periodicals, news agencies, publishing houses and distribution channels. ç) Annulment of ranks of retired personnel. (2) The scope of duty of the Commission shall also contain acts that do not fall within the scope of paragraph 1 and that are directly regulated with respect to the legal status of natural or legal persons by the decree-laws that are brought into force under the state of emergency. (3) In relation to the acts mentioned this article, no separate application shall be lodged for the additional measures introduced by decree-laws put into force under the state of emergency and for the acts subject to judicial review."

12 Article 11 of Emergency Decree Law No. 685 stipulates that an action for annulment against the decisions of the Commission may be filed with the Ankara administrative courts which are determined by the Council of Judges and Prosecutors.

13 State of Emergency Inquiry Commission, "Announcement on State of Emergency Inquiry Commission Decisions," 3 May 2019, https://ohalkomisyonu.tccb.gov.tr/duyurular.

2018, the Commission stopped accepting new applications.[14] The Commission`s mandate was initially established for two years,[15] until Law No. 7075, published on 8 March 2018, conferred a further two-year mandate to enable the Commission to process the backlog of cases.[16]

Since the Commission began operations, it has frequently been questioned whether or not it offers an effective remedy to challenge measures adopted during the state of emergency. By reviewing the Commission's decisions, this report analyses its capacity to provide an effective remedy for those who claim that their rights have been breached by executive decrees during the state of emergency. A total of 193 decisions and 71 pending applications to the Commission[17] were reviewed.[18] We also reviewed the applicants' submissions in these cases to assess whether the applicants' claims were properly addressed by the Commission. Appeal submissions made by the plaintiffs to the administrative courts (in seeking to challenge the Commission's decisions) were also examined.[19]

In addition, more than 56 lawyers were interviewed for this report, including lawyers from the Turkish Medical Association, the Trade Union of Employees in Public Health and Social Services ("SES"), the Trade Union of Bureau Employees ("BES"), the Education and Science Worker`s Trade Union`s Istanbul and Adana branches, Diyarbakir Bar Association and the legal committee of the Academics for Peace. Additional interviews were also conducted with eight academics from the law faculties of various universities in Ankara and Istanbul. All interviews were conducted by telephone or e-mail. As agreed with the interviewees, they have been kept anonymous, and we have also chosen not to disclose the names of applicants who provided us with copies of the Commission's decisions in their cases. The dates of the decisions have also not been shared to respect confidentiality of the applicants' identities.

The decisions examined relate to the measures taken under 13 separate emergency decrees.

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[14] State of Emergency Inquiry Commission, "Announcement on State of Emergency Inquiry Commission decisions," October 2018, https://ohalkomisyonu.tccb.gov.tr/duyurular.

[15] According to Article 3(1) of Emergency Decree Law No. 685, the Commission was mandated for two years subjected to extension by the decision of the President (before 2 July 2018 amendment made in the Decree Law No. 685 by the Emergency Decree No. 703, Council of Minister).

[16] "Turkey's State of Emergency Commission's term extended," 26 December 2018, Hurriyet Daily News, http://www.hurriyetdailynews.com/state-of-emergency-commissions-term-extended-140028.

[17] As of December 2018.

[18] This review was conducted between 17 October 2018 and 17 December 2018. A total of 75 Commission decisions were accessed directly through open sources. All other decisions and petitions were provided by lawyers, NGOs or applicants.

[19] Such submissions were made to Ankara 19, 20, 21 and 22 Administrative Courts, as, at the time, only these Courts were competent to hear cases concerning the Commission's decisions.

Almost half cover the dismissals which took place under Emergency Law No. 672, dated 1 September 2016. The structure of the report is as follows: Part B addresses the establishment of the Commission and outlines the issue of access to judicial remedies for victims of human rights violations under the state of emergency. Part C provides a brief overview of the right to an effective remedy under international law. Part D examines the Emergency Decree Law regulating the establishment of the Commission and outlines key issues regarding its structure and functioning - addressing questions that arose during the establishment phase of the Commission, before it started to receive applications-. Lastly, the decisions of the Commission are analysed with a view to assessing whether the Commission can in fact constitute an effective legal remedy.

B. The Establishment of the State of Emergency Inquiry Commission

In the immediate aftermath of the attempted coup, those affected by state of emergency measures could pursue judicial procedures to address unlawfulness and seek restitution before the administrative courts, the Council of State, the Constitutional Court ("the TCC") and the European Court of Human Rights ("the ECtHR"). Public officials also had the opportunity to instigate an administrative review process at the institution from which they had been dismissed. Our interviews with lawyers showed that some legal practitioners invoked these legal procedures simultaneously, while others chose to pursue them sequentially. Where procedures were pursued simultaneously, lawyers said this was due to the uncertainty of the legal context and the belief that applicants would not suffer detriment effect by applying to different institutions. In light of this, they felt that pursuing multiple legal applications simultaneously was a prudent course of action.[20]

In many instances, applicants directly applied to the TCC without previously submitting a case to the administrative courts, arguing that the administrative courts did not constitute an effective remedy. In the same vein, others brought their applications directly before the ECtHR without attempting to apply either to the administrative courts or the TCC.

Whichever course of action was pursued, all of the lawyers interviewed stressed that the legal remedies they resorted to did not constitute an effective remedy capable of producing a just outcome. Our research established that there were very few cases which led to public officials being

[20] Kerem Altıparmak, "Is the State of Emergency Inquiry Commission, established by Emergency Decree 685, an effective remedy?", 23 February 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943518.

reinstated to their former positions through an administrative review procedure. Only 1.69% of the 116,250 dismissed public officials were returned to public service work as a result of their applications to the administrative institutions that had issued notices of dismissal.[21]

It was also established that legal appeals lodged before administrative courts against dismissals were unsuccessful as the administrative courts decided that they did not have jurisdiction to review emergency decrees. In 320 judgments of the administrative courts reviewed by the Human Rights Joint Platform, the applications were rejected for the same reason: 'although emergency decrees were issued by the executive branch, they could not be the subject of judicial review by administrative courts since they were legislative acts by function' [22]

Applications before the Council of State[23] were also rejected on similar grounds. In a decision dated 4 October 2016, the Council of State decided that it did not have competence to examine a dismissal resulting from the emergency decree laws because this was an "exceptional emergency measure" which was not the same as the sanction of removal from office following a disciplinary procedure.[24] To confuse matters further, it was held by the Council of State that applications should instead be made to the administrative courts.[25]

The TCC and the ECtHR were inundated with tens of thousands of applications resulting from the application of emergency measures in Turkey, a situation which was exacerbated by the confusion over the availability of domestic remedies. In 2016 alone, 80,756[26] applications were made to the TCC. As with the administrative courts, applications before the TCC were rejected on the grounds that the Court had no competence to review emergency decrees, either in form or content (with

[21] "Emergency Decree Law No. 685 on the Creation of State of Emergency Inquiry Commission (1/811) and the issue on its inclusion into the direct agenda of the Grand National Assembly by the Presidency according to Article 128 of the Internal Rules, Speech on behalf of Republican People's Party (CHP) Group by Fatma Kaplan Hürriyet" (31 January 2018), Legislative Year: 3, Session: 53, https://www.tbmm.gov.tr/develop/owa/genel_kurul.cl_getir?pEid=66132.

[22] Human Rights Joint Platform, "State of Emergency Applications Case Report," 23 February 2017, http://www.ihop.org.tr/wp-content/uploads/2017/02/OHAL-%C5%9Eubat2017-raporu.pdf (Turkish).

[23] According to the Law No 6087 Council of Judges and Prosecutors, 11.12.2010 Article 33/(5), the judges and prosecutors who are dismissed by the Council of Judges and Prosecutors could file an action for annulment before the Council of State which would examine the case with due diligence as a first instance court.

[24] Law No 2575 Council of State Act, 20 January 1982 No: 17580 it was stated that the dispute arising from the dismissal of the applicant from public service by the Emergency Decree Law No.672 (on measures taken regarding public officers within the scope of state of emergency) is not covered by Article 24 of the Law No 2575.

[25] Human Rights Joint Platform, "State of Emergency Applications Case Report" (n22).

[26] In 2015, the number of applications made before the TCC was 20376. The number of applications lodged to the TCC multiplied by four in 2016 following the attempted coup d'etat. The statistics can be seen in the website of TCC: https://www.anayasa.gov.tr/tr/istatistikler/bireysel-basvuru/.

reference to Article 148 of the Turkish Constitution).[27] In two applications made by MPs from the Republican People's Party (CHP, the main opposition political party) the Court underlined that the emergency decrees in question were issued in accordance with Article 121 of the Turkish Constitution, and according to Article 148 of the Constitution it had no jurisdiction to rule on the constitutionality of executive decrees adopted within the framework of a state of emergency through the procedure of abstract review.[28]

In relation to submissions made through the individual application procedure to the TCC, the Court rejected them on the grounds that the applicants should have first exhausted all other available domestic remedies prior to applying to the TCC.[29] 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.[30]

Similarly, the ECtHR also declared many applications inadmissible on the grounds that applicants had failed to exhaust domestic remedies.[31] In 2017, 30,063 of 31,053 applications against Turkey were declared inadmissible on these grounds.[32] In the first six months of 2018 alone, the number of inadmissibility decisions among the 4,129 applications was 4,040.[33]

Those affected by state of emergency measures were therefore left in a situation in which they were unable to quickly and effectively challenge such measures.

i) Recommendation of the Venice Commission

Responding to these circumstances, the Venice Commission issued Opinion No. 865/2016 on the Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016.[34] The Opinion highlighted that the immediate reintroduction of full access to courts for all the dismissed

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[27] With these judgments, the TCC departed from its previous case law of 1992 and 2003. In 2003, the TCC ruled that measures which were not relevant to or strictly required by emergency state 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 the constitutional review. (TCC, E.2003/28, K.2003/42, 22 May 2003).

[28] TCC, E.2016/166, K. 2016/159, 12 October 2016; E. 2016/167, K.2016/160, 12 October 2016; E. 2016/171 K. 2016/164, 2 November 2016; E. 2016/172 K. 2016/165, 2 November 2016.

[29] TCC, Remziye Duman decision, no: 2016/25923, 20 July 2017.

[30] TCC, 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/, 4 August 2017

[31] ECtHR, *Zihni v Turkey* (Application no. 59061/16), Judgment of 29 November 2016.

[32] ECtHR, Turkey Country Profile, May 2019, https://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf.

[33] Ibid.

[34] Venice Commission, "Emergency Decree Laws nos. 667-676 adopted following the failed coup of 15 July 2016" (n9).

public officials was not practicable and instead recommended consideration of the possibility of creating a temporary *ad hoc* body tasked with examining individual cases of dismissals of public officials and other associated state of emergency measures.[35] The Venice Commission underlined that the *ad hoc* mechanism to be established should be capable of giving individual consideration of all cases. This required that the body to be established should conform with the principles of a fair trial, particularly the examination of specific pieces of evidence and the issuance of reasoned judgments. The Venice Commission stressed that in order for this structure to function effectively the ability to make quick decisions, transparency and independence in the decision-making process were critically important.[36] It also stipulated that:

> *"This 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*."[37]

ii) The mandate of the Commission

Acting on these recommendations, Emergency Decree Law No. 685 on the Creation of the State of Emergency Inquiry Commission was published in the Official Gazette dated 23 January 2017.[38] The mandate of the Commission was to review decisions on acts flowing from state of emergency decree laws taken on the grounds of membership of, or some connection or contact with, terrorist organisations or other groups "engaging in activities against the national security of the State." [39] Article 2(1) of the decree establishing the Commission extended the scope of the Commission's powers to:

- dismissals from public service
- expulsion of students from universities
- the closure of private legal entities, media institutions and associations (trade unions,

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35 Ibid.

36 Parliamentary Assembly of the Council of Europe, "The functioning of democratic institutions in Turkey-Report," Reference 4274 of 27 January 2017, Adopted on 8 March 2017 by the Committee, http://website-pace.net/documents/19887/3258251/20170308-TurkeyInstitutions-EN.pdf/bbd65de5-86d4-466f-9bc1-185d5218bce7.

37 Venice Commission, "On Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016," (n9).

38 Emergency Decree Law No. 685, (n11).

39 Ibid.

media outlets, educational institutions etc.)

- annulment of ranks of retired personnel.

iii) Endorsement of the Commission by the European Court of Human Rights: *Köksal v. Turkey*

In June 2017, the ECtHR issued a decision in the case of *Köksal v. Turkey*.[40] At this time, the Commission had been established but was not yet active or accepting applications. Nonetheless, the Court found the application inadmissible holding that the applicant Gökhan Köksal, a dismissed teacher, had failed to exhaust available domestic remedies, including the Commission. According to the ECtHR, the Commission would have the power, in particular, to adjudicate on appeals against measures adopted directly by executive decrees with the force of law issued in the context of the state of emergency, including the dismissals of public officials. Public officials affected by the relevant measures thus had the possibility of referring their cases to the Commission whose decisions could then be appealed before the administrative courts, and later to the TCC, by way of an individual petition.[41] Following a judgment issued by the TCC, any individual who still claimed that they had not been given access to an effective remedy could then submit a complaint to the ECtHR.[42]

It is important to note that the decision of *Köksal* represented a departure from the general approach of the Court, which ordinarily required that the question of exhaustion of domestic remedies be assessed at the time when the application is lodged.[43] The Court recognized this, and, rather than relying on evidence of the proven effectiveness of the Commission, instead referred to the absence on factors which would show that it was ineffective. The ECtHR stated that:

> "*The remedy introduced by Legislative Decree No. 685 constitutes in principle an accessible remedy and the Court has no reason to believe that it was not capable of providing appropriate redress for Mr Köksal's Convention complaints or that it did not offer a reasonable chance of success. Even though the commission in question is, strictly speaking, a non-judicial organ, its decisions nevertheless remain subject to judicial review. The Court emphasises, however, that this conclusion does not*

[40] ECtHR, *Köksal v. Turkey* (Application no. 70478/16), Judgment of 6 June 2017.
[41] Ibid.
[42] Ibid.
[43] Ibid. The ECtHR notes that it is justified to make an exception to the general principle that the condition of exhaustion of domestic remedies must be assessed at the time when the application is lodged and that it is for the victim of an alleged Convention violation to test the limits of this new remedy.

prejudge, if necessary, a possible re-examination of the question of the effectiveness and reality of the remedy introduced by Legislative Decree No. 685, both in theory and in practice, in the light of the decisions to be given by the commission and domestic courts, subject to the effective enforcement of those decisions."[44]

Hence, the Court held that an administrative institution, which had, at the time of the decision, not yet begun functioning, constituted a domestic remedy to be exhausted before the admissibility criteria to the ECtHR could be met.[45]

C. An Effective Remedy Under International Law

The right to an effective remedy is recognised in international treaty and customary law, including Article 13 of the European Convention on Human Rights (the Convention) and Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR). Remedies must be timely, accessible and effective in law and in practice. An effective remedy 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.[46] 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."[47] Non-judicial remedies have to "offer sufficient procedural safeguards for the purposes of Article 13," consistent with an effective challenge which offers "adequate guarantees of independence and impartiality."[48] The effectiveness of a remedy does not depend on the certainty of a favourable outcome, but it must offer a reasonable prospect

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44 ECtHR, *Köksal v. Turkey* (n40), para. 29.

45 For detailed discussion on this see: Report of the Conference Organised by German Bar Association, European Association of Lawyers for Democracy and World Human Rights, the Law Society of England and Wales, Lawyers for Lawyers and Observatoire International des Avocats, "(In)effective Remedies from Strasbourg", Berlin, 5 March 2018, https://eldh.eu/wp-content/uploads/2018/06/DAV_Conference_Report_-_Turkey_and_the_ECtHR_-_March_2018.pdf.

46 ECtHR, *Hatton v. the United Kingdom* (Application no. 36022/97) Judgment of 8 July 2003.

47 ECtHR, *Chahal v. United Kingdom [GC],* (Application no. 70/1995/576/662) Judgment of 15 November 1996, para. 155.

48 ECtHR, *Al-Nashif v. Bulgaria* (Application no. 50963/99) Judgment of 20 June 2002, para.133. See also *M. and Others v. Bulgaria* (Application no. 60 41416/08) Judgment of 26 July 2011.

of success.[49] To be considered effective, decisions of the independent decision-maker must, of course, be implemented.[50]

D. The Structure and Functioning of the Commission

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

The independence of the judiciary is enshrined in the Turkish Constitution.[51] Impartiality is an integral part of independence in the sense that there should be no relationship based on self-interest. These two basic notions form the basis of the principle of "fair trial" in the protection of rights in a democratic state.[52] In the case of *Langborger v. Sweden*, the ECtHR held that "... in order to establish whether a body can be considered "independent," regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."[53] In the same case, on the question of impartiality, the Court found that a distinction must be drawn between a subjective test, whereby it sought to establish the personal conviction of a given judge in a given case and an objective test, aimed at ascertaining whether the judge offers guarantees sufficient to exclude any legitimate doubt in this respect.[54]

In light of these fundamental standards, the manner of appointment of Commission members raises various questions about its independence from the Executive and its impartiality. The Commission is comprised of seven members, five of whom are appointed by the President (before 2 July 2018 amendment in the Emergency Decree Law No. 685, Prime Minister), Minister of Justice and Minister of the Interior. The remaining two members are appointed by the Council of Judges and Prosecutors ("*Hakim ve Savcılar Kurulu", hereinafter "HSK*"), with a Head and Deputy Head elected by the Commission itself.

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[49] ECtHR, *Costello-Roberts v. UK* (Application no. 89/1991/341/414) Judgment of 25 March 1993, para. 40.

[50] ECtHR, *Wille v. Liechtenstein [GC]* (Application no. 28396/95) Judgment of 28 October 1999, para. 75.

[51] Article 9 "Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation." Constitution of the Republic of Turkey: "The Constitution was adopted by the Constituent Assembly on October 18, 1982 to be submitted to referendum and published in the Official Gazette dated October 20, 1982 and numbered 17844; republished in the repeating Official Gazette dated November 9, 1982 and numbered 17863 in the aftermath of its submission to referendum on November 7, 1982 (Act No. 2709)." See: https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[52] İbrahim Şahbaz, "Judicial independence and impartiality in the judgments of the ECtHR" 2008, published in Anayasa Yargısı Annual, Volume 25, see: http://www.anayasa.gov.tr/files/pdf/anayasa_yargisi/ibrahim_sahbaz.pdf.

[53] ECtHR, *Langborger v. Sweden* (Application no. 11179/8), Judgment of 22 June 1989.

[54] Ibid.

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 members are appointed by the Turkish President.[55]

Further questions about the independence of the Commission arise because of the overt influence of the Executive both in drawing up the emergency decrees which the Commission is called upon to assess, and its direct involvement in the cases of dismissal of officials in government departments. The President, Prime Minister, the Minister of Justice and the Minister of Interior are among the government officials who sign and effectively legally authorise state of emergency decrees.[56] Moreover, large numbers of cases brought to the Commission concern dismissals from government ministries: 3,342 officials were dismissed from the 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.[57] Accordingly, five out of seven members of the Commission are appointed by the same bodies responsible for thousands of dismissals under examination.

Commission members are appointed for two years and any extension of their term requires a procedure of new appointment. Article 4(1) of the Emergency Decree Law No. 685 set outs the tenure and rights of the Commission members, according to which they cannot be dismissed on any account before their terms of office expires, subject to six exceptions: the failure to attend five or more Commission meetings in a one-year period without an acceptable basis; declared medically unfit to work; final conviction for an offence related to Commission duties; total duration of unfitness to work exceeds three months; initiation of an investigation or prosecution for certain offences under the Turkish Criminal Code; or an administrative investigation instigated by the President (before 2 July 2018 amendment in the Emergency Decree Law No. 685, Prime Ministry) or permit for prosecution given on grounds of membership of, connection or links with, Fethullahist Terrorist Organisation/Parallel State Structure ("FETÖ/PDY")[58] or other proscribed groups or organizations.

[55] The Council of Judges and Prosecutors, webpage of explanation of their own institutional structure, see: http://www.hsk.gov.tr/Hakkimizda.aspx.

[56] Kerem Altıparmak, "Is the State of Emergency Inquiry Commission, established by Emergency Decree 685, an effective remedy?", (n20).

[57] Ibid.

[58] Which is designated as a terrorist organisation and accused of being the power behind the coup attempt by the Government.

It is of concern that members of the Commission may be dismissed simply when they are accused of committing crimes against state security[59] or crimes against the constitutional order.[60] The relevant regulation does not require a conviction, merely the instigation of an investigation can be used as a ground for dismissal.

Moreover, Article 4(1)(e) provides that 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.

All of these factors, taken together, obviously raise serious doubts as to whether the Commission can be considered as an impartial and independent review mechanism. Nevertheless, some commentators have defended the composition and organizational structure of the Commission by stressing that it is an administrative body and as such is not required to comply with judicial standards with regards to the independence and impartiality of its members. They explain that its role is limited to a 'first review' with the aim of quickly processing applications on state of emergency acts and avoiding the need to turn to court-based remedies.[61] This approach was supported by the ECtHR's Turkish judge Işıl Karakaş, who stressed the administrative nature of the Commission.[62]

However, in view of the nature of the decisions and functioning of the Commission, it is highly arguable that it examines charges falling within the scope of criminal law. Applying the ECtHR's 'autonomous concepts' approach, Altıparmak has argued that the dismissal of an individual based on allegations that they have an association or connection with a terrorist organization renders the person in question the subject of "a criminal charge".[63] Therefore, regardless of its title or designation under domestic law, the Commission must in fact be independent and impartial so as to provide the guarantees contained in Article 6 of the ECtHR.[64]

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[59] Turkish Criminal Law, Law No. 5237, Passed On 26.09.2004, Official Gazette No. 25611, dated 12.10.2004, Article 302: "Provocation of war against the State."

[60] Ibid., Article 309: "Offenses against Legislative Organs", Article 310: "Offenses against Government", Article 311: "Armed revolt against the Government of Turkish Republic", Article 312: "Armed organized criminal groups", Article 313: "Supply of arms", Article 314: "Alliance for offense", Article 315: "Confiscation of Army Commanding Quarters"

[61] Cem Duran Uzun, "The structure, functioning and importance of the OHAL Commission in the fight against FETÖ," September 2017, Kriter Monthly Journal of Political Society and Economics, Year 2, Number 16.

[62] Kerem Altıparmak, "Is the State of Emergency Inquiry Commission, established by Emergency Decree 685, an effective remedy?", (n20).

[63] Ibid.

[64] For a fuller discussion on this in relation to Turkey see: Tom Ruys, Emre Turkut "Turkey's Post-Coup 'Purification Process': Collective Dismissals of Public Servants under the European Convention on Human Rights" 18 (2018) Human Rights Law Review September 2018.

ii) The Commission's examination of applications

According to the relevant regulations, the Commission examines applications on the basis of written documents in the case file, with no possibility of holding an oral hearing.[65] Given that no individualised reasoning was provided in individuals' dismissals or the dissolution of legal entities, the plaintiffs have faced real difficulties in making meaningful and targeted submissions when filing an application to the Commission against the measures imposed on them.

The applications which we analysed state that many applicants did not know why (based on what evidence or reasoning) they were dismissed. They 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. Applicants are, in effect, forced to speculate about the reasons for their dismissals and strive to prove that they have no links with any proscribed groups or organisations.[66] The lack of transparency and ability for the applicants to engage meaningfully with the process, means that they have to try to defend themselves against charges of which they were not informed at any stage, and to present a suitably researched, reasoned and corroborated case against almost entirely illusory accusations.

This practice has been strongly criticised by Amnesty International:

> *"At the time of their dismissal under emergency decree, public sector workers were not provided with official reasons beyond a generalized justification put forth in relevant executive decrees that they were assessed to have links to 'terrorist' organizations. As such, when they submit their applications to the Commission, dismissed public sector workers do not know what specific allegations they are facing, nor do they have knowledge of any evidence used against them. Since the Commission cannot grant them a hearing, they are not able to learn the allegations or evidence against them during the proceedings of the Commission either."*[67]

In an application to the Commission dated 4 September 2017 (still pending at the time this report was written), the applicant argued that the administrative court review was not effective because:

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[65] Emergency Decree Law No. 685, Article 9 (n11).

[66] Amnesty International, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers", 25 October 2018, p.16: https://www.amnesty.lu/uploads/media/PURGED_BEYOND_RETURN_TURKEY.PDF.

[67] Ibid.

"although it is possible to apply to [specified] administrative courts against the decisions of the State of Emergency Measures Inquiry Commission, this path can only be effective, if I have been clearly informed of the accusation [I am faced with] in front of the Commission and if the right to defence is guaranteed. If my application is rejected without me knowing the evidence (...) against me and without me effectively defending myself against them, it will not be possible also for the subsequent judicial process to be effective."

In accordance with the procedures and rules regarding the operation of the Commission[68], 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 have 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).[69] Many of the decisions we have examined for the purpose of drafting this report rely on intelligence information, confidential witness statements, witness statements from colleagues, or even research notes on a person's social environment, as an evidentiary basis on which to reject the applicants' appeals. This practice effectively results in administrative institutions (that are specific to fields such as education, security, working life etc.) being treated by the Commission as specialized intelligence units capable of obtaining and assessing allegedly incriminating evidence.

The rules regulating the Commission's procedures have been widely criticised. According to Altıparmak:

"The individual or institutions in question were sanctioned 'on grounds of membership, association, connection or contact with terrorist organizations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State`. However, no information has been given to them as to which bodies, entities or groups they are alleged to be involved in or which behavior constituted connection or contact… under the circumstances,

[68] 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.

[69] Paragraph 4 of Article 12 of the Procedures and Principles Regarding the Operation of the Commission (n68) requires public authorities to transmit requested information to the Commission. Article 6 of Emergency Decree Law No. 685 provides for a confidentiality clause, preventing the Commission members from sharing information classified a s state secret with any parties not authorities by law, including the plaintiff in the proceedings.

the person or institution making a written application can say one of two things. They will either have to say 'I am not involved in any bodies, entities or groups' or they will have to explain how they are not involved in individual organizations as they see relevant."[70]

The 71 applications reviewed in the context of this study suggest some worrying trends, in particular for those applicants who did not have legal representation. Many applicants before the Commission tried to establish that they had no link with a terrorist organization by presenting their bank account statements, and other documents indicating that they are not members of any association, trade union or political party. It is also understood that the applicants took into consideration information published in newspapers, on television or social media about the possible grounds for dismissals and tailored their submissions accordingly. For example, the following reasons were suggested in the media as evidence for a person's alleged link with Gülenists: having a bank account at Bank Asya which was said to have links with Gülenists; having a special application in a mobile phone, called ByLock, allegedly used in communications among the members of Gülenist organisations; having stayed in certain dormitories; and having graduated from, or sent one's children to, schools linked to Gülenists. In a number of cases, the applicants made submissions to try to prove the absence of these links in their cases.

Due to the general and abstract character of the dismissals and applicants' inability to gain access to the allegedly incriminating evidence against them, in practice many applicants simply resorted to blindly expressing their personal opinions or conscience in order to define and establish their personal distance from the coup attempt and/or the 'FETÖ/PDY'. For example, one applicant stated as follows (in his application of 18 July 2017): *"I have always supported the unity and I have always been against terrorism and defenders of terrorism, the fact that I was dismissed* [for an alleged link with terrorism] *made me shocked"*. Another applicant defined his dismissal as a punishment and described the coup attempt as a "*treacherous development*" and himself as a person who is opposed to coup attempts. Another applicant stated in his application dated 3 August 2017 that *"I do not know the characteristics of the accusation against me. What is certain, however, is that I have no contact with the coup attempt or any illegal organization."*

[70] Kerem Altıparmak, "Is the State of Emergency Inquiry Commission, established by Emergency Decree 685, an effective remedy?", (n20).

iii) Application of the 'loyalty' obligation of public officials and the Commission's failure to use objective criteria

The justification provided by the Government for the adoption of Emergency Decree Law No. 685 states that:

> *"... in a democratic country, officials employed in the public sector are obliged to act within the framework of the laws regulating duties, powers and responsibilities with loyalty to the Constitution and laws which are the foundation of the state. In this context, all states seek high criteria of loyalty to the state in the process of both admission to and the continuation of the public service."*[71]

In Turkish law, the obligation of loyalty on public officials is regulated under Article 129 of the Turkish Constitution[72] and Article 6 of the Civil Servants Law No. 657.[73] According to Article 129 of the Constitution, "Public servants and other public officials are obliged to carry out their duties with loyalty to the Constitution and the laws." According to Article 6 of Law no. 657, public officials are obliged to be loyal to the Turkish Republic`s Constitution and its laws and they are obliged to apply the Turkish Republic`s laws with loyalty in the service of the nation.

The judgments of the ECtHR on dismissal of public officials including the lustration cases[74] are also relevant, as references were made to these cases in the justification for Emergency Decree Law No. 685. In seeking to justify summary dismissals during the state of emergency, the Turkish authorities have argued that:

> *"In a democratic society, public officials employed in the public institutions are liable to show loyalty to the constitutional principles that are foundation of a State. In this respect, in public, the States seeks demonstration of this loyalty to the constitutional*

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[71] Grand National Assembly of Turkey, "State of Emergency Inquiry Commission Decree Law No. 685 on Establishment (1/811) and its inclusion into the direct agenda of the Grand National Assembly by the Presidency according to Article 128 of the Internal Rules" Legislation Period: 26, Legislation Year:2, Number of Order: 455, see: https://www.tbmm.gov.tr/sirasayi/donem26/yil01/ss455.pdf (Turkish).

[72] Constitution of the Republic of Turkey: "The Constitution was adopted by the Constituent Assembly on October 18, 1982 to be submitted to referendum and published in the Official Gazette dated October 20, 1982 and numbered 17844; republished in the repeating Official Gazette dated November 9, 1982 and numbered 17863 in the aftermath of its submission to referendum on November 7, 1982 (Act No. 2709)." See: https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[73] Civil Servants Law, Law Number: 657, date of adoption: 14/07/1965, Published in the Official Gazette Date: 23/07/1965, Number of Official Gazettes Published: 12056, see: https://www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf (Turkish).

[74] Cynthia M. Home, International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context, Law & Social Inquiry, Vol. 34, No. 3 (Summer, 2009), pp. 713-744.

principles and laws during both the process of being accepted for the office and during performance of the office."[75]

As a rule, in the lustration cases the ECtHR has recognized that a democratic state is entitled to ask its officials to be loyal and to respect constitutional principles.[76] However, the Court has underlined that there are limitations to be applied to dismissals for the alleged failure to uphold this loyalty principle. The relevant measures must be prescribed by law, based on a legitimate aim (such as national security, public security, the economic well-being of the country or the protection of the rights and freedoms of others), and must also be necessary and proportionate in a democratic society. To meet these criteria the Court has emphasised both the need for the individualisation of the impugned measures, that take into account the personal situation of the individual concerned, and the necessity of clear guidelines for the application of any measure. [77]

In the case of *Vogt v. Germany*, the Court focused on the personal situation of the applicant who was a languages teacher in a secondary school and stated that:

"… Mrs Vogt was a teacher of German and French in a secondary school, a post which did not intrinsically involve any security risks. The risk lay in the possibility that, contrary to the special duties and responsibilities incumbent on teachers, she would take advantage of her position to indoctrinate or exert improper influence in another way on her pupils during lessons. Yet no criticism was levelled at her on this point.…

Since teachers are figures of authority to their pupils, their special duties and responsibilities to a certain extent also apply to their activities outside school. However, there is no evidence that Mrs Vogt herself, even outside her work at school, actually made anti-constitutional statements or personally adopted an anti-constitutional stance…

[75] "Memorandum Prepared by the Ministry of Justice of Turkey for the Visit of the Delegation of the Venice Commission to Ankara on 3 and 4 November 2016 in Connection with the Emergency Decree Law", See: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)067-e.

[76] ECtHR, *Sõro v. Estonia* (Application no. 22588/08), judgment of 3 September 2015.

[77] Ibid.

A final consideration to be borne in mind is that the DKP had not been banned by the Federal Constitutional Court and that, consequently, the applicant's activities on its behalf were entirely lawful."[78]

The case of *Oleksandr Volkov v. Ukraine,*[79] which concerned the dismissal of a supreme court judge, also provides a useful precedent for the situation in Turkey. According to the Court there was no indication that at the time of the determination of the applicant's case there was sufficiently clarity about the notion of "breach of oath." In discussing this, the Court underlined that:

"…the requisite procedural safeguards had not been put in place to prevent arbitrary application of the relevant substantive law. In particular, domestic law did not set out any time-limits for initiating and conducting proceedings against a judge for a "breach of oath." The absence of any limitation periods, as discussed above under Article 6 of the Convention, made the discretion of the disciplinary authorities open-ended and undermined the principle of legal certainty."[80]

The Court went on to find that:

"Accordingly, the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of "breach of oath" and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects. Against this background, it could well be assumed that almost any misbehaviour by a judge occurring at any time during his or her career could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge of "breach of oath" and lead to his or her removal from office."[81]

As to the situation in Turkey, emergency decrees do not provide any clear or objective criteria linking alleged conduct with any disciplinary offences, such as breach of oath, breach of loyalty or misuse of office, in the case of summary dismissals. Moreover, the concepts of having "association", "connection" or "contact" with terrorist organisations are not defined in the domestic law nor are

[78] ECtHR, *Vogt v. Germany* (Application no.17851/91*),* judgment of 26 September 1995, para. 60.
[79] ECtHR, *Oleksandr Volkov v. Ukraine* (Application no. 21722/11), judgment of 9 January 2013.
[80] Ibid., para. 181
[81] Ibid., para. 185.

there any precedents adopted by the high courts to date defining these concepts or their scope. Thus, the Commission lacks any clear legal basis or guidance as to how these terms should be interpreted or applied, creating a very high level of uncertainty. In this regard, Amnesty International concludes that "*it is not clear based on what criteria the Commission is expected to accept or reject applications*".[82] .

Although the emergency decree law concerned defines the obligation on public officials "to be highly loyal to the state",[83] there is no such obligation regarding the students who were dismissed from universities or which was applicable to the private legal entities, media institutions and associations which have been closed down. Furthermore, no criteria are specified in the Ministry's Communiqué on the Working Principles and Procedures of the Commission.[84] Article 14(2) of the Communiqué states as follows: "*The Commission makes its examination on grounds of membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State*." Accordingly, in the absence of clear, objective criteria, the applicants and their representatives cannot know on what criteria these investigations are based, how "high loyalty" is measured, which actions are considered to be a violation of this obligation and which actions are considered as constituting membership of a terrorist organization or supporting or having a relation with the organization. The Emergency Decree Law No. 685 itself is deficient in terms of legal definition and clarity.

In *Kokkinakis v. Greece*,[85] the ECtHR stipulated that Article (7)(1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principles that only the law can define a crime and prescribe a penalty (*nullum crimen*, *nulla poena sine lege*) and that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can comprehend, from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make them legally liable.[86] With regard to

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[82] Amnesty International, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" (n66), p. 17.

[83] Grand National Assembly of Turkey, "State of Emergency Inquiry Commission Decree Law No. 685 on Establishment (1/811) and its inclusion into the direct agenda of the Grand National Assembly by the Presidency according to Article 128 of the Internal Rules" (n71).

[84] "Procedures and Principles Regarding the Operation of the State of Emergency Inquiry Commission" setting out the procedures and principles regarding the standards for, and order of, the examination of an application (n68).

[85] ECtHR, Case of *Kokkinakis v.Greece* (Application no. 14307/88), judgment of 25 May 1993.

[86] ECtHR, Case of *Sunday Times v. The United Kingdom* (Application no. 6538/74), judgment of 26 April 1979, para, 49.

the loyalty obligation and the punishment prescribed, the lack of objective criteria for a balanced assessment and fair opportunity for a subsequent defence do not meet with the standards set by the ECtHR.

iv) The restricted remit of the Commission's decisions

Article 10 of Emergency Decree Law No. 685 states that where the Commission reaches a decision overturning a dismissal, it must be communicated to the State Personnel Administration which, within fifteen days, is required to make a proposal about the re-appointment of the individual to a position similar to their previous role. We note that the individual will not be re-appointed to their previous institution unless an alternative is impossible due to the type of employment or job title etc.

The laws subsequently adopted amending Emergency Decree Law No. 685 imposed special restrictions on the re-appointment of members of the army and security forces, diplomats and academics who had been dismissed.[87] For example, academics cannot be re-appointed 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. In her application to the TCC,[88] one academic posited that, by not reversing her dismissal or reinstating her to her previous position or awarding full material and moral damages, the Commission could not be considered an effective remedy. This was because, she argued, it did not possess the remedial capacity to undo the violation or undo its effects (*restitutio in integrum*). This would require placing the individual in the same circumstances she would have been if the state of emergency decree had never been applied, which was clearly not the case.

If an application succeeds before the Commission, it does not lead to the direct annulment of the dismissal. Although the decision will include a determination that the initial procedure was unlawful, the procedure is not automatically annulled by the Commission. Secondly, if an application is rejected by the Commission, the applicant may appeal to the administrative courts, however, the administrative courts are not competent to review the lawfulness of the initial dismissal based on emergency decrees but could only carry out a formal review of lawfulness of the Commission's

[87] Law no. 7075, adopted 1 February 2018, and Law no.7145, adopted 25 July 2018, amending Emergency Decree Law No. 685.

[88] TCC, Hülya Dinçer decision no: 2017/13720, 3 August 2017.

decision.[89]

v) Judicial review

Judicial review of Commission decisions is regulated by Article 11 of Emergency Decree Law No. 685 which requires the referral of such applications to the Ankara administrative courts selected by the HSK, namely Courts 19, 20, 21 and 22.[90] These administrative courts are exclusively responsible for reviewing Commission decisions.[91]

As the courts given competency to review Commission decisions were determined by the HSK, this raises questions about the issue of executive influence and its obvious implications for independence and impartiality. Altıparmak has argued:

> *"rather than giving the opportunity to appeal to an ordinary judge, the rule foresees a judicial review by administrative courts 'determined' by the High Council of Judges and Prosecutors[92]. Considering the institutional problems of the High Council of Judges and Prosecutors and judicial organs in Turkey, this poses a problem in itself."*[93]

The law also does not clearly define the role and scope of review of the administrative courts. While of course the general law to be applied is the same as in general administrative law cases, the specification of four particular courts (without further defining their functioning in this situation) leads to procedural uncertainty for potential applicants.

The International Commission of Jurists (ICJ) has noted that the effectiveness of administrative courts in Turkey with regard to cases of dismissals has yet to be tested by the wave of cases that are likely to come from the Commission. The ICJ argues that, nonetheless, it is of particular concern that the Ankara Administrative Courts Nos. 19 and 20 (currently also nos. 21 and 22) were designated as the courts competent to hear appeals from the Commission's decisions by the HSK, in

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89 Kerem Altıparmak, "Is the State of Emergency Inquiry Commission, established by Emergency Decree 685, an effective remedy?", (n20).

90 "Two new state of emergency courts were established" 3 October 2018, https://www.haberturk.com/iki-yeni-ohal-mahkemesi-kuruldu-2166277.

91 Article 11 of the Emergency Decree Law No. 685 (n11).

92 Together with the Constitutional Amendments in Turkey on 16.04.2017, Article 159 was amended. The High Council`s name was changed to "Council of Judges and Prosecutors" and `high` was removed.

93 Kerem Altıparmak, "Is the State of Emergency Inquiry Commission, established by Emergency Decree 685, an effective remedy?", (n20).

its formation following the constitutional reform, because the administrative courts may therefore lack independence. [94]

In an application before the TCC dated 8 March 2017, one applicant challenged the effectiveness of the review process:

> *"The Commission is set by an emergency decree, [the procedure of] which does not include any guarantees of fair trial; only proceeds based on the file [with no oral submission being possible]….. The judicial review procedure provided is only possible for the Commission decisions based on the file before the Commission and just about the dismissal itself. There will not be any judicial review regarding fundamental issues such as violations of financial and social rights and cancellation of passports, which are some other important consequences of the emergency decrees, because these are not matters the Commission is authorized to decide."*

As explained in above sections that the procedure before the Commission lacks basic due process guarantees, it is doubtful how these procedural shortcomings, which mark the outcome, could be remedied through appeal procedure before administrative courts. In the period when this research was being carried out, the administrative courts had still not decided enough cases to enable us to draw definitive conclusions as to their practice. However, two decisions[95] that could be examined demonstrated that the administrative courts relied heavily on the Commission's findings and limited their review to questions of formal compatibility of the Commission's decision with grounds set out in the emergency decrees (a formal review of lawfulness).

E. Analysis of the Commission's Decisions

The Commission does not publish its decisions. Therefore, for the purposes of this research the decisions were obtained from lawyers, applicants and an independent website, memurlar.net[96] (which publishes the decisions after obtaining them through its own sources). A total of 193 decisions were examined for this report. 118 of these decisions were obtained directly from various sources

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[94] 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.

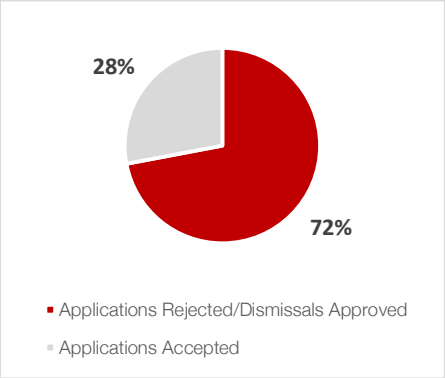
[95] Both decisions were reached via Twitter: Ankara 19th Administrative Court, application no: 2018/10, decision no: 2018/1549, 28 November 2019 and Ankara 20th Administrative Court, application no: 2018/274, decision no: 2018/970, 17 October 2018.

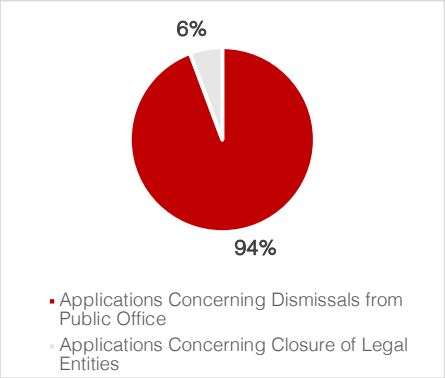
[96] www.memurlar.net, a platform for public servants.

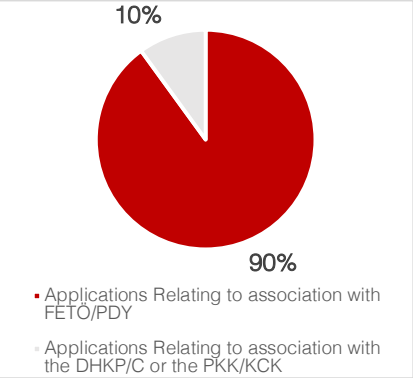
while 75 were found on memurlar.net. In 139 (72%) of these decisions, the Commission rejected the application and approved the dismissals. In 54 (28%) of the examined decisions, the Commission upheld the applications and annulled the decisions (of dismissal or for the closure of a legal entity).

90% of the decisions reviewed related to issues arising from alleged connections with the FETÖ/PDY, and 10% concerned alleged links to the Revolutionary People`s Liberation Party/Front ("DHKP/C") or the Kurdistan Worker`s Party/Kurdistan Communities Union ("PKK/KCK"). All applications concerning dismissals for alleged links with the PKK/KCK or DHKP/C were rejected.

11 of the decisions were applications made against the closure of legal entities. These applications were upheld by the Commission and subsequently the closure decisions were annulled. 182 of the decisions were related to dismissed public sector workers.







As to the cases of dismissals, while the applicants' occupations in the reviewed cases are diverse, and as such relate to at least 42 different public institutions from which the applicants were dismissed, the decisions themselves do not distinguish between different categories of professional groups. The decisions concerned a wide range of professional groups, such as municipal workers, teachers, doctors, soldiers, academics, clerics, and police officers. Although the categories of professions were very diverse, involving different professional duties and responsibilities, the decisions failed to provide any individualized evaluation of the extent and scope of the loyalty required from the applicants, with particular emphasis on their profession, or the type of public service and institution they represented. Nor was the relationship between the profession in question and the safety threat it had allegedly created examined. The same form of evaluation was made uniformly across all the professions considered, teachers, for example, were reviewed in the same way as members of the armed forces. The uniform template and structure used in the Commission decisions consists of five sections:

i. Subject of the application
ii. Preliminary examination
iii. Examination (including procedures and principles for Commission review, statements of the applicant, information, and documents and findings related to the application)
iv. Evaluation (including the declaration of the state of emergency and measures taken in this context, related law, and an evaluation of the application)
v. Decision

This next part of the report considers each of these sections independently and provides a detailed analysis of the content and form of the Commission's decisions with a view to assessing the central question of whether or not the Commission can be considered an effective remedy.

i) Subject of the application

In all decisions reviewed for this research, the same following statement was included by the Commission under this section: "*The application is related to the dismissal of the public office established by the Decree Law No. ....*" The decisions reviewed during the research were related to the emergency measures taken under Emergency Decree Law Nos. 667, 669, 670, 672, 675, 677, 679, 683, 686, 689, 692, 693, and 695.

ii) Preliminary examination

In this section, the Commission refers to Article 10 of the Communiqué on the Working Principles and Procedures of the Commission. In accordance with Article 10(3) of the Communiqué, during the pre-examination phase, the Commission shall evaluate: whether the application is within the scope of the Commission's mandate; whether the application is made on time; if the application is in writing and whether it is made personally or through a legal representative; whether it is made by the authorized representative of a legal entity; and whether the applicant has a legal interest in the application. The same article prescribes that applications that do not meet these requirements will be rejected.

Of the decisions reviewed, there was only one application which was rejected at the preliminary examination stage. The applicant was an employee of an institution that was closed by an emergency decree and his contract was terminated as a result. The applicant did not apply directly to the Commission and instead filed a lawsuit before an administrative court challenging the termination of his employment contract. The applicant's file was sent by the court to the Commission

on the ground that the subject matter was within the scope of the Commission's mandate, however, the Commission rejected the application, finding that the applicant's employment was not terminated directly by an emergency decree.

This is an important example suggesting that the mandate and remit of the Commission are not clearly understood even among the judiciary. In line with this, the lawyer who is representing the applicant in this case stated that the administrative courts have been sending all cases related to state of emergency decree laws to the Commission, without having any proper regard to the mandate of the Commission. Other lawyers contacted during this research have further corroborated such reports, as cases concerning passport cancellations, for example, have also been routinely referred by administrative courts to the Commission, despite the fact that the Commission does not have competence to examine such cases (pursuant to Article 2(3) of Emergency Decree Law No. 685). Such decisions inevitably cause considerable further delays for applicants in having their cases decided.

iii) Examination of applications

The decisions of the Commission adopt the following identical subheadings under this section:

- *Procedures and principles for Commission review*

All of the reviewed decisions contained an identical statement of the Commission's remit, procedures and principles and made references to the relevant laws and regulations.[97]

- *Statements of the applicant*

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[97] The statement reads as follows: "*According to Law no.7075 article 1; the Commission, has been established in order to carry out an assessment of, and render a decision on, applications related to acts established directly through the decree-laws, without any other administrative acts being carried out, within the scope of the state of emergency declared under Article 120 of the Turkish Constitution and approved by the Resolution issued by the Turkish Grand National Assembly, on the ground of membership of, or have relation, connection or contact with terrorist organizations, or structures/entities, or groups established by the National Security Council as engaging in activities against the national security of the State.*

Article 2 of the same law states that; the Commission shall carry out an assessment of and render a decision on the Dismissal or discharge from the public service, profession or organization being held office. Article 9 of the same law also states that the Commission shall perform its examinations on the basis of the documents in the file. The Commission may, following the examination, dismiss or accept the application.

Otherwise, the communiqué of the Prime Ministry "Procedures and principles regarding the operation of the State of Emergency Inquiry Commission" article 14 regulates that the Commission carries out its assessment on the ground of membership of, or have relation, connection or contact with terrorist organizations, or structures/entities, or groups established by the National Security Council as engaging in activities against the national security of the State. Requests for oral testimony or witness hearing are not considered."

The section containing the applicant's statement is also largely similar across all decisions reviewed. The applicants' arguments are summarized and presented in one single sentence. For instance, in a Commission decision dated June 2018, it was stated that "*the applicant, in sum, declares that he has been removed from public office even though he does not have any connection with any illegal organisations and requests his return to public office*." In the same vein, in a decision dated January 2018 it was stated that "*In summary, the attorney of the applicant has requested the reinstatement of his client dismissed from the public office by the Emergency Decree Law No: 679*."

These summaries do not however accurately reflect the contents of the applications. Applicants, who were not represented by a lawyer, mostly referred to the emergency decree by which they were dismissed and requested reinstatement. However, in many others, the applicants also mention the serious consequences of their dismissal, which they defined as "civil death."[98] For example, an applicant dismissed under Emergency Decree Law No. 675 explained that he had no membership of Gülenist-linked organisations other than being a member of a named trade union. The applicant also underlined that he had never participated in any protests or demonstrations, even as a member of that trade union. The remainder of the petition sets out the applicants' financial and psychological problems. Another applicant, dismissed under Emergency Decree Law No. 686, explained how he had experienced economic difficulties throughout his entire educational life. In almost all individual applications, the applicants stressed that they stood against the coup attempt and tried to provide evidence to show that they had not carried out any activities prohibited by law.

Applications which were lodged by lawyers frequently raised procedural objections regarding the emergency measures and included submissions about violations of their clients' fundamental rights and freedoms. The majority of such applications emphasized that "the reason for the dismissal is unknown." Many of the dismissed academics emphasized that they believed they have been dismissed because of the peace declaration they have signed. In addition to this, there were many objections to the Commission's examination procedure. Many applicants demanded to be informed about the "cause" of their dismissal and to be given the opportunity to use the right to defend themselves against the alleged crime.

The fact that none of these points are reflected in the applicants' statements section raise

[98] Parliamentary Assembly of the Council of Europe, Resolution on the Functioning of Democratic Institutions in Turkey, 2156 (2017), adopted 25 April 2017, para. 17; Mağdurlar için Adalet Topluluğu, `The social costs of state of emergency in its second year`, January 2019, https://www.mediafire.com/file/eds9dhzvnc007tq/RAPOR_2019_OHALin_Toplumsal_Maliyetleri_2.pdf/file.

doubts as to whether the Commission duly examined the petitions in order to take full account of individual applicant's explanations, as well as specific allegations, claims and evidence when reaching their decisions.

- *Information, documents and findings related to the application*

Our review of the decisions showed that information and documents are obtained by the Commission from various institutions, and that determinations made under this section are the main basis for the evaluation of the applications. This section consists of several sub-headings, although in practice if the Commission makes a detrimental determination under just one of these areas then the application is often rejected without further consideration.

It is important to note that in this section the Commission's decisions make no mention at all of the documents and evidence submitted by the applicant. Many applicants submit official documents in addition to their application, such as those establishing that they do not have union/association/political party membership, decisions of public prosecutors dropping criminal investigations against them, or court decisions acquitting the applicants. Nevertheless, in the 193 decisions reviewed, not a single paragraph addresses the evidence provided by the applicants.

The decisions frequently refer to a number of issues which the Commission clearly considers as being particularly salient, and are examined further below:

- *Being a user of ByLock*

ByLock is a downloadable secure (encrypted) messaging application, allegedly used in communications between members of the 'FETÖ/PDY'. Having this application downloaded onto a mobile phone has, in itself, been deemed to be sufficient to prove membership of, or connection with, the 'FETÖ/PDY' by Turkish prosecutors and courts, notwithstanding that the application is freely downloadable online and is one of the top 500 apps in over forty different countries.[99] In 66 of the 193 decisions examined, the applications were rejected due to the applicant's alleged use of ByLock. For instance, in a decision dated August 2018, an application was rejected due to both an ongoing prosecution and the applicant's alleged use of ByLock. The decision states that based on the relevant information obtained from the "personnel information file," the "Ankara Public Prosecutor's Office" and the "General Directorate of Security of Minister of the Interior," the Commission "determined

[99] The Guardian, "Turks detained for using encrypted app 'had human rights breached," 11 September 2017, https://www.theguardian.com/world/2017/sep/11/turks-detained-encrypted-bylock-messaging-app-human-rights-breached.

that (the applicant) was using the ByLock program which is a program that is used within the members of the FETÖ/PDY, by her/himself at the mobile phone number….". The same sentence structure has been used by the Commission in all 66 decisions without any rigorous examination into whether ByLock app was actually downloaded or used by the applicants and used for the alleged purpose.

There is no analysis of the way in which applicants are said to have used the ByLock app. The Commission decisions do not include an assessment of vital issues such as the time of the applicants' alleged use of the application, the frequency of the alleged use, whether the applicants used ByLock to communicate with members of the 'FETÖ/PDY', the content of the communications or any concrete evidence proving the causal relationship between the use of the program and the accusations against the individuals. The applicants who had been dismissed on these grounds were reinstated by the Commission when, based on the information in the case file, the Commission reached the conclusion that the applicants did not use the ByLock program themselves but had been inadvertently identified by the authorities, e.g. doing so through the sharing of Wi-Fi with neighbours.

- *Having an account in Bank Asya*

The Commission decisions frequently included information on whether the applicants had a Bank Asya account and a summary of their transactions. In 67 of the cases reviewed, having an account in Bank Asya was used as the basis to reject the applications. Applicants who held bank accounts at Bank Asya are considered by the Commission to be automatically linked to the 'FETÖ/PDY'. The bank has been identified by the Turkish Government as an entity set up by Gülen supporters in 1996 and, as such, measures were taken to target the bank even before the state of emergency. The state confiscated the bank in May 2015 and completely closed it in July 2016, although arrests of shareholders and those who have deposited money in the bank have been ongoing.[100]

For example, in a Commission decision dated July 2018, the applicant was found to have had a savings account of 200,00-TL (approximately 33 Euros) in Bank Asya, which led to the rejection of the application. In a decision dated May 2018, the fact that the applicant's money in a Bank Asya account increased after 2014 was used to establish his link with the 'FETÖ/PDY'. The applicant had

[100] BBC Türkçe, "Bank Asia is seized", 29 May 2015, https://www.bbc.com/turkce/ekonomi/2015/05/150529_bank_asya.

deposited a total of approximately 4,000,00-TL (approximately 663 Euros) in two separate transactions. Among the decisions reviewed, only one applicant who held an account with Bank Asya was successful. In this case, it was determined that the only payment made by the applicant from the bank account was the payment of alimony.

The decisions do not include any evaluation by the Commission of whether the applicants held accounts in other banks, the reason for the transactions they made, the date of the opening of the account or whether the account transactions continued after the seizure of Bank Asya by the State. In short, the fact that the applicants had established a customer relationship with a bank (which was fully in accordance with the law at the time of the transactions) was considered by the Commission to constitute legitimate grounds for the dismissals, even in cases where there was no other evidence supporting the allegations.

- *Membership of a closed Association/ Foundation/Union/Federation*

The decisions reviewed also show that the Commission investigates whether the applicants were members of any unions, associations, foundations, federations, private companies or universities that have been closed by emergency decrees. In 42 of the decisions reviewed, this was one of the reasons provided for the rejection of the applications. However, all these institutions were lawfully established in accordance with the relevant Turkish legislation at the time, and were regarded as completely legal institutions, until their closure by emergency decree. This is clearly demonstrated by the fact that at the time when the applicants became a member, they could do so very easily via the internet or through an online application to an e-platform provided by the Government known as E-Devlet.[101] This process is still valid to this day. It should also be noted that becoming a member of a trade union is a constitutionally recognized right. In other words, people who took steps which were enshrined in their constitutional rights prior to the state of emergency, such as becoming members of legally established trade unions, were dismissed from their positions for the same reason.

The Commission failed to investigate the nature or extent of the applicant's relationships with the relevant institutions. Seemingly, it was of no importance for the Commission if the applicants were founding members, or if they held an executive or administrative role. Simply being a member and/or paying a membership fee was deemed a sufficient basis for upholding dismissals.

[101] E-State.

- *Financial support for organizations which supported a 'terrorist organization'*

Any payments made by applicants to any legal entity closed by an emergency decree are considered by the Commission to be incriminating transactions. As in the cases above, the Commission made no attempt to ascertain why the payments were made to these institutions, or to investigate the date or number of such payments. Various commercial institutions, such as companies that trade household appliances, as well as private schools, are among the institutions listed by the Commission. The Commission took as evidence of the link with the outlawed organisations the payments made to the closed institutions where the applicants may have shopped or made payments for their children's education. In 54 of the decisions which were examined, the applicants were found to have given financial support to the terrorist organizations through these channels and their applications were rejected.

For example, in a decision dated February 2018, it was found that the applicant's child was registered in a school which was closed by emergency decree. The payment made to this school by the applicant was defined as financial support to a legal entity supporting a terrorist organization. This decision is patently arbitrary, as even a cursory inspection establishes that the payment is a school fee. Similar findings were made in two other decisions reviewed, dated August 2018.

In numerous decisions, donations made to the organization, "*Kimse Yok mu?",* was deemed to constitute direct financial support to a terrorist organization. *Kimse Yok Mu?* was a charitable aid organization based in Turkey which operated in over 100 countries worldwide, held consultative status with the United Nations Economic and Social Council (ECOSOC) and was alleged to have had affiliations with "Gülenists." It is also public knowledge that although the organisation has since been closed by emergency decree, its donation campaign had been supported by the Government, including its leader Recep Tayyip Erdoğan himself who had once contacted a live broadcast to show his support for one of their campaigns in 2011.[102]

- *Connections with media organizations linked to a 'terrorist organization'*

Under this section, the Commission examined whether the applicants were subscribed to the Cihan Media Distribution Company, the owner of the Zaman newspaper, recognized as the media organ of the 'FETÖ/PDY'. In 51 of the decisions reviewed, subscription to this newspaper was held to

[102] "25 million TL grant to Africa in live broadcast" 12 August 2011, https://www.mynet.com/canli-yayinda-afrikaya-25-milyon-tl-bagis-11010058664.

establish proof of such connections. It should be noted that Recep Tayyip Erdoğan personally participated in the 25th-anniversary celebrations of this newspaper in January 2012: he cut a cake and delivered a speech full of praise for the Zaman newspaper and its journalism.[103] The Zaman newspaper had around 1 million subscribers in 2011.[104]

- *Determinations based on judicial investigations/prosecutions*

Of the 139 decisions rejecting challenges to dismissals, 49 of the applicants were found to be the subject of ongoing criminal investigations. 43 applicants were on trial in criminal courts and 22 applicants had been convicted (although the judgments were not final, whilst undergoing review on appeal). A decision not to prosecute was given in relation to six applicants, while one applicant was acquitted. In only two applicants' appeals were the decisions of the first instance courts upheld. Although the Commission indicated in the decisions that there were lawsuits pending against seven applicants, there was no information in the decisions as to the stages and results of these cases.

An examination of 15 decisions (selected at random) provided a snapshot of the Commission's approach to the issue of prosecutions and judicial applications. In six out of 15 decisions, the fact that the applicant had been prosecuted previously was used to show a relationship with a terrorist organization, even in the absence of a decision finding the applicant guilty of the crime. In five cases, the existence of an ongoing investigation against the applicant (without the applicant having been charged) was relied on as evidence of a relationship with a terrorist organization. In all 15 applications, only one applicant had been convicted by a criminal court before the date of the Commission's decision. However, even in this case, at the time of the Commission decision the judgment was not final.

In another case, there had been a decision not to prosecute the applicant, but nonetheless the application was rejected by the Commission. The Commission found that, "*Although there is a decision of non-prosecution about the applicant; the information, documents, facts and findings […] reveal that the applicant had links with DHKP-C terrorist organization*." The Commission relied on a personnel file sent by the institution from which the applicant was dismissed containing a note stating that the applicant was thought to have sympathy for the said organization. We note that the

[103] "Zaman brought colour to Turkey's intellectual and media environment like a flower that blooms in fire," 4 March 2016,https://t24.com.tr/haber/erdogan-2012-zaman-ateslerde-acan-bir-cicek-gibi-turkiyenin-fikir-ve-medya-dunyasina-renk-katti,330725.

[104] Zaman Newspaper's circulation and annual analysis, see at: http://web.archive.org/web/20151025160623/http://tiraj.org:80/zaman-gazetesi/2011.

applicant was an employee of the Ministry of Labour and Social Security. There is no explanation in the decision as to how an official in that Ministry would have been in a position to evaluate another official's alleged affiliation with a terrorist organization. Another application which was rejected illustrates a similar situation in which the fact that the investigation against the applicant was dropped by the public prosecutor was not considered by the Commission.

In another decision, it is understood that the applicant was acquitted of the charges against him at the end of the criminal proceedings. However, this was not taken into account by the Commission. Instead, the decision stated as follows: "*although the applicant has been acquitted, in the investigation carried out by the institution in which the applicant performed his/her duties before the dismissal, there are testimonies of his/her liaison with the terrorist organization and his/her involvement in the terrorist organization*."

In 14 out of 15 decisions, although there was no decision convicting the applicants, merely being subject to ongoing investigations or prosecutions was considered as a strong enough basis to justify their dismissals. The Commission did not attempt to evaluate whether the applicants were involved in the coup attempt in any way or any other unlawful activities. In addition, even in cases where the investigations against applicants were dropped or the applicants were acquitted, the Commission found the dismissals justifiable by relying on other conduct which had been lawful at the time and not linked with terrorism.

- *Previous employment in organizations considered to be associated with a 'terrorist organization'*

Under this heading, previous work records of the applicants were obtained through the Social Security Institution and the companies where the applicants had been employed before becoming a public official. All the applications reviewed from individuals, who worked in companies which were closed during the state of emergency due to alleged connections with the 'FETÖ/ PDY', were rejected by the Commission which found that: "*The fact that the applicant has a work record in the organisation that has been closed on the ground of membership of, or have relation, connection with the FETÖ/PDY, shows that the person has a connection with the terrorist organisation*." There were 19 applicants with such a former work record, and all 19 applications were rejected.

In one of the rejected applications, the applicant was previously employed by a private company which was closed during the state of emergency, before becoming a public official for around one year and 10 months. In addition, the application was rejected on the basis of the applicant's personnel file at the public institution which stated that the applicant had a connection

or a relationship with the 'FETÖ/PYD' organization.

In another application rejected by the Commission, there was a criminal investigation against the applicant which was dropped. Despite that, the Commission rejected the application on the ground that the applicant had worked in an affiliated private company which had since been closed, before taking up a position in the public sector.

Assessments based on the previous work records of dismissed public officials also show that the loyalty obligation is applied retrospectively by the Commission, even though the applicants were not subject to loyalty rules when previously working in the private sector.

The decisions also show that there was no investigation on the nature of the applicants' tasks in the private companies, whether they were policy-makers, shareholders or executives in their position or they were just contracted employees working within the scope of labour law.

- *Having children registered at educational institutions considered to be associated with a 'terrorist organization'*

The Commission examines information it receives from the Ministry of National Education to determine whether the applicant's children had been registered students in private educational institutions which were closed on the grounds that they were related to the 'FETÖ/PDY' during the state of emergency. As stated above, applicants whose children were registered in those private education institutions were required to pay money to these institutions as registration fees. These payments were also considered by the Commission as amounting to financial support to institutions associated with a terrorist organization. 35 of the decisions reviewed for this research were rejected on the ground that the applicant's children were registered in the 'FETÖ/PDY-affiliated' educational institutions.

- *An 'administrative investigation'*

The Commission does not adopt the technical term "administrative investigation" uniformly across all decisions, instead, under this heading the Commission describes procedures such as "evaluations" or "administrative investigative reports." Accordingly, it is unclear whether this is a disciplinary procedure conducted under administrative law or a form of background check. Nonetheless, it is understood that this refers to some form of disciplinary investigation, that may or may not have been communicated to the applicant which was carried out by the institution where the public official was working. Our review of the decisions shows that the Commission has regard

to the following information in carrying out its "investigation": "social environment information," research reports, the presence of an applicant's name on a list given by a secret witness or informer called "Albatross," testimonies of people working together with the applicant, and governors' opinions. Albatross appears to be a secret witness who testified against around 6,000 people. His statements were accepted by the Commission as evidence against the applicants, however, his identity has not been disclosed. His statements are often included in the personnel information files obtained from the public institutions for which the applicants had worked.

In one of the decisions reviewed, there is only one determining factor in finding against the applicant, consisting of just the following sentence: "*In the personnel information file of the applicant transferred to our Commission, it was determined that the applicant was considered to be an associate with the PKK/KCK organization*." There is no information about who conducted this investigation, in what manner, for what purpose and on what legal basis. Moreover, there is no evidence as to the competence of the particular institution to conduct such an evaluation. A similar decision states the following "...*in the applicant's personnel information file, it was determined that the applicant was in contact with …, there are social environment information about the applicant which proves that the applicant is extremely closely monitoring the publications of the organization and is representative of the … organization*." The phrase "social environment information" is not explained or defined, and we note that there was no ongoing criminal investigation concerning the applicant, nor was any other disciplinary investigation referenced. Instead, the Labour and Social Security Institution's determination that the applicant was a representative of the specified organization was deemed sufficient. A similar phrase was used in another application, and again was relied on as the sole basis for the rejection of the application: *"[*the Commission*] was informed that there is an environmental research knowledge about the applicant which shows that the applicant has a connection with the FETÖ /PDY terrorist organization based on reliable sources and also as a result of the internal investigations about the applicant, the applicant's last institution concluded that the applicant had an association with the FETÖ /PDY terrorist organization*."

In another decision regarding the dismissal of an academic, the following statement was made: "*In the administrative investigation report, which was submitted to the Commission by the institution, (it was determined that the applicant) was connected to the DHKP/C terrorist organization*." It is impossible to tell from the decision whether the Commission is referencing an investigation report carried out under the administrative law or a report prepared as a result of personnel evaluation.

In nine of the 139 decisions reviewed it was the determination of either the provincial or district governors' offices that the applicant was a member of a terrorist organization, which led to the applications being rejected by the Commission.

It is therefore clear, firstly, that information sources that are not legally defined, such as "social environment information" and "reliable resources," have been used as grounds to reject the applications. Secondly, the determinations about the applicants' sympathy for or connection/relationship to a terrorist organization through their institutions' personnel files apparently based on subjective views of superiors or colleagues raises questions about the independence, objectivity and competence of these sources of information.

In nine of the 139 decisions, the applications were rejected solely on the basis of "information" from such undefined sources and more than 60 decisions list this ground as one factor, among others, to support rejecting the application. This indicates that people who continue to work in public service today are also at risk of being subjectively labelled as having links with terrorist organisations. There are no procedural safeguards to protect those who are faced with this arbitrary practice.

- *Intelligence information*

This section refers directly to "intelligence information" and is referred to in 11 of the decisions reviewed. In seven of these cases, the applicants were dismissed on the grounds of alleged connections to the PKK/KCK. As this is a separate heading in the decisions, it would appear that "intelligence information" and the information examined in the section above, such as the governors' or the institutions' opinion or the secret witness statements, are not the same. However, in some decisions, the information in the personnel file provided by the governor is referenced.

In one case, the Commission states that "*There is intelligence information which shows that the applicant was arrested while in preparation of acts of sabotage and bombings during an operation carried out against the PKK terrorist organization, while the applicant was in prison, [he/she still] participated in the activities of the PKK/KCK terrorist organization*." The source of the information is not specified in the decision, nor is there a reference to an investigation or prosecution despite the seriousness of the allegations it contains. In another decision it was stated that "*there is intelligence information about the applicant showing that he/she is one of the persons involved in the activities of the PKK/KCK terrorist organization*." In another decision it is similarly stated that "*there is intelligence information about the applicant, which shows that the applicant was one of the high-*

ranking persons in the terrorist organization."

- *Other determinations*

In several decisions, the Commission included information relating to personnel files, intelligence notes or witness statements under this section. In three decisions reviewed, statements from "Albatross" were used against the applicants.

In one of the three decisions, there are only two grounds relied on against the applicant. The first references the existence of a criminal investigation against the applicant although it resulted in a decision not to prosecute. The second, which was under the title of "other determinations," references the statement of the secret witness "Albatross," naming the applicant in a list allegedly naming members of the '*FETÖ* /PDY'. The Commission referred to the following reasons in rejecting this application:

> *"although it was decided that there was no place to prosecute the applicant for membership of the armed terrorist organization, according to the secret witness, the applicant's name is in a list under the code 5 category within the FETÖ /PDY terrorist organization, which means that the applicant was trusted by the organization and which is stated by a person who had an affiliation with the organization in the past."*

iv) Evaluation

- *Declaration of the state of emergency and measures taken in this context*

In all decisions, the declaration of the state of emergency and measures taken within its scope are referred to under the heading of 'evaluation'. In decisions related to individuals accused of having connections with the 'FETÖ/PDY', the coup attempt is summarized in one paragraph which is followed by a reference to the decision of the National Security Council which declared Gülenists as the FETÖ/PDY terrorist organisation. In the last paragraph, the Commission references some of the Supreme Court's decisions which also found that the 'FETÖ/PDY' is a terrorist organisation. In decisions related to the PKK/KCK and DHKP, this section starts with a justification of dismissals during the state of emergency and continues by referring to the Supreme Court's decisions prescribing the PKK/KCK and DHKP/C as terrorist organisations.

- *Related Law*

This subsection has the same content in all decisions reviewed. It is stated that sovereignty belongs to the Turkish Nation without any restriction or condition, by reference to Article 6 of the Turkish Constitution. Subsequently, the obligation on public officials to be loyal is defined under Article 129 of the Constitution and Articles 6 and 7 of the Civil Servants Law, and in addition under Article 37 of the Turkish Armed Force Internal Service Act.

In summary in this subsection, it is stated that the dismissals should be accepted as permanent measures achieving the aim of removing the existence and impact of terrorist, and other organizations which work against national security. Accordingly, to uphold such a dismissal measure against a person, it is enough to determine a connection with such organisations. The Commission carries out its assessment based on whether it is appropriate for that person to remain in the public service, regardless of whether or not they have committed any disciplinary or criminal offences.

In the last paragraph of this subsection, the Commission conducts a review as regards the obligation of "loyalty." However, there are no criteria stated to determine which actions are considered contrary to the obligation of loyalty and accordingly which actions make it inappropriate for the person to remain in public office. It is also clear from all the decisions examined that public officials are treated as a homogenous whole. In this sense, the need for an individualized analysis of each context as highlighted in the judgments of the ECtHR has not been taken into consideration. The decisions show, on the contrary, that a primary school teacher, an IT officer, a police officer or a member of armed forces, are evaluated in the same way.

- *Evaluation of the application*

This subsection begins with the same sentence in all decisions: "*when the information, documents and findings contained in the review section are taken into account...*" It then continues with a re-statement of the findings described in the examples referred to above, and the decision of acceptance or rejection follows.

v) Decision-making period of the Commission

The time taken for the Commission to reach a decision was evaluated in 171 decisions.[105]

[105] In 22 decisions the dates were withheld by the sources in order to protect the identity of the applicants. Therefore, this evaluation could not be made in relation to this group of decisions.

Among them, only one decision was concluded within 6 months following a dismissal by emergency decree.[106] At the other end of the spectrum, one applicant waited 2 years and 21 days for a decision to be made. For five applicants, the Commission's review took more than 2 years. Seven Commission decisions were concluded between 6 and 12 months after the dismissal. All other decisions were concluded between 12 and 24 months after the dismissal.

Trade Union representatives and lawyers whom we interviewed heavily criticized the Commission for its delayed processing of applications, particularly concerning certain groups. In an interview conducted with two lawyers representing a large number of the Academics for Peace group[107] on 14 November 2018, it was stated that, by that date, no decisions had been obtained in any applications they had made. In an interview with a lawyer of the BES on 9 November 2018, it was reported that a total of 440 members of BES were dismissed by emergency decrees. About 30 members had received a response from the Commission, of whom 12 were reinstated to their posts via decisions of the Commission. The rest of the applications were still pending. A similar situation was described by SES on 15 November 2018. Approximately 740 SES members were dismissed, but only three members had received reinstatement decisions. No decisions were reached in relation to the other dismissed members at the time of the interview. 71 pending applications reviewed for this report were submitted to the Commission before October 2017 and none of them had been concluded by the time this report was published.

Altıparmak has elaborated on the question of the feasibility of the work of the Commission:

> *"A delegation of 7 persons is expected to examine and finalize 100,000 applications within 2 years. This means that 250 applications per day will be reviewed and decided with an approximate working day account. Since at least 4 members are required to vote in each decision, in this case, each member should report to 35 files per day, and in addition, at least 100 files should be included in the interviews and voting. It would probably not be an exaggeration to say that this is not possible and*

[106] The applicant was dismissed on 24 December 2017 by the Emergency Decree Law No. 685 and decision reached 5 months later.

[107] On 11 January 2016, 1128 academics and researchers from Turkey and abroad, called "Academics for Peace", signed and issued a declaration entitled, "We will not be a party to this crime." As a result, criminal proceedings have been initiated against signatories mainly accusing them of making propaganda in support of PKK. Several of them were also dismissed from universities.

that it would make an automatic decision based on the intelligence report before the Commission."[108]

In this regard, when the technical structure of the Commission, and its mandate are evaluated together, it does not seem to be capable of providing an effective legal remedy, at least in terms of timeliness. In addition it should be noted that while ordinarily any request from the public is to be dealt with in 60 days,[109] there is no means of ensuring that the Commission does in fact decide applications within a certain period of time, and indeed the Commission was explicitly excluded from this requirement.[110] The failure to hold the Commission to a time limit for its decision-making in these applications only serves to contribute to a lack of legal certainty and arbitrariness.

This is compounded by the fact that the Commission does not appear to adopt a specific order when evaluating applications. Among applicants who have been dismissed by the same emergency decree and resorted to similar legal remedies, some have received decisions while others have not. This presents a major obstacle to access to justice. In addition, interviews with several dismissed public officials conducted by Amnesty International illustrate that the long waiting process has caused both psychological and economic problems.[111]

As of 3 May 2019, 55,714 applications were still pending before the Commission for a decision.[112] The Commission states that around 1,200 decisions are made per week. In other words, the Commission claims, with only 7 members, it has examined around 240 files every working day and has made "individual" and "justified" decisions in these cases.

When the Commission's acceptance and rejection rates are examined (as of 3 May 2019 the rejection rate was around 92 per cent), this picture becomes even more troubling. Applicants whose applications have been rejected by the Commission can exercise their right to request an administrative court review. After the first instance administrative court decisions, there is an appeal

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[108] "Procedure of Administrative Justice Act" Act No: 2577, Date of Enactment: 06 January1982, Date of Promulgation in the Official Gazette: 20 January 1982, No: 17580, Collection of Acts: 5, Volume: 21, page: 147, Translated into English: Dr. Kerem Altiparmak, see at: http://www.legalisplatform.net/hukuk_metinleri/2577%20Nr.%20Code.pdf.

[109] Law No. 2577, Procedure of Administrative Justice Act, Article 7 states that 'The time limit to bring an action is sixty days for the actions brought to the Council of State and administrative courts, thirty days for the actions brought to the tax courts, unless otherwise stated in the specific Acts.'

[110] According to article 7(2) of the Emergency Decree Law No.685 and Article 6(5) of the Communiqué of the Prime Ministry No. 30122, Article 10(2) of the Code of Administrative Procedure (Law No. 2577, dated 6 January 1982) requiring all requests from the public to be dealt with in 60 days shall not apply to the applications lodged within the scope of this Emergency Decree Law.

[111] Amnesty International, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Worker" (n66).

[112] State of Emergency Inquiry Commission, "Announcement on State of Emergency Inquiry Commission Decisions" 3 May 2019, (n13).

procedure before the Regional Appeal Court. In case of a negative decision, there is also a TCC application process. For the applicants who have no choice but to go through all of these procedures, the waiting time will be excessively and unacceptably long, perhaps lasting more than a decade.

vi) Evaluation of acts occurring before applicants became public officials under the Law of Civil Servants

Another point of concern is the relevance of matters which occurred before the applicants became public officials as a basis for their removal from public office. Law No. 657 on civil servants lists disciplinary offences and punishments, and sets down limitation periods for the initiation of disciplinary proceedings. According to this law, public officials can only be the subject of a disciplinary investigation as a result of actions committed after they became public officials. Disciplinary proceedings must be initiated (depending on the possible sanction) within 1 month or 6 months after learning about the wrongdoing

One of the pending Commission applications contains striking data in this sense. The applicant, like many other applicants, attempted to evaluate why she was dismissed, which appears to be based on two disciplinary sanctions imposed by the institution where she had previously worked. In her defence, the applicant underlined that both disciplinary processes were related to social media posts which had been published before she was appointed as a public official. The applicant also emphasised that she did not share any such posts on social media after she became a public official.

vii) The presumption of innocence

The presumption of innocence is an integral element of the right to a fair hearing. However, the majority of the Commission decisions examined show that accusations or assumptions made against individuals have been accepted at their face value by the Commission without requiring any proof, resulting in a general disregard for the principle of presumption of innocence for applicants. For instance, in one decision the application was rejected on the grounds of an opinion provided by the public institution from which the applicant was dismissed. In the decision the Commission stated that *"…. [t]he institutional opinion establishes the applicant's links to the PKK/KCK…"* In another decision, the application was again rejected on the grounds of an opinion provided by a state institution. In this case, the institution not only shares its "written opinion," but adds that it was public knowledge

that the members of the 'FETÖ/PYD' became public officials between 2010 and 2013 and the applicant fits with this profile, because he became a public official in 2012.

This approach of assuming what is said to be "known by all" or in other terms accepting "public knowledge" is manifestly arbitrary and unfair. Such interpretations point to an environment in which the provision is accepted without even a minimal investigation, thereby eliminating all kinds of defence rights.

It is clear from the decisions reviewed that the Commission accepts "facts" such as the applicant's child attending a certain school, the applicant working in a certain company before becoming a public official, or shopping at a certain establishment, as facts which are "known by all" and which are capable of corroborating an applicant's links with a terrorist organization. In this sense, it can be concluded that the Commission applied a "presumption of guilt," rather than a presumption of innocence.

viii) Inadequate procedural safeguards and the right to a fair hearing

The decisions examined reveal that applicants are deprived of any real procedural safeguards and that they are unable to exercise their right to defend themselves effectively. As noted above, there is no information in the Commission's decisions which explains how it evaluates the documents submitted by the applicants or their applications.

When applying to the Commission, the applicants do so without knowing the reasons for their dismissal, except for the general statements set out in the emergency decrees. During the evaluation process, documents are collected from multiple public institutions about the applicants. Although these documents and information are not sent to the applicants, the decision is formulated directly in response to such documents, without giving the applicants a *de facto* or *de jure* possibility to challenge them. The applicants can only obtain a list of the documents related to the accusations and to their charges, together with the decision, at the end of the process.

It is patently evident from the abovementioned examples that this procedure leads to procedurally and substantively flawed decisions by the Commission. A prime example is the applicant whose application was rejected on the grounds of an ongoing prosecution, although he had in fact been acquitted before the date of the Commission's decision.

F. Conclusion

The 193 decisions examined within the scope of this report raise major concerns about the ineffectiveness of the review of state of emergency measures in Turkey. Both the structural problems stemming from the legal regulation concerning the Commission and the practices developed by it to date demonstrate that the Commission cannot be regarded as an effective remedy. Moreover, the lack of safeguards against unjust processing of the applications means that decisions are being made arbitrarily and with no transparency.

The decisions reviewed justify concerns raised after the establishment of the Commission. Tens of thousands of people who were dismissed by the emergency decrees have been forced to apply to the Commission without knowing the reasons for their dismissals or the allegations against them. The associations, media outlets, foundations and other entities closed under the emergency decree laws were put in a similar situation. Many applications concerning the latter groups are still pending before the Commission. This results in a complete lack of understanding or certainty as to the criteria utilised by the Commission in formulating its decisions.

In cases concerning the dismissals of public officials, the Commission has not in practice considered the legal arguments put forward by the applicants or the documents they have presented in support of their applications. The Commission has rejected a large number of applications 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.

The process before the Commission takes a considerable length of time. As of 3 May 2019, the Commission has rejected 65,156 applications out of the 70,406 decisions it has made.[113] This means that a large number of applications will be taken to the very small number of administrative courts which have been designated to hear appeals in these cases. The possible passage of time before the first instance administrative court, the provincial administrative courts and TCC in case of successive negative outcomes means that a dismissed public official`s search for justice might take over a decade.

In view of the lack of legal certainty, the clear violation of the presumption of innocence, the violation of the right to a fair hearing, the criminalization of everyday life practices, the evaluation of

[113] State of Emergency Inquiry Commission, "Announcement on State of Emergency Inquiry Commission Decisions," 3 May 2019, (n13).

the applicants' acts which occurred before they were appointed as a public official, and the lack of any effort to collect and evaluate evidence in favour of the applicants, it is evident that the Commission cannot be considered to provide a fair and effective process. The elements required for an effective remedy according to the Convention, and international human rights law more generally, include accessibility, timeliness, capacity to provide adequate redress, competency and the independence and impartiality of the court or tribunal.[114] The Commission has demonstrably failed to meet these requirements.

[114] United Nations Human Rights Committee, "General comment no. 31" The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 15-19. United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Articles 2-3 and 18-23.