



FAILURE OF STRASBOURG AGAINST TURKISH ENCOUNTER

AN INVESTIGATION ON THE CONTROVERSIAL RULINGS OF THE EUROPEAN COURT
OF HUMAN RIGHTS ON THE STATE OF EMERGENCY MEASURES IN TURKEY



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Introduction

1. Following the coup attempt in Turkey on 15 July 2016, a state of emergency (OHAL - in Turkish) was declared on 21 July 2016. On 23 July 2016, the first legislative decree, Emergency Decree Law (EDL) No. 667, was decreed by the Council of Ministers. As per Articles 3 and 4 of the EDL No. 667, “*without right to defence for accused and with no respect to minimum safeguards*”, the Executive was granted with the right to expel judges, prosecutors and civil servants from public offices. Moreover, the government dismissed tens of thousands of civil servants *directly* with EDL No. 667 and following legislative decrees by adding their names to lists appended in such decrees.

2. State of emergency was extended every three months, ultimately to last for two years and has officially been declared lifted on 19 July 2018. In these two years, a total of 125,678 public servants were dismissed *directly* with legislative decrees, indefinitely barring them from public sector. Besides, 164 foundations, 15 private universities, 19 unions, 70 newspapers, 29 publishers, 48 health institutions, 1612 associations, 934 private schools, 20 TV channels, 20 magazines, 6 news agencies, 24 radio stations and 109 other institutions (total 3070) were *directly* shut down with Emergency Decree Laws. As per Article 3 of the EDL No. 667, more than 4,500 judges and prosecutors, including members of higher courts were discharged by the Council of Judges and Prosecutors (CJP, or HSK in Turkish) with no possibility to work in public sector or field of profession, namely as lawyers or notaries. Moreover, around 10,000 more civil servants were dismissed by ministries and other executive bodies, as per Article 4 of the EDL No. 667. Even after the state of emergency was lifted, public officers have been expelled continuously, with tally now reaching 135,000, which was made possible with a law dated 25 July 2018, extending the powers of Articles 3 and 4 of EDL No. 667 for another three years.

3. According to the Well-Established Case Law (WECL) of the European Court of Human Rights (ECtHR), the purges in Turkey constitute “*a punishment criminal in nature*” (see, *Matyjek v. Poland*) and “*civil death*”, and those who were dismissed have started to claim their rights both in domestic law and before the ECtHR. First applications were rejected by administrative courts on procedural grounds, while individual appeals to the Constitutional Court [of Turkey] have been left unanswered for a long time. Moreover, citing Article 45 § 3 of the Law No. 6216 on *Establishment and Rules of Procedure of the Constitutional Court*,¹ the Constitutional Court found inadmissible 46 individual applications introduced by 46 judges who were directly dismissed from their offices in the CJP with a Law dated 28 February 2014.² Persons

¹ According to Article 45 § 3 of the Law No. 6216, “*Individual applications cannot be made directly against legislative acts and regulatory administrative acts and similarly, the rulings of the Constitutional Court and acts that have been excluded from judicial review by the Constitution cannot be the subject of individual application.*”

² Decision of the Turkish Constitutional Court, *Seyfullah Çakmak and 45 others*, Application No. 2014/4233, 30 November 2015. See also, five other similar decisions of the Constitutional Court, Decision *Gökhan Ünal*, Application No. 2012/30, 5 March 2013; Decision *Arif Güneş*, Application No. 2013/837, 5 March 2013;

dismissed with legislative decrees have applied to the ECtHR alongside domestic courts, knowing that in fact there are no effective domestic remedies, both *in theory* and *in practice*, due to Article 45 § 3 of the Law No. 6216 and a plethora of other factors.³ However, these initial applications were controversially rejected by the ECtHR.

4. In its first decision on this matter, the ECtHR found the application inadmissible on the grounds that domestic remedies, namely administrative action and individual application to the Constitutional Court were available and accessible to the applicants (*Akif Zihni v. Turkey*) and that domestic remedies had not been exhausted. By referring to this decision, ensuing applications were rejected, on the same grounds, with a single judge's decision instead of a Chamber. After hundreds of rulings by administrative courts including the Council of State, stating "*dismissals from public office during the state of emergency is outside the scope of judicial review and the appealed decision is definitive*"⁴, and due to the Constitutional Court's position on these cases, Secretary General of the Council of Europe negotiated with the Turkish Government. As a result, with EDL No. 685 dated 23 January 2017, the Commission on Examination of the State of Emergency Procedures (State of Emergency Commission) was established. It was also determined that the Commission would start receiving applications no later than six months from the publication of the decree and those who were dismissed or the institutions closed directly with a legislative decree were eligible to apply. With Article 11 of EDL No. 685, judges and prosecutors dismissed during the state of emergency could lodge an appeal directly to the Council of State. Meanwhile, the ECtHR found an application lodged by a judge (*Kadriye Çatal v. Turkey*) and a teacher (*Köksal v. Turkey*) inadmissible, citing the new remedy instated with EDL No. 685, before the Commission even began reviewing cases. More than 20,000 similar applications pending before the ECtHR were dismissed with referrals to these two decisions, without giving regard whether if the proposed remedy would eliminate all the complaints put forward.

5. As of 1 November 2018, the Commission reviewed 36,000 of 125,000 applications, of which only 2,300 were decided in favour of the applicant. A remaining

Decision *Ahmet Soysal*, Application No. 2012/237, 26 March 2013; Decision *Süleyman Erte*, Application No. 2013/469, 16 April 2013; Decision *Serkan Acar*, Application No. 2013/1613, 2 October 2013.

³ Recently, the complaints of Mr. Hamdi Akın İpek, boss of İpek Media Group (Kanaltürk TV, Bugün TV, Kanal Türk Radio, Daily Bugün and Daily Millet) were rejected by the Constitutional Court on **24 May 2018**. Even though the applicant clearly mentioned in his petition dated 2 February 2018 the violations of freedom of press, right to property, right to access to a court and presumption of innocence because of the closure of his five media outlets by the Emergency Decree Law No. 668, the Constitutional Court found inadmissible the complaint regarding the freedom of press and rejected the application without examining and even mentioning other complaints (Decision **Hamdi Akın İpek**, No. 2015/17763, 24 May 2018, §§ 128-130).

⁴ It was stated in numerous court decisions that the dismissals from public office within the context of Article 3 and 4 of legislative decree no. 667 are "*extraordinary measures non-temporary and final in nature*" and "*the judicial review on subject of the case is closed*" (The 5th Chamber of the Council of State Ruling dated 4 October 2016, no. 2016/8196E – 2016/4066K and the 11th Administrative Court in Ankara Ruling dated 25 November 2016, no. 2016/5060E – 2016/3998K). For sample cases see <http://www.neyapilabilir.net/#1481743392332-175a77a8-aea0>

33,700 appeals were rejected on the basis of documents provided by the institution that the applicants were lastly employed, without resorting to their defence. 89,000 applications are yet to be reviewed, even though a considerable time has passed.

6. Below is examination of initial decisions of the ECtHR in the aftermath of 15 July 2016, within the context of well-established case-law of the Court. These decisions were on appeals of a detained judge on her detention, a judge regarding her dismissal with a CJP decision and two teachers regarding their direct dismissal with a legislative decree.

A- Initial Rulings of the ECtHR

7. Initial decisions rendered by the ECtHR in the aftermath of the coup attempt in Turkey were related to arbitrary detention, dismissal of judges and prosecutors with CJP decisions and direct dismissal of civil servants with emergency decree laws.

1- The First Ruling on Detention: *Zeynep Mercan v. Turkey* (no. 56511/16, 8 November 2016)

8. The first decision of the Court after 15 July 2016 was on the case of Judge Zeynep Mercan, who lodged an appeal with the ECtHR, without taking her case to the Constitutional Court first. The applicant argued that since two members and some rapporteurs of the Constitutional Court were dismissed, it has lost its impartiality and independence and thus she applied to the ECtHR directly. The ECtHR, however, put forward that “*La Cour rappelle ... que le manque allégué d'impartialité peut faire l'objet, le cas échéant, d'un grief sur le terrain de l'article 6 § 1 de la Convention, mais qu'on ne peut, en principe, soulever une telle allégation de manière préventive pour échapper à l'obligation d'épuiser.*” and thus found the application inadmissible.⁵ In other words, the ECtHR rejected the Judge Mercan’s application on 8 November 2016 due to the fact that the domestic individual application remedy was not exhausted. Other applications to the ECtHR with the same complaints were rejected by a single judge with reference to the *Zeynep Mercan v. Turkey* decision.

9. However, a “judge” or a “court” must be independent and impartial in the meaning of Article 5 §§ 3 and 4 of the ECHR (see, *Nikolova v. Bulgaria*; *Assenov v. Bulgaria*; *D.N. v. Switzerland*). The detention review by the Constitutional Court is actually within the context of Article 5 § 4 and the court that is responsible for review in this manner (*habeas corpus*) “*must be independent and impartial*”. Therefore, [lack of] independence is not a claim to be put forward only within the context of Article 6 of the ECHR (right to a fair trial). A domestic remedy that is not independent and impartial within the context of Article 5 § 4 of the ECHR could not be regarded as “*an effective remedy both in theory and in practice*”.

10. According to the ECtHR, “*the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 § 1 of the ECHR. However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence, provided that, it is in fact recognized, and that the other necessary guarantees are present*” (*Campbell and Fell v. The United Kingdom*, § 80 - *Lauko v. Slovakia*, § 63).

⁵ *Zeynep Mercan v. Turkey* (dec.), no. 56511/16, 8 November 2016, § 26.

11. On 16 July 2016, two members of the Constitutional Court were taken under custody and later detained; and on 4 August 2016, were removed from office by the Plenary of the Constitutional Court without a public hearing and without respecting the essential procedural guarantees of a fair trial, such as adversarial proceedings and equality of arms. They were removed from office as per Article 3 of EDL No. 667⁶, despite the plenary failing to find any evidence against them, even after examination of their pending criminal cases. Regarding this decision, the Venice Commission stated that “*The judgment does not refer to any evidence against the two judges concerned*”.⁷ As stated in a report published by the Office of the United Nations High Commissioner for Human Rights, “*judges can be suspended or removed only on serious grounds of misconduct or incompetence after fair proceedings*”.⁸ The Constitutional Court has lost its independence after the arbitrary arrest and dismissal of its two members without any concrete evidence. Therefore, the applicant’s claim against the Constitutional Court is not just a “*simple concern*” (*simple craintes*) as stated in the ECtHR decision.⁹

2- Applications and Initial Rulings on Dismissals from Public Office

a) *Akif Zihni v. Turkey* Decision (No. 59061/16, 29 November 2016)

12. After 15 July 2016, most of the applications lodged with the ECtHR was on dismissals from public office. On 29 November 2016, the ECtHR found inadmissible the application of *Akif Zihni*, a teacher who was directly dismissed with a legislative decree. The ECtHR, while explicitly referring to the last sentence of Article 45 § 3 of the Law No. 6216¹⁰, rejected the application without first waiting and examining the initial decisions of the Constitutional Court and whether seeing this court offers an effective remedy *in theory* and *in practice*. In other words, while it was impossible to apply to the Constitutional Court for violations of human rights emerged directly due to a legislative decree, as per Article 45 § 3 of the Law No. 6216, the ECtHR declared the Constitutional Court an effective domestic remedy.

13. However, on 12 October 2016, the Constitutional Court ruled that it has no jurisdiction over emergency legislative decrees and this ruling was included in summary in the ECtHR decision.¹¹ According to Article 45 § 3 of the Law No. 6216, “*Individual applications cannot be made directly against legislative acts and regulatory administrative acts*

⁶ According to Article 3 of KHK No. 667 dated 23 July 2016, the organs listed in this Article can dismiss all judges and prosecutors, including chiefs and members of higher courts, without trial or resorting to their defense, by unilateral action in any time. This provision is to remain in force for three more years as per a legislation dated 25 July 2018. In short, no judge has the *security of tenure* until 24 July 2021. Even though the most important safeguard of the tenure of judges in Article 139 of the Constitution was abolished with the provisions of a law, the main opposition party failed to press for its annulment in the Constitutional Court within 60 days.

⁷ 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, 12 December 2016, §§ 135, 136

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<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20285>

⁹ *Zeynep Mercan v. Turkey* (dec.), § 26.

¹⁰ Rights violations arising directly from general regulatory acts such as laws, legislative decrees and by-laws cannot be brought before the Constitutional Court with individual appeals.

¹¹ *Akif Zihni v. Turkey* (dec.), No. 59061/16, 29 November 2016, § 15.

and similarly, the rulings of the Constitutional Court and acts that have been excluded from judicial review by the Constitution cannot be the subject of individual application.” In other words, no individual application can be lodged with the Constitutional Court on violations of human rights emerging from a legislative decree that is not subject to review according to the Constitution.¹² Nevertheless, the ECtHR dismissed Akif Zihni’s application on the grounds that “*the applicant has a right to apply to the Constitutional Court and administrative courts, which could not be deemed ineffective and inaccessible*” and remedies of individual application to the Constitutional Court and administrative action should be exhausted.

14. Since September 2016, administrative courts and the Council of State have dismissed without examination of merits of the cases of expelled public officials during the state of emergency. Administrative courts found the applications inadmissible on the grounds that dismissals from public office during the state of emergency constitute non-temporary and final measures in effect and that such actions are not subject to judicial review. While such a ruling by the Council of State on 4 October 2016 was cited in the ECtHR decision on *Akif Zihni v. Turkey*,¹³ the Court ignored these alongside similar rulings by administrative courts and concluded that dismissed public officials have administrative court remedy accessible to them. Despite hundreds of dismissals of cases on procedural grounds by Turkish administrative courts were sent and faxed to the ECtHR by applicants and the Court is very well aware of them, in *Akif Zihni v. Turkey* decision, the ECtHR ruled that the administrative court remedy was *prima facie* accessible.

15. However, even the Turkish Government agreed in its Memorandum submitted to the Venice Commission that those dismissed with emergency decree laws have no right to apply to ordinary courts or to the Constitutional Court (*the Government’s Memorandum, CDL-REF(2016)067, p. 35*)¹⁴. In fact, the Government accepted that “*where the individual measure is commanded by the decree law itself (in the form of “lists” appended to the decree laws), this measure is, arguably, appealable neither before the Constitutional Court nor before the ordinary courts.*”¹⁵ In the Memorandum published by the Commissioner for Human Rights of the Council of Europe on 7 October 2016 (*Memorandum on the human rights implications of the measures taken under the state of*

¹² *Akif Zihni v. Turkey* (dec.), § 13 : « (...) *les actes qui ne sont pas soumis à un contrôle judiciaire en vertu de la Constitution ne peuvent fait l’objet d’un recours individuel.* »

¹³ *Akif Zihni v. Turkey* (dec.), § 17.

¹⁴ The government memorandum stated “[...] *As the expulsion transactions performed as attached to the Decree Laws have the characteristic of legislative activity in technical terms, both the lawsuit and the individual application remedy are not available against these transactions.*” (*Government’s Memorandum, CDL-REF(2016)067, p. 35*).

¹⁵ (“*Venice Commission Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016*” (Opinion No. 865/2016), § 201 ([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)037-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e)).

emergency in Turkey)¹⁶, it was stated that the Turkish Minister of Justice made a similar comment.

16. It shortly became clear that the reasoning behind *Akif Zihni v. Turkey* decision was absolutely groundless and there is no effective domestic remedy that applicants could apply. The State of Emergency Commission was consequently established with EDL No. 685 dated 23 January 2017, as a result of Secretary General of the Council of Europe's initiative in order to create a new domestic remedy and to fill the lacuna. This Commission was authorized with reviewing applications of dismissed civil servants or shut-down institutions. With Article 11 § 2 of the EDL No. 685, judges and prosecutors dismissed by the decisions of CJP were granted the right to bring their cases directly to the Council of State.

b) Kadriye Çatal v. Turkey (dec.) Decision (no. 2873/17, 7 March 2017)

17. On 24 August 2016, the CJP dismissed a total of 2847 judges and prosecutors without any regard for even the minimum safeguards for right to defence. These dismissals continued during the two-year-long state of emergency and a total of about 4500 judges and prosecutors were dismissed. Initial cases brought to administrative courts and the Council of State were rejected on procedural grounds, given that “the dismissals were final and could not be brought before a court”. The first decision of the Council of State on this matter was taken on 4 October 2016 (see, *Akif Zihni v. Turkey*, § 17).

18. Judges and prosecutors realized that the administrative courts were inaccessible and lodged applications to the ECtHR alongside the Constitutional Court. In the first case of its type, *Kadriya Çatal v. Turkey*, the applicant argued that her right to access to a court or to a domestic remedy within the meaning of Articles 6 and 13 of the ECHR were violated and there were no effective remedies available. She alleged that Articles 7, 8, 14, 15, 17 and 18 of the ECHR were violated since she was dismissed after being declared a member of terrorist organization, arbitrarily dismissed from office. She claimed that her right to property was also violated because she lost all her income, guaranteed by Article 139 of the Constitution for the judges.

19. The ECtHR found all complaints inadmissible on the grounds that with Article 11 § 2 of EDL No. 685 published on Official Gazette on 23 January 2017, the applicant could bring her case before the Council of State. The ECtHR included in its decision the following controversial reasoning: “*Force est donc de constater que le pouvoir exécutif a mis fin à la controverse relative à la compétence des juridictions nationales sur le contrôle juridictionnel des mesures prises en application des décrets-lois édictés en période d'état d'urgence.*” (*Kadriye Çatal v. Turkey*, § 28). A similar reasoning can be found in *Köksal v. Turkey* decision (*Köksal v. Turkey*, § 25). However, cases brought before administrative courts and the Council of State during the state of emergency by judges and prosecutors were rejected by these courts on the grounds that “dismissals from judgeship by the decisions of the CJP according to Article 3 of EDL No. 667 are *definite* and are not subject to judicial review.” Since there had been no remedies available for dismissed judges to have their cases reviewed in terms of merit; the right to apply to the Council of State was later

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<https://wcd.coe.int/ViewBlob.jsp?id=2442079&SourceFile=1&BlobId=2952586&DocId=2392872>

brought in due to EDL No. 685. Article 11 § 2 of EDL No. 685 was not decreed to solve a jurisdictional dispute, but rather to grant a right to appeal that was not in existence. Therefore, the ECtHR's reasoning on the matter is groundless and in the authors' opinion, included in the decision just to prevent that *Kadriye Çatal v. Turkey* decision is criticized as violating the principle of “*a tribunal previously established by law*” (see, *Coeme and others v. Belgium*). In the current case, a tribunal was granted jurisdiction after the emergence of a dispute; not only that, this authorization was not made with law (by legislature) but with a legislative decree (by executive). According to Article 142 of the Turkish Constitution, “*duties and powers of courts shall be regulated by law.*”

20. The ECtHR rejected, with reference to *Kadriye Catal v. Turkey* case, hundreds of applications from judges and prosecutors with decisions of a single judge. However, many judges put forward different complaints that were not included in *Kadriye Çatal*'s application.

21. On 29 July 2016, the 1st Criminal Peace Judgeship in Ankara ruled for asset freezes on 2847 judges and prosecutors. After judges' objections were rejected, they lodged an application before the Constitutional Court on claims of violation of right to property (1). In addition, Deputy President of the CJP, Mehmet Yilmaz declared on 13 August 2016, on his Twitter account: “*After the treacherous coup attempt, members of the judiciary proven definitely to be members of [the] armed terrorist organization were quickly dismissed.*” (@mehmetyilmaz073 - 13.08.2016 - 14.03). Many judges lodged applications first before the Constitutional Court and then the ECtHR claiming that the principle of presumption of innocence was violated. The Constitutional Court dismissed these applications in 2017 on the sole ground that “*the applicants have not exhausted yet the remedy established by Article 11 § 2 of EDL No. 685 (applying to the Council of State)*”.

22. However, in terms of right to property, the only domestic remedy is to object criminal peace judgeship's ruling. On this matter, the Council of State has no jurisdiction whatsoever. In terms of presumption of innocence, there is no accessible and effective domestic remedy other than the Constitutional Court, for statements of Mehmet Yilmaz, Deputy President of the CJP, one of the most senior figures of the judiciary, would hold their effect in ongoing or pending criminal cases against these judges and prosecutors.

23. These two claims, which were not reviewed in the *Kadriye Çatal v. Turkey* decision by the ECtHR, were put forward by other applicants; yet the ECtHR, without examining these complaints, rejected all similar appeals with a single reference to the *Kadriye Çatal v. Turkey* decision.

24. Therefore, many applications with regard to the presumption of innocence and right to property were rejected groundlessly by a single judge, despite all domestic remedies were actually exhausted with respect to these complaints. According to the ECtHR, courts shall provide reasoned judgements for every relevant complaint or argument put forward by applicants (*Hiro Balani v. Spain*). By rejecting numerous applications lodged by judges only with reference to the “*Kadriye Çatal v. Turkey*” case, the ECtHR violated the right to reasoned decision, as many complaints put forward later on were not examined in that case.

c) *Köksal v. Turkey (dec.)* Decision (no. 70478/16, 12 June 2017)

25. The State of Emergency Commission (SEC) was founded upon the Council of Europe's advice, as a domestic remedy to eliminate systemic and structural human rights violations emerged in the aftermath of the coup attempt. Before the Commission commenced to work, the ECtHR made a decision on dismissals from public service. In its decision, *Köksal v. Turkey*, the Court examined every single provision of EDL No. 685 and concluded that the SEC was an effective remedy and thus, the application of Mr Köksal, a teacher, was inadmissible.

26. The ECtHR diverged from its well-established practice by ruling the State of Emergency Commission effective in practice, before the Commission commenced to function. However, according to well-established case law of the ECtHR, in order to declare a domestic remedy effective, the effectiveness of the remedy in question should be proven in theory and in practice. A domestic remedy that is not effective in theory and in practice for every single complaint put forward by applicants, cannot be regarded as effective.

27. As seen on Article 2 of EDL No. 685 which regulates the powers of the State of Emergency Commission (*Köksal v. Turkey*, § 16), the Commission has no explicit competence to recognise and eliminate human rights violations that were claimed before the ECtHR. The Commission was authorized to examine dismissals from public office, termination of student status, closure of organizations such as foundations, unions and associations. Even though highly ambiguous, Article 2 § 2 of EDL No. 685 included a provision that could expand the competences of the Commission on human rights violations. According to provisions in this Article, the State of Emergency Commission was authorized to examine "measures that affect legal status of individuals". As stated in the ECtHR decision: "*Entrent également dans les attributions de la commission [l'examen de] toutes les mesures non prévues au paragraphe précédent affectant le statut juridique des personnes physiques et morales et prises directement par les décrets-lois adoptés dans le cadre de l'état d'urgence.*"

28. One should note that reinstatement to public office does not eliminate all human rights violations put forward by applicants. For instance, a public officer's reinstatement to office, after his dismissal with a legislative decree that is effectively convicting him to membership to a terrorist organization without trial does not eliminate the violation of presumption of innocence. Even though reinstatement and pecuniary and non-pecuniary damages present an effective remedy in terms of right to property, it is not possible to argue the same from a presumption of innocence perspective. With regard to presumption of innocence, the legislative decree that directly caused such a violation should be annulled and the applicant's name should be dropped from the list appended to the decree. Moreover, it should be clearly determined that there was a violation and a just satisfaction should be offered. As long as the decree that violated the presumption of innocence has powers of legislation and the applicant's name is on the list of terrorists in government institutions and on the internet, reinstatement to public office does not offer an effective domestic remedy with this regard. Even though there is no provision in EDL No. 685 on recognition, determination and elimination of human rights violations, the ECtHR regarded the OHAL Commission as an effective remedy for every single human rights violation.

29. In fact, with a Prime Ministry Circular published on 12 July 2017, the same day the ECtHR published its *Köksal v. Turkey* decision, evaluation of human rights violations was taken out from the State of Emergency Commission's competences. According to Article 14 of this circular, the Commission reviews the application "*in terms of membership, affiliation and/or connection with terrorist groups or groups and entities that are deemed to be engaged in activities against the national security*".¹⁷ In other words, according to the Circular, the Commission shall not review any application in other aspects, including from a human rights standpoint.

30. In short, none of the provisions of EDL No. 685 aims to examine human rights violations that would be normally put forward before the ECtHR and -if exists- determination and elimination of them. Only possible outcomes were to be reinstated to a public office, re-granted student status and re-opening of a closed institution. The ECtHR employed a highly 'optimistic' attitude regarding the Commission, suggesting it would offer remedies to eliminate all human rights violations that would normally be brought before the Court, just by examining the provisions of EDL No. 685 and without first determining if the Commission is actually effective in practice.

31. Thousands of applicants used online templates prepared by human rights activists to lodge applications before the ECtHR, claiming several human rights violations that were not examined in *Köksal v. Turkey* case. Applicants complained from violations of (1) right to access to courts, (2) the principle of presumption of innocence, due to the fact that they were dismissed from office after being declared terrorists, (3) the principle of no punishment without law, due to the fact that they were accused of their actions which did not constitute a crime at the time of their taking, (4) right to respect for private and family life, due to the fact that their private lives were investigated without court orders and they were branded before 15 July 2016¹⁸, (5) freedom of assembly and association, due to the fact that they were held responsible and punished for being a member of a foundation or a union, (6) freedom of expression and right to access to information due to the fact that they were punished and branded because of books, periodicals and papers they read and websites they visit, (7) all the safeguards enshrined in Article 6 of the ECtHR, due to their punishment without trial, which amounts almost to civil death, (8) right to education, given that they cannot benefit from their diplomas and degrees and they cannot find employment, (9) the principle of *non bis in idem* on the grounds that they were dismissed from public office and faced criminal charges for the same offences, (10) right to property and (11) prohibition of

¹⁷ Article 14 of the Circular on Working Principles and Procedures of the Commission on Examination of the State of Emergency Procedures, published on the Official Gazette on 12 July 2017 reads as: "The State of Emergency Commission shall review appeals in terms of membership, belonging, affiliation and/or connection with terrorist groups or groups and entities that are deemed to be engaged in activities against the national security by the National Security Council."

¹⁸ As stated in the Venice Commission report "*Turkey - Opinion on emergency decree laws Nos. 667-676 adopted following the failed coup of 15 July 2016, Opinion No. 865/2016*" (CDL-AD (2016)037)", the government stated that tens of thousands of civil servants were detected by tracking "the websites they visit, social media accounts, colleagues, neighbours and similar other factors." Thus, the government confessed to illegally and extra-judicially branding and violating respect for private lives of tens of thousands of public officers before 15 July 2016.

discrimination as stated in Article 14 of the ECHR, due to the discriminations they had to face.

32. The ECtHR stated firstly that the individual application lodged by Mr *Koksal* before the Constitutional Court was still pending, therefore that remedy was not exhausted. However, thousands of applicants put forward that human rights violations arising from dismissal from public office were direct results of Emergency Decree laws, and therefore, according to Article 45 § 3 of the Law No. 6216, it is not possible to resort to the Constitutional Court in cases where violations arise from legislative decrees.¹⁹ In other words, the applicants argued that individual application to the Constitutional Court was not an effective remedy in theory, and therefore in practice. As stated, Turkish government also informed bodies of the Council of Europe that individuals dismissed with a legislative decree have no right to lodge an application with the Constitutional Court. Even though in *Koksal v. Turkey* decision, this dimension of the problem was never examined, all other applicants' cases (more than 20 000 applications) were rejected (groundlessly) with reference to *Koksal v. Turkey* case.

33. Secondly, the ECtHR regarded the State of Emergency Commission *a priori* an effective remedy in terms of human rights violations, even before the Commission commenced to function; and dismissed Mr *Koksal's* application especially on these grounds. The ECtHR, despite determining the remedy posed a systemic and structural problem (*Koksal v. Turkey*, § 27), dismissed the application, contrary to its established practice, without first observing if the Commission was effective in practice. With reference to this decision, another 20,000 applications were rejected in a short period. However, according to the ECtHR: “*les dispositions de l'article 35 de la Convention ne prescrivent l'épuisement que des recours à la fois relatifs aux violations incriminées, disponibles et adéquats. Ils doivent exister à un degré suffisant de certitude non seulement en théorie mais aussi en pratique, sans quoi leur manquent l'effectivité et l'accessibilité voulues (voir, notamment, Akdivar et autres c. Turquie, 16 septembre 1996, § 66, Recueil des arrêts et décisions 1996-IV, et Dalia c. France, 19 février 1998, § 38, Recueil 1998-I).*” It should be stated that the OHAL Commission remedy could not be regarded effective in practice before the Commission commenced and its decisions are examined.

34. As of 1 November 2018, the State of Emergency Commission decided on 36,000 cases, without any regard whatsoever for eliminating human rights violations. Thousands of applicants, using petition templates from the internet, explicitly voiced human rights violations stated above, yet the Commission, without examining alleged human rights violations, dismissed most of the applications.²⁰

¹⁹ In a ruling on 46 judges, the Constitutional Court stated that alleged rights violations emanated from a “*law*” dated 28 February 2014 and according to Article 45 § 3 of Law No. 6216, the applicants had no right to apply to the Constitutional Court. There are other examples of similarly dismissed cases and the applicants referred to such rulings of the Constitutional Court in their petitions submitted to the ECtHR (see, below).

²⁰ Some of the bases of rejection decision of the OHAL Commission made public as the cases are being brought before the administrative courts in Ankara are as follows: “*usage of ByLock, which is a communication application used exclusively by FETO/PDY members, opening and account and/or depositing money to Gülen affiliated Bank Asya after 2014, sending his/her children to Gülen affiliated schools, subscriptions to Gülen affiliated media outlets before 2016, membership to certain*

35. Moreover, according to Article 4 § 2 of the relevant Prime Ministry Circular, applications regarding institutions with legislative decrees can only be lodged by “the institutions’ *legal representatives at the time of closure*”. Applications by partners or other shareholders would be rejected, as stated in Article 10 § 3(ç) of the Circular. By this way, many potential applicants were barred from appealing before the Commission.

36. In other words, jurisdiction and powers of the State of Emergency Commission granted with EDL No. 685 were limited with the Prime Ministry circular, namely, the Commission would not be able to examine human rights violations and not all victims of human rights violations would not be able to apply (Articles 4 § 2, 10 § 3(ç) and 14 of Prime Ministry Circular). For example, shareholders of partner companies of media outlets closed by EDL No. 668 have no right to apply directly to the State of Emergency Commission, despite being the principal victims in terms of right to property and freedom of press. Even the ECtHR first dismissed the applications of shareholders of *Feza Gazetecilik A.Ş.*, parent company of *Zaman Daily* and *Today’s Zaman Daily*, with reference to *Koksal v. Turkey*, and decided to re-evaluate the case after the matter was covered in the media.

37. The ECtHR was able to conclude that there were no concrete elements suggesting the State of Emergency Commission do not constitute an effective remedy, just because this decision was hastily-made without even waiting for the Commission to commence. If the ECtHR waited just for a couple of days before rejecting the application with the following reasoning: “*elle ne dispose d’aucun élément qui lui permettrait de dire que celle-ci n’était pas susceptible d’apporter un redressement approprié aux griefs du requérant tirés des dispositions de la Convention*” (*Koksal v. Turkey*, §29), it would have the “concrete elements” indicating the Commission is not an effective remedy. In order to reach such a verdict, the ECtHR should have first waited for the Commission to commence and examined initial rulings of the Commission. The ECtHR handed the Turkish Government an open cheque by deciding on *Koksal v. Turkey* case contrary to its established practice in cases of systemic and structural problems, and by hastily rejecting more than 20,000 applications based on this decision. Cashing in on this generous cheque, the OHAL Commission had never taken eliminating human rights abuses on its agenda.

3- Established Practice of the ECtHR in Cases of Systemic and Structural Violations of Human Rights and its Comparison with the Instant Case

38. For a domestic remedy to be determined effective within the meaning of Article 13 of the ECHR, human rights violations should be put forward before this organ, the organ should have jurisdiction to examine merits of complaints and should be able to afford just satisfaction to victims (*Kudla v. Poland*). Moreover, an effective domestic remedy should be able to explicitly recognize violations of rights, prevent further violations, immediately stop ongoing violations (*Surmeli v. Germany*) and eliminate them and, if possible, reinstitute previous practice (*restitutio in integrum*). If that is not possible, it should be able to decide on other measures to eliminate violations and rule on pecuniary and/or non-pecuniary damages (*Apicella v. Italy*). This organ, even

unions and foundations and so on.” Even an acquittal of these charges may not be adequate sometimes, as the State of Emergency Commission still reject such an applicant’s appeal.

though it is not a judicial body, should be in conformity with the basic procedural principles such as independence and impartiality (*De Souza Ribeiro v. France*) as well as adversary proceedings (*Silver v. The United Kingdom*). The organ should be accessible and effective in theory and in practice, and reach conclusions in a feasible timeline (*Scordino v. Italy, no.1*).

39. The ECtHR, despite determining in *Köksal v. Turkey* decision that the direct dismissals with legislative decrees constitute in fact a systemic and structural problem (*une situation problématique de grande envergure*), did not follow its established practice on this matter.

40. When the ECtHR receives repetitive applications of human rights violations from citizens of a Contracting State, it regards it as a systemic and structural problem and resorts to “*pilot case*” procedure that would offer solutions to all cases. With this procedure, an application stemming from a systemic and structural problem is selected as a “*pilot case*” and all applications are examined and evaluated within the framework of the pilot case. The ECtHR firstly communicates the pilot case to the respondent government, then communicates the government’s response to the applicant and by doing so, undertakes adversarial proceedings, determines violations and fundamental principles to eliminate the systemic problem.²¹ Respondent governments then create and initiate a new domestic remedy in the light of these principles. Meanwhile, all the cases before the ECtHR remains pending until initial decisions of the new remedy demonstrate effectiveness in practice as well. After a while, the ECtHR communicates another application to the relevant government and after receiving observations of the parties, examines whether the new domestic remedy is “*effective both in theory and in practice, in terms of determined human rights violations*”. In case the ECtHR decides the newly-established remedy is effective both in theory and in practice judging by its rulings, the ECtHR finds the application inadmissible and refers the applicant to the new domestic remedy.²² Similar cases would also be dismissed with reference to this ECtHR decision and referred to domestic remedies.

41. The ECtHR regarded “applications from individuals who had been forcibly made emigrate from southeast Turkey in 1990s” and “length-of-proceedings” as systemic problems and resorted to “*pilot case*” procedure on these two issues.²³

42. As stated in many decisions, some 380,000 individuals were forced to emigrate due to disturbances in the region in 1994, from their villages in south eastern Turkey. Some of these emigres, in their applications to the ECtHR claimed that Articles 1, 6, 7, 8, 13, 14 and their right to property were violated. The ECtHR selected and communicated “*Dogan and Others v. Turkey*” case to the Government, and after receiving observations of applicants, on **29 June 2004**, ruled that only right to respect for private life (Article 8 of the ECHR), right to an effective remedy (Article 13) and right to property (Article 1 of Protocol 1 of the ECtHR) were violated and found other

²¹ See, *Doğan and Others v. Turkey* nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004.

²² See, *İçyer v. Turkey* (dec.), no. 18888/02, 12 January 2016.

²³ See also, *Demopoulos and others v. Turkey*, (dec.), [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, 2010, *Altunay v. Turkey* (dec.), no. 42936/07, 17 April 2012, and *Tahir Arıoğlu and others v. Turkey* (dec.), no. 11166/05, 6 November 2012.

complaints inadmissible. In order to eliminate human rights violations, determined in this decision, with a law dated 27 July 2004, the Government established a “*Compensation Commission*” whose decisions are subject to review by administrative courts. Compensation commissions that were established in 76 provinces for 177,000 applicants commenced and decided on several cases, after which, the ECtHR communicated another pending application to the Turkish government. The Turkish government, in return, claimed with example decisions of the Compensation Commission that there was an effective domestic remedy in place and the applicant should first exhaust available domestic remedies. The ECtHR, on 12 January 2016, after receiving the parties’ observations, based on example decisions presented by the government, found the Compensation Commission as an effective remedy both *in theory and in practice* and found the application inadmissible on the grounds of non-exhaustion of domestic remedies (*İçyer v. Turkey*, (dec.), no. 18888/02, 12 January 2016). Later on, the Court dismissed all pending applications with reference to *İçyer v. Turkey* decision.

43. This procedure was repeated with the systemic and structural problem of length-of-proceedings (right to trial within a reasonable time). The ECtHR, in its decision dated 20 March 2012 on the pilot case *Ummuhan Kaplan v. Turkey* (no. 24240/07, 20 March 2012) found violation in terms of length of proceedings and put forward fundamental principles for elimination of this problem. Then the Court held more than 3,800 applications pending for a while²⁴. In the light of principles declared in the ECtHR decision, the Compensation Board was established with a law dated 9 January 2013. After the board commenced, the ECtHR found it effective both in theory and in practice in terms of the violation in question and determined the application inadmissible (*Müdür Turgut and Others v. Turkey*, §§ 19-26 and 47-60). Afterwards, with reference to this decision, the Court found all similar applications inadmissible and directed them towards the Compensation Board.

44. The most prominent characteristic of the ECtHR’s pilot judgement procedure is finding violations with adversarial proceedings and then establishing a domestic remedy with an aim to eliminate those violations. However, regarding the applications from Turkey in the aftermath of 15 July 2016, this procedure was abandoned, alleged human rights violations were not determined, all these were left to the hands of the Turkish government. Moreover, while the ECtHR used to hold applications before the Court pending until determining if the new domestic remedy is effective both *in theory* and *in practice*, this time the Court found the State of Emergency Commission effective before even the Commission commenced and dismissed more than 20,000 applications based on *Köksal v. Turkey* case. The ECtHR thus abandoned its established practice and handed the Turkish government an open check. It would be impossible for the ECtHR to find, after adversarial proceedings once the Commission begun to decide on cases, the State of Emergency Commission an effective remedy in terms of human rights violations. The State of Emergency Commission does not take alleged human rights violations into consideration in the cases it has thus far examined.

45. Moreover, Article 14 of the Prime Ministry circular dated 12 July 2017 limited the Commission’s jurisdiction to examine applications only “*in terms of*

²⁴ See, *Müdür Turgut and others v. Turkey* (dec.), no. 4860/09, 26 March 2013, § 40.

connections with terrorist organizations” and thus left the Commission with no explicit power to review human rights violations. The ECtHR’s efforts to get rid of 20,000 applications and reluctant attitude gave leverage to the government (State of Emergency Commission) even in not examining human rights violations. The Commission, without touching upon the human rights violation complaints in petitions, has been rejecting applications on the grounds of “cash deposits to a bank , usage of a messaging application, subscription to journals and newspapers associated with the Gulenist network”. If the Court had not dismissed pending appeals with reference to *Koksal v. Turkey* decision and waited until evaluating the Commission’s effectiveness in practice, (see, *Ümmühan Kaplan v. Turkey*, § 77), the State of Emergency Commission would have had to examine appeals in terms of alleged human rights violations, at the very least to seem effective before the ECtHR. The State of Emergency Commission, with no regard to eliminate human rights violations whatsoever, rejected 33,700 applications as of 1 November 2018. It is primarily upon the government to prove that a newly-established domestic remedy is effective in theory and in practice in terms of alleged human rights violations.²⁵ Only after the Contracting State proves the remedy is effective, it is upon the applicant to prove the opposite.²⁶ In the current case, without determining if the State of Emergency Commission is effective, or even burdening the Turkish government with such an obligation, the ECtHR found the Commission effective and took a contradictory position to its established practice. Due to this contradictory position taken by the Court, review and elimination of human rights violations of more than 125,000 dismissed civil servants has been delayed for years. In short, the ECtHR’s encouraging stance towards the government constituted one of the principal reasons for that 125,000 public servants’ human rights violations could not be reviewed in domestic law within a reasonable time.

46. The fact is the ECtHR resorted hasty dismissal of applications from Turkey in the aftermath of 15 July 2016, without first examining whether domestic remedies are effective in practice.²⁷ This approach, on one hand, encouraged the government and,

²⁵ See, *İçyer v. Turkey* (dec.), no. 18888/02, 12 January 2016, § 70.

²⁶ According to the ECtHR, “..., the burden of proof is primarily on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1210-11, §§ 65-69, and *Menteş and Others v. Turkey*, judgment of 28 November 1997, *Reports* 1997-VIII, p. 2706, § 57).”

²⁷ For instance, as per Article 45 § 3 of the Law No. 6216, public officials directly dismissed with legislative decrees cannot lodge individual appeals before the Constitutional Court regarding the human rights violations they were subject to. Despite even the government stated to the Council of Europe that those who dismissed directly with legislative decrees cannot resort to the Constitutional Court, the ECtHR persistently dismissed hundreds of applications in a short period with

on the other, deterred victims of human rights violations to resort to the ECtHR. It is alleged that in taking such a stance, the Court aimed to avoid a prominent increase in its workload. However, such a position is not befitting to an international judicial institution whose whole and only purpose is to effectively protect human rights.

47. The State of Emergency Commission does not necessarily have to be independent, given that its decisions can be taken up to administrative courts. Yet unfortunately, the Turkish judiciary as a whole has also lost all its independence. On this matter, this article includes just an example from administrative courts and relies on referring readers to an exhaustive report that includes concrete evidences, facts and findings.²⁸ On 20 November 2015, a confidential document was sent to the High Council of Judges and Prosecutors (HCJP) by the Ministry of the Interior (No: -2043. (31420) 152488 – Subject: *Judicial decisions*). This document entreated the HCJP to take action against 78 administrative court judges who ruled against the Ministry. Thereupon, the 3rd Chamber of the HCJP immediately launched an enquiry against the listed judges, and the 2nd Chamber suspended the promotion process of 12 of them. Similar demands were submitted also by governors, namely those of Siirt, Sakarya, and Diyarbakır.²⁹, who entreated the HCPJ to take steps to rein in judges who issued verdicts against them.

48. As of 1 November 2018, there are 89,000 cases pending before the Commission and it seems impossible for these cases to be resolved within reasonable time by a single commission.³⁰ However, in order to regard a domestic remedy effective, it should also deliver results within a reasonable time (*Paulino Tomas v. Portugal (dec.)*, no. 58698/00, 22 May 2003). Considering reinstatements alongside other rights violations as well as three instances administrative court system and individual appeal to the Constitutional Court, elimination of current human rights violations would take approximately 10 years in domestic courts and around 15 years in the ECtHR. If the ECtHR was to resort to pilot case procedures, as explained above, and determined which rights have been violated, the Government would have been obliged to eliminate mentioned human rights violations in a reasonable time.

Conclusion

From the beginning, the ECtHR has maintained a discouraging and reluctant attitude with regard to appeals lodged by Turkish nationals in the aftermath of 15 July

reference to *Akif Zihni v. Turkey*, on the grounds that the individual application to the Constitutional Court remedy was not exhausted. If the ECtHR waited until the Constitutional Court made its first decision on the subject, it could have gauged if this remedy was in fact effective. However, the ECtHR chose to immediately dismiss such cases, which in turn deterred victims from appealing to the ECtHR.

²⁸ <http://www.platformpj.org/wp-content/uploads/CPJreport.pdf>

²⁹ www.haberdar.com/gundem/bakanlik-aleyhimizde-karar-veriyorlar-diye-hakimlerinikayet-etti-kurul-harekete-gecti-h17382.html

³⁰ As stated in *Icyer v. Turkey* decision, while for 170,000 applicants forcibly made emigrate from south east Turkey, 76 Compensation Commissions in 76 provinces were established (2,236 applicants per commission), for 125,000 applicants who were directly affected by *Köksal v. Turkey* decision, only one commission was established. The ECtHR did not examine in *Köksal v. Turkey* decision if this commission would be able to decide on all appeals within a reasonable time and thus *de facto* effective remedy.

2016, without examining first the effectiveness of domestic remedies in practice. In doing so, it has sometimes abandoned its established practice, carefully refrained from taking steps that would be disliked by the government and left 125,000 applicants, who have been branded as “*traitors* and *terrorists*” by the Turkish government to the mercy of their government. Moreover, by not determining human rights violations in a pilot judgement, despite possessing the jurisdiction to do so, the Court delayed the elimination of such violations by 10 to 15 years. This approach does not befit the ECtHR, whose sole purpose and aim is to effectively protect and develop human rights.

