Strasbourg, 12 December 2016

CDL-AD(2016)037
Engl.only

Opinion No. 865 / 2016

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

TURKEY

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 (Venice, 9-10 December 2016)

On the basis of comments by:

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TABLE OF CONTENTS

I. INTRODUCTION **4**

II. FACTUAL BACKGROUND **4**

III. ANALYSIS OF THE EMERGENCY MEASURES **6**

A. Normative framework **6**
1. National legal framework 6
2. International legal framework 8

B. Existence of “a public emergency threatening the life of the nation” **9**
1. Original decision to declare the state of emergency 9
2. Prolongation of the state of emergency 10

C. Compliance with the procedure **12**
1. Declaration of the state of emergency and its approval by Parliament 12
2. Enactment of the decree laws by the Government and their approval by Parliament 12
3. Notifications of derogations 14

D. General overview of the emergency measures **15**
1. Scope of the emergency measures *ratione personae* and *ratione temporis* 16
2. Compliance with the Law on the State of Emergency of 1983 17
3. Permanent character of some of the emergency measures 19
a. General principles 19
a. Individual measures transcending the period of the state of emergency 19
b. Structural changes introduced by the emergency decree laws 20
4. *Ad hominem* emergency legislation 21
5. Waiver of liability 22

E. Specific emergency measures **23**
1. Dismissals of public servants and associated measures 23
a. Description of measures 23
b. Large margin of appreciation accorded to the State in regulating public service 24
c. Human rights at stake 25
d. The moment when collaboration with the Gülenist network became incompatible with the public service 27
e. Connections to the Gülenist network as a pre-condition for dismissal 28
f. Lack of reasoned and individualized decisions on dismissals 29
g. Lack of administrative due process before dismissals 31
h. Associated measures (evictions, withdrawal of passports, access to communications) 31
i. Dismissals of judges 32
2. Measures related to criminal proceedings 33
a. Description of measures 33
b. Limits to derogation from the States’ procedural human rights obligations during the times of emergency 34
c. Measures related to arrest and detention in custody 36
d. The right to be effectively defended by a lawyer 37
e. Grounds for bringing suspects to criminal liability 38
3. Allegations of ill-treatment and torture 38
4. Dissolution of private associations and companies and confiscation of their assets 39

F. Constitutional review **40**
1. Constitutional review *in abstracto* 40
a. Constitutional review of the decree laws before their approval by Parliament 40
b. Constitutional review of the decree laws after their approval by Parliament 42
2. Constitutional review *in concreto* 42
a. Individual complaints introduced before the approval of the decree laws by Parliament 42
b. Individual complaints introduced after the approval of the decree laws by Parliament 44

G. Judicial review **44**

H. Other remedies **46**

I. Special *ad hoc* body for the review of the emergency measures **47**

IV. CONCLUSIONS **48**

I. Introduction

1. By letter of 27 September 2016, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) requested the opinion of the Venice Commission on the overall compatibility of the implementation of the state of emergency in Turkey, in particular all subsequent decree laws, with Council of Europe standards.

2. Ms Claire Bazy Malaurie, Ms Sarah Cleveland, Ms Regina Kiener, Ms Hanna Suchocka, Mr Kaarlo Tuori, and Mr Jan Velaers were invited to act as rapporteurs for this opinion. On 3 and 4 November 2016, a delegation of the Venice Commission visited Ankara and held meetings with the State authorities, politicians, lawyers and NGO representatives. The Venice Commission expresses its gratitude to the Ministry of Foreign Affairs and the Ministry of Justice of Turkey for the excellent organisation of the visit.

3. The present opinion was prepared on the basis of the comments submitted by the rapporteurs based on the English and French translations of the emergency decree laws (see CDL-REF(2016)061 and CDL-REF(2016)061add) provided by the Turkish authorities to the Council of Europe together with the derogation letters (for more details on the derogation process, see below). This translation may not always accurately reflect the original version in Turkish on all points; therefore, certain issues raised may be due to problems of translation.

4. The Venice Commission also took note of the written Memorandum prepared by Turkish authorities for the visit of the rapporteurs to Ankara, together with the additional documents appended to it (hereinafter – the Government's Memorandum, see CDL-REF(2016)067).

5. The present opinion was adopted by the Venice Commission at its 109th Plenary Session, in Venice (9-10 December 2016).

II. Factual background

6. On 15 July 2016 a group of officers within the Turkish armed forces tried to seize power in the country and overthrow President Erdoğan. The conspirators bombed the Parliament, attacked other public buildings, blocked roads and bridges in major towns, and seized a TV station. They did not hesitate to use heavy weaponry to suppress the legitimate resistance of those State officials who remained loyal to the Government. Hundreds of civilians were injured or killed. However, the Turkish armed forces and the population resisted, and the coup failed. The conspirators within the Army, police and other armed forces were disarmed and arrested.

7. The Venice Commission strongly and resolutely condemns, once again, the ruthlessness of conspirators, and expresses solidarity with the Turkish society which stood united against them. The official name of the Venice Commission is the "European Commission of Democracy through Law". A military coup against a democratic government, by definition, denies the values of democracy and the rule of law. Therefore, the Venice Commission will always oppose those who try to overthrow a democratic government by force.

8. On 20 July 2016 the Government declared a state of emergency for three months. Following the approval of that declaration by Parliament, the Government started to legislate through emergency decree laws. The first was Decree Law no. 667, which entered into force on 23 July 2016. In the following months several other decree laws were enacted. On 5 October 2016 the Government extended the state of emergency for a three further months, effective as of 19 October. The prolongation was approved by Parliament on 11 October 2016.

9. So far, twelve emergency decree laws have been enacted (nos. 667 – 678). The Venice Commission has been informed that two new emergency decree laws were enacted on 22 November 2016. However, since the last two decree laws have not been made available in

English and have not been officially notified to the Council of Europe, the analysis below will cover the first ten decree laws. They provide for a comprehensive purging from the State apparatus of the persons allegedly linked to the conspiracy. The decree laws also simplify the rules of criminal investigation for terrorist-related activities. During the state of emergency, over 100.000 civil servants, military officers, judges, teachers and academics have been dismissed from their jobs. Tens of thousands have been arrested and prosecuted. Private institutions allegedly linked to the conspiracy have been closed down and their property confiscated.

10. According to Turkish official sources, there is strong evidence that the conspiracy has been organised by the supporters of Mr Fethullah Gülen, an Islamic cleric living in the US. In the Turkish official documents the Gülenist network is denoted as “FETÖ/PDY” (“Fethullah Terror Organization/Parallel State Structures”).

11. Originally, the Gülenist network consisted of a large number of educational institutions, charity foundations, business entities, etc. According to the Government, in addition to being largely present in the public education, business sphere and in the third sector, the Gülenists also started secretly penetrating into State institutions.

12. According to the Turkish authorities, in December 2013 the Gülenists tried to destabilize the AKP Government by accusing some of its members of corruption. Now this incident is considered by the Government as a first coup attempt by the Gülenists. Following the events of December 2013 the Government started closing down some key entities of the Gülenist network (such as the *Asya* bank and the *Zaman* newspaper).

13. In addition, a large number of civil servants, military officers and judges suspected of Gülenist sympathies were subjected to disciplinary investigations, or transferred to other places of service. However, these measures were of a limited effect, allegedly because of hidden obstruction from the Gülenists who by then had already infiltrated various State institutions.

14. The official account, according to the Turkish authorities, is corroborated by the testimony of some of the plotters obtained after their arrests, and by various circumstantial evidence which points at Mr Gülen and his supporters. The Venice Commission acknowledges that a very large segment of the Turkish society shares the view of the Turkish authorities on the role of the Gülenist movement. Mr Gülen himself instead denies playing any role in the coup.

15. Most of the trials related to the failed coup are still underway. The Venice Commission is not a court and has neither the mandate nor the resources to resolve such complex factual controversies as those appearing *in casu*. Individual cases related to the post-coup measures are now pending before the Constitutional Court of Turkey, the European Court of Human Rights (ECtHR) and other authoritative international judicial or quasi-judicial bodies. Nothing in the present opinion should be seen as prejudging any conclusions on the facts which those courts or other authoritative judicial bodies might reach in individual cases.

16. Without hampering the right of every individual to be presumed innocent until proven guilty by a court, the Venice Commission takes into account certain factual allegations made by the Turkish authorities, for the purpose of building its legal analysis. The first allegation is that the failed coup was prepared and implemented by a coordinated group composed at least partly of supporters of Mr Gülen within the army and other State institutions. The Turkish authorities called the Gülenist network a “terrorist organisation”; the Organisation of Islamic Cooperation is of the same opinion.[1] There are different definitions of “terrorism”. Regardless of the propriety of these characterisations, those who were *directly involved* in the planning and implementation of the coup definitely formed a criminal organisation.

[1] See http://www.dailysabah.com/war-on-terror/2016/10/19/organization-of-islamic-cooperation-declares-feto-a-terrorist-group

17. The second factual allegation is that, even *before* the coup, a number of members of the Gülenist network were involved in certain illegal acts, which arguably qualify as crimes under the Turkish Criminal Code. Those acts allegedly consisted of manipulations of the entry exams to various State institutions, collection of a *de facto* compulsory "tax", under the guise of benevolent donations supposed to finance charity projects of the Gülenist network, fabrication of incriminating evidence against political opponents, etc. The best known examples of such manipulations, according to the Turkish authorities, are the so-called *Ergenekon* and *Balyoz* trials, in which a large number of persons were convicted on the basis of at least partially fabricated evidence. However, this does not mean that everybody who has ever had contacts with the organisations or projects associated with Mr Gülen may be automatically considered as aiding and abetting the commission of those crimes.

III. Analysis of the emergency measures

18. From the outset the Venice Commission emphasises that not only are certain facts related to the situation in Turkey in dispute, but the legal aspects of the emergency regime in Turkey are also extremely complex and subject to different interpretations. It is impossible, in a single opinion and in such a short time, to cover all legal questions which arise from the post-coup measures taken by the Turkish Government. The Venice Commission will, therefore, concentrate on several selected topics, which appear to be of primary importance. This opinion should not be seen as a comprehensive analysis of the emergency regime.

19. Furthermore, on 9 November 2016, the Committee on Political Affairs and Democracy of the PACE requested an opinion from the Venice Commission on the measures provided in the recent emergency decree laws in Turkey with respect to freedom of the media. This matter requires a separate examination, and will not, therefore, be addressed in the present opinion.

A. Normative framework

20. Before entering into the analysis of the emergency measures, the Venice Commission will outline the existing normative framework of the state of emergency in Turkey and internationally.[2]

1. National legal framework

21. Article 120 of the Constitution permits the Government to declare a state of emergency in the event "of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms […]". The decision on the state of emergency under Article 120 shall be published and shall be submitted immediately to the Turkish Grand National Assembly for approval. Such a regime can be introduced only for a limited period of time.

22. Under Article 91 of the Turkish Constitution, Parliament ordinarily may authorise the Government to issue decree laws on specified issues. During the state of emergency regime the Government may legislate by emergency decree laws without such prior authorisation, simply on the basis of a declaration of the state of emergency, approved by Parliament (Article 121 § 3 of the Constitution). Such emergency decree laws should concern "matters necessitated by the state of emergency" and are to be submitted by the Government

[2] The Special Rapporteur of the UN on human rights and states of exception formulated this requirement as a "legality" principle: the restrictions on human rights and fundamental freedoms during a state of emergency must remain within the limits set by the national and international law instruments. See the Final Report of the Special Rapporteur of the UN on human rights and states of exception, E/CN.4/Sub.2/1997/19, http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/Sub.2/1997/19/Add.1&Lang=F

to Parliament for prompt *ex post* approval ("shall be submitted to the Turkish Grand National Assembly on the same day for approval"); the time-limits and procedure for their approval are indicated in the Rules of Procedure of Parliament (*ibid.*).[3]

23. The limits to the Government's emergency powers are set out in Article 15 of the Constitution. It allows for "partial or total" suspension, "during the state of emergency", of the exercise of fundamental rights and freedoms, but only "to the extent required by the exigencies of the situation" and provided that "obligations under international law are not violated". Article 15 also contains a list of non-derogable rights, such as, for example, the right to life or physical integrity.

24. In addition, Article 121 § 2 of the Turkish Constitution stipulates as follows:

> *"The financial, material, and labor obligations which are to be imposed on citizens in the event of the declaration of state of emergency under Article 119 [which regulates natural disasters and the like], and, applicable according to the nature of each kind of state of emergency, the procedures as to how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15 [which speaks about limitations on human rights in the situation of emergency, irrespective of the type of emergency], how and by what means the measures necessitated by the situation shall be taken, what sort of powers shall be conferred on public servants, what kind of changes shall be made in the status of officials, and the procedure governing emergency rule shall be regulated by the Law on State of Emergency".*

25. The Law on State of Emergency was adopted in 1983; a direct reference to it in the Constitution implies that any measure introduced by an emergency decree law should be in compliance with the 1983 Law, which is defined as setting a legal framework for any subsequent emergency decree laws. The Venice Commission stresses that the 1983 Law is referred to as a legal framework for the current emergency situation in the decree laws (see, for example, preambles to Decree Laws nos. 667 and 668), as well as in the derogation letters.[4] It appears, therefore, that any emergency decree law, adopted under Article 121 § 3 of the Constitution, should be compatible with the 1983 Law, as amended.

26. In other words, Articles 15, 120 and 121 of the Constitution set the following limits to the Government's emergency powers:

- the Government may receive and use emergency powers only in the event "of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms";
- the Government should follow a particular procedure for declaring the state of emergency and enacting decree laws (including prompt approval by the Grand National Assembly);
- certain basic rights should not be affected;
- limitations to other rights should be necessary and proportionate[5] ("to the extent required […]") and be temporary in character[6] ("during the state of emergency");
- the international obligations of the State should be respected;
- the Government should act in compliance with the law on the state of emergency.

[3] Decree laws differ "from ordinary ordinances in the following ways: (a) they do not require a prior enabling act; (b) they are issued by the Council of Ministers presided over by the President of the Republic; (c) they can also regulate, unlike ordinary ordinances, such areas as basic rights, individual rights, and political rights."
(E. Ozbudun, The Constitutional system of Turkey, 1876 to the Present, Palgrave, Macmillan, 2011, p. 70-71)

[4] See https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf

[5] Depending on the jurisdiction, "necessity" and "proportionality" are sometimes seen as essentially the same thing, or as two prongs of a single test.

[6] Which may be seen as an element of proportionality *ratione temporis.*

27. Thus, the Constitution explicitly limits the Government's power to derogate from fundamental rights and freedoms in time of emergency. In addition, certain *implicit* limitations on the Government's emergency powers may be derived from the Constitution, insofar as the system of checks and balances is concerned.

28. In particular, Article 4 of the Turkish Constitution contains irrevocable provisions, which cannot be modified by constitutional amendments. They include, *inter alia,* provisions of Article 1 of the Constitution establishing the form of State as a Republic and the provisions in Article 2 on the characteristics of the Republic. Article 2 refers to Turkey as a "democratic […] State governed by the rule of law" and "based on the fundamental tenets set forth in the Preamble". The Preamble, in turn, refers, *inter alia*, to the concepts of "liberal democracy", the principle of separation of powers, and the principle of the supremacy of the Constitution and the law.

29. The Turkish Constitution does not expressly say that those irrevocable principles are also non-derogable under the state of emergency, but this is self-evident. "During the state of emergency, state institutions function normally, although the distribution of powers is modified in favour of the executive".[7] The Constitution may give to the Government very large emergency powers. However, those powers cannot be limitless - otherwise the Constitution would contain a mechanism of self-destruction, and the regime of the separation of powers would be replaced with the unfettered rule of the executive. Any re-distribution of powers during the emergency regime should be limited to what is provided explicitly by the constitutional and legal provisions on the state of emergency and what is necessitated by the "exigencies of the situation". "In fact, most modern constitutions explicitly state that the *basic structural features of government* remain intact even in an emergency"(italics added).[8] New permanent powers of the Government, or new regulations permanently altering the competencies, composition or principles of the functioning of other constituent bodies should not emanate from the decree laws: they should be expressly authorised by the Constitution.

2. International legal framework

30. Derogation from treaty-based human rights obligations is provided by Article 15 of the European Convention on Human Rights (ECHR) and by Article 4 of the International Covenant on Civil and Political Rights (ICCPR), which are expressed in very similar terms – they permit derogation in time of public emergency which threatens the life of the nation. Turkey is a party to both treaties.

31. On 21 July 2016 the Secretary General of the Council of Europe was informed by the Turkish authorities in accordance with Article 15 of the ECHR that the post-coup measures may involve derogation from the obligations under the ECHR. In the following weeks several other such notifications followed, after the enactment of the subsequent emergency decree laws.

32. On 21 July 2016 the Secretary General of the United Nations was also notified, under Article 4 of the ICCPR, about the derogation by the Turkey from the rights provided Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27 of the ICCPR.

33. The mechanism of derogation allows the Turkish authorities to temporarily reduce the scope of its obligations under treaty-based human rights instruments. However, there are certain conditions for the exercise of the derogation powers under the ECHR and the ICCPR:[9]

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[7] CDL-AD(2016)006, Opinion on the Draft Constitutional Law on "Protection of the Nation" of France, § 64

[8] See examples given by Prof. E. Özbudun, Emergency Powers and Judicial Review, in "Human Rights and the functioning of democratic institutions in emergency situations", proceedings of the UniDem, materials of the Seminar organized in Wroclaw (Poland) on 3-5 October 1996, p. 15.

[9] This list should not be seen as exhaustive; it focuses on such elements which the Venice Commission sees as important and pertinent in the particular situation under examination

- the right to derogate can be invoked only in emergency situations (time of war or other public emergency threatening the life of the nation);
- the State availing itself of this right of derogation has to comply with certain procedural conditions (see Article 15 § 3 of the ECHR, Article 4 § 3 of the ICCPR),[10] like the proclamation and notification requirements, as well as its national law;
- the State may take measures derogating from its obligations "only to the extent strictly required by the exigencies of the situation", both with respect to scope and duration, and the necessity and proportionality of those measures are subject to supervision by the European Court of Human Rights (ECtHR) and monitoring by the Human Rights Committee (HRC);[11]
- certain rights do not allow any derogation;
- the derogation may not be discriminatory or inconsistent with the State's other obligations under international law;
- the predominant objective must be the restoration of a state of normalcy where full respect for human rights can again be secured.[12]

34. The reference to "other obligations" under international law in the national Constitution and in the ECHR and the ICCPR means that the list of non-derogable rights includes those listed in both conventions. Furthermore, the State must comply with other international obligations (which is also expressly stated in the text of Article 15 of the Turkish Constitution), whether based on treaty or on general international law, some of which are non-derogable by definition. Thus, the list of non-derogable rights is larger than the two express lists contained in the ECHR and the ICCPR. In particular, according to the UN Human Rights Committee, States Parties to the ICCPR may under no circumstance invoke Article 4 of the Covenant as a justification for acting in violation of humanitarian law or peremptory norms of international law and should take into consideration the developments of human-rights standards. The Human Rights Committee also has recognised that in order to protect non-derogable rights, certain aspects of other human rights must be non-derogable, including the prohibition against arbitrary deprivations of liberty and unacknowledged detention, and fundamental principles of fair trial, including the presumption of innocence and the right to have a court promptly determine the lawfulness of detention.[13] Other treaties to which Turkey is a party (namely those concerning social and economic rights) also set a normative framework for the emergency measures adopted by the Government.

B. Existence of "a public emergency threatening the life of the nation"

1. Original decision to declare the state of emergency

35. The Venice Commission reiterates that, as a precondition for any derogation under Article 15 § 1 of the ECHR and Article 4 § 1 of the ICCPR, the public emergency must be such as to "threaten the life of the nation". Article 120 of the Turkish Constitution speaks of "widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence" which may lead to the declaration of a state of emergency.

[10] Article 15 § 3 at the ECHR requires a State availing itself of the right of derogation to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons for them. Article 4 § 3 of the ICCPR imposes an obligation to inform the Secretary General of the United Nations "of the provisions from which it has derogated and of the reasons by which it was actuated".

[11] In the Rule of Law Checklist the Venice Commission defined the notion "proportionate" as limited to the extent strictly required by the "exigencies of the situation", in circumstance, scope and duration. See CDL-AD(2016)007, no. 31, ii. See also R. Higgins, "Derogations under Human Rights Treaties", BYBIL 48, (1976-1977), 282-283; see also A. Mokhtar, "Human Rights Obligations v. Derogations. Article 15 of the European Convention on Human Rights", IJHR, vol. 8, 2004, 70.

[12] CCPR, General Comment No. 29, para. 1.

[13] CCPR, General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (2001), para. 10 et seq.

36. In the *Lawless* case, the ECtHR gave the following definition of a "public emergency threatening the life of the nation": "an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".[14] Later the Court stated in the *Brannigan and McBride* case that "by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in that matter a wide margin of appreciation should be left to the national authorities. Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether inter alia the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision."[15]

37. Article 4 § 1 of the ICCPR has been interpreted in the Siracusa Principles on the Limitation and Derogation of Provisions.[16] Paragraph 39 of the Siracusa Principles indicates that "a threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant."

38. The Venice Commission recognises, without any reservation, that the coup attempt of the 15 July 2016 constituted "a public emergency threatening the life of the nation", as it posed an existential threat to Turkish democracy. Furthermore, it is clear that the coup was exactly the sort of situation described in Article 120 of the Turkish Constitution as a pre-condition for the declaration of the state of emergency.

39. The Venice Commission considers that, following the coup, Turkey was entitled to defend its democratic institutions and population, as they were under violent attacks, killing more than 200 persons and leaving thousands injured. The Venice Commission acknowledges, together with the Commissioner for Human Rights of the Council of Europe, that "given the seriousness of the crimes committed by those who were behind the coup attempt and the obvious threat to Turkish democracy and the Turkish state, a swift and decisive reaction to that threat was both natural and necessary".[17]

2. Prolongation of the state of emergency

40. It is less clear whether this "public emergency threatening the life of the nation" still existed three months later, when the state of emergency was extended. Article 120 of the Turkish Constitution requires "serious indications of widespread acts of *violence* aimed at destroying the free democratic order established by the Constitution or fundamental rights and freedoms, or serious disruption of public order *because of acts of violence*" (emphasis added). On this point, the Turkish authorities insist that even though the "active phase" of the coup lasted only for a few hours, a risk of a repeated coup attempt still remains, because many supporters of Mr Gülen are still present in the State apparatus. This claim seems highly speculative, especially after over a hundred thousand public servants had been dismissed and tens of thousands arrested.

[14] *Lawless v. Ireland (no. 3)*, 1 July 1961, § 28, Series A no. 3
[15] *Brannigan and MacBride v. United Kingdom*, 26 May 1993, § 43, Series A no. 258-B
[16] Annex, UN Doc E/CN.4/1984/4 (1984)
[17] Commissioner for Human Rights, Memorandum on the human rights implications of the measure taken under the state of emergency in Turkey", CommDH(2016)35, nr. 25.

41. More generally, in the opinion of the Venice Commission, the prolongation of a state of emergency is not always the best solution to re-establish public security and restore the rule of law. Experience in certain other countries shows that the longer the emergency regime lasts, the further the State is likely to move away from the objective criteria that may have validated the use of emergency powers in the first place. The longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools. Under the ICCPR, the HRC has emphasised that derogations must be temporary and has criticised lengthy emergencies (see, for example, the concluding observations of the Committee on Israel (1998) and on Egypt (2002)).

42. According to the Turkish authorities, the prolongation of the state of emergency is justified not only by the coup attempt of 15 July as such, but also by the activities of the "terrorist organisations which aimed at making use of the disrupted public order and security after the coup attempt on 15 July" in order to intensify their terrorist activities in the country. The Venice Commission acknowledges that in the recent past Turkey has suffered several terrorist attacks. The notification of derogation submitted by Turkey to the Secretary General of the Council of Europe referred to these "other terrorist attacks". However, the state of emergency was mainly declared, as pointed out in the information note on Decree Law no. 667, in order to "promptly defeat the terrorist organisation [i.e. the FETÖ] with all its elements and to take the necessary steps in the most effective and expedious manner for the purpose of eliminating this serious threat to democracy, rule of law and rights and freedoms of our people." According to the Turkish authorities, "the declaration of the State of Emergency had to be resorted to eradicate this terrorist network in a most speedy and effective manner" and the decrees with force of law "aim to facilitate the measures to fight the FETÖ in a most speedy and effective manner". The information note on Decree Law no. 668 confirms that the "measures have been taken for the purpose of effective fight against FETÖ terrorist organization which completely infiltrated into the State's institutions." Therefore, the question arises whether these decree laws can still be justified if the focus shifts towards the "other terrorist acts".

43. That being said, the Venice Commission recalls the European Court's position in the *Brannigan and McBride* case, cited above, where it stressed that the national authorities (in the present context – the Turkish National Assembly) are in principle in a better position to assess the seriousness of such a risk. This matter may ultimately be assessed by the competent judicial bodies at the national and international levels, in particular by the ECtHR. For the purpose of the present opinion the question of the justification for the *extension* of the emergency period may be left open.[18]

44. Be that as it may, even where there is a threat to "the life of the nation", the Government may only take such measures which are required "by the exigencies of the situation" (Article 15 of the Turkish Constitution) and even "*strictly* required by the exigencies of the situation" (italics added - see Article 4 of the ICCPR and Article 15 of the ECHR). Before addressing this central issue, the Venice Commission will examine the procedure for declaring the state of emergency, for enacting the decree laws and for the derogation from international human rights treaties.

[18] As regards the principle of time limitation of the state of emergency, see also the recommendations by the UN Special Rapporteur in his report on the question of Human Rights and the State of Emergency (1997), paragraphs 74 and 75. See also Harris, O'Boyle and Warbrick (Law of the European Convention on Human Rights, 3rd edition (2014), at p. 841), where they argue, with reference to the admissibility decision in *Marshall v. UK*, that to extend the regime of emergency "the state can muster evidence to the effect that its belief that the campaign was at least dormant (with real potential to revive) was not an unreasonable one."

C. Compliance with the procedure

1. Declaration of the state of emergency and its approval by Parliament

45. On 20 July 2016, the Government, under the chairmanship of the President, having consulted with the National Security Council, decided to declare a state of emergency throughout the country for a period of ninety days, beginning from 21 July 2016. The Grand National Assembly of Turkey was on summer recess; however, it was convened immediately and on the same day it approved the declaration of the state of emergency. By the Government's decision of 5 October 2016, approved at the plenary session of the Grand National Assembly, the state of emergency was extended for a further period of three months. Therefore, the domestic procedure for the declaration of the state of emergency and its prolongation was formally respected.

2. Enactment of the decree laws by the Government and their approval by Parliament

46. The decision of Parliament approving the declaration of the state of emergency enabled the Government to realise its power to enact emergency decree laws (this term is also translated from Turkish as "decrees having the force of law").

47. Article 121 § 3 of the Turkish Constitution provides: "[The emergency] decree laws shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Internal Regulation". These decree laws have to be discussed in the committees and in the plenary sessions of the Grand National Assembly with priority and urgency.[19] Decree laws not submitted to the Grand National Assembly of Turkey on the day of their publication shall cease to have effect on that day and decree laws rejected by the Grand National Assembly of Turkey shall cease to have effect on the day of publication of the decision in the Official Gazette. The amended provisions of the decree laws which are approved as amended shall enter into force on the day of their publication in the Official Gazette.

48. Article 128 of the Rules of Procedure of the Grand National Assembly of Turkey specifies: "Decree laws issued as per Articles 121 and 122 of the Constitution and submitted to the Grand National Assembly of Turkey are debated and decided upon according to the rules stipulated in the Constitution and the Rules of Procedure regarding the debate of government bills and private members' bills, but *immediately within thirty days at the latest* [emphasis added] and before other decrees having the force of law and bills in the committees and the Plenary. If the debate on the decrees having the force of law fails to be concluded in the committees, within at least twenty days, the Office of the Speaker puts them on the agenda of the Plenary."

49. So far ten decree laws[20] have been issued, published in the Official Gazette and notified to the Secretary General of the Council of Europe:

- no. KHK/667 of 22 July 2016,
- no. KHK/668 of 25 July 2016,
- no. KHK/669 of 31 July 2016,
- no. KHK/670 of 17 August 2016,
- no. KHK/671 of 17 August 2016,

[19] See Article 90 § 1 of the Rules of procedure of the Grand National Assembly of Turkey: "Bills of empowering acts and decrees having the force of law shall be debated in line with the rules set in the Constitution and the Rules of Procedure regarding the debate of laws, but immediately and before all other bills in the committees and the Plenary."

[20] The two most recent decree laws are not analysed in the present opinion.

- no. KHK/672 of 1 September 2016,
- no. KHK/673 of 1 September 2016,
- no. KHK/674 of 1 September 2016;
- no. KHK/675 of 29 October 2016;
- no. KHK/676 of 29 October 2016.

50. According to the authorities, all decree laws have been immediately submitted to Parliament for approval, as required by Article 121 § 3 of the Constitution. However, from 1 July and until 1 October 2016, Parliament was on summer recess. Returning from recess on 1 October 2016, Parliament, on 18 October 2016, discussed and accepted the first decree law enacted by the Government (no. 667),[21] and started the examination of subsequent decree laws.

51. The Turkish authorities consider that the 30-day period set in the Rules starts running from the moment when Parliament returned from the summer recess. This interpretation of the Constitution and of the Rules of Parliament is a matter of great concern for the Venice Commission. It has allowed the Government to legislate through the emergency decree laws without any parliamentary control for a period of over two months.

52. The Venice Commission notes that the Speaker or the President may summon Parliament during the recess (Article 93 of the Constitution; Article 7 of the Rules). On 20 July 2016, Parliament was summoned for the approval of the *declaration* of the state of emergency, but not for the approval of the ensuing *emergency decree laws*, whereas, in practical terms, the latter are much more important than the former. The Venice Commission does not know why the Speaker of Parliament or the President did not use their power to summon Parliament again, in order to let it discuss immediately the emergency decree laws.

53. The Venice Commission believes that this situation is dissonant with the clear import of the Constitution and the Rules. Although the word "immediately" is used in the Constitution only in respect of the approval of the declaration of the state of emergency, the Constitution and the Rules clearly regard examination of the emergency decree laws also as an urgent matter.[22] Despite the common conviction that the imposition of a state of emergency is always "time for executive power", contemporary constitutionalism provides for regulations to guarantee the role of Parliament in this process. The Turkish Constitution places the emergency decree laws under the *ex post* control of the Grand National Assembly. Such control should be effective; a long delay between the enactment of the emergency decree laws and their examination by Parliament means that such measures were being implemented in the meantime unilaterally without such parliamentary control. Furthermore, in the case at hand, the lack of timely control of the emergency decree laws is all the more problematic as there was no judicial review of the decree laws during the period under examination, and the Constitutional Court may review the emergency decree laws *in abstracto* only once they have been approved by the law (for more details on this see Section F below).

54. That being said, Parliament is now back at work, and nothing prevents it from exercising its supervisory powers in accordance with the Constitution. However, even here Parliament acted with delay: thus, Decree Laws nos. 668, 669, and 671 were approved on 8 and 9 November 2016, i.e. more than 30 days after the end of the summer recess; Decree Law no. 674 was approved on 10 November; other decree laws have been put on the agenda, but have not yet

[21] With some minor amendments and supplementary measures added.

[22] See Article 121 § 1 of the Turkish Constitution: "In the event of a declaration of a state of emergency […] this decision shall be […] submitted *immediately* to the Turkish Grand National Assembly for approval. If the Turkish Grand National Assembly is in recess, it shall be summoned *immediately*" (italics added); see also Article 121 § 3 which requires that the emergency decree laws should be submitted to Parliament "on the same day for approval".

been discussed.[23] Thus, although Parliament had recognised and approved that there had been a nation-wide emergency, subsequently it did not give the emergency situation emergency treatment. Due to the delays involved, the *ex post* parliamentary control lost some of its effectiveness.[24]

3. Notifications of derogations

55. By letters dated 21 July 2016, the Turkish authorities notified the Secretary General of the Council of Europe and the Secretary General of the United Nations about their derogation from the ECHR and the ICCPR during the state of emergency. In the following weeks, the Turkish Government notified to the Secretary General of the Council of Europe further emergency decree laws, with explanatory notes attached to them. The decision to extend the state of emergency was also notified to the Secretary General of the Council of Europe and to the Secretary General of the United Nations. Decree Laws nos. 675 and 676 were notified to the Secretary General of the Council of Europe on 17 November 2016.

56. The derogation instrument lodged with the Secretary General of the Council of Europe under Article 15 of the ECHR did not indicate which Convention articles are affected by the emergency decree laws; it simply informed the Council of Europe about the content of those decree laws. By contrast, the notification instrument lodged with the Secretary General of the United Nations under Article 4 of the ICCPR contained a list of provisions affected by the emergency measures, but not the description of those measures.

57. As suggested by the Siracusa Principles, cited above, the notification under Article 4 § 1 of the ICCPR should contain "a brief description of the anticipated effect of the derogation measures on the rights, recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification" (see p. 45 (e)). The UN Human Rights Committee has emphasised that the notification by States Parties should include full information about the measures taken and a clear explanation of the reasons for them as well as the obligation to notify any changes in the state of emergency. The Committee has asserted its duty to monitor the law and practice of a State party for compliance with Article 4 even where the State party has not submitted a notification.[25]

58. As to the compliance with the notification requirement under Article 15 of the ECHR and Article 4 of the ICCPR, the Venice Commission will not take a stand on this point. It belongs, in the first place, to the competent institutions applying those international treaties to assess validity of the notifications, in view of their form and substance. [26]

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[23] It is unclear whether Decree Law no. 670 has been approved.

[24] The Venice Commission does not have precise information about the reasons for this delay. Under Article 126 of the Rules of Parliament (entitled "Decisions concerning a state of emergency"), "a motion may be tabled during the debates by political party groups or the signature of at least twenty members on shortening or *extending* the time prescribed in the decision mentioned in the paragraph above" (italics added). However, the "paragraph above" appears to cover declaration of the state of emergency, and not the approval of the emergency decree laws. It is Article 128 of the Rules, entitled "Debate on decrees having the force of law adopted during state of emergency and martial law" which sets a 30-days rule, which appear to have no exceptions. Part two of Article 128 indicates that "if the debate on the decrees having the force of law fails to be concluded in the committees, within at least twenty days, the Office of the Speaker puts them on the agenda of the Plenary" – however, this should not be understood as allowing the Speaker to put them on agenda on a later date, which would be beyond the 30-days' period stipulated in the first part of this Article.

[25] CCPR General Comment No. 29, para. 17

[26] The Venice Commission does not have comprehensive information about derogation from other international instruments, to which Turkey is a party.

D. General overview of the emergency measures

59. The main effect of a declaration of a state of emergency/derogation is that the Government may take certain measures which would not be acceptable under normal circumstances. In terms of the European human rights system, this regime significantly extends the Government's margin of appreciation as to how to cope with the emergency. This will be the starting point of the present opinion.

60. However, as demonstrated above, under both the ECHR and the ICCPR the Government's discretion is limited to what is "strictly required by the exigencies of the situation" and by rights that are non-derogable.[27] The Venice Commission has previously stressed that these restrictions are crucial "since State Practice shows that the gravest violations of human rights tend to occur in the context of states of emergency and that States may be inclined, under the pretext of a state of emergency, to use their power of derogation for other purposes or to a larger extent than is justified by the exigency of the situation".[28] The Human Rights Committee likewise has stressed that not only the emergency itself, but the "specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation," and has expressed concern over insufficient attention being paid by derogating states to the principle of proportionality.[29]

61. Furthermore, the scope of the Turkish Government's discretion is also limited by the *general principle of the rule of law*, which is a founding principle of the Turkish Constitution and of international human rights law as well. In its Recommendation 1713(2005) the PACE noted that "the need for security often leads governments to adopt exceptional measures", but stressed that "no State has the right to disregard the principle of the rule of law, even in extreme situation."[30] In the same vein the PACE in its Resolution 2090(2016) warned against the risk that "counter-terrorism measures may introduce disproportionate restrictions or sap democratic control and thus violate fundamental freedoms and the rule of law, in the name of safeguarding State security."[31] On several occasions the Venice Commission has underlined that "even in a state of public emergency the fundamental principle of the rule of law must prevail." [32] Finally, in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*,[33] the ECtHR observed that "the [European] Convention being a constitutional instrument of European public order [references omitted], the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle".

[27] As the Human Rights Commissioner rightly pointed out, "the test of necessity and proportionality ordinarily applying to interferences with human right protected under the ECHR are altered but not suspended during a period of derogation linked with a state of emergency" – see Commissioner for Human Rights, Memorandum on the human rights implications of the measure taken under the state of emergency in Turkey", CommDH(2016)35, No. 25.

[28] Opinion on the protection of human rights in emergency situations, adopted by the Venice Commission at its 66th Plenary Session (Venice 17-18 March 2006), CDL-AD(2006)015, nr. 12; Opinon … France …Opinion on the legal framework governing curfews, adopted by the Venice Commission at its 107th Plenary Sesion (Venice, 10-11 June 2016) CDL-AD (2016)010, nr. 23. See also CCPR, General Comment No. 29, para. 2: "When proclaiming a State of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers."

[29] CCPR, General Comment No. 29, para. 4.

[30] Parliamentary Assembly of the Council of Europe, Recommendation 1713 (2005) Democratic oversight of the security sector in member states, 23 June 2005, http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-VieuwHTLM.asp?FileID=11000&lang=en

[31] Resolution 2090(2016), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.as?fileid=22481&lang=en

[32] CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, § 44.

[33] ECtHR (GC), no. 5809/08, 21 June 2016, § 145

62. The analysis of the necessity and proportionality of emergency measures and their compliance with the rule of law requires a *dynamic approach*. The ECtHR has found that Article 15 § 3 implies a requirement of permanent review of the need for emergency measures[34] and that interpretation of Article 15 must leave a place for progressive adaptation.[35] The same concerns more specific analysis of proportionality and necessity of particular measures - what is justified in the immediate aftermath of a major public crisis may not be needed several months later.

63. Before going into detailed analysis of specific measures enacted through Decree Laws nos. 667 - 676, the Venice Commission will examine certain common characteristics of the emergency measures adopted by the Government.

1. Scope of the emergency measures *ratione personae* and *ratione temporis*

64. Article 121 § 3 of the Turkish Constitution allows the Government to legislate through decree laws "on matters necessitated by the state of emergency". The Venice Commission recalls in this respect the position of the Turkish Constitutional Court expressed in its judgment of 10 January 1991. In that judgment the Court observed that "the scope of the regulation of [emergency] decree laws is limited with 'the issues that are necessitated by the state of emergency or by the state of martial law' […].The issues that are necessitated by the state of emergency *are limited to the reasons and goals behind the state of emergency"* (italics added).[36] In other words, any emergency measure should have a sufficiently close *nexus* to the situation which gave rise to the declaration of a state of emergency.

65. The Venice Commission notes that the declaration of a state of emergency of 20 July 2016 did not contain any reference to the public danger it was addressing, and did not describe, even briefly, the measures to be taken to restore legal order. This is regrettable: without those elements it is difficult to establish the essential material limitations on the Government's emergency powers.

66. The "reasons and goals" of the emergency decree laws under examination were explained by the Turkish authorities in the Information Notes submitted to the Secretary General of the Council of Europe together with the derogation letters. Those Information Notes speak of the need to combat FETÖ/PDY. The Government's Memorandum also refers to the need to defeat "the terrorist organisation *attempting the coup* [italics added] with all its components" (p. 10). The notification of derogation submitted by Turkey to the Secretary General of the Council of Europe also referred to other terrorist attacks (see no. 65), stating: "The coup attempt and its aftermath *together with other terrorist acts* have posed severe dangers to public Turkish democracy and the Turkish state, a swift and decisive reaction to that threat was both natural and necessary."

67. In fact, the emergency decree laws also affect other individuals and organisations, namely those allegedly connected to the PKK, an organisation defined as "terrorist" in Turkey and internationally, as well as other groups defined as "terrorist" in Turkey. As stipulated in Article 1 of Decree Law no. 667, the aim of this decree is "to establish measures that must necessarily be taken within the scope of attempted coup and fight against terrorism". Dismissals of public servants are said to concern persons "considered to be a member of, or have a relation, connection (link) or contact with terrorist organisations or structure/entities or groups established by the National Security Council as engaging in activities against the national

[34] *Brannigan and McBride v. the United Kingdom*, cited above, § 54
[35] ECtHR 18 January 1978, *Ireland v. United Kingdom*, § 83.
[36] Constitutional Court 10 January 1991, Registry n° 1990/25, Decision 1991/1. See also A.R. Coban, "Comparing Constitutional Adjudication. A Summer School on Comparative Interpretation of European Constitutional Jurisprudence. 4th Edition – 2009. States of emergency and fundamental rights. Turkey. Fundamental Rights during States of emergency in Turkey", p. 9.

security of the State".[37] These broad formulas show that the emergency measures may be applied to all organisations which represent a threat to the national security, and not only the Gülenist network.[38]

68. There is no doubt that the State is not only permitted but even required to take energetic measures against *all* terrorist organisations, irrespective of their political platforms, religious affiliations or ethnic composition, as long as these measures are consistent with the State's domestic and international law obligations. The Venice Commission also acknowledges that an emergency situation may deteriorate and take new forms: thus, a major natural disaster may be later aggravated by an epidemic. Such developments may require new measures, not envisaged initially. However, a sufficiently close *nexus* between those measures and the emergency situation that was declared in July should always exist. The Government requested and received emergency powers from Parliament in July 2016 in connection with a *specific public emergency*, and should use those powers accordingly. As underlined in the Rule of Law Checklist (with reference to further international human rights standards), in the context of an emergency situation "strict limits on the duration, circumstance and scope of such [emergency] powers [of the Government] is therefore essential".[39] Other threats to the public order and safety should be dealt with by means of ordinary legislation.

69. That being said, what "matters" are "necessitated by the state of emergency" (a language used by the Turkish Constitution), or "strictly required by the exigencies of the situation" (an expression used by the ECHR and the ICCPR), and whether a sufficiently close nexus exists between the emergency situation and the measure taken by the Government must be decided on a case-by-case basis. The Venice Commission is not supposed to examine specific cases; Turkish Parliament and the courts are better placed to decide whether the Government went beyond its powers and applied emergency measures to those persons and those cases which were not sufficiently related to the situation which gave rise to the declaration of the state emergency or to its subsequent development. Therefore, the Venice Commission will not make any specific recommendations in this regard, but only draw the attention of the Turkish authorities to the fundamental principles limiting the extent of the emergency powers.

2. Compliance with the Law on the State of Emergency of 1983

70. Pursuant to Article 121 § 2 of the Constitution, the scope of the Government's emergency powers is defined in the Law on the State of Emergency of 1983 (hereinafter the 1983 Law). The Turkish authorities argue, on p. 46 of their Memorandum, that the decree laws have the same legal force as the 1983 Law itself; however, this approach would make Article 121 § 2 redundant. The rationale behind this constitutional provision (that certain vital issues pertaining to states of emergency should be regulated *in advance* by a law) would be nullified if the Government could by its decrees – even those having the force of law – deviate from this law.

71. The Venice Commission observes that the emergency decree laws under examination provide for various measures; these include, for example, dismissal of public servants, dissolution of legal entities, confiscation of their assets, etc.

72. Articles 9 and 11 of the 1983 Law describe measures to be taken when the state of emergency is declared in accordance with Article 3 (1) (b) (which covers situations similar to the July 2016 coup). Those two articles contain a *closed* list of measures which may be taken by the Government. In particular, they do not mention the dismissal of public servants or judges

[37] See Article 2 (1), d, 2 (3), 3 (1), 4 (1), and 5 (1) of Decree Law no. 667; Article 2 (1) and 2 (4) of Decree Law no. 668; Article 2 (1) and Article 20 of Decree Law no. 669; Article 2 (1), 5 (1) and 7 (1) of Decree Law no. 670; Article 23 of Decree Law no. 771; Article 2 (1) of Decree Law no. 772; Article 4 (1), 5 (1), 7 (1), 9 (1) of Decree Law no. 773 and Article 8 of Decree Law no. 774.

[38] See also the memorandum of the Turkish authorities, p. 11

[39] cited above § 51

amongst those measures.[40] Neither does the 1983 Law permit for *permanent dissolution* of legal entities; Article 11 (o) only provides for the "*suspension* of the activities of associations for periods not exceeding three months, after considering each individual case" (italics added).

73. These are only a few examples of measures introduced by the decree laws that go beyond the list of permissible measures defined in the 1983 Law. The question is how to approach this ostensible domestic "unlawfulness" of the emergency decree laws.

74. The Turkish authorities suggest that the 1983 Law does not need to be followed strictly.[41] They also claim that "certain provisions that might be applied within the state of emergency periods are included also in the other […] laws such as Civil Servants Law no. 657 (articles 62/1, 72/3, 96, 178); the Law for Provincial Administration no. 5442 (article 31/B) or the Banking Law no 5411 (article 131/3) according to their relevance."[42]

75. This position is hard to reconcile with the text of Article 121 § 2 of the Constitution. First of all, it needs to be verified whether the specific laws referred to by the Turkish Government indeed authorised the measures implemented *in casu*. In any event, Article 121 § 2 refers to a *specific* law which is to define the limits of the Government's emergency powers.[43]

76. In addition, during the state of emergency nothing prevents the executive authorities from using their normal powers provided by the *ordinary legislation*. The Government could have urged the relevant administrative entities to use those powers, with reference to the Civil Servants Law, the Law for Provincial Administration or the Banking Law. Instead, the Government preferred to enact, through the emergency decree laws, special measures, which, on their face, were not based on ordinary legislation, and, at the same time, went beyond the catalogue of measures provided by the 1983 Law.

77. That being said, as regards those extraordinary measures which were not directly indicated in the 1983 Law, it will be up to the Constitutional Court of Turkey to assess their compliance with Article 121 of the Constitution.[44]

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[40] Article 9 (i) speaks of the "closure of workplaces which are not of vital importance to the region", but this does not appear to be the same measure as a comprehensive cleansing of the State apparatus at all levels. Article 32 gives the regional governors the right to impose disciplinary penalties (but not dismissals) on public personnel except the military and judiciary, if they do not perform the duties assigned to them or disobey orders. I.e. these provisions do not allow for dismissals of civil servants.

[41] Memorandum, p. 45: "The inclusion of certain restrictions that might be applied, the certain measures that might be taken and the certain powers that might be granted to the public officials within the state of emergency periods in the Law no 2935 does not eliminate the opportunity to make a legal regulation related to the other necessary and mandatory measures. In other words, it is not possible to [speak] about a monopoly established by the provisions of the Law no 2935 with regard to the measures that might be taken within the state of emergency periods".

[42] *Ibid.*

[43] Another possible interpretation of the 1983 Law is that it established a catalogue of measures to be taken by the *regional* authorities, leaving *carte blanche* to the central Government. Indeed, the measures listed in Articles 9 and 11 of the 1983 Law all have "local" character. However, this interpretation does not follow from the literal reading of the 1983 Law. And, in any event, even assuming that the 1983 Law did not define the scope of powers of the central Government, it means that the condition of Article 121 § 2 of the Constitution (that the Government's discretion should be circumscribed by the State of Emergency Law) has not been met, and the Government acted in a legal vacuum.

[44] It is unclear to what extent the subsequent approval of the emergency decree laws by Parliament may be seen as "legitimising" the measures which are not provided for in the 1983 Law. The Venice Commission leaves this question to the domestic judicial instances, but considers that *ex post* ratification by Parliament of the measures that go beyond the 1983 Law pursuant is not consistent with the logic of Article 121 of the Constitution.

3. Permanent character of some of the emergency measures

a. General principles

78. The most important characteristic of any emergency regime is its *temporary character*. This is stressed in the Paris Minimum Standards of Human Rights Norms in a State of Emergency, Section A, p. 3 (a)[45] adopted by the International Law Association in 1984. This was also emphasised by the Special Rapporteur of the UN on human rights and states of exception, cited above. The Venice Commission affirmed this in its Opinion on the Draft Constitutional Law on "Protection of the Nation" of France.[46] In the same vein, General Comment No. 29 on Article 4 of the ICCPR points out that measures derogating from the provisions of the Covenant must be of "an exceptional and temporary nature".[47]

79. A difficult question is to what extent individual measures taken under the emergency regime may have *permanent effect* (i.e. whether their effects may go beyond the emergency period). Here, a distinction should be made between individual measures and structural (general) provisions. Individual measures may sometimes be irreversible, when the danger may only be averted by an irrevocable action.[48] That being said, during the emergency regime the Government should try, to the maximum extent possible, and whenever the danger may be averted otherwise, to take *provisional* individual measures, i.e. those which are of limited duration or may be later revoked or amended, since the ultimate goal of any emergency should be for the State to return to a situation of normalcy.

80. As to structural (general) measures, the provisions of emergency decree laws should lose their legal effect with the expiry of the state of emergency. Permanent changes to legislation should not be introduced through such decree laws, but must be left to ordinary legislation. This is particularly important for the existence of effective remedies: aspects of the procedures for providing remedies may be altered, but effective remedies may not be completely abolished. The Government should not be allowed to exclude judicial review of its own actions or to change procedural rules so as to make this review ineffective. Equally, the Government should not be able to enact such rules that weaken the position of other independent State institutions, change their composition, principles of functioning etc.[49]

a. Individual measures transcending the period of the state of emergency

81. The emergency decree laws under examination contain measures which transcend the period of the emergency. Thus, Article 2 of Decree Law no. 667 orders permanent dissolution of over two thousand private institutions: under this Decree Law, 35 health institutions, 934 schools, 109 student dormitories, 104 foundations, 1125 associations, 15 universities and 29 trade unions have been liquidated.[50] Pursuant to Article 2 (2) of this Decree Law, all assets of those legal entities are to be transferred to the State, permanently and without compensation. Articles 3 and 4 of Decree Law no. 667 provide for the dismissal of judges and other public servants, to be implemented by decisions of relevant judicial bodies or administrative entities.

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[45] http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ParisMinimumStandards.pdf

[46] CDL-AD(2016)006, § 65

[47] ICCPR, General Comment No. 29. States of Emergency (Art. 4), CCPR/C/21/Rev.1.Add.11.31 August 2001

[48] Such as, for example, killing cattle infected with a dangerous contagious disease, or destruction of buildings which risk collapsing.

[49] General Comment No. 29, cited above, at para. 14, stresses the following: "Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."

[50] Figures produced by the Government in their Memorandum, p. 12.

82. Article 2 of Decree Law no. 668 refers to a list of public servants to be dismissed; the list is appended to this Decree Law. This Decree Law also contains a list of the media outlets to be closed. Under Article 2 (3) of this Decree Law all assets of those media outlets are to be transferred to the State, permanently and without compensation.

83. Subsequent decree laws contain similar measures: they order mass dismissals of public servants, liquidation of legal entities and confiscation of their assets. All these measures are permanent; in addition, the decree laws proclaim that "stay of execution cannot be ordered in the cases brought as a result of the decisions taken and acts performed within the scope of [the relevant decree laws]" (see Article 10 (1) of Decree Law no. 667, Article 38 (1) of Decree Law no. 668, etc.).

84. Given the nature of the conspiracy which led to the coup of 15 July 2016, the Venice Commission understands the need to conduct a swift purge of persons clearly implicated in the coup from the State apparatus. Any action aimed at combatting the conspiracy would not be successful if some of the conspirators are still active within the judiciary, prosecution service, police, army, etc.

85. However, the same result may be achieved by employing *temporary* measures, and not permanent ones. The risk of a repeated coup may be significantly reduced if the supposed Gülenists, as a precautionary measure, were *suspended* from their posts, and not dismissed. Similarly, instead of definitely confiscating all assets of organisations, it may suffice to temporarily *freeze* large amounts on their bank accounts or prevent important transactions, to appoint temporary administrators and to allow only such economic activity which may help the organisation in question to survive until its case is examined by a court following normal procedures. Temporary measures of this type also ultimately make possible the fairer examination of the correctness of the decisions being made according to ordinary judicial process.

86. In addition, the Venice Commission regrets that the decree laws themselves contained individual measures; such method of regulation deprives the persons concerned of the individualised treatment and apparently bars judicial review of their cases. For more details on this issue see subsection 4 below; see also subsection 1 (f) of Section E, subsection 2 of Section F, and Section G.

b. Structural changes introduced by the emergency decree laws

87. The decree laws introduced certain changes to the current regulations, which appear to have a structural character and affect the status and functioning of the institutions or normal rules of procedure. While certain measures introduced by the decree laws are clearly temporary,[51] other measures make changes to the current legislation, and the decree laws do not indicate that these measures will cease to apply after the end of the emergency period. Thus, the authorities intend to keep these measures in the legislation permanently.

88. Thus, for example, Article 23 of Decree Law no. 671 abolishes the Telecom Presidency and transfers its functions to the Information and Communication Technologies Authority. Article 25 of this Decree Law establishes a new procedure for authorising wiretapping of telecommunications and obtaining access to electronic data archives. It thus amends current Article 60 of the Electronic Communications Law. Article 16 of Decree Law no. 674 amends Law no. 5275 on the execution of penalties and security measures, giving the Chief Public Prosecutor the power to restrict the detainees' "temporary leave" from penitentiary institutions and detention centres. Article 38 of this Decree Law amends Law no. 5393 on municipalities and sets out a procedure for the replacement of mayors suspended from duties for aiding and

[51] See, for example, Article 6 (1) of Decree Law no. 667 and Article 3 (1) of Decree Law no. 668 which speaks of the measures introduced "during the period of state of emergency".

abetting terrorism. Article 1 of Decree Law no. 676 introduces the rule that a maximum of three lawyers are admitted to defend a person at a hearing in organised crime cases. Article 3 amends provisions of the Criminal Procedure Code and provides for the detention of those accused of certain types of crimes without the access to a lawyer for 24 hours. Article 6 amends the provisions of Law no. 5275, and describes rules related to the limitations of access to a lawyer of a convict. The list of those structural changes in the emergency decree laws continues.[52]

89. The Venice Commission reiterates its earlier position that the emergency decree laws should not introduce permanent structural changes to the legal institutions, procedures and mechanisms, especially where the power to make such changes is not provided by the Constitution in explicit and precise terms. The idea of a "democratic […] State governed by the rule of law", expressed in Article 2 of the Turkish Constitution, enshrines the principle of a limited government. The Turkish Constitution allows the Government to derogate from certain human rights provisions as long as the state of emergency persists and to the extent "strictly required", but it does not extend this power to legal rules which are to be applied after the end of the emergency period. As the Human Rights Committee has stated, "the restoration of a state of normalcy where full respect for [human rights] can again be secured must be the predominant objective of a State party derogating from the Covenant."[53]

90. Furthermore, in the opinion of the Venice Commission, even the *ex post* approval of the emergency decree laws by Parliament should not lead to the permanent legitimation of such measures. The Turkish Constitution sets a special legal framework for dealing with an emergency situation, which is not adapted for enacting permanent rules. An emergency situation has its own political logic: the executive authorities should be able to act quickly and pro-actively; the public opinion in such moments expects radical and even somewhat simplistic measures from all branches of government. The emergency context thus leaves little room for a thorough and critical discussion of complex societal and legal issues. The Venice Commission recommends that all such structural changes be introduced and discussed in a normal manner, provided by the Turkish Constitution, after the end of the emergency period.

4. *Ad hominem* emergency legislation

91. The Venice Commission notes that the emergency decree laws contain lists of individuals dismissed from public service and of organisations to be liquidated. This manner of regulation is a source of concern.

92. In emergency regimes, the general practice is to make a distinction between general norms (decree laws), which the Government may issue, and individual measures, in turn authorised by these general norms (decree laws). A distinction between general decree laws and individual measures is necessary for respecting the principles of necessity and proportionality and allow for appropriate judicial review. For instance, mass dismissals of public servants executed through non-justiciable, *ad hominem* decree laws and following a summary procedure (or no procedure at all – for more details see below, Section E, subsection 1), are highly problematic also because that makes it extremely difficult, if not impossible, to pay due heed to the principles of necessity and proportionality and verify whether these dismissals were justified. A distinction between general decree laws and individual measures is vital for introducing *ex ante* administrative procedural guarantees and *ex post* judicial guarantees securing a minimum of the rule of law and protection of basic human rights.

[52] Thus, Article 4 (1) of Decree Law no. 668 authorizes the Ministry of National Defense to establish and dissolve military courts. Under Article 16 of Decree Law no. 669 disciplinary powers regarding military judges are given to a body within the Ministry of National Defense. Article 17 of Decree Law no. 669 abolishes Article 31 of Law no. 357 and introduces new rules for suspension from office of military judges.
[53] General Comment No. 29, para. 1.

93. The Venice Commission acknowledges that there may have been a need to take immediate action in respect of a *very limited number* of persons who, due to their functions (position in the Army or Police, etc.), represented a potential security threat. But such action ought to have taken the form of temporary suspensions, imposed by decisions of the respective administrative entities, and followed later by a fair legal process.

94. By contrast, putting tens of thousands of public servants and thousands of legal entities on lists a few weeks after the declaration of the state of emergency[54] suggests that the cases of those individuals and organisations cannot have been thoroughly considered, and that, consequently, those measures may affect a large number of innocent people and organisations which have nothing to do with the conspiracy.[55] It would be more appropriate to delegate the task of vetting the State apparatus to appropriate administrative entities, and ensure that the decisions are taken on a case-by-case basis, providing appropriate review. The PACE in its Resolution 1096(1996) stated (in the context of post-communist lustration processes) that "guilt, being individual, rather than collective, must be proven in each individual case – this emphasises the need for an individual, and not collective, application of lustration laws".[56] The Venice Commission will develop this idea further, in examining specific emergency measures, and the procedural safeguards which should be available for those on the lists.[57]

5. Waiver of liability

95. The Venice Commission is concerned about the provisions of the emergency decree laws which waive the liability of State institutions and officials for measures taken during the state of emergency. Thus, Article 9 (1) of Decree Law no. 667 stipulates that "legal, administrative, financial and criminal liabilities shall not arise in respect of the persons who have adopted decisions and fulfill their duties within the scope of this Decree Law". Similar provisions can be found in the subsequent decree laws.

96. According to the Turkish authorities, the clause's aim is to reassure those officials who are to implement the decree laws that, even though they may need to derogate from the ordinary rules (for example concerning the deadline for bringing a detained person to a judge), they will not face any liability for doing so. Moreover the authorities state that "the non-accountability within the scope of the Decree Laws refer to the non-accountability of persons related to their duties whereas all accountabilities related to the personal crimes of the officials continue".

97. However, in the opinion of the Venice Commission, this clause sends a very dangerous message, especially as regards the waiver of criminal liability. This waiver may be understood as implying that the decree laws directly authorise and command certain actions which should be otherwise considered as "crimes" under the Criminal Code of Turkey, or at least that they suggest to those committing these crimes in the exercise of their functions that they will not be persecuted.

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[54] Thus, Decree Law no. 668, which contained the list of military personnel to be dismissed, has been enacted on 25 July 2016; Decree Law no., 670 which contained list of civil servants to be dismissed was enacted on 17 August 2016.

[55] And which may affect their right to be presumed innocent, guaranteed by Article 6 § 2 of the ECHR, and Article 14 § 2 of the ICCPR.

[56] "Measures to dismantle the heritage of former communist totalitarian systems", p. 12. See also the Human Rights Committee, *M.K., et. al v. Slovakia*, Communication No. 2062/2011 (Views adopted 23 March 2016), paras. 9.3-9.4 (lustration of civil servants on the grounds that they pose a significant danger to human rights or democracy requires an individual assessment, must be based on objective and reasonable criteria aimed at achieving a legitimate purpose, and comply with due process and other rights under the ICCPR).

[57] Imposing repressive measures by "sanctions lists" is occasionally used in the UN system; however, such measures still have to be reviewed at the national level in order to avoid arbitrariness: see *Al-Dulimi and Montana Management Inc. v. Switzerland ECtHR (GC),* no. 5809/08, 21 June 2016.

98. Furthermore, this waiver may be seen as removing any accountability for actions which are taken within the broad discretionary powers given by the decree laws to various state institutions and officials. This, again, is a dangerous logic and contrary to the rule of law. A person may use his or her discretionary powers reasonably and *bona fide*. However, as it will be demonstrated below, the emergency decree laws are formulated in excessively vague terms, giving almost unfettered powers to the state officials implementing them. This creates the risk of large-scale abuses, which cannot be tolerated in a State under the rule of law.

99. Finally, this provision may be seen as waiving criminal liability *ad personam* – i.e. giving immunity to *persons* who "fulfilled their duties within the scope of this Decree Law", even if those persons acted clearly in excess of their powers, or violated non-derogable human rights obligations (for example, ill-treated detainees). Even if this is not intended, it may be perceived as such. And given that some of the measures enacted by the decree laws are supposed to remain after the end of the emergency period, this waiver of liability may also become a permanent feature of the Turkish legal order, which is clearly unacceptable.

100. Therefore, the Venice Commission urges that these clauses be repealed from the decree laws.

E. Specific emergency measures

1. Dismissals of public servants and associated measures

a. Description of measures

101. Article 4 (1) of Decree Law no. 667 orders the dismissal of public servants "who are considered to be a member of, or have relation, connection or contact with terrorist organisations or structure/entities, organizations or groups, established by the National Security Council as engaging in activities against the national security of the State". They are dismissed by decision of the relevant administrative entities and officials. Judges are dismissed on the same grounds by virtue of Article 3 (1) by decisions of the relevant judicial bodies (top courts and the High Council for Judges and Prosecutors, hereinafter the HCJP).

102. Article 2 of Decree Law no. 668 orders the dismissal of military personnel "which belong to, connect to, or contact with […] FETÖ/PDY". This Decree Law contains, as an appendix, a long list of individuals to be dismissed from the military service. Article 2 of Decree Law no. 669 contains a similar provision and encloses another list of military personnel and personnel of the gendarmerie to be dismissed. Article 2 of Decree Law no. 670 orders the dismissal of civil servants for their "membership, affiliation or connection to […] FETÖ/PDY". It also contains appendices with the names of those dismissed from the civil service, army and police. Article 2 of Decree Law no. 672 orders the dismissal of civil servants who have an "affiliation, link or connection" to terrorist organisations.[58] Again, their names are contained in yet another list appended to the Decree Law.

103. The criteria used to assess the links of the individuals to the Gülenist network have not been made public, at least not officially. The Venice Commission rapporteurs were informed that dismissals are ordered on the basis of an evaluation of a combination of various criteria, such as, for example, making monetary contributions to the *Asya* bank and other companies of the "parallel state", being a manager or member of a trade union or association linked to Mr Gülen, using the messenger application *ByLock* and other similar encrypted messaging programmes. In addition, the dismissals may be based on police or secret service reports about relevant individuals, analysis of social media contacts, donations, web-sites visited, and even on the fact of residence in student dormitories belonging to the "parallel state" structures or

[58] The Venice Commission notes that this formula does not anymore refer to "FETÖ/PDY" but to terrorist organisations in general.

sending children to the schools associated with Mr Gülen. Information received from colleagues from work or neighbours and even continuous subscription to Gülenist periodicals are also mentioned amongst those many criteria which are used to put names on the "dismissals lists".

104. Since the adoption of the emergency decree laws, more than 100.000 public servants[59] have been dismissed.[60] A large majority of them are those whose names were directly mentioned in the lists appended to Decree Laws nos. 669, 670 and 672. It is not entirely clear how many public servants were dismissed by decisions taken at the lower level, i.e. by the relevant administrative entities or judicial bodies under Decree Law no. 667, and how many were mentioned directly in the lists appended to the subsequent decree laws.

105. It is understood that both types of dismissals (ordered *directly by* the decree laws or *on the basis* of the decree laws) fall outside the ordinary legal framework for disciplinary liability of public servants. These are extraordinary measures, based on a new criterion[61] - the connections to the Gülenist network and other organisations defined in Turkey as "terrorist".[62] Furthermore, those dismissals do not follow a normal disciplinary procedure. The question is whether this way of purging the State apparatus is compatible with standards derived from the Turkish Constitution and from international law.

b. Large margin of appreciation accorded to the State in regulating public service

106. With respect to European human rights obligations, and speaking of labour disputes involving public servants, the ECtHR in 1999 stated as follows:[63]

> *"[…] [I]n each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State's sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of trust and loyalty. On the other hand, in respect of other posts which do not have this 'public administration' aspect, there is no such interest."*

107. The above was said in the context of a long-lasting discussion on whether or not public servants should have access to the courts in relation to their labour disputes. The ECtHR case-law on this topic has significantly evolved since 1999. However, the underlying idea is still relevant: the policy regulating public service is based on the idea of *loyalty*, and that gives the States a larger margin of appreciation in deciding whom to employ/dismiss, at least when the posts "wielding a portion of the State's sovereign power" are concerned.[64] Judges, prosecutors, police officers and military personnel belong *par excellence* to the category of public servants "wielding a portion of the State's sovereign power". This logic is *a fortiori* applicable in times of a major crisis where the State has to combat a secret organisation which deeply penetrated into its administrative mechanism.

[59] The term "public servant" in this context encompasses civil servants, military and law-enforcement personnel, as well as judges and prosecutors.
[60] Including personnel of the armed forces and the police, but also administrative staff working in the ministries, in the local administrations, teachers, doctors of public hospitals, etc.
[61] Or, at least, it is a differently formulated old criteria. The Venice Commission supposes that belonging to a criminal organisation was always incompatible with the civil service; however, as it will be demonstrated below, the decree laws, as interpreted by the administrative and judicial bodies, seem to adapt the old principle to the new circumstances.
[62] Different Decree Laws describe those links in different words – "affiliation", "connections" etc. The Venice Commission understands that this may be a problem of translation and that all decree laws speak of the same type of connection between the individual concerned and FETÖ/PDY.
[63] *Pellegrin v. France*, [GC], 8 December 1999, Reports of Judgments and Decisions 1999-VIII, § 65
[64] This margin is admittedly narrower when the measure affects employees of the State institutions who do not perform any particular public functions.

108. Therefore, as a starting point the Venice Commission acknowledges that following the coup it might have been necessary to introduce a simplified system of provisional removal[65] of public servants from office, based on the relatively lose criterion of loyalty and following an expedient procedure. This does not imply, however, that mass dismissals of public servants are not a human rights issue, for which the principles of proportionality and necessity must be respected. The first question therefore is which human rights of the public servants may be at stake *in casu*.

c. Human rights at stake

109. The Turkish Constitution guarantees the right to enter public service. The Constitution proclaims, in Article 70, that “every Turk has the right to enter the public service” (§ 1), and that “no criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into the public service” (§ 2). This right, arguably, implicitly includes the right to remain in this service. However, this provision also has many implied limitations, and in times of emergency this right becomes a *particularly weak* one, but it does not disappear completely.

110. At the international level, the dismissals of public servants may raise issues under Article 1 § 2 of the Revised European Social Charter.[66] In addition, Convention no. 111 of the ILO on Discrimination (Employment and Occupation) of 1958[67] may be also of relevance for the assessment of dismissals in the public sector.

111. The ECHR does not guarantee the right to a particular profession, be it in the public or in the private sector. Therefore, as a rule, lack of access to the public service and dismissal from it *as such* cannot form the basis of a complaint before the Strasbourg court.[68] However, this does not mean that dismissals of public servants do not raise any other issue under the ECHR. Some provisions of the ECHR may be applicable depending on the *reasons* and *effects* of the dismissals.

112. Thus, where a person is dismissed for professing a particular religion, expressing an opinion, belonging to a lawfully existing association or trade-union, or for sending children to a religious school, such action may be seen as an interference with the rights under Articles 9, 10, or 11 of the ECHR, or under Article 2 of Protocol no. 1 thereof, accordingly (and Article 14 in conjunction with these guarantees).

113. For example, some recent dismissals in Turkey were reportedly based on the membership in a particular trade-union.[69] Dismissals of public servants for membership in a criminal organisation are not regulated by Article 11 of the ECHR.[70] However, whether or not a lawfully operating trade-union is a criminal organisation is a matter for discussion. Hence, the applicability of Article 11 to such dismissals cannot be ruled out. In the same vein, Article 10 of the ECHR may be applicable to cases where the dismissal has been based on the opinions expressed by a public servant.[71]

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[65] In the following paragraphs the Venice Commission will mostly use the term “dismissal”, because this is the measure introduced by the emergency decree laws. This does not alter, however, its previous recommendation, namely that the State should prefer suspensions to dismissals.

[66] Ratified by Turkey on 27 June 2007; source - http://www.coe.int/en/web/turin-european-social-charter/signatures-ratifications

[67] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111

[68] See ECtHR 28 August 1986, *Glasenapp and Kosiek v. Germany*, § 49 and § 35.; ECtHR 26 September 1995, *Vogt v. Germany*, §§ 43-44; *Thlimmenos v. Greece*, § 41.

[69] See the Memorandum by the Commissioner for Human Rights on the human rights implications of the measure taken under the state of emergency in Turkey, CommDH(2016)35, p. 31

[70] See, in the Turkish context, the admissibility decision by the ECtHR in the case of *Özcan and others v. Turkey* (dec.), 13 June 2002, no. 56006/00, § 6.

[71] See *Kudeshkina v. Russia*, no. 29492/05, § 79, 26 February 2009

114. Occasionally, the ECtHR was prepared to consider dismissals through the prism of Article 8 of the ECHR, which guarantees, *inter alia*, respect for private and family life and the home.[72] According to the case-law of the ECtHR, private life "encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature."[73] Thus, a restriction introducing "a far-reaching ban on taking up private sector employment" was deemed to affect "private life";[74] also, dismissals from office in connection with a particular life-style or personal choices have been found to affect "private life". [75] Even the withdrawal of an internal passport, under certain conditions, may be seen as an interference with private life.[76] In the Turkish context, by virtue of the emergency decree laws, dismissals are accompanied by several additional negative consequences: a life-long ban from working in the public sector (which, reportedly, includes the practice of law)[77] and in private security companies, loss of titles and ranks, annulment of passports, nearly immediate eviction from staff housing, etc.[78] The names of the persons suspected of links to Mr Gülen are published, which, as the rapporteurs were told, reduces the chances of the former public employees to find new jobs even in the private sector. The combined effect of these measures may arguably bring the situation into the ambit of Article 8 of the ECHR.[79]

115. Finally, procedural rights, guaranteed by Articles 6 and 13 of the ECHR may be at stake (the right to a fair trial and the right to an effective remedy). The Venice Commission recalls, that, given the effect of *lustration-related proceedings* in some countries the ECtHR has interpreted these proceedings as falling under the criminal limb of Article 6 of the ECHR.[80] The Human Rights Committee has developed a similar jurisprudence under the ICCPR, as such proceedings implicate, *inter alia*, the rights to fair process under Article 14 and the right to an effective remedy under Article 2 § 3 of the ICCPR.[81] The Venice Commission will return to this issue below, when it examines the right of access to court and other legal remedies available to the persons affected by the emergency decree laws.

116. In sum, a combination of *reasons* for which public servants are dismissed, and practical *effects* which the dismissal may have on various aspects of their lives, brings into play several guarantees of the ECHR and the ICCPR.

117. Which human rights are in play in each particular case may vary. The Venice Commission does not know the facts which triggered specific dismissals, and cannot evaluate whether those dismissals affected private lives or other vital interests protected by the Constitution, ECHR, ICCPR, etc. However, it is certain that in the overwhelming majority of cases dismissals did affect human rights of the public servants concerned.

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[72] See *Oleksandr Volkov v. Ukraine*, 9 April 2013, § 165-167
[73] See *C. v. Belgium*, 7 August 1996, § 25, Reports 1996-III
[74] See *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 47, ECHR 2004-VIII; *Bigaeva v. Greece*, no. 26713/05, §§22-25, 28 May 2009
[75] See *Özpinar v. Turkey*, no. 20999/04, §§43-48, 19 October 2010; see also *Fernández Martínez v. Spain* [GC], no. 56030/07, § 112, ECHR 2014 (extracts)
[76] *Smirnova v. Russia,* nos. 46133/99 and 48183/99, §§ 96-97, ECHR 2003-IX
[77] See the Memorandum by the Commissioner for Human Rights on the human rights implications of the measure taken under the state of emergency in Turkey", CommDH(2016)35, p. 33.
[78] See Decree Law no. 667, Article 4 (2); Decree Law no. 668, Article 2 (2); Decree Law no. 669, Article 2 (2); Decree Law no. 670, Articles 2 (2) and 4 (1); Decree Law no. 672, Article 2 (2)
[79] The Venice Commission didn't examine the effect of those dismissals on the public servants' pension rights and other social benefits, which, by themselves, are not defended by the ECHR, but may be guaranteed by other international instruments or by the provisions of the Turkish Constitution.
[80] See *Matyjek v. Poland* (dec.), no. 38184/03, 30 May 2006, §§ 48-59. However, the Venice Commission is not ready to assert that Article 6 should be applicable *in casu.*
[81] See note 56 above; see also PACE lustration Resolution 1096(1996), para. 12.

118. The fact that human rights have been *affected* does not mean that they have been *violated*. However, where a human right is at stake, the Government must ensure that any derogation in times of emergency involves a derogable right and is necessary and proportionate, and thus "strictly required by the exigencies of the situation".

d. The moment when collaboration with the Gülenist network became incompatible with the public service[82]

119. Disciplinary liability, or any other similar measure, should be *foreseeable*; a public servant should *understand* that he/she is doing something incompatible with his/her status, in order to be disciplined for it. Hence, it is important to establish a moment in time at which a reasonable and well-informed person – and public servants should be reasonable and well-informed – must have understood that their continued connections with the Gülenist network were clearly unacceptable.

120. The obvious difficulty in the situation at hand is that, according to the Turkish authorities, for many years the Gülenist network had two faces: it was at the same time a secret organisation using questionable methods to gain influence within the State, and a network of lawfully operating associations and projects. The Turkish authorities seem to depart from a sweeping presumption that the "lawful incarnation" of the Gülenist network had always been merely a façade, and that all those who ever collaborated with or participated in any project affiliated with Mr Gülen knew about the real purposes and methods of the organisation.

121. The Venice Commission considers that this presumption goes too far. The Turkish authorities themselves do not deny that for many years official structures of the State collaborated with the associations and projects affiliated with Mr Gülen. Given the scale of the network and its presence in all spheres of public, social and economic life, there must have been thousands of people who entered into contact with the network, who supported its activities or even performed certain tasks on its behalf, without, at the same time, being aware of a "hidden face" of this organisation.

122. In a state under the rule of law, allegations of serious crimes must be documented and argued before an independent and impartial court of law, with due respect of the principles of fair trial and rights of the defence. Therefore, in normal conditions, it is for a court to examine activities of the Gülenist network and condemn it (or not) as a criminal or a terrorist organisation that was the instigator of the coup attempt and/or other criminal actions, and to determine the criminal involvement of any particular individual with that organisation.

123. According to the Turkish authorities, several criminal investigations have been started, and hundreds of supposed Gülenists were indicted even before the coup. Charges against them included instances of illegal wiretapping, trade of influence, falsification of evidence, etc. Some of those cases have been heard by first-instance courts and ended with convictions.[83] However, it appears that, so far, there has been no *final* judgment by a court of law providing a comprehensive analysis of the Gülenist network and declaring it a criminal or terrorist

[82] The Venice Commission is aware that the dismissals may be based on the links to other "terrorist organisations"; however, it will concentrate on the dismissal of public servants allegedly linked to the Gülenist network, since it appears to be the main purpose of those measures. It should, however, be borne in mind that a considerable number of dismissals concern alleged PKK sympathizers. These dismissals raise further questions regarding whether they are strictly required by the exigencies of the emergency situation, as indicated above in Section D (1).

[83] Thus, the Turkish authorities provided a translation of the judgment of the Erzincan High Criminal Court, decision no. 2016/127, adopted on 16 June 2016; it appears that this judgment is subject to appeal to the Court of Cassation, but the Venice Commission has no information about the further developments with this case.

organisation. At least, the Turkish authorities were unable to give any precise information on this point.[84]

124. That being said, the Venice Commission admits that public servants might have been expected to sever connections with the Gülenist network *even without waiting* for a final judgment of such a kind and without knowing all the details concerning its alleged criminal activities.

125. According to the Turkish authorities, the point where the "criminal" nature of the Gülenist network must have become evident was the wiretapping incident of 17-25 December 2013. They refer, in particular, to the statements made by the President in December 2013 - March 2014.[85]

126. The Venice Commission observes that in several decisions of the National Security Council (starting from the one dated 30 October 2014, quoted in the Constitutional Court judgment of 4 August 2016), "parallel structures" were declared as posing a threat to national security. According to the Turkish authorities, that term was widely understood as referring to the Gülenist network. Earlier decisions of the National Security Council are worded in more imprecise terms.

127. It is important to define, on the basis of objective facts, the moment in time when, if ever, the Gülenist network as a whole (or any parts thereof) became an organisation "meaningful connections"[86] with which became incompatible with the obligation of loyalty required from public servants. In addition, it is important to define the moment in time when this should have *become clear* to all public servants. In doing so, the Turkish authorities may take into account official decisions by competent bodies which clearly identified the Gülenist network as a "threat to the national security". Lack of clarity on this point may lead to unjust dismissals which may be seen as retroactive punishment. The Venice Commission recommends that the Turkish authorities clarify, as soon as possible, its position on the question of timing, as discussed above. The Turkish courts, in turn, should review whether the position of the Government on this point is objectively justified.

e. Connections to the Gülenist network as a pre-condition for dismissal

128. The next question is the *intensity* of the connections which a public servant needed to maintain with the Gülenist network or its aspects in order to be dismissed. The Decree Laws speak of "relation, connection or contact", "membership, affiliation or connection", etc. Those broad definitions imply that *any sort of link* to the Gülenist network may lead to dismissal.

129. The Turkish authorities explained that the assessment of this "intensity" is based on a number of factual elements present in each case. Thus, only such links which amount to "membership" may lead to criminal prosecution. The authorities refer to Article 314 of the Criminal Code, which addresses membership in a criminal organisation. According to the Turkish authorities, the difference between being a member of a criminal organisation and having "connections", "contacts", "relations" etc. depends on the number of criteria fulfilled by a person and is defined by the administrative entities applying the emergency decree laws. The

[84] The Turkish authorities produced a copy of the decision of 10 March 2003 by the State Security Court of Ankara (in Turkish) concerning Mr Gülen himself. In those proceedings Mr Gülen stood accused of the establishment of an illegal organisation in order to overthrow the secular government. The criminal acts, examined in the 2003 decision, have taken place before 1999. At the end the State Security Court cited Amnesty Law no. 4616 and postponed the criminal procedure for 5 years without taking stand on the substance of the accusations. There is no information about any further developments in this case.

[85] In particular, on 18 December 2013 the President of Turkey characterized the Gülenist network as a "criminal organisation" in a public statement. Furthermore, in a public speech of 22 March 2014 the President called on the population not to send their kids to the Gülenist schools.

[86] This concept will be explained in the sub-section immediately below

authorities gave some explanations regarding the way the criteria are used to qualify someone as being a member of the organisation or simply having "connections" "contacts" or "relations" with it. However, those criteria were not officially published, and their use was not described in any regulations or case-law.

130. The Venice Commission acknowledges that the connection required to justify suspensions (or even dismissals) may be less intensive than the one required for defining a person as a "member" of a criminal organisation. "Membership" requires "organic relationship" with the criminal organisation.[87] Removal of a public servant (temporary or permanent) may require a weaker connection to the criminal organisation.[88]

131. Still, this connection should be *meaningful* – i.e. it should raise objective doubts in his or her loyalty, and exclude any innocent, accidental, etc. contacts. The Venice Commission recommends amending the wording of the decree laws accordingly: a dismissal may be ordered only on the basis of a *combination of factual elements which clearly indicate that the public servant acted in a way which objectively cast serious doubts on his or her loyalty to the democratic legal order*.

f. Lack of reasoned and individualized decisions on dismissals

132. The Venice Commission recalls that dismissals of public servants were implemented either by a decision of the relevant administrative entity[89] or through the system of "lists" appended to the emergency decree laws.

133. In its 2011 Report, the Venice Commission referred to the prohibition of arbitrariness as one of the important elements of the notion of the rule of law. It noted that "although discretionary power is necessary to perform a range of governmental tasks in modern, complex societies, such power should not be exercised in a way that is arbitrary. Such exercise of power permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law."[90] The prohibition of arbitrariness is also a fundamental principle of fair process and the protection of privacy under international human rights law.[91]

134. The Turkish authorities insisted that every dismissal is based on solid evidence, and every file is considered individually; in their words, "the dismissal decisions are taken as a result of comprehensive research and assessments conducted separately for each public servant". However, this claim is hard to prove, in the absence of individualised decisions. The emergency decree laws do not establish any evidentiary standard and do not require that the final assessment should be reasoned and based on evidence. As stressed in the memorandum of the Human Rights Commissioner, "in such circumstances, it is conceivable that different administrations may have interpreted the same vague criteria concerning membership or contacts with a terrorist organisation in different ways, reaching different conclusions in similar cases, or considering legal actions taken in good faith as establishing guilt. This is a situation which naturally fuels all kinds of speculation concerning the reasons behind certain dismissals."[92] The Venice Commission also recalls its own earlier position that "the obligation to

[87] On this point see the detailed analysis of the case-law of the Turkish courts in CDL-AD(2016)002, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, §§ 98 et seq.
[88] See CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, § 122, where the Venice Commission examined such grounds for vetting of judges and prosecutors as "regular and inappropriate" contacts with known criminals, without expressing any objections against the idea that a judge may be dismissed for such contacts.
[89] For the judges – by the HCJP and the plenary sessions of the upper courts
[90] CDL-AD(2011)003rev, Report on the rule of law, § 52.
[91] ICCPR, Articles 14 and 17.
[92] Cited above., p. 31

give reasons should also apply to administrative decisions".[93] It appears that this obligation has not been followed *in casu*.

135. Two examples may be given. On 4 August 2016, the Constitutional Court of Turkey decided, in a judgment, to dismiss two of its own members for their alleged links to Mr Gülen. This judgment was based on the power (given to the Plenary of the Constitutional Court by Decree Law no. 667, Article 3 (1)) to dismiss the Constitutional Court judges "who are considered to be a member of, or have relation, connection or contact with terrorist organizations or structure/entities". The reasoning of this judgment illustrates how Decree Law no. 667 is interpreted in Turkey. The Constitutional Court stated, in particular (see §§ 84 et seq.), as follows:

> *"Establishing a link between members of the Constitutional Court and the terrorist organization […] was not necessarily sought for the application of the measure; it was considered sufficient to establish their link with 'structures', 'organizations' or 'groups' […]. [T]he link in question does not necessarily have to be in the form of 'membership of' or 'affiliation with' a structure, organization or group; it is sufficient for it to be in the form of 'connection' or 'contact' in order for the measure of dismissal from profession to be applied. Lastly, establishing the evidentiary link between the members and the structures, organizations or groups […] is not sought in the Article [of Decree Law no. 667]. 'Assessment' of such link by the Plenary Session of the Constitutional Court is deemed sufficient. The assessment in question means a 'conviction' formed by the absolute majority of the Plenary Session. Undoubtedly, this conviction is solely an assessment on whether the person concerned is suitable to remain in the profession irrespective of whether there is criminal liability. Article 3 of the Decree Law prescribes no requirement to rely on a certain kind of evidence in order to reach this conviction. On the basis of which elements this conviction will be formed is a matter left to the discretion of the absolute majority of the Plenary Session. What is important in this regard is to avoid arbitrariness while reaching a certain conviction. Undoubtedly, while making an assessment as to whether the above-mentioned link exists, the reasons which would lead the competent boards to reach a certain conviction can vary depending on the characteristics of each case."*

136. This long citation is needed to show that, for the Turkish Constitutional Court, a decision to dismiss a judge on the basis of the extraordinary measures ordered by the first decree law does not require any particular *evidence* to be described and analysed in the judgment. Actually, the above-cited judgment does not refer to *any* evidence against the two judges concerned. To decide on the dismissal, it sufficed for the majority of the Constitutional Court to be *subjectively persuaded* that a link between a member of the Constitutional Court and the Gülenist network exists. Apparently, the same approach has been used to put thousands of public servants on "dismissal lists" appended to the decree laws, as well as for their dismissal by administrative entities.

137. Another example is the decision of the HCJP of 31 August 2016, no. 2016/428.[94] By this decision, the HCJP ordered dismissals of several thousands of judges and prosecutors and listed their names in the appendix. This decision was adopted on the basis of the extraordinary powers given to the HCJP by Article 3 (1) of Decree Law no. 667.

138. This decision runs to 60 pages (without the lists of the names). It contains numerous examples of unlawful and even criminal activities of "FETÖ/PDY", outlines the teachings of Mr Gülen, the methods used by the network to recruit new members, to penetrate State institutions and collect funds. It describes the structure of this secret organisation and the

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[93] See the Rule of Law Checklist, cited above, § 68
[94] http://www.hcjp.gov.tr/Eklentiler/files/Reasoned-Decision-of-Dismissal.pdf

means of communication amongst its members. The decision mentions several specific cases where judges and prosecutors allegedly affiliated with "FETÖ/PDY" fabricated evidence and abused their powers to wrongly accuse their opponents.

139. In sum, this decision reads as a comprehensive report revealing the criminal nature of the Gülenist network. However, this decision does not refer to any specific evidence which would support allegations against thousands of judges and prosecutors whose names are mentioned on the appended list. Maybe such evidence exists, but it is not mentioned in the decision of the HCJP and, hence, the existence of the link between the dismissed judges and prosecutors and the Gülenist network cannot be objectively ascertained.

140. In sum, the Venice Commission concludes that the decision-making process which led to the dismissals of public servants was deficient in the sense that the dismissals were not based on individualised reasoning, which made any meaningful *ex post* judicial review of such decisions virtually impossible (on this point see Section G below).

g. Lack of administrative due process before dismissals

141. The Human Rights Commissioner of the Council of Europe noted in his memorandum, cited above, that the emergency decree laws do not require any adversarial proceedings before the dismissals of public servants are ordered. He stressed that, "at a minimum, persons should be able to have access to evidence against them and make their case before a decision is taken".[95]

142. The absence of individualised reasoned decisions has been discussed above. As to the *procedures* which precede dismissals, the Venice Commission fully shares the position of the CoE Human Rights Commissioner: such procedures should correspond to some minimal requirements of administrative due process.

143. The Venice Commission considers that the public servants concerned should have been able, at least, to know the evidence adduced against them and be allowed to comment on that evidence before any decision on dismissal was taken.

h. Associated measures (evictions, withdrawal of passports, access to communications)

144. Article 5 (1) of Decree Law no. 667 provides that the passports of those dismissed from public service shall be cancelled. According to the Information Note on this decree law this measure is taken "for safety of investigation and prevention of absconding." However, withdrawal of passport may also concern, by virtue of Article 10 of Decree Law no. 673, spouses of those dismissed, "where it is considered as detrimental in terms of general safety."[96] In addition, dismissed public servants "shall be evicted from publicly-owned houses or houses owned by a foundation in which they live within fifteen days".[97] Pursuant to Article 3 (1) of Decree Law no. 670, "all kinds of information and documents including those related to interception of communication through telecommunication which are required by the competent boards, commissions or other authorities shall be provided by all the public *and private institutions and organizations* [italics added] without delay", and this measure concerns not only the persons who are under inquiries with respect of their possible dismissal, but also their spouses and children.

[95] Pp. 30-32
[96] It is unclear whether those measures have been maintained or cancelled in the subsequent decree laws.
[97] See Decree Laws no. 667, Article 3 (1); no. 668, Article 2 (2); no. 669 Article 2 (2) and similar provisions in the subsequent decree laws.

145. All those measures seriously affect family members of public servants, i.e. people who may have nothing to do with the Gülenist network. Interfering with privacy, home and the freedom of movement of people belonging to the close circle of those public servants requires particularly strong reasons.[98]

146. The Venice Commission also recalls that the main purpose of the emergency regime is to restore normal functioning of the democratic institutions, dismantle the conspiracy and prevent a new coup. It is not clear to the Venice Commission how such measures as eviction of the family of the public servant from the publicly owned housing may contribute to this goal. To the extent that these measures have a punitive character and imply a kind of "guilt by association", they cannot be deemed to be "strictly required by the exigencies of the situation", in the opinion of the Commission.

i. Dismissals of judges

147. According to the Turkish authorities, the judiciary, together with the army, has been one of the most "penetrated" State institutions.[99] Article 3 of Decree Law no. 667 gave to the supreme judicial instances (the Constitutional Court, the Court of Cassation, the Supreme Administrative Court, the Court of Accounts) the power to dismiss their members linked to Mr Gülen. Lower court judges were to be dismissed by a decision of the HCJP. Pursuant to this decree law, two Constitutional Court judges have been dismissed, and thousands of judges working at all levels of jurisdiction lost their jobs. *In toto*, 3,673 judges have been dismissed from their positions on the basis of the emergency decree laws;[100] that figure includes 173 judges from the top courts, and five members of the HCJP. 198 judges have been reinstated to their positions later by the HCJP.

148. Although judges have not been dismissed directly by the decree laws but by the decisions of the respective supreme courts and the HCJP, everything said above in respect of collective dismissals of public servants commanded directly by the decree laws is applicable to the judges. One aspect of the situation, however, stands out: judges represent a special category of public servants, whose independence is guaranteed at the constitutional and international levels (see the ICCPR, Article 14 § 1, and the ECHR, Article 6 § 1). Therefore, any dismissals within the judiciary or the regulatory bodies of the judiciary such as the HCJP, for example, should be subjected to particularly exacting scrutiny, even in times of a serious public emergency. Such dismissals not only affect human rights of the individual judges concerned, they may also weaken the judiciary as a whole. Finally, such dismissals may create a "chilling effect" within the judiciary, making other judges reluctant to reverse measures declared under the emergency decree laws out of fear of becoming subjects of such measures themselves. These measures may have adverse effects on the independence of the judiciary and the effectiveness of the separation of powers within the State. This "institutional dimension" of the measures taken in respect of judges thus deserves special attention.

149. The Venice Commission reiterates that Decree Law no. 667 entrusts the power to dismiss to the HCJP, as far as lower court judges are concerned, or to the top courts, in respect of their members. This scheme is probably not fully in line with the ordinary rules of the dismissal of judges for disciplinary breaches; however, in the circumstances, entrusting those powers to the top courts and to the HCJP appears to be an acceptable solution, showing respect to the independence of the judiciary and its governing bodies.

[98] See Article 8 of the ECHR, Article 17 of the ICCPR, CCPR, General Comment No. 16: Article 17 (Right to Privacy) (1988).

[99] See, for example, a press report of a testimony of a former judge-member of the HCJP: http://www.hurriyetdailynews.com/govt-gülenists-bargained-over-top-judiciary-posts-former-justice-says.aspx?pageID=238&nID=106231&NewsCatID=509

[100] Statistics obtained on 15 November 2016 from the High Judicial and Prosecutorial Council of Turkey.

150. That being said, all other remarks made in respect of the procedure for the dismissal of other public servants remain valid regarding the dismissals of judges. The Venice Commission reiterates that every decision ordering the dismissal of a judge needs to be individualised and reasoned, must refer to the verifiable evidence, and that the procedures before the HCJP have to respect at least minimal standards of due process. The Venice Commission also recalls that, according to its well-established position, an appeal against disciplinary measures should normally be available to the dismissed judges (on the judicial remedies available to public servants in general see Sections F and G below).[101]

2. Measures related to criminal proceedings

a. Description of measures

151. Decree Law no. 667 introduced certain rules aimed at simplifying the task of the investigative bodies, prosecution and courts in examining cases related to a number of serious offences. The essential changes introduced by Decree Law no. 667 are as follows:[102]

- the dead-line for bringing an arrested person to a judge is extended to 30 days;[103]
- the police may take witness statements and will deal with cases concerning military personnel;
- oral consultations between the detainees and their lawyers may be recorded for security reasons, and the documents they exchange may be seized; the timing of such consultations may be regulated, and the lawyer may be replaced, at the request of the prosecution, by the Bar;
- the prosecution may bar an advocate from taking up his/her duties if an investigation is pending against this person related to enumerated offences;
- an accused may be represented by a maximum of three lawyers at a hearing;
- a bill of indictment or "documents which substitute for the bill of indictment" may be "read out or summarized and explained" before the start of the trial;
- review of detention or examination of the applications for release may be conducted on the basis of written materials contained in the case-file (i.e. without hearing the person concerned);
- the detainee may only be visited by his/her closest relatives, and his/her telephone contacts should be limited to ten minutes every fifteen days.

152. Subsequent decree laws further amended rules of criminal procedure. Thus, Decree Law no. 668, in its Article 3 (1), introduced the following essential measures:

- any application for release or appeal against a detention order shall first be examined by the magistrate who took the decision and only after ten days forwarded to the competent reviewing authority;
- any application for release will be decided also within 30 days and without an oral hearing, on the basis of the case-file;
- in urgent cases searches in private premises and offices (including lawyers' offices) may be authorised by a prosecutor; such seizures should be submitted to a judge for review within five days; this procedure also applies to inspection of computers, databases, software, etc.;

[101] See CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 25; See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 110

[102] This is not the full list; other changes of lesser importance are not examined by the Venice Commission.

[103] According to the Government memorandum, p. 70, by 28 October 2016, out of 45,225 persons who were arrested within the scope of FETÖ/PDY investigations, 61,1% (27,514 persons) remained in detention without access to a judge for 1-5 days, 24,1% (11,042 persons) for 6-10 days, 9,4% (4,139 persons) for 11-15 days, 3,7% (1,760 persons) for 16-20 days, 1,2% (478 persons) for 21-25 days, and 0,5% (292 persons) for 26-30 days.

- in urgent cases a prosecutor may order undercover investigative measures (such as wiretappings) which are subject to *ex post* judicial examination;
- the prosecution may seize and inspect correspondence between defendants and "privileged witnesses" (such as spouses and lawyers, for example);
- if the purpose of the investigation may be compromised, the defence counsel's right to examine the contents of the case-file or take copies may be restricted by the decision of the prosecutor;
- the right of the arrested person to see a lawyer may be restricted for five days by the prosecutor, but no formal statements shall be taken during this time from the accused.

153. As a preliminary remark, the Venice Commission notes that under Article 6 (1) of Decree Law no. 667 and Article 3 (1) of Decree Law no. 668 those measures are introduced "during the period of state of emergency" and "with regard to the offences enumerated under Fourth, Fifth, Sixth and Seventh Sections of Fourth Chapter of Second Volume of the Turkish Criminal Code no. 5237 dated 26 September 2004, the offences falling under the Anti-Terror Law no. 3713 dated 12 April 1991 and the collective offences".

154. Regrettably, some of the temporary provisions of the two first decree laws have been made permanent in Decree Law no. 676, dated 29 October 2016 – or, at least, that may be inferred from the wording of Decree Law no. 676. Thus, under its Article 1, "the principle of three lawyers" is henceforth a part of the Criminal Procedure Code for all organised crime cases. This Decree Law, in Article 2, also provides that it suffices for the lawyer to be accused of a specific crime in order to be excluded from the representation of a client. The possibility to be detained without the access to a lawyer has also been made permanent, albeit only for a 24-hours' period (Article 3). Finally, the rules imposing limitations on confidential contacts between a detained person and his or her lawyer have been made permanent, and introduced in Law no. 5275.

155. This shows that there is a risk of *de facto* "permanentisation" of certain extraordinary measures, which may be afterwards made permanent *de jure* through the Parliament's approval of the emergency decree law introducing such measures. That represents, in the eyes of the Venice Commission, a danger for democracy, human rights and the rule of law. As stressed above, permanent changes of the legislation should not be enacted in the framework of an emergency regime: their permanent necessity should rather be debated in ordinary parliamentary procedures, without any time pressure and far from emotional reactions caused by the dramatic events which led to the state of emergency.

b. Limits to derogation from the States' procedural human rights obligations during the times of emergency

156. The modifications to the rules of criminal procedure affect a large array of "procedural rights" guaranteed by the Turkish Constitution and by international human rights law, such as, in particular, the right to liberty (in relation to arrests and custody procedures and the right to be brought promptly before a court), and the right to a fair trial (in relation to access to lawyers, confidentiality of lawyer-client contacts, and extension of the search and seizure powers of the prosecuting authorities). Amendments related to the search and seizure powers and secret surveillance, and limitations on the contacts of the detainees with their relatives also affect the right to privacy, family life, respect of secrecy of communications and the home. The first question is how far may the State depart from these rights in an emergency situation.

157. In the wording of Article 15 § 2 of the ECHR, procedural rights are not part of the non-derogable rights. However, Article 15 § 1 stipulates that derogation measures should be "strictly required", which ordinarily means that basic safeguards of protection against abuse of power and arbitrary behaviour should still be in place even after the derogation.

158. It should also be recalled that measures which a Contracting Party may take under Article 15 § 2 must not be "inconsistent with its other obligations under international law". Turkey has ratified the ICCPR. Article 4 of the ICCPR contains a list of non-derogable provisions. The Human Rights Committee in its General Comment No. 29, cited above, held that in addition to the rights specifically listed in Article 4 of the ICCPR, there were certain other obligations under the Covenant that were non-derogable:[104]

> *"States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence".*

159. In his report on the question of Human Rights and the State of Emergency (1997), the UN Special Rapporteur makes the following recommendations (with regard to the principle of proportionality, italics added): "When a state of emergency affects the exercise of certain derogable human rights, *administrative or judicial measures* shall be adopted to the extent possible with the aim of mitigating or repairing the adverse consequences this entails for the enjoyment of the said rights".[105]

160. Examples from other jurisdictions confirm that certain procedural rights may be seen as *implicitly* non-derogable. Thus, the American Convention on Human Rights explicitly prohibits the suspension of "the judicial guarantees essential for the protection of such rights" which are underogable (Article 27 § 2 of the ACHR). The Inter-American Court of Human Rights in its advisory opinion on "Habeas Corpus in Emergency Situations"[106] has advised that the states may not suspend the rights to a judicial remedy to test the lawfulness of detention (Article 7 § 6 of the ACHR) and the right to judicial protection (Article 25 § 1 of the ACHR).

161. It could therefore be argued that Turkey has an obligation under Article 15 § 2 of the ECHR to act in compliance with Article 4 § 2 of the ICCPR, as interpreted by authoritative bodies, and that the right to access to justice (at least in respect to fundamentally fair process and in relation to other non-derogable rights) is also *implicitly non-derogable*. In the light of what was said above on the protection of procedural rights in a state of emergency situation, Turkey under the ECHR and the ICCPR cannot derogate from "fundamental principles of fair trial" or the prohibition on arbitrary detention, and cannot deny remedies against human rights violations.[107]

162. The Venice Commission acknowledges that "non-derogability" may only relate to the core of those procedural rights; probably, certain associated procedural guarantees may be either set aside or significantly reduced in scope, to the extent strictly required by the emergency situation. Otherwise declaring the emergency situation would make no practical sense.

163. The Venice Commission is not in a position to assess all measures proposed by the emergency decree laws in the sphere of criminal procedure law. It will therefore concentrate on two particularly important modifications, namely those related to the pre-trial custody and access to a lawyer.

[104] Para 11; see also § 34 above.
[105] Report by the UN Special Rapporteur on the question of Human Rights and the State of Emergency (1997), para 91 (3).
[106] Advisory Opinion OC-8/87, of January 30, 1987, published at American Society of International Law, International Legal Materials Vol. 27, No. 2 (March 1988), pp. 512-523.
[107] The Venice Commission observes that the right to be presumed innocent cannot be derogated from in times of emergency according to Article 15 of the Turkish Constitution; it implicitly means that the fair trial guarantees are *de facto* non-derogable also under the national Constitution, since fair trial is a pre-condition of the presumption of innocence.

c. Measures related to arrest and detention in custody

164. Article 5 of the ECHR and Article 9 of the ICCPR protect individuals against arbitrary deprivation of liberty by the State. So far, tens of thousands of suspects have been detained in Turkey in connection with their alleged participation in the conspiracy.[108]

165. Two elements of Article 5 of the ECHR are particularly important in connection with those mass arrests. The first is the requirement that detention must be ordered on the basis of a "reasonable suspicion" against the suspect. Although the standard of proof for arresting a suspect is not the same as for a criminal conviction, the authorities have to "furnish at least some facts or information capable of [showing] that the arrested person was reasonably suspected of having committed the alleged offence."[109]

166. Another important safeguard is the requirement that any arrested person should be "promptly brought before a judge" (Article 5 § 3 of the ECHR) and should have the right to request his or her release (Article 5 § 4 of the ECHR). Both §§ 3 and 4 of Article 5 speak essentially about the same basic guarantee – speedy judicial scrutiny of detention.

167. On the basis of Article 6 (1) of Decree Law no. 667, during a state of emergency a suspect may be held in custody without being brought before a judge for maximum of thirty days (see also Article 3 (1) of Decree Law no. 668).

168. On several occasions the ECtHR has underlined the importance of the guarantee afforded by Article 5 § 3 to an arrested person. The Court stated that "such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, *incommunicado* detention and ill-treatment".[110] The Court recognises however that, as in the context of anti-terrorism legislation, there exist exceptional circumstances or special difficulties justifying a longer period than normal before the authorities bring the arrested person before a judge.[111] In case a State enters derogation under Article 15, this period can be extended. In the *Brannigan and McBride* judgment,[112] the Court held that the United Kingdom had not exceeded their margin of appreciation to the extent that suspected terrorists were allowed to be held for up to seven days without judicial control. In the case of *Aksoy v. Turkey* the Court took however the stance that a period of detention without judicial control for fourteen days without being brought before a judge did not satisfy the requirement of "promptness", even despite the existence of a derogation.[113]

169. The Venice Commission has serious doubts as to whether the 30-day rule is compatible with the human rights obligations of Turkey. The current situation may probably be distinguished from the state of emergency situation examined in *Aksoy*. For example, it is clear that mass dismissals will affect the smooth functioning of the judiciary and cause delays in the judicial review of detention matters. Next, Decree Law no. 668, in its Article 3 (1) puts a stricter limit to *incommunicado* detention (5 days), whereas in *Aksoy* the detention was not only unsupervised by a judge, but also without the legally enforceable right of access to a lawyer, doctor, friend or relative. However, it is clear that by extending the limit of unsupervised detention to 30 days, the Turkish authorities are going beyond the limit which has been previously seen by the ECtHR as acceptable following a derogation. The Venice Commission thus recommends reducing this time-limit. As the Commissioner for Human Rights stated, "this

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[108] See a summary of Amnesty International's concerns regarding the failed coup attempt in Turkey and its aftermath, 6 September 2016.

[109] *O'Hara v. the United Kingdom*, no. 37555/97, §35, ECHR 2001-X

[110] *Magee and Others v. the United Kingdom*, nos. 26289/12, 29062/12 and 29891/12, §74, ECHR 2015 (extracts)

[111] *Magee and Others*, cited above; § 78, with further references; see also *Brogan and Others v. the United Kingdom*, 29 November 1988, §§ 60 et seq., Series A no. 145-B; or, in the context of Turkey, *Demir and Others v. Turkey*, 23 September 1998, §§ 49 et seq., *Reports of Judgments and Decisions* 1998-VI

[112] Cited above, § 36

[113] *Aksoy v. Turkey*, 18 December 1996, §§ 65 and 84, Reports of Judgments and Decisions 1996-VI

should be facilitated by the fact that the number of arrests have diminished since the coup attempt and in the light of the information provided by the Minister of Justice during the visit that in 95% of the cases so far the period of custody did not exceed 3-4 days in practice."[114]

d. The right to be effectively defended by a lawyer

170. Under the decree laws, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c) of the ECHR, may be restricted (see above). In particular, under Decree Law no. 668, the right of a suspect in custody to consult with the lawyer may be limited for a maximum of five days. Amnesty International reports several cases of detainees being held *incommunicado* for four days or more by the police, without being able to inform their families of where they were or what was happening to them.[115] It should be recalled in this respect that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, 'his assistance would lose much of its usefulness' […]".[116]

171. Timely and unrestricted access to a lawyer of one's choice is relevant in the context not only of Article 6, but also of Articles 3 and 5 of the ECHR (prohibition of torture and the right to liberty; see also Articles 7 and 9 of the ICCPR, which include non-derogable rights). In the *Aksoy* judgment, the ECtHR held that "the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him."[117]

172. Moreover, in the recent case of *Ibrahim and others* the ECtHR stated: "Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment […] The first question to be examined is what constitutes compelling reasons for delaying access to legal advice. The criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case […]".[118]

173. The Venice Commission would like to stress the need for "individual assessment of the particular circumstances of the case". Indeed, under the ECHR, a decision to restrict access to legal aid or put conditions limiting confidentiality of lawyer-client contacts may be based on a combination of several presumptions of fact, convincingly showing the presence of a security risk. Thus, as the ECtHR stressed in *Khodorkovskiy and Lebedev*, "there could be legitimate restrictions related to the security risks posed by the defendant. The existence of any 'security risk' may be inferred from the nature of the accusations against him, by the detainee's criminal profile, his behaviour during the proceedings, etc. Thus, the Court has tolerated certain restrictions imposed on lawyer-client contacts in cases of terrorism and organised crime […]".[119]

[114] See the Memorandum of the Commissioner, cited above, p. 25.
[115] A summary of Amnesty International's concerns regarding the failed coup attempt in Turkey and its aftermath, 6 September 2016.
[116] *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06, 13772/05, §627, 25 July 2013.
[117] Cited above, § 83.
[118] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, §§255, ECHR 2016, §§ 255 and 258
[119] Cited above, § 628

174. However, the use of presumption of facts does not exclude the need for individualised examination of the circumstances of each particular case. Such limitations as described in the decree laws should not be generally imposed and should not become a routine procedure, but remain a rare and narrowly circumscribed exception. This is particularly true where, as here, there are valid concerns regarding allegations of ill-treatment and torture (see sub-section 3, below). Decisions imposing temporary limitations on contacts with the lawyer may be imposed only in exceptional situations in individual cases, where the existence of security risks is convincingly demonstrated, should be reasoned with reference to the facts of the case, should be notified to the defence, and the court should be able to review the validity of any such limitations.[120]

e. Grounds for bringing suspects to criminal liability

175. The emergency decree laws did not alter substantive grounds for bringing alleged members of the Gülenist network to criminal liability for the crimes they had allegedly committed. It appears that the Criminal Code, as well as the case-law (in particular the case-law defining the *corpus delicti* of membership in an armed criminal organisation) still applies.[121]

176. The Venice Commission was informed that criminal cases are initiated on the basis of the same list of criteria which is used for the dismissals. The Venice Commission agrees that the co-existence of several factual elements, which point at a possible connection of an individual with the conspiracy, may be an acceptable starting point for opening an investigation. However, the evidentiary threshold for arresting that person ("reasonable suspicion"), and, *a fortiori*, for convicting him or her ("beyond reasonable doubt") should be much higher. In view of the non-individualised manner in which mass dismissals were ordered under the emergency regime, the Venice Commission feels obliged to reiterate that criminal conviction requires a particularly high standard of proof, and should be based on convincing evidence of individual guilt, which shows that the accused willingly joined a criminal organisation and was aware of its goals and methods.

3. Allegations of ill-treatment and torture

177. The Venice Commission is very concerned by the reports containing allegations of ill-treatment and even torture exercised by the Turkish authorities against those arrested after the coup.[122] The Venice Commission has no mandate or resources to examine individual cases; hence, it will abstain from making any findings in this respect. However, the Venice Commission draws the attention of the Turkish authorities to the evident fact that measures adopted following the coup and described in sub-section 2 above[123] remove crucial safeguards that protect detainees from abuse, and hence *increase the likelihood* of ill-treatment and torture. The Commission also underscores that the prohibition on torture and cruel, inhuman or degrading treatment or punishment is a non-derogable human rights obligation under both the ECHR and the ICCPR. No emergency situation may justify such abuse.

[120] For example, decision of the prosecution to open an investigation against a lawyer is not an ultimate proof that the lawyer has abused his professional status and should be removed from the case; the tribunal reviewing the removal of the lawyer should verify whether there has been any objective ground for the opening the investigation, in the first place.

[121] See, in particular, CDL-AD(2016)002, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, §§ 95 et seq.

[122] See, for example, the report by the Human Rights Watch of 24 October 2016, https://www.hrw.org/report/2016/10/24/blank-check/turkeys-post-coup-suspension-safeguards-against-torture.

[123] Such as extending the maximum length of police detention to 30 days denying detainees' access to a lawyers for up to five days, restricting their right to a lawyer of their choice and their right to confidential conversations with their lawyers.

4. Dissolution of private associations and companies and confiscation of their assets

178. Article 2 of Decree Law no. 667 orders liquidation of organisations “which belong to, connect to, or have contact with” the “FETÖ/PDY”. These organisations include private health institutions, private education institutions, private dormitories and lodgings for students, foundations and associations and their commercial enterprises, trade-unions, federations, etc. A list of legal entities to be liquidated is attached to the Decree Law. Under Article 2 (2) all assets of those companies are transferred to the State without any compensation. Decree Law no. 668 orders liquidation of private media outlets.

179. These measures constitute a far-reaching interference with several rights provided by the ECHR, namely the freedom of association (Article 11), and the right to peaceful enjoyment of possessions (Article 1 of Protocol no. 1 to the ECHR). Liquidation of media outlets may raise issues under Article 10 of the ECHR (freedom of expression),[124] whereas liquidation of educational institutions may affect the students’ right to education (Article 2 of Protocol no. 1 to the ECHR). They also implicate parallel obligations under, *inter alia*, Articles 19 and 21 regarding freedom of expression and association under the ICCPR.[125]

180. As stressed above, the Venice Commission considers that temporary *suspension* of the activities of private institutions allegedly linked to the Gülenist network and provisional freezing of their assets would not be less effective and would be more consistent with rights and freedoms of the individuals than their definite liquidation and confiscation of their property. The Venice Commission stresses that this measure affects not only legal entities concerned, but thousands of innocent people related to them – employees, contractors, students, patients, etc. Article 2 (2) of Decree Law no. 667 stipulates that “under no circumstances shall any claim or demand related to all kinds of debts of those listed in paragraph one be made against the Treasury.” This may be understood as meaning that the State confiscates the assets of the liquidated entities, but does not accept their liabilities. Such provision may unjustly penalise other economic actors, which had contractual, labour and other relations to the liquidated entities without, however, being involved in their allegedly unlawful activities.[126]

181. Similarly to mass dismissals of public servants, the Venice Commission regrets that the closing down of private institutions was done without any individualised decisions, was not based on verifiable evidence, and that due process requirements were seemingly not fulfilled. The State may have a somewhat larger discretion when it comes to the organisation of its own apparatus, and to the questions of appointments and dismissals of public servants. However, in this part the decree laws are aimed at *private institutions*, independent from the State. So, it is *a fortiori* important to introduce safeguards which would protect private institutions from arbitrary dissolution and stripping of their assets. This concern is particularly acute where the actions target media outlets vital to the exercise of freedom of expression.

182. To the extent that all such measures cannot be deemed as “strictly required by the exigencies of the situation” the Venice Commission urges the authorities to cease taking such measures and reverse or remedy unjustified measures already taken.

[124] The question of media freedom under the state of emergency regime in Turkey will be discussed by the Venice Commission in a separate opinion.
[125] See CCPR, General Comment No. 34, Article 19: Freedoms of opinion and expression (2011).
[126] Decree Law no. 675 seems to address this issue, at least partially, by excluding liability of financial institutions which had accounts of the organisation liquidated under the emergency decree laws. This decree law also seems to order the transfer to the State of all claims directed against the liquidated entities; however, it is difficult to assert whether, by virtue of this Decree Law, the State accepts all liabilities of the companies which have been liquidated within the limits of their assets.

F. Constitutional review

183. The Council of Europe Commissioner for Human Rights in a report of 2001 argued that the large margin of appreciation the Council of Europe member states enjoy under Article 15 of the ECHR must be *counterbalanced by effective domestic scrutiny*: "[it is] precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations. This is, indeed, the essence of the principle of the subsidiarity of the protection of Convention rights".[127] He further stressed that "effective domestic scrutiny must, accordingly, be of particular importance in respect of measures purporting to derogate from the Convention: parliamentary scrutiny and judicial review represent essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures".[128]

184. As to the parliamentary control, as the Venice Commission observed above, for over two months Parliament did not exercise its controlling powers over the *specific* decree laws. Even after Parliament resumed its work in October 2016, it did not fully comply with the 30-day time-limit for reviewing the emergency decree laws.

185. Moreover, the Venice Commission agrees that "since in a parliamentary democracy the executive is normally composed of party leaders and other leading party figures, […] legislative control may not be sufficiently effective in practice to curb the abuse of executive power. Therefore, in a State based on the rule of law, legislative control must be supplemented by appropriate and effective means of judicial control".[129] Thus, in the following sub-sections the Venice Commission will analyse judicial and other legal remedies existing in Turkey in the context of the current emergency regime.

186. From the outset, the Venice Commission notes an obvious paradox related to the constitutional and judicial review of the emergency measures. On 4 August 2016 the Constitutional Court dismissed two of its members, thus confirming, in essence, the validity of Decree Law no. 667 which served as a legal basis for that very decision. Furthermore, the Court of Cassation and other supreme courts of Turkey, as well as the HCJP, dismissed thousands of judges using the extraordinary powers given by Decree Law no. 667. This means that challenging the legitimacy of the process of mass dismissals of judges and prosecutors before those courts will have little chance of success. The judges and prosecutors may probably still seek review of their individual cases, or challenge other aspects of the decree laws (for more details on this see below), but the general legitimacy of the scheme of dismissals *de facto* cannot be put into question.

1. Constitutional review *in abstracto*

a. Constitutional review of the decree laws before their approval by Parliament

187. As regards the decision to *declare* a state of emergency, it cannot be subject to review by the Constitutional Court either before or after its approval by Parliament, because the approval is not done in the form of a law. In its opinion on the Draft Constitutional Law on "Protection of the Nation" of France, the Venice Commission acknowledged that "comparative constitutional law offers no clear and unequivocal answer on whether it is appropriate for declarations of a state of emergency to require judicial review, something that might be awkward given the highly

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[127] Opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, On certain aspects of the United Kingdom 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights CommDH(2002)7, paragraph 9.

[128] *Ibid.*, paragraph 8.

[129] See E. Özbudun, Emergency Powers and Judicial Review, in CDL-STD(1996)017, Human Rights and the functioning of the democratic institutions in emergency situations - Science and technique of democracy, No. 17 (1996), p. 12

political nature of such decisions".[130] Thus, the fact that the declaration of 20 July 2016 has not been reviewed by the Constitutional Court does not appear to be problematic in itself.[131]

188. As to *specific decree laws*, Article 148 § 1 of the Constitution in principle prevents their constitutional review:

> *"No action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency […]."*

189. In its previous jurisprudence, the Turkish Constitutional Court gave a liberal interpretation to this provision. Thus, it declared itself competent to examine the constitutionality of the emergency decree laws, but only to the extent that they went beyond the scope of the state of emergency *ratione temporis* and *ratione loci*.[132]

190. In September 2016 the CHP, the main opposition party, challenged Decree Law no. 667 before the Constitutional Court, *inter alia* because this Decree Law introduced permanent (as opposed to temporary) measures. However, on 13 October 2016, the Constitutional Court rejected the appeal and denied a review of the Decree Law *in abstracto*. As it was explained to the rapporteurs of the Venice Commission, the Constitutional Court abandoned its old case-law and preferred to stick to a literal interpretation of Article 148 § 1 which prevents, in absolute terms, any review of the emergency decree laws.

191. The Turkish Constitutional Court is better placed to interpret the Constitution. However, the constitutional situation which emerged after the declaration of the state of emergency is a source of concern for the Venice Commission. The declaration itself did not define the scope of the Government's emergency powers. Similarly, Parliament, when approving the declaration, did not circumscribe in any manner the Government's mandate. The Constitution contains certain general principles which should not be contravened even in the times of emergency, but since Parliament did not give general instructions to the Government and did not exercise its controlling functions over specific decree laws until October, the Government, during this period, had unfettered power to rule the country without any checks and balances but its own good will. This situation is dangerous for a democratic legal order, especially in view of the virtually irreversible character of measures taken by the Government.

192. The Venice Commission recalls its earlier observations made on account of the obvious inconsistency between the 1983 Law and the decree laws enacted by the Government in 2016. If the Turkish Government considers that the emergency decree laws as such may amend or supplement the 1983 Law, these decree laws should be treated as any other legislative act and be therefore subject to supervision by the Constitutional Court in the same way as "normal" laws. If, by contrast, those decree laws have a subordinate status, and, as such, cannot be subject to the constitutional review, they should fully comply with the 1983 Law. And, in any event, the Constitutional Court should have the power to assess the constitutionality of the laws by which Parliament ratifies the emergency decree laws (see immediately below).

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[130] CDL-AD(2016)006, Opinion on the Draft Constitutional Law on "Protection of the Nation" of France, § 61

[131] The Venice Commission stresses that the appropriateness of the declaration of emergency and the measures taken in response are subject to the review, *inter alia*, before the ECtHR.

[132] See Constitutional Court 10 January 1991, Registry No. 1990/25, Decision 1991/1; Constitutional Court 3 July 1991, Registry n° 1191/6, Decision No. 1991/20, see A.R Coban, "Comparing Constitutional Adjudication. A Summer School on Comparative Interpretation of European Constitutional Jurisprudence. 4th Edition – 2009. States of emegency and fundamental rights. Turkey. Fundamental Rights during States of emergency in Turkey", p. 9.

b. Constitutional review of the decree laws after their approval by Parliament

193. The rapporteurs have been informed that once an emergency decree law is confirmed by Parliament, that decision is subject to appeal to the Constitutional Court, since the approval is done in the form of a law, and laws are subject to constitutional review *in abstracto*. Thus, at present the Government's powers can be subjected both to parliamentary control and, as regards those decree laws which have been approved by Parliament, to the control of constitutionality by the Constitutional Court (at the request of a competent body).

194. It remains to be seen how speedy and effective the control of constitutionality will be, and what its scope would be. At present, it is not clear whether the Constitutional Court will declare itself competent to assess the *substance* of the measures enacted by the decree laws, as approved by Parliament. In the opinion of the Venice Commission, the Constitutional Court should have this competency, although, indeed, it belongs primarily to the Constitutional Court to interpret the Constitution on those matters. The emergency decree laws introduced a number of permanent structural changes to the legislation, which is problematic in itself. Furthermore, the Government took individual measures which may be seen as going beyond the limits set in Article 15 of the Constitution. Article 148 § 1 may give the Government a respite; however, it should not be seen as giving the Government immunity from *ex post* constitutional control of its actions just because these actions have been taken during the state of emergency. Otherwise the Government would be able to use this period in order to completely re-write the legislation and limit fundamental rights and freedoms without any oversight by the Constitutional Court, including for the future. Such an approach would be contrary to the very idea of constitutional control enshrined in the Turkish Constitution.

2. Constitutional review *in concreto*

a. Individual complaints introduced before the approval of the decree laws by Parliament

195. The rapporteurs were informed that, by early November 2016, the Constitutional Court received over 45,000 individual complaints related to the application of the emergency decree laws, mostly concerning dismissals.

196. From the outset, the Venice Commission notes that such measures that were applied on the basis of *pre-existing* legislative provisions (criminal-law provisions or disciplinary provisions) should still be reviewable by the Constitutional Court. Thus, in a recent admissibility decision the ECtHR confirmed its jurisprudence that an individual complaint to the Constitutional Court against a pre-trial detention order is an effective remedy, and that this remedy needed to be exhausted even during a state of emergency, in particular because the power to arrest does not emanate from the emergency decree laws themselves.[133] It follows that the right of individual petition in respect of those measures should not be affected by the emergency decree laws.

197. The situation with constitutional review of individual measures ordered directly by the emergency decree laws or on the basis of these decree laws is more complex. At present, it is not entirely clear whether the Constitutional Court will accept to examine individual complaints concerning such measures, although this possibility is not ruled out, and the wording of Article 148 does not exclude *concrete* review of norms (i.e. in connection with specific cases). That being said, the Venice Commission sees two major legal obstacles for the availability of such a review *in concreto*.

[133] See *Zeynep Mercan v. Turkey*, (dec.), no. 56511/16, 8 November 2016, in particular § 29

198. Firstly, under Article 45 of Law no. 6216 ("On establishment and rules of procedure of the Constitutional Court"), the right of individual petition only concerns "fundamental rights and freedoms secured under the Constitution which falls into the scope of the European Convention on Human Rights and supplementary protocols thereto, which Turkey is a party to".

199. In principle, measures taken in the context of *criminal investigations* (such as arrests, searches, limitations on access to the lawyer) fall within the material scope of the ECHR, and in particular its Articles 5, 6 and 8. The same concerns the dissolution of associations and confiscation of their property – these measures clearly fall under Article 11 and Article 1 of Protocol no. 1 to the ECHR. As to the dismissals of public servants, the ECHR does not regulate those matters *expressis verbis*. So, the remedy provided by Article 45 of Law no. 6216 will be effective only if the Constitutional Court is prepared to examine those cases through the prism of Articles 8 – 11 of the ECHR or other substantive provisions which may be applicable.

200. The second, more serious obstacle is the term "directly" mentioned in § 3 of Article 45 of 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."*

201. According to the Government's Memorandum, cited above, where individual measures (dismissals, confiscations, etc.) are decided by the administrative entities (or other bodies empowered by the decree laws to dismiss public servants - such as HCJP, for example), individual application to the Constitutional Court may be lodged against those measures, following prior exhaustion of other remedies. However, 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.[134] It remains to be seen, however, whether the Constitutional Court and the ordinary courts will agree with this interpretation.[135]

202. The Venice Commission has already expressed its objection to the practice of *ad hominem* legislation. It is highly problematic from many points of view: thus, it denies those concerned procedural guarantees which should normally accompany an individual decision-making process and violates the principle of equality.[136] In the current context it is unclear why some people or legal entities are put on the lists attached to the decree laws, whereas others are not. As a result of this arbitrary distinction a large group of public servants may be deprived of the right of individual petition to the Constitutional Court, which is inadmissible.

[134] The memorandum, on p. 35, reads as follows "[…] {A}s the judicial remedy is available against the administrative transactions performed by the administrative boards based on the authorization granted by the Decree Laws […], individual application can be made against these transactions. On the contrary, 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."

[135] The Venice Commission observes that pursuant to Article 159 of the Turkish Constitution, paragraph 9, "the decisions of the Council, other than dismissal from the profession, shall not be subject to judicial review." This provision clearly implies that dismissals *are* subject to judicial review.

[136] See CDL-AD(2016)027, Turkey – Opinion on the suspension of the second paragraph of Article 83 of the Constitution (parliamentary inviolability), §§ 73-76

b. Individual complaints introduced after the approval of the decree laws by Parliament

203. If a law approving an emergency decree law may be reviewed by the Constitutional Court *in abstracto*, § 3 of Article 45 of Law no. 6216 becomes irrelevant, and the Constitutional Court, from that moment on, should be competent to examine individual complaints related to the emergency decree laws.

204. However, this form of review remains an equation with many variables. Will the Constitutional Court review the cases of all those public servants whose names were put on the lists appended to the decree laws? Will the Constitutional Court have the power to annul individual measures which have been enacted by the decree laws during the period when these decree laws have been, in principle, "unreviewable"?[137] And last, but not least: how is the requirement of exhaustion of remedies, contained in Article 45 § 2 of Law no. 6216, and the time-limits set in Article 47 § 5,[138] to be applied?

205. The Venice Commission calls on the Constitutional Court to consider those questions as a matter of urgency and adopt "pilot judgments" which would clearly address questions of competency and give clear guidance on the exhaustion of remedies. Its role is crucial to assert the consistency of the individual measures with the Constitution.

G. Judicial review

206. In the Information Note to Decree Law no. 667, the Turkish authorities asserted the following:

> *"Under this Decree Law, stay of execution cannot be ordered during the state of emergency in order not to disrupt fight against terrorism. However, cases can be brought against all kinds of acts and actions before the competent and authorized courts and if the conditions exist, stay of execution will be able to be ordered at the end of state of emergency. Thereby, all kinds of acts and actions to be taken in accordance with this Decree Law shall be subject to judicial review. In this sense, an effective remedy (ECHR art.13) is available."*

207. The Government's Memorandum, cited above, takes a more differentiated view. The Government asserted that those individual measures which had been commanded by the decree laws (in the appended lists) cannot be challenged either in ordinary courts or before the Constitutional Court, whereas other individual measures, based on the emergency decree laws, but ordered at the lower level, are subject to such appeals.[139]

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[137] On this point the Venice Commission considers that the Constitutional Court should have this power – see above, the sub-section of constitutional review *in abstracto*.

[138] This provision reads as follows: "the application must be filed within thirty days after the final proceeding which exhausts legal remedies is notified to the applicant or, in case no legal remedy is provided for, within thirty days after the violation is found out."

[139] Citation from p. 37: "It is considered that as Decree Having the Force of Law has the characteristic of a specific legislative transaction and does not remain within the scope of administrative transaction, it is not possible to request the annulment of the transaction by applying to the courts of first instance in relation to the institutions and organizations which are closed directly with the provision of decree having the force of law. […] In addition to this, in connection with the institutions and organizations closed, there is no legal obstacle for those concerned to request the review and withdrawal of the transaction performed by administrative application. Hence, certain private educational institutions and organizations which had been previously closed with the article 1 of the Decree Law No 673 were removed from the relevant lists of Decree Having the Force Law and the transactions performed were withdrawn. On the other hand, in the event that the closure transaction is not based directly on the provision of decree having the force of law, but based on the transactions performed by the administrative boards or committees authorized with the Decree Laws, it is possible to apply to the administrative judicial remedy against these administrative transactions."

208. The Venice Commission will consider the latter interpretation as given. It will, therefore, concentrate on the dismissals and liquidations ordered in the lists attached to the emergency decree laws.[140]

209. The Turkish authorities claimed, in their Memorandum, that the State may legitimately exclude the right of access to court for public servants. The Venice Commission acknowledges that, in principle, this is permissible under the ECHR, but under certain conditions. According to the criteria developed by the ECtHR in the *Vilho Eskelinen* case the "civil" limb of Article 6 § 1 of the ECHR is applicable to *all* disputes involving public servants, unless two conditions are met: (1) the national law expressly excluded access to a court for the post or category of staff in question, and (2) this exclusion can be justified on objective grounds in the State's interest.[141] It means that if those two conditions are met, Article 6 would be inapplicable. By contrast, the applicability of Article 6 of the ECHR would imply that either the administrative authorities taking the decisions to dismiss comply with the requirements of a fair trial in their decision-making procedure (which is clearly not the case in Turkey – see the analysis above, in sub-Section 1 of Section E), or they are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1.[142]

210. As to the first condition, in its recent judgment in the *Baka* case, cited above, the ECtHR noted "that in the few cases in which it has found that the condition ('expressly excluded') had been fulfilled, the exclusion from access to a court for the post in question was clear and 'express'".[143] Moreover, according to the judgment of the ECtHR in *Saghatelyan v. Armenia*,[144] the law has to exclude the access to court specifically, which implies that a general restriction of access to the court for everybody, in respect of a specific type of administrative act (the emergency decree laws *in casu*) would not be sufficient. It is questionable whether, in the Turkish context, the condition of "explicit" and "specific" exclusion is met, since unavailability of judicial review follows not from the emergency decree laws but from the general rule that legislative acts are not subject to ordinary judicial review. Furthermore, there is no provision in the 1983 Law prohibiting or restraining the right to judicial review *per se* during a state of emergency.

211. Putting a person on a list attached to a decree law is a discretionary decision of the Government. It is impossible to see why certain public servants are dismissed through the "lists" while others are dismissed on the basis of decisions of the administrative entities. Thus, the Government has unfettered power to decide whether a person should have access to justice or not. Such a method of regulation *ad hominem* is incompatible with the principle of the rule of law. And it is doubtful whether this model will be accepted by the ECtHR for the purposes of applying the *Vilho Eskelinen* test. Moreover, the question arises whether this differentiated treatment of public servants with regard to the dismissal procedure is in compliance with Article 14, in combination with Article 6 of the ECHR, as well as under parallel obligations imposed by the ICCPR.

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[140] The Venice Commission notes that in a recent decision in the case of *Akif Zihni v. Turkey* (59061/16, 29 November 2016), the ECtHR declared inadmissible an application lodged by a teacher dismissed directly by one of the decree laws. The ECtHR decided that the applicant should have tried to exhaust domestic remedies, in particular to bring his case before an administrative court and then lodge an individual complaint before the Constitutional Court. The Venice Commission is aware that the question of accessibility of judicial review to these public servants who were dismissed directly by the decree laws is a matter of controversy domestically, and that the Turkish courts have not yet said their final word in this regard (see, in particular, a decision of the Council of State of 4 October 2016, nos. E. 2016/8136, K. 2016/4076).

[141] *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, §62, ECHR 2007-II. In applying the *Vilho Eskelinen* test, the European Court has already ruled that Article 6 of the ECHR is applicable to the dismissal of members of the judiciary – see, for example, *Olujić v. Croatia*, no. 22330/05, § 35, 5 February 2009; *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, §§ 85-87, 15 September 2015; *Baka v. Hungary* [GC], no. 20261/12, §§100-110, ECHR 2016.

[142] *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A no. 58

[143] *Baka v. Hungary*, cited above, § 113

[144] *Saghatelyan v. Armenia*, no. 7984/06, §§33-36, 20 October 2015

212. Another element which makes ordinary judicial review practically ineffective is the absence of individualised reasoning. This applies both to the dismissals/liquidations commanded at the level of the emergency decree laws and the dismissals ordered by the administrative entities. It appears that in both cases dismissals take the form of collective non-individualised decisions. Without knowing the reasons for which the person has been dismissed or an association has been disbanded, it is difficult to challenge these decisions before the court.

213. Finally, the Venice Commission reiterates that the ECtHR was prepared to treat lustration-related measures as a criminal punishment, in view of their legal nature and their effects. Dismissals of public servants as a lustration measure – for the danger that they may represent for the State on account of their connections with the Gülenist network, which is defined as a terrorist organisation – are different in nature from ordinary dismissals on account of breaches of disciplinary rules. These dismissals have legal repercussions, which go much beyond the loss of a job; all factors considered together, it is not excluded (although not guaranteed) that such dismissals may be characterised by the ECtHR as criminal-law measures in essence, if not in name. In this assumption, Article 6 of the ECHR will be also applicable under its criminal limb, which entails all the guarantees listed in its §§ 2 and 3.

214. The question of how far the State may go in curtailing the right under Article 6 of the ECHR (under its criminal and civil limbs) during times of emergency is open to discussion. In any event, the requirement of strict proportionality of derogation measures according to Article 15 § 1 of the ECHR will ordinarily require *basic* safeguards of protection against abuse of power and arbitrary behaviour. The Venice Commission reiterates that it could be argued that Article 15 § 1 of the ECHR embodies an *implicitly non-derogable* right of access to justice, consistent with the position of the Human Rights Committee under the ICCPR.[145]

215. Even assuming that the Turkish State had large discretion in regulating access to courts for public servants in times of emergency, this logic does not work for *private* legal entities which have been liquidated by "lists": denying judicial review with respect to actions taken against private entities can hardly be justified by the "exigencies of the situation".

216. Bearing those considerations in mind the Venice Commission reiterates that it ultimately belongs to the Constitutional Court of Turkey, the ECtHR and other authoritative international institutions to evaluate whether the supposed impossibility for a large number of public servants to challenge the emergency measures in court violated the Turkish Constitution, the ECHR and other international treaties to which Turkey is a party.

H. Other remedies

217. The Turkish authorities asserted to the rapporteurs that various other remedies are available to those affected by the emergency measures. Thus, the Government's Memorandum suggests that those who had been dismissed by the decisions of administrative entities may obtain the review of their cases by way of internal hierarchical appeals. This is confirmed by the last paragraph of Resolution no. 2016/428 by HCJP of 31 August 2016, which reads as follows:

> *"As per article 33 of Law no 6087, request for re-examination may be placed before the Plenary of the High Council of Judges and Prosecutors within ten days subsequent to the notification of this decision".*

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[145] As was said in the context of the Inter-American human rights system, "The declaration of a state of emergency – whatever its breadth or denomination in internal law – cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency."; IACHR, Report no. 48/00, case 11.166, *Walter Humberto Vásquez Vejarano v. Peru*, April 13, 2000, § 48.

According to the Turkish authorities, the persons who were dismissed from public service were provided with the opportunity to object to these decisions; as a result, thousands of public servants who were re-assessed after the objections returned to their duties pursuant to the decree laws. Moreover, the Turkish authorities state that, as a result of the appeals and re-assessments, 53 private schools and 1 private dormitory which had been shut down under Decree Law no. 673, and 42 private educational institutions and private dormitories which had been shut down by the decision of the relevant minister pursuant to the authority given by Decree Law no. 667, were re-opened.

218. Furthermore, those included in the lists may reportedly appeal directly to Parliament seeking their reinstatement in subsequent decree laws – at least this is what the rapporteurs were told during the visit.

219. The existence of those legal avenues has to be welcomed, but it clearly cannot replace a judicial procedure. Parliament and the administrative entities are not, by definition, adjudicative bodies, and have no obligation to consider cases, respect fair trial guarantees and give reasoned decisions.

I. Special *ad hoc* body for the review of the emergency measures

220. The Venice Commission understands that, given the scale of the problem, the immediate reintroduction of a full access to court for all dismissed public servants may be difficult, if not impossible. Therefore, a temporary *ad hoc* solution may be needed.

221. Without prejudice to the power of the Constitutional Court to assess the constitutionality of the emergency decree laws, the Venice Commission invites the Turkish authorities to consider other options – such as, for example, the creation of a special *ad hoc* body, which would be tasked with the examination of individual cases related to dismissals of public servants and other associated measures. A proposal in similar terms has been made by the Secretary General of the Council of Europe to the Turkish authorities, and the Venice Commission believes that this is a path to be explored.

222. The essential purpose of that body would be to give individualised treatment to all cases. That body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. 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. Limits and forms of any compensation may be set by Parliament in a special post-emergency legislation, with due regard to the Constitution of Turkey and its international human-rights obligations.

223. As to the legal entities liquidated on the basis of the emergency decree laws, they are fewer in numbers and, hence, their cases may be examined by the courts following the ordinary procedure.

IV. Conclusions

224. The Venice Commission fully agrees with the statement made by its President in the immediate aftermath of the failed coup of 15 July 2016, condemning the attempted overthrow of the Turkish Government, where he stressed that "any changes in the government must follow democratic channels".[146]

225. There is no doubt that the Turkish authorities were confronted with a dangerous armed conspiracy, and that they had good reasons to declare a state of emergency and give extraordinary powers to the Government. Moreover, certain additional limitations on human rights in this situation are permissible. Nevertheless, the state of emergency regime should remain within the limits set by the Constitution and domestic and international obligations of the State.

226. The provisions of the Turkish Constitution on the declaration of a state of emergency appear to be in line with common European standards in this area. However, the Government interpreted its extraordinary powers too extensively and took measures that went beyond what is permitted by the Turkish Constitution and by international law.

227. The main concerns of the Venice Commission related to the current constitutional situation in Turkey may be summarised as follows:

- Following the declaration of a state of emergency, for over two months, the Government was *de facto* permitted to legislate alone, without any control by Parliament or the Constitutional Court;
- The Government took permanent measures, which went beyond a temporary state of emergency. Civil servants were dismissed, not merely suspended, organisations and bodies were dissolved and their property confiscated instead of being put under temporary State control. In addition, the Government made a number of structural changes to the legislation, which should normally be done through the ordinary legislative process outside of the emergency period;
- The Government implemented its emergency powers through *ad hominem* legislation. In particular, tens of thousands of public servants were dismissed on the basis of the lists appended to the emergency decree laws. Such collective dismissals were not individualised, i.e. they did not refer to verifiable evidence related to each individual and described in the decisions;
- Basic rights of administrative due process of the public servants dismissed by the decree laws or on their basis have not been respected;
- Collective dismissals were ordered because of the alleged connections of public servants to the Gülenist network or other organisations considered "terrorist", but this concept was loosely defined and did not require a meaningful connection with such organisations (i.e. such connection which may objectively cast serious doubt in the loyalty of the public servant);
- Some of the measures associated with the dismissals unduly penalised family members of the dismissed public servants;
- In the area of criminal procedures, extension of the time-limit for pre-trial detention without judicial control up to 30 days is highly problematic; arrests of suspects should be ordered only on the basis of "reasonable suspicion" against them; limitations on the right of access to a lawyer may be imposed only in exceptional situations in individual cases, where the existence of security risks is convincingly demonstrated, for a very limited lapse of time and, ultimately, should be subject to judicial supervision;

[146] http://www.venice.coe.int/webforms/events/?id=2266; see also the view of the Secretary General of the Council of Europe, published on 22 August 2016 in Le Monde / La Stampa / Hürriyet / Hürriyet Daily News / Frankfurter Allgemeine Zeitung.

- The Government has removed crucial safeguards that protect detainees from abuses, which *increases the likelihood* of ill-treatment;
- It is unclear whether the Constitutional Court will be able to review the constitutionality of the emergency decree laws *in abstracto* and *in concreto.* The Venice Commission considers that the Constitutional Court should have this power;
- Collective dismissals "by lists" attached to the decree laws (and similar measures) appear to have arbitrarily deprived thousands of people of judicial review of their dismissals.

228. The Venice Commission is particularly concerned by the apparent absence of access to justice for those public servants who have been dismissed directly by the decree laws, and those legal entities which have been liquidated by the decree laws. If, for practical reasons, the re-introduction of full access to court for public servants is impossible in the current conditions, the Turkish authorities should consider alternative legal mechanisms, which might permit individual treatment of all cases and ultimately give those dismissed their "day in court". The Venice Commission supports the proposal made by the Secretary General of the Council of Europe concerning the creation of an independent *ad hoc* body for the examination of individual cases of dismissals, subject to subsequent judicial review.

229. In conclusion, the Venice Commission recalls that the main purpose of the state of emergency is to restore the democratic legal order. The emergency regime should not be unduly protracted; if the Government rules through emergency powers for too long, it will inevitably lose democratic legitimacy. Moreover, during the course of the emergency, non-derogable rights cannot be restricted, and any other restrictions on rights must be demonstrated to be strictly necessary in light of the exigencies of the stated emergency. The Venice Commission hopes that, despite the dramatic events of 15 July 2016, the Turkish State will soon return to its normal functioning. The Venice Commission remains at the disposal of the authorities for any assistance they may need in this respect. The Venice Commission also recalls that it will examine the effects of the emergency measures on the freedom of the media in a separate opinion.