TURKEY TRIBUNAL

Because Silence is the Greatest Enemy of Fundamental Human Rights

Judicial Independence & Access to Justice

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Prologue
The Ruin of Rule of Law in Turkey

Since July 2016, the 96-year old Republic of Turkey, under the rule of its President Recep Tayyip Erdoğan[1], has gained the fame of a Country where fundamental rights and liberties are trampled: in the last five years, more than 300 journalists, party co-chairs and tens of elected mayors of HDP (the pro-Kurdish People's Democratic Party), thousands of judges, prosecutors and lawyers, the head of the dissolved association of judges (YARSAV) and president of Progressive Lawyers Association (ÇHD) as well as more than 263,000, including academicians, writers and free minds, have been detained upon the allegation of terrorism-related charges.

Not surprisingly, what we see today is a Country that ranks 107th among 128 in rule of law index of 2020[2], whereas, it was still 59th in 2014, in the aftermath of violent repression of Gezi protests[3].

Although the Turkish Constitution, in itsarticle 2, describes the Republic of Turkey as "a democratic, secular and social state governed by the rule of law", Turkish courts have not been capable to effectively protect the fundamental rights of persons, leaving citizens under the arbitrary exercise of power by the Executive.

The rule of law is a conception of the State in which all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

Under the rule of law, courts thus operate as the ultimate guardians of the respect of the law by public authorities and the State accepts courts' authority.

Consequently, the rule of law has a direct impact on the life of every citizen becauseit is a precondition for ensuring equal treatment before the law and the defence of individual rights and for preventing abuse of power by public authorities. Respect for the Rule of Law is also essential for citizens to trust public institutions.

Having this concepts in mind, in this report I will display facts, and especially actions by public authorities, occurred in Turkey since 2010 and which relate to the role of the

1 Recep Tayyip Erdoğan is President of the Republic of Turkey since 2014; from 2003 to 2014 he held the office of Prime Minister.

2 WJP-ROLI-2020-Online_0.pdf (worldjusticeproject.org)

3 On 28 May 2013 a wave of civil demonstrations began in Istanbul initially to contest the urban development plan for Istanbul's Taksim Gezi Park. The peaceful demonstrations were violently repressed by the police. The reaction of police triggered the spreading of protests and strikes across Turkey, at the core of which were issues of freedom of the press, expression, and assembly, as well as the Islamist government›s erosion of Turkey's secularism. Protested lasted for almost 20 days, until 16 of June. The Gezi events were unprecedented both in terms of their geographic scope and the numbers of participants: according to the estimates of the Ministry of the Interior, over the course of the events, 2.5 million persons had participated in demonstrations in 79 of Turkey's 81 provinces. Nils Muižnieks Commissioner for Human Rights of the Council of Europe visited Turkey in July 2013, and "received a large number of serious and consistent allegations of human rights violations committed by law enforcement forces against demonstrators during the Gezi events. Many of these allegations were supported by witness accounts, reports of reputable national or international NGOs, photos, videos, and forensic evidence, as well as the number of deaths and injuries over the course of the events. According to the information available to the Commissioner, six persons had thus lost their lives as a result of the events, including one police officer and a demonstrator shot to death by a police officer. While the number of injuries is a point of contention, the Turkish Medical Association stated on 15 July 2013 that 8 163 demonstrators in 13 provinces had sought medical attention in the context of the Gezi events, with 63 serious injuries (three of which were in critical condition), 106 cases of head trauma, 11 persons losing an eye, and one splenectomy"- Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to Turkey from 1 to 5 July 2013-.

Turkish Judiciaryand the abrupt changes that have shaken it after 2013.

The final aim of the report is answering the two following questions.

1) Can we evaluate the judiciary system of Turkey as corresponding to internationally protected standards of independence and impartiality?

2) Can we evaluate the judicial system of Turkey as ensuring full access to justice and effective judicial protection in case of human rights violations?

I have consistently divided the report in two parts:

- the first one is devoted to JUDICIAL INDEPENDENCE
- The second to ACCESS TO JUSTICE AND EFFECTIVE JUDICIAL PROTECTION.

Before entering the core of the report, a premise is needed about the period of the "judicial history" that I have considered.

My report starts from 2010, when Turkey adopted important constitutional reforms that reinforced the independence of the judiciary and the protection of fundamental rights of citizens. Those reforms aimed to align Turkish justice to the standard of European democracies and to the requirements of the European Convention of Human Rights[4]. They were adopted along the path for the accession of Turkey to the European Union[5].

The constitutional reforms represented the landing, at constitutional level, of waves of legal reforms, adopted by Turkey in the previous years, aimed at reinforcing the access to justice and the protection of fundamental rights. These waves positively continued in 2012 and 2013, when "the third and fourth package of judicial reform"were adopted.

Unexpectedly, 2013 signed an irreversible turning point for the protection human rights in Turkey and for the Turkish Judiciary.

In May 2013, the violent reaction by the police to the peaceful Gezi protest, that mobilised Turkish civil society at large, unveiled the authoritariannature of the Government.

Then, in December 2013, when some prosecutors, started to investigate in the secret rooms of the Government in a corruption scandal,the Executive decided, in few days, to shatter the independent High Judicial Council (HYSK) and to regain political control over the judiciary. December 2013 signs the start of the race to the bottom for the rule of law in Turkey.

Illegitimate forced transfer of judges and prosecutors but even detention of judges and prosecutors, who investigated in Government affairs[6], occurred much before

July 2016, when the state of emergency was declared; they continued also after July 2018, when the extraordinary long state of emergency was revoked.

4 Turkey is a member of the Council of Europe since 1949.

5 Turkey was officially recognised as a candidate for full membership to European Union on 12 December 1999, at the Helsinki summit of the European Council.

6 On 6 and 7 May 2015 former Adana Chief Public Prosecutor Süleyman Bağrıyanık, former Adana Deputy Chief Public Prosecutor Ahmet Karaca, Adana prosecutors Aziz Takçı and Özcan Şişman were detained based on orders issued by the Tarsus 2nd Heavy Criminal Court because they had been involved in a search of Syria-bound trucks which were found to belong to the National Intelligence Organisation (MİT),

The rapid decline of rule of law in Turkey is, therefore, not connected with the attempted coup d'état of 15 July 2016. On the contrary the attempted coup d'état was a "gift from God"[7], as the President Erdoğan declared shortly after the facts, an invaluable occasion for the Government to implement wide purges against an independent judiciary, political opponents, and critical voices.

This has also been confirmed by the following statement of the parliamentary assembly of the Council of Europe in the debate held on 25 April 2017: Considering the scale *of the operations undertaken, the Assembly is concerned that the state of emergency has been used not only to remove those involved in the coup from the State institutions, but also to silence any critical voices and create a climate of fear among ordinary citizens, academics, independent nongovernmental organisations (NGOs) and the media, jeopardising the foundations of a democratic society*[8].

PART I

Can we evaluate the judiciary system of Turkey as corresponding to internationally protected standards of independence and impartiality?

JUDICIAL INDEPENDENCE

To answer the question, the definition of the scope of judicial independence and impartiality, according to the international standards, is necessary.

Judicial independence is protected by the constitutions of European democracies, by the European Convention of Human Rights (art. 6),by the Charter of Fundamental Rights of European Union (art. 47)and by many international instruments regarding justice. Judicial independence isan essential component of the **right to an effective remedy** in situations where rights and freedoms are violated.

The **Turkish Constitution** protects it too in its article 9. It states that the judicial power is exercised by *"independent and impartial courts on behalf of the Turkish nation."* The independence of the Turkish courts is further guaranteed in article 138 of the Constitution, according to which:*Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law. No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions*.Article 139 establishes the security of tenure of judges and public prosecutors and stipulates that: *Judges and public prosecutors shall not be dismissed, or unless they request, shall not be retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or a post*[9].

The principles enshrined in the Turkish Constitution reflect the content of international standards on judicial independence, which provide that the independence of an individual judge requires an independent judiciary[10] and it precludes not only influence from outside but also from within the judiciary[11].

7 Erdogan says coup was 'gift from God' to reshape country, punish enemies – EURACTIV.com

8 Assembly debate on 25 April 2017 (12th Sitting) (see Doc. 14282 and addendum, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteurs: Ms Ingebjørg Godskesen and Ms Marianne Mikko). Text adopted by the Assembly on 25 April 2017 (12th Sitting).

9 According to the same article "exceptions can be provided by the law to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties because of ill health, or those determined as unsuitable to remain in the profession, are reserved".

10 Recommendation CM/Rec(2010)12of the Committee of Ministers of the Council of Europe, on Judges independence, efficiency and responsibilities (hereinafter referred as: CM/Rec(2010)12), para 4.

11 European Court of Human Rights (hereinafter also referred as ECtHR), judgment of 22.12.2009,

Judicial independence has therefore two main features: external and internal independence.

External independence protects judges from external political pressure. Judiciary must not be subject to any hierarchical constraint or subordinated to any other body. Independence is, therefore, guaranteed primarily vis-à-vis the other State's powers, especially the Executive[12].

Internal independence encompasses the independence of individual members of the judiciary and requires that judges designated to decide a case be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court or the Judicial Council. According to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe (chapter III), the principle of internal independence implies four different aspects:

a) In their decision-making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary.
b) Hierarchical judicial organisation should not undermine individual independence.
c) The allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge.
d) Judges should be free to form and join professional organisations whose objectives are to safeguard their independence, protect their interests and promote the rule of law.

The internal independence is linked to **impartiality**[13]. Judges should maintain equal distance from the parties to the proceedings and their respective interests with respect to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[14]. It also has two components. First, members of judicial bodies should be subjectively impartial, which means that they must not show any bias or personal prejudice in the case. Second, the judicial body must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect.[15].

Further many European democracies have incorporated a politically neutral **High Council for the Judiciary** into their legal systems -sometimes as an integral part of their Constitution -as an effective instrument to protect the autonomy and independence of the judiciary, the role of the judiciary in safeguarding fundamental freedoms and rights. It is generally assumed that the main purpose of the very existence of a High Council for the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions.The Turkish Constitution has incorporated a High Council for the Judiciary (HYSK) in its article 159.

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application no. 24810/06Parlov-Tkalcic vs. Croatia, para 86; Agrokompleks vs. Ukraine, judgment of 6 October 2011, No. 23465/03, para 137.

12 ECtHR, judgment of 24 November 1994, application no 15287/89,Beaumartin v. France, paragraph 38; CJEU, Grand Chamber, judgment of 24 June 2019, C.573/17,Popławski paragraph 96.

13 The ECtHR has long recognised that the concepts of independence and impartiality are closely related and may sometimes require joint examination (see, for example, ECtHR, Grand Chamber judgment of 6 November 2018,applications nos. 55391/13, 57728/13 and 74041/13, Ramos Nunes de Carvalho e Sá v. Portugal, paras 150 and 152).

14 See, for example, ECtHR, judgment of 9 January 2018, application no. 63246/10, Nicholas v. Cyprus, paragraph 49.

15 ECtHR, judgment of 25 September 2018, application no. 76639/11, Denisov v. Ukraine, paragraph 63.

In brief, as stated by the the European Court of Human Rights, in interpreting and applying the right to a fair hearing under ECHR article 6, "[i]n determining whether a body can be considered to be 'independent'—notably of the executive and of the parties to the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."[16]

My intent is to demonstrate, in the following chapters, that allprinciples mentioned above: external independence, internal independence in its four features(individual independence from internal and external pressure, individual independence from internal hierarchies, the natural judge, and free rights of association) of the judiciary, the appearance of impartiality of judges, and the autonomy and independence of the Judicial Council, have been progressively demolished in Turkey,starting from 2013 with a dramatic acceleration after July 2016. The aspects highlighted by the Court of Human Rights -independence of the judiciary of the Executive, the tenure of office, the manner of appointment of judges and the appearance of independence- are the most problematic in this context.

The provisions of the Turkish Constitutionabout judicial independence have not been sufficient to protect the judiciary from the arbitrary attack of the Government.

1. THE 2010 REFORMS THAT REINFORCED THE JUDICIAL INDEPENDENCE IN TURKEY

As anticipated above, the critical situation of rule of law in Turkey was determined in 2013 by an unexpected downturn that followedprevious promising reforms adopted by the Turkish Parliaments in the context of the negotiations for the accession of the Republic of Turkeyto the European Union. .

In March 2010, a constitutional reform package prepared by the Government was introduced in the Grand National Assembly and was confirmed by a referendum held on 12 September 2010. With a voter turnout of approximately 74%, the amendments were adopted by a margin of 58% yes to 42% no votes.

The core of the reform consisted in a series of amendments to Part Three of the Constitution[17]and was focussed on the judiciary, being directly relevant to the independence and impartiality of the judiciarythose amendments that changed the composition and extended the powers of the Constitutional Court and the High Council of Judges and Public Prosecutors[18].

1.1. THE INDIVIDUAL APPLICATION TO THE CONSTITUTIONAL COURT FOR THE PROTECTION OF HUMAN RIGHTS

In 2010, the powers of the Constitutional Court (hereinafter also referred as CC) [19]were extended considerably by the introduction of the individual application procedure for the protection of fundamental rights. Pursuant to Art. 148 (5) of the Constitution,

16 ECtHR, judgment of 28 June 1984, application no. 7819/77, *Campbell and Fell v. the United Kingdom*,para. 78.

17 Affecting Art. 144 – 149, 156 – 157, and 159.

18 See: Thomas Giegerich, *Report on Independence, Impartiality and Administration of the Judiciary in Turkey*, August, 1, 2011, pag. 8 Professor Dr (avrupa.info.tr)

19 The Turkish Constitutional Court was created by the 1961 Turkish Constitution that endowed it with the power to review the constitutionality of laws and decrees with the force of law. This system of constitutional review was preserved in the 1982 Constitution, with minor changes.

anyone who claims that any of their fundamental rights and freedoms guaranteed by both the Constitution and the European Convention on Human Rights has been violated by the public authorities can apply to the Constitutional Court, provided that he or she has exhausted all the ordinary legal remedies.The aim for the introduction of the new system was to guarantee the effective protection of fundamental rights by granting individuals a domestic effective remedy[20].

Alparslan Altan

This system of individual application started to be operational by 24 September 2012 and the remedy proved to be very effective during the first two years of its implementation.

Four clear cases show how, during those years, an independent Constitutional Courtprotected fundamental rights against the abuses of the State

1) Decisions of 4 July 2013 about detention on remand in terror related cases[21]
One of the main reasons for human rights violations in Turkey is the wide[22] and prolonged use of detention on remand[23] . The length of such detention has often been subject to the scrutiny of the ECtHR that repeatedly found a violation of Art. 5/4 of the Convention.[24]
In 2013, the CC annulled a legal provision contained in the Antiterror Law which allowed long pre-trial detention, up to 10 years. Although the CC found that 10 years in detention is disproportionate time, it gave the Parliament one-year time to amend this rule, according to Article 153 (3) of the Constitution. The CC made also clear that detention time cannot exceed five years, even if a person is

20 See: Needs Assessment Report on The Individual Application to the Constitutional Court of Turkey¸ coordinated by Luca Perilli in the context of a Council of Europe project 16806f2348 (coe.int);

21 CC, judgment of 4.7.2013, no. E:2012/100, K:2013/84.

22 According to a 2021 report of the Commissioner for Human rights of the Council of Europe (Thomas HAMMARBERG, Commissioner of Human rights of the Council of Europe, "Administration of justice and protection of human rights in Turkey", dated 10 January 2012, § 30), Turkish prosecutors and courts continue to rely very heavily on remands in custody to the detriment of existing non-custodial supervision measures. The Commissioner pointed at the proportion of persons remanded in custody in percentage of the total prison population, which was 43% as of April 2011, as a telling sign of the extent of the problem. Furthermore, the Commissioner for Human rights of the Council of Europe reported that in several cases domestic courts had failed to take into account alternative, noncustodial restrictions on personal freedom (See also ECtHR, judgment of 24 July 2007,application no, 47043/99,Mehmet Yavuz v. Turkey,§ 40), such as bans on leaving the country, release on bail or judicial controls, despite the fact that such measures are provided for in the criminal procedural code (Thomas HAMMARBERG report § 37.).

23 The term "detention on remand" is intended to relate to the time spent in detention by the suspect from the police arrest until the first instance conviction and to the further period spent in detention during first instance retrial, when the first instance decision is quashed by the Court of Cassation.

24 ECtHR, judgment of 11 October 2011, application no. 43654/05, Kalaylı v. Turkey, para. 21.

tried for more than one criminal offence in a single case[25].

2) The *Balbay* ruling[26]
The applicant had been detained for 4 years and 5 months on terrorism related accusations. However, the CC indicated in its decision that the applicant may have been subject to legal control mechanisms as a result of the amendment of the Criminal Procedure Code by virtue of the Law no. 6352 which entered into force on 5 July 2012. The CC also tookinto account the applicant's status as an MP since he was elected as an MP on 2 June 2011, having been detained since 6 March 2009.
Accordingly, the CC found that the legal control mechanisms were not duly taken into account by the trial court which eventually violated the principle of proportionality (paragraph 118 of decision) with regard to the applicant's right to freedom in conjunction with the applicant's right to carry out political activities as an MP.
After this decision, Mr. Balbay was released.

3) The Twitterban
The Twitter case is paradigmatic. It originates in the Turkish government's decision to block access to the social networking and micro blogging service Twitter. After Ankara's 15th administrative court had issued a stay of execution ruling on March 26, the TİB - Turkey's telecoms authority- should implement the administrative court's ruling within the following 30 days. The Minister of Justice reportedly said that he expected to read the ruling, to establish whether "implementing the court orders is contrary to the Constitution"[27]. In the aftermaths of the administrative court's stay of execution ruling, the CC ordered the Turkish authorities on April 2,2014 to lift the ban on Twitter[28]. The Prime Minister harshly slammed the decision and said publicly that the government would not oppose to it but that he personally did not "respect it". He furthermore criticised the CC for having handled the case with urgency whereas "a number of cases are pending" and for having decided although all legal remedies had not been exhausted yet.[29]

4) The Can Dündar and Erdem Gül case.

In May 29, 2015 the journalists Can Dündar and Erdem Gül published an article in Cumhuriyet titled "Here are the weapons Erdoğan claims to not exist", alleging that Turkey's National Intelligence Organization (MIT- Millî İstihbarat Teşkilâtı) had been delivering arms to rebels inSyria. Cumhuriyet also published a video and photos supporting the claim in June 2015. Following this, President Erdoğan publicly stated that they would 'not get away with it' and in November 26, 2015, the journalists were arrested and held in pretrial detention on charges

25 In a number of individual cases (amongst others, see CC, First Section, no. 2012/239, k.t. 2.7.2013, para. 54), the Court has stated that if the detention time, pending trial, is separately assessed for every single criminal charge, the total detention period becomes unforeseeable for the accused. Thus, it is also a violation of the principle of proportionality. The principle of proportionality can be infringed, according to the CC ruling, also if total pre-trial detention time does not exceed five years. As to latter category of cases, the CC leaves a certain margin appreciation to the first instance courts (B. No: 2012/239, para. 49). However, the Court also stated that if the first instance court decides to extend detention period, the reasons for the extension must be relevant and sufficient with reference to the concrete conditions of the case (B. No: 2012/1137, 2/7/2013, para. 63). When the Court uses stereotype reasons for extension, these criteria are not met (No. 2012/1158, 21.11.2103, para. 56.)

26 CC, decision of 4 December 2013, no. 2012/1272, Mustafa Ali Balbay. In its decision the CC referred to Article 19 par.7 (corresponding to Article 5 par. 3 of the European Convention) and Article 67 (partly corresponding to Article 3 of Protocol no.1 of the European Convention) of the Turkish Constitution.

27 http://www.hurriyetdailynews.com/ankara-court-grants-stay-of-execution-for-governments-twitterban.aspx?pag.ID=238&nID=64121&NewsCatID=339

28 CC, decision of April 2, 2014, no. 2014/3986, Yaman Akdeniz et al.

29 http://www.hurriyetdailynews.com/constitutional-court-ruled-to-unblock-twitter-before-elections-chief-judgereveals.aspx?pag.ID=238&nid=64639

of espionage (Article 337 Turkish Penal Code), divulging state secrets (Article 329 Turkish Penal Code) and membership of a terrorist organization. Dündar, before testifying to prosecutors, said: "We are not traitors, spies or heroes: we are journalists".

The defendants applied to the constitutional court demanding to be released on the grounds that their pretrial arrest was unconstitutional and that their lawyers had been unable to examine their files. They cited the 2014 European Court of Human Rights decision of Ahmet Şık and Nedim Şener v. Turkey[30], in which the Court found that Turkey had violated the right to freedom of expression and the right to a free trial.

Dündar and Gül were held in Turkey's Silivri prison for 92 days until the Constitutional Court ruled in their favour, recognizing that their right to personal liberty and security together with their right to freedom of expression were infringed under Articles No. 19 (the right to personal liberty and security), 26 (the right to express and disseminate one's thoughts and opinions) and 28 (freedom of the press) of the Turkish Constitution. Consequently, they were released on February 26, 2016, although the Turkish President of the Republic stated that he would neither recognize nor obey the Constitutional Court's ruling. He said that, "the prosecutor may object the decision and an upper court may start a new process". He further noted that Turkey is ready to pay compensation if an upper court's decision – detaining the two journalists again – would be appealed before the Strasbourg Court. "The State can object to the European Court of Human Rights if it gives a decision supporting the Constitutional Court or it can pay the compensation", he said[31].

In December 2020, Can Dündarwas convicted in absentia by a Turkish criminal court to 18 years and nine months in jail.

FairCC decisions, though contested and slammed by the President, who already showed great intolerance versus the judicial control, proved to be still effective, because they were finallyimplemented by Turkish Authorities. In those years (2013-2015) the rule of law still prevailed in Turkey and the freedom of liberty of individuals and MPs and the freedom of expression were still protected by the Turkish courts.

However, the resilience of the Constitutional Court prepared the reaction of the Executive. On 16 July 2016, the day after the attempted coup d'état, the Government action targeted immediately the Supreme Constitutionalbody, with the arrest of two its members, Arparslan Altan and Erdal Tercan, which has been lately evaluated illegal by the Court of Human rights in Strasbourg.Detention of Kurdish MP's, hundreds of journalists andthousands of judges was the next step.

1.2 AN INDEPENDENT HIGH COUNCIL OF JUDGES AND PROSECUTORS (HSYK)

The High Council of Judges and Public Prosecutors plays a crucial role in the promotion and transfer to other locations and disciplinary proceedings against judges and public prosecutors, including their removal from office and in the appointment and removal of Presidents of courts and Chief prosecutors.

According to Art. 159 of the Constitution, as amended by the 2010 constitutional reform

30 ECtHR, decision of 8 July 2014, applications no. 53413/11 and no. 38270/11, Nedim Şener v. Turkey, andŞık. v. Turkey.

31 Global Freedom of Expression | *The Case of Can Dündar and Erdem Gül - Global Freedom of Expression (columbia.edu)*

package, the new High Council had 22 (instead of seven) regular and twelve (instead of five) substitute members. Due to the enlargement, the High Council became much more pluralistic and representative of the Turkish judiciary. The previous dominance of the Court of Cassation and the Council of State was eliminated, although they still sent five regular members (three coming from the Court of Cassation, two from the Council of State). This eased the hierarchical structure of the Turkish judiciary andprotected judicial independence against threats from within the judiciary. A very positive development was that judges and public prosecutors of the lower courts, including the administrative courts, were for the first time represented in the body that has the power to decide about their professional life: seven regular and four substitute members of the Council were first category (i.e. experienced) judges or public prosecutors from the ordinary courts, three regular and two substitute members were first category administrative judges or public prosecutors from the administrative judiciary. Together, they made up the largest group in the High Council[32].

Another very positive progress were the new rules on selection and appointment of Council's members because the selection of the sixteen regular and the twelve substitute judicial members of the High Council was entirely left to judicial organs without any interference from the executive or legislative branch of government. The appointment of regular and substitute members coming from the Court of Cassation and the Council was completely entrusted to the general assemblies of the high courts.

The elections of the members of the Council, according the new ruled, took place in 2010.

2. DECEMBER2013 ARRESTS SHAKE THE GOVERNMENT

THE START OF THE RAPID DECLINE TO THE BOTTOM

An independent and independently elected Judicial Council had the effect to reinforce the sense of individual independence of individual judges and prosecutors, who started to have their career protected by a self-governing body.

This was evident in decisions of first instance judges who started to "resist" to Yargitai (the Court of cassation) when their decisions were quashed and sent back. This attitude of judges to act independently put into question not only the hierarchy in the judiciarybut also the concept, guarded by Yargitay, that judges should protect the interest of the State vis a vis citizens' rights.

The awareness of self- independence finally induced the prosecutors to conduct their investigations in the heart of the State,in an attempt to unveil the corruption in the Government.

In the first days of December 2013, Turkish police arrested the sons of three cabinet ministers and at least 34 others. The detentions went to the core of the Erdoğan administration and included leading businessmen known to be close to the government and officials said to be engaged in suspected corruption, bribery and tender-rigging. The sons of the interior minister, the economics minister and the environment and city planning minister were among those detained. Other detainees included the head

32 *Thomas Giegerich, Report on Independence, Impartiality and Administration of the Judiciary, cit., pag. 21.Professor Dr (avrupa.info.tr)*

of the state controlled Halkbank, the mayor of an Istanbul district considered to be a stronghold of the ruling AK party as well as the three construction sector tycoons, Ali Agaoglu, Osman Agca and Emrullah Turanli. Agaoglu had recently made headlines with controversial mega-projects and works for the notoriously opaque state housing agency (Toki)[33].

The reaction of the Executive was violent and, since then,for the rule of law it was a quick decent to the bottom.

1.1 THE GOVERNMENT REACTION. THE INDEPENDENCE OF THE JUDICIAL COUNCIL CURTAILED

December 2013 investigations against cabinet members and/or their close relative for suspicion of corruption were conducted by special prosecution offices of special heavy criminal courts[34]. Special courts[35]had tried all high profile and controversial cases of recent years, such as Sledgehammer[36], Ergenekon[37], Oda TV, KCK.

Under Turkish criminal procedural law prosecutors are obliged to investigate in a neutral manner, collecting evidence for and against potential suspects.

The first reaction by the Government to those proceedings was an amendment of 26 December 2013 to the by-law on the Judicial Police, which required police investigators assisting prosecutors in the investigations to report those investigations to their police superiors first, instead of to prosecutors.

The HSYK thereupon issued a public statement in which it qualified such a reporting requirement as an interference in the independence of prosecution.

In February 2014 an Omnibus Law (Law n° 6526 amending the anti-terror law, the criminal procedure code and various laws) abolished the special courts set up under the umbrella of art. 10 of the anti-terror Law, the liberty judges and the special prosecutors, without further prorogations of their operations. These changes occurred while investigations and trials on high profile cases were going on[38].

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33 The Guardian, 17 Dec 2013, Turkish ministers' sons arrested in corruption and bribery investigation.

34 The special courts were established by articles 250, 251 and 252 of the Turkish Criminal Procedural Code of 2005, as specially authorized heavy criminal courts equipped with special powers. Specially authorized prosecutors were attached to the special courts. The specially authorized heavy criminal courts were subsequently abolished by the so-called third judicial reform package of 2 July 2012. Instead, special heavy criminal courts were set up under art. 10 of the anti-terror Law (, together with special prosecutor offices and liberty judges, tasked to deal with the so called "protective measures" (pre-trial detention orders, searches, interception of communications, undercover agents, seizures). The art. "250" courts had been authorized, by transitional provisions, to complete pending trials.

35 Special courts have been at the centre of controversy since their establishment. Criticism has focused on the wide interpretation of their special powers, imposition of a strict pre-trial detention regime, limitations on the rights of the defence, excessively long indictments, the role of the police in launching investigations and handling arrest decisions, the slow pace of judicial proceedings linked to the very large number of individuals tried by the courts. See: Luca Perilli, report on the findings and recommendations of the Peer Review Mission on criminal justice (Istanbul and Ankara, 19-23 May 2014), pag. 3. TABLE OF CONTENTS (avrupa.info.tr)

36 In Sledgehammer case, a first instance court on 21 September 2012 sentenced a total of 323 (out of 365) suspects, being retired and active duty military personnel including three former army commanders -250 of whom were under arrest-, to 13-20 years on charges of attempting to remove or prevent the functioning of the government trough force and violence. The court handed down mass verdicts (information extracted from the EC 2012 Progress Report about Turkey).

37 Ergenekon case refers to a landmark trial of the 1990 and the following 1997 postmodern coup perpetrators. The armed forces former chief of general staff was arrested in January 2012 on charges of attempting to overthrow the government and membership of a terrorist organization. Thetrial began in April 2012. In 2013, the number of defendants was 279 of whom 65 were under arrest. On Monday 5 august 2013 an Istanbul court sentenced the former chief of general staff to aggravated life imprisonment without parole and handed down harsh sentences to nearly 250 defendants including many military force commanders accused of plotting to topple the Government. 21 Defendants were acquitted. Four retired generals, one retired colonel, one journalist, one lawyer and one workers' party leader were sentenced to aggravated life imprisonment.

38 See: Luca Perilli, Report on the findings and recommendations of the Peer Review Mission on criminal justice, cit. pag. 3.

On 26 of February 2014 the Parliament adopted Law No 6524 that dramatically increased the control of the Government over the HSYK. Many provisions of this law were subsequently struck down by the Constitutional Court (decision of 10 April 2014).

On 6 of March 2014, the Law n° 6526, that abolished special courts and special prosecutors, entered into force.

Following the abolition of special courts and prosecution offices, special judges and prosecutors were relocated by HSYK to other tasks in only 15 days. The number and location of the new courts, their territorial jurisdiction and judges and prosecutors assigned to the new courts were decided by the HSYK in only 6 days since the entering into force of the law. The Proposal of the Ministry of Justice dated 09/07/2012 concerning the determination of number and location of the new courts was discussed and voted on the same day by the general assembly of the HSYK, which decided to establish 13 high criminal courts in 11 places. The First Chamber of the HSYK, in charge with the appointment and transfer of judges and prosecutors, by decision no 1888 dated 10.07.2012, appointed unanimously: - 65 judges, including 13 presidents of courts, 26 members of courts and 26 liberty judges; - 80 prosecutors, including 11 deputy prosecutors and 69 prosecutors. Only a small number of the judges and prosecutors of the former special courts had been appointed to the new ones[39].

The appointment of judges and prosecutors did not follow a public call for applications; judges and prosecutors were not consulted prior their appointment; the reasons for their appointment were neither made public nor communicated to them. The HSYK decision about the appointment was not reasoned.

In the prosecution offices, the pending files, previously assigned to special prosecutors, were redistributed by the Chief Prosecutor and his deputies. The Chief prosecutors of the most important prosecution offices (Ankara, Istanbul, Izmir) were transferred by HSYK to different locations before and after the abolishment of special courts.

In major cases, such as Ergenekon, Sledgehammer and KCK, prosecutors in charge with the investigations were withdrawn from the case by the chief prosecutor and assigned to other tasks, and judges in on-going cases were subject to disciplinary investigation[40] and transferred by HSYK to other duties before the formal adoption of a disciplinary sanction or were transferred to other duties even without being subject to any prior disciplinary investigation and, thus, without being given the possibility to defend themselves[41].

It goes without saying that the above process jarringly conflicted with the relevant standards about judicial independence. The HSYK practice to decide, pending investigations and trials, the mandatory and "express" relocation of judges and prosecutors is contrary to principle 52 of Recommendation CM/Rec(2010)12 of the Council of Europe, according to which a judge should not (..) be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions. But also the "express" appointment of judges and prosecutors to newly set up courts violated the same REC (2010)12, according to which decisions concerning the appointment of

39 Out of 145 judges and prosecutors appointed to the new regional serious crime courts, 41 were selected among judges and prosecutors already working at the suppressed SAC. In more details: 3 out of 11 chief prosecutors; 29 out of 69 prosecutors; 1 out of 13 presidents of courts and 8 out of 52 judges came from previous specialized courts and prosecution offices.

40 Judge Zafer Baskurt, president of the 10th Istanbul court of assize, judge Erkan Canak and judge KoksalSengun, involved in the Ergenekon case, were subject to disciplinary sanctions and "authorised to other duties" by HSYK. The Deputy Chief Prosecutor Turan Colakkadi and prosecutors Bilal Bayraktar and Mehmet Berk were removed from the case by former Chief Prosecutor Aykut Cengiz Engin, after issuing a motion for an arrest warrant of 95 military personnel. In the KCK case the prosecutor SadrettinSarikaya, who was investigating in the MIT (National Intelligence Organisation), was removed from the case by the chief prosecutors. e

41 Judge Yilmaz Alp was transferred against his will by the HSYK from one Istanbul court of assizes to an ordinary court, without being subject to any prior disciplinary investigation and, thus, without being given the possibility to defend himself.

judges should be based on objective criteria pre-established by law or by the competent authorities, and on merit[42], having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity[43]. Not to say that the procedure to evaluate and weigh the qualifications, skills and capacity of the judges and prosecutors, would imply sufficient time and the possibility for candidates to participate in.

The Government intervention struck down the external independence of the Judicial Council - heavily interfering in its procedures trough Law No 6524- and internal independence of judges, who were not protected from improper influence and pressure by the same Judicial Council and by the intervention of the Head of offices who reallocated the cases according to new instructions. Therefore, also, the principle of natural judges stayed severely affected.

2.2. LARGE SCALE TRANSFERS OF JUDGES AND PROSECUTORS WITHOUT THEIR CONSENT

Under the Government pressure, between 2014 and 2016, the Council of Judges and Prosecutors continued to engage in large-scale transfers of judges and prosecutors without their consent.

Accredited sources of information report significant cases of forced transfers such us in the cases of Murat Aydın, a judge in Karşıyaka and Vice-President of the Judges and Prosecutors' Association (YARSAV)[44]; the Chief Judge of the Istanbul Regional Appeal Court, Sadık Özhan, who was reassigned after his decision to reverse the CHP

Deputy Enis Berberoglu's conviction[45]; judges İbrahim Lorasdağı, Barış Cömert and Necla Yeşilyurt Gülbiçim from the Istanbul Court who released twenty-one detained journalists after eight months of pre-trial detentionand were suspended by HYSK [46]; judges of the Istanbul 37th Heavy Penal Court who were removed by the Council after the Court released seventeen detained lawyers[47]; Ankara 20th Regional Appeal Court that was dismantled a day after the Court acquitted a military officer of coup attempt charges, when four Judges of the Court were unseated and subjected to disciplinary investigation. President Erdoğan called the judges terrorists[48].

42 According to the Opinion n. 10 of the Consultative Council of European Judges in the process of appointment of judges by judicial councils, there must be total transparency in the conditions for the selection of candidates, so that judges and

43 § 44 of the REC (2010)12.

44 He was reassigned and exiled to Trabzon, after he applied to the Constitutional Court for the annulment of the criminal provision providing the crime of "insulting the president. Stockholm Center for Freedom. Descent into Arbitrariness. The End of the Rule of Law. https://stockholmcf.org/wp-content/uploads/2017/04/Turkey%E2%80%99s-Descent-Into-Arbitrari-

45 Cumhuriyet. Kemal Kilicdaroglu ve EnisBerberoglu'nundavalarinabakanhakimlergeceyarisigorevdenalindi. http://www.cumhuriyet.com.tr/haber/siyaset/895122/Kemal_Kilicdaroglu_ve_Enis_Berberoglu_nun_davalarina_bakan_hakimler_gece_yarisi_gorevden_alindi.html

46 https://www.turkishminute.com/2017/04/03/govt-suspends-judges-released-journalists/

47 https://odatv.com/turkiyenin-konustugu-karari-veren-hakimler-suruldu-mu-20091802.html

48 https://ipa.news/2020/01/19/general-re-arrested-as-erdogan-fumes-at-judges-for-freeing-him/

In year 2014[49],according to The Arrested Lawyers Initiative[50], hundreds of judges and prosecutors have been reassigned because of their decisions "which somehow displeased to the Government".

A similar trend has been reported in 2015[51].

As highlighted by the ICJ in a report of June 2016[52], transfers of judges between judicial positions in different regions of Turkey were being applied as a hidden form of disciplinary sanction and as a means to marginalize judges and prosecutors seen as unsupportive of government interests or objectives.

2.3 PRESSURE ON JUDGE AND PROSECUTORS CLIMBS. AFTER THE RELOCATION, THE ARREST

On 30 May 2015, İstanbul's 29th Court of First Instance Judge Metin Özçelik and Judge Mustafa Başer from the İstanbul 32nd Court of First Instance were referred to the Bakırköy 2nd High Criminal Court for arrest, accused of "being a member of a terrorist organisation", the judges had previously authorised the release of journalist Hidayet

49 The Arrested Lawyers Initiative (The Judiciary in Turkey: inefficient and under political control) reports that: Judges HülyaTıraş, SeyhanAksar, Hasan Çavaç, BahadırÇoşlu, Yavuz Kökten, OrhanYalmancı, Deniz Gül, Faruk Kırmacı, were the first Criminal Peace judges to be appointed to the Ankara Courthouse by the a HSYK decree of 16 July, 2014. In just a year, between 16 July 2014 and the 28 July 2017, seven of the eight Criminal Peace judges were all dismissed. Firstly, Judges Yavuz Kökten and SüleymanKöksaldı were removed from office because of their decisions to acquit some police officers. Judge OrhanYalmancı was dismissed from bench because of his refusal, on 1 March 2015, to arrest certain police officers. Hasan Çavaç, who dismissed an indictment against judge OrhanYalmancı's and SeyhanAksar, who had released the judge, were also dismissed on the 9 March 2015. The Judge of the 8th Criminal Court of Peace, HülyaTıraş who released 110 officers who had been detained for 110 days, was relieved of her duty two weeks after her decision. Judges YaşarSezikli and Ramazan Kanmaz were dismissed for the same reasons on the 23 July 2015. Judge Osman Doğan, who did not arrest 18 officers who were detained for alleged illegal wiretapping investigation, was also relieved of his duty.

50 The Arrested Lawyers Initiative is a rights group that consists of lawyers making advocacy to ensure lawyers and human rights defenders perform their duty without fear of intimidation, reprisal and judicial harassment. The Arrested Lawyers Initiative is the member of the International Observatory for Lawyers. https://arrestedlawyers.org/

51 The Arrested Lawyers Initiative (The Judiciary in Turkey: inefficient and under political control) reports that: Kemal Karanfil, the former Criminal Justice of the Peace of Eskişehir, who questioned independence and impartiality of Criminal Peace Judgeships raised the issue before the Turkish Constitutional Court for consideration, was moved to a court in Zonguldak on 15 January, 2015, only 6 months after he took office in Eskişehir.
The 7th Assize Court Judges, İsmail Bulun and NumanKılınç, who had dismissed a case about the wiretapping of the Prime Minister's office were removed from their posts shortly after their decision on 25th July 2015 by the HSYK.
NilgünGüldalı, a judge in the Bakırköy 2nd Assize Court, who decided the release of the arrested judges, Mustafa Başer and MetinÖzçelik, on 24 July 2015, was appointed to a Labour Court only a day later, by an HSYK resolution.
The 4th Administrative Court Chief Judge, Cihangir Cengiz, who granted a motion for a stay of execution regarding the TIB's (Turkey's Presidency of Telecommunication and Communication) decision to ban access to YouTube, was transferred to Konya Administrative Court before the end of his tenure.
The Chief of the 4th Istanbul Administrative Court and two of its members were transferred to other cities for holding a motion for the stay of an execution, which concerned the environmental impact assessment report for Istanbul's Third Airport, and the demolition of the 16/9 towers that spoil the Istanbul skyline.
The Chief Judge of the Istanbul 10th Administrative Court, Rabia Başer, and an associate judge, Ali Kurt, who repealed the Gezi Park &Taksim Square Projects, were moved to different courts and different cities after their decisions, and before the end of their tenure.
The Chief of the 4th Istanbul Administrative Court and two of its members were transferred to other cities for holding a motion for the stay of an execution, which concerned the environmental impact assessment report for Istanbul's Third Airport, and the demolition of the 16/9 towers that spoil the Istanbul skyline.
Shortly before the general elections that were held on the 1st November 2015, certain TV channels were arbitrarily removed from Digiturk, a digital TV platform. The Judge of the 1st Consumer Court of Mersin Province, Mustafa Çolaker, who upheld the claim of channels STV and Bugün TV against the Digiturk platform, was transferred to the Çorum Province, and was subject to a disciplinary procedure.
The Court of Cassation prosecutor, Mazlum Bozkurt, who upheld the first instance criminal of Colonel HüseyinKurtoğlu and five other military officers, was suspended by the HSYK on 1 December 2015.

52 ICJ, Turkey: the Judicial System in Peril, 2 June 2016, available at https://www.icj.org/turkey-icj-raises-concernsat-threats-to-the-independence-of-judges-prosecutors-and-lawyers/

Karaca and 63 police officials who had been under arrest for four and a half months. On 27 April the Judges had been suspended from the profession by the HYSK[53].

In 2015, the following case attracted particular attention by the press and public opinion. On 6 and 7 May 2015 former Adana Chief Public Prosecutor Süleyman Bağrıyanık, former Adana Deputy Chief Public Prosecutor Ahmet Karaca, Adana prosecutors Aziz Takçı and Özcan Şişman and former Adana provincial gendarmerie commander Col. ÖzkanÇokay were detained based on orders issued by the Tarsus 2nd Heavy Criminal Court. According to press[54] reports they faced charges of "attempting to topple or incapacitate the Turkish government through the use of force or coercion and obtaining and exposing information regarding the security and political activities of the state". The four prosecutors and a former gendarmerie commander had been involved in a search of Syria-bound trucks in January 2014. The trucks, which were found to belong to the National Intelligence Organisation (MİT), were stopped by gendarmes in two incidents in the southern provinces of Hatay and Adana after prosecutors received information that the vehicles were illegally carrying arms to Syria. What was discovered in the vehicles was not made available to the press, but MİT later said the trucks were carrying humanitarian aid to war-stricken Syrians. The prosecutors were earlier suspended from duty and transferred to other positions by the HSYK after the January 2014 search.The journalists Can Dündar and Erdem Gül who published, on May 29, 2015, an article in Cumhuriyet titled "Here are the weapons Erdoğan claims to not exist", were subsequently arrested in November 2015 they, as above reported.

Arrest and detention of judges and prosecutors, who adopted decisions or performed investigations disliked by the Government, happened much before the attempted coup d'état; the charge was the same, before and after July 2016, "being a member of a terrorist organisation".

In this context, the coup d'état was a timely pretext for a lethal attack to the rule of law.

3. THE RESOLUTION 2021 (2016) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

Following the rapid deterioration of rule of law in Turkey, on 22 June 2016, the Parliamentary Assembly of the Council of Europe adopted the Resolution 2121 (2016) on the functioning of democratic institutions in Turkey[55], according to which the developments pertaining to freedom of the media and of expression, erosion of the rule of law and the alleged human rights violations in relation to the anti-terrorism security operations in south-east Turkey constituted a threat to the functioning of democratic institutions and the country's commitment to its obligations to the Council of Europe.

4. THE STATE OF EMERGENCY. PURGES OF JUDGES AND PROSECUTORS

Only a month later, the disruption of the rule of law became full reality.

Following the 15 July 2016 attempted coup d'état, the state of emergency was declared on 20 July 2016 by the President.

Under the state of emergency, the Parliament's key function as legislative power was curtailed, as the government resorted to emergency decrees with 'the force of law',also to regulate issues which should have been processed under the ordinary legislative

53 Stockholm Center for Freedom, Judges Özçelik and Başer sentenced with 10 years of prison over alleged Gülen links - Stockholm Center for Freedom (stockholmcf.org)

54 Stockholm Center for Freedom, Prosecutor who stopped MİT trucks in 2014 detained over coup involvement - Stockholm Center for Freedom (stockholmcf.org)

55 96 votes in favour, 20 against.

procedure.[56]

During the state of emergency, fundamental rights were radically curtailed including freedom of expression, freedom of assembly, and defence rights, such as the right to a fair trial and the right to an effective remedy, expanding police powers[57].

Emergency decrees also amended key pieces of legislation which would have continued to have an effect when the state of emergency was lifted[58].

The decrees have not been open to judicial review.

As highlighted by the parliamentary assembly of the Council of Europe, during the state of the emergency, the protection of fundamental freedoms and the functioning of the democratic institutions have been severely affected with disproportionate and long-lasting effects[59]

Since the introduction of the state of emergency[60], over 150 000 people have been taken into custody. This included a large number of critical voices. Over 78 000 people have been arrested based on terror-related charges. Relatives of suspects were directly or indirectly targeted by a series of measures, including dismissal from public administration and confiscation or cancellation of passports[61].

By 12 December 2016,the Monitoring Committee of the Council of Europe (set up in the context of the Post Monitoring Dialogue with Turkey), reported the following facts and figures about the price paid, in the aftermath of the failed coup, by the judiciary.

56 EC, commission staff working document, Turkey 2018 Report, 17.04.2018, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 (hereinafter referred as: EC 2018 report).

57 EC 2018 report.

58 EC 2018 report.

59 Assembly debate on 25 April 2017 (12th Sitting) (see Doc. 14282 and addendum, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteurs: Ms Ingebjørg Godskesen and Ms Marianne Mikko). Text adopted by the Assembly on 25 April 2017 (12th Sitting). Paragraph 37 (…) In the wake of the failed coup, which revealed serious dysfunctions within Turkey's democratic institutions, the Assembly believes that the post-coup developments, including the implementation of the state of emergency, have had large-scale, disproportionate and long-lasting effects on the protection of fundamental freedoms, the functioning of democratic institutions and on all sectors of society. It notes that the disproportionate measures taken (150 000 civil servants, military officers, judges, teachers and academics dismissed; 100 000 individuals prosecuted and 40 000 of them detained), the prevailing legal uncertainty despite recent steps taken by the authorities, and the consequences of the emergency decree laws on individuals and their families have created a climate of suspicion and fear which is detrimental to social cohesion and stability.

60 The state of emergency declared after the attempted coup of 15 July 2016 has been extended seven times, each time for a three-month period, until July 2018.

61 EC 2018 report, pag. 8.

4. On 16 July 2016, the High Council of Judges and Prosecutors (HSYK) held an extraordinary meeting and decided to lay off 2745 judges and remove 5 members of the HYSK allegedly linked to the Gülen Movement. Arrest warrants were issued for 140 members of Supreme Court of Appeal as well as 40 Members of the State Council. By July 2016, 7 543 people were detained for their alleged participation in the coup, including 100 police officers, 6 038 soldiers of different ranks, 755 judges and prosecutors and 650 civilians.

5. Two members of the Constitutional Court, Arparslan Altan and Erdal Tercan were taken in custody on 16 July 2016. On 4 August, the Constitutional Court decided to dismiss them form the profession following the decree-law of 23 July 2016.

10. In the framework of the state of emergency, several "Decrees with Force of Law" were published, which notably regulated:

10.1 The dismissal of (...) "members of judiciary" (..) whose names appeared in the lists appended to the decree-laws, or those who were considered to be a member of, affiliated with or have cohesion or connection with "terrorist organisation" (....). Those dismissed from office shall not be employed again. They shall not, directly or indirectly, be assigned in public service. Their gun licenses were revoked and their passport cancelled.

10.4 The dissolution of the Association of judges and prosecutors (YARSAV, a member of the International Association of Judges) – and later the arrest of its board members, as its President Murat Arslan on 26 October 2016.

11. On 23 September 2016, the CHP decided to challenge some Articles of Decrees 668 and 669 before the Constitutional Court. On 12 October 2016, the Constitutional Court declined to review the constitutionality of these decree-laws do to "lack of jurisdiction".

12. At the same time, 45000 applications were sent to the Constitutional Court.

13. There were allegations of ill treatment and torture during detention evoked by the CHO, the Human Rights Association of Turkey and Amnesty International. The CHP collected 37 000 complaints about unfair treatment.

Figures and timing speak by themselves being here impossible to report thousands of names of people, whose lives and families were destroyed by the action of the Government.

Based on one of the emergency decrees, the Supreme Court (with respect to its own members) and the HSYK (for all lower court judges and prosecutors) were given competences to dismiss "suspect" judges and prosecutors[62].

The fact that the Council, the exact day following the attempted coup d'état, approved a list of proscription of 2745 judges and prosecutors is the evidence that the purge had been prepared much in advance. The mere compilation of such list would have taken some days. It is reported that the list also included people who had died before the 15th of July.

The purges clearly targeted the independent voices in the Judicial Council and the Constitutional Court.

The dismissals and prosecutions included two (2) members of the Constitutional Court, five (5) present and ten (8) previous members of the High Council as well as sixteen (16)

62 Report dated 17th July 2017 of the Platform for an Independent Turkish Judiciary, that assembles the four most representative associations of judges in Europe (AEAJ, EAJ, J4J and Medel) about the situation of the Turkish Judiciary Situation-of-Turkish-Judiciary-Platform-Report.pdf (medelnet.eu)

election candidates to the High Council.

All the sixteen (16) candidates[63] from the so-called "independent group", as opposed to the government supported YBP group (Platform of Judicial Unity) in the October 2014 elections to the High Judicial Council, were dismissed and arrestedwith conditions of solitary confinement. It is also striking that eight (8) former members[64] of the previous High Council of 2010-2014, who received the most of votes in 2010 elections, were dismissed and put in solitary confinement. In sum, the Judicial Council members who received the support of more than % 60 of their peers from the general jurisdiction and % 70 from the administrative jurisdiction in the October 2010elections were dismissed and put under arrest. This action was clearly aimed at silencing the voices of those who, within and outside the Council, could speak in favour of the colleagues persecuted. It was further clearly aimed at submitting the Council to the total control by the Government.

When the Turkish Constitutional Court decided on 4th August 2016 on the dismissal of judges Arparslan Altan and Erdal Tercan, the judgment did not refer to any evidence against the two judges concerned. The reasoning shows that it sufficed for the majority of the Constitutional Court members to be subjectively persuaded that a link between a member of the Constitutional Court and the Gülenist network existed. This persuasion might be the consequence of fear.

The purges hit symbolically the Constitutional Court first, because, as said above,it was the Constitutional Court to act, in years 2013-2015, asa shelter for the protection of human rights against the State's arrogance.

TheGovernment formal justification of the purges was targeting alleged members of the Gülen movement, a former ally of the ruling party operating legally until 2014, lately labelled as the "Fethullahist Terrorist Organisation"/"Parallel State Structure" and considered a terrorist organisation.

A set of unofficial criteria were relied upon to determine alleged links to the Gülen movement, including the attendance of a child at a school affiliated with the organisation, the deposit of money in a bank affiliated with the organisation or the possession of the mobile messaging application ByLock. In September 2017, the Court of Cassation held that the possession of ByLock constitutes sufficient evidence for establishing membership of the Gülen movement[65].

The extraordinary situation of violation of the independence of the judiciary in Turkey has induced all four European Associations of Judges[66] to join together in their activities and form a Platform for an Independent Judiciary in Turkey. Since its creation, the Platform has been working together to promote the independence of the Judiciary in Turkey and the right to freedom and a fair trial to all the Judges and

63 İlker ÇETİN (5312 votes), Orhan GÖDEL (5202), Levent ÜNSAL (5143), Yeşim SAYILDI (5009), İdris BERBER (5003), Yaşar AKYILDIZ (4943), Ayşe Neşe GÜL (4816), Mehmet KAYA (4864), Teoman GÖKÇE (4797), Nesibe ÖZER (4545), Hasan ÜNAL (4495), Ahmet BERBEROĞLU (735), Mahmut ŞEN (713), Sadettin KOCABAŞ (692), Ali BİLEN (651), Egemen DEVRİM DURMUŞ (626).

64 İbrahim OKUR (6401), Teoman GÖKÇE (6084), Nesibe ÖZER (5842), Ömer KÖROĞLU (5833), Hüseyin SERTER (5770), Ahmet KAYA (5692), Ahmet BERBEROĞLU (870), Resul YILDIRIM (821).

65 EC 2018 report, pag. 9.

66 •The Association of European Administrative Judges (AEAJ) • Judges for Judges • "Magistrats Européens pour la Démocratie et les Libertés" (MEDEL) • The European Association of Judges (EAJ). The European Association of Judges (https://www.iaj-uim.org/european-associationof-judges/) is a regional branch of the International Association of Judges and represents national associations of 44 countries, practically all the European countries. The International Association of Judges (www.iaj-uim.org) was founded in Salzburg (Austria) in 1953. It is a professional, non-political, international organisation, bringing together national associations of judges, not individual judges. The main aim of IAJ is to safeguard the independence of the judiciary, which is an essential requirement of the judicial function, guaranteeing human rights and freedom. The organization currently encompasses 92 national associations or representative groups, from five Continents. IAJ is the largest association of judges in the world, representing directly more than 120.000 judges.

Prosecutors detained. In 2017, the Platform for the Turkish Judiciary has reported the following[67]. "The developments since 15th July 2016 with the following mass dismissals of more than 4000 Turkish judges and prosecutors as well as mass arrests of around 2450 Turkish Judges and Prosecutor are the climax of this constantly rising pressure and constitute an intolerable violation of the Rule of Law".

The Platform for an independent Turkish Judiciary[68] has maintained that the mass dismissals and mass arrests without proper individualized accusations clearly have "chilling effect" within the judiciary. This means that those judges and prosecutors, who are still in power, fear to be subject to such arbitrary measures themselves. These judges and prosecutors can no longer be seen to be independent, as the pressure is too high on them. As for the mass dismissals no minimum procedural requirements (not even a hearing as a basic benchmark for adversarial procedures) were followed.[69] .

Under this purge, thousands of judges and prosecutors have been sacked by the Government. They have been replaced by inexperienced newcomers, ill-equipped to handle the dramatic spike in workload from coup-related prosecutions. At least 45% of Turkey's roughly 21,000 judges and prosecutors now have three years of experience or less, Reuters calculated from Ministry of Justice data[70].

By 20 March 2018 the HYSK processed the objection and reconsideration requests of 3,953 dismissals of judges and prosecutors. As a result, the dismissal decisions on 166 judges and prosecutors (4,19%) were revoked. The remaining 3,786 applicants' objections were rejected[71].

As reported above, the parliamentary assembly of the Council of Europe in the debate held on 25 April 2017 issued the following statement: Considering the scale of the operations undertaken, the Assembly is concerned that the state of emergency has been used not only to remove those involved in the coup from the State institutions, but also to silence any critical voices and create a climate of fear among ordinary citizens, academics, independent nongovernmental organisations (NGOs) and the media, jeopardising the foundations of a democratic society[72].

The scale of the operations was particularly shocking with reference to the judiciary. The main actor of the purges was the politically controlled Judicial Council. Its action strike to death what remained of the external and internal judicial independence.

67 Report dated 17th July 2017 of the Platform for an Independent Turkish Judiciary about the situation of the Turkish Judiciary, cit.; Situation-of-Turkish-Judiciary-Platform-Report.pdf (medelnet.eu)

68 Report dated 17th July 2017 of the Platform for an Independent Turkish Judiciary about the situation of the Turkish Judiciary, cit;Situation-of-Turkish-Judiciary-Platform-Report.pdf (medelnet.eu).

69 9 http://www.hurriyetdailynews.com/turkeys-board-of-judges-prosecutors-temporarily-suspends-four-fororderingrelease-of-gulen-suspects.aspx?pag.ID=238&nID=111576&NewsCatID=509

70 How Turkey's courts turned on Erdogan's foes, Reuters, 4 May 2020, pag. 3 Reuters_How Turkey's courts turned on Erdogan's foes.pdf.

71 European Commission 2018 Report, pag. 23.

72 Assembly debate on 25 April 2017 (12th Sitting) (see Doc. 14282 and addendum, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteurs: Ms Ingebjørg Godskesen and Ms Marianne Mikko). Text adopted by the Assembly on 25 April 2017 (12th Sitting), cit.

5. DETENTION OF THOUSANDS OF JUDGES WITHOUT SUPPORTING EVIDENCE

Judges who lost their lives (Teoman Gökçe, Mustafa Erdogan

ILL-TREATMENTS OF JUDGES DURING DETENTION

According to Human Rights Watch[73], Turkey's courts placed at least 1,684 judges and prosecutors in pretrial detention in the aftermath of the failed July 15, 2016 coup. They were detained on suspicion of being members of a terrorist organization, involved in the coup attempt. Some lawyers were reluctant to represent the judges for fear that they would be tainted by association.

In cases examined by Human Rights Watch, decisions to arrest and detain someone pending investigation appeared to have been made simply because their names appeared in the list of alleged suspects. At a July 19, 2016 news conference, Mehmet Yılmaz, the deputy head of the Higher Council, indicated that the Ankara prosecutors' office had issued a decision to detain 2,740 judges and prosecutors.

According to the Venice Commission, among the tens of thousands cases of detention decided by the criminal peace judgeships following the coup, the numerous detentions of judges are an important issue because the peace judgeships do not even have jurisdiction to detain other judges. Depending on their rank, judges can only be detained by the ordinary courts. However, following the failed coup, many judges were first dismissed and then detained, as ordinary citizens, by decision of the peace judges.[74].

Further, judges and prosecutors were arrested without supporting evidence, according to the investigations made by HRW[75] who interviewed three judges, two lawyers, and two spouses of detained judges and prosecutors about the detentions.

HRW reports that a judge, who was released from preventive detention, said the following: *"The prosecutor had a list of 10 or 15 questions along the lines of: which high school and private prep school [to supplement state education system] did you go to; where did you live during high school and university years; were you encouraged not to vote for the AKP during the elections; which candidates did you support in the Higher Council of Judges and Prosecutors election in 2014; during the council election were you on duty and there when the votes were counted? Did you make election propaganda for any name*

73 HRW, Report of 5 August 2016, Turkey, Judges, Prosecutors Unfairly Jailed (hereinafter referred as: HRW report), Turkey: Judges, Prosecutors Unfairly Jailed | Human Rights Watch (hrw.org).

74 Venice Commission, Opinion No. 852/2016, pag. 20.

75 HRW report.

during the election period? Do you send your children to any prep school connected with the FETÖ/PYD? Have you participated in programs at your children's school? Which school did your wife go to? Have you ever paid money as charity? Beyond that I was informed there was a secrecy order on the investigation."

The Platform for an Independent Turkish Judiciary issued the following statement on 19 July 2019 about the lack of evidence supporting the criminal conviction of Vaclav Havel Human Rights Prize Winner Murat Arslan, President of the Independent Turkish Judges Association YARSAV, convicted under charges of being member of an armed terrorist organization[76], in violation of the fair trial.

Mr Murat Arslan is a Turkish judge and president of the Turkish Association of Judges and Prosecutors (YARSAV). He has been arrested in October 2016 and remains since then in (pre-trial) detention. He was awarded in October 2017 the Václav-Havel Human Rights prize by the Parliamentary Assembly of the Council of Europe. In the course of the ongoing (first set of) criminal proceedings, evidence on the concrete use of the communication system ByLock (similar to "WhatsApp" or other communication means) and its evidential value for the concrete accusations was neither carefully analyzed nor thoroughly investigated. Furthermore, the many violations of the Turkish Criminal Procedural Code, characterizing these whole proceedings, have culminated in an unbelievable infringement of fundamental procedural rights in yesterday`s hearing. Basic fundamental procedural rights, like proper representation or right to appeal against biased judges, have been neglected and in this way also procedural safeguard of the Turkish laws were ignored. Against the background of European standards, the evidence brought forward by the public prosecutor cannot be regarded as sufficient evidence and has been nothing more than an enumeration of unproven assertions. This ignorance of basic principles of a fair trial – which could be perceived immediately by European trial monitors in the hearings – shows clearly that this was a purely politically motivated judgment, again bringing to light the lack of rule of law in Turkey.

The vast majority of arrested judges, including two members of the constitutional court, are held in - overcrowded - prisons, some - especially the higher judges - are even held in solitary confinement.Basic fundamental rights, guaranteed under Art. 5 and 6 ECHR are disregarded. Only a fraction has heard formal charges so far.[77].

Recently the Platform for an Independent Judiciary has openly stressed that imprisoned Turkish judges and prosecutors face precarious situations and ill-treatments. It has particularly mentioned:

judge Mehmet Tosun, who was detained under severe conditions despite his suffering from an autoimmune illness and reportedly had been mistreated in jail so that his state of health further deteriorated, finally leading to his death on 6th March 2017 aged only 29 years;

- judge Sultani Temel who has been jailed since 16th January 2017 (with exception for the period of 5 October 2017 to 6 June 2018) - partly with her five-year old daughter - and suffers from a major depression without having access to adequate medical treatment;

- judge Hüsamettin Ugur, who has been isolated in a one-person cell since July 2016 and reportedly has been beaten by four guards, who subsequently forged a medical report suggesting that that it was judge Hüsamettin Ugur who would have attacked the guards so that he could not file a criminal complaint against the guards.

76 Statement dated January 19th 2019 of the Platform for an Independent Turkish Judiciary about the criminal conviction of Vaclav Havel Human Rights Prize Winner Murat Arslan, President of the Independent Turkish Judges Association YARSAV, convicted under charges of being member of an armed terrorist organization (namely of being active member of FETÖ/PDY) and sentenced to 10 years imprisonment. Microsoft Word - Statement of Platform _EAJ, AEAJ, MEDEL and J4J_ - Murat Arslan (medelnet.eu)

77 http://www.economist.com/news/europe/21722200-president-erdogans-drive-power-includes-puttingjudges-under-his-thumb-turkeys-purgesare?cid1=cust/ddnew/n/n/n/20170518n/owned/n/n/nwl/n/n/eu/Daily_Dispatch/email

In August 2020 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (further: CPT) of the Council of Europe published two reports on Turkey, namely on their periodic visit of 2017[78] and the ad hoc visit of 2019[79] to Turkey. In both reports, the CPT gives detailed examples of torture and ill-treatment and criticises the lack of a reliable system of medical controls. It is noteworthy that the Turkish Government has still not yet requested the publication of the report of the CPT about their ad hoc visit to Turkey from 28th August to 6th September 2016, so immediately after the mass arrests took place [80].

In August 2020, Special Rapporteurs of UN OHCHR mechanism jointly penned a letter addressed to the Turkish Government. In this letter[81] (dated 26 August 2020, with Reference Number OL TUR 13/2020), it has been once again stressed that: Turkey's anti-terrorism legal framework grants the Government excessive authority over the judiciary, thus undermines its independence. In this connection, the Special Rapporteurs denounce the Law No. 7145 which gives the Government the authority to dismiss any public official, judge, or prosecutor solely based on an "assessment" regarding their contact with terrorist organizations or structures, entities or groups. In the joint letter, it was also emphasised that, the National Security Council (MGK) as a security entity being in a position to make such determinations without judicial oversight and review is extremely troubling. Last but not least, the letter urges the Turkish Government to comply with international human rights law, including by providing judicial guarantees to those facing charges of terrorism.

Judges, prosecutors and lawyers continue then to face unfair persecution simply because they stand for the values of rule of law. Those who are in jail face precarious conditions and ill-treatment[82].

78 See Council of Europe, CPT/Inf (2020)22, Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 23 May 2017, https://rm.coe.int/16809f209e.

79 See Council of Europe, CPT/Inf (2020)24, Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 17 May 2019, https://rm.coe.int/16809f20a1.

80 Statement dated 31th August 2020 of the Platform for an Independent Turkish Judiciary, Turkey-Anti-Torture-Committee-Appeal_Platform_31.8.2020.pdf (medelnet.eu). Under Article 11 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the report relating to a visit remains confidential until the authorities of the state concerned request its publication. However, in the 2017 CPT report it is made clear that the (unpublished) findings of the August/September 2016 visit showed a high number of allegations of physical ill-treatment by law enforcement officials from detained persons who had been detained on suspicion of terrorism related offences, in particular in connection with the military coup attempt of 15 July 2016. Therefore these published reports of the CPT, the expert organ of the Council of Europe, on their visits in 2017 and 2019 give sufficient reason to believe that the warnings of the Platform for an Independent Judiciary in Turkey against the ill-treatment of the judges (and prosecutors) deprived of their liberty which have been repeatedly voiced since 2016 were correct. These recent CPT-reports also give weight to the warnings of the Platform for an Independent Judiciary in Turkey that torture or ill-treatment has been used to get (false) confessions or information.

81 Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Fionnuala NíAoláin); the Working Group on Arbitrary Detention (Vice-Chair Elina Steinerte); the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Irene Khan); the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Clement Nyaletsossi Voule); the Special Rapporteur on the situation of human rights defenders (Mary Lawlor); and the Special Rapporteur on the independence of judges and lawyers (Diego García-Sayán); Available at:
https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25482

82 Report dated 17th July 2017 of the Platform for an Independent Turkish Judiciary, about the situation of the Turkish Judiciary, cit..Situation-of-Turkish-Judiciary-Platform-Report.pdf (medelnet.eu)MEHMET TOSUN, former rapporteur judge at the Council of State of Turkey, passed away at 29 years of age on March 6th, 2017. Like many other judges, he was dismissed and detained under severe conditions after the attempted coup with no evidence and solid reason. He suffered from an autoimmune illness. According to his lawyer, Hüseyin Aygun, Mehmet Tosun was mistreated in jail and his state of health deteriorated. Although he spent his last months at hospital due to his heavy health problems, he was deprived of even his assets and personal savings, access to his personal bank accounts which were crucial for his medical treatment which obviously costed enormous amount of money for a dismissed person with no social security. Sultani Temel has been arrested (followed by pre-trial deten-

6.THE DISSOLUTION OF THE ASSOCIATION OF JUDGES

The emergency also became a pretext to dismantle the free association of judges.

Pluralism in judges' associations was severely affected by the closure under the state of emergency of two important associations, the Association of Judges and Prosecutors (YARSAV) and the Judges Union.

YARSAV, the Turkish Association of judges and prosecutors, at the time of the attempted coup d'état had more than 1.800 members. YARSAV is member of AEAJ[83] and of MEDEL[84]. Being a relevant member of IAJ with several judges working actively in the different bodies within the organization, YARSAV organized even a General Assembly of IAJ, gathering judges from all over the world. The event took place in Istanbul in 2011.

Murat Arslan

The President of YARSAV, Murat ARSLAN, was arrested and convicted to 10 years of imprisonment after a trial that did not meet the minimum requirements of a due process of law, as witnessed by MEDEL that sent observers to all the sessions of the trial[85]. By appointment of MEDEL, Murat ARSLAN has been subsequently awarded by

tion) since 16 January 2017 (with exception for the period of 5 October 2017 to 6 June 2018), together, until recently, with her five-year-old daughter. Whereas judge Temel suffers from a major depression without having access to adequate medical treatment, her daughter suffers equally, being denied to see her mother since February 2020. The most recent and worrying case is that of Judge Hüsamettin Uğur, a former member of Turkey's Supreme Court of Appeals, who has been isolated in a one-person cell in a Kırıkkale prison since July 2016. According to his daughter and the TR724 news website, Judge Uğur was beaten by four guards in a room without cameras on February 17. Judge Uğur's daughter tweeted: "When they left him alone after he collapsed on the ground, they said, 'Only your dead body will leave here'.", further revealing that the guards subsequently forged a medical report suggesting that it was Hüsamettin Uğur who attacked them so that he cannot file a criminal complaint.

83 The AEAJ is an organisation founded in the year 2000. Its membership comprises: national associations, representing administrative judges from Member States of the European Union and the Council of Europe; Individual members, being administrative judges from those countries in which such associations do not exist. Currently, national associations of administrative judges from 19 European countries have joined the AEAJ. In addition, there are individual members from 13 more European countries

84 MEDEL a Non-Governmental Organization (NGO) established in 1985, gathering Judges' and Prosecutors' associations. One of the goals of MEDEL, according to article 2(2) of its statutes (available at www.medelnet.eu), is "the defense of the independence of the judiciary in the face of every other power". MEDEL has 24 member associations, coming from 16 different countries: Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Italy, Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Spain and Turkey. In total, MEDEL's member associations represent more than 18.000 magistrates (judges and prosecutors). MEDEL is an active participant in many international organisations, having observer status in several bodies of the Council of Europe, such as the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE). MEDEL also actively and regularly meets with relevant bodies of the European Union in the field of Justice and is dully registered in the European Union Transparency Register, under ID nr. 981119221130-18.

85 Reports can be found at https://www.medelnet.eu/index.php/news/europe/426-report-of-medel-s-observertothe-ongoing-trial-of-murat-arslan-president-of-yarsav-in-german-and-english

the Parliamentary Assembly of the Council of Europe the Vaclav Havel Human Rights Prize in 2017.

On August 2021, Filipe Marques, President of MEDEL released the following statement: *"The situation in Turkey is probably the most dramatic MEDEL had to face in its history. Our member association, YARSAV, was administratively disbanded immediately after the attempted Coup d'État of July 2016 and many of its members were arrested, dismissed and deprived of freedom or property without any solid evidences, basic guarantees or procedural rights. Murat Arslan, the President of YARSAV, is in jail since October 2016 and was sentenced on January 18th, 2019 to 10 years imprisonment, after a trial that didn't meet any basic principles of a due process of law. MEDEL does not recognize the legitimacy of the dismantlement of YARSAV and still considers it a full member and its board members as its rightful representatives. By appointment of MEDEL and others, Murat Arslan was awarded in2017 the Václav Havel Human Rights Prize, by the Parliamentary Assembly of the Council of Europe"*[86].

The dissolution of the free judicial associations had a chilling effect on the members of the judiciary. Turkey's biggest association, the Association for Judicial Unity, which reached around 9,300 members, was perceived as being close to the government. Newly recruited judges and prosecutors are handed a membership application to the Association for Judicial Unity automatically upon recruitment[87].

The reason why the Government violently targeted the association of judges is easily explained by considering the role of judicial association in protecting judicial independence and fostering the rule of law.

The individual right to form and to join associations is ensured by many international instruments protecting human rights[88] . The right for judges to associate is explicitly granted in the UN Basic Principles for the Independence of the Judiciary[89], the Bangalore Principles of Judicial Conduct[90] and the Universal Charter of the Judge[91]

The European Charter on the Statute for Judges[92]underlines the contribution of associations of judges to the defence of the status of judges. Recommendation (2010)12[93]of the CoE names the most central element of a judge´s status, which is independence, and adds as an additional task: the promotion of the rule of law. The Magna Carta of Judges confers to the association of judges the task of the "defence of the mission of the judiciary in the society" [94].

The right to associate is, therefore, not only in the interest of a judge personally. This right is in the interest of the whole judiciaryand the larger society as well[95].

The statutes of many associations of judges express, as central goals, two overriding objectives[96]:

86 Interview with Filipe Marques, President of MEDEL by the "arrested lawyers initiative" on 21 august 2020.

87 EC, commission staff working document, Turkey 2020 Report, 6.10.2020, accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (hereinafter referred as: EC 2020 report), pag. 25, turkey_report_2020.pdf (europa.eu)

88 Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, Article 20/1. International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16.12.1966. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4.11.1950, Article 11/1.

89 United Nations Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly on 29.11.1985, para 9.

90 Bangalore Principles of Judicial Conduct, Principles 4-6.

91 Universal Charter of the Judge, adopted by the IAJ on 14.11.2017,article 3/5.

92 European Charter on the Statute for Judges: principles 1.7 and 1.8.

93 Recommendation (2010)12, para 25.

94 CCJE Magna Carta of Judges (Fundamental Principles), of 17.11.2010, para 12.

95 CCJE Opinion No. 23 (2020) The role of associations of judges in supporting judicial independence of 6 November 2020 (hereinafter referred as: CCJE Opinion No. 23(2020).

96 CCJE Opinion No. 23 (2020),paras 16, 17, 18.

1) establishing and defending the independence of the judiciary; it encompasses among other factors defending judges and the judiciary against any infringements of independence, claiming sufficient resources and satisfactory working conditions, aiming for adequate remuneration and social security, rejecting unfair criticism and attacks against the judiciary and individual judges, establishing, promoting and implementing ethical standards, and safeguarding non-discrimination and gender balance.

2) Fostering and improving the rule of law. It encompasses among other factors contributing to training, exchanging and sharing knowledge and best practices, contributing to the administration of justice in conjunction with those who are responsible for it, contributing to reforms of the justice system and law making, fostering the knowledge and information of the media and the general public about the role of judges, the judiciary and the rule of law.

Striking down the free association of judges was therefore a fatal attack to judicial independence and the rule of law.

7. ENCJ DECISION TO SUSPEND THE TURKISH HIGH JUDICIAL FOR THE JUDICIARY

It is worth noting the reaction taken by the European Network of Councils for the Judiciary (ENCJ) concerning the Turkish Council of Judges and Prosecutors (HSYK). On 8 December 2016 the ENCJ General Assembly suspended the observer status of the High Council for Judges and Prosecutors of Turkey (HSYK) as it no longer complied with the ENCJ Statutes and was no longer an institution which is independent of the executive and legislature ensuring the final responsibility for the support of the judiciary in the independent delivery of justice[97].

8. PACE REOPENS THE MONITORING PROCEDURE

On 25 April 2017, the Parliamentary Assembly of the Council of Europe (PACE) adapted the Resolution 2156(2017) through which it decided to reopen the monitoring procedure in respect of Turkey until "serious concerns" about respect for human rights, democracy and the rule of law "are addressed in a satisfactory manner"[98].As a result of this Resolution, Turkey has been downgraded to the league of Countries under monitoring status for the first time in Europeanhistory. It is worth noting that, accession negotiations between EU and Turkey had commenced based on the European Council decision of 17 December 2004 that concluded that Turkey had met "the Copenhagen Criteria"[99]. It was the same time when the Country was exempted from the scope of monitoring status under the mandate of the PACE.The reopening of the monitoring procedure put into question the persistence of the conditions for keeping open the door for Turkey to access EU.

9. FORCED TRANSFER OF JUDGES CONTINUES AFTER THE CLOSURE OF THE STATE OF EMERGENCY

In 2020 the EC observed that in total, 4,399 judges and prosecutors have been dismissed since the attempted coup. In 2019, none were reinstated to their positions by the

97 ENCJ Votes to suspend the Turkish High Council of Judges and Prosecutors, available at: https://www.encj.eu/node/449

98 Parliamentary Assembly reopens monitoring procedure in respect of Turkey - Council of Europe (coe.int).

99 Copenhagen criteria refers to the overall criteria which applicant countries (to the European Union (EU)) have to meet as a prerequisite for becoming members of the European Union were defined in general terms by the Copenhagen European Council in June 1993.

Council of Judges and Prosecutors[100].

At the same time, the Council of Judges and Prosecutors continued to engage in large-scale transfers of judges and prosecutors without their consent and no constitutional guarantees were introduced to prevent such transfers, which, according to European standards, can only be justified where courts are being reorganised. In May 2019, the Judicial Reform Strategy announced a guarantee of geographical tenure that should be introduced for judges with a certain professional seniority and based on merits. A day after the announcement of the Strategy, the Council of Judges and Prosecutors published a decree through which the posts of 3,358 judges and prosecutors in the civil and criminal judiciary and 364 in the administrative judiciary were changed. Overall, 4,027 judges and prosecutors were transferred in 2019. No reason was given for the transfers apart from requirements of the service. No action was taken to remedy the shortcomings identified in the December 2016 opinion of the Venice Commission, which stated that every decision regarding the career of a judge needs to be individual and reasonedand that the procedures before the Council of Judges and Prosecutors must respect standards of due process[101].

It is an obvious consideration that continuous forced transfers of judges make the judicial internal independence and the principle of natural judge vain. They also severely affect the quality and continuity of judicial work.

10. THE 2017 CONSTITUTIONAL AMENDMENTS PUT THE HIGH JUDICIAL COUNCIL UNDER FORMAL POLITICAL CONTROL

No measures were taken to restore legal guarantees ensuring the independence of the judiciary. On the contrary, constitutional changes in relation to the Constitutional Court and the Council of Judges and Prosecutors further undermined external judicial independence from the Executive.[102].

On 20 January 2017, the Parliament approved eighteen amendments to the Constitution.A national referendum was held on 17 April 2017 to confirm the proposed reforms. A majority of 51.41% voted "yes" to approve the proposal with a turnout rate of 85.43%.

The amendments were assessed by the Venice Commission as lacking sufficient checks and balances as well as endangering the separation of powers between the executive and the judiciary.

The referendum itself raised serious concerns in relation to the overall negative impact of the state of emergency, the 'unlevel playing field' for the two sides of the campaigns and undermined safeguards for the integrity of the election.[103].

Following the 2017 constitutional amendments, the CC actually consists of 15 judges. Three of these judges are elected by the Parliament. A further 12 judges are selected by the President of the Republic. Also, the constitutional changes regarding the manner of appointment of the members of the High Judicial Council will have repercussions on the Constitutional Court. The Council is responsible for the elections of the members of the Court of Cassation and the Council of State. Both courts are entitled to choose two members of the Constitutional Court by sending three nominees for each position to the President, who makes the appointments. The influence of the Executive over the

100 EC 2020 report, pag. 25
101 EC 2020 report, pag. 25
102 EC 2018 report, pag. 25.
103 European Commission, Key findings of the 2018 Report on Turkey (europa.eu)

Constitutional Court is therefore increased.

As regards the Judicial Council, under the previous constitutional framework, the President only appointed 3 out of 22 members of the Council. Pursuant to the amendments, the President will have the power to appoint 4 members, that is almost a third of the members of the Council of Judges and Prosecutors, whose number is also to be decreased, from 22 regular (+ 12 substitute) to 13 regular members. Two other members of the HYSK, the minister of justice and his/her undersecretary, are also be appointed by the President (minister and undersecretary as a high official). The President will therefore appoint almost half of the members of the Judicial Council.

The Venice Commission has stressed that the President will no more be a pouvoir neutre but will be engaged in party politics: his choice of the members of the Judicial Council will not have to be politically neutral. The remaining members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council.[104].

Further, although nine of the Council members are judges and prosecutors, none of them are elected by their peers. Instead, according to European standards, at least a substantive part of the members of a High Judicial Council should be judges appointed by their peers. The Committee of Ministers of the Council of Europe in its Recommendation CM/Rec(2010)12 stated that: *"Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary." [...] "The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers".*[105] Thus, a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. To provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification considering possible conflicts of interest"[106].

Pursuant to this constitutional reform, HSK (previously HSYK, but changed as HSK after the constitutional amendments of 2017) is now under full political control.

According to the US Department of State, the executive branch exerts strong influence over the Board of Judges and Prosecutors. The ruling party controlled both the executive and the parliament when the current members were appointed in 2017.[107].

11. MASS RECRUITMENT OF NEW JUDGES AND PROSECUTORS/QUALITY OF JUSTICE

In this context of a Judicial Council deprived of its independence, Turkey has conducted massive recruitment of judges and prosecutors.

As of 15 July 2016, the day of the abortive coup, there were around 14.500 judges/prosecutors in Turkey. 4.560 of them were dismissed in a few weeks following 15 July. According to the EC 2020 report, as of December 2019, judges and prosecutors were

104 European Commission for Democracy through Law (Venice Commission). Turkey opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), pag. 26-27.

105 CM/Rec(2010)12, paras. 27 and 46

106 Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028, paragraph 29; see also the Report on the independence of the judicial system, Part I: the independence of judges, CDL-AD(2010)004, § 32.

107 US Department of State, 2019, Country Reports on Human Rights Practices: Turkey (hereinafter referred as: USDOS report); Turkey - United States Department of State

20,632 in total[108].

That means that at least 45% of Turkey's roughly 21,000 judges and prosecutors have three years of experience or less. Hakki Koylu, chairman of the Justice Commission in Turkey's parliament and a lawmaker for Erdogan's AK Party, acknowledged to Reuters that some judges and prosecutors *"have been appointed without adequate training."* Koylu said. *"We see some of the rulings they make. Now we can only hope that the upper courts correct these rulings"* upon appeal. But the Supreme Court of Appeals, the highest appeals court, has been hollowed out too. Cirit, the court's president, told Reuters the appointment of judges with less than five years' experience to the Supreme Court of Appeals *"poses risks not only for the reasonable duration of proceedings, but also for the right to a fair trial"*[109].

This happens in a time when the purges have inflated the workload of Turkey's judicial system. More than half a million people have been investigated since the coup attempt. As of late 2019, around 30,000 were still awaiting trial as the courts try to process the vast number of coup-related cases. Some suspects have been jailed for months without an indictment or a trial date[110].

Vacancies continued to be filled by allowing most candidates to enter the system through a fast-track procedure and non-transparent selection process. The Council of Judges and Prosecutors is not independent of the executive and the Ministry of Justice runs the selection boards for new judges and prosecutors and manages their yearly appraisal[111].The lack of objective, merit-based, uniform and pre-established criteria[112] for recruiting and promoting judges and prosecutors has opened wide the door to the politicisation of the judiciary. This severely affects not only the independence but also the appearance of impartiality of judges.

The following testimony reported by the PACE rapporteur clearly depicts the situations: *"The President of the Union of Turkish Bar Associations, whom I met, mentioned the lack of a minimum score in the entrance exam and the preponderant weight given to performance in subsequent unrecorded oral interviews involving politically biased questions: as a result, candidates with the "right" political profile who performed badly in the written tests were nevertheless recruited. Judges are also being appointed directly from the justice academy, without completing their training. 5 000 of 15 000 first instance judges have less than one year's experience, and another 5 000 have less than five years".*[113]

The Platform for an independent Turkish Judiciary[114] observed that reliable reports say that 800 of the 900 newly appointed judges have direct links to the ruling Justice and Development Party (AKP)[115].

A ceremony for 1236 new judges and prosecutors was held in the Presidential palace

108 EC 2020 report, pag. 26

109 How Turkey's courts turned on Erdogan's foes, Reuters, 4 May 2002, pag. 8. Reuters_How Turkey's courts turned on Erdogan's foes.pdf

110 How Turkey's courts turned on Erdogan's foes, Reuters, cit., pag. 7.

111 EC 2020 report, pag. 25.

112 CM/Rec(2010)12, par 44. Decisions concerning the selection and career of judges should be based on objective criteria preestablished by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

113 State of emergency: proportionality issues concerning derogations under article 15 of the European Convention on Human Rights, PACE report, Doc. No. 14506, 27 February 2018 para. 98.

114 Report dated 17th July 2017 of the Platform for an Independent Turkish Judiciary, about the situation of the Turkish Judiciary, cit.; Situation-of-Turkish-Judiciary-Platform-Report.pdf (medelnet.eu)

115 http://theglobepost.com/2017/05/11/top-judge-defends-purge-state-of-emergency-measures/

in March 2018 and contributed to the perception of an increased influence of the executive over the judiciary[116].

In the light of above-mentioned negative developments, the functioning of the justice system in Turkey is an area of serious concern. As highlighted in the report[117] of PACE Monitoring Group, many issues, including the lack of independence of the judiciary and the insufficient procedural safeguards and guarantees to ensure fair trials, remain to be addressed.

THE ANSWER TO THE QUESTION

CAN WE EVALUATE THE JUDICIARY SYSTEM OF TURKEY AS CORRESPONDING TO INTERNATIONALLY PROTECTED STANDARDS OF INDEPENDENCE AND IMPARTIALITY?

The answer to the question could be directly drawn by a recent statement dated 8 December 2020 of ENCJ that explained the failure of the HSK (previously HSYK, but changed as HSK after the constitutional amendments of 2017) to guarantee the access to independent, fair and impartial courts delivery. "Four years later, unfortunately, the situation has not improved and has in fact deteriorated considerably. The Council for Judges and Prosecutors is a Council in name only, as none of its actions or decisions demonstrate any concern for the independence of the judiciary. Without a Council to protect and guarantee the independent delivery of justice in Turkey, there is little hope for the Rule of Law in Turkey in general and for access to independent, fair and impartial courts for all who come before the courts including Turkish citizens."[118]

This statement fully reflects what I have reported in the chapters above.

A reformed Judicial Council has been the target of the Government since December 2013, when HYSK issued a public statement to protect the independence of prosecutors, who dared to exercise judicial control over the action of the Executive (chapter 2.1.). Since then, the external independence of the Judicial Council was severely curtailed by the political majority until 2017, when the constitutional amendments dissolved the formal independence of the Council and put it under complete political control of the Executive (chapter 10.). In the meantime, the Judicial Council acted as an instrument of the Government to spread pressure and fear among judges and prosecutors, who started to be forcibly moved from posts and cases, in contravention to the basic standards of judicial independence (chapter 2.2.). Some were even arrested (chapter 2.3.). This was a harsh attack to the internal judicial independence and the principle of natural judge. The attempted coup d'état gave the Executive the occasion to finally prostrate the judiciary, purging thousands of judges and prosecutors, who were dismissed, detained and ill-treated, without a sustainable charge against them (chapters 4. and 5.). The first arrests hit the members of the Constitutional Court that, in the previous years, had bravely protected the fundamental rights of individuals against the State (chapter 1.1.). The dissolution, by decree, of the free associations of judges and the arrest of their leaders, demolished the last shelter of the judicial independence and of the rule of law (chapter 7.). The annihilation of the judicial independence opened an avenue to the Executive for the persecution of journalists, political opponents, and critical voices (see later chapters 12, and 12.2.). The end of the state of emergency did not put any

116 EC 2018 report, pag. 25.

117 PACE Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), 19 October 2020: New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards.

118 ENCJ Board Statement on the Situation in Turkey; https://www.encj.eu/node/578.

end to the political control of judges and prosecutors. A massive recruitment of young judges and prosecutors, who did not undergo transparent procedures of selection and a proper initial training (chapter. 11.) and who are subject to constant forced transfers (chapter 9.), casts a shadow on the appearance of impartiality of large part of the judiciary and on its professional capacity to deal with a steady increase of cases involving the protection of fundamental rights.

PART TWO – EFFECTIVE JUDCIAL PROTECTION

In the previous chapter, I have assessed how judicial independence has been demolished, since December 2013, by progressive interventions of the political majority leaded by President Recep Tayyip Erdoğan, which have struck both external and internal judicial independence, fired and detained thousands of judges and prosecutors and then replaced them with political controlled ones.

In this chapter I will consider the consequence of the attack to the judiciary for the protection of fundamental rights, with the aim of answering the following question.

Can we evaluate the judicial system of Turkey as ensuring full access to justice and effective judicial protection in case of human rights violations?

The reply could be obvious, if we consider the definition of effective judicial protection in the light of the international standards.

Under general international law, and including in times of crisis, the obligation to respect and ensure respect for international human rights law and international humanitarian law includes the duty to provide effective remedies to victims, including reparation. The right at issue is guaranteed by articles 13 and 41 of the ECHR and by article 19 of the Treaty on European Union and art. 47 of the Charter of Fundamental rights of EU.

According to the ECtHR, an effective remedy should be accessible and should be provided by an independent and impartial judicial body and should prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities[119]. It further must be enforceable, and lead to cessation and reparation for the human rights violation concerned[120].

The lack of and independent and impartial judiciary in Turkey vanishes the effectiveness of the remedy.

However, the incapacity of Turkey to ensure an effective domestic legal remedy in the sense of the European Court of Human Rights (ECtHR) or an effective judicial protection in the sense of art. 19 of the Treaty on European Union becomes much more alarming if we enlarge the consideration to other relevant ambits, such us: the role of lawyers and human rights defenders in Turkey, the access to Justice, the right of the defence, the fairness of the procedure, the enforcement of the rulings of the European Court of Human rights, the fragmentation and weakness of further public institutions responsible for protecting human rights and freedoms[121].

12. ACCESS TO JUSTICE IS DENIED

119 ECtHR, judgment of 11 December 2008,application no 42502/06, Muminov v. Russia para. 100; judgment of 19 June 2008, application no. 20745/04, Isakov v. Russia, para. 136; judgment of 8 July 2010, application no. 1248/09, Yuldashev v. Russia, paras. 110-111; judgment of 10 June 2010, application no. 53688/08, Garayev v. Azerbaijan, paras. 82 and 84.

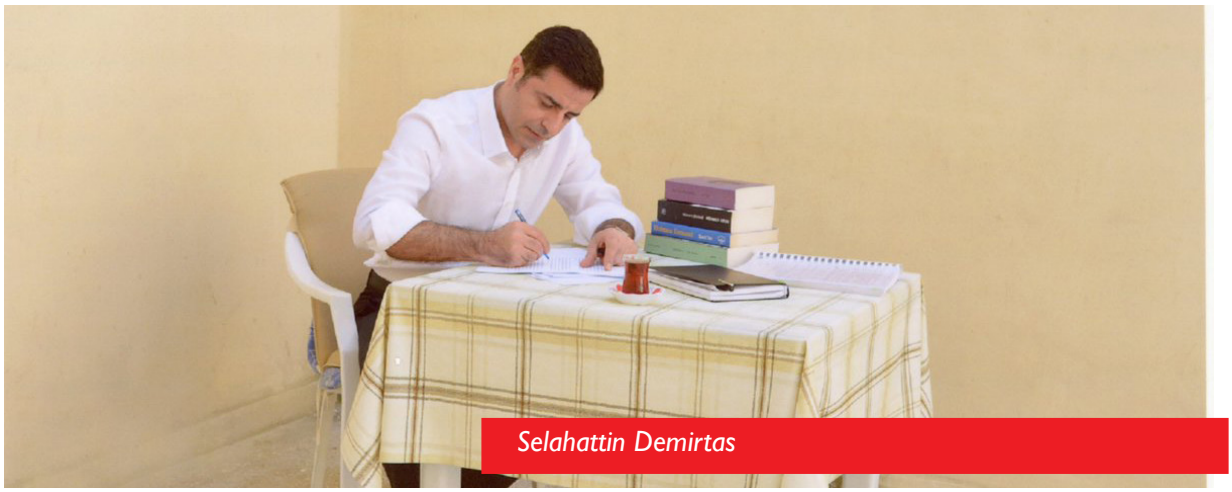
120 International Commission of Jurists, IcJ report, Justice Suspended: Access to Justice and the State of Emergency in Turkey, 2018 (hereinafter referred IcJ report), pag. 11.

121 EC 2020 report, pag. 6

PERSECUTION OF LAWYERS AND HR DEFENDERS

Since the Gezi protest and even before, in high profile cases and in cases regarding Kurdish defendants, the Human Rights Defenders (HRD) and especially lawyers have been a target of the Government.

As highlighted above in chapter 2.2. and 2.3, early 2014 marked the starting of an unprecedented phase for the government in strengthening its control over the judiciary through arrest, dismissal and arbitrary transfer of judges and prosecutors. The level and intensity of threats against lawyers increased parallel to this trend.[122]



Selahattin Demirtas

12.1 ACCESS TO JUSTICE IS DENIED

PERSECUTION OF LAWYERS

In the aftermath of July 2016, 615 lawyers were arrested and 1600 faced prosecution based on terrorism-related accusations.Among persecuted lawyers, fourteen were presidents (or former presidents) of their respective provincial bar associations: President of the Konya Bar Association, Fevzi Kayacan, President of the Trabzon Bar Association, Orhan Öngöz, President of the Siirt Bar Association, Cemal Acar, President of the Gumushane Bar Association, Ismail Tastan were arrested and unlawfully unseated. Furthermore, the presidents of the Aksaray and Kahramanmaras Bar Associations, Levent Bozkurt and VahitBagci, respectively, and the former presidents of the Yozgat Bar Association, Haci Ibis and FahriAcikgoz, were detained for a certain time before they were released on bail.[123].

On 15 September 2017, the İstanbul 37th High Assize Court, which had decided, at the first trial hearing held in the previous day, the release of 17 lawyers, ruled to re-detain 12 of them[124], including the Chairman of the Association of Progressive Lawyers (ÇHD)[125], Selçuk Kozağaçlı[126].Lately,14 lawyers from the Progressive Lawyers Association-involved in "terrorism-related" cases were- sentenced to heavy prison sentences. These verdicts were upheld by the Supreme Court of Cassation on 15 September 2020.[127]

122 A/HRC/35/22/Add.3, paras. 68–69; available at https://undocs.org/en/A/HRC/35/22/Add.3

123 Arrested Lawyers, Mass Prosecution of Lawyers in Turkey, 2016-2021, available at: https://arrestedlawyers.files.wordpress.com/2021/01/report-2016-2021.pdf

124 Ahmet Mandacı, AycanÇiçek, Aytaç Ünsal, BarkınTimtik, BehiçAşçı, Ebru Timtik, Egin Gökoğlu, Naciye Demir, ÖzgürYılmaz, SelçukKozağaçlı, SüleymanGökten, and Şükriye Erden.

125 The ÇHD was established in 1974 and is a member of the European Association of Lawyers for Democracy and Human Rights (ELDH). It was closed by a government decree under a state of emergency declared in the aftermath of July 15, 2016 events.

126 SelçukKozağaçlı detained | Front Line Defenders

127 PACE Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe

Selçuk Kozagaçlı, Eren Keskin and Ebru Timtik

Ebru Timtik, among the twelve layers re-arrested in September 2017, later died[128], after 238 days into her hunger strike in Silviriprison demanding a fair trial. Friends said Ebru Timtik weighed only 30 kilograms when she and her colleague Aytac Unsal were transferred to Hospital in July 2020. Timtik's death came after the death in April 2020 and May 2020, following a hunger strike, of the music band Grup Yorum members HelinBölek[129] and İbrahim Gökçek[130], as well as Mustafa Koçak[131] who and were also demanding a fair trial and had been represented by lawyer Ebru Timtik. As Timtik supporters approached a northern Istanbul cemetery chanting *"Ebru Timtik is immortal"* and the *"murderous state will be held to account,"* helmeted police with shields fired volleys of teargas[132],

Another prominent lawyer and human rights defender, subject to various forms of intimidation and persecution is Eren Keskin. She has for almost thirty years been fighting mainly for the rights of Kurdish people, LGBTI community and women's rights. She is currently the co-chair of the Human Rights Association (IHD). In an interview[133] she recently gave to Turkey Tribunal[134], she summarised her story as follows: *"Throughout years, I have been detained, arrested, attacked (...). There are currently 122 criminal prosecutions and cases filed against me. Actually, the initial number was 143, but some of them were merged in time. These are mainly cases with allegations of insulting the President, membership to armed terror organisations, making propaganda of terror organisations, defamation of military and security forces of the state, etc. Many of these cases are pending whereas some verdicts with a total imprisonment of 17 years and 2 months, are about to be finalised at the highest appeal court (Yargitay) stage. Besides, I have been fined to pay 450.000 Turkish Liras (appr. €50.000)."*

Arrest and detention of lawyers have created a climate of fear among colleagues, making it very difficult for detainees to have access to a defence lawyer. Some lawyers stated they were hesitant to take cases, particularly those of suspects accused of PKK or Gülen movement ties, because of fear of government reprisal, including prosecution.

In particular, lawyers providing legal assistance face considerable obstacles in performing their work and are at risk of arrest, detention and prosecution. Lawyers have been often targeted due to the identity or affinity of their clients. Lawyers representing individuals who are accused of terrorism offences have largely been

(Monitoring Committee), 19 October 2020: New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards.

128 Ebru Timtik Dies After 238-Day Hunger Strike (nypost.com)

129 HelinBölek of Turkish band GrupYorum dies after hunger strike | Ahval (ahvalnews.com)

130 Turkish folk singer dies two days after pausing 'death fast' | Middle East Eye

131 Hunger striker Mustafa Koçak dies in Turkish prison | Ahval (ahvalnews.com)

132 Hunger-striking Turkish lawyer dies — denied fair trial, EU says | News | DW | 28.08.2020

133 https://www.youtube.com/watch?v=6lHDb1qkwcI

134 Turkey Tribunal – Because silence is the greatest enemy of fundamental human rights

associated with their clients' alleged political views. Hence, they found themselves consequently being prosecuted for the same, or other related offences of which their clients are being accused.

In a report issued in March 2018[135], the Office of the United Nations High Commissioner for Human Rights confirmed that "OHCHR identified a pattern of persecution of lawyers representing individuals accused of terrorism offences". International NGO Freedom House in its *2018 Freedom in the World* report confirms that "in many cases, lawyers defending those accused of terrorism offenses were arrested themselves.[136]"

Evidently, this pattern of oppression constituted a significant obstacle to the enjoyment of the right to fair trial and access to justice.[137]

The two main accusations imputed to arrested lawyers are membership of an armed terrorist organisation and forming and leading an armed terrorist organisation[138].

Vague interpretation of Article 314 of Turkish Penal Code (membership to an armed terror organisations), which constitutes the basis to this intimidation, has been repeatedly found to be contrary to the Convention principles and arbitrary applied by the ECtHR[139].

Most recently, in its judgment dated 22 December 2020 in Selahattin Demirtas v.Turkey[140] (No. 2) case, the Court observed, in line with the Venice Commission's findings in its Opinion[141] on Articles 216, 299, 301 and 314 of the Criminal Code, that the Code does not define the concepts of an "armed organisation" and an "armed group". It is this vague formulation of the said provisions, and overly broad interpretation thereof by the Turkish judges and prosecutors, that jeopardises the enjoyment of fundamental rights for lawyers and human rights defenders as a whole.

Further,article 314 of the criminal code is the base for an arbitrary interpretation of the situation of "in flagrante delicto"[142] ,which is the only condition, under the Code of Lawyers (Law No 1136), to prosecute a lawyer in the absence of the authorization of the Justice Minister.[143]

It goes without saying that persecution of lawyers runs against international standards on the right to defence.Under international law, an accused person must be granted prompt access to counsel in accordance with the right to communicate with counsel[144]and as part of the right to a fair trial[145]. Such access may serve as a preventive measure against ill-treatment, coerced self-incrimination and "confessions" or other violations of the

135 Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January – December 2017, par. 9.

136 USDOS 2019 report.

137 OHCHR, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the south-east", paras. 49–57. See also CAT/C/TUR/QPR/5, para. 17; available at https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf

138 New Report: Mass Prosecution of Lawyers in Turkey – The Arrested Lawyers Initiative

139 Inter alia, Court's recent judgment of 15.09.2020 Application no 15064/12, in Ragip Zarakolu v. Turkey.

140 ECtHR, 22 December 2020, application no. 14305/17, Selahattin Demirtasv.Turkey para 277.

141 CDL-AD(2016)002-e, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e

142 In terms of misinterpretation of this principle, the situation of lawyers in terms of being subject to detention is no different than that of judges and prosecutors. European Court of Human Rights (ECHR) in the cases of AlparslanAltan v. Turkey (judgment of , 16 April 2019, application no. 12778/17) and Baş v. Turkey, (judgment of 3 March 2020, application no. 66448/18,), has elaborated this issue and concluded that the interpretation of in flagrante delicto was arbitrary and in clear violation of the Convention (see below chapter 13.3).

143 https://arrestedlawyers.files.wordpress.com/2021/01/report-2016-2021.pdf

144 UN Basic Principles on the Role of Lawyers, principle 1.

145 ECtHR, judgment of 27.11.2018, application no. 36391/02, Salduz v Turkey, paras. 54–55.

rights of the suspect[146].

In this connection, the UN Basic Principles on the role of lawyers require governments to ensure that lawyers: "(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics". These protection measures are crucial to providing effective legal assistance to clients[147].

Recommendation R(2000) 21 of the Council of Europe Committee of Ministers identifies the obligations of States take all necessary measures "to respect, protect and promote the freedom of exercise of profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights".[148]

12.2 ACCESS TO JUSTICE IS DENIED PERSECUTION OF HRD

Beyond lawyers, the Government action has also targeted HRD from the civil society and national and international NGOs, notably in the face of a large number of arrests of activists or of the closure of associations or organisations. Public stigmatisation and a recurrent use of bans of demonstrations and other types of gatherings further shrank the space left for organisations working on fundamental rights and freedoms. The map of civil society organisations has started to change significantly, with a more visible role given to the progovernment organisations[149].

Taner Kılıç ve Idil Eser

More than 1 400 associations were closed on the basis of emergency decrees. These associations were active in a wide spectrum of activities, such as children's rights, women's rights, cultural rights, and victims' rights, among others. 358 were allowed to reopen following a re-examination of their case[150].

Many rights-based organisations remained closed as part of the measures under the state of emergency and they have not been offered any legal remedy in relation to

146 IcJ report, pag. 40

147 UN Basic Principles on the role of lawyers, principles 16 (b), 22.

148 UN HRC, General Comment No. 31, the Nature of the General Obligations Imposed on State Partiesto the Covenant, CCPR/C/21/Rev. 1/Add. 13, 26 May 2004, para. 8; ECtHR, judgment of 28 October 1998, application No. 23452/94,Osman v. UK.

149 EC 2020 report, pag. 14.

150 EC 2020 report, pag. 17.

confiscations[151].

Particularly eloquent are trials and persecutions against representative of NGO's, well known and active in the protection of human rights.

The HRA (Human Rights Association) reported that, as of June 2019, its members had cumulatively faced more than 5,000 legal cases, mostly related to terror and insult charges since the group's establishment. The HRA also reported that executives of their provincial branches were in prison[152].

The HRFT (Human Rights Foundation of Turkey) reported its founders and members were facing 30 separate criminal cases. The harassment, detention, and arrest of many leaders and members of human rights organizations resulted in some organizations closing offices and curtailing activities and some human rights defenders self-censoring[153].

A criminal trial was launched against a group of 11 human rights defenders in Büyükada Island for alleged links to a terrorist organisation. Four of them, including IdilEser, the former director of Amnesty International Turkey, were convicted in July 2020[154].

Persecution of Taner Kiliç and Osman Kavala have a particular symbolic value.

Ex-Amnesty International Turkey chair Taner Kiliç was sentenced to six years and three months for "membership of a terrorist organisation". The activists had been accused of seeking to wreak "chaos in society", a similar charge to the one brought against protesters in Gezi demonstrations.*"This is an outrage. Absurd allegations. No evidence. After three-year trial Taner Kiliç convicted for membership of a terrorist organisation"*, Amnesty's senior Turkey researcherAndrew Gardner tweeted.[155].

Osman Kavala, a prominent philanthropist and civil society leader was detained in 2017 on charges of "attempting to overthrow the government" for involvement during the 2013 Gezi Park protests. The government also prosecuted on similar charges 15 others loosely associated with Kavala, including human rights activists and academics. Local and international human rights groups criticized the detentions and trials as politically motivated and lacking evidentiary justification[156]. In June 2019, the court hearings started against Osman Kavala and 15 other members of civil society organisations. While the Constitutional Court rejected Osman Kavala's application to end his pre-trial detention in May 2019, the ECtHR ruled in favour of his immediate release in December 2019. In February 2020, the local court acquitted the defendants who were not abroad and ruled for the release of Osman Kavala. However, only a few hours later, he was rearrested in relation to another investigation connected to the 2016 coup attempt despite the lack of credible grounds.[157]

Persecution of layers and human rights defenders, both associations and individuals, has severely narrowed the access to a remedy in the many cases of violation of fundamental rights.

151 EC 2020 report, pag. 14.
152 USDOS 2019 report.
153 USDOS 2019 report.
154 EC 2020 report, pag. 31
155 Former Amnesty Turkey leaders convicted on terror charges | Turkey | The Guardian
156 USDOS 2019 report.
157 EC 2020 report, pag. 31.

12.3ACCESS TO JUSTICE IS DENIED

INSURMOUNTABLE OBSTACLES TO DEFENCE

ESPECIALLY IN ANTI-TERROR CASES

The emergency decree gave prosecutors the right to suspend lawyer-client privilege and to deny access to a lawyer to detainees for up to five days[158] -later reduced to 24 hours[159]-; to observe and record conversations between accused persons and their legal counsel; to seize documents given by the defendant to lawyers; to limit days and hours for the interview between defendant and lawyer. Article 6.1. of the Emergency Decree Law no.667, even, provides for to the removal of the right for a lawyer to exercise advocacy[160]. In some cases, as in that of lawyer Ömer Kavili, the latter power was further abused by the peace judge who imposed a general and permanent ban on exercising advocacy, instead of banning the advocate from acting as a defence counsel in a specific case[161]. The Human Rights Joint Platform reported that also the 24-hour attorney access restriction is arbitrarily applied. The HRA reported that in terrorism-related cases, authorities often did not inform defence attorneys of the details of detentions within the first 24 hours, as stipulated by law. It also reported that attorneys' access to the case files for their clients was limited for weeks or months pending preparations of indictments, hampering their ability to defend their clients[162].

In April 2019 Human Rights Watch reported that authorities frequently denied detainees access to an attorney in terrorism-related cases until security forces had interrogated the alleged suspect[163].

12.4. INSURMOUNTABLE OBSTACLES TO DEFENCE

LACK OF EVIDENCE SUPPORTING DETENTIONS AND CONVICTIONS

ESPECIALLY IN ANTI-TERROR CASES

158 Emergency Decree no. 668 of 28 July 2016.

159 Emergency Decree no. 684 of 23 January 2017.

160 "Within the scope of the investigations performed, the defence counsel selected under Article 149 of the Criminal Procedure Code no. 5271 of 4 December 2004 or assigned under Article 150 thereof may be banned from taking on his/her duty if an investigation or a prosecution is being carried out in respect of him/her due to the offences enumerated in this Article. The Office of Magistrates' Judge shall render a decision on the public prosecutor's request for a ban without any delay. Decision on banning shall be immediately served on the suspect and the relevant Bar Presidency with a view to assigning a new counsel."

161 Venice Commission, Opinion No. 852/2016, pag. 19. In the case 2016/5120 M., the Istanbul Criminal Peace Judgeship No. 2 decided that Mr Ömer Kavili no longer has the right to exercise advocacy. This decision first explains that Mr Kavili was the advocate for five persons accused of the crime of "being member of FETÖ/PYD armed terrorist organisation". The fact which justifies the prohibition to act as attorney at law is that "there are investigation files numbered 2014/104753 and 2016/7933 within our Chief Public Prosecutor's Office". In the decision it is not even explicitly stated against whom these files are directed (the Government Opinion explains that they are directed against Mr Kavili) and there is no indication relating to the content of the files. The very fact that according to the prosecutor a file exists is used to justify the decision on the merits. In addition, instead of banning the advocate from acting as a defence counsel in a specific case as foreseen in Article 6.1.g, the peace judge imposed a general and permanent ban on exercising advocacy. There is not a single argument of reasoning to justify such a drastic measure. The Government Opinion insists that "Offenses against the security of the State, the Constitutional order and the functioning of this order listed in the Volume Two, Chapter Four of the Turkish Criminal Code, are also among the offences that constitute impediment to attorneyship pursuant to Article 5 titled 'impediments to admission into attorneyship' of the Attorneyship Law" and "This authority is only concerned with criminal courts, and there is no restriction on lawyers to exercise their profession in civil courts. The right to exercise advocacy of a lawyer who has been investigated for the mentioned offenses shall not be automatically banned and shall be decided upon, where necessary, after the separate evidence assessment has been made for each file." It seems that in practice, at least in the case at hand, the peace judgeships do not apply such limits.

162 USDOS 2019 report.

163 USDOS 2019 report.

Emergency decrees imposed additional restrictions to rights of defence.[164].

The Parliamentary Assembly of the Council of Europe declared to be extremely worried about the high number of individuals arrested and kept in custody waiting indictment, without access to their files.[165].

Emergency Decree Law no. 667 allowed detention without hearing, on the basis of the case-file.[166]

According to the EC 2020 report, indictments often reflected allegations that are not supported by credible evidence. The lack of established links between the evidence and the alleged crime are some of the many elements that raise serious concerns. In some cases, evidence presented by the defence was not included in the court's assessment. In many cases access to justice and the right of defence was limited due to the use of confidentiality decisions. In parallel, details of prosecution files continued to appear in the media, which resulted in smear campaigns in some cases and violates the presumption of innocence[167].

In most cases concerning arrested Turkish judges and prosecutors the national judicial authoritiesadopted a broad interpretation of the offences provided for in Article 314 §§ 1 and 2 of the Criminal Code.As the Venice Commission observes in its Opinion dated 15 March 2016, in applying Article 314 of the Criminal Code, the domestic courts often tended to decide on a person's membership of an armed organisation based on very weak evidence[168].The exercise of rights, such as voting in the HSYK 2014 elections or supporting individual candidates in the elections, being member of executive of YARSAV or having worked at higher positions in the judiciary or Ministry of Justice, or even the use of a phone application were considered sufficient evidence for establishing a link between the defendant and an armed organisation. The national courts did not take into account the case law of the Turkish Court of Cassation, according to which the membership to a terrorist organisation implies the evidence of "continuity, diversity and intensity" of acts the within the structure of the organisation.

Secret witnesses were frequently used, particularly in cases related to national security.[169] Attorneys and the accused had no access or ability to cross-examine and challenge in court secret witnesses.[170]

In a letter[171] penned and publicised by the Special Rapporteurs of the OHCHR, it has

164 EC 2020 report, pag. 6.

165 Assembly debate on 25 April 2017 (12th Sitting) (see Doc. 14282 and addendum, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteurs: Ms IngebjørgGodskesen and Ms Marianne Mikko), cit.. Text adopted by the Assembly on 25 April 2017 (12th Sitting).

166 Venice Commission, Opinion No. 852/2016, pag. 19.

167 EC 2020 report, pag. 25.

168 CDL-AD(2016)002-e, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e

169 USDOS 2019 report. For example, a court sentenced university student Baran Baris Korkmaz to 59 years in prison for membership in an illegal organization based on testimony from a secret witness. Police in Diyarbakir denied any knowledge of the secret witness, identified by a pseudonym in court documents, despite a court request for information regarding the secret witness.

170 USDOS 2019 report.

171 Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (FionnualaNíAoláin); the Working Group on Arbitrary Detention (Vice-Chair Elina Steinerte); the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Irene Khan); the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Clement Nyaletsossi Voule); the Special Rapporteur on the situation of human rights defenders (Mary Lawlor); and the Special Rapporteur on the independence of judges

been once again voiced that the Anti-Terror Law undermines the right of the accused to present his or her defence. In the said letter, article 14 of the Anti-Terror Law has been criticised as it foresees that the identity of witnesses providing information against the accused is not required to be disclosed. This is explicitly against the right of the defendant's right, as provided by article 14 (3)(e) of the International Covenant on Civil and Political rights.

1.5 ACCESS TO JUSTICE IS DENIED

THE DISRUPTION OF THE RIGHT TO A FAIR PUBLIC TRIAL

The right to a fair public trial is protected by the Turkish Constitution.

Bar associations and HRD report that increasing executive interference with the judiciary and actions taken by the government through state of emergency provisions have severely jeopardized this right[172].

The law provides a presumption of innocence of defendants and the right to be present at their trial, although in a number of high-profile cases, defendants increasingly appeared via video link from prison, rather than in person.[173] Individuals from the southeast were increasingly housed in prisons or detention centres far from the location of the alleged crime and appeared at their hearing via video link systems too. Some human rights organizations reported that hearings sometimes continued in the defendant's absence when video links purportedly failed[174].

Courtroom proceedings are, as a rule, public except for cases involving minors as defendants. The state increasingly used a clause allowing closed courtrooms for hearings and trials related to security matters, such as those related to "crimes against the state."[175]. Court files, which contain indictments, case summaries, judgments, and other court pleadings, were closed except to the parties to a case, making it difficult for the public, including journalists and watchdog groups, to obtain information on the progress or results of a case.In some politically sensitive cases, judges restricted access to Turkish lawyers only, limiting the ability of domestic or international groups to observe some trials.

1.6 ACCESS TO JUSTICE IS DENIED

MISUSEOF PRE-TRIAL DETENTION

Rule of law advocates noted that broad use of pretrial detention[176] had become a form of summary punishment, particularly in cases that involved politically motivated terrorism charges. According to Human Rights Watch, one-fifth of the prison population (approximately 50,000 of 250,000 inmates) were charged or convicted of terrorism-

and lawyers (Diego García-Sayán); Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25482

172 USDOS 2019 report.

173 USDOS 2019 report.

174 USDOS 2019 report.

175 USDOS 2019 report.

176 As regards preventive detention in general, a distinction can be drawn between detention following initial police arrest (art. 5.1. ECHR) on the one hand, and detention following a judicial decision that a person should remain in custody (art. 5.3. ECHR), on the other.

related offenses[177].

According to international standards and the ECtHR case law, even where the national law has been complied with, the deprivation of liberty cannot be considered lawful if domestic law allows for excessive detention in the concerned case[178]. Pre-trial detention should, therefore, be limited to those circumstances where it is strictly necessary in the public interest, but also the continuing detention must be justified, as long as it lasts, by adequate grounds of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.

Under the state of emergency law, authorities could detain persons without charge for up to 14 days. Under antiterror legislation adopted in 2018, the government may detain without charge (or appearance before a judge) a suspect for 48 hours for "individual" offenses and 96 hours for "collective" offenses. These periods may be extended twice with the approval of a judge, amounting to six days for "individual" and 12 days for "collective" offenses. This is in contrast with international standard about police custody. The protection afforded by Article 5 of the Convention is relevant here. The ECtHR accepts that protecting the State's interest is a legitimate goal but that this cannot justify that judicial control is not prompt enough[179].

Human rights organizations raised concerns that holding individuals in police custody for up to 12 days without charge increased the risk of mistreatment and torture. There were numerous accounts of persons, including foreign citizens, held in detention beyond 12 days awaiting formal charges. For example, child rights activist YigitAksakoglu was held without charge for four months before prosecutors included him in the larger indictment for those involved in the 2013 Gezi Park protests. According to media reports, more than 50,000 people were in pretrial detention in the country in 2019[180]. Detainees awaiting or undergoing trial prior to the state of emergency had the right to a review in person with a lawyer before a judge every 30 days to determine if they should be released pending trial. Under a law passed in July 2018, in-person review occurs once every 90 days with the 30-day reviews replaced by a judge's evaluation of the case file only[181]. Bar associations noted this element of the law was contrary to the principle of habeas corpus and increased the risk of abuse, since the detainee would not be seen by a judge on a periodic basis[182].

Trials sometimes began years after indictment, and appeals could take years more to reach conclusion[183]. This practice runs contrary to article 5§3 of ECHRthat imposes a special diligence on prosecutors in bringing the case to trial if the accused is detained[184] and implies that a detained person is entitled to having the case given priority and

177 USDOS 2019 report.

178 ECtHR, Scott. V. Spain, decision of 18 December 1996.

179 ECtHR, judgment of 12 December 1996, application no 21987/93, Aksoy v. Turkey, para. 66. "The Court recalls its decision in the case of Brogan and Others v. the United Kingdom (judgment of29 November 1988, Series A no. 145-B, p. 33, para. 62), that a period of detention without judicialcontrol of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3 (art. 5-3). It clearly follows that the period of fourteen or more days during which Mr. Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of "promptness".

180 USDOS 2019 report.

181 The persistence of a strong suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention. However, after a certain lapse of time, it no longer suffices other grounds must exist to justify the continuation of deprivation of liberty.

182 USDOS 2019 report.

183 USDOS 2019 report.

184 ECtHR, judgment of 26 June 1991, application no.12369/86,Letellier v. France, para 35; judgment of 27 August 1992, application No 12850/87, Tomasi v. France, para 84; judgment of 27 Novembre 1991, applications nos. 12325/86 and 14992/89, Kemmache v. France , para 45.

conducted with particular expedition. To this respect, the ECtHR has held that the duration of pre-trial detention must not exceed a reasonable time[185].

In cases of alleged human rights violations, and in cases of long duration of pre-trial detention, detainees have the right to apply directly to the Constitutional Court for redress while their criminal case is proceeding. Nevertheless, a backlog of cases at the Constitutional Court slowed proceedings, preventing expeditious redress[186].

The perceived influence of the executive over the decisions and the jurisdiction and practice of 'criminal judges of peace' continued raising serious concerns. The criminal judgeships of peace were established by Law no. 6545, which entered into force on 28 June 2014. Concerns particularly relate to their extensive powers, such as to issue search warrants, detain individuals, block websites or seize property, with considerable financial consequences; and to the fact that objections to their decisions are not reviewed by a higher judicial[187] body but by another single-judge institution. Their rulings increasingly diverge from European Court of Human Rights case-law and rarely provide sufficiently individualised reasoning[188].

This incapacity of the criminal judicial system (including the Constitutional Court in the context of the individual application complain) is particular evident in the case of detention of journalist and media professionals.The criminal justice system continued to allow journalists to be prosecuted and imprisoned on extensive charges of terrorism, insulting public officials, and/or allegedly committing crimes against the state and the government. Indictments often failed to establish direct and credible links with the alleged offence and, in some high-profile cases, the arguments provided by the defendants were not taken into consideration by the court[189].According to the EC, in 2020 there were still an estimated 120 journalists in prison. Threats and physical attacks on journalists and media organisations due to their work continued in the years following the attempted coup d'état up to the date.

At this point, it is worth mentioning that the Working Group on Arbitrary Detentions (WGAD) of United Nations Human Rights Council, in its recent Opinion[190], has issued the following statement: *"In the past three years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey. The Working Group expresses its concern over the pattern that all these cases follow and*

185 By way of example, the Court has found excessive periods of pre-trial detention lasting from two and a half to nearly five years ECtHR, ,judgment of 25 April 2000, application no.31315/96,Punzelt v. Czech Republic; judgment of 6 November 2003, application no. 60851/00, Pantano v. Italy.

186 USDOS 2019 report.

187 Venice Commission, Opinion No. 852/2016, pag. 14. On this point, the Venice Commission concluded that: "it is not a general human right to litigate to an appellate court. However, the lack of an appeal to a superior court of general jurisdiction exacerbates the difficulties that were identified above regarding the dangers of a specialist court; it also removes the common safety-net of an appeal to an independent superior court that is present in most European systems. The Venice Commission emphasised in its Opinion on Articles 216, 299, 301 and 314 of the Criminal Code of Turkey that the highest courts' guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case-law. It is evident that an appeal procedure before a superior court would provide for better guarantees to the interested parties compared to an appeal procedure before a same level judgeship".

188 Venice Commission, Opinion No. 852/2016, pag. 18. "Already in its Opinion on Law no. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law") the Venice Commission, had stated that "[s]ome decisions of the peace judgeships which the Venice Commission has been able to see during the meetings in Ankara, do not provide for any motivation and reasons to justify the interference with the right to freedom of expression. The Venice Commission does not have at its disposal sufficient examples of judgeship decisions. However, it reiterates the crucial importance of the statement of reasons in a court decision in order not only to respect the principle of proportionality under Article 10 ECHR, but also to satisfy the requirements of fair trial under Article 6 ECHR."

189 EC 2020 report, pag. 34.

190 A/HRC/WGAD/2020/51), paragraph 102

recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity"-

13. JUDICIAL REMEDIES ARE INEFFECTIVE

13.1JUDICIAL REMEDIES ARE INEFFECTIVE.

THE DECISIONS TO RELEASE DETAINEES ARE NOT ENFORCED.

Representatives of the executive and legislative branches continued to publicly comment on ongoing judicial cases, disregarding the presumption of innocence of the suspects.

Ahmet Altan

Some significant examples are reported below by accredited sources of information.

- Twenty-one journalists, who were released on 1st April 2017 by the Istanbul 25th High Criminal Court, after 10-months in pre-trial detention because of accusation for membership to the Gülen movement, were rearrested at the exit gate of the Silivri Prison. They were re-arrested because a prosecutor appealed against their release, and a new investigation was hastily launched. When the release decision was announced, pro-government figures, including journalists, immediately launched a campaign on social media, which passionately demanded their re-arrest[192].
- Many Kurdish MPs, including Ayhan Bilgen, Nursel Aydoğan, Ferhat Encü, Besime Konca, were re-arrested shortly after their release by the court[193].
- Enis Berberoglu, a prominent journalist and a CHP Deputy, on 14 July 2017 remained in prison, despite a court decision which quashed his conviction. The Chief of the court that quashed the conviction was himself banished to another court. In February 2018, Enis Berberoglu was convicted by Chamber no2 of the Istanbul Regional Court of Justice to 5 years and ten months imprisonment for publishing of images of the halting of the intelligence agency trucks[194].

191 EC 2018 report., pag. 10

192 Stockholm Center for Freedom. 21 Journalists' Re-Arrest Comes After Outcry Among Pro-Gov't Colleagues. stockholmcf. org/21-journalists-re-arrest-comes-after-outcry-among-pro-govt-colleagues/

193 https://stockholmcf.org/turkish-court-rules-re-arrest-of-pro-kurdish-hdps-spokesperson-ayhan-bilgen/ https://www. turkishminute.com/2017/05/02/arrest-warrant-issued-for-newly-released-hdp-deputy/ https://turkeypurge.com/8023-2, https:// stockholmcf.org/arrest-warrant-issued-for-released-hdp-deputy-konca/

194 CHP's EnisBerberoğlu sentenced to 5 years and 10 months' imprisonment (cumhuriyet.com.tr)

- On 2nd May 2017, Aysenur Parıldak, a 27-year old Turkish journalist, was re-arrested only a few hours after an Ankara court released her from her nine-months pre-trial detention[195].
- In November 2019, Ahmet Altan, a Turkish journalist and author, was detained a week after the Istanbul Regional Appeal Court released him[196].
- Cahit Nakıboğlu, a 70-year-old businessman who spent almost eighteen months in jail as part of the government's post-coup crackdown on the Gülen movement, was re-arrested only a day after he was released from prison, and he was put under house arrest[197].
- Taner Kılıç, who is the Chair of Amnesty International's Turkey branch, was re-detained even before his release from Izmir Sakran Prison, and was then rearrested by the same court which had decided to release him. TanerKılıç was taken into custody on 6th June 2017 and was subsequently arrested by the Izmir Peace Criminal Judgeship on 9th June 2017. On 31st January 2018, the Istanbul 35th High Penal Court decided to release him at the trial's third hearing. However, after the prosecutor's appeal against the court's decision, his release procedure was frozen, and Mr. Kılıç was re-detained by prison guards, taken into the courthouse, and re-arrested by the same court that had decided to release him only hours before[198].
- The İstanbul 37th High Assize Court, which had decided, at the first trial hearing, the release of 20 lawyers, ruled to re-detain 12 of them, including the Association of Progressive Lawyers' (ÇHD) Chairman, Selçuk Kozağaçlı[199].
- Metin Iyidil, a military officer, was detained a day after the Ankara Regional Appeal Court had acquitted and released him[200].
- On 18th February, 2020, Osman Kavala was acquitted on charges related to the "Gezi Protest" trials but, on the very same day, he was re-arrested with the claim being made against him that he was involved in the attempted coup in 2016, and also with espionage[201].

In almost all the cases of re-arrest, decisions to re-arrest have been triggered either by an AKP politician's statement, or by a message from a pro-Erdoğan journalist that has been posted online.

13.2THE TURKISH CONSTITUTIONAL COURT'S DECISIONS ARE INEFFECTIVE

THE ALTAN AND ALPAY CASES

Art. 153 of the Turkish Constitution establishes that decisions of the Constitutional Court are binding over legislative, executive and judicial organs, administrative authorities and persons and corporate bodies.

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195 Stockholm Center for Freedom. Turkish Journalist Under Suicide Risk Re-Arrested A Few Hours After Release . stockholmcf.org/journalist-parildak-re-arrested-before-leaving-prison-following-her-release-by-court/

196 https://ahvalnews.com/turkish-courts/turkish-journalist-ahmet-altan-detained-days-after-release

197 Stockholm Center for Freedom. 70-Year-Old Turkish Businessman Re-Arrested After Erdoğan's Henchman Reacted To His Release.
https://stockholmcf.org/70-year-old-turkish-businessman-re-arrested-after-erdogans-henchman-reacted-to-his-release/

198 AfÖrgütü. TanerKılıç›ıntahliyekararınınardındangerçekleşenhukukisüreç.
https://www.amnesty.org.tr/icerik/taner-kilicin-tahliye-kararinin-ardindan-gerceklesen-hukuki-surec

199 https://arrestedlawyers.org/2018/09/16/turkey-rearrests-12-lawyers-a-day-after-their-release/

200 https://ipa.news/2020/01/19/general-re-arrested-as-erdogan-fumes-at-judges-for-freeing-him/

201 https://www.hrw.org/news/2020/02/20/turkey-prominent-civic-leader-rearrested-after-acquittal

Nevertheless, in high profile cases, the authority of the Constitutional Court was ignored by court decisions.

Case of journalists SahinAlpay and Mehmet Altan is of particular significance to this regard.

On 11th January 2018, the Turkish Constitutional Court ruled that decisions to arrest of journalists Sahin Alpay and Mehmet Altan were unlawful. On the same day, the Istanbul 13rd and 26th High Penal Courts refused to release Altan and Alpay, on the grounds that the decisions of the CC had not yet been published in the Official Gazette. On 14th January 2018, the Istanbul 13th and 26th High Penal Courts refused to release Altan and Alpay again, on the grounds that the CC had exceeded its authority. On 15th January 2018, the Istanbul 14th and 27th High Penal Courts refused the objections of Altan and Alpay's lawyers[202]

The European Court of Human Rights examined the applications of each of the two journalists and ruled on 20 March 2018 that the Turkish authorities had violated their rights to liberty and security and their freedom of expression. The ECtHR also supported the reasoning and the role of the Turkish Constitutional Court and criticised the lower court for not having conformed with the Constitutional Court ruling of January 2018[203].

13.3THE EUROPEAN COURT OF HUMAN RIGHTS' DECISIONS ARE INEFFECTIVE. THE CASES OF ALPARSLAN ALTAN AND HAKAN BAS.

Following the lifting of the state of emergency, in August 2018 Turkey revoked its derogations to the European Convention on Human Rights and to the International Covenant on Civil and Political Rights (ICCPR). However, the full monitoring procedure re-opened by the Parliamentary Assembly of the Council of Europe in April 2017 continues.

Nevertheless, in a decision adopted on 4 June 2020, referring to the ECtHR's Hakan Baş v. Turkey ruling (similarly applied to the Alparslan Altan case), the Constitutional Court refused to implement the European Court ruling, invoking the national margin of discretion.

- In the case Baş v. Turkey, (no. 66448/18, 3 March 2020), connected to the attempted coup of 15 July 2016 and regarding Mr. Hakan Baş, a first instance court judge, the European Court found that his arrest was illegal because of different reasons: there was no reasonable suspicion that he had committed an offence; the necessary procedure for investigation and arrest of judges was not followed; state of emergency and derogation from human rights conventions cannot be seen as a "carte blanche" for arbitrary arrests; right to speedy review of the lawfulness of detention (of Article 5 § 4) was breached by the time of 14 months during which the applicant had not appeared in person before a judge.

  Similarly, in the case Alparslan Altan, the former Deputy Chief Justice of the Turkish Constitutional Court, was detained hours after the coup attempt, and he was subsequently arrested by the Ankara Criminal Peace Judgeship.

  The European Court of Human Rights, on 16th April, 2019[204], decided that his

202 The Arrested Lawyers Initiative: https://arrestedlawyers.org/2018/01/16/lawyers-to-alpay-altan-say-constitutional-court-rulings-are-binding-on-all/

203 EC 2018 report, pag. 25.

204 ECtHR, judgment of 16 April 2019, application no. 12778/17,Alparslan Altan v. Turkey,http://hudoc.echr.coe.int/eng?i=002-12446

detention was unlawful[205]. The case was also connected to the attempted coup of 15 July 2016.Since then Alparslan Altan has not been released and, on the contrary, he has been sentenced to eleven years in prison[206].

In both cases the Court found a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights as regards the alleged unlawfulness of the applicants' initial pre-trial detention on account of lack of reasonable suspicion of the perpetration of a criminal offence. Having examined the case-law of the Court of Cassation which finds a mere suspicion of membership of a criminal organisation as sufficient to characterise the element of in flagrante delicto, the Court concluded that the national courts' extension of the scope of the concept of in flagrante delictowas not only problematic in terms of legal certainty, but also appeared manifestly unreasonable

The Turkish Constitutional Court, however, in an inadmissibility decision adopted on 4 June 2020 and related to the concept of in flagrante delicto, referring to the ECtHR's Hakan Baş v. Turkey ruling, determined that while the ECtHR rulings remain binding for Turkey, the interpretation of Turkish laws on the imprisonment of members of the judiciary pertains to the Turkish courts, which are "much better positioned than the ECtHR for explaining and interpreting the provisions of the Turkish law." . This decision has made highly questionable the ECtHR case law effectiveness in Turkey.

13.4 THE EUROPEAN COURT OF HUMAN RIGHTS' DECISIONS ARE INEFFECTIVE: THE CASES OF SELAHATTIN DEMIRTAS AND OSMAN KAVALA

In two further high-profiledecisions of the ECtHR against Turkey, regarding detainees, the enforcement of the Europe Court ruling was ignored by regular Turkish courts.

Selahattin Demirtas and Osman Kavala

Selahattin Demirtas, who was the Co-Chair of pro-Kurdish Party, HDP, was detained on 4th November 2016. On 20th November 2018, the ECtHR decided that Turkey had violated Article 18 of the Convention, in conjunction with Article 5 § 3, and therefore the detention was unlawful[207]. However, Mr. Demirtas was not released.On 21st September 2019, the Turkish President, Recep Tayyip Erdoğan, said his government would not allow the release of SelahattinDemirtaş. *"This nation does not forget, and will not forget, those who invited people to the streets and then killed 53 of our children in Diyarbakır. We have been following, will follow, this issue, until the end. We cannot release those people. If we release them, our martyrs will hold us accountable"*[208] said Erdoğan. On the very

205 ECtHR, AlparslanAltan v. Turkey, cit.

206 https://www.turkishminute.com/2019/03/06/former-deputy-chief-justice-given-11-year-jail-sentence-over-gulen-links/

207 ECtHR, judgment of 20 November 2018, application no. 14305/17,Demirtas v Turkey, http://hudoc.echr.coe.int/eng?i=001-187961

208 https://ahvalnews.com/recep-tayyip-erdogan/turkeys-erdogan-signals-continued-imprisonment-former-hdp-leaders

same day, Selahattin Demirtas was detained under a new investigation to prevent his release from the ongoing detention. The ECtHR held a Grand Chamber hearing in September 2020 and issued a final decision on 22 December 2020[209].

The ECtHR Grand Chamber finally ruled that Demirtaş' four years in prison violated his rights under five different categories, including freedom of expression and right to liberty. In its judgment dated 22 December 2020, the Court observed, in line with the Venice Commission's findings in its Opinion on Articles 216, 299, 301 and 314 of the Criminal Code[210], that the Code does not define the concepts of "armed organisation" and "armed group"[211]. The arrests based Article 314 of Turkish Penal Code (membership to an armed terror organisations), which is also the basis to arrest judges, prosecutors, lawyers and journalists, has been repeatedly found to be contrary to the Convention by the ECHR.[212].On 23 December 2020 the Minister of Interior, Suleyman Soylu declared: *"Demirtas is a terrorist. The European Court of Human Rights ruling, whatever the reason, is meaningless"*[213].Mr. Demirtas was not released following the ECtHR Grand Chamber decision. In January 2021 Mr, Selahattin Demirtaş, has filed another individual application to Turkey's Constitutional Court, demanding the implementation of the European Court of Human Rights ruling for his immediate release[214].

Osman Kavala, a prominent civil society leader, was detained in October 2017. On 10th December2019, the ECtHR decided that a violation of Articles 5.1 (right to liberty and security), 5.4 (right to a speedy decision on the lawfulness of detention) and 18 (limitation on use of restrictions on rights) of the ECHR occurred. The Court called for the immediate release of Osman Kavala. The Court found that the authorities were unable to demonstrate that the applicant's initial and continued pre-trial detention had been justified by reasonable suspicions based on an objective assessment of the acts attributed to him.[215] However, on 24th December, 2019, and 28th January, 2020, the trial court (the Istanbul 30th Heavy Penal Court) refused to release Mr. Kavala[216]. Furthermore, on 18th February 2020, Osman Kavala was acquitted on charges related to the "Gezi Protest" trials but, on the very same day, he was re-arrested upon the charge that he was involved in the attempted coup in 2016, and also with espionage[217]. The European Court's ruling became final on 12 May 2020 as it rejected the Turkish government's request for referral. Osman Kavala was not released.

209 ECtHR, Grand Chamber, judgment of 22 December 2020, application no. 14305/17, SelahattinDemirtas v. Turkey.

210 CDL-AD(2016)002-e, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e

211 The qualifying criteria for a criminal organisation have been set out in the case-law of the Court of Cassation: such an organisation has to have at least three members; there should be a hierarchical connection between the members; they should have a common intention to commit crimes; the group has to display continuity in time; and the structure of the group, the number of its members, its tools and its equipment should be appropriate for the commission of the crimes envisaged. Regarding "membership of an armed organisation", the Turkish Court of Cassation takes into account the continuity, diversity and intensity of the acts attributed to the suspects in order to determine whether those acts prove that the suspect had an "organic relationship" with the organisation or whether the acts may be considered to have been committed knowingly and willingly within the "hierarchical structure" of the organization.

212 Inter alia, in the Court's recent judgment of 15.09.2020, application no 15064/12, Ragip Zarakolu v. Turkey.

213 ECHR ruling on 'terrorist' HDP leader is 'meaningless' (aa.com.tr)

214 Jailed Kurdish politician SelahattinDemirtaş appeals again for his release | Ahval (ahvalnews.com)

215 ECtHR, judgment of 10.12.2019, application no. 28749/18,Kavala v. Turkey.http://hudoc.echr.coe.int/eng?i=001-199515

216 https://www.reuters.com/article/us-turkey-security-gezi/turkey-keeps-businessman-in-jail-despite-european-court-release-call-idUSKBN1YS0O1

217 https://www.hrw.org/news/2020/02/20/turkey-prominent-civic-leader-rearrested-after-acquittal

14. INQUIRY COMMISSION ON THE STATE OF EMERGENCY MEASURES IS INEFFECTIVE

On 23 January 2017, the Turkish Council of Ministers issued Decree Law no. 685 establishing a "Commission to Review the Actions Taken under the Scope of the State of Emergency"[218].

The Council of Ministers called the establishment of the Commission a *"tangible example of Turkey's commitment to the Council of Europe's standards"* and declared that the Commission was *"established with the aim to creating an effective domestic remedy for those who were affected by the measures under the decree laws."*[219]

The Commission has competence to review dismissals, closure of associations, annulment of ranks of retired personnel ordered through decree-laws; in short,it was tasked to review hundred thousand of potential violations of fundamental rights, and to establish redress. However,it was not given any competence on decisions adopted by administrative act in accordance with rules contained in thedecrees, including dismissals of judges and prosecutors[220].

It is here useful to recall the characters of an effective domestic remedy in the light of international standards,as highlighted above: an effective remedy should be accessible and should be provided by an independent and impartial judicial body and should prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities[221]. It further must be enforceable, and lead to cessation and reparation for the human rights violation concerned[222].

The UN Special Rapporteur on freedom of expression, who visited Turkey after the establishment of the Commission, expressed concern *"about the narrow scope of the Commission's mandate and its lack of independence and impartiality"*[223].In 2017, the UN Special Rapporteur on torture expressed the view that *"the composition of the Commission may raise legitimate questions regarding its independence and impartiality, given that the majority of its members will be appointed by the Government. ... Concerns have also been raised that the Commission may be considered as an additional domestic remedy that has to be exhausted before individuals or institutions can have their cases reviewed by the Constitutional Court* (and possibly later by the European Court of Human Rights)"[224].The Parliamentary Assembly of the Council of Europe[225]and the Office of the

218 Article 3.1, Decree Law no. 685, Published in the Official Gazette no. 29957, dated 23 January 2017.

219 Information Note Concerning the Inquiry Commission on the State of Emergency Measure.

220 Decree Law no. 685, published in the Official Gazette no. 29957, dated 23 January 2017, article 2.

221 ECtHR, judgment of 11 December 2008, application no 42502/06, Muminov v. Russia, para. 100; judgment of 19 June 2008,application no. 20745/04, Isakov v. Russia, para. 136; judgment of 8 July 2010, application no. 1248/09,Yuldashev v. Russia, paras. 110-111; judgment of 10 June 2010, application no. 53688/08, Garayev v. Azerbaijan, paras. 82 and 84.

222 IcJ report, pag. 11.

223 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey, UN Doc. A/HRC/35/22Add.3, 21 June 2017, para. 40

224 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Turkey, UN Doc. A/HRC/37/50/Add.1, 18 December 2017, para 84

225 State of emergency: proportionality issues concerning derogations under article 15 of the European Convention on Human Rights, PACE report, Doc. No. 14506, 27 February 2018, para 92. "Members come from the same authorities which dismissed the officials in question, putting in doubt their independence and impartiality; its members are automatically dismissed should a terrorism-related investigation be opened concerning them – given the very broad scope of antiterrorism law in Turkey and the potential for its arbitrary abuse, this places the members' positions on the Commission at the mercy of the authorities; the secretariat of the Commission, responsible for administrative and preparatory work, is appointed by the Prime Minister, putting its independence in question; the basis of contested decisions is unclear, making them difficult to contest; there is no possibility of adversarial proceedings and there are no hearings, making it difficult for applicants to articulate their cases; the workload, working methods (each decision requires the participation of four of the Commission's seven members) and time-frame available would seem to make it almost impossible "to give individualised treatment to all cases", as intended

UN High Commissioner for Human Rights have, similarly, expressed concern for lack of independence and impartiality of the Commission members and for the unfairness of its procedure.

More recently, the EC has observed the lack of institutional independence, lengthy review procedures, the absence of sufficiently individualised criteria, and the absence of a proper means of defence cast serious doubt over the Inquiry Commission on the State of Emergency Measures' ability to provide an effective remedy against dismissals[226].

In 2020, the Inquiry Commission stated it reviewed individually all complaints related to more than 150 000 dismissals through emergency decrees. As of the end of March 2020, 126,300 applications had been made. Of these, the Inquiry Commission had reviewed 105,100 and only 11,200 had led to a reinstatement(8,86% rate), while 93,600 complaints had been rejected. 57 reinstatement decisions were linked to the re-opening of organisations that were closed after the coup attempt. At that time, there were 21,200 applications pending.

The EC has considered that the rate of processing of applications raises concerns as to whether each case is being examined individually. There are strong concerns about a lack of respect for the rights of defence of those dismissed and an assessment procedure in line with international standards. Since there were no hearings, there was a general lack of procedural rights for applicants and decisions were taken on the basis of the written files related to the original dismissal, all of which called into question the extent to which the Inquiry Commission is an effective judicial remedy.[227]

It is then clear that the State of Emergency Commission has serious shortcomings related to its independence from the executive that disqualify it as a judicial remedy. It is therefore also clear, on these grounds alone, that the Commission, not being independent, does not in itself provide an effective remedy.[228]

Further, the remedy before the State of Emergency Commission is not an effective one, because its procedure unfair and its exam is not individualised.

More, the alarming situation of the judiciary in Turkey, described above, casts serious doubts as to the capacity of the judicial system to provide an effective appeal against decisions of the Commission or of ministries or agencies that have dismissed employees[229].

It is however certain that the establishment of a Commission, that lacks independence and effectiveness, prevented more than 150.000 Turkish citizens, who claimed to have their fundamentals rights severely violated by the action to the Government, to access a judge and to access a prompt and effective remedy. More than four years have passed since July 2016, when hundreds ofthousandsof people were suddenly deprived of their jobs and their income, without having possibility to access a judicial effective remedy.

15. HUMAN RIGHTS AND EQUALITY INSTITUTION (NHREI) AND THE OMBUDSMAN INSTITUTION ARE INEFFECTIVE

Turkey has also two institutions on human rights: the National Human Rights and

by the Venice Commission."

226 EC 2020 report, pag. 6.

227 EC 2020 report, pag. 21.

228 IcJ report, pag. 36.

229 IcJ report, pag. 33.

Equality Institution (NHREI) and the Ombudsman institution. Both are authorised to monitor, protect and promote human rights, and to prevent violations in this area. They can also investigate individual complaints or allegations. The NHREI also acts as the national preventive mechanism against torture and has the mandate to investigate ill-treatment and torture upon application or ex officio. It has also the power to launch investigations of its own initiative into potential human rights violations.

According to the EC, neither of two above institutions has operational, structural or financial independence and their members are not appointed in compliance with the Paris Principles.[230].

The US Department of State reported that the government continued to staff its human rights monitoring body, the NHREI. According to August press reports, the NHREI received in 2019 at least 10 applications regarding prison conditions and the practices of prison authorities. The NHREI did not accept any of the complaints. In response to an application regarding prison overcrowding, the NHREI stated that "due to the increased number of arrestees [related to the state of emergency period] and intensity of the capacity in prisons, such practice shall be accepted as proportionate." Critics complained the institution was ineffective and lacked independence[231].

16.THE ACTION PLAN SUBMITTED TO COE FOLLOWING THE ALPARSLAN ALTAN RULING IS INEFFECTIVE

Notwithstanding the case-law of the ECHR, the Action Plan[232] submitted by the Turkish Government to the Committee of Ministers of Council of Europe in reply to the ECtHR's Alparslan Altan judgment is a clear indication of the Government's lack of will, any plan or project for the proper implementation of the said judgment of the ECHR.

17. THE JUDICIAL REFORM STRATEGY IS INEFFECTIVE

The President announced the Judicial Reform Strategy for 2019- 2023 in May 2019. However, it falls short of addressing key shortcomings regarding the independence of the judiciary. No measures were announced to remedy the concerns identified by the Council of Europe's Venice Commission and in the European Commission's annual country reports. No measures were taken to change the structure of, and process for, the selection of members of the Council of Judges and Prosecutors to strengthen its independence. Concerns regarding the lack of objective, merit based, uniform and pre-established criteria for recruiting and promoting judges and prosecutors persisted. No changes were made to the institution of criminal judges of peace so that concerns regarding their jurisdiction and practice remained[233]. Shortly after the adoption of the judicial reform strategy, the HYSK ordered the forces transfer of almost 4000 judges and prosecutors.

230 EC 2018 Report, pag. 31.

231 USDOS 2019 report.

232 1383rd meeting (29 September-1 October 2020) (DH) - Action plan (23/06/2020) - Communication from Turkey concerning the AlparslanAltan v. Turkey (Application No. 12778/17).

233 EC 2020 report pag. 6.

THE ANSWER TO THE QUESTION. EPILOGUE.

Can we evaluate the judicial system of Turkey as ensuring full access to justice and effective judicial protection in case of human rights violations?

The answer to the question comes directly form the first part of the report

Independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice[234].

Judicial independence is therefore necessary to ensure effective judicial protection of the rights of individuals, as recognisedby articles 13 and 41 of the ECHR and by article 19 of the Treaty on European Union and art. 47 of the Charter of Fundamental rights of EU.

Effective judicial protection further implies access to justice and judicial remedies that are effective in law as well in practice and are not unjustifiably hindered by the acts of State authorities.

In Turkey, fundamental rights are not protected.

Persecution of lawyers and HRD (chapter 12.), unjustifiable limitations of the right of defence (chapters 12.1, 12.3 and 12.2), legal and factual impediments to access to evidence by the defendants (chapter 12.4), disruption of fair trial rules (chapter 12.5) and misuse of detention (chapter 12.6) hinder access to Justice.

Political control over the judiciary make the judicial remedies ineffective: decisions to release detainees are not executed (chapter 13.1.); decisions of constitutional court are not respected (chapter 13.2.); landmark judgments of the Court of Human Rights are disregarded and denied enforcement (chapter 13.3. 13.4).

Without effective judicial protection of fundamental rights there is no Justice; without Justice there is no Rule of Law.

234 CM/Rec(2010)12, principle 11