State of Emergency Acts Review Commission used to hold off proper legal review

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Since the failed coup attempt of 15 July, the Turkish government ('the Government') has been carrying out an unprecedented purge and has already dismissed over 125,000 public officials, including judges, prosecutors, academics, military staff, police officers, and shut down over 4,000 non-governmental organisations, ranging from private universities to national and local media outlets.[1] The declaration of a state of emergency on 21 July, which authorised the Government to issue decree-laws with virtually no constitutional limits, made this massive purge possible. While a number of officials have been dismissed by their respective institutions, some 91,000 people have been dismissed directly by way of lists appended to Decree-Laws No. 668, 669, 670, 672, 673, 675, 677, 679, 683.

Although decree-laws are subject to constitutional review by the Turkish Constitutional Court ('the Constitutional Court'), Art. 148/1 of the Turkish constitution immunises *state of emergency decree-laws* from constitutional review. Since decree-laws are functionally legislative acts, they are not normally subject to administrative judicial review either. The only legal remedies remaining for those dismissed by a decree-law are, therefore, the constitutional complaint mechanism to the Constitutional Court and the individual application mechanism to the European Court of Human Rights ('the ECtHR'), both of which are limited to establishing violations of the rights protected in the European Convention on Human Rights and are not mechanisms to challenge the legality of the acts.

Following the purges, the people dismissed have sought various legal remedies. Some applied to first instance administrative courts or directly to the Council of State (*Danıştay*) to challenge the legality of the decree-law concerned, others applied to the Constitutional Court or the ECtHR, claiming their rights have been violated. The Council of State has rejected the cases and referred the applicants to first instance administrative courts,[2] but these courts too have ruled that reviewing decree-laws is outwith their jurisdiction.[3] Likewise, the

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[1] Parliamentary Assembly of the Council of Europe, Committee on Political Affairs and Democracy, *Ad hoc* Sub-Committee on recent developments in Turkey, 'Report on the fact-finding visit to Ankara (21-23 November 2016)', AS/Pol (2016) 18rev, 15 December 2016, website-pace.net/documents/18848/2197130/20161215-Apdoc18.pdf/35656836-5385-4f88-86bd-17dd5b8b9d8f, para. 24.

[2] *See* for instance, Danıştay 5th Chamber, File No. 2016/8136, Decision No. 2016/4076, 4 October 2016 and Danıştay 5th Chamber, File No. 2016/7983, Decision No. 2016/4079, 4 October 2016.

[3] *See* for instance, Administrative Court of Trabzon, File No. 2016/1113, Decision No. 2016/1046, 8 September 2016.

Constitutional Court received more than 60,000 applications after 15 July alone,[4] but is yet to decide any. The ECtHR, however, decided two cases inadmissible, ruling that the applicants are required to lodge a constitutional complaint to the Constitutional Court in order to exhaust the domestic remedies.[5] The Republican People's Party (CHP), the main opposition party, took the decree-laws to the Constitutional Court for annulment, yet the Constitutional Court dismissed the request for lack of jurisdiction, abandoning its long-established jurisprudence of reviewing state of emergency decree-laws as to whether they are in line with the necessities and limits of the state of emergency.[6]

On 23 January 2017, exactly six months after the purges began, as a result of the accumulation of applications and growing international pressure over human rights violations under the twice-extended state of emergency, the Government established the State of Emergency Acts Review Commission ('the Commission') by Decree-Law No. 685. The Commission will review and decide the individual applications against the provisions of decree-laws regarding dismissals, closing of non-governmental organisations, and stripping retired staff of ranks, as well as other acts in decree-laws that directly regulate the legal status of real or legal persons, except for the otherwise justiciable acts and the additional measures provided in decree-laws.

The Commission consists of seven members. The Prime Minister appoints three members from public officials, the Minister of Justice appoints one member from judges and prosecutors, the Minister of the Interior appoints one member from local government personnel and the High Council of Judges and Prosecutors appoints one member each from the judge-rapporteurs of the Court of Cassation and the Council of State. Both the quorum and the quorum for decisions are four and no member can abstain from voting. The Commission is set to work for two years, subject to indefinite one-year extensions. The Commission will dismiss any of its members who becomes subject to an investigation on the account that he is a member of or affiliated to organisations defined as a threat to national security by the National Security Council or to terror groups—the same uniform wording with the reason given for all the dismissals in decree-laws.

[4] Speech of the President of the Turkish Constitutional Court, www.anayasa.gov.tr/icsayfalar/basin/konusmalar/4.html, 19 December 2016.
[5] *Mercan v. Turkey* (dec.), no. 56511/16, 8 November 2016 and *Zihni v. Turkey* (dec.), no. 59061/16, 29 November 2016.
[6] Turkish Constitutional Court, File No. 2016/166, Decision No. 2016/159, 12 October 2016 and Turkish Constitutional Court, File No. 2016/167, Decision No. 2016/160, 12 October 2016.

The applications to the Commission will be filed through governorates or the latest institution the applicant worked at before dismissal. Importantly, the 60-day rule in the Law of Administrative Procedure, which stipulates that the silence of the administrative bodies is regarded as refusal after 60 days following a request and that the subject of the request becomes justiciable afterwards, is not applicable to the Commission.

The Commission will either accept or dismiss the application. If the Commission accepts an application of a dismissed official, the applicant will be reinstated to a public post in line with his latest rank and status. If an application with regard to the closing of an organisation is accepted, the provisions of closure with all its consequences will lose effect *ab initio*. The decree-law also provides that the applicants have the right to appeal to administrative courts of Ankara against the decisions of the Commission, with the exception of judges and prosecutors, who will apply directly to the Council of State. The procedures governing the working of the Commission are to be regulated by the Prime Minister.

Although the establishment of the Commission seems to follow the recommendations of the Venice Commission[7] and the Parliamentary Assembly of the Council of Europe[8], and purports to soften the terms of the state of emergency, there are several reasons to see this step as a delaying tactic that subverts the rule of law and disproportionately constrains the right of access to court.

By issuing decree-laws, the Government has been directly dismissing public officials and also authorising all public institutions to dismiss their personnel. In either case of dismissals, no individual-specific reason for dismissal or evidence is ever provided. This unconstitutional practice, however, has been going legally unchallenged. By another decree-law, the Government now created the Commission, which has no constitutional guarantee and is subject to the decree-law regime, meaning that its composition, working procedures and its authority can be altered or that it can even be abolished altogether—by yet another decree-law. Moreover, the Commission is not a judicial body and it will be composed of seven members five of whom are appointed by the executive, and the majority of the Commission consists of bureaucrats and not members of the judiciary. Furthermore, the members of the

[7] 'Turkey: Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016', European Commission for Democracy through Law (Venice Commission) (Venice, 9-10 December 2016), www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)037-e, paras. 220-23.
[8] Parliamentary Assembly of the Council of Europe, Committee on Political Affairs and Democracy, *Ad hoc* Sub-Committee on recent developments in Turkey, 'Report on the fact-finding visit to Ankara (21-23 November 2016)', AS/Pol (2016) 18rev, 15 December 2016, website-pace.net/documents/18848/2197130/20161215-Apdoc18.pdf/35656836-5385-4f88-86bd-17dd5b8b9d8f, para. 112.

Commission will be under immense pressure, as there is nothing to stop another decree-law permanently dismissing them from public service, simply by adding their names to a new list of dismissed officials. It is extremely difficult for the members to act impartially and remain independent of the executive. The matter of procedural rules regarding the burden of proof, evidence, and standards of review also remains an open question. The criminal nature of the generic allegation of "membership or affiliation to organisations defined as a threat to national security by the National Security Council or to terror groups" makes the Commission's role even more ambiguous. This troublesome design is aggravated by the fact that there is no time limit on reviewing the applications. The exemption from the 60-day rule effectively means that there is an indefinite period of time before an applicant can contemplate litigation, which will then have to start from scratch at the doorstep of the first instance administrative court, to be followed by an appeal to the regional administrative court, then to the Council of State, after which the Constitutional Court and the ECtHR will finally hear his complaints. Additionally, it remains unknown what the right to appeal to administrative courts against the decisions of the Commission is provided for. By what standards are the decisions to be reviewed? What will be the effect of the decision of the administrative courts, considering that they cannot invalidate decree-laws? The administrative judicial review of the decisions does not seem to be able to yield anything more than perhaps a reconsideration of the application by the Commission.

It should be kept in mind that the establishment of the Commission is not aimed at reviewing the human rights violations resulting from the dismissals, such as the violations of the right to a fair trial, the principle of no punishment without law, the right to respect for private and family life, the right to an effective remedy, the right to property and the prohibition of discrimination, but reviewing the acts of dismissal themselves. It would be a mistake for the Constitutional Court and the ECtHR to suspend the cases before them that arose from the dismissals by way of decree-laws. It is impossible that human rights violations and damages will be remedied by the Commission as the extent of its power is to reinstate the dismissed persons and to invalidate the closing of organisations. Therefore, the review by the Commission should not be regarded as an effective domestic remedy. International observers should remain vigilant with regard not only to the work of the Commission, but also to the composition and its degree of independence from the influence of the executive. The Political Affairs Committee of the Parliamentary Assembly of the Council of Europe hastily

welcomed the establishment of the Commission,[9] but it should ensure its plaudit is dependent upon the Commission's fulfilment of what it is expected to attain. It must be emphasised that the Commission's duty is complementary to the function of the Constitutional Court and the ECtHR, as its authority is to simply reinstate a previous legal status but not to award damages for possible human rights violations which will not be remedied automatically by reinstatement.

In any case, the way the Commission has been set up indicates that the effort is not to make reparations to those unfairly dismissed, but rather to delay the fully-fledged human rights review by the Constitutional Court and the ECtHR that will expose the fundamental unconstitutionality of dismissals by decree-laws and grave human rights violations. The best course of action is to keep the channels of human rights review open as it will compel the Commission to take its duty seriously, as well as helping identify and compensate human rights violations within a reasonable time.

[9] Parliamentary Assembly of the Council of Europe, 'Situation in Turkey: statement by PACE Committee on Political Affairs', assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=6492&lang=2, 24 January 2017.