Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members

Decision of 4 August 2016, E. 2016/6 (Miscellaneous file), K. 2016/12

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INTRODUCTION

The Turkish Constitutional Court (the Court) delivered an unprecedented decision (the Decision) on 4 August 2016. Sitting *en banc*, minus two of its Members who had been arrested after the coup attempt of 15 July 2016, the Court unanimously decided to dismiss them from the Court and bar them from the judicial profession.[1]

In addition to prosecution of those who actually took part in it, the failed coup attempt resulted in a general purge and persecution of dissidents. Thousands of public officials, including members of the judiciary, whose names appeared on lists apparently drawn up in advance, were detained within hours of the coup attempt. The crackdown later spread to all public sectors as well as to business persons, journalists, academics, lawyers and students. Some 140,000 public officials were dismissed from their jobs with no individual reasoning given or due process provided. Over 50,000 people are being held under arrest awaiting trial, and summary judgment is passed in most cases without evidence.[2] Thousands of

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[1] E. 2016/6 (Miscellaneous file), K. 2016/12, 4 August 2016, <kararlaryeni.anayasa.gov.tr/Uploads/2016-12.docx>, visited 13 February 2017 (in Turkish). The English translation of the Decision can be found on the Court's website, <www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/pdf/2016-12.pdf>, visited 13 February 2017.

[2] For an overview of the purges and persecution in the aftermath of the coup attempt, *see* Research Turkey, 'An Overview of the post-Coup Attempt Measures in Turkey', 10 April 2017, <www.researchturkey.org/en/an-overview-of-the-post-coup-attempt-measures-in-turkey>, visited 13 June 2017.

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private organisations, including businesses and associations, have been confiscated and liquidated with no judicial procedure. Considering the virtual collapse of the rule of law in Turkey since the coup attempt,[3] it is perhaps not too surprising that the Court's decision to dismiss two of its own Members did not attract much attention. Yet, this decision is deserving of examination from both constitutional law and human rights perspectives — specifically, its implications for judicial independence in general, and for the right to a fair trial and the mechanism of constitutional complaint in particular. The Decision is legally and politically significant and useful for identifying the Turkish Constitutional Court's post-15 July role in reinforcing the government's attack on fundamental rights and the rule of law, and its acquiescence to the executive branch.

Background

Less than 24 hours after the coup attempt, the police detained Alparslan Altan and Erdal Tercan, two of the 17 Members of the Turkish Constitutional Court. They were arrested by a criminal peace judge[4] on 20 July 2016, on the charge of being members of a terrorist group, and have remained under arrest since.[5]

[3] On the erosion of the rule of law in Turkey, *see* United Nations High Commissioner for Human Rights, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression - Mission to Turkey', A/HRC/35/22/Add.3, 7 June 2017, <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session35/Documents/A_HRC_35_22_Add_3_E.docx>, visited 13 June 2017, para. 66ff; European Commission, 'Turkey 2016 Report', 9 November 2016, <ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf>, visited 13 June 2017, paras. 17-20; Parliamentary Assembly of the Council of Europe, Resolution 2156, 'The functioning of democratic institutions in Turkey', 25 April 2017, <assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23665&lang=en>, visited 13 June 2017; '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/default.aspx?pdffile=CDL-AD(2016)037-e>, visited 13 June 2017.

[4] On the establishment and controversial functioning of the 'criminal peace judgeships', *see* 'Turkey - Opinion on the duties, competences and functioning of the criminal peace judgeships', European Commission for Democracy through Law (Venice Commission) (Venice, 10-11 March 2017)', <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)004-e>, visited 18 March 2017.

[5] As of 11 June 2017, 2,581 judges and prosecutors have been arrested since the coup attempt, including 104 Members of Yargıtay (*the Court of Cassation*) and 41 Members of Danıştay (*the Council of State*), on the same grounds. *See* news report 'Adalet Bakanlığı FETÖ soruşturması verilerini açıkladı' [*The Ministry of Justice Releases Data of FETÖ Investigation*], *Cumhuriyet*, 11 June 2017, <www.cumhuriyet.com.tr/haber/turkiye/758621/Adalet_Bakanligi_FETO_sorusturmasi_verilerini_acikladi.html>, visited 13 June 2017.

Meanwhile, the Turkish government declared a state of emergency on 21 July 2016, which has since been extended three times, with the latest continuation announced on 18 April assuring that the state of emergency would likely soon be able to celebrate its first anniversary. The most significant consequence of the state of emergency has been the lavish use of decree-laws. As per Article 121/3 of the Turkish Constitution, 'during the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decree-laws on matters necessitated by the state of emergency'. The government used this mechanism to bypass parliamentary procedure and has since been ruling the country predominantly by decree-laws, even when their subject matter does not even remotely concern the conditions and exigencies of the state of emergency.[6]

The first emergency decree-law after the declaration of the state of emergency, 667 sayılı Olağanüstü Hal Kapsamında Alınan Tedbirlere İlişkin Kanun Hükmünde Kararname [*Decree-Law No 667 on Measures to be Taken under the State of Emergency*], was proclaimed on 23 July 2016. Article 3 of the decree-law granted, inter alia, the Constitutional Court the authority to dismiss any of its Members it deems to be linked to terrorist groups.

On 4 August 2016, the Court announced[7] on its website that it had dismissed Alparslan Altan and Erdal Tercan, exercising the authority conferred by Decree-Law 667. The full decision was published on 9 August. The Court also dismissed one rapporteur judge, four assistant rapporteur judges and 36 administrative staff, and suspended 12 others at later dates.[8]

The Case

On 18 July, the Presidency of the Court decided to launch a preliminary examination into its two Members being held in detention. Meanwhile, Decree-Law 667 was announced, conferring upon the Court the authority to dismiss its own Members. Upon conclusion of the preliminary examination, on 26 July 2016 the Court decided unanimously to perform an assessment of Alparslan Altan and Erdal Tercan within the meaning of Article 3 of Decree-Law 667, and gave them five days to submit written pleas,[9] which the two Members did before the deadline.

[6] *See* K. Gözler, '15 Temmuz Kararnameleri: Olağanüstü Hâl Kanun Hükmünde Kararnamelerinin Hukukî Rejiminin İfsadı Hakkında Bir İnceleme' [*15 July Decrees: A Review on the Subversion of the Legal Regime of State of Emergency Decree-Laws*], 17 February 2017, <www.anayasa.gen.tr/15-temmuz-kararnameleri.pdf>, p. 11-14, visited 13 June 2017.

[7] Turkish Constitutional Court, Press Release, 4 August 2016, <www.anayasa.gov.tr/icsayfalar/duyurular/detay/49.html>, visited 13 February 2017 (in Turkish).

[8] Turkish Constitutional Court, Press Release, 30 December 2016, <www.anayasa.gov.tr/icsayfalar/duyurular/detay/60.html>, visited 13 February 2017 (in Turkish).

[9] E. 2016/6, para. 8.

The Court also received the investigation file that had served as the basis for their arrest, from the Chief Public Prosecutor of Ankara.[10]

The Court's decision began by devoting paragraphs 12-24 to explaining the history and structure of an alleged terrorist group, the 'Fetullahist Terrorist Organisation/Parallel State Structure' (referred to throughout this note as 'the alleged terrorist group'), which is accused of the 15 July coup attempt.[11] It then went on to summarise the criminal investigations into the group that were already underway before the coup was attempted. The Court listed 22 'general' allegations made during the investigations and proceedings, although without citing specific cases.[12] The Court then noted all explicit and implicit references made by the National Security Council to the alleged terrorist group in 14 of its meetings spanning 2014 to 2016.[13] These references aim to illustrate that, over the course of three years, the Council came to the conclusion that the Gülen movement was a terrorist group.[14]

In paragraphs 19-23, the Court put special emphasis on the activities of the alleged terrorist group within the judiciary. The Court referred to the 'public opinion' that the alleged terrorist group was entrenched in specially-authorised criminal courts and prosecutorial offices,[15] and that its members in the judiciary and the police force acted upon the orders of the group and in line with its interests.[16] The Court further referred to an indictment[17] in which it was alleged that the alleged terrorist group had misused many contentious criminal procedures

[10] Ibid., para. 11.

[11] Fethullah Gülen, the leader of the Gülen movement, is a Turkish Muslim cleric who lives in self-imposed exile in the United States. For a brief account of the nature of the movement, its political involvement and links to the coup attempt, *see* '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) paras. 10-14, www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)037-e, visited 13 February 2017.

[12] E. 2016/6, para. 15.

[13] Ibid., paras. 17-18.

[14] *See* 'Turkey officially designates Gulen religious group as terrorists', *Reuters*, 31 May 2016, <www.reuters.com/article/us-turkey-gulen-idUSKCN0YM167>, visited 13 February 2017.

[15] On specially authorised courts, *see* L. Perilli, 'Report on the findings and recommendations of the Peer Review Mission on criminal justice (Istanbul and Ankara, 19-23 May 2014)', January 2015, <www.avrupa.info.tr/sites/default/files/2016-11/Criminal_Justice_report_final_January_2015.pdf>, visited 13 June 2017.

[16] Ibid., para. 19.

[17] Chief Public Prosecutor of Ankara, E. 2016/24769, 6 June 2016. The indictment, as summarised in para. 16/n of the Decision, charges 73 people, including Fethullah Gülen, with leading an armed terrorist organisation, attempting to destroy the government of the Republic of Turkey or prevent its functioning, political and military espionage, embezzlement, fraud, forgery of official documents, money laundering, as well as illegal recording, transfer, dissemination and seizure of personal data.

to undermine public officials who were not its members and to consolidate its power within various public institutions.[18] Additionally, the Court claimed that the group's alleged active role in the judiciary became a matter of 'public discussion' after bloc votes helped 15 independent candidates get elected to the High Council of Judges and Prosecutors, i.e. a great number of judges and prosecutors voted for a specific group of independent candidates, despite the absence of a formal list.[19]

The Court also made mention of the group's alleged infiltration of the Turkish military. Summarising the indictment, the Court noted that it had been alleged that taking hold of the military was the group's main objective, and that it had succeeded in becoming a dominant power within it.[20] After using various means to get rid of its adversaries, and with the help of the courts martial, one of its strongholds, it had managed to organise effectively within the military, and to promote its members to critical positions.[21] Eventually, this created 'an armed group of tens of thousands that is subject to a hierarchy other than that of the state'.[22] The indictment also mentioned that the threat of a military coup had been 'clear and imminent', and that 'the purge of [the alleged terrorist group] was a matter of life and death for the state'.[23]

The Court reported, in paragraphs 25-33, on the events of the coup attempt of 15 July and its immediate aftermath, and concluded that the 'authorities' had, in Decree-Law 667, declared that the coup attempt was carried out by members of the alleged terrorist group. The Court noted further that some news outlets were reporting that some of the suspects who allegedly took part in the coup attempt had admitted that they were linked to the alleged terrorist group and that the group had involvement in the coup attempt.[24]

The Court thus far summarised and explained the allegations made against the alleged terrorist group, both in formal indictments and in public discourse. It then moved on to the criminal investigations into two of its Members, stating that Alparslan Altan and Erdal Tercan, along with several other members of the judiciary, had been arrested and charged with being members of an armed terrorist group and that their bank accounts and other assets had been frozen.[25]

The Court explained what the coup attempt of 15 July 2016 meant constitutionally, and concluded that it was perhaps the most serious attack on

[18] E. 2016/6, para. 20.
[19] Ibid., para. 23.
[20] Ibid., para. 24.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid., para. 34.
[25] Ibid., paras. 35-38.

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the democratic constitutional order, fundamental rights and freedoms of individuals and national security in the history of Turkish democracy.[26] The Court then described the measures taken by the government, specifically regarding members of the judiciary.[27] It noted that the aim was to dismiss, from all public institutions, individuals who were *deemed* to have some sort of contact with terror groups.[28] Significantly, it argued that, unlike sanctions imposed for ordinary or disciplinary offences, dismissal within the meaning of Decree-Law 667 was an extraordinary measure with permanent and final character.[29]

In the next section of the Decision, the Court noted that the Decree-Law did not require 'membership in' or 'affiliation with' a terror group: 'adherence to' or a 'connection with' it were sufficient grounds for dismissal.[30] More significantly, the Court interpreted the Decree-Law to mean that legal 'certitude' was not necessary for establishing a link between the Members and terror groups, and that the existence of a link could furthermore be established solely on the 'conviction' of an absolute majority of the General Assembly of the Court, with no need to provide evidence.[31]

In the final section, the Court again mentioned that Altan and Tercan had been arrested in the aftermath of the coup attempt, and noted that they rejected all allegations.[32] The Court, however, concluded that the facts, the *collective conviction* of the Members of the Court, and the *social network information* indicating that Altan and Tercan had a *connection* with the alleged terrorist group, which constituted sufficient reason to conclude that they maintained links that conflicted with their office, as stipulated by Article 3/1.[33]

Analysis

The Decision and reasoning of the Court is problematic in at least five respects. First, the authority the Court relied on in delivering the decision is unconstitutional. Second, the Court violated the right to a fair trial of two of its own Members and ignored any presumption of innocence. Third, it admitted that its *ratio decidendi* was entirely subjective. Fourth, the Court's interpretation of the decree-law requiring no evidence to dismiss was subsequently adopted as authoritative and applicable to other provisions of the same decree-law.

[26] Ibid., para. 68.
[27] Ibid., paras. 69-81.
[28] Ibid., para. 78.
[29] Ibid., para. 79.
[30] Ibid., para. 85.
[31] Ibid., paras. 86-87.
[32] Ibid., paras. 91-93.
[33] Ibid., para. 98.

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This effectively authorised the High Council of Judges and Prosecutors and all government institutions to dismiss the judicial and public officials in their employ. Finally, the Decision implied that over 140,000 people[34] dismissed from public service after 15 July by way of decree-laws or other administrative acts stood little chance of gaining access to the constitutional complaint mechanism.

The authority of the Court

It can be argued that the Court lacks the authority to lawfully dismiss its own Members since that authority was accorded by an emergency decree-law in violation of Articles 148/10 and 121/3 of the Constitution.

Articles 146-153 of the Turkish Constitution establish the Constitutional Court. Article 148/1 entrusts the Court with the duty and authority to review the constitutionality of laws, decree-laws, Parliament's rules of procedure, constitutional amendments (only as to their form), and to hear constitutional complaints. As per Article 148/6-9, in its capacity as the Supreme Court, the Court is also authorised to try the highest-ranking officials (including members of the Constitutional Court) for offences relating to their duties. Finally, Article 148/10 states that 'The Constitutional Court shall also perform the other duties given to it by the Constitution'. A constitutional amendment is required to endow the Court with new powers, as Article 148/10 refers to 'other duties given to it by the Constitution'.

In the Decision, however, the Court relied on the authority it had been accorded by Decree-Law 667.[35] Article 3/1 of the decree-law granted the Constitutional Court the authority to dismiss, by an absolute majority vote, any of its Members that it *deemed* to have 'membership in' or an 'affiliation with', or to have 'adhered to' or 'maintained contact with' terror groups or organisations that the National Security Council sees as a threat to national security. This is a power not given to the Court by the Constitution or constitutional amendment, but rather by an emergency decree-law. Therefore, the part of Article 3/1 of Decree-Law 667 that confers the power to dismiss upon the Constitutional Court is in contravention of Article 148/10, and is hence unconstitutional.

Another unconstitutional aspect of the decree-law concerns its wide scope. Article 121/3 of the Constitution limits the scope of decree-laws made under a

[34] P. Kingsley, 'Turkey Purges 4,000 More Officials, and Blocks Wikipedia', *The New York Times*, 30 April 2017, <www.nytimes.com/2017/04/30/world/europe/turkey-purge-wikipedia-tv-dating-shows.html>, visited 6 May 2017.

[35] For the English translation of Decree-Law 667, *see* 'Turkey - Emergency Decree Laws of July – September 2016 Nos. 667-674', European Commission for Democracy through Law (Venice Commission). <www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2016)061-e>, visited 13 February 2017.

state of emergency to 'the matters necessitated by the state of emergency'. The Court's established jurisprudence on the review of decree-laws held that they could only apply to the geographic area where the state of emergency had been declared, only for the duration of the state of emergency, and could not make any changes to existing legislation.[36] The Court would treat an emergency decree-law not meeting any of these three criteria as an ordinary decree-law subject to constitutional review pursuant to Article 148 of the Constitution. In its post-15 July jurisprudence, however, the Court abandoned precedent and declared itself not competent to exercise the constitutional review of Decree-Laws 668[37], 669[38], 670[39] and 671[40]. In doing so, the Court left no recourse against the executive's breaches of constitutional limits on its authority to take up the legislative role in times of emergency.[41]

Article 3/1 of Decree-Law 667 furthermore violated the principles of the separation of powers and judicial independence. Article 138/2 of the Constitution stipulates that '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 3/1, by specifically granting the Constitutional Court the power to dismiss its Members, implied that the Court was expected to implement government policy of purging unwanted officials, including members of the judiciary. This provision has had, if nothing else, a chilling effect on the Members of the Court, as there is no longer any legal mechanism that can be used to challenge future decree-laws that would dismiss all the Constitutional Court's Members, or shut it down altogether.[42]

[36] E. Özbudun, Türk Anayasa Hukuku [*Turkish Constitutional Law*], (Yetkin 2010) p. 259-260.

[37] E. 2016/166, K. 2016/159, 12 October 2016, <kararlaryeni.anayasa.gov.tr/Uploads/2016-159.doc>, visited 13 February 2017 (in Turkish).

[38] E. 2016/167, K. 2016/160, 12 October 2016, <kararlaryeni.anayasa.gov.tr/Uploads/2016-160.doc>, visited 13 February 2017 (in Turkish).

[39] E. 2016/171, K. 2016/164, 2 November 2016, <kararlaryeni.anayasa.gov.tr/Uploads/2016-164.doc>, visited 13 February 2017 (in Turkish).

[40] E. 2016/172, K. 2016/165, 2 November 2016, <kararlaryeni.anayasa.gov.tr/Uploads/2016-165.doc>, visited 13 February 2017 (in Turkish).

[41] For an analysis of this shift, *see* S. Esen, 'Judicial Control of Decree-Laws in Emergency Regimes — A Self-Destruction Attempt by the Turkish Constitutional Court?', 19 December 2016, *Blog of the IACL, AIDC*, <iacl-aidc-blog.org/2016/12/19/judicial-control-of-the-decree-laws-in-emergency-regimes-a-self-destruction-attempt-by-the-turkish-constitutional-court/>, visited 13 February 2017.

[42] Such court-packing is not unprecedented in Turkey. Two weeks before the 2016 coup attempt, the Turkish parliament passed Law No. 6723, which dismissed nearly all Members of Danıştay (*the Council of State*) and Yargıtay (*the Court of Cassation*). The case challenging the constitutionality of this law is still pending before the Constitutional Court with the file number E. 2016/144. *See* T. Olcay, 'Resetting the Turkish Judiciary', 1 July 2016, *International Journal of Constitutional Law Blog*, <www.iconnectblog.com/2016/07/resetting-the-turkish-judiciary>, visited 13 February 2017.

The right to a fair trial and the presumption of innocence

The European Court of Human Rights categorises lustration as a criminal sanction, even in cases where it is not regarded as such in domestic law. Accordingly, it is subject to the criminal limb of Article 6 of the European Convention on Human Rights.[43] Thus, by ruling to impose a criminal sanction without demanding proof of guilt or any manner of trial or engagement with the Members' somewhat restricted right to submit a written defence, the Decision violated the two Members' right to a fair trial. The presumption of innocence was flouted and the defence rights stipulated in Article 6/2-3 of the Convention and Articles 15 and 38 of the Constitution were ignored.

Faced with the criminal sanction of dismissal, the two Members were denied the right to appeal the Decision. As per Article 153/1 of the Constitution, decisions of the Court are final. Therefore, the Members had no domestic legal recourse to challenge the Decision or file a human rights claim. The two Members were also unable to lodge a constitutional complaint, as Article 45/3 of the Law on the Constitutional Court exempts decisions of the Court from the constitutional complaint mechanism.

Furthermore, in Turkish constitutional law, there is no sanction of dismissal for the Members of the Court equivalent to the dismissal mechanism of Decree-Law 667. Even in the event of a final and conclusive conviction for certain crimes or for health reasons (Article 147/2), the severest sanction per Article 19 of the Law on the Constitutional Court is to 'invite the Member to withdraw from membership'. This 'invitation' is only extended if two thirds of the votes of the General Assembly agree to it, and only if the Member's attitude and conduct are found to be incompatible with his or her office. Even then, the Member retains the right to apply for a re-examination of the decision. Implementation of Decree-Law 667, therefore, radically diverges from Turkish constitutional standards by producing final decisions with no legal recourse, as in this Decision, which severely restricts the Members' right of access to a court.

A subjective judgment

Considering that the Court found that its authority in this case emanated from Article 3/1 of Decree-Law 667, its narration and discussion of the alleged terrorist organisation and the coup attempt were beside the point. The Court's argument dwells on the allegations and the indictment as well as on public opinion regarding the alleged terrorist organisation, emphasising what the coup attempt meant for Turkish democracy. However, none of this explains how the Court concluded that the two of its Members maintained relations with the group.

[43] ECtHR 30 May 2006, Case No. 38184/03, *Matyjek* v *Poland* (dec.).

The Court, noting that Article 3/1 of Decree-Law 667 requires no further evidence beyond *convictions* of the Members of the Court, also rejected their request to be provided with the opportunity to defend themselves again after having been presented with concrete information and documents regarding the allegations against them, or to hear their witnesses.[44]

The Court concluded that the facts of the case, the *collective conviction* of the 15 Members of the Court formed over time, and the *social network information* indicating that Altan and Tercan had a *connection* with the alleged terrorist organisation gave sufficient reason to conclude that they maintained links that conflicted with the responsibilities of their office, as stipulated by Article 3/1.[45] The Court thus ruled that 'it is not appropriate for the Members Alparslan Altan and Erdal Tercan to remain in the profession and that they be barred from practice'.[46]

This is the most striking part of the Decision. After dwelling on pages of fact *nihil ad rem*, ultimately noting nothing more than that allegations had been made linking the two Members to a terrorist group, without providing a single piece of evidence or individualised reasonings, the Court unanimously delivered its irreversible decision to bar the Members from the judicial profession, based solely on the unsubstantiated personal *convictions* of its 15 Members.

Adoption of the Court's interpretation by other bodies

Article 3/1 of Decree-Law 667 also authorises the Court of Cassation, the Council of State, the Court of Accounts, and the High Council of Judges and Public Prosecutors to dismiss any of their members deemed to be 'members of' or 'affiliated with', or who 'adhere to' or 'maintain contact with' terror groups or organisations that the National Security Council sees as a threat to national security. Likewise, Article 4 authorises all public institutions, including ministries, the military, and the Council of Higher Education, to dismiss public officials in their employ.

An important implication that follows from the Decision is that, when justifying dismissals, public institutions will tend to resort to the Court's reasoning: no evidence will be required, an unsubstantiated *subjective assessment* will suffice. The High Council of Judges and Prosecutors, for instance, in eight decisions spanning nine months, dismissed a total of 4,240 judges and prosecutors, consistently quoting paras. 54-81 of the Decision in full and without providing individual reasoning, by issuing blanket orders appended by

[44] E. 2016/6, para. 95.
[45] Ibid., para. 98.
[46] Ibid., para. 100.

lists of the dismissed judges and prosecutors.[47] Public institutions likewise refer to the Decision when dismissing officials and in the accompanying administrative court proceedings. The Court's definitive interpretation and application of Article 3/1, therefore, established precedent that has resonated in the dismissal proceedings of thousands of public officials.

Implications for future constitutional complaint cases

The final implication of the Decision affects the constitutional complaint mechanism. Article 45/1 of the Law on Constitutional Court establishes the right to bring a claim if rights that fall within the scope of the European Convention on Human Rights and which are also guaranteed by the Turkish Constitution have been violated due to public action. This mechanism, which was introduced by constitutional amendment in 2010 and came into effect in 2012, aims to reduce the number of applications to the European Court of Human Rights by domestically resolving human rights claims.

Zühtü Arslan, the President of the Court, announced that in the period after 15 July 2016, more than 60,000 constitutional complaints were lodged,[48] and Engin Yıldırım, the Vice-President of the Court, added that they were 'agonising' over the number of complaints related to dismissals.[49] The Court has, however, yet to find any complaint admissible. The Decision seems to have important ramifications for dismissal cases, which are usually justified giving the same

[47] HSYK Decision No. 2016/426, 24 August 2016, <www.hsk.gov.tr/Eklentiler/files/karar.pdf>, visited 19 May 2017, p. 57-60; HSYK Decision No. 2016/428, 31 August 2016, <www.hsk.gov.tr/Eklentiler/files/gerekceli-karar.pdf>, visited 19 May 2017, p. 57-61; HSYK Decision No. 2016/430, 4 October 2016, <www.hsk.gov.tr/Eklentiler/files/karar(1).pdf>, visited 19 May 2017, p. 57-60; HSYK Decision No. 2016/440, 15 November 2016, <www.hsk.gov.tr/Eklentiler/Dosyalar/c160bbb7-e86b-490c-8f1a-73ed4606d0f0.pdf>, visited 19 May 2017, p. 62-65; HSYK Decision No. 2017/35, 13 February 2017, <www.hsk.gov.tr/Eklentiler/files/GerekceliKarar(1).pdf>, visited 19 May 2017, p. 65-68; HSYK Decision No. 2017/113, 17 March 2017, <www.hsk.gov.tr/Eklentiler/Dosyalar/Karar-20-03-2017.pdf>, visited 19 May 2017, p. 65-68; HSYK Decision No. 2017/665, 3 April 2017, <www.hsk.gov.tr/Eklentiler/Dosyalar/04-04-2017-karar.pdf>, visited 19 May 2017, p. 65-68; HSYK Decision No. 2017/682, 5 May 2017, <www.hsk.gov.tr/Eklentiler/Dosyalar/08-05-2017-Karar.pdf>, visited 19 May 2017, p. 65-68.

[48] Z. Arslan, 'Mahkememiz Başkanı Sayın Zühtü Arslan'ın İstanbul Tahkim Merkezi (ISTAC) "Kamu Kurum ve Kuruluşları Açısından Tahkim" Konferansı Açış Konuşması' ['*The Opening Speech of "Arbitration for State Institutions and Organisations" Conference by Zühtü Arslan, President of the Constitutional Court*'], 19 December 2016, <www.anayasa.gov.tr/icsayfalar/basin/konusmalar/4.html>, visited 13 February 2017.

[49] 'AYM Başkanvekili Yıldırım: Kara Kara Düşünüyoruz [*Vice-President of the Constitutional Court Yıldırım: We are Agonising*]', *Cumhuriyet*, 24 November 2016, <www.cumhuriyet.com.tr/haber/siyaset/635522/AYM_Baskanvekili_Yildirim__Kara_kara_dusunuyoruz.html>, visited 13 February 2017.

uniform blanket terminology used by the Court: 'membership in', 'affiliation with', 'adherence to', or 'contact with' terror groups or organisations that the National Security Council sees as a threat to national security, all without revealing any specific reasons or providing supporting evidence for dismissal. The Court, by dismissing two of its Members in this manner, put the constitutional complaint mechanism's 'effectiveness' as a remedy into question in future cases involving dismissals, and it would now be difficult to imagine the Court finding a rights violation in acts that are substantively identical to the Decision. Noting that the Decision created an 'obvious paradox', the Venice Commission also voiced concerns with regard to the legitimisation of this scheme of dismissals.[50]

For the time being, the European Court of Human Rights still seems to regard the constitutional complaint mechanism as an effective domestic remedy and rejects the argument that the Court has lost its impartiality.[51] It may be some time, however, before the Constitutional Court delivers any decision for constitutional complaints involving dismissals. It seems that cases are now first referred to the State of Emergency Acts Review Commission, an administrative review body created by the Government in January to review dismissals based on decree-laws.[52] An applicant may only lodge a constitutional complaint after exhausting the administrative judicial review process first, i.e. appealing the decisions of the Review Commission before the administrative courts.[53] If the Review Commission indeed proves to be merely a delaying tactic, it could be years

[50] *See* n. 11 *supra*, para. 186.

[51] ECtHR 8 November 2016, Case No. 56511/16, *Mercan* v *Turkey* (dec.); ECtHR 29 November 2016, Case No. 59061/16, *Zihni* v *Turkey* (dec.). For an analysis, *see* E. Turkut, 'Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?', 28 December 2016, *EJIL: Talk*, <www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/>, visited 13 February 2017. Taking no account of the criticisms with regard to its structure, functions and its failure to start working, the Strasbourg Court more recently directed applicants to seek remedies before the yet-to-be established State of Emergency Acts Review Commission. *See* ECtHR 12 June 2017, Case No. 70478/16, *Köksal v Turkey* (dec.).

[52] The Court rejected two constitutional complaints in February by two dismissed judges, arguing that they should apply to the Council of State in order to exhaust the ordinary remedies. *See Murat Hikmet Çakmakçı Başvurusu* B. No. 2016/35094, 15 February 2017, <www.kararlaryeni.anayasa.gov.tr/Content/pdfkarar/2016-35094.pdf>, visited 13 June 2017; *Hacı Osman Kaya Başvurusu* B. No. 2016/41934, 16 February 2017, <www.kararlaryeni.anayasa.gov.tr/Content/pdfkarar/2016-41934.pdf>, visited 13 June 2017. As per Art. 11/2 of Decree-Law 685, unlike other public officials, the dismissed members of the judiciary will apply to the Council of State instead of this Commission. As of 13 June 2017, the Court has yet to decide any constitutional complaints from non-judiciary applicants, even though the State of Emergency Acts Review Commission still has not started accepting applications.

[53] For an analysis of the establishment of this commission, *see* T. Olcay, 'State of Emergency Acts Review Commission used to hold off proper legal review', April *Public Law* (2017) p. 316.

before the Court delivers a decision. Even if the Court does eventually hear a constitutional complaint, the question arises of how it could maintain any semblance of impartiality when it hears complaints involving dismissal cases since the Court itself has exercised the same dubious authority to dismiss.

Conclusion

The Turkish Constitutional Court delivered a decision that reflects the current state of the rule of law in Turkey, the implications of which reach far beyond the dismissal of two of its Members and are magnified by the Court's abandonment of its established jurisprudence on the review of overly-expansive state of emergency decree-laws. By dismissing two of its Members upon the indirect order of the executive, the Court jeopardised its indispensable role in upholding the Constitution, especially under a state of emergency. The unconstitutional authority exercised by the Court, the violation of its two Members' right to a fair trial, the inarticulate and flawed presentation of its argumentation, the biased assessment, and the implications for future constitutional complaint cases involving dismissals from other bodies - by no means an exhaustive list - are the most immediately pressing problems stemming from the Decision. Its chilling effect on the remaining Members of the Court, and its two newly-appointed Members, provides yet another serious cause for concern.

In a speech delivered on 12 August 2016 at the 3rd Congress of the Asian Constitutional Courts and Equivalent Institutions (AACC), the President of the Court referred to the alleged terrorist organisation as the plotter and executor of the coup attempt, and mentioned its tactics aimed at creating a parallel state organisation from within public institutions, perhaps letting slip that the not-yet-proven allegations the Court enlisted in support of the Decision were in fact legally finalised criminal convictions. He claimed that the group used 'concealment' tactics, specifically referring to paragraph 15 of the Decision.[54] However, there the Court explicitly states that this was a general summary of the *allegations* made against the alleged terrorist organisation in ongoing investigations and prosecutions.[55] The top court in Turkey thus seems to be taking the executive's narrative for truth, even before the relevant criminal investigations and trials have been completed.

[54] Z. Arslan, 'The 15th July Coup Attempt and the State of Emergency: A New Challenge for the Constitutional Democracy in Turkey', 3rd Congress of the Asian Constitutional Courts and Equivalent Institutions (AACC), <www.anayasa.gov.tr/icsayfalar/etkinlikler/pdf/endonezya_baskanbey_konusma_eng.pdf>, visited 13 February 2017.

[55] *See* text to n. 12 *supra*.

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By pronouncing this decision, aggravated by its silence on constitutional complaints and its restraint in reviewing the constitutionality of decree-laws, the Court seems to have thrown away the opportunity to act as the last bastion of human rights protection in Turkey. If the Court had embraced this role, it not only would have been acting as a guardian of human rights but could also have served as a facilitator of truth-finding during the crisis. This would have helped the judicial branch to confidently and credibly reveal the perpetrators of the coup attempt as well as the nature and organisation of the alleged terrorist organisation. By exhibiting unquestioning submission to the executive, however, the Court seems to have failed both to hold the executive-legislator accountable and to remedy the grave human rights violations perpetrated under the state of emergency.

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