



CONFERENCE OF INGOs
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CONSEIL DE L'EUROPE

**EXPERT COUNCIL ON NGO LAW
CONF/EXP(2017)2**

30 November 2017

EXPERT COUNCIL ON NGO LAW
**OPINION ON THE IMPACT OF THE STATE OF EMERGENCY ON
FREEDOM OF ASSOCIATION IN TURKEY**

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on behalf of the Expert Council on NGO Law**

Expert Council on NGO Law

The Expert Council on NGO Law carries out thematic and country studies on specific aspects of NGO legislation and its implementation that seem to pose problems of conformity with international standards, notably the European Convention on Human Rights and the Recommendation (2007)14 on the legal status of NGOs in Europe. Its work covers the 47 member countries of the Council of Europe and Belarus.

It was created in January 2008 by the Conference of INGOs of the Council of Europe with the aim of creating an enabling environment for NGOs through examining national NGO legislation and its implementation and providing advice on how to bring national law and practice into line with Council of Europe standards and European good practice.

The Expert Council provides follow-up to a Recommendation adopted in 2007 by the Council of Europe's Committee of Ministers which sets a framework for the legal status of NGOs in Europe (CM/Rec(2007)14) and to the Council of Europe's commitment to the role of civil society in the promotion of democracy, human rights and the rule of law. It co-operates closely with other Council of Europe bodies, in particular the Venice Commission and the Commissioner for Human Rights.

The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.

Foreword

The Expert Council on NGO Law, a major organ of the Conference of INGOs of the Council of Europe, is wholly committed to upholding, defending and expanding democracy, human rights and the rule of law, which are the core values of the Council of Europe.

By their membership in the Council of Europe, governments commit themselves to those same principles and values. So too do the member organizations of the Conference of INGOs, the body which groups all INGOs that hold Participatory Status with the Council of Europe.

In the light of the above, the present Expert Council Opinion on "The impact of the State of Emergency on Freedom of Association in Turkey" makes for sobering and sad reading. Sobering reading, because the fine legal analyses that underlie this Opinion leave no room for doubt that the Council of Europe values stated above have been under increasing life-threatening pressure in Turkey since the Government declared the State of Emergency sixteen months ago.

Sad reading, because those legal analyses and the ensuing conclusions show incontrovertibly that Turkey—a country of immense geopolitical, historical and cultural importance—is contradicting, even abandoning, its march along the path of democracy, human rights and the rule of law.

Amnesty International—whose Turkish President is currently in prison on illogical charges—has rightly stated that the Turkish authorities are conducting "a direct attack on the backbone of human rights".

The principal victims of this attack are to be found in the ranks of NGOs, academia and the media, namely the organs of society to which a government should look for partnership in upholding human values and fostering active citizenship.

This Expert Council Opinion pinpoints examples of the existence of a legal vacuum, of legal uncertainty, of abuse of power, of impunity, of arbitrariness, of denial of judicial review, of an absence of proportionality, of partiality, of juridical inconsistencies, even on the part of the Constitutional Court of Turkey.

Sobering and sad, indeed. The Expert Council can only hope that this Opinion will assist authorities in Turkey in determining how to return in the immediate future to the practice of the Rule of Law, the bedrock of a modern society in which a government respects the rights and opinions of the citizens to whom it is accountable.

The Expert Council, and the whole Conference of INGOs, is ready and eager to work with all relevant organs of the Council of Europe to achieve this goal.

Cyril Ritchie
President, Expert Council on NGO Law
November 2017

INDEX

Introduction	Paras 1-8
International standards governing freedom of association	Paras 9-22
State of emergency: permissible derogations	Paras 23-28
Domestic legislation pertinent to the State of Emergency	Paras 29-67
Impact of the State of Emergency on NGOs	Paras 68-75
Conclusion	Paras 76-81

Introduction

1. On 20 July 2016, amid the failed military coup, the Council of Ministers ('the Government') declared a nationwide state of emergency in Turkey, effective from 21 July 2016 for a period of ninety days.¹ The state of emergency was declared pursuant to Article 120 of the Constitution and Article 3 par. 1 (b) of the Law on the State of Emergency (Law No. 2935). The Government argued that it was a necessary measure to protect democracy in Turkey. President Erdogan stressed "that the declaration of the state of emergency has the sole purpose of taking the necessary measures, in the face of the terrorist threat that our country is facing".²
2. On 21 July 2016 the Government officially notified the Secretary General of the Council of Europe ('the CoE') about its decision to apply a derogation from the Convention, pursuant to Article 15 thereof;³ it also notified the United Nations about its decision to apply derogation from the International Covenant on Civil and Political Rights ('the ICCPR').⁴ In the corresponding statement the Secretary General recalled that it was incumbent on Turkey to ensure that measures taken under the state of emergency were proportional, and stressed that "anyone claiming to be the victim of a violation of the Convention by Turkey as a result of new measures adopted under the state of emergency will have the right to bring their case to the European Court of Human Rights. The Court will then decide on whether the action in question is in conformity with the Convention".⁵
3. On 21 January 2017, against the background of the declared state of emergency, the Turkish Grand National Assembly ('the Parliament') adopted a proposal for constitutional amendments seeking to significantly strengthen the power of the President. The proposed amendments were subsequently confirmed in the contested national referendum, which was held on 16 April 2017.⁶ The CoE Venice Commission has expressed concern that the proposed (and subsequently approved) amendments

¹ Decision of the Council of Ministers No. 1116 of 20.07.2016; Turkish Grand National Assembly, Plenary Session No. 117 of 21. 07. 2016.

²<http://www.aljazeera.com/news/2016/07/erdogan-declares-state-emergency-turkey-160720203646218.html>.

³ https://www.coe.int/en/web/portal/news-2016/-/asset_publisher/StEVosr24HJ2/content/secretary-general-receives-notification-from-turkey-of-its-intention-to-temporarily-suspend-the-european-convention-on-human-rights.

⁴ The decision was approved by the Turkish Parliament on July 21, 2016 and published in the "Official Gazette of the State of Turkey. Derogation pertains to Articles 2-3, 9-10, 12-14, 17, 19, 21, 22, 25-27, pursuant to Article 4 of the ICCPR.

⁵ Statement of July 22, 2016. <https://www.coe.int/en/web/secretary-general/news-2016>.

⁶ See OSCE/ODHIR Statement on Preliminary Findings and Recommendations on the Republic of Turkey Constitutional Referendum which among other notes that "the 16 April constitutional referendum took place on an unlevel playing field and the two sides of the campaign did not have equal opportunities... voters were not provided with impartial information about key aspects of the reform, and civil society organizations were not able to participate.". It further notes that "while the technical aspects of the referendum were well administered and referendum day proceeded in an orderly manner, late changes in counting procedures removed an important safeguard and were contested by the opposition". www.osce.org/odihr/elections/turkey/311721?download=true.

were not “based on the logic of separation of powers, which is characteristic for democratic presidential systems”.⁷

4. The state of emergency allows the Government to rule by decrees with the force of law, by-passing the Parliament’s legislative process.⁸ It has subsequently been extended five times and currently runs through 18 January 2018.⁹ CoE various bodies—as well as other international organizations—have raised concerns over the continuous prolongation of the state of emergency, and urged the Government to bring it to a conclusion.¹⁰ On 24 April 2017—following the adoption of the Resolution 2156 (2017) on the State of Democracy in Turkey—the Parliamentary Assembly of the CoE (‘the PACE’) voted to reopen the monitoring mechanism in respect of Turkey until “serious concerns” over respect for human rights, democracy and the rule of law “are addressed in a satisfactory manner”.¹¹
5. As of 18 October 2017, the Government has issued 28 emergency degrees, out of which five have direct effect on non-governmental organizations (‘NGOs’).¹² This opinion examines the impact of state of emergency and the emergency decrees on freedom of association as protected by international instruments, particularly the European Convention on Human Rights (‘the Convention’) and the CoE Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe (‘the

⁷ Venice Commission, 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, CDL-AD(2016)007, March 18, 2016. par. 126. See also paras. 127. and further detailing concerns with the constitutional amendments.

⁸ Article 4 of the Law on State of Emergency, Official Gazette, No. 18024, October 27, 1983.

⁹ Decision of the Council of Ministers, No. 1130 of 11. 10. 2016. Turkish Grand National Assembly, Plenary Session No. 5 of 11. 10. 2016 (covering the emergency period 19.10.2016 – 18.01.2017); Decision of the Council of Ministers No. 1134 of 3. 01. 2017. Turkish Grand National Assembly, Plenary Session No. 49 of 3. 01. 2017 (19. 01. 2017 – 18. 04. 2007); Decision of the Council of Ministers No. 1139 of 18. 04. 2017. Turkish Grand National Assembly, Plenary Session No. 84 of 18. 04. 2017 (19. 04. 2017-18. 07. 2017.); Decision of the Council Of Ministers No. 1154/17 of 07. 2017. Turkish Grand National Assembly, Plenary Session No. 112 of 17. 07. 2017. (19. 07. 2017 - 18. 10. 2017); Decision of the Council Of Ministers No. 1165 of 16. 10. 2017. Turkish Grand National Assembly, Plenary Session, No. 9. of 17. 10. 2017.

¹⁰ See among others, Resolution No 2156 (2017) of the CoE Parliamentary Assembly on the State of Democracy in Turkey; The CoE Secretary General response to PACE members about the situation with the fundamental rights in Turkey, dated June 26, 2017, <https://www.coe.int/en/web/portal/-/secretary-general-jagland-says-justice-must-start-to-work-in-turkey-now>; The CoE Commissioner of Human Rights, Memorandum on Freedom of Expression and Freedom of Media in Turkey, COMMDH (2017)5, February 15, 2017; The opening statement of the United Nations High Commissioner for Human Rights Zeid Ra’ad al-Hussein, for the 36th session of the Human Rights Council, September 11, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041>; The European Commission statement on Turkey, dated February 20, 2017, http://europa.eu/rapid/press-release_PESC-94-31_en.htm See also Venice Commission, Venice Commission, OPINION ON EMERGENCY DECREE LAWS NOS. 667-676 ADOPTED FOLLOWING THE FAILED COUP OF 15 JULY 2016, Opinion No. 865/2016, CDL-AD(2016)037, paras 40-44 with further references (hereinafter: *Opinion on emergency decree laws*).

¹¹ <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6603&lang=2&cat=8>.

¹² Emergency Decree (KHK)/667 (23. 07. 2016.); KHK/677 (22. 11. 2016.); KHK/679 (6. 01. 2017.); KHK/689 (29. 04. 2017.); and KHK/694 (25. 08. 2017.)

Recommendation'). Given that the state of emergency is still in force—as well as formidable challenges in ensuring effective legal remedies for NGOs and others affected by the emergency decrees—the opinion can only provide a *preliminary* assessment of the impact of state of emergency on freedom of association.

6. The opinion looks first at pertinent provisions of the Convention and the case-law of the European Court of Human Rights ('the ECtHR'/'the Court') which govern freedom of association. Thereafter the opinion analysis international standards pertinent to a state of emergency as set out in the Convention and the ECtHR case-law. It then proceeds with the analysis of domestic laws governing a state of emergency in Turkey as they effect freedom of association. This analysis is followed with specific instances of application of the state of emergency measures on domestic and international NGOs, as detailed in various reports. The opinion concludes with an overall evaluation of the compatibility of the Turkey's legal framework and case-law pertinent to the state of emergency with international standards governing freedom of association and a state of emergency.
7. While the opinion is primarily concerned with the impact of the state of emergency on freedom of association, it duly notes the larger problems it has posed for the regime of human rights and rule of law in Turkey. These problems are referenced throughout the opinion, as appropriate.
8. This opinion was prepared by Dragan Golubović on behalf of the Expert Council on NGO Law of the Conference of INGOs. Other members of the Expert Council as well as a colleague from Turkey provided valuable inputs to the opinion.

International standards governing freedom of association

9. The rights protected by the Convention are guaranteed to "everyone". This includes natural but also legal persons—depending on the nature of the rights concerned—'within the jurisdiction' of a Contracting Party (Article 1, Convention). The ECtHR interprets the notion 'within jurisdiction' to at least include all persons residing—or for that matter having a place of business—on a territory of a Party.¹³ Article 11 of the Convention guarantees freedom of association and reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

¹³ See e.g. *Brankovic and others v. Belgium and others*, judgement of 12 December 2001, § 67.: "In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention". See also *Soering v. the United Kingdom*, judgment of 7 July 1989. On the application of the notion of 'everyone' with respect to Article 11 of the Convention see Expert Council on NGO Law, "Conditions of Establishment of Non-Governmental Organizations", OING Conf/Exp (2009) 1, First Annual Report, Strasbourg, January 2009, paras 20-24.

“2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”.

10. Once recognized as a legal entity a NGO¹⁴ is entitled not only to the right enshrined in Article 11, but also to the other rights protected by the Convention which pertain to legal persons, notably, the right to a fair trial, no punishment without law, freedom of thought, conscience and religion, freedom of expression, the right to an effective remedy, prohibition of discrimination, and protection of property.¹⁵ However, only membership NGOs (associations)—including those without legal entity status—may invoke the protection afforded by Article 11 of the Convention.
11. The primary obligation of a Contracting Party with respect to Article 11 is negative one: an obligation not to interfere with the enjoyment of freedom of association.¹⁶ This is in keeping with the overriding objective of Article 11: to afford protection to legal and natural persons in exercising those rights from undue interference by public authorities.¹⁷ The ECtHR shall primarily interpret pertinent national legislation and domestic case-law, as well as decisions and actions of government, against the background of the negative obligation of a Party.¹⁸ Legitimate interference of a Party (‘positive obligation’) is limited to instances in which its action is deemed necessary to ensure the full protection of those rights.¹⁹ This *inter alia* includes an obligation of a Party to allow an association to acquire legal entity status and afford necessary legal protection during its life-cycle.²⁰

Legitimate interference with freedom of association

12. The ECtHR has developed an analytical framework which sets a high threshold for a Contracting Party’s legitimate interference with freedom of association. Accordingly, any alleged interference with freedom of association must be ‘prescribed by law’, must ‘serve legitimate aim’, and must be ‘necessary in a democratic society’.²¹ The

¹⁴ In international parlance, the terms ‘non-governmental organizations’ and ‘civil society organizations’ are used inter-changeably and entail both membership (associations) and non-membership organizations (foundations, endowments, trusts, etc.). See *infra*, par. 21.

¹⁵ Articles 6, 7, 9, 10, 13 and 14 of the Convention, respectively, Article 1 of the First Protocol to the Convention. See European Committee on Legal Co-operation, “Non-Governmental Organizations in the Case-law of the European Court of Human Rights”, Strasbourg, 8 April 2010, CDCJ (2010) 12.

¹⁶ The negative obligation of a Contracting Party pertains to the right of privacy (Article 8) and freedom of thought, conscience and religion (Article 9) as well.

¹⁷ *Brega and Others v. Moldova*, judgment of 24 January 2012 (Article 11, Convention).

¹⁸ *Ramazanova and Others v. Azerbaijan*, judgment of 1 February 2007 (Article 11, Convention).

¹⁹ *Demir and Baykara v. Turkey*, judgment of 12 November 2008.

²⁰ *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998.

²¹ *Handyside v. United Kingdom*, judgment of 7 December 1976.

Court applies the same analysis with respect to the other qualified rights in the Convention, notably, the right to privacy, freedom of thought, conscience and religion, and freedom of expression, which are protected by Articles 8, 9 and 10 respectively.

13. *Prescribed by law*. The expression ‘prescribed by law’ requires that the impugned measure have a basis in domestic law. In addition, it also refers to the quality of the law in question, and requires that it must be both accessible to the persons concerned and formulated with *sufficient precision* so that a common person, if need be, with appropriate advice, can reasonably foresee the consequence of a particular action. Because it is impossible to attain an absolute precision in the drafting process, a law which confirms some degree of discretion on the side of public authorities is not itself inconsistent with this requirement—insofar as the scope of the discretion and the manner of its exercises are formulated with sufficient clarity. The ECtHR acknowledged that a degree of precision required for a law in question may depend on a number of factors, including: the content of the instrument in question; the field it seeks to cover; and the status of those effected by a law.²² This is also in keeping with the subsidiary role of the Court in the protection of the rights guaranteed by the Convention: it is primarily for national authorities to interpret and apply domestic law. However, this cannot serve as a pretext for a Contracting Party to avoid obligations arising from the Convention.²³
14. The subsidiary role of the ECtHR by no means implies that it may not proceed with its own independent analysis of the contested legislation, decisions and case-law of domestic authorities. Indeed, the Court has set high standards in applying the ‘prescribed by law’ requirement. In *Maestri v. Italy*, a case involving a justice who was reprimanded by the supervisory judiciary authority for violation of regulations prohibiting judges from membership of the Freemasons, the Court ruled violation of Article 11 because the contested regulations did not meet ‘prescribed by law’ standard. The Court found regulations not foreseeable i.e. written with necessary quality which would have allowed for their unambiguous interpretation, even though the applicant was a well-informed person (justice). The Court noted that the expressions ‘prescribed by law’ and ‘in accordance with the law’ in Articles 8 to 11 of the Convention not only require that the impugned measure have some basis in domestic law, but that law is written with *certain quality*. It further noted:

"For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of democratic society enshrined in the Convention, for a legal discretion granted to the executive to be

²² *Maestri v. Italy* [GC], judgment of 17 February 2004, § 30. *Koretskyy and others v. Ukraine*, judgment of 3 April 2008, § 47.

²³ *Refah Partisi and Others v. Turkey* [GC], judgment of 13 February 2003, § 57.

expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise".²⁴

15. *Legitimate aims*. Any derogation from the aforementioned rights must serve 'legitimate aim'. The grounds for legitimate derogation set out in Article 11, par. 2 of the Convention are exhaustive i.e. *numerus clausus*, and therefore derogation (interference) may not legitimately serve any other goals (*supra*, par. 9.).
16. The ECtHR has acknowledged that a Contracting Party does have some margin of appreciation with respect to the manner and scope by which the legitimate derogation is applied. However, it goes hand in hand with rigorous supervision. As it noted in *Sidiropulos and Others v. Greece*:

"Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts."²⁵

17. *Necessary in a democratic society*. The ECtHR has repeatedly noted that democracy is a fundamental feature of the European public order and the only regime compatible with the Convention.²⁶ Therefore, it is incumbent on a Contracting Party to prove that interference with the right enshrined in Article 11 is not only prescribed by law and serves legitimate aim, but is also in response to "pressing social needs".²⁷ In *Refah Partisi (the Welfare Party) and Others v. Turkey* the Court stated:

"Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it".²⁸

18. Furthermore, it is incumbent on a Contracting Party to prove that the interference in question is not only necessary in a democratic society i.e. serves pressing social needs, but is also *proportional* to the needs it purports to serve: a Party must prove that the interference in question is the *minimum level of interference* necessary to

²⁴ Ibid. § 30. See also *Sunday Times v. the United Kingdom* (no. 1), judgment of 26 April 1979, § 49; *Hasan and Chaush v. Bulgaria* [GC], judgment of 26 October 2000, § 84.

²⁵ *Sidiropulos and Others v. Greece* § 40. See also *Handyside v. United Kingdom*, §48-49; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 October 2001; *Gorzelik and Others v. Poland* [GC], judgment of 17 February 2004; *Emin and Others v. Greece*, judgment of 27 March 2008; *Tourkiki Enosi Xanthis and Others v. Greece*, judgment of 27 March 2008.

²⁶ *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, § 45.

²⁷ *Handyside v. United Kingdom*, § 48.

²⁸ *Refah Partisi (the Welfare Party) and Others v. Turkey* § 86.

attain legitimate goals. The ECtHR aptly summarized this requirement in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*:

"When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".²⁹

19. Proportionality therefore requires striking a fair balance between the general interest and the requirements for the protection of fundamental rights, which is inherent in the whole of the Convention. In a significant number of cases involving violation of Article 11 of the Convention the ECtHR found that the interference served a legitimate aim, however, the respondent failed to meet the proportionality test.³⁰ While the test of necessity and proportionality has somewhat different connotations in case of *derogation* from the Convention during a state of emergency, it *does not* render it suspended altogether (*infra*, paras. 27, 46-48, 80.).

Recommendation CM/Rec (2007)14

20. The Recommendation on the legal status of non-governmental organizations in Europe, although not legally binding, represents a major milestone in the CoE efforts to promote democracy, rule of law and human rights. The Recommendation recognizes: "the essential contribution made by non-governmental organizations (NGOs) to the development and realization of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies". It also underscores the role of NGOs in "the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe".³¹
21. The Recommendations define NGOs as: "voluntary self-governing bodies or organizations established to pursue the essentially non-profit-making objectives of their founders or members"; this definition entails both membership and non-membership organizations, but not political parties (paras. 1-2, Recommendation).

²⁹ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, judgment of 8 October 2009, § 68.

³⁰ *Handyside v. the United Kingdom; Sunday Times v. the United Kingdom* (No. 1), judgment of 26 April 1979; *Yeşilgöz v. Turkey*, judgment of 20 December 2005; *Kjeldsen, Busk, Madsen and Pederson v. Denmark*, judgment of 7 December 1976; *Loizidou v. Turkey*, judgment of 23 March 1995. See also Compilation of Venice Commission opinions concerning freedom of association, Strasbourg, 16 July, 2013, CDL(2013)035 pp. 9-12.

³¹ Preamble, Recommendation.

22. The Recommendation sets out a number of principles governing the legal status of NGOs. Significantly, many of those principles have been specifically referred to in the ECtHR case-law. Thus in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* the Court made specific references to the Recommendation's principle governing the dissolution, the internal governance, the permissible objectives, and the supervision and liability of an NGO.³² The Court's case-law therefore underscores the point about the role of the Recommendation in the CoE overall structure designed to protect democracy, human rights and rule of law.

Permissible derogation from the Convention in a state of emergency

23. Article 15 of the Convention sets out substantial (pars. 1-2.) and procedural requirements (par. 3.) which must be met with respect to permissible derogation of the rights guaranteed by the Convention in a state of emergency. It reads as follows:

- “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed”.

24. Article 2 of the Convention protects the right to life; Article 3 prohibits torture; Article 4, par. 1. prohibits slavery or servitude; and Article 7 prohibits punishment without law. In addition, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime), Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances), and Article 4 of Protocol No. 7 (the right not to be tried or punished twice) to the Convention.

Application of Article 15 of the Convention

25. The ECtHR case-law provides the guidance with respect to the substantial requirements set out in Article 15, par. 1 of the Convention (*supra*, par. 23.). This entails: (i) the meaning of the notion of ‘war or other public emergency threatening the life of the nation’; (ii) the requirement that the emergency measures must be strictly limited to what is required by the exigencies of the situation; and (iii) the

³² *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, § 39.

requirement that emergency measures are not inconsistent with [the High Contracting Party's] other obligations under international law".³³

26. For the purpose of this opinion, the requirement that the emergency measures must be strictly limited to what is required by the exigencies of the situation merits particular consideration. As a starting point of this analysis, the ECtHR acknowledged that a subsidiary role of the Court and the Convention in the protection of human rights in particular pertains to the application of Article 15 of the Convention. As the Court stated in *Ireland v. United Kingdom*:

“It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 (...) leaves those authorities a wide margin of appreciation”.³⁴

27. The wide margin of appreciation of a Contracting Party with respect to Article 15, par. 1 is subject to limitation, however: it is within the purview of the ECtHR to determine whether it has gone *beyond* the extent that is *strictly required* by the exigencies of the situation.³⁵ In making such a determination, the Court will take into due account “the nature of the rights affected by the derogation, and the circumstances leading to, and the duration of, the emergency situation”.³⁶ This entails the Court considering various factors, including: “whether ordinary laws would have been sufficient to meet the danger caused by the public emergency;³⁷ whether the measures are a genuine response to an emergency situation;³⁸ whether the measures were used for the purpose for which they were granted;³⁹ whether the derogation is limited in scope and the reasons advanced in support of it;⁴⁰ whether the need for the derogation was kept under review;⁴¹ any attenuation in the measures

³³ European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights; Derogation in Time of Emergency* (hereinafter: Guide on Article 15 of the European Convention on Human Rights), updated on April 30, 2017, pp. 6-9

³⁴ *Ireland v. the United Kingdom*, judgement of 18 January 1978, Series A no. 25. § 207. See also *A. and Others v. the United Kingdom* [GC], judgment of 19 February, 2009. § 173-174; Guide on Article 15 of the European Convention on Human Rights, p. 7; Opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights CommDH(2002)7, par. 9; Venice Commission, *Opinion on the emergency decree laws*, par. 183.

³⁵ *Ireland v. the United Kingdom*, § 207; *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, § 43, Series A; *A. and Others v. the United Kingdom* [GC], § 173.

³⁶ Guide on Article 15 of the European Convention on Human Rights, p. 8. *Brannigan and McBride v. the United Kingdom*, § 43. *A. and Others v. the United Kingdom* [GC], § 173.

³⁷ *Lawless v. Ireland* (no. 3), § 36; *Ireland v. the United Kingdom*, § 212.

³⁸ *Brannigan and McBride v. the United Kingdom*, § 51.

³⁹ *Lawless v. Ireland* (no. 3), § 38.

⁴⁰ *Brannigan and McBride v. the United Kingdom*, § 66.

⁴¹ *Ibid.* § 54.

imposed;⁴² whether the measures were subject to safeguards;⁴³ the importance of the right at stake, and the broader purpose of judicial control over interferences with that right;⁴⁴ whether judicial control of the measures was practicable;⁴⁵ the proportionality of the measures and whether they involved any unjustifiable discrimination;⁴⁶ and the views of any national courts which have considered the question: if the highest domestic court in a Contracting State has reached the conclusion that the measures were not strictly required, the Court will be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article, or reached a conclusion which was manifestly unreasonable".⁴⁷ It is important to note that the foregoing factors underpin the requirement for *proportionality* and *necessity* which are both embedded in the *rule of law*, which is inherent to all articles of the Convention (*infra*, paras. 42-43, 46-49, 80.).⁴⁸

28. The foregoing factors "will normally be assessed, not retrospectively, but on the basis of the 'conditions and circumstances reigning when [the measures] were originally taken and subsequently applied'".⁴⁹ However, the ECtHR is not precluded from taking into due consideration information which comes to light subsequently.⁵⁰ Thus in *A. and Others v. the United Kingdom*, the Court took note of the bombings and attempted bombings in London in July 2005, which took place after the notification of the derogation in 2001.⁵¹

Domestic legislation pertinent to the state of emergency

Constitution

29. Article 2 of the Constitution:

"The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights,

⁴² *Ireland v. the United Kingdom*, § 220.

⁴³ *Ibid.* §§ 216-219; *Lawless v. Ireland* (no. 3), § 37; *Brannigan and McBride v. the United Kingdom*, §§ 61-65; *Aksoy v. Turkey*, judgement of 18 December 1996, §§ 79-84.

⁴⁴ *Aksoy v. Turkey*, Reports of Judgments and Decisions 1996-VI, § 76.

⁴⁵ *ibid.* § 78; *Brannigan and McBride v. the United Kingdom*, § 59.

⁴⁶ *A. and Others v. the United Kingdom* [GC], § 184, 190.

⁴⁷ Guide on Article 15 of the European Convention on Human Rights, p. 8. *A. and Others v. the United Kingdom* [GC] § 174.

⁴⁸ See the Preamble to the European Convention on Human Rights: "THE GOVERNMENTS SIGNATORY HERETO... being members of the Council of Europe, Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration...".

⁴⁹ *Ireland v. the United Kingdom*, § 214.

⁵⁰ Guide on Article 15 of the European Convention on Human Rights, p. 8.

⁵¹ *A. and Others v. the United Kingdom* [GC], § 177.

loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble”.

30. Article 4 of the Constitution:

“The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed”.

31. Article 15 of the Constitution:

“In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. (As amended on May 7, 2004; Act No. 5170).

Even under the circumstances indicated in the first paragraph, the individual’s right to life, the integrity of his/her corporal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling”.

32. Article 120 of the Constitution:

“In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months”.

33. Article 121 of the Constitution:

“In the event of a declaration of a state of emergency under the provisions of Articles 119 and 120 of the Constitution, this decision shall be published in the Official Gazette and shall be immediately submitted to the Grand National Assembly of Turkey for approval. If the Grand National Assembly of Turkey is in recess, it shall be immediately assembled. The Assembly may alter the duration of the state of emergency, may extend the period for a maximum of four months each time at the request of the Council of Ministers, or may lift the state of emergency.

The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of state of emergency under Article 119 and the manner in which fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sorts of powers shall be conferred on public servants, what kinds of changes shall be made in the status of officials as long as they are applicable to each kinds of states of

emergency separately, and the extraordinary administration procedures, shall be regulated by the Act on State of Emergency.

During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency. These decrees shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure”.

34. Article 148 of the Constitution:

“The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance”.

35. Article 11 of the 1983 Law on State of Emergency (as amended by the Decree No. 3076, dated 14 November 1984):

“Whenever a state of emergency is declared in accordance with Article 3 (1)(b) to protect general security, safety and public order and to prevent the spread of acts of violence, in addition to the measures taken in accordance with Article 9, the following measures may be taken:.....

(o) Suspension of the activities or associations for periods not exceeding three months, after considering each individual case”.

Emergency Decrees

36. As already noted, on 20 July 2016 the Government notified the CoE Secretary General about its decision to apply a derogation from the Convention pursuant to Article 15 thereof, effective on 21 July 2016 (*supra*, par. 2.). The language of notification lacks any detail concerning the precise scope of derogation; it simply states that “measures taken may involve derogation from the obligations under the Convention”. While there is a precedent to such a notification language,⁵² it nevertheless gives rise to the issue of whether Turkey has effectively *derogated* from the Convention or whether it has merely *indicated* its intention to derogate at some point during the state of emergency.⁵³ In particular given that the Government’s

⁵² See France notification to the Secretary General on derogation from the Convention, dated November 24, 2015, following the government’s decision to declare a state of emergency. Available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW.

⁵³ See also Venice Commission, *Opinion on emergency decree laws*, paras 56, 58.

notification to the United Nations does make specific references to the articles of the ICCPR which shall not be applicable during the state of emergency (*supra*, note 4.).

37. On 25 July 2016 the Government filed with the CoE additional communication expressing its commitment to the “fundamental rights and freedoms, while observing the principle of the supremacy of law”, and recognizing that the Convention makes it clear that “derogation is not a *suspension* of rights. It brings certain *limitations* to the exercise of certain rights to the extent *strictly* required by the exigencies of the situation” (emphasis ours).⁵⁴
38. The first emergency decree with the force of law (‘Kanun Hükmünde Kararname’ - KHK) which the Government issued was the Decree no. 667 of 23 July 2016 (‘Decree’). Article 2 of the Decree *inter alia* sets out procedures and rules for dissolution of private legal persons (commercial and non-commercial alike). By virtue of the Decree 1 125 associations, 104 foundations, 19 trade unions, 15 universities, 934 private schools, and 35 private medical establishments, which were alleged to have had links with the “Fethullahist Terrorist Organization” (‘FETÖ’), were immediately dissolved and their asset (money, movable objects, real estate, business files, etc.) was confiscated and transferred to the State Treasury. Article 2 of the Decree reads as follows:
 39. “(1) a) Private health institutions and organizations listed in the Annex I, b) Private education institutions and organizations as well as private dormitories and lodgings for students listed in the Annex II, c) Foundations and associations and their commercial enterprises listed in the Annex III, ç) Foundation-run higher education institutions listed in the Article IV, d) Unions, federations and confederations listed in the Article V, which belong to, connect to, or contact with the Fetullahist Terrorist Organization (FETÖ/PDY), established posing a threat to the national security, have been found to exist, have been closed down.
 - (2) All movables and real estate as well as all assets, receivables and rights, and all documents and papers of foundations closed down shall be deemed to have been transferred to the General Directorate of Foundations without cost. Health application and research centers that belong to the foundation-run higher education institutions closed down, and all movable properties as well as all assets, receivables and rights and all documents and papers that belong to other institutions and organizations closed down shall be deemed to have been transferred to the Treasury without cost, and all real estate that belong to them shall directly be registered, free and clear of any restrictions and encumbrances on the immovables, in the name of the Treasury in the land registry. Under no circumstances shall any claim or demand related to all kinds of debts of those listed in paragraph one be made against the Treasury. The Ministry of Finance or the General Directorate of Foundations, according to its relevance, shall carry out all procedures relating to transfer by receiving necessary assistance from all institutions concerned.
 - (3) Private and foundation-run health institutions and organizations, private education institutions and organizations as well as private dormitories and lodgings for students, foundations, associations, foundation-run higher education institutions, unions, federations

⁵⁴ Turkey, Notification of Communication, Ref: JJ8190C Tr./005-192, Strasbourg, 25, July, 2016, p. 5.

and confederations that have been found to be a member of structure/entities, organizations or groups, or terrorist organizations, which are found established to pose a threat to the national security, or whose connection or contact with them have been found to exist and which are not listed in the Annexes shall be closed down upon the proposal of the commission to be established by the minister in the relevant ministries and with the approval of the Minister. Provisions of paragraph 2 shall apply to institutions and organizations closed down under this paragraph.....”⁵⁵

40. Following the simplified administrative procedure for the further dissolution of NGOs and other legal entities and confiscation of their asset, which is set out in Article 2, par. 3 of the Decree, additional 475 associations were dissolved pursuant to the decisions of the commissions established by the respective line ministries. (Decree no. 677, 679, 689 and 694, respectively). In addition, 54 foundations were dissolved by the decisions of the Directorate General of Foundations and regional commissions operating under its supervision (Decree no. 689). Following the administrative appeal launched by dissolved NGOs, the Government reversed decisions on dissolution of 188 associations and 19 foundations, (*infra*, par. 52.). Overall, as of August 31, 2017, the number of dissolved NGOs includes 1412 associations and 139 foundations.⁵⁶
41. The Venice Commission and the Commissioner of Human Rights of the CoE have both raised profound reservations about the overall compatibility of the Decree with international standards—and indeed, with pertinent domestic legislation.⁵⁷ With respect to the impact of the Decree on freedom of association, several substantial concerns stand out. Firstly, Article 2, paras. 1-3 of the Decree envisages dissolution and seize of assets of associations and foundations as the *only* measure for NGOs with the alleged links to the FETÖ movement. However, these provisions run afoul the language of Article 11 of the Law on State of Emergency which allows only for

⁵⁵ Translation of the Decrees No. 667 – 674 is provided by the Turkish authorities and is available in the Venice Commission, CDL-REF(2016)061, November 10, 2016.

⁵⁶ İnsan Hakları Ortak Platformu (IHOP), Olağanüstü Hal Durum Raporu, 31 Ağustos 2017, pp. 40-41. According to the official data, as of November 2016, there were 109,898 registered NGOs in the country. Of that number, there are 33,666 professional and solidarity associations; 21,039 NGOs involved with sports; 18,063 associations are active in religious affairs; cca 18,000 ideal with humanitarian assistance, education, culture and arts; and 327 are concerned with the elderly and children. <https://www.dernekler.gov.tr/tr/DernekIslemleri/derbis.aspx>.

⁵⁷ This among others include: the broad scope of the Decree which entails not only the failed coup attempt, but the fight against terrorism in general (Articles 1-4); a simplified procedures for dismissal of judges, including judges of the Constitutional Court and Supreme Courts, without any specified evidentiary requirements (Article 3); a simplified administrative procedure to terminate the employment of any public employee (including workers), with no administrative appeal and no evidentiary requirements (Article 4); automatic cancellation of passports of persons being investigated or prosecuted, without court order (Article 5); restrictions to the right of access to a lawyer and the breach of the confidentiality of the client-lawyer relationship for detainees (Art. 6); cancellation of rental leases between public bodies and persons considered to be a member of or in contact with a terrorist organisation, a measure that is likely to affect not only the suspects but also their families (Article 8). See Venice Commission, *Opinion on emergency decree laws*, pp. 4-48. Statement of the CoE Commissioner of Human Rights on measures taken under the state of emergency in Turkey. Available at <https://www.coe.int/en/web/commissioner/-/measures-taken-under-the-state-of-emergency-in-turkey?desktop=true>. On concerns with a lack of timely and proper parliamentary oversight of the emergency decrees see *Opinion on emergency decree laws*, paras. 50-54.

the “*suspension* of the activities of *associations* for periods not exceeding three months, after considering each *individual* case” (emphasis ours). Article 11, therefore, *does not* envisage dissolution of an association as a *legitimate* measure during a state of emergency. In addition, it does not envisage dissolution of associations *en masse*, but rather on a *case-by-case* basis—nor does it *envisage* confiscation and transfer of *asset* of a dissolved legal entity to state authorities as a *legitimate* measure. Furthermore, Article 11 refers to *associations* only, and *not* to *foundations*. Given the *exhaustive* list of emergency measures set out in Article 11 of the Law, there is nothing in the language thereof to suggest it also pertains to foundations. It therefore remains *unclear* what is the precise legal basis for Article 2, paras. 1-3 of the Decree. This gives rise to the impugned measures running afoul Article 121, par. 2 of the Constitution, the language of which suggests that the Law on State Emergency, rather than the emergency decrees, is the controlling instrument during a state of emergency (*supra*, par. 33.). Indeed, this reading of Article 121, par. 2 of the Constitution is consistent with the Government’s notification to the UN on derogation from the ICCPR as well as the preamble of the Decree No. 667 which both *recognize* the Law on State Emergency as the controlling instrument.⁵⁸ The fact that notification to the CoE on derogation from the Convention does not contain a similar language bears no relevance for this analysis.

42. The Government argues that Article 121 par. 2 of the Constitution should not be strictly interpreted and points to the other laws which arguably also apply in a state of emergency, including the Law on Civil Servants, the Law for Provincial Administration and the Banking Law (none of these laws seem to have bearing on dissolution and confiscation of asset of NGOs, though). It also argues that provisions of Article 121, par. 3 of the Constitution, which provide the basis for the Government to issue emergency decrees having the force of law on “matters necessitated by the state of emergency” (*supra*, par. 33.), constitute the ground for imposing emergency measures which fall out of the scope set out in the Law.⁵⁹ Examining compatibility of the emergency decrees with the Constitution is ultimately an issue for the Constitutional Court (*infra*, paras. 53-54.). We note however that the Government’s position on this issue is difficult to reconcile with. It would effectively render Article 121, par. 2 of the Constitution meaningless, and would give rise to the departure from the requirement of *legality* (foreseeability) and *supremacy* of the *law* which underpin the rule of law.⁶⁰ In other words, allowing the

⁵⁸ United Nations: Turkey Notification Under Article 4(3). Ref C.N.580.2016.TREATIES-IV.4 (Depositary Notification) <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf>. See also Venice Commission, *Opinion on emergency decree laws*, p. 7.

⁵⁹ Venice Commission, Memorandum prepared by the Ministry of Justice of Turkey for the visit of the delegation of the Venice Commission to Ankara on 3- 4th November, 2016, in connection with the emergency decree laws, CDL-REF(2016)067, November 23, 2016, pp. 39-41 (hereinafter: *Memorandum of the Ministry of Justice of Turkey*).

⁶⁰ See Venice Commission, RULE OF LAW CHECKLIST, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Endorsed by the Ministers’ Deputies at the 1263th Meeting (6-7 September 2016), Endorsed by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016), CDL-AD(2016)007, March 18, 2016, pp. 10-11. For detailed references of the ECtHR case-law defining the inherent elements of the rule of law see

Government to “cherry pick” applicable laws during a state of emergency, unconstrained with the limits set forth in the Constitution, would essentially amount to granting it an unfettered executive power, in breach of the rule law.

43. The rule of law is not only enshrined in Article 2 of the Constitution, but also in the Preamble of the Convention. The CoE various bodies have repeatedly stressed the significance of the rule of law for the European public order.⁶¹ As the ECtHR noted, the principle of the rule of law is not a merely ‘rhetorical reference’, devoid of relevance for those interpreting the Convention. Quite to the contrary, one reason why the signatory governments decided to take the first steps for the collective enforcement of human rights “was their profound belief in the rule of law”.⁶² The rule of law thus “inspires the whole Convention”,⁶³ is “inherent in all the articles of the Convention”,⁶⁴ and is defined as “one of the fundamental principles of a democratic society”.⁶⁵
44. In view of the Venice Commission: “another possible interpretation of the 1983 Law (the Law on State of Emergency, our remark) is that it established a catalogue of measures to be taken by the regional authorities, leaving *carte blanche* to the central Government. Indeed, the measures listed in Articles 9 and 11 of the 1983 Law all have ‘local’ character. However, this interpretation does not follow the literal reading of the 1983 Law. And, in any event, even assuming that the 1983 Law did not define the scope of powers of the central Government, it means that the condition of Article 121 § 2 of the Constitution (that the Government’s discretion should be circumscribed by the State of Emergency Law) has not been met, and that the Government acted in a legal vacuum”.⁶⁶ Either way, therefore, there are manifest problems with the precise legal basis for the impugned measures in Article 2, paras. 1-3 of the Decree. The Government’s memorandum with respect to the Decree (“measures related to private institutions and enterprises”) does not shed more light on this issue either (*infra*, paras. 51-54.).⁶⁷
45. In light of the foregoing, it is important to note that the Preamble of the Constitution invokes liberal democracy, separation of power, and supremacy of the Constitution and the law as fundamental principles underpinning the organization of the state. Articles 1 (organization of the state as a republic) and 2 set out additional basic

Davit Melkonyan, Concept of the Rule of Law in the Case-law of the European Court of Human Rights, pp. 339-349. http://ysu.am/files/Davit_Melkonyan-1415702096-.pdf.

⁶¹ See e.g. CoE Secretary General, State of Democracy, Human Rights and Rule of Law in Europe, 2017. PACE, Resolution 2121 (2016) on the functioning of democratic institutions in Turkey; Resolution 2156 (2017) on the functioning of democratic institutions in Turkey. Venice Commission, Opinion on the draft law on the legal regime of the state of emergency of Armenia, CDL-AD(2011)049, November 28, 2011, par. 44.

⁶² *Golder v. United Kingdom*, judgment of 21 February 1975, § 34.

⁶³ *Engel v. the Netherlands*, judgment of 8 June 1976, § 69.

⁶⁴ *Anuur v. France*, judgment of 25 June 1996, § 50

⁶⁵ *Klass v. Germany*, judgment of 8 September 1978, § 55. See also Davit Melkonyan, Concept of the Rule of Law in the Case-law of the European Court of Human Rights, pp. 339-340.

⁶⁶ Venice Commission, *Opinion on emergency decree laws*, p. 18, footnote 43.

⁶⁷ Venice Commission, *Memorandum of the Ministry of Justice of Turkey*, p. 10.

principles and values, including the rule of law. These principles and values cannot be amended or suspended under *any circumstances*, including a state of emergency. Nor is a proposal for amendments to the Constitution to that effect deemed permissible (Article 4, Constitution).⁶⁸

46. Secondly, the impugned measures in Article 2, paras. 1-3 of the Decree, coupled with the perceived lack of effective legal remedies (*infra*, paras. 60.- 66.), give rise to the issue of *proportionality*, given that the same effect could have been accomplished by less intrusive interference—that is, a *temporary freeze* of activities and assets of NGOs (provided there is a *proper legal basis* for the impugned emergency measures in the first place, *supra*, paras. 41.- 42.). The Government argues that dissolution of NGOs (rather than temporary measures) was deemed necessary, given that “the extraordinary periods necessitate to take extraordinary measures”, and that “it has become mandatory to take permanent measures in order to break the strength of the terrorist organization”.⁶⁹ This vague language of the rationale for the NGOs dissolution however falls short of the requirement for proportionality and government’s obligation to apply the minimum interference necessary to accomplish the legitimate goal.
47. The requirement of necessity and proportionality is enshrined in articles 15 of the Constitution and the Convention, respectively. While the two instruments employ somewhat different language in limiting the scope of legitimate measures in a state of emergency,⁷⁰ they both require that those measures do not violate a Contracting Party’s obligations under *international law*. To that end, the impugned emergency measures fall short of the specific guidance developed in the ECtHR case-law with respect to Article 15 of the Convention (*supra*, par. 27.). In addition, they give rise to the issue of violation of Article 11 of the Convention (freedom of association, *supra*, paras. 18-19) as well as Article 1 of the First Protocol (peaceful enjoyment of property). The vague language of the Government’s derogation notification to the CoE only exacerbate these concerns (*supra*, par. 37.).
48. With respect to Article 1 of the First Protocol, the ECtHR ruled in *Sporrong and Lönnroth v. Sweden* that it is incumbent on a Contracting Party to prove that any interference with the right to property serves a *legitimate aim* and is *proportional* to such an aim. This *inter alia* requires the Court to determine:

“Whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights...

⁶⁸ Venice Commission, *Opinion on emergency decree laws*, paras. 27-29.

⁶⁹ Venice Commission, *Memorandum of the Ministry of Justice of Turkey*, p. 44.

⁷⁰ Article 15 of the Constitution provides that derogation from the rights embodied in the Constitution may be taken to the extent “required by the exigencies of the situation, as long as obligations under international law are not violated”, whereas Article 15 of the Convention provides that derogation must be “strictly limited to what is required by the exigencies of the situation”.

The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of the First Protocol].”⁷¹

49. Thirdly, it is of particular concern that the language of Article 2, par. 1 of the Decree suggests that *any kind* of direct or indirect link, connection or contact with the FETÖ movement may cause dissolution of an NGO. Article 2, par. 1 thus gives rise to the issue of an unfettered discretionary power of the state authorities to decide on this matter. In the absence of specific guidance and limits set out in the law, any linkage with the FETÖ movement, however remote it might seem—and regardless of the fact that there had not been any final judgement declaring FETÖ a terrorist organization before the state of emergency came into effect—could trigger dissolution of an NGO.⁷² Indeed, such a reading of Article 2, par. 1 is consistent with a view of the Turkish Constitutional Court (‘TCC’) with respect to Article 3, par. 1 of the Decree (which contains a language similar to Art. 2, par. 1). The TCC ruled that the linkage in question does not have to be in the form of “membership” or “affiliation” with a structure, organization or a group; it is sufficient for it to be in the form of “cohesion” or “connection” in order for a judge or public servant to be dismissed.⁷³ The language of Article 2, par. 1 of the Decree therefore falls short of the requirements of legality and legal certainty (foreseeability) which underpin the rule of law (Article 2, Constitution). With respect to Article 11 of the Convention and Article 1 of the First Protocol, it also falls short of the same requirement (“prescribed by law”, *supra*, paras. 13.-14).⁷⁴ Given the foregoing analysis, the gravity of the impugned emergency measures and the perceived lack of effective legal remedies (*infra*), there is a legitimate concern therefore that the language of Article 2, paras. 1-3 of the Decree has effectively turned the *rule of law* into *rule by law*.

⁷¹ Judgment of 23 September 1982, § 69. See also Monica Carss-Frisk, *A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Council of Europe, Human rights handbooks, No. 4; Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organizations Performing the Function of Foreign Agents Law, OING Conf/Exp (2013) 1 August, 2013, paras. 95-96.

⁷² On 30 October 2014, the National Security Council (NSC), headed by the President of Turkey, issued a declaration in which the FETÖ was defined as “a parallel organisation in legal disguise which carries out illegal activities”. On 26 May 2016, the NSC went a step further with its prior definition and issued an advisory resolution in particularly for the government and other state authorities by which the NSC defined the FETÖ as a terrorist organisation for the first time. See also Venice Commission, *Memorandum of the Ministry of Justice of Turkey*, p. 51. The Memorandum does not specifically address problems with the vague language of Article 2. Par. 1. of the Decree. However, it recognizes difficulties with the similar language employed with respect to the dismissal of state employees. Memorandum, p. 47.

⁷³ Decision No. 2016/12 of 4 August 2016 on the dismissal of two members of the Constitutional Court. Press Release Regarding the Reason for Decision on the Dismissal of Two Members of the Constitutional Court, Alparslan Altan and Erdal Tercan from Profession, paras. 36-39. Available at <http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/31.html>. On 29 September 2017, the ECtHR communicated the application of Mr Alpslan Altan to the Turkish Government concerning his ongoing detention (appl. no.12778/17).

⁷⁴ *A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, paras. 18-19, p. 9 and further.

50. The gravity of the impugned measures set out in Article 2, paras. 1-3 .of the Decree needs to be reviewed against the background of available legal remedies and procedural safeguards. As the CoE Commissioner for Human Rights noted:

“Another worrying feature of the Decree is that it foresees complete legal, administrative, criminal and financial impunity for administrative authorities acting within its framework (Article 9) and the fact that administrative courts will not have the power to stay the execution of any of these measures (Article 10), even if they consider that such measures are unlawful. These two provisions effectively remove the two main safeguards against the arbitrary application of the Decree”.⁷⁵

51. Article 10 of the Decree provides that “stay of execution cannot be ordered in the cases brought as a result of the decisions taken and acts performed within the scope of this Decree Law”. The Government provided the Venice Commission with the following analysis of the legal remedies available to NGOs (as well as other private legal entities) which have been dissolved during the state of emergency. The Government offered the following starting point of its analysis:

“In the determination of whether there is a judicial remedy that can be applied to in connection with the institutions and organizations which are decided to be closed by ending their activities within the scope of the decree laws issued within the state of emergency period, the legal nature of the transaction performed should be taken into account. Within this framework, it is mandatory to make an evaluation according to whether the closure transaction is based directly on the provision of decree having the force of law”.⁷⁶

52. The Government further contends that a decree having the force of law (emergency decree) is deemed a “specific legislative transaction”, which does not fall within the remit of “administrative transaction”. That is because Article 148 par. 1 of the Constitution does not provide for *in abstracto* review of an emergency decree on the ground of proceedings and substance, either *ex officio* (by the initiative of the Constitutional Court) or by those affected by an emergency decree. Therefore, NGOs and other legal entities which are dissolved by virtue of an emergency decree cannot challenge their dissolution before administrative courts, but can rather “request the review and withdrawal of the transaction performed by administrative application” (*supra*, par. 40.).⁷⁷

53. The TCC has already subscribed to the Government’s foregoing reading of Article 148, par. 1 of the Constitution. In September 2016 the main opposition party, the Republican’s People Party (CHP), contested unconstitutionality of several articles of the four emergency decree (no. 668, 669, 670 and 671, respectively) *inter alia* on the ground of a lack of proportionality. On 13 October 2016 the TCC rejected the CHP application in four cases, based on the strict reading of the language of Article 148,

⁷⁵ Commissioner of Human Rights, Statement of the CoE Commissioner of Human Rights on measures taken under the state of emergency in Turkey.

⁷⁶ Venice Commission, *Memorandum of the Ministry of Justice of Turkey*, p.33.

⁷⁷ *Ibid.*,

par. 1 of the Constitution.⁷⁸ It is noteworthy, however, that impartiality of the TCC to decide on this issue was called into question even before the 13 October deliberation. On 4 August 2016 the TCC dismissed two of its members invoking the Decree no. 667 and citing “the common conviction” of the members of TCC as well as “the information from the social circle” as sufficient grounds for the dismissal.⁷⁹

54. The Government’s analysis further suggests that an individual appeal to administrative courts against decisions of state authorities empowered by emergency decrees are permissible.⁸⁰ This reading is consistent with the TCC’s recent ruling in *Murat Hikmet Çakmakçı* case.⁸¹
55. As already noted, NGOs (and other private legal entities) which were dissolved by virtue of emergency decrees, rather than by decisions (“transactions”) carried out by state authorities, cannot challenge the impugned measures before the administrative courts; they can only resort to filing administrative appeal with the Government (*supra*, par. 52.). This reading is consistent with the ruling of the administrative courts in more than 300 cases.⁸² As a result, NGOs and other legal entities which were dissolved by virtue of emergency decrees were *effectively deprived of any* legal remedies to contest their dissolution and confiscation of property, in particular given that the administrative appeal with the Government against decisions of state authorities is “not guided by any rules or principles”.⁸³
56. The Venice Commission, on the other hand, noted that on prior occasions the TCC gave a liberal interpretation of the language of Article 148, par. 1 of the Constitution and “declared itself competent to examine the constitutionality of the emergency decree laws, to the extent that they went beyond the scope of the state of emergency

⁷⁸ E.2016/166, K. 2016/159, 12 October 2016, Official Gazette 4 November 2016-29878; E. 2016/167, K.2016/160, 12 October 2016, Official Gazette 4 November 2016-29898; E. 2016/171 K. 2016/164, 2 November 2016, Official Gazette 8 November 2016-29882; E. 2016/172 K. 2016/165, 2 November 2016, Official Gazette 8 November 2016-29882). See also Venice Commission, *Opinion on emergency decree laws*, par. 190.

⁷⁹ Decision No. 2016/12 of 4 August 2016. See also Constitutional Court, Press Release Regarding the Reason for Decision on the Dismissal of Two Members of the Constitutional Court, Alparslan Altan and Erdal Tercan from Profession, paras. 46-48. See also par. 45. of the press release which states that the sacked members of the Constitutional Court denied charges and “requested that they be provided with the opportunity to defend themselves again after the concrete information and documents regarding the imputed offence are submitted to them and certain witness whose names they provided be heard”. However, “common conviction” and “the information from the social circle” prevailed. <http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/31.html>.

⁸⁰ Venice Commission, *Memorandum of the Ministry of Justice of Turkey*, p.33.

⁸¹ App. No. 2016/35094. The TCC ruled the application inadmissible for non-exhaustion of available legal remedies. TCC Press Release No. 1/17: Individual Application, September 13, 2017. See also Venice Commission, *Memorandum of the Ministry of Justice of Turkey*, pp. 33-34.

⁸² Kerem Altıparmak, Is the State of Emergency Inquiry Commission Established by Emergency Decree 685 and Effective Remedy? Human Rights Joint Platform (IHOP), February 2017, p. 2 (hereinafter, Kerem Altıparmak).

⁸³ *Ibid.*

ratione temporis and *ratione loci*".⁸⁴ In four landmark decisions the TCC established various limiting criteria the emergency decrees had to fulfil, and ruled that if these criteria were not met the decrees were deemed ordinary decrees which are subject to constitutional review. Thus in the two decisions in 1991 and 1992 the TCC ruled that the emergency decrees were "limited 'legal regimes' deriving from the Constitution. Hence, "a state of emergency is a legal regime within the understanding of 'democratic State governed by the rule of law', in accordance with Article 2 of the Constitution that cites the characteristics of the Republic".⁸⁵ In 2003 the TCC expanded the scope of this precedent, and ruled that the power of the Government to issue the emergency decrees was not only limited by Articles 121 and 122, but also by *other relevant provisions* of the Constitution. Thus the TCC interpreted the phrase 'matters necessitated by the state of emergency' in Article 121 broadly, taking all provisions of the Constitution pertaining to the state of emergency into consideration.⁸⁶

57. The Venice Commission noted that the TCC's most recent strict interpretation of Article 148, par. 1 of the Constitution gives rise to the Government's unfettered executive power, given that the Declaration of the state of emergency did not define the scope of the Government's emergency power, and that Parliament did not provide the Government with general instructions to that effect. Nor did the Parliament exercised its controlling functions over the issued emergency decrees until October 2016. This poses a threat for a democratic legal order, especially given "virtually irreversible character of measures taken by the Government".⁸⁷ The Venice Commission further points that the reversed position of the TCC with respect to Article 148, par.1 is inconsistent with the Government's position that the Law on State of Emergency is not the controlling instrument for the emergency decrees. If that is the case, the emergency decrees should be deemed ordinary legal acts and thus subject to the TCC review. If however the Law on State of Emergency is the controlling instrument for those decrees, it is incumbent on the Government to ensure they fully comply with the Law (*supra*, paras. 42.-44.).⁸⁸
58. We also note that the TCC most recent position on *in abstracto* review seems inconsistent with the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey. Article 42 of the Law provides that subject of TCC review cannot be "international treaties set into effect in compliance with the procedure" (par. 1.) as well as laws specifically referenced in par. 2 of the same

⁸⁴ Venice Commission, *Opinion on emergency decree laws*, par. 189. See also PACE, Resolution on the functioning of democratic institutions in Turkey 2017, par. 19.

⁸⁵ E.1990/25, K.1991/1, 10 January 1991, Official Gazette 5 May 1992-21162; E.1991/6, K.1991/20, 3 July 1991, Official Gazette 8 March 1992-21165. See Selin Esen, *Judicial Control of Emergency Decrees-Laws in Emergency Regime – A Self-Destruction Attempt by the Turkish Constitutional Court*, IACL, AIDC, [tps://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](https://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).

⁸⁶ E. 2003/28, K.2003/42, 22 May 2003, Official Gazette 16 March 2004-25404. Selin Esen, *ibidem*.

⁸⁷ Venice Commission, *Opinion on emergency decree laws*, par. 191.

⁸⁸ *Ibid.* par. 192.

article.⁸⁹ The list of laws therein does not include the Law on State of Emergency, which the Constitution envisage as the governing instrument for the emergency decrees (*supra*, par. 33.).

59. The Government further contends that the *approval* of the emergency decrees by Parliament is subject to appeal to the TCC, given that the approval is carried in the form of a law and laws are subject to constitutional review *in abstracto*. According to an expert opinion: “If the Parliament approves emergency decree-laws they will become ordinary laws. They can then be subject to judicial review by the [T]CC”.⁹⁰ It remains to be seen however whether the TCC will eventually utilize this avenue to probe the constitutionality of the approved emergency decrees, or whether it will confine itself to the review of the Parliament’s approval laws in a narrower sense.⁹¹
60. The Opinion of the Venice Commission also details serious problems with regard to the lack of effective legal remedies, including those for dissolved NGOs and other legal entities. It notes that “even assuming that the Turkish State had large discretion in regulating access to courts for public servants in times of emergency, this logic *does not* work for *private* legal entities which have been liquidated by ‘lists’: denying judicial review with respect to actions taken against private entities can hardly be justified by the ‘exigencies of the situation’⁹² (emphasis ours). The Venice Commission recommended that the Government establish an ad hoc body to review the state of emergency measures.⁹³ A similar proposal was first put forward by the CoE Secretary General and subsequently endorsed by the PACE ad hoc sub-committee.⁹⁴ Such a body would need to review cases individually and would have to observe the basic principles of due process, including examination of evidence and reasoned decision. In addition, the body would need to be independent and impartial, and would need to have sufficient power to restore the status quo and provide

⁸⁹ The Law on Unification of Education dated 3 March 1924 and numbered 430; b) The Law on Wearing of the Hat numbered 25 November 1925 and numbered 671, c) The Law on Closure of Religious Lodges, Convents and Tombs and Prohibition and Abolition of Tomb Keepers and Certain Titles dated 30 November 1925 and numbered 677, ç) The provision of conclusion of marriage contracts before marriage registrars adopted by the Turkish Civil Code dated 17 February 1926 and numbered 743 and the provision of Article 100 of the same Law, d) The Law on the Adoption of International Numbers dated 20 May 1928 and numbered 1288, e) The Law on Adoption and Application of the Turkish Alphabet dated 1 November 1928 and numbered 1353, f) The Law on the Abolition of Titles and Appeals such as Efendi, Bey, Pasha dated 26 November 1934 and numbered 2590, g) The Law on the Prohibition of Wearing Certain Garments dated 3 December 1934 and numbered 2596. Translation of the Law is provided in the Venice Commission, *Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey*, CDL-REF(2011)047 Engl. only, 12 September 2011., p. 21.

⁹⁰ Selin Esen, *Judicial Control of Emergency Decrees-Laws in Emergency Regime – A Self-Destruction Attempt by the Turkish Constitutional Court*.

⁹¹ Venice Commission, *Opinion on emergency decree laws*, paras. 193-194

⁹² Venice Commission, *Opinion on emergency decree laws*, par. 215.

⁹³ *Ibid.* par. 220.

⁹⁴ 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) 18 rev, paras. 62,63.

adequate compensation, as appropriate. Finally, its decisions would need to be subject to judicial review.⁹⁵

61. In efforts to address the CoE concerns over *ad hominem* and *en masse* prosecution, as well as a lack of effective legal remedies, the Government established an *ad hoc* Inquiry Commission for the State of Emergency Measures (“Commission”), pursuant to the Emergency Decree no. 685 of 23 January 2017 (“Decree”). The Government noted that the establishment of the Commission “is a tangible example of Turkey’s commitment to the Council of Europe standards”.⁹⁶ The Decree *inter alia* allows NGOs and other legal entities to contest the impugned measures resulting directly from emergency decrees in administrative proceedings before the Commission (Article 1, par. 1, Article 2, par. 1, c), par. 2), which has the power to decide a case on merit (Article 9). The Decree further provides that “in cases of acceptance of the applications concerning dissolved ‘institutions and organizations’, the relevant provisions of the emergency decrees shall be deemed revoked along with all effects and consequences with regard to the institution and organization in question, as from the publication of the decree at issue”. The Commission’s decisions shall be carried by the Ministry of Interior, the Ministry of Finance, the Ministry of Health or the Directorate General for Foundations, as appropriate (Article 10, par. 2).⁹⁷ The Commission shall exercise its functions for the period of two years following the date of the Decree’s entering into force, and the Government may subsequently extend this period for one or more years (Art. 3, Decree). A decision of the Commission may be appealed before the Ankara administrative courts determined by the High Council of Judges and Prosecutors, whose decision in turn may be contested before the TCC (Article 11, Decree).⁹⁸
62. The Decree further provides that the Commission shall be composed of seven members. Three members shall be assigned by the Prime Minister from among public officials; one member shall be assigned by the Minister of Justice from among judges and prosecutors who hold office in central organization of the Ministry of Justice and in related and affiliated institutions; one member shall be assigned by the Minister of Interior from among personnel holding the class of civil administration; and, two members shall be assigned by the High Council of Judges and Prosecutors from among rapporteur judges who hold office in the Court of Cassation or in the Council of State. The Commission shall elect a Head and a deputy Head from among its members (Article 1, par. 2, Decree.). The presence of at least four members of the Commission is required for a case deliberation (Art. 1, par. 3, Decree). The

⁹⁵ Venice Commission, *Opinion on emergency decree laws*, par. 222.

⁹⁶ Ministry of Justice of Turkey, INFORMATION NOTE CONCERNING THE INQUIRY COMMISSION ON THE STATE OF EMERGENCY MEASURES ESTABLISHED BY THE DECREE LAW NO. 685 DATED 23 JANUARY 2017 AND AMENDED BY THE DECREE LAW NO. 690 DATED 29 APRIL 2017, dated 24 May 2017, p. 1. (hereinafter: Ministry of Justice, *Information to the CoE* of 24 May 2017). <https://rm.coe.int/1680717465>.

⁹⁷ Venice Commission, Emergency Decree Law on the Creation of an Inquiry Commission No. KHK/685, CDL-REF(2017)014, 21 February 2017. Translation is provided by Turkish authorities.

⁹⁸ As a result of the recent constitutional referendum held on 16 April 2017, the name of the institution was changed to “Council of Judges and Prosecutors”.

Government appointed members of the Commission on 16 May 2017, which commenced functioning on 22 May 2017. However, its Rules of Proceeding were approved only on 12 July 2017, six months after the Decree had been issued. There are altogether 181 staff working for the Commission (28 judge/prosecutors, 23 inspectors, 12 experts, and 118 director-staff members). It is expected that the Commission will render first decisions in November 2017. While working for the Commission, its members are released from their official duties.⁹⁹

63. While the TCC has already ruled that the Commission is deemed an effective legal remedy—and therefore individual applications to the TCC by-passing the Commission will be declared *inadmissible* on procedural grounds¹⁰⁰—there are several issues with respect to the Decree which give rise to grave concerns. These issues need to be viewed against the fact that *in abstracto* conformity of the Decree with the Constitution cannot be challenged, given that it also falls into the category of the *emergency* decrees (*supra*, paras. 52-53.). Firstly, it is clear that the composition of the Commission *does not* guarantee its *impartiality*, given the controlling influence of the *executive branch* (Government) in this respect. In addition, similar to the administrative courts which are responsible for the review of applications contesting decisions of state authorities (*supra*, paras. 51, 54.), the Commission does not have the power to order a *stay of execution* for any decision (“transaction”) which originates from the state of emergency. Furthermore, the Decree does not guarantee an *independence* of the Commission’s members. While Article 4, par. 1. of the Decree stipulates that its members cannot be dismissed on any account, it subsequently stipulates the grounds for a member’s dismissal. Particularly troubling in this respect is the language of Article 4, par. (1) e) which allows for the Commission to dismiss its member if “administrative investigation against a member is initiated by the Prime Ministry or a permit for prosecution against a member is issued on the ground that the member concerned is a *member* of, or have *relation, connection* or *contact* with terrorist organizations, or structures/entities, or groups established by the National Security Council as engaging in activities against the national security of the State” (emphasis ours). The initiation of administrative investigation on vaguely defined grounds therefore is deemed sufficient for a member’s dismissal, while no judicial or administrative remedy against the Commission’s decision is available.¹⁰¹
64. The Decree does not guarantee *due process* either, given that Article 9 thereof provides that the Commission shall carry out examination “on the basis of the documents in the files”, which are compiled by state bodies—unless those documents are classified as a state secret (in which case the Commission will have no access to those documents, Article 5, Decree). We note however that NGOs and legal entities

⁹⁹ Ministry of Justice, Information to the CoE of 24 May 2017, p. 1

¹⁰⁰ See a decision of the Constitutional Court in *Murat Hikmet Çakmakçı* (App. No. 2016/35094), which ruled the application inadmissible for non-exhaustion of available legal remedies, including the Commission. Press Release No.1/17: Individual Application, September 13, 2017.

¹⁰¹ Kerem Altıparmak, pp. 8-9. As a secondary issue, it does not seem clear what rules govern the decision making process, in case of dismissal of a member of the Commission.

affected by emergency decrees never had an opportunity to review documents which justified their dissolution, and hence are not aware of the precise nature of charges against them.¹⁰² This is particularly significant, given that a party cannot challenge proceedings before the Commission. We recognize that Article 5, par. 2 of the Decree provides that “public institutions and organizations as well as judicial organs are obliged to submit to the Commission all kinds of information and documents it needs within the scope of its duties, without delay, or to make them available for an on-site examination”. However, it does not address the foregoing problem of NGOs and others affected by emergency decrees not having access to documents which supported charges against them.

65. Given the foregoing, there is little doubt that the Decree gives rise to the issue of overbearing influence of the executive branch on the functioning of the Commission and falls short of ensuring due process.
66. The seriously flawed rules governing the establishment and operations of the Commission need to be viewed against its already enormous case-log. According to the President of the Commission, as of 16 October 2017, there have been *101.000* applications pending before the Commission, while the case log is expected to reach *500.000* applications.¹⁰³ There is a profound concern therefore that the case log alone will make it *virtually impossible* for the Commission to both observe due process and deliver timely justice.
67. The foregoing problems with the Commission need also to be viewed against the background of the ECtHR’s rulings in *Mercan v. Turkey*¹⁰⁴ and *Zihni v. Turkey*.¹⁰⁵ Both cases dealt with the alleged violation of the rights protected by the Convention as a result of the state of emergency. The Court invoked Article 35 of the Convention and ruled the applications inadmissible on the ground that applicants did not exhaust domestic legal remedies, without *a priori prejudice* as to the functioning of the newly established Commission. Given the foregoing analysis, however, there is a legitimate concern that NGOs and others that have been gravely affected by the impugned emergency measures may end up being deprived of any effective domestic or international legal remedy, and that justice will not be served.

Reports on the impact of the State of Emergency on NGOs and civil society

68. Various reports detail concerns about the impact of emergency measures on NGOs. This impact cannot be fully appreciated however if it does not take into due account the other segments of civil society (media outlets and universities). This requires an appreciation within the context of freedom of expression (Article 10 of the Convention), as well as freedom of assembly and association (Article 11 of the

¹⁰² Ibid. pp. 11, 18.

¹⁰³ <http://www.milliyet.com.tr/yazarlar/gokcer-tahincioglu/neden-ihrac-ettiginizi-bildirin-2523726>.

¹⁰⁴ Judgment of 17 November 2016.

¹⁰⁵ Judgment of 8 December 2016.

Convention). The selected reports below are reflective of the challenges facing NGOs and civil society during the State of Emergency. The Human Rights Watch Report on Turkey for 2017 notes in this respect:

“Government-led efforts to silence media criticism and scrutiny of government policy in Turkey involved five main trends: the prosecution and jailing of journalists; takeover of media companies—including the daily *Zaman* newspaper—by appointing government-approved trustees and seizing assets and the closing down of media; removal of critical television stations from the main state-owned satellite distribution platform and their closure; physical attacks and threats against journalists; and government pressure on media to fire critical journalists and cancel their press accreditation. Blocking of news websites critical to the government also increased. Turkey made the highest number of requests to Twitter of any country to censor individual accounts.

In January 2016, over 1,000 university lecturers who signed a petition criticizing government policy in the southeast and calling for a return to political negotiations with the PKK, were harshly targeted by Erdoğan in speeches and then subjected to a criminal investigation for “insulting” the Turkish state. The investigation had not been concluded at time of writing. Some universities dismissed signatories of the petition, and 68 were fired by decree in September and October.

International pressure, including from the UN Secretary General, helped to secure the release of some journalists from unjustified detention, including Reporters Sans Frontières (RSF) representative Erol Onderoğlu in June. However, following the coup attempt such pressure appeared to have less effect.

Following the coup attempt, the government closed down by decree over 160 media outlets, most linked to the Gülen movement or Kurdish media. The number of journalists in pretrial detention on the basis of their writing and journalistic activities surged to 144 by mid-November, making Turkey once again a world leader in jailing journalists. Presenting no evidence of criminal wrongdoing, authorities detained many reporters and columnists employed by media outlets allegedly linked to Gülen. Among those jailed pending investigation were veteran journalists and commentators who have been prominent government critics such as Nazlı Ilıcak, Şahin Alpay, Ahmet Altan, and Mehmet Altan.

Authorities detained journalists and writers on charges of links with the PKK but again presented no evidence to support the charges. Among this group were novelists Necmiye Alpay and Aslı Erdoğan. Authorities closed down the pro-Kurdish daily *Özgür Gündem* in August and placed dozens of journalists who had participated in a solidarity campaign with the newspaper under investigation for “spreading terrorist propaganda.”

Cumhuriyet daily newspaper editor Can Dündar and the Ankara bureau chief Erdem Gül were convicted in May and sentenced to over five years’ imprisonment for revealing state secrets by publishing evidence of arms being sent to Syria. Dündar and Gül have appealed the verdict. Dündar is outside Turkey. In November, authorities arrested Murat Sabuncu who became *Cumhuriyet* editor after Dündar, as well as nine writers and board members from the newspaper.

Using state of emergency powers, in November the government suspended by decree the activities of 370 nongovernmental associations, among them a children’s rights group, three lawyers’ associations with a human rights focus, and women’s rights and humanitarian organizations in the southeast.

Authorities frequently impose arbitrary bans on public assemblies and violently disperse peaceful demonstrations. For the second year running, the Istanbul governor’s office banned the annual Istanbul Gay and Trans Pride marches in June 2016, citing concerns about security threats and public order”.¹⁰⁶

69. On 5 July 2017 the Government detained the Amnesty International (‘AI’) Turkey Director İdil Eser, among eleven human rights defenders who were attending a human rights workshop, including a German and a Swede national. As the AI statement reads: “They are suspected, without grounds, of “committing crime in the name of a terrorist organization without being a member”. Eight of the detained remained in pre-trial custody and two were bailed. Their detention followed the arrest of AI Turkey President Taner Kiliç, who has been imprisoned since 6 June 2017 on the suspicion of being a member of an ‘armed terrorist organization’.¹⁰⁷ The CoE Secretary General joined calls for the release of the detained.¹⁰⁸ On 25 of October 2017 the court ordered the temporary release of the eight detained, pending further investigation, however, Mr. Kiliç remains in custody.¹⁰⁹ The AI further stated that “the Turkish government is abusing its power, deliberately making the country a dangerous place for people who speak out for human rights. These brave activists have been detained for no reason except for their belief in human rights”.¹¹⁰
70. On 10 July 2017 police arrested 42 university staff members, including Koray Caluskan, a former adviser to the main opposition Republican People’s Party. They are seeking another 30 academics suspected of links to the FETÖ. Caliskan has been placed under house arrest. Overall, the impact of state of emergency on the academic community has been significant. As detailed in one report:

“The government had claimed that the purges—conducted at a stroke via legislative decrees — would target supporters of US-based preacher Fethullah Gulen, the accused mastermind of the putsch. After coming to power in 2002, the ruling Justice and Development Party (AKP) had opened dozens of new universities, and a large number of Gulenists had been appointed to their faculties as the alliance between the AKP and Gulen flourished. Indeed, the initial legislative decrees were largely aimed at scholars known as Gulenists. But soon things changed, and academics of various stripes critical of the government came into the crosshairs. The latest legislative decree of Feb. 7 dealt perhaps the most devastating blow in this respect. More than 300 academics were expelled from their universities, including signatories of a Peace Declaration in

¹⁰⁶ Human Rights Watch, World Report 2017: Turkey. <https://www.hrw.org/world-report/2017/country-chapters/turkey>.

¹⁰⁷ <https://www.amnesty.org/en/latest/news/2017/10/amnesty-turkey-chair-kept-in-jail>

¹⁰⁸ <https://www.coe.int/en/web/secretary-general/news>.

¹⁰⁹ <https://www.amnesty.org/en/latest/news/2017/10/turkey-court-releases-human-rights-defenders-including-amnesty-internationals-turkey-director>.

¹¹⁰ <https://www.amnesty.org/en/latest/campaigns/2017/07/free-rights-defenders-in-turkey>.

January 2016, which had condemned a military crackdown in Kurdish-majority cities and towns. Academics who did not sign the original declaration but issued a separate one later to defend the right to free speech after their colleagues faced a judicial onslaught were not spared either. Illustrating just how wide the net was cast, the list included medical professor Cihangir Islam, a prominent Islamic activist and husband of Merve Kavakci, the first veiled woman to be elected to the Turkish parliament. The expulsions had a crippling effect on campus. The worst affected was Ankara University, which has so far lost about 100 academics who had signed the Peace Declaration. The university's prestigious faculty of political sciences is on the verge of collapse, with 23 courses left without lecturers and 50 postgraduate students without advisers, according to Ayhan Yalcinkaya, a senior faculty member. The 158-year-old faculty is a leading educational institution, having raised a plethora of top Turkish politicians and diplomats. Beyond that, however, it is an iconic hotbed of political activism and dissidence, a tradition the AKP had so far failed to break".¹¹¹

71. In March 2017, the Government revoked Mercy Corps' registration that allowed it to operate in Turkey, forcing it to shut down its operations. Mercy Corps conducted from Turkey one of the largest humanitarian operations in Syria, delivering assistance to 350,000 to 500,000 civilians. They also provided a range of social services and other emergency assistance in Turkey, reaching about 100,000 Syrian and Turkish men, women and children in 2016 alone.¹¹²

72. As Devex reported on 2 October 2017:

"A series of detentions and the expulsion of Mercy Corps earlier this year have rattled the aid community in Turkey. At the same time, mounting bureaucratic obstacles are threatening NGOs' ability to operate: the Turkish government has allowed permits to lapse, leaving organizations in legal limbo and employees at risk of deportation".¹¹³

73. The Devex report also notes that "authorities only started asking NGOs to register in 2014. As The Century Foundation noted in a recent report on the aid crackdown, Turkey had no previous experience in dealing with INGOs. As they scrambled to respond to the growing crisis, "nearly every INGO fell afoul of some regulation".¹¹⁴

74. The PACE 2017 Resolution on the functioning of the democratic institutions in Turkey also recognizes the adverse impact of emergency measures on NGOs and civil society. It states *inter alia*:

"Assembly remains worried about respect for fundamental rights under the state of emergency. Considering the scale of the operations undertaken, the Assembly is

¹¹¹ Sibel Hurtas, Al Monitor, The Collapse of Turkish Academia, 13, February 2017. <https://barisicinakademisyenler.net/node/383>.

¹¹² <https://www.mercycorps.org/press-room/releases/mercy-corps-closes-operations-turkey>

¹¹³ <https://www.devex.com/news/massive-anxiety-as-turkey-cracks-down-on-international-ngos-91004>.

The foregoing pattern of the Government's actions fits into the perceived global pattern of shrinking civil space, which includes closed offices, seized records, bureaucratic delays, and new laws targeting NGOs work.

¹¹⁴ Ibid.

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” (par. 20.).

75. The foregoing reports therefore suggest that measures taken during the State of Emergency against NGOs and other segments of civil society have gone beyond the requirement of necessity, and give rise to the political vendetta launched against those that are not deemed sympathetic towards the Government/President’s causes.

Conclusion

76. Given the subsidiary role of the Convention and the ECtHR in the European regime of human rights protection, it is incumbent on a Contracting Party to ensure this protection in the first place. With respect to Article 15 of the Convention (derogation from the Convention in a state of emergency), a Party enjoys a wider margin of appreciation in honouring its commitments arising from the Convention, relative to the other articles thereof. However, this wider margin of appreciation goes hand in hand with the obligation of a Party to ensure the proper parliamentary oversight of a state of emergency, as well as effective legal remedies against the emergency measures. The primary obligation of a Party to ensure sufficient regime of human rights protection is therefore reinforced in a state of emergency, given the gravity of measures it entails (*supra*, par. 26.).
77. As the opinion suggests, regrettably, Turkey has fallen short of the foregoing commitments. There are serious substantial and procedural concerns with respect to the Emergency Decree No. 667 (‘Decree’) as well as the other emergency decrees affecting NGOs. With respect to substantial concerns, the language of Article 2, paras 1-3 of the Decree goes beyond the legitimate measures envisaged in Article 11 of the Law on State of Emergency (‘Law’). The Government argues that the Law is not a controlling instrument for the emergency decrees, and that impugned measures may go beyond the scope set out in the Law. However, such a reading is not supported by the language of Article 15 of the Constitution. Even if one accepts the Government’s argument at face value, it means that it has been issuing emergency decrees in a legal vacuum, devoid of any constitutional constraints, in breach of the rule of law. Article 2 of the Constitution, on the other hand, provides that the principle of the rule of law cannot be changed or altered under any circumstances, including a state of emergency (*supra*, paras. 42.-44.).
78. In addition, the impugned measures in Article 2, paras. 1-3 of the Decree (dissolution and confiscation of the asset of NGOs) fall short of the requirement of proportionality, given that the same effect could have been accomplished by temporary freeze of activities and asset of NGOs. In particular given the perceived problems with available legal remedies, which are detailed in the opinion. Furthermore, the language of Article 2, par. 1 of the Decree renders the Government

a sweeping power in establishing the alleged linkage with the FETÖ movement which is deemed sufficient to trigger the impugned measures. This reading was confirmed by the TCC with respect to Article 3, par. 1 of the Decree, which contains a language similar to Article 2, par. 1. The language of Article 2, par. 1 of the Decree therefore falls short of the requirement of legality and foreseeability, which is enshrined in articles 15 of the Constitution and the Convention respectively, as well as in Article 11 of the Convention (“prescribed by law”). Taken together, there is a legitimate concern that the language of Article 2, paras. 1-3 has effectively turned the *rule of law* into *rule by law* for the affected NGOs (*supra*, paras. 46-49.).

79. The regime of legal remedies available to NGOs during the state of emergency also gives rise to grave concerns. The Decree no. 685 falls short of ensuring the due process as well as the Commission’s impartiality and independence—and gives rise to the overbearing influence of the executive branch in the functioning of the Commission. In addition, the sheer number of cases pending before the Commission (more than 100,000), as well as those expected to be filed (additional 400,000), makes it virtually impossible for the Commission to both observe due process and deliver timely justice. These perceived shortcomings need to be viewed against the background of the TCC’s decision which has already recognized the Commission as an effective legal remedy, and has denied constitutional review of individual cases until domestic legal remedies are exhausted. There is a grave concern therefore that justice may not be timely served (if served at all) for those NGOs that were dissolved during the state of emergency, given that more than 14 months have already lapsed since the impugned emergency measures took effect, and that proceedings before domestic courts—let alone the ECtHR—are likely to take years. Even in the best case scenario, which presumes that the Commission will render first positive decisions in November 2017, formidable challenges will persist for the exonerated NGOs to fully recover and get up and running. The ECtHR, on the other hand, ruled that domestic legal remedies (however flawed they seem to be, our remark) must be exhausted, without *a priori* prejudice to the functioning of the Commission, before the alleged violation of the Convention’s rights during the state of emergency is brought to the Court (*supra*, paras. 60. - 67.).
80. As detailed in the opinion, the TCC’s “change of heart” and reversal to the strict reading of Article 148, par. 1 of the Constitution, which does not allow for a review of the emergency decrees *in abstracto*, is particularly regrettable and problematic. It amounts to the TCC essentially giving the Government an unfettered executive power during the state of emergency, even if it goes beyond the fundamental values and principles set out in the Preamble and the Constitution (including the rule of law). This is particularly troublesome, given the noted problems with parliamentary oversight of emergency decrees as well as the Government’s contention that the emergency decrees are not bound by the limits set out in the Law on State of Emergency (*supra*, paras. 42).. The analysis in this opinion concurs with the Venice Commission’s conclusion that the TCC’s most recent position on the issue is contrary to the very idea of constitutional control enshrined in the Constitution.¹¹⁵

¹¹⁵ Venice Commission, *Opinion on emergency decree laws*, par. 194.

The strict interpretation of Article 148, par. 1 of the Constitution would render meaningless the regime of human right protection set out in the Constitution—and indeed, the role and function of the TCC. It should be beyond reasonable doubt therefore that the only conceivable understanding of the underlying rationale for the human rights safeguards embedded in the Constitution (Articles 2, 4, 15 and 121 par. 2, in particular) is to ensure, among others, the foreseeability and proportionality of the emergency measures and their compliance with Turkey’s international commitments.

81. While it is ultimately an issue for the TCC to decide, it seems nevertheless that *in abstracto* review of the contested emergency decrees might be the only effective legal remedy for the affected NGOs at this point. This is an option which the TCC should be encouraged to further explore. This would require *in extenso* review of the Parliament’s laws approving emergency decrees, so as to include a review of emergency decrees as well (*supra*, paras. 51.-59.). Given the gravity of the impugned measures, a timely review of emergency decrees would also be of paramount importance. This course of action seems necessary if Turkey were to honour its commitments under the Convention—and, indeed the Constitution, and if justice for NGOs and others affected by the state of emergency were to be served.