ACADEMICS FOR PEACE: DEFENDING ACADEMIC FREEDOMS IN TIMES OF EMERGENCY

Kerem Altıparmak – Yaman Akdeniz

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Translation from Turkish to English

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The acknowledgements in this book necessarily have to be different from ones we have written or will write in other works. It is not the case that we have decided to write a book and produced this publication, as would be the case in most academic endeavours. It is the strange circumstances enveloping Turkey that have lead to the writing of this book. As you will witness in the following pages, there are numerous actors involved in this process. A group of these actors, who are a part of the academic community, are also the perpetrators of the grave violations of freedom of expression and academic freedoms described herein. We are unable to extend any thanks to them. However, it is our hope that this work will encourage them to turn from the wrongful and unjust path that they have taken.

There is a second group which has given occasion to this publication. They define themselves as Academics for Peace and are the signatories of the Declaration titled "We will not be a party to this crime". It is to those whom we owe the greatest thanks. Not because they have given occasion to this book, but because they have been patiently leading a struggle for the past year to protect the dignity of universities despite the legal and even physical attacks they have faced in an extraordinarily repressive environment. Their struggle has given the authors both inspiration and strength. The legal opinions we have written in solidarity with our colleagues to defend academic freedoms have developed into this book.

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İÇİNDEKİLER

INTRODUCTION – EVENTS

The Academics for Peace Initiative (https://barisicinakademisyenler.net) was launched in November 2012 by a group of academics who "*came together to issue a declaration during the hunger strikes by Kurdish prisoners*". In their inaugural declaration the Academics for Peace have noted their objective as "to produce academic knowledge by examining world examples regarding non-conflict processes as well as those for peace building and socialization and to expeditiously present this knowledge to the public and those concerned". In April 2013, Academics for Peace issued a declaration demanding "An immediate solution to the Kurdish issue and the building of peace enabling freedom and justice"[1] followed by numerous declarations concerning the peace process.[2]

The declaration titled "We Will Not Be a Party to This Crime"[3], which is the subject of this book, was shared with the public by Academics for Peace on 11 January 2016. The declaration was initially signed by 1128 academics. By 20 January 2016, the number of signatures totalled 2212. The text reads as follows:

As academics and researchers of this country, we will not be a party to this crime!

"The Turkish state has effectively condemned its citizens in Sur, Silvan, Nusaybin, Cizre, Silopi, and many other towns and neighbourhoods in the Kurdish provinces to hunger through its use of curfews that have been ongoing for weeks. It has attacked these settlements with heavy weapons and equipment that would only be mobilized in wartime. As a result, the right to life, liberty, and security, and in particular the prohibition of torture and ill-treatment protected by the constitution and international conventions have been violated.

This deliberate and planned massacre is in serious violation of Turkey's own laws and international treaties to which Turkey is a party. These actions are in serious violation of international law.

We demand the state to abandon its deliberate massacre and deportation of Kurdish and other peoples in the region. We also demand the state to lift the curfew, punish those who are responsible for human rights violations, and compensate those citizens who have experienced material and psychological damage. For this purpose we demand that independent national and international observers to be given access to the region and that they be allowed to monitor and report on the incidents.

We demand the government to prepare the conditions for negotiations and create a road map that would lead to a lasting peace which includes the demands of the Kurdish political movement. We demand inclusion of independent observers from broad sections of society in these negotiations. We also declare our willingness to volunteer as observers. We oppose suppression of any kind of the opposition.

We, as academics and researchers working on and/or in Turkey, declare that we will not be a party to this massacre by remaining silent and demand an immediate end to the

1 https://barisicinakademisyenler.net/node/38
2 https://barisicinakademisyenler.net/duyurular
3 https://barisicinakademisyenler.net/node/62

violence perpetrated by the state. We will continue advocacy with political parties, the parliament, and international public opinion until our demands are met"

Immediately after the declaration was published, numerous government officials and President Recep Tayyip Erdoğan in particular, targeted the signatories as "supporters of terrorism". On 12 January 2016, President Erdoğan addressed the matter for the first time in a speech he gave at the Annual Convention of Ambassadors: "*This mob that call themselves academics are blaming the government"* and *"these poor replicas of an intellectual unfortunately speak of the state engaging in a massacre. All you so-called intellectuals (enlightened ones), you are nothing but dark, dark forces. There's nothing about you that's enlightened. You are so dark and ignorant that you have no idea where the Southeast or the East of this country is."* He further stated that the state was facing *"the treason of so-called intellectuals"*.[4]

In another speech he delivered on 14 January 2016, President Erdoğan said, "*This mass that call themselves 'academics' are imposing the language and style of the terrorist organisation on the public; they are lies, distortions and propaganda. There is no difference between firing a gun in the name of the terrorist organisation and disseminating propaganda on its behalf. This has nothing to do with freedom of thought and expression."*[5] On 15 January 2016, Erdoğan went on to say, "*I once again strongly condemn those academics who have published this dark declaration and condoned those massacres."* With these words, the President not only defined the academics as *"dark forces/people"* but also said "*They are infamous persecutors, because those who stand with persecutors are persecutors themselves.... I have invited all judicial bodies and the university senates to assume their responsibilities against these actions which are against the Constitution and laws...to take urgent action... they have committed the same crime."*[6] The President thus called upon all authorities to take the necessary action against the signatories of the Declaration. On 20 January 2016, Erdoğan continued to speak against the signatories "*I'll be clear, I'm disgusted with this mentality that delivers so-called academic and political fatwas for the attacks against public officials by the terrorist organisation and then says 'it would have been better if they hadn't done that' when civilians are killed."*[7]

Immediately after the initial statements by the President, on 12 January 2016, the General Assembly of the Council of Higher Education issued a written statement noting that the necessary action would be taken within the framework of the law: "*The declaration published by a group of academics, which describes the anti-terrorism struggle of our state as 'a massacre' brings the entire academic community under suspicion. The profession and status of a person who supports terrorism does not confer privileges on them in any country; condoning terrorism must not be taken lightly under any circumstances. This declaration in support of terrorism has nothing to do with academic freedoms. Ensuring the security of our citizens is the primary duty of the state."*[8]

After this statement, universities rapidly launched disciplinary proceedings against the signatory academics. While some faculty members were suspended from their positions following the launch of proceedings, others were dismissed by the public and private (foundation) universities which employed them. Academic teaching staff who were on assignment in other countries were called back to their universities based on the proceedings against them.

In addition to the administrative proceedings initiated at universities, Chief Public Prosecutors in many provinces launched criminal investigations. Some academics were taken into police custody

4 http://bianet.org/bianet/toplum/171012-erdogan-dan-akademisyenlere-ey-aydin-musveddeleri
5 http://www.imctv.com.tr/cumhurbaskani-erdogandan-akademisyenlere-yeniden-elestiri/
6 http://www.hurriyet.com.tr/erdogandan-akademisyenler-bildirisine-sert-sozler-40040876
7 http://www.hurriyet.com.tr/akademisyenlere-tiksiniyorum-40043131
8 http://www.yok.gov.tr/documents/10279/21236927/Akademisyenlerin_Bildirisi_Uzerine_YOK_Genel_Kurul_Basin_Aciklamasi.pdf/

and questioned within the scope of these investigations. Faculty members Esra Mungan, Muzaffer Kaya, Kıvanç Ersoy and Meral Camcı were arrested and prosecuted on grounds of 'disseminating terrorist propaganda' under Article 7 § 2 of the Anti-Terrorism Law.

Following the coup attempt on the evening of 15 July 2016, which killed 240 and injured thousands, the Government of the Republic of Turkey decided to declare a State of Emergency on 21 July 2016. The Council of Ministers, headed by the President, adopted its decision No. 2016/9064 by which it declared a State of Emergency for a period of 90 days starting on 21 July 2016. This period was extended for another 90 days starting 19 October 2016.

Under the State of Emergency, 2346 higher education teaching personnel were dismissed from public service pursuant to Article 2 of Emergency Decree No. 672 published in the Official Gazette No. 29818 (Repeated Issue) on 1 September 2016. Similarly, 1262 academics were dismissed from public service under Article 1 of Emergency Decree No. 675 published in the Official Gazette No. 29872 on 29 October 2016. A further 242 academics were dismissed under Article 1 of Emergency Decree 677 published in the Official Gazette No. 29896 on 22 November 2016. Article 1 of Emergency Decree 679, published in the Official Gazette 29949 on 6 January 2017 brought the dismissal of another 631 academics. Finally, immediately after the first edition of this book was published, 330 academics were dismissed from public service under Article 1 of Emergency Decree 686 published in the Official Gazette No. 29972 on 7 February 2017.

Of the 4753 academic teaching personnel dismissed from public service in the absence of any proceedings under hastily prepared lists and prevented from directly or indirectly working in public service, 312 are signatories of the Declaration of Academics for Peace.

The penalties imposed on the signatories as of 02/12/2016 are as follows:[9]

Violations of Rights of Academics for Peace			
	Public	*Private*	*Total*
Dismissal from Public Service Under an Emergency Decree	298	8	306
Dismissal from Office	37	38	75
Resignation	15	10	25
Forced Retirement	20	1	21
Disciplinary Proceedings	429	63	492
Files sent to the Council of Higher Education Demanding Dismissal from Profession or Public Service	103	5	108
Suspension	76	11	87
Removal from Administrative Duties	3	4	7
Police Detention	52	3	55
Pre-trial detention	2	2	4

(*)While 312 signatories of the Declaration for Peace were dismissed from public service, a teacher, who is both a PhD student and employed by the Ministry of National Education, was also dismissed from public service. At least 63 signatories in the Programme for Training Academic Teaching Staff were subject to rights violations due to substantive and procedural changes introduced by emergency Decrees. Three academics were kept under pre-trial detention for 40 days, one was kept under pre-trial detention for 22 days before being released by the court.

The purpose of this book is to assess the entire process of administrative proceedings and criminal investigations launched against the Declaration of Academics for Peace and its signatories. The first part is dedicated to an examination of disciplinary proceedings against the signatory academics. An analysis will be presented as to why these proceedings cannot be subject to the

[9] https://barisicinakademisyenler.net/node/314 Last access: 04/04/2017.

relevant provisions of Law No. 2547 on Higher Education or Law No. 657 on Civil Servants. The second part focuses on an assessment, in light of human rights law, of the dismissal of the signatories from public service based on Statutory Decrees issued under the State of Emergency. The third and final part presents an assessment of the criminal investigations and prosecutions against the signatories in view of human rights law and discusses the issue of restricting speech related to terrorism.

PART I: DISCIPLINARY PROCEEDINGS AGAINST ACADEMICS FOR PEACE

The Current Legal Situation Regarding Disciplinary Measures Applicable to Academic Staff at Higher Education Institutions [10]

For the purpose of safeguarding scientific freedom and the autonomy of higher education institutions, the Constitution makes a distinction between public officials and academic staff, and confers a distinct status on institutions of higher education, their management and personnel. Whereas Article 128 of the Constitution sets forth general rules concerning public service, Article 130 specifically focuses on higher education institutions and academic staff. Article 130 of the Constitution reads as follows:

"the duties of the teaching staff, their titles, appointments, promotions and retirement, […] disciplinary and penal matters, financial affairs, personnel rights, rules to be abided by the teaching staff, the assignment of the teaching staff in accordance with inter-university requirements, […] shall be regulated by law".

The article read as a whole, sets forth that the matters listed are to be regulated under not just any law, but a special law guaranteeing the autonomy of universities. The regulation of disciplinary sanctions concerning academic staff under general laws applicable to other public servants is against the nature of academic service as well as Article 130 of the Constitution, which explicitly states that these matters are to be treated separately. In line with these provisions, ever since the Constitution was adopted, matters of disciplinary offences and penalties concerning academic staff have been set forth under the Higher Education Law No. 2547. Article 53 § b of the Higher Education Law titled 'Disciplinary and Penal Matters' is about disciplinary offences and penalties applicable to academic teaching staff. After an amendment introduced by Article 7 of Law No. 6528, Article 53 § b currently reads as follows:

> *Article 53 § b " The disciplinary penalties applicable to academic personnel, civil servants and other staff are: written notice (warning), censure, dismissal from management duties, pay cut, suspension of promotion, expulsion from the academic profession, and expulsion from public service. The Council of Higher Education shall regulate the disciplinary penalties to be imposed for various offences and shall specify the disciplinary proceedings applicable to the persons listed in this paragraph as well as the mandate of disciplinary supervisors, also taking into account the principles and procedures applicable to civil servants."*

The second sentence of Article 53 § b refrains from defining offences and penalties and leaves this to the Council of Higher Education. After the amendment was introduced, Article 53 § b was

[10] This section expands on the earlier legal opinion published by the authors with the title "Barış için Akademisyenler – Disiplin Soruşturmaları Hakkında Hukuki Görüş: Üniversitelerde açılan disiplin soruşturmalarında 2547 veya 657 sayılı Kanunların ilgili hükümleri uygulanamaz, 18.01.2016, http://cyber-rights.org.tr/docs/Disiplin_Gorus_YAKA.pdf" (Academics for Peace – A Legal Opinion on Disciplinary Investigations: The articles under Laws 2547 and 657 are inapplicable in the case of disciplinary investigations launched at Universities, 18/01/2016.)

challenged before the Constitutional Court. In its judgment of 14 January 2015[11], the Constitutional Court found the first sentence of the paragraph to be in conformity with the Constitution but annulled the second sentence.

In its decision of annulment, the Court pointed out that since Article 38 of the Constitution did not distinguish between administrative and judicial sanctions, disciplinary penalties should also be subject to the principles set forth therein. It followed from this that the principle of legality of crime and punishment must also be applicable in the case of administrative offences and penalties. The Court noted that, according to this principle, "since an act which requires the imposition of a penal sanction must *'expressly'* be defined as an offence, regulations on crime and punishment must not only be issued as laws to meet the formal requirement, but must also be capable of meeting the specific purpose in terms of their content". According to the Court "the text of the law must be such that it allows individuals to foresee, with some degree of clarity and certainty, which legal sanctions or consequences shall ensue from specific acts. Hence **the law should allow individuals to know, with some degree of certainty, which legal sanctions shall be imposed for which acts and to foresee the consequences of their actions**." The Constitutional Court noted that, despite this requirement, the annulled provision "fails to lay down the general principles of disciplinary practices and to specify the circumstances and conditions requiring disciplinary penalties. Moreover, the provision fails to stipulate legal regulations concerning the supervisors and boards mandated to impose disciplinary penalties, the statute of limitations and periods for issuing decisions, the working procedures and method of the high disciplinary board, the rights of public officials including the right to appeal against board decisions and the right of defence, execution of penalties, and the conditions required for disciplinary penalties to be deleted from personnel files."

The Constitutional Court found the article flawed not only because it failed to define offences and penalties but also because it failed to set forth the disciplinary procedures to be applied. In addition to specifying the acts, a legal regulation must set forth the bodies mandated to make decisions, the periods for appeal and defence, and the execution and finalisation of penalties. With this reasoning, the Constitutional Court found that failure to specify the principles and procedures applicable to the disciplinary proceedings of personnel covered in the article and the regulation of these matters by the Council of Higher Education was against Articles 38, 128 and 130 of the Constitution and annulled the provision.

The Constitutional Court found that the second sentence amounted to the delegation of legislative authority, vested in the Grand National Assembly of Turkey, to the Council of Higher Education. Since such delegation of authority is not possible, the judgment of the Constitutional Court not only annuls the second sentence of Article 53 § b of Law 2547, but also indirectly renders inapplicable the "Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions" issued by the Council of Higher Education. Anything to the contrary would amount to allowing the Council of Higher Education to regulate matters that fall within the mandate of the parliament. However, in its judgment, the Constitutional Court stated that since the legal loophole arising from the decision of annulment was of a nature that would disrupt public order, the annulment was to be enforced after nine months from the publication date of the Judgment in the Official Gazette, pursuant to Article 153 § 3 of the Constitution and Article 66 § 3 of Law No. 6216. The Judgment of the Constitutional Court annulling the provision was published in the Official Gazette dated 7 April 2015 (O.G. No. 29319), and the nine-month period expired on 7 January 2016. Since the required legal arrangements have not been adopted as of 7 January 2016, a legal loophole has arisen.

[11] Judgment No. E:2014/100, K:2015/6, T: 14.01.2015

Even before 7 January 2016, it was not possible to apply the regulation issued based on the annulled article. Although the judgment became enforceable on 7 January 2016, it had been established on 29 April 2015, that no penalties could be imposed during the nine-month period based on the said Regulation. After the judgment of the Constitutional Court was published in the Official Gazette, the Plenary Session of Administrative Law Divisions issued a decision on 29 April 2015, in which it stated the following:

> *"Although the judgment of annulment issued by the Constitutional Court states that the annulment shall be enforceable nine months from the date of publication in the Official Gazette, it would be against the principle of constitutional supremacy and the rule of law to continue debating existing cases based on rules that have been found to be unconstitutional despite the knowledge that a law or a certain provision thereof has been annulled for being contrary to the Constitution. In other words, the postponement of the enforcement of the annulment by the Constitutional Court primarily serves to grant time to the legislative branch to adopt new regulations in line with the reasoning of the judgment and to prevent a legal loophole, it does not follow from this that, when debating existing cases, judicial bodies are expected to enforce those rules that have been annulled for being unlawful and unconstitutional or to invoke such rules when debating and resolving disputes*."[12]

Furthermore, according to the Plenary Session of Administrative Divisions of the Council of State, the judgment of the Constitutional Court is binding on the legislative, executive and judicial branches under Article 153 of the Constitution and should be applicable to all pending cases filed prior to the judgment. This means that it does not suffice to refrain from filing new cases under the annulled Regulation; any administrative cases filed for the annulment of disciplinary penalties issued previously must also be concluded with a decision of annulment. Hence with the annulment of the second sentence of Article 53 § b of Law No. 2547, which is the basis for the "Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions", disciplinary investigations have become devoid of any legal basis.

The Question of Whether Legal Loopholes Can be Closed by Invoking General Provisions

Since no amendments were introduced to Law No. 2547 after the decision of annulment by the Constitutional Court, it has become impossible to enforce the Disciplinary Regulation about academic staff as of 7 January 2016. In any event, according to the Plenary Session of Administrative Divisions of the Council of State, the Regulation cannot be taken as a basis in any proceedings after the publication of the judgment of the Constitutional Court since it was based on a rule which has been annulled for being unconstitutional and has now become devoid of any legal basis.

Despite nine months having elapsed since the judgment of the Constitutional Court, the lawmaker has not introduced the necessary amendments to Law No. 2547. The decision adopted on the matter by the General Assembly of the Council of Higher Education was communicated to University Rectors by the Presidency of the Council of Higher Education in its letter No. 65649 dated 30 November 2015. In its decision, the General Assembly of Higher Education referred to the judgment of the Constitutional Court (dated 14/01/2015) and the decision of the Plenary Session of the Administrative Divisions of the Council of State (dated 29/04/2015) and concluded that the Regulation on Disciplinary Proceedings in Higher Education was devoid of a legal basis. However, the General Assembly then went on to state that "other than those matters specifically regulated under Article 53 § a and other articles of Law No. 2547, the provisions of Law No. 657 on disciplinary matters will be applicable; with respect to procedural rules absent in both laws,

[12] E:2013/826, K:2015/1654.

the provisions on disciplinary procedures under the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions will be applicable."

In the absence of a special law for staff employed at higher education institutions, as referred to in Article 1, paragraph 3 of the Civil Servants Law No. 657, the Council of Higher Education is of the opinion that the general law, namely Law No. 657, should be applied. However, this opinion is inapplicable since it is clearly against the Constitution as well as Law No. 657, and violates the general principles of law and the judgment of the Constitutional Court. The decision of the Council of Higher Education is unconstitutional for two reasons, as shall be explained below.

The Disciplinary Offences and Penalties of Public Officials Cannot be Regulated Under a General Law

Firstly, as explained above, according to Article 130 of the Constitution disciplinary offences and penalties involving higher education personnel cannot be regulated under a general law. These matters may only be regulated under a special law. Academic staff are different from other public officials and cannot be treated under the same status. According to the Constitutional Court:

> *"The Constitution describes universities as institutions where scientific studies are undertaken and taught and hence confers scientific and administrate autonomy as distinct from other public institutions; whereas academic staff are still regarded as public officials, they are given a separate status within the general classification of public officials indicating that the profession has a special importance and value."* [13]

A systematic interpretation of the Constitution verifies this approach. Article 27 of the Constitution specifically sets forth scientific freedom, whereas Article 130 § 1 underlines the autonomy of universities. Academic staff employed at Universities, which should be autonomous, cannot be treated as civil servants.

The obligation of loyalty to the State, which is expected from a civil servant, cannot be expected from a faculty member who is required by ethical principles to be loyal to scientific facts and universal principles. It is for this reason that academic staff cannot be the subject of Law No. 657, especially in discipline-related matters. Indeed, the disciplinary offences on many subjects covered under Law No. 657 are of a nature that cannot be applicable in the case of academic staff. Their application would be a violation of Article 27 of the Constitution and international conventions on human rights.

The Decision of the Council of Higher Education is a Grave Violation of the Principle of Legality of Crime and Punishment

The Council of Higher Education requires that Law No. 657 be applied not only in disciplinary proceedings initiated after it issued its decision on the matter but also in cases before that date. This approach is a grave violation of the principle of legality of crime and punishment stipulated in Article 38 of the Constitution. This is because an academic staff member who engages in some act on 1 May 2015 cannot possibly foresee that s/he will be subject to Law No. 657. S/he will naturally expect to be treated according to the Regulation on Disciplinary Proceedings. Disciplinary offences at Universities have been regulated under the Regulation on Disciplinary Proceedings for the past 30 years. The decision of the Council of Higher Education to retroactively apply Law 657 in disciplinary matters is clearly against Article 38 of the Constitution, which reads

[13] AYM, 2010/29, K. 2010/90 T.16.7.2010.

"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed".

As noted by the Constitutional Court in its above-mentioned judgment, it does not suffice to have a law on disciplinary offences and penalties as a matter of formality. The law must also set forth rules that are foreseeable by individuals who are subject to it. The principle of legality of crime and punishment (*Nullum crimen, nulla poena sine lege*) is one under which the principle of legality is most rigorously applied. The European Court of Human Rights (ECtHR) interprets the principle in the same manner. According to the ECtHR, two tests must be applied to ensure that the principle is being complied with. The first test involves whether there is an express legal basis for penalising the accused in national and/or international law at the time the act was committed. The second test involves whether the accused could have foreseen the rule in question at the time the act was committed, whether the rule was accessible and whether the individual was able to foresee which acts constituted a crime.[14] However, as of 7 January 2016, there is no clear legal basis to launch proceedings against academic staff under Law No. 657, and the individuals concerned have no means of foreseeing the application of this law. A rule that has never before been applied to academic staff, despite being in force for 50 years, cannot be deemed foreseeable when that rule is suddenly invoked by an administrative decision to deal with disciplinary offences.

Hence, the decision of the Council of Higher Education disregards the judgment of the Constitutional Court. There are at least three reasons for this.

Firstly, the Constitutional Court states that the Administration does not have the authority to regulate crime and punishment. Yet the Council of Higher Education has created crimes and punishments which were non-existent until 30 November 2015 by declaring the application of Law No. 657. One may accept that the Council of Higher Education did have such authority until 14 January 2015 when the Constitutional Court issued its judgment. However, since no such authority exists after the annulment of Article 53 § b of Law No. 2547, the Council of Higher Education can neither issue totally new regulations to define an act as an offence where it was not defined as such prior to 30 November 2015, nor apply the provisions of another law to academic staff. Such authority is vested only in the lawmaker. Otherwise, the judgment of the Constitutional Court would be meaningless.

Secondly, the said decision of the Council of Higher Education also contradicts the determination of the Constitutional Court regarding legal loophole. If the Court had been of the opinion that Law No. 657 could be applied for disciplinary offences, it would not have considered the loophole arising from the annulment to be of a nature that would disrupt public order. The Constitutional granted a period of nine months to the lawmaker because if the annulment had been immediately enforced, there would have been no disciplinary rules that could have been enforced.

Lastly, the Constitutional Court noted that the principle of legality applies not only to substantive rules but also to procedural rules. According to the Court, matters involving "supervisors and boards mandated to impose disciplinary penalties, the statute of limitations and periods for issuing decisions, the working procedures and method of the high disciplinary board, the rights of public officials including the right to appeal against board decisions and the right of defence, execution of penalties, and the conditions required for disciplinary penalties to be deleted from personnel files" must also be regulated by law. Yet, the Council of Higher Education states that the Regulation will continue to be applied in these matters. This decision clearly disregards the decisions of the Constitutional Court and the Plenary Session of the Administrative Sections of the Council of State. According to the final paragraph of Article 153 of the Constitution, Decisions of the Constitutional Court shall be immediately published in the Official Gazette, and shall be binding on the legislative,

[14] *Kononov v. Latvia* [BD], no. 36376/04, 17.5.2010, para. 186.

executive, and judicial organs, on the administrative authorities, and on real persons and legal entities.

The decision of the Council of Higher Education is also contrary to Law No. 657. Article 1 of the law, which is about scope, sets forth that "faculty members and assistants employed a Universities, Academies of Economic and Commercial Sciences, Public Academies of Engineering and Architecture, Public Academies of Fine Arts, the Institute for Public Administration in Turkey and the Middle East" shall be subject to provisions of special laws. This means that, unless otherwise stipulated, Law No. 657 cannot be applied to academic staff, which is a practice in conformity with Article 130 of the Constitution. Bearing in mind that Law 2547 makes no reference whatsoever to Law No. 657 regarding disciplinary provisions, the idea that the general law is applicable in the absence of a special law is devoid of any leal basis.

For reasons explained above, the Council of Higher Education does not have the authority to recommend the application of disciplinary provisions under the Civil Servants Law No. 657 instead of the provisions of Law No. 2547 and it is not possible to apply these provisions due to substantive reasons.

The Question of Whether the Matter Can Be Regulated as an Offence Under an Ex Post Facto Law

It is not possible to criminalise the petition issued by Academics for Peace with an ex post facto Disciplinary Regulation. As explained above, there are no rules requiring them to be punished for their act at the time the petition was issued. Punishing them under a provision issued after that date would be against Article 38 of the Constitution, which states "*No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed*". Hence, it is legally not possible to impose a punishment for the petition by defining it as a disciplinary offence after the fact.

An Assessment of the Ongoing Disciplinary Proceedings at Universities

As examined above, academic personnel who have signed the petition of Academics for Peace cannot be subjected to proceedings, suspension and/or disciplinary penalties based on Law No. 2547 or on the "Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions".

Moreover, Law No. 657 cannot be invoked to launch disciplinary proceedings against the signatories. Since academic personnel defined under Law 2547 and are not civil servants, the Law on Civil Servants cannot be applicable on grounds that it is a general law.

Despite this evident and clear evaluation, we have witnessed proceedings being launched against 511 signatories at 36 different universities. Owing to the gravely unlawful nature of these proceedings, we believe it is necessary to address these in a separate evaluation.

The Ambiguity Regarding the Legal Basis of Disciplinary Proceedings

The only common aspect of proceedings against signatories of the declaration is that they have nothing in common. It is therefore evident that the proceedings are entirely arbitrary and ambiguous.

The 1128 signatories of the declaration issued by Academics for Peace were employed at different public and private universities. As we have noted in our legal opinion of 18 January 2016, although they all signed the same declaration and engaged in the same act, which is alleged to constitute a disciplinary offence, the lack of an explicit legal basis has resulted in each University choosing to launch proceedings by employing different methods.

Examples of Disciplinary Proceedings Against Academics for Peace and the Problem of Ambiguity

There is total uncertainty as to which law or regulation is taken as a basis in some of the proceedings. Despite nine months having elapsed since the launching of proceedings, the uncertainty has not been resolved. This is why the disciplinary proceedings cannot be concluded. In a manner never before seen in the history of higher education in the country, both Universities and the Council of Higher Education seem to be waiting for a signal to finalise the proceedings. From this perspective, it would be appropriate to speak of desperation rather than uncertainty. An act which is politically regarded as deserving punishment lacks the legal basis required to define it as an offence. The fact that Universities differ in their choice of legal grounds in the proceedings they have launched for the same act, and their inability to conclude the proceedings is clear proof of this situation.

For instance, in its notice to the signatories, Ankara University stated "*Disciplinary proceedings have been launched based on the provisions of Article 53 § a and other articles pertaining to disciplinary matters under Law No. 2547 on Higher Education, the provisions pertaining to disciplinary matters under Law No. 657 on Civil Servants and the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions pertaining to procedural matters that are not covered under the two laws*."

In the cover letter written by the Office of the Rector of Istanbul University, reference was made to the decision of the Council of State, ordering proceedings to be launched under the provisions of Law No. 657 and the procedural rules set forth in the Regulation on Disciplinary Proceedings. In a proceeding launched by Anadolu University, the official letter sent by the inquirer reads as follows: "*I have been appointed as an inquirer in the disciplinary proceedings initiated against you under Law No. 2547 on Higher Education*." In another proceeding started by the same University, reference is made to Law 657 on Civil Servants as the legal basis.

The notice sent by Uludağ University states "*proceedings have been started against you under the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions due to the press statement issued by academics which you have undersigned.*" Similarly, Yıldız Technical University issued a notice stating that the proceedings would be conducted in accordance with the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions, which was adopted pursuant to Article 53 and 65 § a (9) of Law No. 2547 on Higher Education.

The examples show that despite the clear decisions of the Constitutional Court[15] and the Plenary Session of the Administrative Sections of the Council of State[16], some universities have chosen to establish offences and penalties based on the Regulation of the Council of Higher Education, which is not in force. Others have chosen to apply the Regulation with respect to procedural matters and not for substantive matters. Yet, as explained above, neither the judgment of the Constitutional Court, nor the decision of the Plenary Session of the Council of State allows this course of action.

In the proceedings conducted by Yaşar University, the disciplinary offences under Article 125 of Law No. 657 on Civil Servants were listed and the act of signing the declaration was considered to fall within the scope of "*similar acts requiring the start of proceedings*". The signatories were asked to make their defence with respect to three separate offences.

Some Universities fail to show any legal basis for the proceedings. For example, the notice sent by Doğuş University to faculty members who were signatories of the declaration reads: "*You are*

15 AYM E:2014/100, K:2015/6, 14/1/2015.
16 DİDDK, E:2013/826, K:2015/1654, 29/04/2015.

required to submit a written defence within seven days as of receipt of this notice. Failure to submit a written notice will be regarded as a waiver of this right."

Not a single one of the notices we have examined refers to a specific provision of a law defining the act in question as one that constitutes an offence. Notices about the start of proceedings either refrain from offering any legal basis or make a general reference to a Law or Regulation. The process is even more arbitrary at universities in non-metropolitan areas.

Some universities have suspended academic staff without even initiating disciplinary proceedings, while others have suspended them as the proceedings were ongoing. To our knowledge, 85 academic personnel were suspended from their posts as a precautionary measure. The confusion about legislation is also observed in decisions of suspension. No information is imparted as regards which article in the Law or Regulation is being invoked to suspend staff and no reasoning is provided regarding the risk they would pose if they were to be kept in their positions.

Assessment of the Act Constituting a Disciplinary Offence and its Elements

The situation is no different in terms of the characterisation and/or definition of the offence. The vast majority of the disciplinary notices we have examined neither define the offence nor point out the specific statement in the Declaration that constitutes an offence. They also fail to demonstrate the legal basis of the allegations.

The proceedings launched by Ankara University offer no information about the act that constitutes an offence or about the legal provision that defines the act as such. The notice sent by the Rector's Office fails to meet the requirements to launch disciplinary proceedings under any one of the laws in question, including Law No. 2547, the Regulation or under Law No. 657, which is inapplicable in any event. Proceedings instituted in this manner are legally flawed under all circumstances.

In the disciplinary proceedings started at Uludağ University, the signatories are accused of "*engaging in acts that are incompatible with the title of civil servant*", yet no explanation is offered as to how such a conclusion was reached. Another notice issued by Anadolu University states that proceedings were started on grounds that the persons involved "*Accused the State of massacre and spoke against the State's existence and independence*". Different from the proceedings launched by other universities, Istanbul University issued a notice in which it cited five sentences from the Declaration of Academics for Peace. These expressions were alleged to be constituting an offence but no explanations were offered as to which specific offence they corresponded to. Yıldız Technical University launched proceedings within the scope of the Regulation of the Council of Higher Education on grounds that the signatories had "*publicly denigrated the Turkish Nation, the State of the Republic of Turkey, The Grand National Assembly of Turkey, the Government of Turkey, the judicial organs of the State and disseminated propaganda for a terrorist organisation*", "*Engaged in dishonourable and shameful acts incompatible with the title of civil servant*", "*Engaged in acts that undermined the reputation of the State abroad or acts and behaviours that undermined the honour of their office*". There is complete uncertainty as to which law these offences are set forth under since they do not exist in the Regulation on Disciplinary Proceedings issued by the Council of Higher Education. There is also uncertainty as to which act has given rise to these offences.

In the proceedings launched by Yaşar University, the act constituting an offence is, once again, not mentioned. The notice states that proceedings were launched on grounds of Law No. 657 Article 125/A(e), which requires a written warning, Article 125/B(d), which requires a censure, and Article 125/E(b), which requires expulsion from civil service. There is no information whatsoever about how these provisions were violated since they each regulate the penalties to be imposed for different offences.

As observed from these examples, despite the fact that there is only a single act in question, universities have either failed to legally define the act or have defined it differently and invoked different rules as being the basis for the proceedings. Within this wide spectrum of proceedings, one fails to find allegations that are even similar to one another, let alone being identical.

However, the chaos and confusion witnessed in finding a legal basis and in defining and characterising the offence do not effectively arise from the mistakes made by universities. Signing the declaration is not an offence and it was not defined as such prior to the act, which is why attempts to create an ex post facto legal basis inevitably lead all universities to act arbitrarily. One may argue that the administrations of universities instituting disciplinary proceedings have themselves committed a disciplinary offence since, in the lack of an offence, they failed to apply due process. A legal assessment as to why there is no offence to begin with is the following section.

Assessment from the Perspective of the Rule of Law and Foreseeability of Crimes

As understood from the established case-law of the Constitutional Court, Article 38 of the Constitution does not distinguish between administrative and judicial offences. The Constitution institutes the principle of *legality of crime and punishment* in the first paragraph of Article 38, which reads *"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed*" and the third paragraph, which reads "*Penalties, and security measures in lieu of penalties, shall be prescribed only by law"*. According to the Constitutional Court, "*This principle, which is based on the notion that individuals should be able to know those acts which have been proscribed, aims to guarantee fundamental rights and freedoms. Since Article 38 of the Constitution does not distinguish between administrative and judicial punishments, disciplinary penalties are also subject to the principles set forth under this article*."[17]

In a decision adopted by the Plenary Session of the Administrative Sections of the Council of State in 2012,[18] the judgment of the Constitutional Court was referenced[19] "*It is a legal requirement that disciplinary offences and penalties to be applied to administrators, academic personnel and civil servants employed at institutions of higher education are prescribed by law.*" Similarly, as the Constitutional Court has repeatedly noted on different occasions, "certainty" and "foreseeability" are among the most fundamental characteristics of the rule of law. The meaning of "certainty" can be understood from the following statement:

> *"One of the fundamental principles of the rule of law is "certainty". According to this principle, legal regulations are required to be explicit, clear, understandable, enforceable and objective without leaving room for hesitation or doubt on the part of either the individuals in question or the administration and to comprise protective measures against the arbitrary practices of public authorities. The principle of certainty is linked to legal security; individuals should be able to know from the law, to a degree of certainty, which specific legal sanctions or consequences would arise from specific acts and behaviours. Individuals can only foresee their obligations and adjust their behaviours under these circumstances. Legal security requires that norms are foreseeable, that individuals trust the state with respect to the actions and procedures it undertakes and that the State refrain from methods that would undermine this feeling of trust in legal regulations.*"[20]

The definition of crime and punishment is, without doubt, an area in which the certainty principle is to be most strictly applied. One of the fundamental principles of criminal law is the legality of

[17] AYM, E:2014/100, K:2015/6 dated 14/1/2015; E: 2010/28, K: 2011/139, T: 20.10.2011,
[18] DİDDK, E: 2007/1018, K: 2012/1333, T: 01.10.2012
[19] AYM, E: 2010/28, K: 2011/139, T: 20.10.2011
[20] AYM, 26/12/2013, E. 2013/67 and K. 2013/164.

crime and punishment (*nullum crimen*, *nulla poena sine lege*). In the legal system of Turkey, this principle is enshrined in both the Penal Code and in the Constitution as a fundamental right. According to Article 38 § 1 of the Constitution, *"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed."* Similarly, according to Article 2 § 3 of the Turkish Penal Code, *"Analogies shall not be used in applying those provisions of the law that institute crimes and punishments. Provisions containing crimes and punishments shall not be widely interpreted to give rise to analogies".* According to Article 7 § 1 of the ECHR, *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."* Hence, in order to speak of an offence, the legality principle must be observed. In other words, the act in question must correspond to the type of offence defined in the law.[21]

The principle that only the law can define a crime and prescribe a penalty prohibits, extending the scope of existing offences to acts which previously were not criminalised, and also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[22] As noted by the ECtHR, regardless of how clearly a law is worded, its meaning may need to be brought to light through judicial interpretation. For the same reasons, the law may need to be adapted to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[23] However, the resultant development of the judicial interpretation should be consistent with the essence of the offence and should reasonably be foreseen.[24]

The case-law of the ECtHR allows us to draw three essential conclusions with respect to the principle of legality:

Some provisions of criminal law are open to interpretation. The interpretation of some general concepts in criminal law by judicial bodies does not constitute a violation of the principle of legality of crime and punishment. However, there are two important limitations to such interpretation.

The first limitation is that the interpretation cannot result in the creation of a new offence that is irrelevant and inconsistent with the essence of the offence prescribed by law.

The second limitation is that the concept to be defined through interpretation should be foreseeable by those involved even if with the help of the court. Accordingly, individuals must be able to foresee which behaviours would entail criminal liability.

Yet, as explained above, no information is offered in the notices regarding the offence committed by the academics subject to disciplinary proceedings and no reference is made to the legal provisions defining their acts as an offence. As mentioned earlier, Law No. 657 is inapplicable in the case of academic personnel. Even if it were applicable, it cannot be applicable with respect to the acts of the academics in the current case. According to the Constitutional Court, "*disciplinary penalties are legally regulated sanctions instituted with the objective of ensuring the delivery of public services and the continuity of public interest within the scope of the duties, authorities and responsibilities of public officials*."[25] As elaborated below, according to Article 124 of Law No. 657,

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21 Application of Karlis A.Ş., No: 2013/849, 15/4/2014, para 32.

22 *Coëme and Others v. Belgium*, no. 32492/96, para. 145, ECHR 2000-VII; *Achour v. France*, no. 67335/01, para. 41, ECHR 2006, Del Rio Prada v. Spain, no. 42750/09, para 78.

23 *Sunday Times v. United Kingdom* (no. 1), 26.4.1979, para. 49, Series A no. 30.

24 *Streletz*, *Kessler and Krenz v. Germany* [BD], no. 34044/96, para. 50, ECHR 2001-II

25 AYM, E: 2010/28, K: 2011/139, T: 20.10.2011

disciplinary offences causing disturbance at the site of duty or work place are subject to penalties "*for the purpose of ensuring the due delivery of public services*" and cannot be applicable, by drawing an analogy, in the case of signatories of a declaration where such a declaration has nothing to do with the workplace.

The notices issued under the ongoing proceedings are of a nature that violates the three-pronged test drawn from the case-law of the ECtHR. Neither Law No. 657 nor 2547 nor the Regulation contain legal provisions corresponding to the act alleged to constitute an offence. Hence, University administrations have attempted to create an offence which is irrelevant to service and non-existent in relevant legal texts. Secondly, in terms of disciplinary law, since there is no applicable rule, it is not possible to speak of the foreseeability of the rule by the respondents of the proceedings. Despite nine months having elapsed since the issuing of the declaration, there is not a single proper proceeding demonstrating which specific rule was violated.

Hence, none of the universities that have launched proceedings were able to come up with a disciplinary provision corresponding to the act alleged to constitute an offence. Instead, they have chosen to refrain from mentioning the offence and penalty, which is unacceptable in rule of law, or have resorted to ambiguous statements. An 'offence' which is so elusive that it fails to be defined by so many lawyers and administrators could not possibly have been foreseen by the academics who engaged in the act.

For the reasons explained above, the proceedings launched against the signatories are a grave violation of the principle of legality of crime and punishment as defined in the judgments of the Constitutional Court and the ECtHR and the principle of the rule of law. For this reason alone, the proceedings should be terminated without delay.

The Nature, Reasons and Lack of Legal Basis of the Allegations and its Effect on the Right of Defence

Although Article 53 § a of Law No. 2547 is about the establishment of disciplinary boards, it does not mention any disciplinary offences. In Law No. 657, there are five different disciplinary penalties and various acts that require their imposition. As required by the right to a fair trial under Article 36 of the Constitution and Article 6 of the ECHR and by the decisions of the administrative courts based on judgments of the Council of State and the ECHR, in order for a member of academic teaching staff to make a defence, s/he should be given clear and detailed information as to how signing the declaration has lead to the commission of the act requiring a disciplinary penalty and which specific penalty is to be imposed. Otherwise, the individual will be obliged to make a defence without knowing what s/he is accused of and the legal basis of the accusation. This is not only a clear violation of the right of defence but also makes it effectively impossible to present a proper defence.

According to Article 36 of the Constitution, everyone has the right to a fair trial. In proceedings requiring criminal sanctions, a fair trial can only be possible if the individual is informed of the charges. According to Article 6 § 3 of the ECHR, "*everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.*" The Council of State has noted that the right for defence not only requires the accused to be informed of the material facts that have given rise to the charges but also the legal characterisation of such material facts.[26] In another decision, the Council of State has found it unlawful that an individual was sanctioned without indicating the acts alleged to

[26] Council of State, Plenary Session of Administrative Sections, 20.10.1989, E: 1989/401, K: 1989/156, DD, S: 78-79, p. 111-114.

constitute a crime and failure to indicate which articles of the Security Forces Disciplinary Statute each individual act fell under:

> *"The disciplinary inquirer had proposed disciplinary penalties in the absence of a determination as to which disciplinary offence under the Security Forces Disciplinary Statute the acts in question were linked to. Furthermore, the High Disciplinary Board of the Directorate General of Security imposed penalties in accordance with the proposal of the inquirer. As such, the applicant was deprived of the right of defence by being unable to argue his rightfulness, to prove that he did not commit a disciplinary offence and to demonstrate that the penalties imposed did not correspond to the acts in question. Furthermore, no opportunity was given to the judicial bodies to conduct a fair review regarding compliance of the disciplinary penalty to laws. Under the circumstances, the decision of the administrative court to reject the case on grounds that the alleged acts constitute disciplinary offences under the relevant articles of the Security Forces Disciplinary Statute has been found to be non-compliant with the law*."[27]

As underlined in a decision issued by the Sakarya Regional Administrative Court,[28] the right of defence is safeguarded in view of higher legal norms not only with respect to investigations and prosecutions conducted by judicial bodies but also with respect to disciplinary enquiries. In light of these higher legal norms and the aforementioned judgments of the Constitutional Court, the right of defence must also apply to disciplinary proceedings. Within this scope, in order to properly exercise the right of defence, the public official in question should be informed of the accusations against him, the evidence backing the accusations, the legal characterisation of the acts alleged to have been committed and the disciplinary penalties demanded. In the absence of this information, one cannot speak of the right of defence. The decision in question annulled the proceedings by the administration on grounds that the notice sent by the administration to the public official ordering a testimony could not be accepted as a notice asking for a defence since it lacked the elements mentioned, and that the written response given by the public official within this scope could not be characterised as his exercising the right of defence.

In its judgment in the case of *Pélissier and Sassi v. France*, the Grand Chamber of the ECtHR notes that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence. The Court considers that according to Article 6 § 3(a) the accused has the right to be informed in detail not only of the causes of the accusation, in other words, the alleged acts giving rise to the charges, but also of how such acts are legally characterised.[29] In its judgment in the case of *Sadak v. Turkey* the Court noted that as per Article 6§3(a), provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.[30]

An assessment of the above-mentioned notices for proceedings in light of the legal principles and court decisions shows that the right to a fair trial has been violated since the notices fail to determine which sentence in the Declaration signed by the academics gives rise to which specific disciplinary offence and also fail to mention which disciplinary penalty is likely to be imposed. Under the circumstances, the notices sent to academics are not only unlawful, their ambiguous nature also makes it impossible to exercise the right of defence .

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27 Council of State, Twelfth Chamber, E: 2005/6353, K: 2006/540.
28 E: 2013/962, K: 2013/809, T: 28.05.2013.
29 *Pélissier and Sassi v. France*, no. 25444/94, 25.03.1999, para. 54.
30 *Sadak v. Turkey*, no. 29900/96, 17.07.2001, para. 49.

The Notices of Disciplinary Inquiry Result in Self-incrimination and Violate the Principle of Presumption of Innocence

The notices of disciplinary inquiry we have examined fail to indicate the specific act corresponding to an offence, for which the defence is demanded. Under the circumstances, the accused is obliged to evaluate the content of the Declaration and the act of signing it by reference to all offences and penalties listed under Article 125 of Law No. 657 on Civil Servants, and then to make a defence by reference to either each of the offences listed in the law or a few that he chooses, or to accept the offence which he finds to be relevant. Hence, the individual is required to first find the offences that the act of signing the declaration has given rise to and then to defend himself on the basis of these offences although he had not considered the signing of the declaration to constitute an offence in the first place. This approach violates the most fundamental legal principles and also constitutes a grave flaw of service.

The ambiguity of the accusations is against Article 38 § 5 of the Constitution which stipulates that no one shall be compelled to make self-incriminating statements or to present self-incriminating evidence. It is also in violation of the right to remain silent and the right not to be forced to make self-incriminating statements, which are found to be essential to the right to a fair trial in the case-law of the ECtHR even if not expressly stated in the Convention.[31]

The Declaration Is Not Relevant to Disciplinary Law, It Is an Exercise of a Political Right

The proceedings undertaken by Universities are disciplinary enquiries. Any behaviour of an individual that is not relevant to their working life concerns other rights and freedoms and therefore cannot be the subject of a disciplinary inquiry. In a recent judgment, the Constitutional Court has clearly drawn the boundaries of disciplinary law.

In an application filed by a civil servant who was discharged from civil service as a result of a disciplinary proceeding under Article 125 of Law No. 657 for acts which he had engaged in outside of the work place and working hours, the Constitutional Court made the following evaluation:

> "In the current application, it is obvious that the applicant has not been discharged from civil service as a result of a disciplinary proceeding conducted for reasons associated with his duties. As it is understood from the disciplinary proceedings, the decision of discharge from civil service and the decision of the first instance court, the applicant's behaviour and relations in his private life in particular were the determinants in the decision. Under the circumstances, the decision of discharge from civil service on grounds that the applicant has engaged in certain acts in his private life, is clearly an interference in the right to private life…. During the disciplinary proceedings resulting in discharge from civil service, the applicant was subject to questions concerning allegations not only about his professional life, but also his private life. Within this scope, it is observed that the allegations against the applicant are not solely about the performance of his duties but about acts involving his private life and his right to privacy."[32]

The Court noted that the disciplinary proceedings involved acts that were engaged outside the work place and working hours and found a violation on grounds that the decision of discharge was disproportionate. The Constitutional Court reached a similar conclusion in another recent case, in which it stated:

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31 *Saunders v. United Kingdom*, no. 19187/91, 17.12.1996, ECHR 1996-VI.

32 *Şengül Kayan Application*, B. No: 2013/1614, 3.4.2014, para. 38 and 66.

> *"In consideration of the reasoning of the administrative and judicial bodies with respect to the foregoing disciplinary proceedings, it is understood that there is no fair balance between the loss incurred by the individual subject to a restriction of fundamental rights and freedoms, and the general interest aimed to be protected with the restriction. Therefore, there has been a violation of the right to privacy of the applicant as safeguarded under Article 20 of the Constitution."*[33]

According to the ECtHR, the notion of private life is one which protects the physical and moral integrity of the individual and enables the individual's self-development and self-actualisation.[34] Accordingly, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.[35] Even if the right to work or the right to be admitted to public service are not regulated, disproportionate interferences in a person's working life constitute a violation of the right to private life under Article 8, since they hinder the development of healthy relations with the outer world.

The ECtHR is of the opinion that the questioning of witnesses about an aspect of an applicant's private life within the scope of a disciplinary inquiry and the administrative consequences ensuing from such an inquiry and the decision of discharge based on the behaviour of the applicant constitutes a breach of the right to private life.[36] In the case of *Özpınar v. Turkey*, the Court notes that the accusations made against the applicant during a disciplinary inquiry involve the personal dignity of the individual.[37] In this context, the ECtHR is of the opinion that an individual's right to protect his dignity also falls within the scope of Article 8. [38]

Despite the fact that, in the absence of provisions under Law No. 2547, there is still an attempt to apply the disciplinary provisions under Article 125 of Law No. 657 to academic staff, we are of the opinion that the principles noted above are all the more applicable for academic staff .

Moreover, starting disciplinary proceedings for activities that are unrelated to their duties is not only a violation of their right to private life but also of their political freedoms. The academics have collectively expressed their disapproval of state policies by means of issuing a declaration. Collective petitioning or application is not a disciplinary offence even for civil servants. The Constitutional Court has previously annulled sub-paragraph (h) of Article 125 § 1(C) of Law No. 657, which sets forth the act of 'making collective applications or complaints' as an act requiring a pay-cut. The sub-paragraph was found by the Court to be against Articles 2, 13 and 74 of the Constitution.[39] In the judgement, the Court states that "*whereas it may be considered that the rule in question was introduced to prevent the disturbance of public order and collective action by public officials, it no longer serves its purpose at a time when fundamental rights and freedoms have been widened, mass demonstrations and marches are allowed, civil servants are eligible to become members of unions and can engage in union activities*." The Constitutional Court has noted that "*individual or collective petitions filed against the administration is an effective course of action for*

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33 *Serap Tortuk Application*, B. No: 2013/9960, 21/1/2015, para. 61.
34 *Sidabras and Others v. Lithuania*, no. 50421/08 and 56213/08, 23.6.2015, para. 43.
35 *Niemietz v. Germany*, 16.12. 1992, Series A no. 251-B, para. 29.
36 *Smith and Grady v. United Kingdom*, no. 33985/96 and 33986/96, 27.09.1999, para 71, CEDH 1999-VI.
37 *Özpınar v. Turkey* , no. 20999/04, 19.10.2010.
38 *Haralambie v. Romania*, no. 21737/03, 27.10.2009, para 79.
39 AYM, E: 2008/111, K: 2010/22, T: 28.1.2010, R.G.: 10.12.2011-28138.

solving some problems in a democratic society; the right of petition has therefore been recognised as a political right and guaranteed in the Constitution." The Court found that the 'right of petition' under Article 74 of the Constitution is applicable to everyone without discrimination, including civil servants.[40] Hence, all citizens, including academic staff, "*have the right to lodge written petitions with authorised bodies and the Grand National Assembly of Turkey regarding their wishes and complaints concerning themselves or the public*".

Moreover, even if interference in political activities undertaken outside of duty is acceptable in the case of other public officials, it cannot be acceptable in the case of academic staff. According to Article 68 of the Constitution, civil servants in public institutions and organizations, other public officials who are not considered to be workers by virtue of the services they perform cannot become members of political parties. Yet, according to the same article, higher education teaching personnel can become members to political parties. Permitting an individual to become a member of a political party in the light of a Constitutional rule and then punishing him under Article 125 of the Civil Servants Law for engaging in ideological activities is contrary to the rule that laws cannot contradict the Constitution.

Moreover, restricting activities outside of work in the case of academic staff as if they were civil servants contradicts the systematic interpretation of the Constitution. Article 20 of Law No. 2914 on Higher Education Personnel, which is characterised as a special law, sets forth that the provisions of Law No. 2547 on Higher Education and Law No. 657 on Civil Servants are to be applied in instances where Law 2914 has no provisions. However, it is mistaken to deduce that the Civil Servants Law is to be applied in every instance where the Higher Education Personnel Law lacks provisions. Moreover, as elaborated above, academic staff are not civil servants. They are different from civil servants due to the nature of their work and this difference makes it impossible to apply certain provisions in their case. The existence of a separate law for academic staff arises from this difference.

Faculty members are expected to find the truth and reach scientific facts. In this regard, a scientist cannot be expected to show loyalty to the state in the same manner expected from a civil servant. This distinction in the nature of their work requires that academic personnel are granted a different sphere of freedom. Indeed, the Constitution regulates freedom of science and the arts under an article separate from that which regulates freedom of expression. According to Article 27 of the Constitution, "*Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely*". The grounds for restriction listed under other articles of the Constitution are therefore not listed under Article 27.

This aspect of academic teaching personnel is also highlighted in international instruments. The Recommendation Concerning the Status of Higher-Education Teaching Personnel, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO)[41] underlines that institutions of higher education, and more particularly universities, are communities of scholars preserving, disseminating and expressing freely their opinions on traditional knowledge and culture, and pursuing new knowledge without constriction by prescribed doctrines[42] and goes on to note that access to the higher education academic profession

[40] An amendment introduced to the Council of Education Regulation on Disciplinary Proceedings in January 2014 has repealed the sub-paragraph 'collective application or complaint' under the paragraph 'offences requiring '**pay-cuts**' (RG-29/1/2014-28897).

[41] The UNESCO Recommendation adopted on 11 November 1997 was translated into Turkish by faculty members of Ankara University, Faculty of Political Sciences, Kerem Altıparmak, Koray Karasu, Ersin Embel, Hasan Sayim Vural and Sarp Balcı.

[42] Recommendation, para. 4.

should be based solely on appropriate academic qualifications, competence and experience and be equal for all members of society without any discrimination.[43]

In light of this information, one must conclude that the provisions of the Law on Civil Servants, which is incompatible with scientific freedom and academic autonomy, cannot be applied in the case of higher education personnel. Since the right to receive services in higher education is directly linked to the freedom of science and the arts as set forth in the Constitution, it cannot be regarded as just any public service. Therefore, those provisions of the Law on Civil Servants, which are contradictory to the essence of academic activities are inapplicable.

Under the circumstances, in order for an activity outside of work to be regarded as falling within the scope of disciplinary regulations in the case of academic staff, such activity must have the potential to affect the individual's work. Other than that, proceedings cannot be launched against academics on grounds of national security or public order for activities conducted outside their work, because by nature of their profession there is no possibility of their posing a threat with respect to those grounds. Indeed, according to Article 1 § 2 of the European Social Charter, "*the Contracting Parties undertake to protect effectively the right of the worker to earn his living in an occupation freely entered upon*". Article E of the Revised Text of the European Social Charter regulates non-discrimination. Article G stipulates that the rights and principles set forth in the Charter "*shall not be subject to any restrictions or limitations, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*". In other words, a restriction imposed on the right to earn a living in an occupation freely entered upon cannot be imposed solely for purposes of national security. The restriction must also be prescribed by law and be necessary in a democratic society.

When examining the case of individuals discharged from civil service due to their past services in totalitarian regimes, the Committee of Social Rights applied the measure of "*necessity in a democratic society*" to the concept of an occupation that was freely entered upon. According to the Committee, restrictions on a person's right to freely enter into an occupation were not necessary in a democratic society in that they did not apply solely to services which had responsibilities in the fields of law and order and national security or to functions involving such responsibilities.[44] The Committee's statement can be reformulated as follows; if the individual subject to a restriction has assumed responsibilities involving public order and national security, and enjoys the privileges of public authority, then, since there is a causal link between the services he delivers and the restriction imposed, the condition of necessity in a democratic society will have been met. However, the imposition of disciplinary sanctions on persons who have not assumed duties of this nature is unacceptable in a democratic society.

As summarized above, none of the disciplinary proceedings launched have established a causal link between the act alleged to constitute an offence and the delivery of scientific services. None of the academics in question are accused of imposing their political opinion on their students, discriminating or behaving unethically in their scientific research due to their political convictions. On the contrary, the accusations are ambiguous. Under these conditions, the proceedings are not only unlawful with respect to their subject matter but are also in violation of the right to freedom of science, political freedom and private life.

A Case Against the Decision of the General Assembly of the Council of Higher Education and the Stay of Execution Issued by the 8th Chamber of the Council of State

[43] Recommendation, para. 25.
[44] Cited in ECtHR, *Sidabras and Dziautas v. Lithuania*, no. 55480/00 and 59330/00, 21.10.2013, para. 31.

The Union of Education and Science Labourers filed a case with the Council of State demanding the annulment of the above-mentioned decision of the Council of Higher Education (No. 2015.14.486 dated 12/11/2015) and requested a stay of execution on grounds that it was contrary to the judgment of the Constitutional Court. The Union demanded the annulment of those parts of the decision which instructed universities to apply Law No. 657 and the Regulation which had been abrogated and asked for a stay of execution. The Reporter Judge of the Council of State issued an opinion calling for the acceptance of the demand.

The 8th Chamber of the Council of State issued a stay of execution,[45] which was notified to the parties shortly before 20 July 2016, on which date the Council of Higher Education High Disciplinary Board was due to examine the demands for discharge from public office. The stay of execution thus made it impossible for the High Disciplinary Board to adopt any decisions on the matter.

The 8th Chamber of the Council of State examined the demands of the Union for Education and Science Labourers under two separate headings. We will be employing the same method in our own evaluation.

Application of the Disciplinary Provisions of Law No. 657 to Higher Education Teaching Personnel

In its decision, the 8th Chamber of the Council of State found that the disciplinary provisions of Law No. 657 on Civil Servants was applicable to academic personnel, thereby going against all the legal justifications we have provided in previous sections. The Council of State provides the following reasoning for its decision:

"In this regard, on disciplinary matters not included under Law No. 2547, which is a special law, one must apply the provisions of Law No. 657, which is a general law. Failure to do so would amount to disregarding disciplinary penalties that are currently in force in the case of higher education teaching personnel. This would lead to a disruption of the order of work in public institutions and the hindering of education services which is the raison d'être of these institutions."

The Council of State argues that Law No. 657 can be applied to higher education personnel because failure to apply any disciplinary rules would disrupt the delivery of services. In other words, although it does not expressly state it, it has chosen to uphold one of two conflicting legal principles. The 8th Chamber of the Council of State supports this reasoning by pointing out the similarity between the offences listed under Law No. 657 and the offences under the annulled Regulation:

"A comparison of the disciplinary provisions under Law No. 657 and the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions shows that the acts and behaviours which require disciplinary penalties are almost identical with the exception of those acts which can only be committed by academic staff. This shows that even when the provisions of the Regulation were enforceable, the basis of disciplinary measures was Law No. 657."

The decision of the Council of State contains grave logical errors. These errors can be summarised as follows:

Firstly, the 8th Chamber of the Council of State establishes an erroneous balance. According to the Court, the damage caused by the disruption of public order in the absence of disciplinary penalties will yield consequences more grave than the violation of the principle of legality of crime and punishment. Yet, such a balancing attempt cannot be made. The principle of legality of crime and

[45] Council of State, E: 2016/1221, T: 09.03.2016.

punishment is the basis of law, so much so that, let alone administrative offences, even acts defined as crimes against humanity in international law are not punishable if they were not defined as crimes at the time they were committed.[46] If one accepts that the principle of legality of crime and punishment can be violated for the purpose of preserving public order, then any matter which is not regulated by law could give the administration and courts freedom to create crimes on these matters according to their own evaluations and apply any law by means of analogy. This would undoubtedly undermine the rule of law. Therefore, this is not a case in which we have two conflicting principles that need to be balanced. On the contrary, we have a fundamental constitutional legal principle, the violation of which cannot possibly be allowed.

This brings us to the second crucial mistake made by the Council of State. As understood from the nine-month period granted by the Constitutional Court, the duty to prevent the disruption of public order by adopting laws is not the duty of the executive or the judiciary, but the duty of the legislative branch. By annulling the relevant provision of Law No. 2547, the Constitutional Court has already declared that the will of the Council of Higher Education could not be taken into consideration. Yet, the Council of State is of the opinion that "*a comparison of the disciplinary provisions... of the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions shows that the acts and behaviours which require disciplinary penalties are almost identical with the exception of those acts which can only be committed by academic staff. This shows that even when the provisions of the Regulation were enforceable, the basis of disciplinary measures was Law No. 657*". The Council of State continues to take into consideration the will of an authority which was nullified on grounds that it was unconstitutional and asserts that the Regulation itself was an implementation of Law No. 657. Such an interpretation would mean that legislative authority is now transferred from the executive to the judiciary. Just as administrative bodies cannot exercise legislative authority, judicial bodies cannot substitute a non-existent criminal provision through interpretation. This would amount to a violation of Article 7 of the Constitution which prohibits the delegation of legislative power.

The decision of the Council of State violates the Constitution not only with respect to principles but also with respect to rules. As explained earlier, pursuant to Article 130 of the Constitution, "disciplinary matters and penalties" involving academic personnel must be regulated separately. When the Constitution is read as a whole, the justification for this provision is understood more clearly. Article 27 of the Constitution safeguards freedom of science (academic freedom) as a matter that is distinct from freedom of expression. Freedom of science can only be possible in autonomous scientific institutions that protect freedom of science. Indeed, all international instruments that regulate academic freedom indicate that academic freedom can be best achieved when universities are morally and intellectually independent of all political or religious authority and economic power.[47] According to the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel, "*Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. All higher-education teaching personnel should have the right to*

[46] *Korbely v. Hungary* [BD], no. 9174/02, 19/9/2008; *Vasiliauskas v. Lithuania*, no. 35343/05, 20/10/2015. In the former case, the applicant had been sentenced for a crime which was not defined as a crime against humanity at the time it was committed; in the latter case, the applicant had been convicted of a crime which was not defined as genocide at the time it was committed. Although the acts of the applicants are international crimes as we understand them today, the definition of the crimes were narrower at the time of the events. The ECtHR thus ruled that the respondent States had violated Article 7 of the Convention.

[47] Council of Europe Recommendation of 30 March 2000 (No R (2000) 8) on the research mission of universities; Parliamentary Assembly Recommendation 1762 (2006) on Academic freedom and university autonomy, especially paragraph 7.

fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source". Along the same lines, the Constitutional Court has noted that "*The Constitution describes universities as institutions where scientific studies are undertaken and taught and hence confers scientific and administrate autonomy as distinct from other public institutions; whereas academic staff are still regarded as public officials, they are given a separate status within this general classification, indicating that the profession has a special importance and value*". [48] Therefore, following the logic of the Council of State, the fact that the Regulation issued by the Council of Higher Education is an identical copy of Law No. 657 would, at the most, mean that the Regulation is in violation of Articles 130 and 27 of the Constitution as well as the universal rules of science. Disciplinary regulations that fail to recognise the scientific freedom of academic teaching personnel are problematic in terms of both procedural and substantive law since they violate the Constitution and international standards. Instead of viewing this as a problem, the Council of State has strangely chosen to uphold it.

As the Council of State judge Mithat Özcan wrote in his dissenting opinion against the majority vote, the assessment of the majority is also contrary to the basic rules of interpretation. Özcan, asserts that Law No. 657 cannot be applied to academic personnel by means of referencing. Özcan, rightly determines that Article 62 of Law No. 2547, which is a reference to the general provisions, is only applicable in matters relevant to the *rights and benefits of personnel*. The judge also points out that both Article 130 § 9 of the Constitution and Articles 9 and 11 of Law No. 2547 make a distinction between disciplinary matters and subjects pertinent to the rights and benefits of personnel. Therefore, "*it is not possible to consider that a law makes a reference which exceeds its own scope*".

As observed, the opinion of the 8th Chamber of the Council of State asserting that the disciplinary provisions of Law No. 657 are applicable to higher education personnel, is against both the Constitution and the fundamental principles of law.

The Question of Whether the Procedural Provisions Under the Annulled Regulation Can Continue to be Applied

The 8th Chamber of the Council of State did not issue a stay of execution for the application of the disciplinary provisions of Law No. 657 to universities. However, the Chamber decided that it was legally not possible to apply the procedural rules of the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions as recommended by the Council of Higher Education in instances where neither Law 657 nor 2547 had anything to say. This section of the decision issued by the Council of Higher Education was subject to a stay of execution until the case was concluded by the Court. As a grounds for the stay of execution, the Council of State made reference to the judgment of the Constitutional Court which states that matters involving "*supervisors and boards mandated to impose disciplinary penalties, the statute of limitations and periods for issuing decisions, the working procedures and method of the high disciplinary board, the rights of public officials including the right to appeal against board decisions and the right of defence, execution of penalties, and the conditions required for disciplinary penalties to be deleted from personnel files*" can only be regulated by law. Based on the foregoing, the Council of State decided that the provisions of the Regulation pertaining to procedure could not be enforced in the absence of a law.

In view of the above, the Council of State is of the opinion that academic staff employed at universities can be subject to the penalties envisaged for civil servants under Law No. 657. However, since matters involving the procedural aspects of disciplinary enquiries, such as who is to conduct proceedings, which procedures are to be observed and how penalties are to be determined and executed, also require the existence of a law, and since such a law does not exist,

[48] AYM, E: 2010/29, K: 2010/90, T: 16.7.2010.

the procedural provisions under the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions have become inapplicable at universities for disciplinary enquiries filed after 30 November 2015. Therefore, disciplinary proceedings started after 30 November 2015 and the penalties imposed or proposed with respect to these proceedings are unlawful.

An analogy can be made with criminal law to further clarify the situation. In criminal law, it does not suffice to have a penal code to prosecute and punish individuals. There must also be a law setting forth how the trial is to take place, the rights and authorities of the parties and by what procedures and by whom the punishment is to be imposed. In the absence of a procedural law, it is not possible to issue a sentence solely based on the penal code. The main reason is that, in the absence of procedural law, there is ambiguity as to who is mandated to institute a legal process and issue a sentence or a writ. The writ declared by an unauthorised body has no effect.

Therefore, since the disciplinary bodies had been formerly defined under the Regulation, they have ceased to exist after its annulment. As per the 'principle of legality of public administration', these disciplinary bodies no longer exist. The writ of a non-existent body is not just problematic in terms of mandate, it should also be treated as having no legal effect. Hence, with respect to all disciplinary proceedings started after 30 November 2015 according to the procedures under the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions, the writ of the disciplinary bodies must be deemed legally non-existent since the disciplinary bodies themselves are legally non-existent.

Within this scope, the penalties of "expulsion from public service" which were proposed by the High Disciplinary Board of the Council of Higher Education in the case of the signatories of the Declaration of Academics for Peace, and which were imposed contrary to procedural rules, must be rejected with a decision of "non-jurisdiction".

In fact, a ruling by the 4th Administrative Chamber of the Ankara Regional Administrative Court confirms our assertion.[49] The case brought before the court was an appeal against an order of censure against the applicant, based on the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education Institutions, and issued on 2 September 2015, after the Judgment of the Constitutional Court but before the expiry of the nine-month period granted to Parliament. An earlier action of annulment against the order of censure had been filed with the 2nd Administrative Court, which rejected the case on 24 May 2016. The Regional Administrative Court reached the conclusion that an annulled rule could not be applied in the case for two reasons. Firstly, if a rule that has been annulled is applied in the case of an individual when he brings a case before the court, the individual will be effectively deprived of his right of appeal, which is a right granted by the Constitution to everyone who resorts to legal remedies. Secondly, according to the Regional Administrative Court:

> "*It is understood from the reasoning of the Constitutional Court in its judgment of annulment that the procedural and substantive rules pertinent to acts and behaviours requiring disciplinary penalties, regulations concerning the supervisors and boards mandated to impose disciplinary penalties, the statute of limitations and periods for issuing decisions, the working procedures and method of the high disciplinary board, the rights of public officials including the right to appeal against board decisions and the right of defence, execution of penalties, and the conditions required for disciplinary penalties to be deleted from personnel files must be prescribed by law. With the annulment of the second sentence of Article 53 § b of Law No. 2547, which was the basis of the Regulation on Disciplinary Proceedings of Administrators, Academic Staff and Civil Servants Employed at Higher Education*

[49] Ankara Regional Administrative Court, 4th Administrative Chamber, E: 2016/219, K: 2016/247.

Institutions, the disciplinary penalty imposed in the current case has become devoid of a legal basis".

Although the court does not debate the possibility of applying Law No. 657 in the current case, one can deduce from the decision that this option is not possible. Firstly, the decision notes that the disciplinary order must be annulled not only because of substantive rules but also because of procedural rules. Strictly speaking, after the annulment of the Regulation, there is ambiguity as to which procedures are to be followed to impose a penalty. Secondly, the court does not state that the legal basis for the disciplinary proceedings "has changed"; it states that the disciplinary proceeding "has become devoid of a legal basis". Hence, if the legal regulation constituting a basis for the proceeding has been annulled, the same legal proceeding cannot be continued by invoking another law. Thirdly, since the decision of annulment will result in the proceedings being deemed non-existent, any new proceedings launched for the same act will be subject to a statute of limitations.

For this reason, since disciplinary proceedings started after 30 November 2015, including proceedings against Academics for Peace, are deemed to be legally non-existent, the launching of new proceedings is also not possible due to the expiry of the time-limit. It is not legally possible to revive these proceedings or to impose penalties under other provisions of crime and punishment under future proceedings.

Is Law No. 657 Applicable With Respect to Procedural Rules?

A question that should be addressed at this stage is whether the procedural provisions of Law No. 657 can be applied in disciplinary proceedings conducted at universities. At first sight, one may make the erroneous assumption that the Council of State's decision allowing the application of the provisions on offences and penalties under Law No. 657 to academic staff can also be applicable with respect to procedural rules. However, a comparison between the provisions of the annulled Regulation and the provisions of Law No. 657 will clearly show that this option is altogether impossible in the case of at least some provisions.

In its decision allowing the application of Law No. 657 to academic staff, the Council of State employs the reasoning that the offences under Law 657 are identical to those under the Regulation. However, no such similarities exist with respect to procedural rules. The Council of Higher Education is aware of this fact and has therefore proposed the application of Law No. 657 in substantive matters and the Regulation in matters of procedure.

Without going into detail, we should note that this inconsistency between Law No. 657 and the Regulation is a natural requirement of the autonomy enjoyed by Universities. For the purpose of safeguarding scientific freedom and the autonomy of higher education institutions, the Constitution makes a distinction between public officials and academic staff, and confers a distinct status on institutions of higher education, their management and personnel. Whereas Article 128 of the Constitution sets forth general rules concerning public service, Article 130 specifically focuses on higher education institutions and academic staff. It follows from this that the disciplinary bodies of universities should be composed of academic staff. Otherwise, the principle of autonomy enshrined in the Constitution will become unenforceable. For instance, as stipulated under Law No. 657, the governor cannot be given mandate with respect to some disciplinary matters in the case of academic staff.

For these reasons, Law No. 657 is silent regarding proceedings to be conducted at institutions of higher education. Different from substantive rules, the procedural rules under Law No. 657 have nothing in common with those under the Regulation on Disciplinary Proceedings of

To illustrate this point, it will suffice to examine the composition of the High Disciplinary Board which is to evaluate the proposed penalties of "expulsion from public service" under the procedurally unlawful proceedings against the signatories of the Declaration of Academics for Peace. According to Article 3 of the Regulation, which was annulled and subsequently deemed inapplicable by the 8th Chamber of the Council of State, the High Disciplinary Board is defined as the "General Assembly of the Council of Higher Education". This rule was changed in 2014 by decision No. 28897. According to the former rule, the High Disciplinary Board was defined as the "Executive Board of the Council of Higher Education" and as the "General Assembly" in disciplinary matters involving members of the High Council of Education, rectors and deans. As observed, the question of what the High Disciplinary Board is and who it is composed of remains to be addressed.

Neither of these boards has a counterpart in Law No. 657. In fact, the provisions of Law No. 657 on disciplinary boards and supervisors is embodied in a Regulation of the Council of Ministers. In the Regulation on Disciplinary Boards and Disciplinary[50] supervisors, the concept of 'university' or 'higher education' are not once mentioned. This is because, as stipulated by Article 1, the disciplinary mechanisms under Law No. 657 do not cover universities. Therefore, neither the provisions of Law No. 657 nor the Regulation on Disciplinary Boards and Disciplinary Supervisors can be applied by means of analogy with respect to procedural rules in the disciplinary proceedings of the Council of Higher Education and universities.

Since the Regulation on Disciplinary procedures has been abrogated, it is no longer possible, by resorting to Law No. 657, to conceive of a High Disciplinary Board responsible for evaluating the penalty of expulsion from public office. As expressly stated by the judgment of the Constitutional Court and accepted by the Council of State, this subject is not regulated under Law No. 657 and should be regulated in a separate law.

An opinion similar to our own is presented in a dissenting opinion in the judgment of the 8th Chamber of the Council of State. The dissenting opinion states that:

> *"The rules prescribed by Law No. 657 on Civil Servants are not general rules applicable to all public officials. Pursuant to Article 1 § 1 of the Law, the rules therein are applicable only to personnel who are characterised as 'civil servants' and constitute only a part of all public officials. In fact, Article 1 § 3 of Law No. 657 mentions academic staff as public officials who are outside the scope of the Civil Servants Law and subject to the provisions of a special law. In this regard, one cannot legally assert that a law, which expressly excludes a certain category of personnel, contains general rules that can be applied to them (by means of analogy). It is self-evident that a public official cannot be imposed a disciplinary penalty for an act under a law which he is not subject to (because he is expressly excluded from the scope of that law)."*

Under the circumstances, one inevitably reaches the following conclusion: just as the mere definition of offences does not suffice to impose legal punishments in the absence of a procedural law defining the prosecutor, the judge, the lawyer and the accused, similarly, disciplinary penalties cannot be imposed in a situation where the authorised inquirer, disciplinary boards and appeal mechanisms are not prescribed. Even if one is to assume that the offences and penalties prescribed by Law No. 657 are applicable to academic staff, as accepted by the Council of State, the procedural provisions of the same law are inapplicable in the case of universities. Therefore, it is not possible for existing disciplinary boards, and in particular, the High Disciplinary Board of the Council of

[50] O.G. 17848, t. 24.10.1982.

State to impose the penalty of 'dismissal from public office' as it is "*against the relevant Constitutional and legal regulations and the general principles of law as well as court judgments*".[51]

For reasons explained in this section, since all disciplinary proceedings conducted at universities to date are unlawful, it has become a legal imperative to dismiss disciplinary proceedings because the time limitations have been exceeded.

With respect to demands for the imposition of the penalty of "dismissal from public office", submitted for the evaluation of the High Disciplinary Board of the Council of Higher Education, the members of the Council who convene as the High Disciplinary Board should issue a decision of non-jurisdiction.

Amendment of the Disciplinary Rules of Higher Education Under Law No. 6764

At the time the current book was being finalised, the Grand National Assembly of Turkey adopted Law No. 6764 on the Introduction of Amendments to the Emergency Decree on the Organisation and Mandate of the Ministry of National Education and Other Laws and Emergency Decrees.[52] Law No. 6764 containing these amendments was approved by the President and entered into force at the date of publication in the Official Gazette No. 29913 on 9 December 2016.

As ordered by the Constitutional Court, Law No. 6764 sets forth legal provisions regulating disciplinary offences and penalties and the disciplinary procedures to be applied. Articles 26-34 set forth the new offences and penalties and the procedure to be followed in disciplinary proceedings. The law makes amendments to introduce Articles from 53 to 53 § G under Law No. 2547. An examination of these amendments, which are extremely problematic in terms of academic freedom, freedom of expression and association, goes beyond the limits of the current study. For this reason, we will proceed to examine the amendments within the context of the disciplinary proceedings against Academics for Peace. In this context, three important points must be underlined.

Law No. 6764 was adopted 11 months after the expiry of the period, on January 2016, granted to Parliament by the Constitutional Court to adopt a new legal regulation. The newly introduced provisions cannot be retroactively applied to cover the eleven-month period. Therefore, the amendments introduced by Law No. 6764 and the new provisions under Law No. 2547 cannot be retroactively applied to the Declaration of the Academics for Peace and its signatories.

A second important point should be made regarding the legal amendments. All types of offences and penalties listed in the new provisions are now preceded with the condition "in addition to the offences set forth under Law No. 657". As we have noted when examining the relevant decision of the Council of State, it is evident that Law No. 657 cannot be applied in the case of academic personnel. In fact, prior to the amendments introduced under Law No. 6764, no legal text contains rules stipulating that Law No. 657 is applicable to academic personnel. It seems that, by making this addition, the government wishes to give the impression that Law No. 657 was applicable to academic staff even prior to the adoption of these new amendments. However, it goes without question that such arrangements cannot be introduced retroactively.

Finally, Law No. introduces two different rules relevant to Academics for Peace, which were previously non-existent. According to this, the penalty of censure under the new Article 53 § b(2) in Law No. 2547, is now applicable to the act of "*printing, reproducing, disseminating declarations, posters, banners and tapes and other similar items whose content serve violence, terrorism and*

[51] 8th Chamber of the Council of State, E: 2016/1221, T: , Reasoned Dissenting Opinion.
[52] https://www.tbmm.gov.tr/kanunlar/k6764.html, adopted: 2.12.2016.

hostility, or hanging or exhibiting the same at any location in the institution." Similarly, the penalty of dismissal from public office under Article 53 § b(6) is now applied to those "*engaging in acts characterised as terrorism or to support such acts*". It is clear that especially the second act is highly ambiguous. The third section of this study will examine the ambiguity of the crime of terrorist propaganda under criminal law in Turkey and look into its problematic nature in human rights law.

Nevertheless, the new provisions clearly demonstrate one point. These two types of administrative offences, introduced for the first time under Law No. 6764, were never before present, even in Law No. 657 and certainly not at the time the declaration of the Academics for Peace was made public. If they had existed, it would have been meaningless to adopt these regulations "in addition to those offences under Law No. 657." Even if for a moment one assumes that the new provisions typically correspond to the acts of the Academics for Peace, since it is clearly accepted that these do not exist under Law No. 657, they cannot be retroactively applied. Moreover, as explained above, even if they had been present under Law No. 657, it would have been against academic autonomy as well as the relevant provisions of the Constitution and international instruments to invoke them in proceedings against the Academics for Peace. Therefore, the text of the new Law itself can be regarded as an open confession that no administrative proceeding can be conducted against the declaration of Academics for Peace and its signatories.

PART II: LEGAL ASSESSMENT ON SIGNATORIES OF ACADEMICS FOR PEACE DISMISSED FROM PUBLIC OFFICE DURING THE STATE OF EMERGENCY

As mentioned in the Introduction, on the evening of 15 July 2016, a group of officers in the Turkish Armed Forces attempted a military coup against the government, which lasted until the early hours of the morning, killing 240 people and injuring thousands. Following these events, on 21 July 2016, the Government of the Republic of Turkey decided to declare a State of Emergency. The Council of Ministers headed by the President adopted its decision No. 2016/9064 by which it declared a State of Emergency for a period of 90 days starting on 21 July 2016. This period was extended for another 90 days starting 19 October 2016. On 21 July 2016, the government notified the Council of Europe regarding the State of Emergency.

During this time, Emergency Decree No. 672 was issued and published in the Official Gazette No. 29818 dated 1 September 2016 (Repeated Issue). Pursuant to Article 2 of the Emergency Decree, 2346 academic personnel were dismissed from public service. The article reads as follows:

> *ARTICLE 2 - (1) With respect to those who are members of, have an affiliation, link or connection with terrorist organizations or structures, formations or groups which have been determined by the National Security Council to perform activities against the national security of the State;*
> *a) Persons listed in Annex 1 have been dismissed from public service,*
> *b) Persons listed in Annex 2 have been dismissed from the Directorate of General Security,*
> *c) Persons listed in Annex 3 have been dismissed from the Gendarmerie General Command,*
>
> *ç) Persons listed in Annex 4 have been dismissed from the Coast Guard Command, without the need for any other act. Additional communication documents shall not be served on them. Procedures with respect to dismissals shall be conducted on the basis of the provisions of special laws.*

Similarly, an additional 1267 members of academic staff were dismissed from public service under Article 1 of Emergency Decree No. 675 published in the Official Gazette No. 29872 dated 29 October 2016. The article reads as follows:

> *ARTICLE 1- (1) Those persons listed in Annex 1 who are members of, have an affiliation, link or connection with terrorist organizations or structures, formations or groups which have been determined by the National Security Council to perform activities against the national security of the State have been dismissed from public service. Additional communication documents shall not be served on them. Procedures with respect to dismissals shall be conducted on the basis of the provisions of special laws.*

A further 242 academic personnel were dismissed from public service as per Article 1 of Emergency Decree No. 677 published in the Official Gazette No. 29896 dated 22 November 2016. Finally, 631 academic personnel were dismissed from public service as per Article 1 of Emergency Decree No. 679 published in the Official gazette No. 29940 on 6 January 2017. Immediately after the publication of the first edition of this book, 330 more academics were dismissed from public service as per Article 1 of Emergency Decree No. 686 published in the Official Gazette No. 29972 dated 7 February 2017.

We have no information about the method followed in the preparation of Emergency Decrees 672, 675, 677, 679 and 686. No one knows the criteria by which so many academics were chosen. There's no information about the members of the committee who determined these names, the evidence that was taken as a basis for the dismissals and how such evidence was assessed. The State of Emergency was declared because of the attempted military coup and the Council of Europe was notified that emergency measures has been taken on these grounds.

The question of how nearly 100,000 public officials were linked to the attempted coup remains unanswered. There is also no information about which violent tools were used by more than 40,000 teachers to contribute to the coup. It is obvious that the purge and lustration in the public services has turned into a means for revenge and is not limited to the organisation alleged to have attempted the military intervention.

The thousands of people dismissed from public service were offered no opportunity to defend themselves. Moreover, since the reasons for their dismissal were not given, we have no information on the causal link between the military coup, the Emergency Decrees and the sanction of dismissal from public service.

Among the academic personnel named in hastily prepared lists, dismissed from public service without any proceedings and either directly or indirectly prevented from working in public service under Emergency Decree No. 672, 41 people are signatories of the Declaration of Academics for Peace. Of these, 19 are from Kocaeli University, seven from Ankara University, four from Adıyaman University, four from Niğde University, two from Gazi University, one from Anadolu University, one from Celal Bayar University, one from Istanbul Technical Unversity, one from Muş Alparslan University and one from Tunceli University. Similarly, 22 signatories were dismissed from public service under Emergency Decree No. 675. The distribution of academic personnel according to universities is as follows: Batman University: 1, Cumhuriyet University: 2, Düzce University: 1, Erzincan University: 1, Fırat University: 1, Gaziantep University: 5, Istanbul University: 5, Mardin Artuklu University: 1, Tunceli University: 1, Turkish-German University: 1, Yalova University 3.[53] A further 15 signatories were dismissed by Emergency Decree 677. The distribution of academic personnel dismissed under the Decree according to universities is as follows: Akdeniz University: 8, Ondokuz Mayıs University: 6, Kastamonu University: 1. Another 42 signatories were dismissed under Emergency Decree No. 679. The breakdown by universities is as follows: Adnan Menderes University: 1, Ankara University: 9, Ege University: 9, Gazi University: 1, Mardin Artuklu University: 9, Munzur University: 11 and Muş Alparslan University: 2. Under these Emergency Decrees, as total of 120 signatories of the Declaration of Academics for Peace were dismissed from public service. Finally, 184 signatories were dismissed from public service under Emergency Decree No. 686. The distribution of academic personnel dismissed under the Decree according to universities is as follows: Adnan Menderes University: 2, Anadolu University: 26, Ankara University: 71, Atatürk University: 1, Bartın University: 1, Beykent University: 2, Bingöl University: 1, Çukurova University: 2, Doğuş University: 2, Dumlupınar University: 1, Eskişehir Osmangazi University: 6, Giresun University: 3, Hakkari University: 2, Iğdır University: 1, İstanbul Ayvansaray University: 1, İstanbul Bilim University: 2, İstanbul Yeni Yüzyıl University: 1, Kafkas University: 1, Kırıkkale University: 1, Marmara University: 23, Mustafa Kemal University: 1, Ordu University: 1, Recep Tayyip Erdoğan University: 1, Trakya University: 1, Uludağ University: 2, Yıldız Teknik University: 27.

[53] Furthermore, one signatory working in the Ministry of Science, Industry and Technology and another signatory working as a teacher in the Ministry of National Education were also dismissed from public service under Emergency Decree 675. See, https://barisicinakademisyenler.net/node/338

A total of 312 signatories of the Declaration of Academics for Peace were dismissed under all the Emergency Decrees issued to date.

It is understood that the reason for the dismissal of the 312 academics is their having signed the declaration "We Will Not Be a Party To This Crime". For example, since the 19 signatories employed at Kocaeli University are not *members of, have affiliations, links or connections* with the organisation or formation alleged to have organised the coup attempt, it is not difficult to guess why they were dismissed from public service. These 19 academics were penalised under an Emergency Decree and dismissed from public service in the absence of the right of defence under proceedings which were not concluded. Some university rectors saw the coup attempt as an opportunity, and although the academic personnel in question had not engaged in any acts linked to the event or had any connections with the accused organisation, their names were included in lists prepared by rectors and sent to the Council of Higher Education asking for their dismissal. The Council of Higher Education then forwarded these lists to the Council of Ministers which dismissed the listed personnel from public service without asking for their defence.

It is evident that the only reason for the dismissal of a group of academic personnel is their having signed the Declaration of Peace. This situation is a violation of the right to freedom of expression safeguarded by Article 10 of the ECHR. An assessment of events with respect to freedom of expression will be made in Part 3 of this publication. Yet, freedom of expression is not the only rights that is violated by the action taken against the signatories. Their fair trial rights and right to private life were also violated, which will be the focus of this section.

An Assessment Regarding the Violation of Article 6 of the ECHR

312 signatories of the Declaration of Academics for Peace were dismissed from public service under Article 2 of Emergency Decree No. 672, published in the Official Gazette No. 29818 dated 1 September 2016 (Repeated Issue), Article 1 of Emergency Decree No. 675, published in the Official Gazette No. 29872 dated 29 October 2016, Article 1 of Emergency Decree No. 677, published in the Official Gazette No. 29896 dated 22 November 2016, Article 1 of Emergency Decree No. 679, published in the Official Gazette No. 29940 dated 6 January 2017 (Repeated Issue) and Article 1 of Emergency Decree 686 published in the Official Gazette No. 29972 dated 7 February 2017. Article 2 of Emergency Decree 672, and Articles 1 of Emergency Decrees 675, 677, 679 and 686 indicate that persons "*who are members of, have an affiliation, link or connection with terrorist organizations or structures, formations or groups which have been determined by the National Security Council to perform activities against the national security of the State have been dismissed from public service*". Yet, the meaning of the concepts "*membership, affiliation, link and connection*" is unclear. There is also no information as to which particular acts of the dismissed academics qualify them to be treated under this category.

Moreover, academics dismissed from public service were not informed of any charges brought against them, did not face any criminal investigation or prosecution and consequently were not granted their right of defence. The individuals in question were not informed of the evidence against them and were thus deprived of their right to challenge such evidence or produce evidence in their favour.

The entire procedure shows that a '*criminal charge*' is in question within the meaning of the *criminal limb* of Article 6 of the ECHR. Our initial assessment will provide an explanation of the nature of criminal charges. Subsequently, if the existence of criminal charges is rejected, we will examine why dismissal from public service in the case of the signatory academics is a violation with respect to the *civil limb* of Article 6.

Assessment With Respect to a Criminal Charge

Article 6 of the Convention guarantees fair trial rights "in the determination of... any criminal charge" against a person. The concept of a "criminal charge" has an autonomous meaning within the scope of the Convention. This means that regardless of whether a sanction is deemed to fall within the scope of criminal law in domestic classification, the European Court of Human Rights can hold that the sanction in question engages criminal law.

Article 2 § 2 of the Emergency Decree, which gives rise to the violation, sets forth that the penalties shall be imposed on persons dismissed from public service "without the requirement of a sentencing decision". However, the absence of a sentencing decision does not necessarily mean that there were no criminal charges within the meaning of the Convention.

In order for a penalty to be regarded as a 'criminal' one, within the meaning of the Convention, it must be subjected to a test based on the three criteria outlined in the case-law of the Court, namely, (i) the classification of the proceedings under domestic law (ii) the nature of the offence, and (iii) the type and severity of the penalty that the person concerned risks incurring.[54] However, the ECtHR is not bound by the classification made under domestic law. The second and third criteria concerning the nature of the offence and the type of the penalty are alternative and not cumulative ones.[55] Nevertheless, if none of the aspects in a case are decisive on their own, they may be taken together cumulatively.[56]

The ECtHR has examined lustration-related cases in which applicants were dismissed from public service in Eastern European countries in a manner similar to that of the dismissal of signatory academics. While the Court examined some of these cases in terms of the concept of 'civil rights and duties' with respect to Article 6[57] others were examined in terms of the notion of a 'criminal charge'.

The dismissal of the signatory academics under Emergency Decrees is more similar to the lustration-related cases against Poland, which the ECtHR examines in terms of the notion of a 'criminal charge'. The Court has noted that the proceedings used in reaching decisions in these cases were very similar to criminal proceedings and also took into consideration the nature of the offence and the severity of the penalty incurred. The applicants in these cases had not been sentenced to imprisonment or imposed a fine. However, individuals who were determined to have lied about their past communist activities were deprived of the right to work in civil service and take part in politics for a period of up to ten years. According to the ECtHR, when this aspect of the case is taken together with others, it points towards the existence of a 'criminal charge' against the applicants.[58]

There are both similarities and differences in the Emergency Decrees issued in Turkey. Different than the cases from Poland, the decisions in Turkey were executed without any proceedings whatsoever. Therefore, one cannot speak of a criminal proceeding. Yet, this is an aspect which works against the government rather than in its favour. The absence of any proceedings in a situation which requires the following of criminal proceedings does not relieve the government of its obligations. In terms of the nature of the offence and the type of penalty, the criminal nature of the penalty is much more severe compared to the cases in Poland.

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54 *Phillips v. United Kingdom*, no. 41087/98, 05/07/2011, para. 31, *Garyfallou AEBE v. Greece*, 24.9.1997, Reports of Judgments and Decisions 1997-V, para. 32.

55 *Lutz v. Germany*, no. 9912/82, 25.8.1987, para. 55

56 *Bendenoun v. France*, 24.2.1994, Series A no. 284, para. 47.

57 *Sidabras and Džiautas v. Lithuania* (dec.), no. 55480/00 and 59330/00, 21.10. 2003; *Rainys and Gasparavičius v. Lithuania* (dec.), no. 70665/01 and 74345/01, 22.1. 2004; *Ivanovski v. Macedonia*, no. 29908/11, 21.1.2016, para. 117-122.

58 *Matyjek v. Poland*, no. 38184/03, 30/5/2006, admissibility decision; *Bobek v. Poland*, no. 68761/01, 24/10/ 2006.

The act (or offence) giving rise to a penalty is being a "*member of, having an affiliation, link or connection with terrorist organizations or structures, formations or groups which have been determined by the National Security Council to perform activities against the national security of the State*". Membership to a terrorist organisation is set forth as a grave crime under the Turkish Penal Code. This crime is not one which is characterised as a disciplinary offence, and can possibly be committed by anyone in the society, not just those performing specific duties. It is for this reason that the crime in question cannot be regarded as a disciplinary offence, in which case it would have to be regulated under disciplinary law applicable to a single area of work.

The penalty imposed on persons who are members of, have affiliations, links or connections with terrorist organisations is much more severe than that imposed in Poland. Persons who engage in these activities are indefinitely dismissed from public service and explicitly labelled as terrorists. The Emergency Decree sets forth that these persons "*may not be employed in public service in the future or either directly or indirectly given duties*". Moreover, the penalty of dismissal from public service has been linked to numerous other legal consequences.

In addition to the penalty of dismissal from public service, Law No. 657 on Civil Servants sets forth conditions that call for the termination of civil servant status. According to Article 98 of the Law, civil servant status is terminated if "*it is understood that the person concerned does not meet any one of the conditions which were required for admission into civil service; or if the person ceases to meet one of these conditions*." Among the conditions that must be met to preserve civil servant status, Article 48 § 5 of the Law mentions the requirement not to have been imposed a prison sentence of more than one year. Under the circumstances, Emergency Decrees 672, 675, 677, 679 and 686 all impose the penalty of dismissal from public service, which, in the absence of a disciplinary proceeding, can only be imposed after a conviction issued by a criminal court. This shows that the penalty is of a 'criminal' characteristic within the meaning of the ECHR.

Application of the Right to a Fair Trial in Terms of the Notion of a Criminal Charge

Although it is for the national courts to assess the evidence they have obtained and the relevance of such, the ECtHR has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6.[59] Safeguarding rights of defence in criminal cases is one of the fundamental principles of a democratic society and Article 6 of the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[60]

The effect of Article 6 § 1 is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.[61] If courts fail to take into consideration serious complaints or irrefutable evidence adduced by the parties, the trial will be deemed arbitrary and give rise to a violation of the right to a fair trial.[62]

As reiterated by the ECtHR on numerous occasions, the right to a fair administration of justice holds such a prominent place that it cannot be sacrificed in the name of public interest, no matter how strong such interest may be. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most

[59] *Mantovanelli v. France*, 18.3.1997, Reports 1997-II, para. 34; *Elsholz v. Germany* [BD], no. 25735/94, 13.07.2000, para. 66, ECHR 2000-VIII.
[60] *Artico v. Italy*, no. 6694/74, 13.5.1980, para. 33.
[61] *Van de Hurk v. Netherlands*, 19.4.1994, Series A no. 288, para. 59.
[62] *Khamidov v. Russia*, no. 72118/01, 15.11.2007, para. 170-175.

complex.[63] In some cases the ECtHR has found a given procedure to be against the *principle of fairness* as a whole without determining a specific violation of Article 6.[64]

The Emergency Decree giving rise to the dismissal of the signatory academics from public service violates Article 6 as a whole since it imposes a penalty without any trial whatsoever. Yet, it is nevertheless important to also point out the specific safeguards that are violated by this procedure.

The principle of the right to a fair trial, which is the essence of Article 6, requires that an assessment be made by an independent and impartial tribunal. The right to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law concerning dismissal from public service cannot be displaced by the *ipse dixit* of the executive even if there are concerns over national security.[65]

In order to speak of a fair trial, the rules of criminal procedure must be prescribed by law. This imposes certain requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for the *principle of equality of arms*. The principle of equality of arms requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. The ECtHR observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority.[66] Furthermore, the trial must be *adversarial* in both criminal and civil cases and afford the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.[67]

Article 6 of the Convention also safeguards the right of the parties to be heard. The person concerned must be given the opportunity to impart his opinion either directly or through a legal representative. The prosecution authorities are required to disclose to the defence all material evidence in their possession for or against the accused so that a proper defence may be made.[68] Finally, the right to be heard naturally requires courts to issue reasoned decisions. Adequately reasoned decisions allow people to understand why a decision was issued against the accused and guarantee the presumption of innocence, which is one of the fundamental principles of criminal law.[69]

The decision dismissing the signatory academics from public service does not respect any of the above-mentioned principles and, more importantly, is in total disregard of the principles of a fair trial enshrined under Article 6, which constitute the foundation of a democratic state of law. Academics dismissed from public service were not presented any explicit accusation, they were deprived of their right of defence and the opportunity to challenge and debate the arguments and evidence presented by the prosecution. So much so that the academics are still oblivious to the accusations against them even after having been dismissed.

Whereas some violations can be ended through recourse to legal remedies after the violation takes place,[70] Emergency Decrees 672, 675, 677, 679 and 686 make this option impossible. This is because the academics have no opportunity to challenge the accusations against them before a court. Hence, it is not possible to do away with the consequences caused by an arbitrary act by

63 *Teixeira de Castro v. Portugal*, no. 25829/94, 9.6.1998, para. 36.
64 *Van Kück v. Germany*, no. 35968/97, 12.6.2003, para. 55 ff.
65 *Tinnely and Others v. United Kingdom*, no. 20390/92, 10.7.1998, para. 77.
66 *Coeme v. Belgium*, no. 32492/96, 22.6.2000, para. 102.
67 *Ruiz Mateos v. Spain*, no. 12952/87, 23.6.1993, para. 63.
68 *Dowsett v. United Kingdom*, no. 39482/98, 24.06.2003, para. 41 ff.
69 *Adjaric v. Croatia*, no. 20883/09, 13.12.2011, para. 51.
70 *Edwards v. United Kingdom*, 16.12.1992, Series A no. 247-B.

means of resorting to a judicial mechanism. In this respect, the presumption of innocence has been violated since none of the accusations against those concerned were proven beyond doubt.

It is obvious that this practice violates the fair trial rights guaranteed in Article 6.

Assessment With Respect to the Civil Limb of Article 6 of the Convention

If the dismissal of academics from public service under Emergency Decrees 672, 675, 677, 679 and 686 does no engage the criminal limb of Article 6, it is needless to say that the civil limb of the same article would apply within the scope of disputes arising from civil rights.

Starting from its earliest judgments, the ECtHR case-law shows that applications against decisions on the termination of professional activity have been examined within the scope of disputes concerning civil rights.[71] Furthermore, the Court has considered it unnecessary to determine whether, the criminal limb of Article 6 is to be engaged since the rules which are alleged to have been breached under Article 6 apply to both civil and criminal matters.[72]

Nevertheless, since academic personnel are also public officials, it is necessary to examine whether the penalty of dismissal from public service falls within the scope of Article 6. According to the criteria under the *Eskelinen* judgment, the ECtHR holds that two conditions must be fulfilled in order for a civil servant to be excluded from the protection afforded by Article 6. Firstly, the national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds. In order for the exclusion to be justified, two further conditions must be fulfilled.[73] Firstly, the State must establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in *Pellegrin*, a "special bond of trust and loyalty" between the civil servant and the State, as employer.[74] Secondly, it is also for the State to show that the subject matter of the dispute is related to the exercise of State power or that it has called into question the special bond. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified. The presumption that Article 6 applies has been maintained in numerous cases concerning public service, including dismissals, in the case-law following the judgment of *Eskelinen*.[75]

In the case of *Baka v. Hungary*, the ECtHR further developed the *Eskelinen* criteria.

Accordingly, the rule that excludes access to a court must be present under domestic law before, rather than at the time when, the impugned measure against the person concerned is adopted. Otherwise, this would open the way to abuse, allowing Contracting States to bar access to a court in respect of individual measures concerning their public servants, by simply including those measures in an *ad hoc* statutory provision not subject to judicial review.[76] In view of the foregoing, the exclusion of access to a court under rules adopted after the dismissal fails to fulfil the condition of the *Eskelinen* test that exclusion from access to court should be "expressly" present in law before the time of measures taken against the individual.

Neither one of the conditions under the *Eskelinen* test have been fulfilled in the case of academic personnel dismissed from public service. Law No. 2547 on Higher Education and Law No. 657 on

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71 Le Compte, Van Leuven and De Meyere v. Belgium, no. 6878/75, 23.6.1981, para. 44-51.
72 *Diennet/Fransa*, no. 18160/91, 26.9.1995, para. 28.
73 *Vilho Eskelinen and Others v. Finland* [BD], no. 63235/00, 19.04.2007, para. 62 ECHR 2007-II.
74 *Pellegrin v. France* [BD], no. 28541/95, 08.12.1999, para. 66, ECHR 1999-VIII.
75 *Baka v. Hungary* [BD], no. 20261/12, 23.6.2016, para. 105.
76 *Baka v. Hungary*, para. 116.

Civil Servants sets forth how academic teaching personnel can be dismissed from public service by judicial and administrative decisions. Furthermore, the penalty can be challenged before the administrative courts. According to Article 129 of the Constitution, "*Public servants, other public officials and members of public professional organizations or their higher bodies shall not be subjected to disciplinary penalties without being granted the right of defence*" and "*Disciplinary decisions shall not be exempt from judicial review*". These provisions have not foreseen any penalty involving the dismissal of public officials indefinitely in the absence of explicit proceedings and the right of defence on grounds of their being "*members of, having an affiliation, link or connection with terrorist organizations or structures, formations or groups which have been determined by the National Security Council to perform activities against the national security of the State.*" The penalty in question was introduced and implemented by Emergency Decrees, 672, 675, 677, 679 and 686, which also excluded the opportunity to access courts. In this respect, the decrees clearly fail to meet the condition that the national law must have "expressly excluded access to a court" prior to the dismissal.

It is also evident that the dismissal of academic personnel by Emergency Decrees fails to meet the second condition of the Eskelinen test in that there is no "special bond of trust and loyalty" between academic personnel and the State, as noted in the Pellegrin judgment. In this respect, the dismissal from public service of university teaching personnel by associating them with a coup attempt in the absence of any substantive evidence is unjustified.

For the reasons explained above, as elaborated in the judgment in the case of *Baka v. Hungary*, there has been a clear violation of the right of access to court and the right to a fair trial with respect to both the criminal and civil limb of Article 6 in the case of academic personnel dismissed from public service.

Assessment with Respect to Articles 8 and 14 of the Convention

Applications concerning the right to be admitted to public service were rejected by the ECtHR on grounds that they fell outside the scope of the Convention. In the opinion of the Court, it is legitimate for the public officials of a democratic state to be loyal to the constitutional principles that establish the society.

Nevertheless, the Court is of the opinion that the notion of private life is one which protects the physical and moral integrity of the individual and enables the individual's self-development and self-actualisation. Accordingly, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world.

In other words, even if the right to work or the right to be admitted to public service are not regulated under the Convention, disproportionate interferences in a person's working life constitute a violation of the right to private life under Article 8 and the prohibition of discrimination under Article 14, since they hinder the development of healthy relations with the outer world.

In an effort to ensure that the lustration procedures adopted after the collapse of totalitarian regimes were conducted according to the principle of the rule of law, the Guidelines of the

Parliamentary Assembly of the Council of Europe,[77]which are taken as a basis by both the ECtHR and the Venice Commission,[78] state that lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy.

The Guidelines underline the following principles to be respected in the process of lustration:

"Para. 4: [...] A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished - it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves.

Para 12: [...] these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case - this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed..."

In addition, the following principles must be respected:

"*a.* Lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament;

b. Lustration may only be used to eliminate or significantly reduce the threat posed by the lustration subject to the creation of a viable free democracy by the subject's use of a particular position to engage in human rights violations or to block the democratisation process;

c. Lustration may not be used for punishment, retribution or revenge; punishment may be imposed only for past criminal activity on the basis of the regular Criminal Code and in accordance with all the procedures and safeguards of a criminal prosecution;

d. Lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy, that is to say appointed state offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or appointed state offices where human rights abuses may be ordered and/or perpetrated, such as law enforcement, security and intelligence services, the judiciary and the prosecutor's office;

g. Disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated;

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77 Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems and the respective Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a State based on the rule of law (doc. 7568), 3 June 1996.

78 The Venice Commission takes as a basis Resolution No. 1096 when assessing laws adopted by some countries for this purpose. Venice Commission, CDL-AD(2012)028, Amicus Curie Brief on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security ("lustration law") of "the Former Yugoslav Republic of Macedonia", Opinion no. 694/2012, 17 December 2012. ;Venice Commission, CDL-AD(2015)012, Final opinion on the law on government cleansing (lustration law) of Ukraine, as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015, Opinion no. 788/2014, 19-20 June 2015; Venice Commission, CDL-AD(2009)044, Amicus Curie on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania, Opinion no. 524/2009, 13 October 2009).

m. In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal."

As noted in the guidelines, lustration should only be limited to persons who hold positions of public authority in which there is good reason to believe that the subject would pose a significant danger to human rights. Law enforcement, security and intelligence services, the judiciary and the prosecutor's office can be regarded to fall within this category. However, the dismissal of academics who signed a declaration for peace cannot be regarded as necessary in a democratic society when they do not exercise such public authority and in the absence of evidence that they directly took part in the coup attempt. The ECtHR found violations in cases of dismissals disregarding the individual position of the person concerned, their individual wrongdoing and the period in which they were in service.[79] The Court holds that the global treatment of all cases and the lack of differentiation in the Law between different levels of former involvement with the KGB constitutes a violation of the Convention.[80]

Furthermore, no person shall be subject to lustration solely for association with any organisation if such activities do not constitute an offence or a violation of human rights.[81] Similarly, the opinions and convictions of an individual are not sufficient reason for dismissal. Since lustration measures are similar to criminal law, individual culpability must be taken into consideration. The ECtHR refers to the Council of Europe Parliamentary Assembly Resolution and points out that a determination must be made as to whether the person being lustrated was cooperating with the former regime under compulsion or of his own will.[82] Under the circumstances, the position held by individuals is not sufficient justification on its own to subject them to lustration measures if they have not engaged in any wrongdoing.[83]

There must also be a temporal link between the dismissal and the danger in question. The continuation of the disqualification from office after the danger is over cannot be regarded as necessary in a democratic society.[84] As clearly stated by PACE in its guidelines, the only way to prove that the lustration measures were necessary in a democratic society is through a fair trial guaranteeing all due process rights. In the absence of due process rights, dismissal from public service will not be deemed as necessary in a democratic society.

The academic personnel who were dismissed from public service have no involvement in the coup attempt or the religious community or organisation which is accused of undertaking it. Their individual guilt was never proven and they did not resort to any violent means. Thus, there is no justification whatsoever for their dismissal from public service.

There are no criminal investigations, accusations or any indictment or evidence presented against the persons concerned. They were deprived of their right to make a defence and to present evidence against the accusations prior to their dismissal. Therefore, it is not possible to argue that the dismissals were necessary in a democratic society.

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79 *Adamsons v. Lithuania*, no. 3669/03, 24.6.2008, para. 125.

80 *Žičkus v. Lithuania*, no. 26652/02, 7.4. 2009, para. 33; *Soro v. Estonia*, no. 22588/08, 3.9.2015.

81 Venice Commission, CDL-AD(2009)044, Amicus Curie on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania, Opinion no. 524/2009, 13 October 2009), para. 106.

82 *Ivanovski v. Macedonia*, no. 29908/11, 21.1.2016, para. 182.

83 The Venice Commission is of the opinion that individual guilt is necessary for a person to be subjected to lustration measures. Opinion no. 694/201, para. 7.

84 *Adamsons v. Lithuania*, no. 3669/03, 24.6.2008, para. 116.

Furthermore, the dismissal of academics who have no causal link with the coup is also a disproportionate measure. Their dismissal from public service is definite. Moreover, they have been banned from both direct and indirect entry into public service and their passports have been revoked. Under these conditions, they are unable to work in public or private universities or to seek jobs at universities in other countries. It is clear that such disproportionate interventions in their working life violate the right to private life guaranteed under Article 8 as well as the prohibition of discrimination under Article 14.

Since Domestic Remedies are not Available, Academic Personnel Dismissed from Public Service are Obliged to Apply to the ECtHR

In Turkey, the penalty of dismissal from public service is an administrative procedure. Under normal conditions, persons subject to this penalty can file a case before the administrative courts. However, in an effort to block this option, instead of describing the categories of professionals who are to be dismissed from service and leaving the implementation to administrative bodies, Emergency Decrees 672, 675, 677, 679 and 686 directly give a list of the names of individuals who are dismissed. In this fashion, over 76,000 public officials have been dismissed, including the 312 signatories of the Declaration of Academics for Peace.

According to Article 148 of the Constitution, Emergency Decrees may be annulled not by administrative courts, but by the Constitutional Court. For this reason, if a person files a case demanding the annulment of a procedure against him, the administrative courts, having no jurisdiction in annulling an Emergency Decree, will also be unable to annul the individual procedure since it is not separate from the decree.

In a case filed prior to the State of Emergency, the 5th Chamber of the Council of State gives the following reasons for why they are unable to examine procedures instituted by Emergency Decrees:

> *"Although Emergency Decrees are issued by the Executive branch, they function as laws. Since Administrative Courts have jurisdiction in cases filed against administrative procedures, it is legally not possible for these courts to examine cases filed for the annulment of Emergency Decrees.*
>
> *The Claimant has been dismissed from his position as branch director under Article 90 of Emergency Decree 662. The Emergency Decree offers no opportunity to the Administration to make an assessment or institute other procedures for his appointment. For this reason, since the claimant is regarded as having been dismissed from office under a legal arrangement that functions as a law, it is not possible to speak of an administrative procedure or action taken by the administration that would fall within the jurisdiction of administrative courts."*[85]

As observed in this decision, the Council of State holds that if a matter directly stipulated under an Emergency Decree does not give an opportunity to administrative bodies to make further arrangements or undertake further procedures, it cannot be examined by administrative courts. We should note that this decision of the Council of State concerns an Emergency Decree issued during ordinary times which is open to judicial review by the Constitutional Court. The name of the claimant was not expressly listed in the decree dismissing him from his position; instead the decree mentioned that branch directors were dismissed from their positions.

Emergency Decrees 672, 675, 677, 679 and 686 are much more explicit in this respect. These decrees are State of Emergency Decrees having the force of law. For this reason, their

[85] Council of State 5th Chamber 5 D., E: 2014/1845, K: 2016/1931, T: 04.04.2016.

constitutionality cannot be challenged under Article 148 of the Constitution. In addition, different from Emergency Decree 662, which was the subject of the decision of the Council of State, Emergency Decrees 672, 675, 677, 679 and 686 list the individual names of 100,000 public officials including the 312 signatory academics. It is not possible for the Administration to act against these procedures and refuse to dismiss these public officials since the procedure is instituted by a decree which functions as a law. Hence, it is also not possible for the Council of State or other administrative judicial bodies to decide against the Emergency Decrees. The decisions issued by courts after the State of Emergency confirm this view.[86] Thus, it is meaningless for those dismissed from civil service to resort to administrative courts.

The Ministry of Justice has also clearly stated that no judicial remedies are available to those who have been dismissed from public service by Emergency Decrees. In their memorandum of 7 October 2016, the Council of Europe Commissioner for Human Rights notes the information provided by the Minister of Justice that persons whose names are annexed to decrees are considered to be dismissed by a law, and therefore would not have a judicial remedy.[87]

In addition to the legal reasons explained above, it should also be noted that it has become virtually impossible to obtain any results from administrative courts due to the post-coup measures adopted by the government. Under normal conditions, the 5th Chamber of the Council of State, which is responsible for cases about public officials, receives seven to nine thousand new cases each year. This figure has risen to 45,000 as of the first week of November 2016. The figure is expected to reach 60,000 by the end of 2016. The number of cases brought before first degree administrative courts is commensurate with those pending before the Council of State. According to the Emergency Decrees, it will not be possible for administrative courts to issue a stay of execution in these cases throughout the term of the State of Emergency.

In its decision of non-jurisdiction issued on 4 October 2016 (Decision No. E. 2016/8136, K. 2016/4076), the 5th Chamber of the Council of State has ruled that the instant case concerning Emergency Decree No. 672 was under the jurisdiction of administrative courts. According to the 5th Chamber, the dispute "*has arisen from the Emergency Decree having the force of law, adopted by the Council of Ministers headed by the President with the authority vested under Article 121 of the Constitution. A dispute of this nature is not one which has arisen from a Council of Ministers' decisions set forth under Article 24 of Law No. 2575.*"[88]

Yet, as mentioned above, administrative courts state that they have no jurisdiction in these cases.

Individual Application to the Constitutional Court Is Not an Available Remedy

According to Article 148 of the Constitution: "*Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities*". However, this option does not stand as a legal remedy to be exhausted by the signatory academics. Individual application to the Constitutional Court cannot be regarded as an effective legal remedy in their case. According to Article 45 § 3 of Law No. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, "*Individual applications cannot*

[86] Trabzon Administrative Court, E: 2016/1113 and K: 2016/1046; Kastamonu Administrative Court, E: 2016/1155, K: 2016/1149, 27.10.2016; Antalya 3rd Administrative Court, E: 2016/1219, K: 2016/946. An additional 49 court decisions the authors have accessed after the book was written are similar. Although these decisions were issued by different courts across Turkey, they are all boilerplate decisions.

[87] Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, CommDH (2016)35, para. 43.

[88] For similar decisions, see, Council of State, 5th Chamber, E: 2016/7983, K: 2016/4079, T: 04.10.2016, Council of State, 5th Chamber, E: 2016/8196, K: 2016/4066, T: 04.10.2016.

be made directly against legislative transactions and regulatory administrative transactions and, similarly, the rulings of the Constitutional Court and transactions that have been excluded from judicial review by the Constitution cannot be the subject of individual application".

Although Emergency Decrees 672, 675, 677, 679 and 686 are regulatory administrative transactions in substance, they are a legislative transaction in terms of their function. Indeed, a closer look at the Emergency Decrees issued after the State of Emergency was declared shows that numerous laws establishing certain bodies have been amended permanently. For instance, Emergency Decree 669 has closed all military schools and established a new university. Under normal conditions, these transactions are only possible through laws. Similarly, a number of provisions in the Criminal Procedures Law has been amended by Emergency Decree No. 676. It has thus been accepted that amendments to even basic laws can be introduced by Emergency Decrees.

Hence, the Constitutional Court finds inadmissible those applications against transactions that have the characteristics of a direct legislative transaction.[89]

Distinct from other examples, Emergency Decrees 672, 675, 677, 679 and 686 do not only introduce normative rules. Instead, they list individual names of persons, thereby instituting a transaction against each person on the list. In this respect, we can speak of an individual transaction rather than a substantive legislative transaction or even a regulatory one. Yet, even in this case, the Constitutional Court cannot examine individual applications in substance. The Constitution does not allow the Constitutional Court to review the constitutionality of Emergency Decrees issued during a State of Emergency.

Article 148 of the Constitution sets forth that "*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*." The Constitutional Court has rejected the applications filed by the main opposition party regarding two State of Emergency Decrees on grounds of non-jurisdiction. The Court noted "*The provisions of the Emergency Decree issued on the basis of Article 121 of the Constitution, which are the subject matter of the current application cannot be subject to a substantive review as per Article 148 § 1-3 of the Constitution which reads: 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."* In other words, according to the Constitutional Court, regardless of the gravity of the violation caused by a State of Emergency Decree, the Constitutional Court cannot review it.[90] The Constitutional Court has persisted in this case-law in applications concerning two other Emergency Decrees.[91] As long as the State of Emergency continues –a matter which is decided by the government without any judicial review- everyone in Turkey is excluded from legal protection.

Despite the express case-law of the Constitutional Court, establishing that State of Emergency Decrees can indeed be reviewed and annulled in instances where they fail to fulfil the conditions of a State of Emergency Decree with respect to place, time and substance,[92] the Constitutional Court has refrained from resorting to its own case-law and has failed to give reasons for this course of action. In our opinion, this is unacceptable and legally flawed.[93] The Court fails to make any

[89] *Application of Umut Oran*, B. No. 2014/18926, 22.1.2015; *Application of Arif Güneş*, B. No. 2012/837, 5.3.2013.
[90] AYM, E: 2016/166, K: 2016/159; E: 2016/167, K: 2016/160, T: 12.10.2016.
[91] AYM, E: 2016/171, K: 2016/164; 2016/172, K: 2016/165, T: 2.11.2016.
[92] AYM, E: 1990/25, K: 1991/1; E: 1991/6, K: 1991/20; E: 1992/30, K: 1992/36; E: 2003/28, K: 2003/42.
[93] Kerem Altıparmak, "AYM, artık bir anayasamız olmadığını ilan etti!", http://t24.com.tr/haber/aym-artik-bir-anayasamiz-olmadigini-ilan-etti,369214

convincing arguments about the matter. It is also striking that none of the members have voted in favour of invoking the former case-law.

The legal basis of the transaction in the dismissals is the Emergency Decree itself and the Constitution Court holds that the substance of Emergency Decrees cannot be reviewed. If the substance of an Emergency Decree cannot be reviewed, then, it should also not be possible to examine the individual applications made to the Court challenging those dismissals which are instituted by Emergency Decrees. Otherwise, we would be facing the situation described in the Constitutional Court's judgment No. 2016/159. The said judgment states that "*In order for State of Emergency Decrees to be reviewed by the Constitutional Court, there should be an express constitutional authority vested in the Court. The wording of Article 148 of the Constitution is such that, in view of the aim and the relevant legislation of the maker of the Constitution, State of Emergency Decrees cannot be subject to judicial review under any name whatsoever. Any judicial review undertaken despite the said provision would be against Article 11, setting forth the supremacy and binding force of the Constitution, and Article 6, which states that no person or organ shall exercise any state authority that does not emanate from the Constitution*."[94]

If judicial review cannot be conducted under any name, individual application to the Court would also be out of the question. It would be helpful if the Constitutional Court clarified this issue without delay.

The Constitutional Court has also stated that in cases where the Constitution excludes judicial remedies, the Court cannot conduct examinations as per Article 45 § 3 of Law No. 6216. Accordingly, the Constitutional Court has held that it had no jurisdiction in applications challenging the decisions of the Supreme Board of Election.[95] The Constitutional Court holds that it is bound by Article 79 of the Constitution which states "No appeal shall be made to any authority against the decisions of the Supreme Board of Election." And individual application on the matter is not possible.

Moreover, the Constitutional Court has made it clear that it would not conduct an effective legal review in its judgment concerning the dismissal of its own members. According to Article 3 of Emergency Decree No. 667, "*With respect to members of the Constitutional Court who are considered to be a member of, or have affiliations, connection or contact with terrorist organizations or structure/entities, organizations or groups found by the National Security Council as engaging in activities against the national security of the State, their dismissal from the profession shall be decided by the absolute majority of the Plenary Session of the Constitutional Court*". When deciding on the dismissal of two of its own members, the Constitutional Court has determined that under the Emergency Decree, observance of the principles of fair trial was not required.[96]

The Constitutional Court is of the opinion that the elements noted below are sufficient to dismiss a high justice from public service:

> *"83. Whereas Article 3 of the Emergency Decree makes a general reference to "terrorist organizations or structure/entities, organizations or groups found by the National Security Council as engaging in activities against the national security of the State", it is understood from the rationale of the provision that FETÖ/PDY are the main organisations of concern.*
>
> *84. For the purposes of the measure, the court has not sought to establish links between the members of the Constitutional Court and the said the terrorist organisation, terrorist*

94 AYM, E. 2016/166, K. 2016/159, § 23.
95 *Application of Atila Sertel* [GK], B. No: 2015/6723, 14.7.2015, para. 39; *Application of Oğuz Oyan* [GK], B. No: 2015/8818, 14.7.2015, 27.
96 AYM, Plenary Session, 2016/6 (Değişik İş), K: 2016/12, T: 4.8.2016.

activities, and the coup attempt; the Court has found it sufficient to establish a link between the member and the "structure/entities, organizations or groups" found by the National Security Council as engaging in activities against the national security of the State.

85. Furthermore, the dismissal from the profession is warranted not only in case of 'membership' or 'affiliation', but also in case of 'connection' or 'contact'.

86. Lastly, the article does not require the Court to 'prove' the link between the members and the terrorist organisations, structure/entities, organizations or groups found by the National Security Council as engaging in activities against the national security of the State. It has been found sufficient for such links to be 'assessed' by the Plenary Session of the Constitutional Court. Such an assessment indicates a 'conviction' of the absolute majority of the Plenary Session. Needless to say, independent of whether there is criminal liability, such a conviction is based on an assessment of whether it is suitable for the member to remain in the profession.

87. Article 3 of the Emergency Decree does not require the Court to base its conviction on any specific evidence. The basis of the conviction is at the discretion of the absolute majority of the Plenary Session."

As observed in the foregoing, the Constitutional Court is of the opinion that a person need not be a member of a terrorist organisation to be dismissed. It will suffice for a member to have a connection with an entity found by the National Security Council to be acting against the national security of the State. There is also no need for the administration to make an effort to prove such a connection. The existence of a 'conviction' is found to be sufficient even in the absence of any substantive evidence. While the Constitutional Court states that this does not imply criminal liability, it fails to state what kind of liability it is. Consequently, the Constitutional Court dismissed two of its members from public service without any substantial evidence "*based on information from social circles pointing towards their relations with the said entities and the common conviction of the members of the Constitutional Court developed over time*".

Under the circumstances, it is clear that individual application to the Constitutional Court has become entirely meaningless once the Court decided that there is no requirement to observe fair trial rights in cases involving dismissals from public service under State of Emergency Decrees.

It is also effectively not possible for the Constitutional Court to address the applications filed after 15 July 2016. The Court received 40,000 applications in the three months following the coup attempt of 15 July 2016, which were all related to these events. The figure is expected to reach 100,000 by the end of 2016 due to the grave and widespread interventions by the government.[97] Since the Constitutional Court has not chosen to annul the main rule giving rise to dismissals, it would take decades for it to properly examine each individual case to establish whether the dismissal was justified.

In conclusion, in the case of the signatories of the Academics for Peace, there is no domestic remedy to be exhausted before making a direct application to the ECtHR. On the contrary, both the administrative courts and individual application to the Constitutional Court are legally and effectively excluded.

Assessment of the Decision of the ECtHR in the Application of Zihni v. Turkey

[97] "AYM Başkanvekili: Kara kara düşünüyoruz," http://www.gercekgundem.com/guncel/244650/aym-baskanvekili-kara-kara-dusunuyoruz

Shortly after the finalisation of this study, the ECtHR issued a decision of inadmissibility in the application of *Zihni v. Turkey*, concerning the dismissal of an applicant under Emergency Decree No. 672. It has become an imperative to assess this decision since it contradicts the foregoing evaluations in this book.

Firstly, the ECtHR referred to a decision of non-jurisdiction issued by the Council of State in a case concerning the dismissal of a judge under an Emergency Decree and noted that the case, which was referred to the first instance court, was still pending.[98] The ECtHR also recalled its case-law regarding the right to apply to the Constitutional Court.[99] The ECtHR is of the opinion that the four decisions of the Constitutional Court determining that it cannot review the constitutionality of the Emergency Decrees does not necessarily mean that it will not examine individual applications.[100]

It is observed that the decision regarding the *Zihni v. Turkey* application has failed to give consideration to, or has given erroneous consideration to, the factors we have presented above. These factors can be listed as follows:

The ECtHR assumes that the refusal of the Constitutional Court to review the Emergency Decrees will not affect individual application. As a rule, actions for annulment/appeal and individual application are independent procedures. Refusal to examine an action of annulment against a law does not mean that no violations will be found in the law's implementation. However, there are exceptions to this basic rule. Decisions of dismissal are among those exceptions. The Constitutional Court holds that State of Emergency Decrees cannot be reviewed under any circumstances. The legal basis of the dismissal of public officials is the Emergency Decree, whose constitutionality cannot be subject to review. In other words, with respect to the applicants, the cause of the dismissals is not the implementation of the Emergency Decree but the Emergency Decree itself. Under the circumstances, it is not possible for the Constitutional Court to examine an individual application without contradicting its own decision. Moreover, as explained above, the Constitutional Court has stated on numerous occasions that it cannot review a decree which functions as a law through individual application. No explanation has been made as to how it can turn back from this case-law with respect to Emergency Decrees that are excluded from constitutional review.

The ECtHR notes that the concerns of the applicant regarding the chances of success presented by the Constitutional Court is not sufficient to rule that it is an ineffective remedy. It is clear that and individual's personal concerns are not a sufficient measure of the effectiveness of a legal remedy. Yet, if there is substantial information supporting such concerns, such information should be considered. As noted above, the Constitutional Court has employed a completely arbitrary method in dismissing its own members. This decision of dismissal is not mentioned at all in the ECtHR's decision. The Constitutional Court has stated that a decision of dismissal can be issued in the absence of evidence based only on convictions, as was required by the Emergency Decree. By stating this position, it is beyond comprehension which legal criteria the Constitutional Court will consider when assessing the constitutionality of the transactions of institutions that have decided on dismissals based on their own convictions. Since there is no legal criteria giving superiority to the conviction of the Constitutional Court over the convictions of any other administrative units, the Constitutional Court should not be able to undertake a legal review of the Council of Ministers' decision which calls for the dismissals based on its own conviction.

Moreover, it is evident that the concerns about the judiciary are not just subjective concerns, as examined earlier. There are numerous independent observations finding the judiciary to be under

98 *Zihni v. Turkey*, no. 59061/16, 29.11.2016, para. 24.
99 *Zihni v. Turkey*, para. 25-27.
100 Zihni v. Turkey, para. 28.

political influence in recent years.[101] These concerns have multiplied in 2016. In its Resolution 2121 (2016), The Parliamentary Assembly of the Council of Europe has noted that interference in the judiciary has increased after the amendment to the Law on the High Council of Judges and Prosecutors in 2014.[102] Similarly, in its evaluation report on Turkey, the Group of States Against Corruption (GRECO) has stated that the judiciary in Turkey is not independent despite the Constitutional guarantees. [103] A similar evaluation was made by the Council of Europe Commissioner for Human Rights.[104] Finally, in its recent report on the lifting of immunities of parliamentarians, the Venice Commission has taken into consideration the developments after the coup attempt of 15 July 2016. The Commission has underlined that two members of the Constitutional Court and over 3000 judges and prosecutors have been dismissed from public service.[105] In light of all this information, one cannot claim that the applicant's concerns are subjective.

The ECtHR decision refers to a decision of non-jurisdiction issued by the Council of State in a case concerning the dismissal of a judge and notes that the case is still pending before the administrative court. However, as mentioned above, numerous decisions have been issued by administrative courts after this date and every single one, without exception, has rejected applications, without examining the merits, on grounds that Emergency Decrees function as laws and cannot be regarded as administrative transactions. It is also striking that these decisions all use the same wording, despite having been issued by different administrative courts across the country. Under the circumstances, one might ask how many more decisions are needed before accepting that the applicants have no chance of success. We are of the opinion that there is ample evidence to show that administrative courts are not an effective remedy.

After its decision in the Zihni v. Turkey application, it is highly likely that the ECtHR will reject similar applications for some time. However, it should be noted that since the existing legal situation makes it impossible for persons dismissed under Emergency Decrees to access any effective remedies, the ECtHR would have to be included in the process to obtain any results. The decision of the ECtHR in the Zihni v. Turkey application only serves to prolong this inevitable fact and will only have delayed the process in addressing the grievances.

It is also observed that the Venice Commission, as another body of the Council of Europe, is not so hopeful of either the administrative courts or the Constitutional Court.[106] Moreover, the government itself informed the Venice Commission that neither administrative courts nor individual application to the Constitutional Court were available to public officials who were dismissed by Emergency Decrees.[107]

Having made this determination, the Venice Commission recommended that the government establish an *ad hoc* commission to review the State of Emergency measures.[108] The Secretary General of the

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101 European Commission 2014 and 2015 Turkey Country Reports, European Parliament Report, USA Department of State, Turkey Human Rights Report 2014, Report of the Human Rights Watch.

102 The functioning of democratic institutions in Turkey, para. 29.

103 Greco Eval IV Rep (2015) 3E, adopted by GRECO at its 69th Plenary Meeting (Strasbourg, 12-16 October, 2015).

104 http://www.coe.int/en/web/commissioner/-/turkey-security-trumping-human-rights-free-expression-under-threat?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey

105 CDL-AD (2016)027, Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability), para. 59-60.

106 Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, para. 200-202.

107 Memorandum prepared by Turkish authorities for the visit of the rapporteurs to Ankara, together with the additional documents appended to it (hereinafter – the Government's Memorandum, see CDL-REF(2016)067), s. 31.

108 Venice Commission Report, para. 220 ff.

Council of Europe has made a similar recommendation which was supported by an ad hoc sub-committee established by the Parliamentary Assembly of the Council of Europe.[109]

The Inquiry Commission Established by Emergency Decree No. 685

Following the above-mentioned developments, the government seems to have realised that it could not keep stalling in response to recommendations by various bodies of the Council of Europe and thus issued Emergency Decree No. 685 establishing the Inquiry Commission for State of Emergency Measures.

The timing of the publication of the Emergency Decree betrays its purpose. On the day the Emergency Decree was published, the Parliamentary Assembly of the Council of Europe rejected the request to hold an urgent debate on Turkey. Although there were 94 votes in favour, 68 against and 19 abstaining, the proposal was rejected on grounds that the 2/3 majority had not been reached. It is understood from the statement issued by the PACE Committee on Political Affairs that the Emergency Decree adopted on the same night played a significant role in this decision.[110]

Both the Constitutional Court and the ECtHR were inundated with individual applications after 15 July 2016. Against the 2212 applications lodged with the ECtHR against Turkey in 2015, the figure rose to 8308 in 2016.[111] Considering that most dismissals and dissolutions have not yet been brought before Strasbourg in the post 15 July context, it is obvious that the sheer volume of applications yet to come risks bringing down the entire ECtHR system if measures are not taken. Indeed, Judge Işıl Karakaş has stated that 2000 new applications from Turkey were lodged with the ECtHR in the first month of 2017.[112] In other words, the number of applications filed in the first month of 2017 is equal to the number of total applications filed in 2015. It is worth noting that any decision issued by the ECtHR to save the moment will yield even more serious consequences. Thousands will come back to the ECtHR in a couple of years as the Commission will not provide justice.

With respect to the government, the acknowledgement of the Commission as an effective domestic remedy will buy them time. We can put this at between two and ten years. Nearly nine months have elapsed since the first dismissals. According to paragraph 2 of Provisional Article 1 of Emergency Decree No. 685, the start date for applications shall be announced by the Prime Ministry and cannot be more than six months as of the publication date of the Decree. There is uncertainty as to how long it will take for the Commission to start receiving applications as of the announcement date. However, in the best scenario, even if applications are received immediately after such an announcement, the opportunity to make an appeal to the Commission will have arisen one year after the dissolution of organizations closed with the first Emergency Decrees and 10 months after the dismissal of public officials. As of the beginning of April 2017, members of the Inquiry Commission have not yet been chosen. It has been stated that it could take until July 2017 for the Commission to be established. [113]

Although the term of office of the Inquiry Commission is two years under Article 3 of the Emergency Decree, this period is not realistic since the expected number of applications is around 100,000. Consider a case that is rejected by the Commission and administrative courts but accepted at the Constitutional

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[109] 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, para. 62,63.

[110] Situation in Turkey: statement by PACE Committee on Political Affairs, http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=6492&lang=2

[111] European Court of Human Rights (2017), Annual Report, (Strasbourg: CoE), s. 201.

[112] For the interview given by Judge Karakaş to Deutsche Welle, see, "AYM'ye 'süratle karar ver' çağrısı",http://www.dw.com/tr/aymye-s%C3%BCratle-karar-ver-%C3%A7a%C4%9Fr%C4%B1s%C4%B1/a-37382911

[113] Cumhuriyet, "OHAL komisyonu temmuza kaldı," 02 Nisan, 2017, http://www.cumhuriyet.com.tr/haber/dunya/712344/OHAL_komisyonu_temmuza_kaldi.html

Court. The process before the Commission can last two years and then on top of that a case brought before the administrative courts, including the appeal process, would last another three years, it could take almost 10 years for a person dismissed from office to exhaust domestic remedies, including the Constitutional Court.

Under the circumstances, it is particularly important to evaluate whether the Inquiry Commission is of a nature that meets the requirements of the Council of Europe bodies and whether it is an effective one in light of the case-law of the ECtHR.

The Venice Commission noted that the essential purpose of an Inquiry Commission would be to give individual treatment to all cases. Similarly, it stated that the body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial and be given sufficient powers to restore the status quo ante and/or where appropriate to provide adequate compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body.[114] In the final section of its report, the Commission made the following recommendations to the government:

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

The State of Emergency Inquiry Commission, established by Emergency Decree 685, is far from meeting the criteria foreseen by the Venice Commission and the standards adopted in the case-law of the ECtHR. It is obvious that the only function of this procedure is to buy time and prolong the process of application to the ECtHR. In an effort to illustrate this situation, the current legal arrangement has been examined under four separate headings.

The Structure of the Commission

In an effort to introduce a means to stem the flow of cases brought before the ECtHR concerning thousands of village evacuations in Turkey's southeast in the 1990s, in 2004 the Turkish government set up provincial Damage Assessment Commissions, composed of seven members, under Law No. 5233 on Compensation for Damage Arising from Terror and Combating Terror.[115] Although these commissions cover a broad issue, in essence they perform a simple task. Damage Assessment Commissions were established to compensate the damages incurred by people due to acts falling under the Anti-Terror Law and measures taken to combat terrorism. Hence, the commissions only assess whether any damage was incurred on account of such acts and measures without considering whether the actions taken by the government were lawful in the first place.

The Inquiry Commission established under Emergency Decree No. 685 is distinct from the commissions established under Law 5233 in that it is a single body with no additional commissions

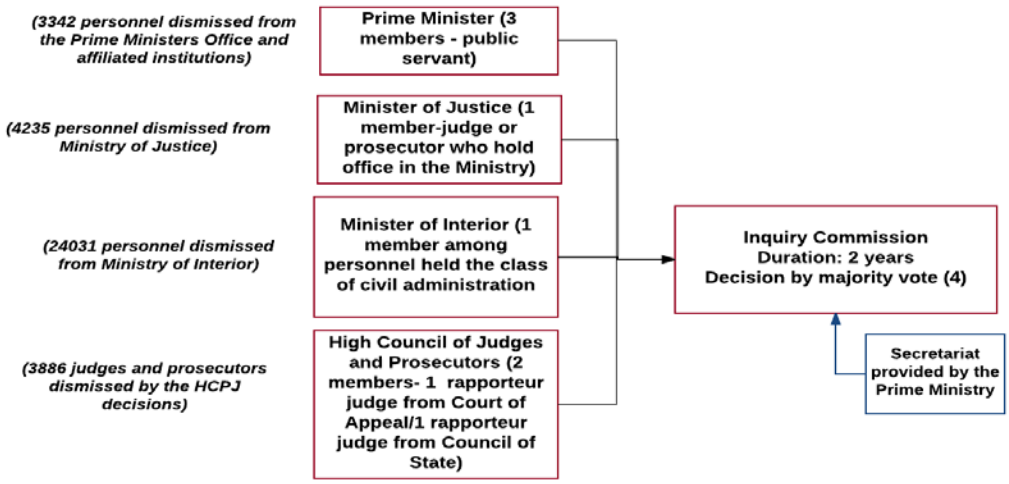
[114] Venice Commission Report, para. 222.

[115] In its decision of inadmissibility for the İçyer v. Turkey case, the ECtHR noted that the Compensation Commissions were an effective remedy and referred the 1500 cases before the Court to these bodies. See, İçyer v. Turkey, no. 18888/02, 12/1/2006. For a review of the ECtHR's decision see, Kerem Altıparmak (2009), "Kopya Davalar ve Pilot Kararlar: Bir Kararda Bin Adaletsizlik", 50. Yılında Avrupa İnsan Hakları Mahkemesi: Başarı mı Hayal Kırıklığı mı? (Kerem Altıparmak, Ankara Barosu Yayınları, Ankara), p. 60 ff.

to be established in each province. As elaborated below, while the Commissions under Law 5233 were not tasked with reviewing the merits of administrative procedures, the State of Emergency Inquiry Commission will be reviewing administrative decisions on their merits. In other words, they will be reviewing whether the dismissals from public office and the dissolution of organisations are legally justified. In this respect, they have a heavier workload by comparison. Yet, although the Damage Assessment Commissions were established in each province, the Inquiry Commission under Emergency Decree 685 is a single body based in Ankara.

Owing to the greater political burden it carries, it is understandable that the Inquiry Commission be established centrally and have broader authority. The Commission will, after all, issue decisions about real persons and legal entities who were sanctioned on grounds that they were associated with terrorism. However, the decree shows that this is not the purpose. According to Article 1-2 of Decree No. 685: '*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 the 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 title of governor; 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 decisions of dismissal and dissolution were made by the very same political and administrative authorities who are authorised to appoint the members of the Commission. The fact that the Commission tasked with reviewing the lawfulness of the adopted measures is appointed by the very same authorities who adopted those measures shows that the principles of independence and impartiality were disregarded at the outset.



On the other hand, the Prime Minister has full and unlimited discretion in choosing the members he is authorised to appoint. The members to be appointed by the High Council of Judges and Prosecutors are assigned not from the senior judges but from among reporter judges. Similarly, the Ministry of Justice will assign members from among judges and prosecutors who hold office in the Ministry of Justice. It is evident that the members will not have a high profile or any serious guarantees in their mandate. Moreover, although Article 4 of the Emergency Decree is titled *Guarantees and Rights of Members*, it instead inscribes a serious lack of guarantee. The article starts off by stipulating that 'Members cannot be dismissed on any account before their terms of office

expire' but then goes on to list the conditions under which their dismissals can be justified. One of these conditions is particularly interesting: According to Article 4-1 (e):

A member shall be dismissed by the Commission,

'if it is found that an administrative investigation was launched or authorisation was given to start an investigation by the Prime Ministry against a member on grounds of membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State.

The article mentions no requirement for a judicial or even an administrative decision against a member for him/her to be dismissed; the existence of an administrative investigation is sufficient grounds for dismissal. Membership can be terminated if an investigation is launched by the Prime Minister who has undersigned the decisions of the Council of Ministers for the dismissals and closures. Considering that tens of thousands of people have been dismissed from public office on the same grounds without the opportunity to defend themselves, a Commission member who signs a couple of decisions not favourable to the administration or a member who gives a dissenting opinion could easily be subjected to a similar investigation.

On the other hand, the Inquiry Commission is expected to receive nearly 100,000 applications. It is obvious that a satisfactory examination cannot be conducted with such a high volume of applications. Whereas the damage assessment commissions were established in all provinces under Law 5233, the Inquiry Commission will be performing its duties with only seven people. This increases the importance of administrative support to be provided to the Commission. According to Article 12 of the Emergency Decree, titled 'Secretariat', '*The secretariat services of the Commission shall be carried out by the Prime Ministry. A sufficient number of personnel shall be allocated to the Commission for performance of these services'.* In other words, the entire staff that will conduct the actual examination on hundreds of thousands of applications and act as rapporteurs to the Commission will be civil servants who report to the Prime Minister within a hierarchy. These staff members also enjoy no guarantees. It is the Prime Minister and not the Commission who has the authority to decide whether they will continue their duties or are to be deployed elsewhere.

ECtHR judge, Işıl Karakaş, made a statement in which she noted that the Commission established by Emergency Decree No. 685 is an administrative body which does not even have quasi-judicial authority and that concerns regarding its independence and impartiality were thus unjustifiable. According to Karakaş, this administrative structure, whose decisions can be challenged at courts, meets the standards of the ECtHR.[116] Leaving aside the fact that it is inappropriate and unfortunate for a judge of the ECtHR to give an opinion on a case which has not yet been brought before the Court, and to do so on behalf of the entire Court, the statement made by Judge Karakaş is clearly flawed in legal terms.

As we have tried to express elsewhere,[117] the dismissal of an individual based on allegations that they have an association or connection with a terrorist organisation in fact qualifies the person in question to be counted as a subject of 'criminal charges' in the light of the ECtHR's 'autonomous concepts' approach.

Persons who are in this case denied the right to defend themselves against criminal charges are now advised to wait for years before an administrative unit which has no judicial authority. Throughout this period, the applicants will continue to bear the label of 'terrorist' and shall not be

[116] See the interview mentioned in footnote 111.

[117] Kerem Altıparmak (2016), "OHAL KHK'leri "Sivil Ölüm" mü Demek?", http://m.bianet.org/bianet/siyaset/178496-ohal-khk-leri-sivil-olum-mu-demek

eligible to work in public services. Moreover, their social security records will show that they were dismissed by an Emergency Decree.

It is expected that individuals who are denied the opportunity to challenge the criminal charges against them for an entire year, will wait before an administrative commission for years and then apply for an administrative judicial review, which, as explained below, has no power to remedy the situation. This is clearly a reversal of the presumption of innocence.

It would only be by coincidence if a fair examination and decision were conducted in such highly political cases by a structure subject to the orders of the executive.

Inquiry and Working Procedure of the Commission

According to a recent decision by the 5th Chamber of the Council of State, the measures are described as follows: '*as opposed to sanctions imposed in the case of criminal acts or disciplinary offenses, expulsion from a profession or dismissal from public office are permanent emergency measures that produce definitive outcomes and aim to end the existence of terrorist organisations and bodies considered to act against national security in public agencies*'. [118] The Constitutional Court uses the same expression in the decision by which it dismisses its own members.[119]

In the adoption of this emergency measure, no charges were brought against the subjects of the decisions in most cases. People were denied the right to make a defence and the basic principles of disciplinary law were disregarded. Moreover, instead of suspending the individuals in question and conducting an investigation in the meanwhile, these persons were directly dismissed. In fact, even the proceedings explained in detail in the first part of this book were not concluded before the decisions of dismissal came into effect.

On the other hand, the rule which is the basis of the dismissals is one which could not have been foreseen in advance. According to the Emergency Decree, applications to the Commission can be made to challenge actions taken directly within the provisions of emergency decrees in the absence of any other administrative actions, on grounds of membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State.

None of the emergency decrees give a description of the bodies, entities and groups decided by the National Security Council to have acted against the national security of the state. Moreover, the grounds of having association and contact with these groups are unknown concepts that have never before been heard of. As already noted above, even if the concepts used are defined as administrative sanctions, they are in fact 'criminal charges' within the scope of the ECHR.

This is particularly important in that the individuals and organisations concerned were denied the presumption of innocence in the absence of an opportunity to defend themselves, to present evidence, bring witnesses, debate and refute the allegations made against them. It is a matter of debate whether it would be fair to offer reparation after an investigation that will last years without restoring their position in public service. Yet, this is not the only problem that arises due to the modus operandi of the Commission. The working procedures of the Commission are far from addressing the procedural shortcomings leading to the dismissals.

According to Article 13 of the Emergency Decree, '*The procedures and principles concerning the applications and the functioning of the Commission shall be set forth and announced by the Prime Ministry upon the proposal of the Commission'*. The provision shows that the procedures for the functioning of the Commission have no legal guarantee. Moreover, according to Article 9, '*The*

[118] Council of State 5th Chamber, E. 2016/8196, K. 2016/4066, k.t. 04.10.2016.
[119] E. 2016/6, K. 2016/12, 4.8.2016, para. 79.

Commission shall perform its examinations on the basis of the documents in the files'. The fact that the Commission shall examine applications based on files entirely eliminates the opportunity to make a defence.

The individual or institutions in question were sanctioned '*on grounds of membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State*'. However no information has been given to them as to which bodies, entities or groups they are alleged to be involved in or which behaviour constituted connection or contact. Under the circumstances, the person or institution making a written application can say one of two things. They will either have to say 'I am not involved in any bodies, entities or groups' or they will have to explain how they are not involved in individual organisations as they see relevant.

This method is against Article 38 of the Constitution, which reads '*No one shall be compelled to make a statement that would incriminate himself/herself or his/her legal next of kin, or to present such incriminating evidence*' as well as the principle of the right to remain silent and not be forced to self-incrimination, which is a general international principle constituting the foundation of the right to a fair trial in the judgments of the ECtHR even if it is not explicitly stated in the Convention.[120]

This procedure forces people and institutions to acknowledge a crime of which they were not informed at any stage and then to make a suitable defence. The person applying to the Inquiry Commission will first need to choose a crime and then make their defence as to how they did not commit that crime.

Guaranteeing the right to defence in criminal cases is one of the essential principles of a democratic society. Article 6 of the Convention should be interpreted to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[121] As underlined by the ECtHR on numerous occasions, public interest, no matter how strong, cannot justify sacrificing the right to a fair administration of justice. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex.[122] For this reason, the ECtHR has found in some cases that a procedure as a whole is against the principle of fairness without finding a specific violation of Article 6.[123]

The principle of the equality of arms requires that the parties facing the allegations have a reasonable opportunity to make a defence without facing serious disadvantages. The ECtHR observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority.[124] Furthermore, the right to an adversarial trial is valid for both criminal and civil cases and requires that the parties be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party.[125]

The State of Emergency Inquiry Commission provides none of the procedural guarantees required for bodies employing a judicial method. In this case, what will the Commission base its decisions on? Since the injured party is not informed of any charges, the Commission will have to decide based on the information and documents held by the executive. What authority does the Commission have in examining these documents? Article 5 of the Emergency Decree answers this question with the following words: '*Without prejudice to the provisions of the legislation related to*

[120] Saunders v. United Kingdom, 17/12/21996, ECHR 1996-VI.
[121] Artico v. Italy, no. 6694/74, 13.5.1980, para. 33
[122] Teixeira de Castro v. Portugal, no. 25829/94, 9.6.1998, para. 36
[123] Van Kück v. Germany, no. 35968/97, 12.6.2003, para. 55 ff.
[124] Coeme v. Belgium, no. 32492/96, 22.6.2000, para. 102.
[125] Ruiz Mateos v. Spain, no. 12952/87, 23.6.1993, para. 63

the confidentiality of investigation and the State secrets, 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'

At first glance, it may appear that the Commission will have access to all documents held by at least the administration. However, the persons dismissed were dismissed on account of their activities in relation to terrorist organisations. There is a probability that an investigation was started against these people and that it constitutes a State secret. According to Article 47 of the Criminal Procedures Law, 'Information which would undermine the foreign relations, national defence and national security of the State or pose a threat to the constitutional order and foreign relations if disclosed shall be considered a state secret'. When information is requested and the administration says 'these are state secrets, we cannot disclose them', the Commission has no authority to obtain this information. There are also no rules in the Emergency Decree allowing the applicant to challenge this or any other provision of the procedure. Petitions filed under the Right to Information Act can be brought before the Right to Information Assessment Board or before the administrative courts to appeal against decisions of rejection on grounds that the information is a 'state secret'. However, it may not be possible to receive a response to these applications for many years. Moreover, there are public institutions and agencies which fail to meet the demands for information in practice despite the decisions of the Board or judgments of administrative courts. Although there is the possibility to file a complaint with the highest supervisor in the institution concerned or the Ministry it reports to[126] or a criminal complaint to the public prosecutor against those who fail to execute the decisions of the Board or administrative courts, it is practically impossible to obtain any outcome from such applications.

Another point about the working procedure of the Commission is worth noting. Even if no further emergency decrees are issued after this point in time, the Inquiry Commission is expected to receive nearly 100,000 applications. It is expected that a commission composed of seven members will examine and conclude 100,000 applications in a period of two years. A rough calculation shows that 250 applications must be examined and concluded in a single workday. Since at least four members need to vote in each decision, each member is required to be a rapporteur for 35 files per day as well as to debate and sign at least 100 decisions. It would not be an exaggeration to say that this is an impossible task and that the Commission will instead make automatic decisions based on the intelligence reports brought before it.

Nature of Decisions

In order for a remedy to be deemed effective according to Article 34 of the Convention, it must be capable of undoing the violation where possible or to undo its effects to the extent possible. To achieve this, the situation of the victim should be restored to what it was before the violation occurred (*restitutio in integrum*).[127]

However, with most human rights violations, it may not be practically possible to restore the conditions that existed before the violation took place. As noted by the International Law

[126] Article 29 of Law No. 4982 states: "Civil servants and other public officials who have shown negligence, fault or deliberate wrongdoing in the implementation of this Law, shall be subject to the disciplinary penalties under the relevant legislation concerning them, without prejudice to criminal investigations that may arise from general provisions requiring the penalisation of the acts in question."

[127] See, Permanent Court of International Justice, The Factory at Chorzów (Indemnity) (Germany v. Poland) for an explanation on how *restitutio in integrum* is the primary means of reparation in international law, PCIJ, Ser. A., No. 17, 1928, p. 47; Democratic Republic of Congo v. Belgium, 14.2. 2002, ICJ Report 2002, p.3. Draft Articles on Responsibility of States for Internationally Wrongful Acts, prepared by the International Law Commission and adopted by the General Assembly, UN Doc. No. A/56/10, Article 30 and the interpretation of the Commission. (Draft Articles on Responsibility of States), art. 35 and the comments of the Commission.

Commission, there is a requirement to compensate the damage suffered insofar as such damage is not made good by restitution. Where this is not possible, other means of satisfaction can be introduced.[128] Hence, the primary aim is to restore the *status quo ante* to the extent possible. Where this is not possible, the aim is to provide the means of compensation that would allow for a solution as close as possible to the former conditions. The International Law Commission accepts that the test of whether restitution is possible requires that it is a) not materially impossible, b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[129]

The primary purpose of the ECHR is to re-establish the conditions that existed before the violation occurred. In its judgment in the case of Papamichalopoulos v. Greece, the ECtHR has noted

> *"a judgment in which the Court finds that the Convention was violated gives rise to the responsibility of the respondent State to put an end to the violation and re-establish, to the extent possible, the situation which would, in all probability, have existed if that act had not been committed (restitutio in integrum) ".* [130]

For this reason, the payment of compensation is not an alternative to *restitutio in integrum*. Compensation is a measure resorted to only when the nature of the violation or the domestic law does not provide for restitution.[131] In other words, it is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.[132] For example, the violation of the right to life and the prohibition of torture are violations that are irreversible, however alternative remedies must be proportionate to the gravity of the violations.[133] As a consequence, where restitution is not possible, the alternative means of reparation must provide a solution as close as possible to the conditions that existed before the violation. In other words, a decision of compensation to be issued by the Commission is not sufficient to remedy a sanction and violation as grave as dismissal from public service.

In its judgment in the case of *Scozzari and Giunta v. Italy*, the Court noted that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects.[134] In its judgment in the case of *Salah v. The Netherlands*, the Court compared articles 41 and 46 and stated that the primary responsibility of the state was to put an end to the violation and to redress the effects thereof and that the general and individual measures to be adopted were more important than sums awarded by way of just satisfaction.[135]

Based on this case-law, we can conclude that the primary course of action should be to end an ongoing violation, then to restore, to the extent possible, the conditions that existed before the

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[128] Draft Articles on Responsibility of States, art. 35-37. The draft Articles set forth restitution, compensation and other means of satisfaction. Where restitution is sufficient for reparation, no other means of reparation shall be sought.
[129] Draft Articles on Responsibility of States, art. 35.
[130] Papamichalopoulos/- v. Greece (Article 50), 31.10.1995, Series A no. 330-B, para. 34; Assanidze v. Georgia (BD), no. 71503/01, ECHR 2004-II, para. 197; *Maestri v Italy*, no. 39748/98, ECHR 2004-I, para. 47.
[131] De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium (Article 50), Series A no. 12, para. 20.
[132] Scozzari and Giunta v. Italy (BD), nos. 39221/98 and 41963/98, ECHR 2000-VIII, para. 250.
[133] The Court determined the relationship between impossibility of restitution and compensation in case involving the strip-search of inmates. According to the Court, compensation must be awarded since there is no possibility of restitution. Salah v. Netherlands, no. 8196/02, 6.7.2006, para. 75
[134] Scozzari and Guinta v. Italy, 13.7.2000, para. 249.
[135] Salah v. Netherlands, no. 8196/02, 6.7.2006, para. 71.

violation occurred and to redress its effects, and finally to compensate for the damage suffered as long as the violation continued.

In order for means of reparation to be deemed effective in cases involving dismissal from public office and dissolution of organisations and institutions, the wrongful decision should be reversed and the material and moral damages incurred should be compensated for.

According to Article 9 of the Emergency Decree No. 685, the Inquiry Commission will be able to decide whether to accept or reject the application after it conducts an examination. The conditions required for the application to be accepted are set forth under Article 10. Accordingly:

> *"ARTICLE 10 – (1) In case of acceptance of the application concerning those who were dismissed from public service, the decision shall be notified to the State Personnel Administration. The appointment proposals of the personnel notified in this manner shall be made, within fifteen days, by the State Personnel Administration, having regard to province they reside in, for the positions appropriate to their former status and titles in the public institutions and organizations apart from the institutions in which they were employed; except for those whose assignments in other institutions are not possible due to their status, titles and the duties they performed. [...]*
>
> *(2) In cases of acceptance of the applications concerning the closed institutions and organizations, the relevant provisions of the emergency decree shall be deemed to be annulled with all effects and consequences for the particular institution in question, as of the date of publication of the emergency decree."*

This rule is likely to give rise to several consequences. Firstly, the decision is not one of annulment. Although the decision makes a determination that the initial procedure was unlawful, the procedure is not annulled. Hence, it is not the case that the *status quo ante* is restored for the person or organisation involved. On the contrary, the rule states that such persons will be appointed to cadres and positions corresponding to their former status and titles in public agencies and institutions other than the institutions where they were previously employed. For instance, a faculty member at Istanbul University who was wrongfully dismissed from public service will not return to Istanbul University but instead will be appointed to a university in another province. It is difficult to understand why a person would be appointed to a post different from his earlier one since his unemployment was a result of the wrongdoing of the State.

On the other hand, since the decision issued by the Commission is not one of annulment, it only has a prospective effect and no retroactive one. As mentioned earlier, at the time the Commission starts working, one year will have elapsed since the first dismissals and ten months will have elapsed since the first dissolutions. If the Commission composed of seven members is able to accomplish the super-human feat of concluding 250 files per day, it could complete all applications within a period of two years. However, it is evident that this is not possible. Some applications will be concluded in three to four years.

Those applications which are rejected will be given the opportunity to appeal to administrative courts. This will mean an additional two or three years spent at the appeal stage. The emergency decrees enforcing the dismissals prevents the persons involved from working in public service both directly and indirectly and makes it impossible for individuals to leave the country since their passports are withdrawn (both official and ordinary passports). This means that a faculty member who is dismissed from public service will be unemployed for six years at the end of which she will receive no compensation whatsoever even if it is determined that she was wrongfully dismissed.

It is also not possible for a person to demand the awarding of damages under general provisions. Firstly, general provisions do not have applicability in this situation. As explained above, the Commission does not have the authority to annul a former decision. The Commission does not annul a decision but rather issues a decision in line with Article 10 of the Emergency Decree. While Article 12 of Law No 2577 on Administrative Proceedings states that "*In cases where an action of annulment has been filed and decided, a full remedy action can be filed within the time limit to bring a lawsuit as of the date of the notification of such a decision or the date of notification of a decision issued by a court of law or as of the date of execution of a decision giving rise to damages*", this article will not be applied to decisions issued by the Commission.

Secondly, the procedure which gives rise to damages is not a decision of the Commission but a procedure instated by the Emergency Decree. Decree 685 does not offer the option of judicial remedy for the procedure enforced by the Emergency Decree. As explained below, the judicial remedy foreseen in the Emergency Decree under Article 12 is an action of annulment of a decision by the Inquiry Commission. Courts will not be able to review whether the Emergency Decree is lawful but only be able to annul a Commission decision. In this case, the time limit to file a lawsuit for damages suffered due to the Emergency Decree procedure is the general time limit specified under Article 7 of the Administrative Procedures Law. This time limit is 60 days and will have long expired by the time a decision is issued after six years. Thus, neither the dismissed individuals nor the closed organisations and institutions will be compensated through the Commission for the hundreds of thousands or millions of Liras of damages they have suffered due to the wrongful procedures against them. Many people will be unemployed throughout this time and their private and family lives will be ruined.

It is clear that a decision of this nature cannot be regarded as an effective remedy.

Judicial Review of the Decisions of the Inquiry Commission

As far as we have observed, some experts consider that all these shortcomings can be addressed due to the availability of the guarantee of a judicial review and hold that the ECtHR would accept the Commission to be an effective remedy because of this rule. Based on this guarantee, Judge Karakaş states that the shortcomings in the administrative structure should not be regarded as a problem.[136] We are of the opinion that this is also extremely erroneous.

In order for the judicial remedy to be considered an effective one, it should be able to do away with the above-mentioned shortcomings. However, it is not possible for the judicial remedy foreseen to achieve this. The proposed judicial remedy only introduces an additional burden which will delay application to the ECtHR by up to ten years.

As underlined above, only a single type of case is foreseen to challenge decisions of the Commission. According to Article 11 of the Emergency Decree, "*An action for annulment of decisions of the Commission may be filed with the Ankara administrative courts determined by the High Council of Judges and Prosecutors*".

Firstly, rather than giving the opportunity to appeal to an ordinary judge, the rule foresees a judicial review by administrative courts 'determined' by the High Council of Judges and Prosecutors. Considering the institutional problems of the High Council of Judges and Prosecutors and judicial organs in Turkey, this poses a problem in itself. Moreover, according to this rule, an appeal can be made only against a decision of the Commission and not the Council of Ministers which instated the initial procedure against an individual or organisation, or the Emergency Decree which was the source of the procedure.

[136] See the interview referred to in footnote 111.

The claim of the person who applies to the Commission will be that he/she does not have any membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State. It is unknown how this was decided in the initial procedure against the persons involved. Hence, an individual will be appealing against this decision but will be unable to make an effective defence since he/she will have no idea how this conclusion was reached in the first place. However, since the individual concerned is still deprived of opportunity to make an effective defence at the stage of administrative proceedings, he/she will not be able to claim the unlawfulness of the initial procedure. This is because the Emergency Decree allows for an examination only of the file and does not provide for an effective defence.

In its recent judgment in the case of *Karajanov v. The Former Yugoslav Republic of Macedonia*,[137] the ECtHR found that decisions based on documentary evidence in files where the applicant is not a party in the case and is deprived of the opportunity to engage in an adversarial process would amount to a violation of Article 6 of the Convention. The dismissals in Turkey go far beyond the situation described in the Karajanov case. The dismissals in Macedonia were not subject to review by the Commission after they were issued, it was the Commission itself who issued the dismissals in the first place. The members of the Commission deciding on the dismissals were chosen by a qualified majority of parliament and the act leading to the dismissal was already defined in the relevant legislation. An individual subject to the dismissal could apply to the administrative court and, despite shortcomings, have access to the facts which gave rise to his dismissal. Despite these differences, the Court was of the opinion that the denial of an oral defence and the opportunity to refute the allegations against them resulted in a violation of the rights protected under Articles 6 and 8 of the Convention.[138] It is obvious that the situation in Turkey is much more dire where the entire process is marked by uncertainty.

On grounds that Emergency Decree 685 is a State of Emergency Decree, it was found by the Constitutional Court that its conformity with the constitution cannot be reviewed by the Constitutional Court.[139] As we have examined in the section on Inquiry and Working Procedures, the procedure governing the Commission is far from meeting the criteria for a fair trial under both the Constitution and the ECHR. Moreover, because the provisions of the Emergency Decree cannot be annulled or determined to be unlawful, the decisions of the Commission cannot be annulled since they only issue decisions based on examination of a file in contradiction to the principles of a fair trial.

This situation can be explained with an example. Let us imagine that the testimony of another employee had an influence in dismissing a public official. The individual will not have access to this testimony against him, will be deprived of the opportunity to provide evidence and will be unable to challenge that person in line with the principles of equality of arms and adversarial proceedings. The Inquiry Commission will be basing its decision on the file, as foreseen in the Decree, and will be rejecting the application. Bearing in mind that the Emergency Decree itself cannot be annulled, the administrative court will not be able to reverse the decision of the Commission on grounds that it is unlawful. Under the circumstances, the Commission will have issued its decision based on the file within the limits of its mandate. It is not possible for it to go beyond these limits and afford judicial guarantees. Since the provisions of the Emergency Decree are clear, the administrative court will not be able to question the Commission as to why it did not hear witnesses or the applicant or why it failed to observe the principle of equality of arms. The administrative court will thus be unable to annul the decision of the Commission. For this reason, a court decision is not

[137] Karajanov v. the Former Yugoslav Republic of Macedonia, no. 2229/15, 06.04.2017, para 55.
[138] Karajanov v. the Former Yugoslav Republic of Macedonia, especially para. 18-26.
[139] AYM, E. 2016/166, K. 2016/159; E. 2016/167, K. 2016/160, k.t. 12.10.2016.

sufficient to do away with the procedure observed by the Commission – a procedure which is contrary to the ECHR.

As observed above, despite the initial impression that judicial guarantees are being granted, no such guarantees exist. Nor is it possible for the judicial authority to issue any decisions about the initial administrative procedure which was decided at the discretion of the authorities. Hence, the judicial remedy foreseen to challenge decisions of the Commission is meaningless.

The Legitimacy of an Ex Post Facto Legal Remedy

According to the ECHR, the domestic remedies which must be exhausted are those remedies which exist at the time the violation occurred. As explained in the introduction, there are no domestic remedies available at the time of the dismissals and closures under the Emergency Decrees. Although the ECtHR has reached a different conclusion in the case of Zihni v. Turkey, it was quickly understood that this decision was not correct. The remedy introduced by Emergency Decree 685 is an exceptional one. The ECtHR has accepted in various judgments that there may be exceptions to the rule requiring for a domestic remedy to be available at the time of the violation.[140]

Particularly after the adoption of the pilot judgment method by the ECtHR, it is observed that the Court made institutional exceptions to this general principle. It is observed that in its pilot judgments, the ECtHR accepts quasi-judicial mechanisms introduced by governments to be effective remedies especially in cases involving the violation of the right to be tried within a reasonable time [141], the settlement of past violations of the right to property through compensation[142], violations caused by court decisions that have not been executed for a long time[143], ill-treatment arising from prison conditions. There are three examples in this regard, which are particularly important for Turkey. The ECtHR has recognised the Damage Assessment Commissions, which were established by Law No. 5233 on Compensation for Damage Arising from Terror and Combating Terror[144], the Compensation Commissions under Law No. 6384 on the Settlement of Cases Brought Before the ECtHR Through Compensation[145], the Immovable Property Commissions established in the Turkish Republic of Northern Cyprus under Law No. 67/2005[146] as domestic legal remedies established after the violation.

In cases like these where there are mass violations, this method is clearly an effective one to address not only the violations voiced by the applicants, which are the tip of the iceberg, but violations committed against thousands more. However, the domestic legal remedy instated by Emergency Decree 685 is in many aspects distinct from these other remedies accepted by the ECtHR.

Firstly, the ex post facto domestic remedies accepted by the ECtHR mostly involve prolonged proceedings, failure to execute judgments and the reinstatement of property rights.[147] The situation of persons is almost the same across all these cases. Hence, the domestic remedy offered

[140] Baumann v. France, no. 33592/96, 22.5.2001, para. 47; Brusco v. Italy, no. 69789/01, 06.09.2001.
[141] Taron v. Germany, no. 53126/07, 29.05.2012; Techniki Olympiaki A. E. V. Greece, no. 40547/10, 01.10.2013; Valcheva and Abrashev v. Bulgaria, no. 6194/11, 18.6.2013.
[142] Michalak v. Poland, no. 24549/03, 1.3. 2005; Hutten-Czapska, no. 35014/97, 19.6.2006; Zadric v. Bosnia Herzogovina, no. 18804/04, 16.11.2010; Preda and Others v. Romania, no. 9584/02, 29.4.2014.
[143] Nagovitsyn and Nalgiyev v. Russia, no. 27451/09, 23.9.2010 (The ECtHR later reached the decision that there was no effective remedy in Russia. Kalinkin and Others v. Russia, no. 16967/10, 17.4.2012).
[144] İçyer v. Turkey, no. 18888/02, 12.1.2006.
[145] Turgut and Others v. Turkey, no. 4860/09, 26.3.2013 (however, see, Behçet Taş v. Turkey, no. 48888/09, 10.3.2015).
[146] Demopoulos and Others v. Turkey, no. 46113/99, 01.03.2010.
[147] An important exception is the case of 13426 people whose citizenships were erased in Slovenia. However, even this case is not one in which each person has a distinct case. It is an issue where everyone faces the same treatment. Anastasov and Others v. Slovenia, no. 65020/13, 18.10.2016.

is not one which requires a separate investigation or examination. If there is a violation, a mathematical calculation is performed. Therefore, the above-mentioned problems concerning the composition or the modus operandi of the Commissions established by Emergency Decree 685 are not encountered in such cases. For example, in the case of an individual who suffers damages due to prolonged proceedings, it will be sufficient to apply the case-law of the ECtHR, which has become the standard, to decide on an award of compensation. There is no problem in delivering such a decision based on the file.

However, Emergency Decree 685 sets forth the procedure by which decisions will be made about tens of thousands of people who have not undergone an investigation or been given the right to defend themselves. It is obvious that such an examination cannot be conducted in a mechanical way. The State of Emergency Decrees are similar to cases concerning lustration rather than cases about property or prolonged proceedings in the ECtHR case-law.[148] The situation of a public official dismissed on grounds of membership of a terrorist organisation and the situation of an association dissolved on grounds of having relations with a terrorist organisation are still criminal charges within the meaning of the ECtHR case-law. A proper examination of criminal charges could only be conducted with the fair trial guarantees recognised in the ECHR. All other methods are bound to be against the fundamental principles and spirit of the ECHR.

Both the Constitutional Court[149] and the ECtHR in its judgment in the case of *Çatal v. Turkey*[150] have issued their first decisions about Emergency Decree No. 685. Although these are important judgments with respect to the recognition of the legitimacy of a legal remedy instituted after the violation took place, it should be emphasized that these decisions are not relevant to the State of Emergency Inquiry Commission. Emergency Decree No. 686 foresees two separate recourses for dismissed public officials. Those public officials dismissed directly under an Emergency Decree are to apply to the Inquiry Commission. Those who were dismissed from public service by administrative bodies under Article 11 of Decree No. 686 and Article 3 of Decree 667, are to apply to the Council of State, which is to function as first degree court in these cases. Under this rule, nearly 4000 judges and prosecutors who were dismissed from public service by the High Council of Judges and Prosecutors will be able to directly apply to the Council of State. Both the Constitutional Court and the ECtHR have issued decisions of inadmissibility on grounds that the Council of State is an effective remedy.

It is observed that both courts are currently silent on the matter of the Inquiry Commission, which has not yet started to function. It is likely that the ECtHR will reach a final decision once it observes the functioning of the Inquiry Commission. We are of the opinion that it would be wrong for the ECtHR to wait for months to observe the functioning of this remedy. In fact, an opinion issued by the Venice Commission after Emergency Decree 685 was published, questions the effectiveness of the Inquiry Commission with opinions similar to those we have presented above. In its report of 13 March 2017 on the effect of the Emergency Decrees on freedom of the media,[151] the Venice Commission provides an assessment of the Inquiry Commission established under Emergency Decree No. 685 and its mandate. The Venice Commission draws attention to the fact that the members of the Inquiry Commission, five of which are directly appointed by the Executive would be responsible for examining 130,000 dismissals and thousands of closures and underlines that the examination would be conducted without the participation of the applicants and the public. According to the Venice Commission, there is ambiguity as to the basis of the applications to be prepared by media outlets –a question also valid in the case of dismissed public officials- because

[148] For detailed information, see, Altıparmak/Akdeniz, p. 74 ff.

[149] Application of Murat Hikmet Çakmacı, no. 2016/35094, 15.2.2017; Application of Hacı Osman Kaya, no. 2016/41934, 16.2.2017.

[150] No. 2873/17, 10.03.2017 (decision of inadmissibility).

[151] Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media, Opinion No. 872/2016, CDL-AD(2017)007.

at the time of application, the applicants have no information about what they are accused of[152] Under the circumstances, it seems difficult for the Inquiry Commission to issue individualised decisions as previously recommended by the Venice commission. Applications to the administrative court against the decisions of the Inquiry Commission do not present an opportunity to remedy the shortcomings. In the absence of reasoned and individualised decisions by the Inquiry Commission, it becomes impossible for the administrative courts and the Constitutional Court to conduct a judicial review.[153]

In the face of such a clear legal situation, if the ECtHR chooses to issue judgments only after the finalisation of the process before the Inquiry Commission and the administrative courts, this will have a devastating effect undermining the entire human rights protection mechanism and will lead to irreversible damage being suffered by hundreds of thousands of people.

Even if lustration is inevitable, it will be impossible to go back to a democratisation process if the dismissals and the functioning and decision-making processs of the Inquiry Commission are devoid of the fundamental principles mentioned above and carried out as a means of revenge. While lustration measures should only be applied in the case of persons who pose the risk of harming the democratisation process and giving rise to human rights violations, their global application to universities, the media and civil society organisations will be against the judgments of the ECtHR and the principles laid down by the Venice Commission.

[152] Report of the Venice Commission, para. 86.
[153] Report of the Venice Commission, para. 88.

PART III: CRIMINAL INVESTIGATIONS AND PROSECUTIONS AGAINST THE SIGNATORIES OF THE DECLARATION OF ACADEMICS FOR PEACE

Assessment With Respect to Human Rights Law

In the first part of this book, we established that the administrative proceedings against signatories of the Declaration of Academics for Peace was devoid of a legal basis. In addition, we presented a legal assessment of the situation affecting the signatories who were dismissed from public service based on a series of Emergency Decrees issued during the State of Emergency declared after the coup attempt of 15 July 2016, and who are likely to be bringing their cases before the ECtHR.

Parallel to these developments, Public Prosecutors in numerous provinces have questioned the signatory academics within the scope of criminal investigations launched against them. Four signatories were arrested and prosecuted for having issued an additional statement declaring that they stood behind their signatures. In the indictment, these four academics were accused of the following:

> *"It has been understood that*
>
> *the so-called declaration for peace is public propaganda in support of the PKK/KCK terrorist organisation; and that its main purpose is to create a public opinion to stop the operations conducted by the security forces in regions where the PKK/KCK terrorist organisation has declared so-called autonomy in an effort to clean the region of terrorists and secure the peace and wellbeing of the people of the region; and that*
>
> *the actions of the suspects are of a nature supporting the PKK/KCK terrorist organisation based on the instructions of Bese Hozat, the Co-President of the so-called Executive Council of the PKK/KCK terrorist organisation; the State of the Republic of Turkey is accused of a massacre by the suspects in an attempt to legitimize the PKK/KCK terrorist organisation through their 'peace declaration'; the intention of the suspects is to lay the foundation for the deployment of United Nations observer missions in the territory of the Republic of Turkey in the regions declared to be autonomous by the PKK/KCK terrorist organisation and its members; the suspects have attempted to legitimize the so-called autonomous administrations, a phrase which they and the PKK/KCK terrorist organisation use to describe 'local independence';*
>
> *...*
>
> *'Autonomous administration was declared in the districts of Silopi and Cizre in Şırnak, the district of Nusaybin in Mardin, the district of Yüksekova in Hakkari, the districts of Varto and Bulanık in Muş to the effect that the people of these districts would create their own assemblies and not recognize the local government institutions or engage with them in any way, that they would do their own work and exercise their right to defend themselves if any attacks were to be launched against the autonomous administrations'. These declarations were made in the wake of the statement made by the PKK/KCK terrorist organisation on 12 August 2015 declaring that 'there is no alternative left other than autonomy of the people' In this manner the suspects..."*

The suspects were brought before the Istanbul 13th Assize Court for 'disseminating propaganda in support of the PKK/KCK terrorist organisation' as per Article 7 § 2 of the Anti-Terrorism Law No. 3713. However, after the first hearing, a change was made in the charges upon the demand of the prosecutor; the accused are currently being tried for having violated Article 301 of the Turkish

Criminal Code. Other signatories were questioned by prosecutors under Article 7 § 2 of the Anti-Terrorism Law for which investigations are ongoing.

In view of the foregoing, in this third part of the book, we find it necessary to make an assessment in terms of human rights law. The primary reason for such an assessment is that the problem is not isolated from the general problem of freedom of expression in Turkey. Indeed, among all members of the Council of Europe, Turkey continues to rank first in violations of Article 10 of the ECHR.[154] In addition, the provisions of the Anti-Terrorism Law and the Turkish Penal Code that are problematic in terms of freedom of expression are being invoked to an increasing degree in the last three years.

The second reason is that the standards of human rights law represent a higher value, which sheds light on both criminal and administrative law. The administrative and criminal investigations against both the signatories of the Declaration of Academics for Peace and other persons expressing their opinion should not be of a nature that violates freedom of expression. In this case, once the limits of freedom of expression are determined, one will be able to address the question of whether any penalty is legitimate, regardless of which specific provision of the law is being applied. Hence, if the conclusion reached after an analysis is that the statements of the academics fall within the scope of freedom of expression, then a penalty under criminal law would not be legitimate. In this case, it would be unnecessary to determine whether the elements of the relevant offence are present.

Thus, this last part of the book will focus on an assessment of the problem in view of freedom of expression by reference to the Constitution and international human rights law, and present an analysis of whether the imposition of administrative and criminal penalties in the case of Academics for Peace is in violation of freedom of expression as safeguarded in the Constitution and international human rights instruments.

The Problem of Limiting Terrorism-related Expressions

As is the case in all periods of political crisis, freedom of expression has, once again, become the target of arbitrary restrictions. Together with the re-emergence of armed conflict after the termination of the Peace Process on 24 July 2015, anti-terrorism measures have become the main justification for interference in the right to freedom of expression. The word 'terrorism' carries such a compelling meaning that anyone, including university professors, members of parliament, artists, journalists, can easily be investigated and penalised for disseminating terrorist propaganda. However, there is no legal basis to allow for such criminalisation. Laws are more pro-freedom compared to the 1990s when a similar approach was prevalent. Since the State was found to be in violation of the Convention in hundreds of freedom of expression-related cases brought before the ECtHR in the 1990s and 2000s, national laws were amended numerous times to comply with the requirements of these judgments.

Unfortunately, none of these advancements have saved us from experiencing the same problems during a period of crisis. In this chapter, we will try to show the limits to expressions about terrorism in human rights law and demonstrate that all the ongoing proceedings against Academics for Peace are unlawful.

One of the most fundamental questions in Constitutional and international human rights case-law regarding freedom of expression is how to assess the link between freedom of expression and

[154] Turkey's track record at the ECtHR shows that 258 of the 610 judgments issued between 1959 and 2016, in which the Court found a violation of Article 10, was against Turkey. With this figure, Turkey decidedly ranks first in the list of countries violating the Article 10, to be followed by Austria and France, which each have only 34 judgments against them.

violence. This debate has a history of nearly a hundred years in US Constitutional law and decades in ECHR law. The purpose of these two mechanisms and other constitutional and international review systems is, in essence, quite simple. Yet, fulfilling this purpose is challenging due to the diversity of expressions and their medium. The challenge has become even more pronounced due to the fact that the problem mostly arises in relation to the concept of 'terrorism', which lacks an international definition. In addition, new means for expression brought about by technological advancements have had a significant effect on violence-related issues and sensitivities have increased following the attacks of 11 September 2001 in New York and 7 July 2005 in London.

The simple equation we have presented above can be explained as follows: The purpose of anti-terrorism regulations is to maintain public order by means of preventing possible acts of violence, however the restrictions introduced for this purpose have an extremely high potential of violating freedom of political speech, which should be afforded the widest protection. This is because, the offence type categorised as terrorism is directly linked to political demands. Hence, the problem should be viewed not as one of making a political demand, but as resorting to violence and threats to have those demands met. It is also the case that in each instance where violence is used to pursue a political aim, there are other groups who advocate the same political aim through peaceful means. Moreover, in most cases, there will inevitably be some communication between those groups who accept violence as a legitimate means and those groups who don't in pursuing the same political demands.

The employment of violence by some groups to achieve an aim does not justify the restriction of legitimate demands. One of the most frequently voiced legitimate demands in these instances is the cessation of State violence. Needless to say, those who believe that State violence can only be resisted through violence can criticise violence being used by the State in an effort to legitimise their own view. Yet, this does not necessarily mean that everyone who criticises State violence or methods of combating terrorism is disseminating terrorist propaganda. Since political criticism in general and criticism against the State in particular should be afforded the widest protection under freedom of expression, a distinction should be made between political expression and statements that encourage violence.[155]

Hence, a legal system based on the standards of international human rights instruments must refrain from violating the obligation to give the widest freedom to political expression while preventing calls to violence that would disturb public order. Various legal systems have developed interpretation methodologies to serve this purpose. Disregarding all such criteria and restricting freedom of expression solely because the demands voiced are the same as those expressed by a terrorist organisation will be against the ECHR as well as all other human rights instruments and the Constitution.

The following discussion is not an assessment from the perspective of criminal law, but from that of human rights law. Thus, it is not based on any provision in the Turkish legal system. Nevertheless, it should be read as a general assessment to be applied to all relevant provisions. As explained in the following pages, whether an interference in freedom of expression is based on Articles 215, 216 or 301 of the Turkish Penal Code or Article 7 of the Anti-Terrorism Law is of no consequence. Similarly, disciplinary proceedings that violate the criteria for freedom of expression, as discussed here, must be deemed to be null and void since they violate a fundamental rule of human rights guaranteed at the Constitutional level.

The Scope of Speech Associated With Terrorism

The categorisation of statements associated with terrorism as an offence is based on the argument that it is not the statement itself but the effect that it causes which must be prohibited. Since the

[155] C. Walker (2002), Blackstone's Guide to Anti-Terrorism Legislation (Blackstone, London), p. 18-19.

restriction of speech is problematic in terms of freedom of expression as set forth in the Constitution and international human rights instruments, there is a necessity to determine the conditions under which a statement associated with terrorism can be restricted.

Firstly, one should determine what the word 'associated' implies, because a statement condemning terrorism is also associated with terrorism. The word 'associated' denotes, in this instance, that the statement should be one that endorses acts of terrorism or their purpose, since these are the kinds of expressions that are set forth as crimes. However, because this corresponds to an extremely wide scope, restriction of statements that fall under this category are also an exception. Acts described as terrorism are, at the end of the day, means to achieve a political aim. That which is prohibited is not the political aim sought or the act of defending that particular political aim but rather, the use of violence and threats to achieve it. Different from hate speech, speech associated with terrorism is criminalised not because of its content but because of the causal link it has with damage. Therefore, demanding Federalism, for instance, would not amount to a criminal act, whereas using violence to achieve that end would. In this case, in order for speech 'associated' with terrorism to be criminalised, it does not suffice to demand Federalism. One must establish a causal link between an act of violence and the speech in order to impose a punishment.

Such an assessment requires considering two separate elements:

- The Causality Link: The question of whether the link with the act is direct or indirect.
- The Temporal Connection: The question of whether the statement came before /ex ante) or after (ex post) the act.

The first link has to do with the degree to which the speech caused the act. The second link has to do with the timing of the speech. In order to understand the link between any statement and an act of violence, an assessment must be made of these two elements.

Using statements in such a way as to give rise to the commission of a crime would generally be regarded as complicity in criminal law systems and its penalisation would not pose a serious legal problem even in the absence of a separate legal regulation. The direct incitement to commit a crime is described as desiring and motivating a person to commit a certain criminal act and is against the law in many countries. On the other hand, indirect incitement to crime is not criminalised in many legal systems.[156] Two fundamental problems arise in the case of terrorism-related offences. The first is general statements which are not associated with a concrete criminal act; the second is statements that indirectly incite terrorism.

In both cases, in order for criminal sanctions imposed on such statements not to violate freedom of expression, a link must be established with the violent act. Since terrorist propaganda and incitement to terrorism are regarded as criminal endangerment crimes, they need not give rise to damage for there to be a link with violence; it would suffice for such acts to be of a nature that could incite or encourage any likely violent conduct in the future. This would mean that a test to be conducted in terms of freedom of expression would be one to determine the proximity between the statement and the act. States do not have unlimited discretion in regulating and setting forth this matter within the scope of criminal law. The limits are drawn by human rights conventions and the case-law of the bodies interpreting them.

The International Legal Framework Used to Limit Speech Associated With Terrorism

According to Article 90 of the Constitution, in the case of conflict between international conventions on fundamental rights and freedoms and the provisions of domestic laws, the

[156] Explanatory Report on the Council of Europe's Convention on the Prevention of Terrorism, para. 97.

provisions of international conventions shall prevail. In order for Article 90 to be meaningful in any way, especially in terms of rights such as freedom of expression -in which case the restriction regime depends heavily on how the freedom is interpreted by authorities- it is not only the text which guarantees the right that should be considered as an international convention, but also the interpretation of that text. This requirement is also expressly recognised by the law-maker for the crime of terrorist propaganda.

Indeed, the reasoning of Article 8 of Law No. 6459, which introduced an amendment to Article 7 § 2 of Law No. 3713, states as follows: "*The ECtHR has found that statements that do not incite violence fall within the scope of protection of freedom of expression; the punishment of individuals under Article 7 § 2 of the Anti-terrorism Law for statements that do not encourage violence or amount to incitement to armed insurgency have been found by the Court to be against freedom of expression.*" The Anti-terrorism Law was thus amended in an effort to bring the standards of the crime in compliance with the ECtHR judgments with the addition of the phrase "*in a manner which legitimises or glorifies methods of coercion, violence or threat or incites people to resort to such methods*".

However, in the mid-2000s, the crime of terrorist propaganda was redefined in some legal texts with a view that expressions inciting violence were not sufficiently limited by laws and conventions. While these legal texts bring an opportunity or even an obligation to states to restrict these types of statements, they also point towards the limits of such regulations in terms of human rights law. Among these texts are the UN General Assembly Resolution 1624, which is not legally binding since it is based on Section 6 of the UN Charter[157] and the Council of Europe Convention on the Prevention of Terrorism,[158] which was ratified by Turkey and aims to fill this loophole.

Indeed, the ECtHR has referred to the Convention on the Prevention of Terrorism in its assessments in recent judgments.[159] Nevertheless, the ECtHR has found Turkey to be in violation of Article 10 even in judgments issued after the enforcement of the Convention on the Prevention of Terrorism.

The Convention on the Prevention of Terrorism also requires compliance with the ECHR and other international human rights standards. Although the ECHR and the case-law of the ECtHR were already taken into consideration in drafting the Convention, a requirement was still set forth to ensure that the provisions of the Convention were interpreted in accordance with human rights law.[160] For this reason, it is possible to see the Convention as bringing a limit to the crime of terrorist propaganda:

> "Article 12
>
> 1- Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the

[157] S/RES/1624 (2005), 14.9.2005.
[158] OG 13.1.2012, S. 28172.
[159] Yavuz and Yaylalı v. Turkey, no. 12606/11, 17.12.2013; Güler and Uğur v. Turkey, no. 31706/10, 2.12.2014; Herri Batasuna and Batasuna v. Spain, no. 25803/04, 30.06.2009.
[160] The same condition is present in the UN General Assembly Resolution 1624. While the Resolution introduces regulations for the prohibition of incitement to terrorism, it reminds state parties that the restrictions must not be against the Universal Declaration of Human Rights and Article 19 of the Covenant on Civil and Political Rights. S/RES/1624 (2005), 14.9.2005.

International Covenant on Civil and Political Rights, and other obligations under international law.

2 - The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment."[161]

Thus, even if proscription of propaganda activities can be viewed as legitimate for purposes of combating terrorism, it is clear that arbitrary, discriminatory, racist and disproportionate restrictions are a violation of international law.

Two Separate Tests for Propaganda Crimes

As explained above, two separate links must be examined to understand the connection between speech and violence in a legal system that respects freedom of expression: the causality link and the temporal connection. Yet, as discussed below, other than in one exception, the temporal connection does not offer anything more than a means to determine the causality link.

The Causality Link

In determining causality, speech that directly prompts someone to engage in violence is not the main element to be examined. This would amount to direct incitement, which is prohibited in the Turkish legal system as in many others. The question is, rather, whether speech described as indirect incitement can be penalised. This calls for an examination of the strict test developed by the US Supreme Court and the more flexible test developed by the ECtHR, which grants higher discretion to State Parties. The case-law of the Court of Cassation and the Constitutional Court observes the ECtHR's test more closely. Nevertheless, since some provisions in national legislation refer to the criteria adopted by the US Supreme Court and because the two tests yield the same result in many cases, the US Supreme Court test also deserves a close examination. It can be said with certainty that in cases where both tests find a restriction to be illegitimate, there would be violation of international standards and the Constitution.

The Clear and Present Danger Test

The "clear and present danger" test was first adopted by the US Supreme Court and is the more rigorous of the two tests used to delineate the connection between violence and speech. Needless to say, the tribunals of a foreign country cannot be directly taken as a reference point in criminal law. However, one may argue that the law-maker in Turkey has opted for this test since the standard it brings has been inscribed in a number of provisions in Turkish law. An examination of this test is important not only because it is an alternative to the ECtHR test, but also because of its influence in Turkish and ECHR law.

The "clear and present danger" test appears in three separate provisions in Turkish law. The standard was first incorporated into Turkish law under Article 6 of Law No. 4748 which introduced

[161] The Preamble to the Convention states that it is not intended to affect established principles relating to freedom of expression and freedom of association.

an amendment to Article 17 of Law No. 2911.[162] Articles 215[163] and 216[164] of the Turkish Penal Code count "clear and present danger" as a constituent element in determining whether speech can be criminalised. The said amendments in national legislation were introduced for compliance with the case-law of the ECtHR.[165] Hence, the law-maker views the standard of "clear and present danger" as a condition to be met for conformity with ECtHR case-law.

The "clear and present danger" standard is not only inscribed in provisions of law but also mentioned in judgments in which there is a discussion of the connection between speech and violence. The Court of Cassation requires the application of the "clear and present danger" test in crimes of terrorist propaganda:

"Regardless of whether the expressions take place in rallies and demonstration marches, an assessment should be made to determine whether the message delivered in print or oral speech (chants, banners or uniforms) is a call, incitement or encouragement to violence, armed resistance or insurgency, or if it is hate speech provoking an atmosphere conducive to violence by creating meaningless hostility and aggressive emotions; in cases where there is a direct or indirect call to violence the speech should be subject to a test of clear and present danger in view of the identity and position of the accused and the place and time of speech."[166]

Moreover, according to the Criminal Plenary Session of the Court of Cassation, "*it is also a universal rule to prohibit expressions that create a 'clear and present danger' and disrupt national security*".[167] In a recent decision, the 8th Chamber of the Court of Cassation assessed whether there was evidence of "clear, present and grave danger" to public security when applying Article 216 § 3 of the Turkish Penal Code.[168]

Although the ECtHR does not explicitly adopt this standard, it was first mentioned in various concurring opinions,[169] and has more recently been accepted by the majority of the court in some judgments.[170] In other judgments the standard of "real and present danger" has been used.[171]

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[162] "The regional governor, governor or district governor may postpone a specific meeting for a period of not more than one month for reasons of national security, public order, prevention of crime, general health and general morals or for the protection of the rights and freedoms of others, or may ban the meeting if there is a **clear and present danger** that a crime will be committed."

[163] Article 215 of the Turkish Penal Code (as amended by Article 10 of Law No.6459): "Any person who publicly praises an offence or a person on account of an offence he has committed shall be sentenced to a penalty of imprisonment for a term of up to two years if such praise creates a clear and present danger to public order."

[164] Article 216 § 1 of the Turkish Penal Code: "A person who publicly provokes hatred or hostility in one section of the public against another based on social class, race, religion, sect or regional differences, thereby posing a clear and present danger to public security, shall be sentenced to imprisonment for a term of one to three years."

[165] See, "İnsan Hakları ve İfade Özgürlüğü Bağlamında Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı Gerekçesi", http://www2.tbmm.gov.tr/d24/1/1-0748.pdf.

[166] Yargıtay 16 CD., E: 2015/2742, K: 2015/2316, T: 17.7.2015; Yargıtay 16 CD., E: 2015/1843, K: 2015/3918, T: 10.11.2015; Yargıtay 16 CD., E: 2015/3635, K: 2015/4310, T: 23.11.2015; Yargıtay 16 CD., E: 2015/2032, K: 2015/4019, T: 5.11.2015

[167] Yargıtay Ceza GK, E: 2007/244, K: 2008/92, T: 29.4.2008.

[168] Yargıtay 8. CD, E: 2014/35434, K: 2015/22535, T: 12.10.2015 (Decision in the case of Fazıl Say).

[169] In the famous judgments against Turkey on 8 July 1999, Judge Bonello has recommended the consistent use of 'clear and present danger' criteria in cases from Turkey. E.g., *Ceylan v. Turkey*, no. 23556/94, 08.07.1999.

[170] "Furthermore, neither in the domestic court decisions nor in the observations of the Government is there any indication that there was a clear and imminent danger which required an interference such as the lengthy criminal prosecution faced by the applicants." *Gül and Others v. Turkey*, no. 4870/02, 08.06.2010, para. 42; *Kılıç and Eren v. Turkey*, no. 43807/07, 29.11.2011, para. 29; *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, 12.6.2014, para. 57.

[171] *Vajnai v. Hungary*, no. 33629/06, 08.07.2008, para. 49.

The doctrine of clear and present danger has a history of almost a century. Over the years, it has deviated from the original standard.[172] The test was first used by Supreme Court Justice Holmes in the case of *Schenck v United States*[173]. Yet, the test was originally used with a focus on the possible consequences of the speech rather than the words themselves and the intention of the person who uttered them. Later in the judgment of *Dennis v. United States* Justice Vinson used it as a balancing test. [174] Accordingly, the court "must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger". However, the test in this judgment is not envisaged as a cumulative one. When one variable is strong, the value of the other diminishes. In other words, the graver the evil of the act advocated, the less probable the danger need to be to justify governmental intrusion. This approach has resulted in making the "clear and present danger" test a more flexible one prone to restrict freedom.[175]

The doctrine reached its current stage after it was interpreted for the third and final time. Whereas in its original version, the "clear and present danger" test took as its basis the consequences that speech would lead to, in its final form, ever since the *Brandenburg v. Ohio* decision of the Supreme Court, a three-pronged test is applied to determine both the nature of the content and its probable consequences. This last test is different from the one applied in the case of *Dennis v. United States*. While the Dennis judgment used the clear and present danger doctrine as a balancing test, the Brandenburg case employed a cumulative test requiring an examination to determine the existence of both elements. The famous principle adopted in the Brandenburg judgment is as follows:

"the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[176]

As understood from this statement, after 1974 the "clear and present danger" test was fashioned in a such a way as to ensure that advocacy of the use of force was not seen as an act to be penalized. The only exception to this is knowingly offering material support, help or resources to foreign terrorist organisations such as the PKK and others. In these cases penalization is regarded as a "precautionary measure" against terrorist attacks and one which prohibits the act of giving foreign terrorist groups material support.[177]

The three-pronged Brandenburg test requires that a. the speech must intend to incite imminent lawless action, b. in context, the words used should be likely to produce imminent lawless action c. the words used by the speaker must objectively encourage incitement. The test counts two elements: namely "incitement" and "producing imminent lawless action". Although indirect speech can be prohibited with respect to the second element, it would be extremely difficult to prove this according to the Brandenburg test.

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[172] There is a vast amount of academic literature on the subject. We will not delve into the details in of the subject in this publication. For more information se: G. Edward White (1996) "The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America", 95 Michigan Law Review 299; Martin H. Redish (1982), "Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger" 70 California Law Review 1159.

[173] *Schenck v. United States* (1919), 249 U.S. 47 (1919). Along the same lines, *Debs v. United States*, (1919) 249 US 211, *Frohwerk v. United States* (1919) 249 US 204.

[174] Dennis v. United States (1951), 341 US 494.

[175] Stefan Sottiaux (2008), Terrorism and the Limitation of Rights: The ECHR and the US Constitution, (Hart Publishing: Oxford), s. 85.

[176] *Brandenburg v. Ohio*, 395 U.S. 444 (1969), s. 447.

[177] Holder, Attorney General, Et Al. v. Humanitarian Law Project Et Al., 561 U.S. 1 (2010), 130 S.Ct. 2705.

The Clear and Present Danger Test Applied to the Declaration of Academics for Peace

Nowhere does the declaration openly advocate violence. On the contrary, it "*demands an immediate end to the violence perpetrated by the state*". It also states, "*We demand the government to prepare the conditions for negotiations and create a road map that would lead to a lasting peace which includes the demands of the Kurdish political movement*".

One may argue that, even if the text does not incite violence, it is "directed to producing imminent lawless action". Yet, the declaration calls upon the State to comply with international law and there is not a single word in it to demonstrate that it invites a certain group to engage in violence to do away with the unlawfulness.

The section "*We demand the state to abandon its deliberate massacre and deportation of Kurdish and other peoples in the region*" was one of the most criticized parts of the declaration. Yet, there is nothing in these words that suggests that the signatories find it legitimate to violently resist against those actions of the State which are described as a massacre. On the contrary, the declaration calls on the State to urgently abandon its policies and reminds it of the international conventions to which it is a party, international customary law and the mandatory regulations of international law. In order to do away with the violations, the Declaration states, "*We demand the state to lift the curfew, punish those who are responsible for human rights violations, and compensate those citizens who have experienced material and psychological damage. For this purpose we demand that independent national and international observers to be given access to the region and that they be allowed to monitor and report on the incidents*." All the measures recommended in the Declaration of Academics for Peace are described in legal terms.

This being the case, one fails to understand how the text could provoke and incite people to violence. Naturally, no one has decided to resort to violence or stated that their decision to engage in violence was reinforced after having read the declaration. As a matter of fact, people who read the declaration have questioned how a Turkish academic could possibly write such a text. Yet, no one has asserted that the text incites people to violence and poses a clear and present danger. The question of whether a member of faculty should sign such a text is an ethical one; however it cannot be the justification for subjecting the signatories to legal sanctions.

Because the Declaration does not "advocate the use of force", is not "directed to inciting or producing imminent lawless action" and is not "likely to incite or produce such action", which are the elements of the clear and present danger standard, it is clearly within the scope of freedom of expression. Its restriction cannot be seen as legitimate.

The ECtHR's Multi-Pronged Incitement Test

The ECtHR opts for a much more complex balancing test compared to the clear and present danger standard used by the US Supreme Court. The test takes into account the varying needs of different legal systems and grants a margin of appreciation to both the ECtHR and the State Parties. Although there are arguments that this approach leads to uncertainty, it would be safe to say that in most cases, the ECtHR's balancing test yields similar results to that of the "clear and present danger test".

The ECtHR's 1999 judgments in cases against Turkey and its subsequent case-law where a balancing test is applied to determine the connection between speech and violence, take into consideration the person making the speech and the medium used. This balancing approach

requires a three-pronged cumulative test based on the formula "cannot be said to incite violence or construed as inciting violence":[178]

- Does the assessment take into consideration who the expression is uttered by, on what subject and through which means?
- Is there incitement to violence?
- Is it likely that the speech will cause violence?

In other words, in order for speech to be lawfully restricted under the Convention, it must be an incitement to violence and there must be a likelihood of violence occurring as a result of such incitement. The ECtHR examines a set of factors to determine whether these two conditions are met.

The Speaker, the Content and the Context

The ECtHR judgment in the case of Zana v. Turkey is much criticised despite being widely cited in the Turkish judiciary.[179] Many cases elaborated below show that the influence of this case-law has been very limited. It is one of those rare cases in which the ECtHR has found Turkey not to be in violation of the Convention with respect to sanctions imposed on terrorism-related statements. The Court took into account the ambiguity of the statement made by the applicant as well as his position as former mayor of Diyarbakır and the fact that the interview in which he made the statement was circulated in a national newspaper.[180] It is safe to say that since the Zana judgment, the ECtHR has moved from the more objective test of 'necessity in a democratic society' to a more perpetrator-focused incitement test.[181]

Other than this important exception, all of the below-mentioned elements should be taken into consideration as the limit to restricting freedom of expression. These elements must be observed by the prosecutor when launching an investigation and by the judge when formulating a decision and a balance must be sought between the probable danger and the rights at stake.

There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. The limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. Accordingly, freedom of expression of an opposition member of parliament is afforded greater protection.[182] Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.[183] As pointed out in the *Castells* judgment, national courts should display restraint in resorting to criminal sanctions in cases of criticism against government authorities.[184] Such criticism, even if harsh, should be viewed as a part of political pluralism and freedom to impart one's opinion.

In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. The public

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178 David G. Barnum, "Indirect incitement and freedom of speech in Anglo-American law", 3 E.H.R.L.R. 258, 269.
179 *Zana v. Turkey*, no. 18954/91, 25.11.1997.
180 *Zana v. Turkey*,, para. 60.
181 Stefan Sottiaux (2009), "Leroy v France: apology of terrorism and the malaise of the European Court of Human Rights' free speech jurisprudence", 3 EHRLR 415, 419.
182 *Castells v. Spain*, no. 11798/85, 23.4.1992, para. 42; *Jerusalem v. Austria*, no. 26958/95, 27.2.2001, para. 36.
183 *Erdoğdu and İnce v. Turkey*, no. 25067/94, 8.7.1999, para. 50; *Başkaya and Okçuoğlu v. Turkey*, no. 23536/94, 08.7.1999, para. 62; *Sürek v. Turkey (no. 4)*, no. 24762/94, 08.7.1999, para. 57; *Sürek v. Turkey (no.2)*, no. 24122/94, 8.7.1999, para. 34; *Yalçın Küçük v. Turkey,* no. 28493/95, 5.12.2002, para. 38, *Erdoğdu v. Turkey*, no. 25723/94, 15.6.2000, para. 61-62.
184 *Castells*, para. 46.

has the right to receive information and different perspectives on a subject.[185] The public has a right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them, any interference with the right to freedom of expression must take into consideration the right of the public to receive information.[186]

Consideration must be given to the importance of the press in light of the public's right to receive information.[187] While the press must not overstep the bounds set, *inter alia*, for the protection of vital State interests, such as national security or territorial integrity, against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones.[188] In this regard the ability of the press to publicly disseminate views which have their place in a public debate whose existence cannot be denied cannot be restricted.[189] It would be against the Convention and excessive to restrict freedom of journalistic expression to include only those ideas which are generally accepted, favourably received or considered to be harmless or indifferent. [190]

The title and position of the person making the speech is also important. For instance, freedom of expression, which is valuable to everyone, is particularly important for an elected representative of the people.[191] Scientific studies and academic freedom are also important elements. Full consideration should be given to this aspect in the dissemination of studies conducted based on expert knowledge. The restriction of freedom of expression would have to be more narrow in the dissemination of the unbiased views of a sociologist about the process by which the PKK's ideology was taking hold in Turkish society and how the roots of a Kurdish State were being formed.[192] Consideration should also be given to the circumstances when a statement is included in an academic piece of work on the socio-economic development of Turkey from a historical perspective.[193]

Hence, just as an intervention in a person's freedom of expression and dissemination of thought solely based on their identity cannot be justified, the mere fact that a member or leader of a proscribed organization expresses his/her thoughts and opinions does not justify an intervention in their freedom of expression and dissemination of thought.[194]

Element of Incitement to Violence

Direct Incitement

Speech Alone is not Sufficient for Incitement

Although cases brought against Turkey at the ECtHR concerning the violation of Article 10 are based on different criminal provisions, they are similar in that they all involve statements that disturb the State and the society at large, mostly criticising the government's anti-terrorism practices and its policies about the Kurdish issue, sometimes praising and legitimising an organisation, its activities or its leader.

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185 *Şener v. Turkey*, no. 26680/95, 18.7.2000, para. 40, *Ceylan v. Turkey*, no. 23566/94, 8.7.1999, para. 34; *Sürek v. Turkey (no.1)* [BD], no. 26682/95, 08.7.1999, para. 61; *Sürek (no. 3)*, no. 24735/94. 8.7.1999, para. 37; *Gerger v. Turkey*, no. 24919/94, 8.7.1999, para. 48.

186 Erdoğdu and İnce, para. 52; Sürek (no. 4), para. 58.

187 *Sürek v. Turkey no.4*, para. 55; *Sürek (no. 1)*, para. 59; *Sürek and Özdemir*, para. 58; *Şener*, para. 41; *Sürek* (*no. 2)*, para. 35; *Sürek* (*no. 3)*, para. 38.

188 *Şener*, para. 41.

189 *Hertel v. Switzerland*, no. 25181/94, 25.8.1998, para. 50, and *Erdoğdu*, para. 72.

190 *Ayşe Öztürk v. Turkey*, no. 24914/94, 15.10.2002, para 85.

191 *İbrahim Aksoy v. Turkey*, no. 28635/95, 10.10.2000, para. 59. For a case involving an applicant who is both a politician and a unionist, see, Ceylan *v. Turkey*, no. 23566/94, 8.7.1999

192 Erdoğdu and İnce, para. 51.

193 *Başkaya and Okçuoğlu v. Turkey*, no. 23536/94, 08.7.1999, para. 65. *Karataş v. Turkey*, no. 23168/94, 8.7.1999.

194 *Abdullah Öcalan Application* [GK], B. No: 2013/409, 25/6/2014, para. 101.

In such cases, the ECtHR finds that it is not acceptable to impose criminal sanctions based solely on the statement itself. In numerous judgments issued after 2005, the ECtHR has repeatedly found violations and made reference to its earlier judgments without the need for any additional in depth examination in cases where national courts had issued decisions of imprisonment in the absence of any examination solely because the statements in question were unfavourable and amounted to propaganda and incitement to hostility and hatred.[195]

Needless to say, one must first examine the statement itself to determine whether it is of a nature that incites violence. However the mere fact that an expression is harsh and critical of the government and even one-sided does not necessarily mean that it amounts to incitement. In this regard, the ECtHR has found various statements to fall within the acceptable limits of freedom of expression including those such as, Kurdistan having been annexed as a colony by the Turkish State; the portrayal of the Turkish State as an oppressor of "Kurdistan" in "political, military, cultural [and] ideological" terms; the "racist policy of denial" *vis-à-vis* the Kurds being instrumental in the development of the "fascist movement"; [196] the romanticizing of the aims of the Kurdish movement by saying that "it is time to settle accounts"; referring to the Republic of Turkey as a "terrorist state";[197] the condemning of the "*military action*" of the State which includes the State's "dirty war against the guerrilla" and the "open war against the Kurdish people";[198]saying that "*Kürdistan is burning*" and "describing events as genocide";[199] claiming that the State is engaging in "massacre" or defining the conflict as "a war"[200].

A situation widely known in Turkey is that those who are critical of the Turkish State are condemned because they do not equally criticise the terrorist organisation and hence fail to fulfil their legal and moral responsibilities. However, according to the ECtHR, although criticism directed at both sides would indicate that the statements are not an incitement, the one-sided nature of the expression is not sufficient reason to justify its incrimination. On the contrary, national authorities have an obligation to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.[201] In its recent judgment in the case of *Yavuz and Yaylalı,* the ECtHR has pointed out that the fact that information is one-sided is not sufficient reason on its own for limiting freedom of expression.[202] Similarly, the Constitutional Court has adopted the opinions in the ECtHR judgments in its decision in the case concerning Abdullah Öcalan's book the "*Kurdistan Revolution Manifesto, The Kurdish Question and the Solution of a Democratic Nation (Defending the Kurds in the Tongs of Cultural Genocide)".* The Constitutional Court has noted that under Articles 26 and 28 of the Constitution, "*bodies exercising public authority have a very narrow margin of appreciation in restricting political speech of public interest or debates on social issues*". On the other hand, although no restriction was placed on the freedom to express and disseminate ideas or the freedom of the press with respect to content, it has been noted that the State authorities have a wider discretion in their interventions on issues such as racism, hate speech,

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195 Judgments in this category are still under supervision by the Committee of Ministers in the group of cases *Gözel and Özer v. Turkey* and *İncal v. Turkey*. For access to the list of over 100 judgments: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Del/OJ/DH(2014)1230&Language=lanFrench&Ver=prel0002&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true

196 Başkaya and Okçuoğlu, para. 64.

197 Sürek (no. 4), para. 56

198 *Erdoğdu*, para. 62.

199 *Şener*, para. 44.

200 *Karkın v. Turkey*, no. 43928/98, 23.9.2003.

201 *Şener*, para. 45.

202 *Yavuz and Yaylalı v. Turkey*, no. 12606/11, 17.12.2013, para. 51; *Güler and Uğur v. Turkey*, no. 31706/10, 2.12.2014, para. 52. For a similar judgment, see, *Yağmurdereli v. Turkey*, no. 29590/96, 04.06.2002, para. 52.

war propaganda, inciting and encouraging violence, calls to insurgency or the justification of terrorist acts, which are the limits of such freedoms.[203]

The Tone of the Statement and its Links to the Truth

The fact that a statement is biased or that it resorts to hyperbole and distorts the truth, that fact that it is provocative and voiced as an insult against the State are not sufficient grounds on their own to criminalise speech.[204] In cases where views are expressed in an unbiased manner to criticise both sides and reflect the truth, one cannot speak of any incitement whatsoever. The same applies to statements that call for peace and equality.

In the case of Abdullah Aydın, the applicant was sentenced to imprisonment on grounds that he had not condemned and criticised the actions of the PKK despite having made a call for "peace, equality and freedom". The ECtHR was of the opinion that this was not sufficient grounds to restrict freedom of expression.[205] In the case of the DTP (Democratic Society Party), the ECtHR found it unfortunate that no weight had been given to the peaceful aims expressed by the co-presidents of the party with their words: "*We defend the view that violence is not a solution. Weapons must be silenced and the PKK must abandon arms (...) In the first quarter of the 21st century, we have reached the end of armed struggle!" (A. Tuğluk) and "We absolutely do not advocate the use of arms (...)" (E. Ayna)*".[206]

Since uncovering the truth is of utmost importance with respect to the crimes allegedly committed by the State, statements that explain the truth and contribute to uncovering it should be more carefully considered.

i. If the information imparted is an expression of facts, it cannot be regarded as incitement even if it poses a threat against the person alleged to have committed a crime. Or, more correctly, even if it leads to incitement, it would be compliant with the law since it imparts the facts. However, it is not necessary for the statements to be proven. In the case of *Castells v. Spain*, the applicant had been convicted on grounds that he had insulted the government by claiming that it was responsible for the murders committed in the Basque Region. Whereas the applicant had offered before the national courts to establish that the facts recounted by him were true and well known, being deprived of this opportunity gave rise to a violation of Article 10.[207] The accusations against public officials on terrorism-related issues generally give rise to serious liability. In the Sürek case (No. 2) the applicant was denied the opportunity to prove the truth of his allegations in the news reports about the grave violations of public officials. A conviction issued in the absence of defences of truth and public interest amounts to a violation of the Convention.[208]

ii. A reading of the Convention as a whole would naturally result in the granting of a higher degree of tolerance to harsh statements that have the ability to protect fundamental principles such as the right to life and the prohibition of torture. Uncovering the acts of state agents violating these rights is of special importance when one considers how difficult it is to unearth the truth in repressive environments. Imposing criminal penalties on people who uncover such violations and publicise them will be against the spirit of the Convention since such measures will eliminate the opportunity to conduct an effective investigation. Therefore, in circumstances where there is compelling information pointing towards conduct in violation of the right to life or the prohibition of torture, it is not possible to contest that the person expressing these concerns is engaging in

[203] *Abdullah Öcalan Application* [GK], B. No: 2013/409, 25/6/2014, para. 99.
[204] *Özgür Gündem v. Turkey*, no. 23144/93, 16.3.2000, para. 60.
[205] *Abdullah Aydın v. Turkey*, no. 42435/98, 9.3.2004, para. 33.
[206] Demokratik Toplum Partisi and Others v. Turkey no. 3840/10, 12.1.2016, para. 77.
[207] *Castells v. Spain*, para. 47-48.
[208] *Sürek (no. 2)*, para 39.

incitement. National courts must be tolerant towards criticism against the acts committed by public authorities if such criticism involves the right to life safeguarded under Article 2 of the Convention.[209] Otherwise, it will be impossible to effectively combat violations of the right to life.

Indirect Incitement

The common argument in terrorism-related investigations in Turkey is that the main purpose of those who criticise the State is to support the terrorist organisation, and that even if the name of the organisation is not explicitly stated or openly supported, the intention is to offer indirect support, which is the reason why statements to this end must be punished. However, the Report of the UN Security Council shows a special effort to keep indirect incitement outside the scope of legitimate restrictions [210] The introductory part of he UN Security Council Resolution only renounces speech that would incite the recurrence of the violent act in the future. However, the situation is different from the perspective of the Council of Europe and the European Union[211]. A study conducted by the Council of Europe at the preparation stage of the Convention on the Prevention of Terrorism showed that indirect incitement was not regulated as an offence in Council of Europe member states with the exception of three countries and recommended the criminalisation of indirect incitement with a view that this created a loophole. [212] The Convention was thus drafted to include the concepts of both direct and indirect incitement.[213]

According to Article 5 of the Convention titled "Public provocation to commit a terrorist offence":

"For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed."

The Committee of Experts on Terrorism, when drafting this provision, took into consideration the views of the Parliamentary Assembly of the Council of Europe [214] and the Council of Europe Commissioner for Human Rights[215]. The Commissioner has stated in his report that the provision covers "*conduct, such as the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour, that could constitute indirect provocation to terrorist violence*."

The provision is important in that while it aims to prohibit indirect encouragement of terrorist activity, it tries to set forth an obligation compliant with the case-law of the ECtHR. As observed, the provision brings together the three conditions which must cumulatively be met:[216]

i. The message must directly or indirectly advocate terrorist offences,

ii. The message must cause a danger that one or more such offences may be committed,

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[209] Yavuz and Yaylalı v. Turkey, para 54.

[210] For the Report of the UN Secretary General, see, Report on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/63/337.

[211] Framework Decision on Combating Terrorism, EU Council Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA combating terrorism, Official Journal of the European Communities (OJ) L 330/21, 9 December 2008.

[212] Olivier Ribbelink (2004), "Apologie du terrorisme" and "incitement to terrorism" (Council of Europe Publishing, Strasbourg), 44-45.

[213] For internal debates in each of the three organisations, see, Yael Ronen (2010), "Incitement to Terrorist Acts and International Law", 23 Leiden Journal of International Law 645, 664 ff.

[214] Opinion no. 255 (2005), para. 3 vii and ff.

[215] BcommDH (2005) 1, 30.

[216] David G. Barnum, "Indirect incitement and freedom of speech in Anglo-American law", 3 E.H.R.L.R. 258, 261.

iii. The person must disseminate the message with the intent to incite the commission of a terrorist offence.

Adopted by a country instrumental in the drafting of the Convention, the UK Terrorism Act of 2006, albeit much criticised in terms of freedom of expression, [217] states that the glorification of any conduct is unlawful if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances. The Act counts this as grounds of proscription. [218] Statements that are proscribed on these grounds can be counted as those which have a causal link with terrorist violence.

The ECtHR does not make a clear distinction between direct and indirect incitement.[219] However, it is extremely difficult to fulfil the conditions of the test applied by the Court in cases where the statement does not openly provoke violence. Especially in cases where the accused is alleged to have intentions different from those they publicly display, the authorities have an obligation to present concrete evidence that this is the case.[220] Merely arguing that the terrorist organisation also voices similar views does not count as concrete evidence. Hence, as noted by the Constitutional Court, and to be further elaborated below: "*restrictions cannot be imposed on ideas that are unfavourable to pubic authorities or a segment of the society if such ideas do not encourage violence, justify terrorist acts and trigger hatred*."[221]

Probability of the Statement to Cause Violence

In the case-law of the ECtHR, a measurement of the likely danger created by the statement does not play as significant a role as in the jurisprudence of the US Supreme Court. The analysis is largely based on whether there is incitement. As a matter of fact, in his partly dissenting opinion in the Sürek (1) judgment, which is the only one in which the Court found a violation in the group of cases dated 9 July 1999, and in his joint concurring opinion in the seven cases he wrote with four other judges, [222] Judge Palm was of the opinion that it does not suffice to examine the words of a statement and that one should ask the following questions to establish a causal link: Was there a real and genuine risk that the statement might inflame or incite to violence? Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

In its semi-pilot judgment in the case of *Gözel and Özer v. Turkey,* the ECtHR summarises a basic formula which clearly shows that the probability of the statement to cause violence must be considered when determining incitement: "A statement cannot be proscribed only because it is a statement made by or about a terrorist organisation if it does not incite to violence, justify terrorist acts to facilitate the aims of its supporters *and cannot be construed to encourage violence based on a deep and unreasonable hatred towards certain people*."[223]

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[217] For problems caused by the law, see, Daragh Murray (2009), "Freedom of Expression, Counter-Terrorism and Internet in the Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights", 27 Neth. Q. Hum. Rts. 331., 341; *R v Gul* [2013] UKSC 64, [2014] A.C. 1260 [2014] 1 CrAppR 14, 26-41.

[218] Terrorism Act 2006, art. 20.

[219] Howard Davis, "Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech" [2005] E.H.R.L.R. 75.

[220] Yağmurdereli v. Turkey, para. 53.

[221] *Application of Mehmet Ali Aydın*, [GK], B. No: 2013/9343, 4.6.2015, para. 84.

[222] For example, see Sürek (no.4) and Başkaya and Okçuoğlu.

[223] Altıparmak, Kerem and Hüsnü Öndül (2013), Monitoring Report on the Execution of the Gözel and Özer v. Turkey judgment, İHOP, 2013, 6, also see, *Sürek v. Turkey (no. 1)* ; *Gözel and Özer v. Turkey*, no. 43453/04 and

The questions posed by Judge Palm appear in various judgments of the ECtHR. For instance, in the *Sürek v. Turkey* (1) case, while the Court does not find a violation of Article 10, it has considered that the interviews published concerned the south-east of Turkey, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region.[224] In other cases, reference was made to the effect of the Gulf War.[225] In one of the judgments, consideration was given to the fact that the disclosure of the identities of the persons in the letters increased the likelihood of aggression against them. The use of labels such as "*the fascist Turkish army*", "*the TC murder gang*" and "*the hired killers of imperialism*" alongside references to "*massacres*", "*brutalities*" and "*slaughter*" were not regarded as grounds for proscription on their own but because they created a danger for certain persons. The intervention was thus seen to be legitimate and the modest fine imposed on the applicant was found to be a proportionate intervention.[226]

Although the ECtHR has only recently started to explicitly use the phrase 'clear and present danger' as adopted by the US Supreme Court, one can easily infer from both earlier and more recent judgments that the Court requires for the likely danger to be present to justify interference.

In its judgment in the case of *Erdoğdu v. Turkey*, which is one of the earlier judgments, the Court was not convinced by the argument that the publication could in the long term result in consequences which would be very harmful in terms of the prevention of disorder and crime in south-east Turkey or that young people would be incited by the publication "to join the ranks of the PKK against their better judgment", as the Government maintain.[227] In the case of *Gül and Others v. Turkey*, "*the Court observes that, taken literally, some of the slogans shouted (such as "Political power grows out of the barrel of the gun", "It is the barrel of the gun that will call into account") had a violent tone. Nevertheless, having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during lawful demonstrations – which limited their potential impact on "national security" and "public order" – they cannot be interpreted as a call for violence or an uprising*."[228] In the case of Yağmurdereli,[229] the fact that the harsh statements made by the applicant were uttered in Istanbul, hundreds of kilometres away from the conflict region, played an important role in the Court's finding that there had been a violation.

The form of an expression is also likely to lower the risk of danger. For instance, in the cases of Arslan and Polat[230], the Court was of the opinion that artistic expression limits the potential impact of the words on national security and found a violation of Article 10.

As observed in the foregoing, the flexible test applied by the ECtHR requires consideration of various different factors. Yet, in its essence, it yields the same results as the "clear and present danger" standard by taking into account "incitement to violence" and the "potential of such incitement to cause violence".

31098/05, 06.07.2010; *Faruk Temel v. Turkey*, no. 16853/05, 01.02.2011; *Öner and Türk v. Turkey*, no. 51962/12, 31.03.2015; *Gül and Others v. Turkey*, para. 41-45.

224 The same facts were given consideration in another judgment (*Sürek no.3)* issued on the same day in which no violation was found. This aspect is repeatedly considered in the other judgments but does not cause a violation on its own. The Court's approach shows that it may only be considered in conjunction with other factors. For example, *Sürek ve Özdemir*, para. 61.

225 *Ceylan v. Turkey*, no. 23566/94, 8.7.1999, para. 32.

226 *Sürek (no. 1)*, para. 62-64.

227 *Erdoğdu*, para. 69.

228 Gül and Others v. Turkey, para. 41. Similarly, Kılıç and Eren v. Turkey, para. 28.

229 *Yağmurdereli*, para. 54.

230 *Arslan v. Turkey*, no. 23462/94, 8.7.1999; Polat v. Turkey, no. 23500/94, 8.7.1999.

An Assessment of the Declaration of Academics for Peace In view of the Multi-Pronged Incitement Test of the ECtHR

The Speaker, the Content, the Context

The Declaration of Academics for Peace was published at a time marked by the escalation of the conflict, the use of heavy warfare in civilian settlement areas and hundreds of casualties, as announced by the authorities. Since the text is critical of the measures adopted by the government regarding the most serious political issue in the country, it should be assessed with the widest interpretation of the standards of freedom of political expression. Considering that the events in question are narrated in a one-sided fashion by the government-driven media and alternative views and news reports are legally and practically prevented, the dissemination of a collective statement by leading academics is crucial for the wider public to find out and question the events in the conflict regions.

The Element of Incitement to Violence

The mere presence of words such as "massacre" and "war" does not necessarily mean that the text incites to violence. As observed in numerous examples above, accusations made against the State through even more virulent statements have not been regarded as incitement to violence. Moreover, far from advocating the use of violence against violence, the Declaration proposes a legal response. The texts proposes that the crimes against international law must be independently investigated and ended. It is clear that this call cannot be shown as evidence of incitement to violence.

It is also evident that the tone of the text is not a determining factor on its own, just as insults against the State cannot be criminalised. In particular, concepts such as "peace and solution" should be taken to support the freedom of expression. The declaration makes a demand for "*the government to prepare the conditions for negotiations and create a road map that would lead to a lasting peace which includes the demands of the Kurdish political movement."* Although it may have disturbed the government with these words, the language employed in the text should afford it stronger protection in terms of freedom of expression.

Another factor to take into account in assessing incitement is the relationship of the statement with the facts. There are numerous statements and reports issued by reputable international organisations, institutions and NGOs such as the UN High Commissioner for Human Rights[231], the Council of Europe Commissioner for Human Rights, [232] the Venice Commission [233], Amnesty International[234] and Human Rights Watch, reporting numerous offences and unlawful practices throughout last year in Turkey. Moreover, whereas the ECtHR has issued interim measures in some applications, it has decided to give priority treatment to a number of complaints from Turkey. [235] Lastly, the Council of Europe Commissioner for Human Rights, who has recently

[231] For the statement of Commissioner Zeid Ra'ad Al Hussein, see: "Need for transparency, investigations, in light of "alarming" reports of major violations in south-east Turkey" For details, see, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19937&LangID=E#sthash.nUHxoG2c.dpuf

[232] For the statement of Commissioner Nils Muižnieks, see:. "Turkey: security trumping human rights, free expression under threat", https://www.coe.int/en/web/commissioner/-/turkey-security-trumping-human-rights-free-expression-under-threat, 14.4.2016.

[233] For the report by the Venice Commission on the unlawfulness of the curfews, see: Opinion No. 842 / 2016, CDL-AD(2016)010, 13.6.2016. The ECtHR has made reference to the report of the Venice Commission in its interim decision in the application of Dolan and Others v. Turkey: *Dolan and Others v. Turkey*, no. 9414/16, 15.12.2016, para. 38.

[234] For the comment by Amnesty International reporting that the situation in Turkey is similar to that of the 1990s, see: Turkey: Security operations in south-east Turkey risk return to widespread human rights violations seen in the 1990s, EUR 44/4366/2016, 30.6.2016

[235] Curfew measures in south-eastern Turkey: Court decides to give priority treatment to a number of complaints, ECHR 054 (2016), 5.2.2016

examined allegations of human rights violations on the said issues, has noted that the curfews and the conduct of the security forces in south-eastern Turkey have given rise to grave human rights violations. The Commissioner also noted that failure to conduct effective investigations into these cases has lead to a structural problem of impunity.[236] Under the circumstances, imposing criminal sanctions on a group of academics for using the words "crime" and "massacre" not only violates freedom of expression, it can also be construed as a failure by the State to fulfil its positive obligations to protect the right to life. Hence, such statements cannot possibly be interpreted as insults to the State or as incitement to violence.

Indirect Incitement

As observed in the provision on indirect incitement introduced by the Council of Europe Convention on the Prevention of Terrorism, a three-pronged test must be conducted to determine whether a statement can be deemed indirect incitement and penalised.[237] Accordingly, if a statement glorifying a terrorist offence committed in the past is giving the message that the act should be emulated in the future, and if the statement is sufficient to actually cause such danger, it would be possible to speak of indirect incitement. However, nowhere in the Declaration of Academics for Peace is there glorification of terrorist acts. On the contrary, the demand is for the prevention of violence and crimes caused by the State.

Needless to say, indirect incitement is different from direct incitement in that affords an opportunity to make an inference to some extent. However, such an inference is not enough to criminalise a statement which has nothing to do with violence just because it advocates the ideals of those who engage in violent acts. If those who resort to violence say that they have done so to prevent the crimes committed by the State, this does not mean that no one else, from that point onwards, is allowed to criticise State violence. Indirect incitement does not mean that there has to be no link between the statement and the violent act. It still requires the presence of a causal link between the statement and danger caused by possible violence.

Perhaps the only judgment of the ECtHR in which criminal sanctions imposed for indirect incitement were not found to violate the Convention is the case of *Leroy v. France*.[238] In its judgment, the Court found the conviction of the applicant legitimate not because of the criticism he directed to the State, but because of his praises of the September 11 attacks in which thousands of people were killed. The Court noted that it denigrated the memory of the deceased to joke about an event in which thousands lost their lives.[239] No violation was found in the punishment imposed on the applicant because beyond being critical of American imperialism, he had supported the idea of destroying American imperialism through violence and glorified acts which attempted to do so. Yet, the Declaration of Academics for Peace does not glorify killings and does not, in any sense of the word, denigrate victims of terrorism.

The Potential of Speech to Cause Violence

The most significant element in the ECtHR test is the potential of the statement to cause violence. In light of this element, the declaration of Academics for Peace cannot possibly be construed as "advocating violence or bloodshed and revenge, justifying terrorist acts and encouraging violence by creating meaningless hostility and aggressive emotions against certain groups". The declaration describes the actions of the State as criminal, but says nothing about resorting to violence to prevent this crime. Nowhere does it advocate the use of violence. As a matter of fact, in none of the

[236] Memorandum on the Human Rights Implications of Anti-Terrorism Operations in South-Eastern Turkey, CommDH (2016)39, 2.12.2016. The ECtHR has made reference to the report of the Commissioner for human Rights in its interim decision in the application of Dolan and Others v. Turkey: *Dolan and Others v. Turkey*, no. 9414/16, 15.12.2016, para. 36.

[237] See, footnote 216 above and the cited text.

[238] *Leroy v. France*, no. 36109/03, 2.10.2008

[239] *Leroy*, para. 43.

accusations made against the signatories were they asked the question "Why did you invite people to violent acts?" Instead the questions were dedicated to matters that were not the focus of the declaration, such as "Who were you referring to when you said 'massacre'?", "Do you believe the PKK is a terrorist organisation?" These questions should be considered as an attempt to establish the element of violence during the interrogation, since the element is absent in the text itself.

It is clear that the Declaration of Academics for Peace cannot be criminalised in light of the multi-pronged incitement test of the ECtHR. So much so that the investigations launched against the academics are unable to fulfil even a single condition of the test. Naturally, in light of this standard, the declaration cannot possibly be the subject of a criminal and/or administrative sanction.

The Temporal Connection

As a rule, criminalisation of statements related to terrorism aims to eliminate a danger which is likely to occur in the future and is thus temporally associated with an act not yet committed. The two tests we have examined above are temporally relevant to actions that have not yet occurred, but where the danger of their occurring has arisen as a result of the statement made. In this regard, there are two instances in which it may be possible, in exceptional circumstances, to restrict statements about an action that has occurred in the past.

The first possibility is that the glorification of an act committed in the past may give rise to the commission of a similar act in the future. As noted above, this is the offence type defined in the UK Terrorism Act of 2006. In this case, the criteria to be applied is the same criteria described above. In other words, if the glorification of an act committed in the past does not amount to incitement that creates the danger of the act being emulated in the future, the glorification of an offence or an offender is not sufficient grounds on its own for restricting freedom of expression.[240] The ECtHR made this very clear in its judgments in the famous cases involving the use of the word "Sayın" as a mark of respect before the name of Abdullah Öcalan, in which the national courts had convicted the applicants on grounds of glorifying offence and offenders in violation of the Turkish Penal Code.[241] Indeed, it is extremely unlikely, in light of the standards of the Convention, for an act to be regarded as one which has given rise to the possibility of a crime by glorifying an act committed in the past. In the UK, only seven people have been tried and four convicted for this offence between 2006 and September 2016.[242]

The second possibility is that damage may be caused by denigrating the victims of an act committed in the past. The ECtHR is of the opinion that restrictions within this scope can be justifiable.[243] It is observed that the offence of glorifying terrorism (*l'apologie du terrorism*), prescribed in only a few European countries, has started to become more widespread because of the argument that terrorism cannot be combatted only by considering direct incitement.[244]

The judgment of *Leroy v. France* is an important case in this second category. It is one in which the ECtHR has not used the multi-pronged incitement test we have elaborated above. A cartoon published in the weekly Basque magazine Ekaitza represented the attack on the World Trade Centre with a caption which parodied the advertising slogan of a famous brand: "*We have all dreamt of it... Hamas did it*". As noted by Sottiaux,[245] the Leroy judgment does not show that the

[240] See, for example, *Öztürk v. Turkey* involving the glorification of İbrahim Kaypakkaya. No. 22749/93, 28.9.1999.
[241] *Yalçınkaya and Others v. Turkey*, no. 25764/09, 1.10.2013, para. 35-36.
[242] Operation of police powers under the Terrorism Act 2000, quarterly update to September 2016, data tables, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508974/police-powers-terrorism-hosb0216-tabs.ods
[243] *Yavuz and Yaylalı v. Turkey*, no. 12606/11, 17.12.2013, para. 51; *Güler and Uğur v. Turkey*, no. 31706/10, 2.12.2014, para. 52.
[244] For leading examples, see, Daphne Barak-Erez ve David Scharia (2011), "Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law", 2 Harv. Nat'l Sec. J. 1, 6 vd.
[245] Sottiaux, p. 424.

basic test about incitement to violence has changed. According to the Court, the main challenge in such cases is to determine "*whether the glorification of terrorism can be penalised without violating fundamental rights such as freedom of expression*". In other words, the main question in this case was not whether the cartoon would cause similar acts in the future but whether it denigrated the human dignity of the victims.

Implications of the ECtHR Test on Turkish Law

The ECtHR case-law described above has been instrumental in prompting the law-maker to amend all relevant legal provisions to comply with the Convention. The last and most significant of these amendments is Law No. 6459 on Amendments to Some Laws In Relation to Human Rights and Freedom of Expression. The reasoning of Article 8 of Law No. 6459, which introduced an amendment to Article 7 § 2 of Law No. 3713 reads as follows: "*The ECtHR has found that statements that do not incite to violence are within the acceptable limits of freedom of expression. The Court has found violations in the penalisation of statements under Article 7 § 2 of the Anti-Terrorism Law if such statements do not encourage violence or incite people to armed insurgency*." A new phrase was added to the provision to specify acts "*legitimising, glorifying or encouraging the use of methods of coercion, violence or threat*", with the aim of harmonising the elements of the offence with ECtHR case-law.

Following this amendment, the Court of Cassation started to use both the multi-pronged incitement test of the ECtHR and the "clear and present danger" test of the US Supreme Court. This new approach makes acquittals an imperative in cases where convictions were easily issued in the past.

According to the Court of Cassation, "*Regardless of whether the expressions take place in rallies and demonstration marches, an assessment should be made to determine whether the message delivered in print or oral speech (chants, banners or uniforms) is a call, incitement or encouragement to violence, armed resistance or insurgency, or if it is hate speech provoking an atmosphere conducive to violence by creating meaningless hostility and aggressive emotions; in cases where there is a direct or indirect call to violence the speech should be subject to a test of clear and present danger in view of the identity and position of the accused and the place and time of speech*."[246]

As a result of this new standard of assessment, various acts were no longer defined as offences including the chanting of the slogan of a terrorist organisation if it did not have elements of coercion or violence,[247] chanting of slogans for a leader or an organisation and hanging up banners with the words "*Stop Military and Political Operations*", [248] taking part in a demonstration demanding the lifting of segregation of members of an organisation and wearing a necklace bearing the words of the organisation,[249] carrying a flag bearing the sign of the organisation and a picture of its leader[250].

In its judgment in the cases of Abdullah Öcalan, the Constitutional Court has adopted the standards of the ECtHR and has noted that under Articles 26 and 28 of the Constitution, "*bodies exercising public authority have a very narrow margin of appreciation in restricting political speech of public interest or debates on social issues*". On the other hand, although no restriction has been placed on the freedom to express and disseminate ideas or the freedom of the press with respect to content, the Constitutional Court has noted that the State authorities have a wider discretion in their interventions on issues such as racism, hate speech, war propaganda, inciting and encouraging violence, calls to insurgency or the justification of terrorist acts, which are the limits of such

[246] Court of Cassation 16 CD, E. 2015/3635, K. 2015/4310, T. 23.11.2015.
[247] Court of Cassation 16 CD, E. 2015 / 2742, K. 2015 / 2316T. 17.07.2015.
[248] Court of Cassation 16 CD, E. 2015/1843, K. 2015/3918, T. 10.11.2015.
[249] Court of Cassation 16 CD, E. 2015/2032, K. 2015/4019, T. 5.11.2015.
[250] Court of Cassation 16 CD, E. 2015/5601, K. 2015/4209, T. 4.11.2015.

freedoms.[251] The Constitutional Court has found a violation of the freedom to impart and disseminate ideas and the freedom of press under Articles 26 and 28 of the Constitution in the case involving a publication alleging that "*The Turkish State aims to dispose of Kurdishness with its political, military, cultural and ideological policies*", describing "*the conflict between the terrorist organisation PKK and the security forces as a 'war of freedom*'", and stating that "*the Kurdish question is a complex one and the PKK has also undergone transformations in the process*".

In finding a violation, the Constitutional Court has also noted that the book in question harshly criticises "*Turkey's Kurdish policy and its actions in the south-east*", and "*Portrays the Republic of Turkey and the security forces in particular in a bad light*". Nevertheless, the Court has noted that the applicant "*demands the recognition of the 'Kurdish reality' and asks for the use of peaceful means instead of resorting to armed conflict*." Hence, according to the Constitutional Court, "*the book should be assessed as a whole to determine whether certain parts include 'a call to violence, 'call to armed resistance' and 'insurgency', whether the statements are of a nature that triggers a deep and unreasonable hostility and causes violence"*.[252]

In assessing the book as a whole, the Constitutional Court has not found it to "*glorify violence; or to provoke or encourage people to adopt terrorist methods, i.e. to violence, hatred revenge or armed resistance, in the 'process that lays before us' as conceptualised by the applicant.*[253]

Similarly, the Constitutional Court has made an assessment of a poetry book under Article 7 § 2 of the Anti-Terrorism Law in the application of Fatih Taş. The Court examined the book as a whole and noted that it cannot be construed to "*glorify violence or to provoke or encourage people to adopt terrorist methods, i.e. to violence, hatred revenge or armed resistance".* On the contrary, the Court has noted that in the poems shown as grounds for the applicant's conviction, he "*has narrated, in poetic and abstract language, the discomfort felt regarding the imprisonment of the founder and leader of the PKK terrorist organisation, and the grief felt for those who had died in armed conflict; the applicant has said that the people who died in the region described as Kurdistan died in the name of freedom.*"[254]

In the application of Mehmet Ali Aydın,[255] the Constitutional Court examined the arrest of the applicant, the provincial chair of the Diyarbakır branch of the BDP (Peace and Democracy Party) for the statements he made during a press conference and the allegations that his freedom of expression, and right to personal freedom and security had been violated due to his trial under Article 7 § 2 of the Anti-Terrorism Law. The proceedings against the applicant were based on the press statement in which he was accused of glorifying the illegal terrorist organisation PKK and its founder and leader Abdullah Öcalan, glorifying terrorist activities by describing them as a struggle for freedom and assisting the organisation by disseminating terrorist propaganda. According to the Constitutional Court, consideration should be given to the fact that the applicant is the provincial chair of the Diyarbakır branch of the BDP and the subject raised in the press statement are social issues relevant to a segment of the society. On the question of whether there was any propaganda for the PKK terrorist organisation, the Court noted the following: "

"*Regard must be had to the words used when describing the PKK terrorist organisation and Abdullah Öcalan as well as the context in which they were published, the identity of the speaker, the time and*

[251] *Application of Abdullah Öcalan* [GK], B. No: 2013/409, 25.6.2014, para. 99.
[252] Application of Abdullah Öcalan, para. 105.
[253] Application of Abdullah Öcalan, para. 108.
[254] *Application of Fatih Taş* [GK], B. No: 2013/1461, 12.11.2014, para.106.
[255] *Application of Mehmet Ali Aydın* [GK], B. No: 2013/9343, 4.6.2015.

purpose of the words used, the identities of the persons to whom it was addressed, its possible effect and the other statements in the press conference as a whole".[256]

According to the Constitutional Court, the first instance court had not demonstrated which words glorified violence, and how the statements provoked and encouraged people to adopt terrorist methods, i.e. violence, hatred, revenge, or armed resistance. The first instance court had merely decided that the applicant has supported the PKK terrorist organisation and Abdullah Öcalan with his words. Furthermore, the Constitutional Court noted that when the statements of the applicant are examined as a whole, they cannot be construed to "*glorify violence or terrorist acts, or to provoke or encourage people or groups to adopt terrorist methods, or violence, or to invite them to racism, hatred, revenge or armed resistance*".[257] On the contrary, the Court held that the applicant, in the press statements, criticises the government's policies in addressing the Kurdish question and "*opposes the use of violent methods instead of democratic means, and demands the lifting of political bans, the cessation of armed conflict and the release of Abdullah Öcalan*".[258]

Thus, according to the unanimous decision of the Plenary Session of the Constitutional Court, "*ideas that are unpalatable for the public authorities or a segment of the society cannot be restricted so long as they do not incite to violence, justify terrorist acts or trigger hostile emotions*".[259]

CONCLUSION

As observed in the examples, after the legal amendments, both the Court of Cassation and the Constitutional Court have adopted the multi-pronged incitement test of the ECtHR. However, the Court of Cassation, in particular, has expressly given reference to the clear and present danger standard used by the US Supreme Court. An individual who considers these development cannot possibly foresee that the Declaration of Academics for Peace would be criminalised in Turkey in January 2016. Whereas both the legislation and the case-law of the high courts in Turkey have established, in compliance with international case-law, that it is unlawful to criminalise statements made against notions regarded as sacrosanct in the absence of a causal link with violence, these precedents have suddenly been totally disregarded through political manoeuvres. Independent from the nature of the criminalisation, this approach undoubtedly wipes out all trust in the law.

No one working in the field of human rights and freedom of expression in Turkey today can argue that it is legitimate to criminalise the Declaration of Academics for Peace. The foregoing analysis shows that the signatories of the declaration cannot possibly be penalised in compliance with international human rights law and the Constitution, despite the silence caused by the current environment of fear. It is the ethical duty of all academics who work in the field of human rights and all lawyers who believe in the rule of law to stand against such a radical mistake which could disengage the Turkish academic community from the rest of the world.

Together with the escalation of armed conflict in south-east Turkey, statements associated with violence are rapidly becoming the subject of criminal and administrative investigations in the region and across the country. Yet, fundamental amendments have been introduced to the legislation which had once been the source of hundreds of ECtHR judgments finding violations by Turkey. The high courts in Turkey have, since then, significantly developed their case-law on freedom of political expression to incorporate the standards adopted by the US Supreme Court and the ECtHR.

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[256] *Özgür Gündem v. Turkey*, B. No: 23144/93, 16.3.2000, para. 63; *Sürek v. Turkey*, B. No: 24762/94, 8.7.1999, para. 12, 58.
[257] Application of Mehmet Ali Aydın, para 82.
[258] Application of Mehmet Ali Aydın, para. 83.
[259] Application of Mehmet Ali Aydın, para. 84.

However, in a period of crisis and with the interventions of the government, unjust and unfounded investigations have been launched and convictions issued throughout the country in complete disregard for national and international law.

Human rights law is based on the Constitution and the international human rights canon. Under no circumstances can criminal laws be interpreted to yield consequences contrary to human rights law. For this reason, the human rights standards, the scope of which we have shown above, are valid not only with respect to the Anti-Terrorism Law and the crime of terrorist propaganda but with respect to all offence types in the Turkish Penal Code.

The escalation of violence can only change how the standards are applied in each specific case, not the standards themselves. In other words, the escalation of conflict does not mean that freedom of expression can be arbitrarily restricted. It can only serve to establish the link between the statement in question and the concrete act of violence, if the conditions allow. One must be extremely cautious in this respect. The gravest human rights violations occur during times of conflict. In such a period, the repression of freedom of expression will increase to hide the truth and the most readily invoked justification will be the concept of terrorism. It is observed that prosecutors and judicial bodies are changing the standard rather than their own assessment in terms of the specific circumstances of the cases. By disregarding all legal amendments and case-law, they are returning to the standards applied in the 1990s. This course of events warrants a strong objection.

We are aware of the difficulty in voicing this demand at a time when grave structural problems are emerging with respect to the independence of the judiciary. It is evident that we have no choice but to advocate law, justice, academic freedom and human rights.

Concluding Assessment

The purpose of this book was to present a comprehensive assessment of the legal dimensions of a process which can be best described as a witch-hunt started after the signing and publishing of the Declaration of Academics for Peace in January 2016. This fifteen period is marked by administrative proceedings, suspensions and dismissals at universities, followed by criminal investigations launched across the country by public prosecutors against academics for peace on grounds of "disseminating terrorist propaganda" and finally the launching of criminal proceedings against four faculty members. Finally, 312 signatory academics were dismissed from public service for being "*members of, having an affiliation, link or connection with terrorist organizations or structures, formations or groups which have been determined by the National Security Council to perform activities against the national security of the State*", based on Article 2 of Emergency Decree 672 and Article 1 of Emergency Decrees 675, 677, 679 and 686, all of which were adopted as post-coup measures under the State of Emergency declared after 15 July 2016. The process is still ongoing.

In democratic systems, the actions of the government, their negligence and mistakes are subject to rigorous oversight by not only the legislative and judicial branches, but also the public.[260] Such oversight includes the levelling of harsh criticism against the government and its organs within the scope of freedom of political expression. As elaborated in this book from multiple perspectives, the text of the Declaration of Academics for Peace cannot be construed as glorification of terrorism, incitement to violence or dissemination of terrorist propaganda. Exposing the negative aspects of the government's anti-terrorism policies and practices, and harshly criticising the dismal situation in south-east Turkey does not amount to incitement to violence and armed resistance.[261] On the contrary, taken as a whole, the purpose of the declaration is to remind the government, in a harsh

[260] *Yavuz and Yaylalı v. Turkey*, no. 12606/11, 17.12.2013, para 52.
[261] *Kalın and Turkey*, no. 31236/96, 10.11.2004, *Özkaya v. Turkey*, no. 42119/98, 30.11.2004.

language, of its obligation to protect the right to life safeguarded under Article 2 of the European Convention on Human Rights.

The fact that the content or the style of the declaration is crude or harsh, or the fact that it has deeply disturbed the government and the President does not mean that it has exceeded the acceptable limits of freedom of expression. Such a text should be treated with tolerance and forbearance. Moreover, it is not the tolerance limits of the President or government authorities but the limits of freedom of political expression that will be taken as a basis in a legal assessment made within the framework of the case-law of the European Court of Human Rights. Even if criticism is viewed to be harsh and reactions as disturbing, it will be considered to fall within the limits of freedom of expression by the Court so long as it does not constitute an incitement to violence, armed resistance or an uprising or hate speech.[262] Anything to the contrary is inconceivable.

Yet, the persecution of academics who signed the declaration "We will not be a party to this crime!" is one of numerous unlawful actions recently taken by the Justice and Development Party government, including thousands of criminal investigations and prosecutions against statements and speeches, the closure of newspapers, magazines, television and radio channels, prior restraints, lawsuits filed for the sole purpose of damaging the plaintiff, the abuse of the legal right of reply, withholding Internet content, blocking access to websites and social media platforms, administrative penalties and tax investigations against owners of media outlets, the repression of media outlets to dismiss journalists critical of the government and its policies.

This book is dedicated to the signatory academics who stood up to say "We will not be a party to this crime!" and were subsequently subjected to unlawful administrative proceedings, suspended from their positions, faced criminal investigations and were finally dismissed from public service in the absence of any proceedings in the post-coup environment following 15 July 2016.

[262] *Savgın v. Turkey*, no. 13304/03, § 45, 02.02.2010 and *Gerger v. Turkey* [BD], no. 24919/94, 8.07.1999, para. 50.