Global Campus Europe

University of Strasbourg

European Master's Degree in Human Rights and Democratisation
A.Y. 2018/2019

The Controversial Position of the European Court of Human Rights towards the Large-Scale Human Rights Crisis in Turkey in the "Age of Subsidiarity"

Author: Özenç Bilgili
Supervisor: Florence Benoit-Rohmer

ABSTRACT

This thesis examines the European Court of Human Right's approach to the large-scale human rights crisis in Turkey, in particular the post-coup era. Despite the centralization of the power and the absence of effective domestic mechanism in Turkey, the Court has abstained considerably from conducting any meaningful examination in reasonable time on the grounds of the non-exhaustion of domestic remedies. In doing so, the Court has emphasized the subsidiary nature of the Convention mechanism. However, the question as to whether this attitude of the Court is justifiable under the principle of subsidiarity arises, considering that the original *raison d'être* of the Court is to prevent the resurgence of totalitarianism and the destruction of the rule of law.

Global Campus Europe

The Controversial Position of the European Court of Human Rights towards the Large-Scale Human Rights Crisis in Turkey in "the Age of Subsidiarity"

1. INTRODUCTİON

In the recent years, especially after the parliamentary election of June 2015, the political and legal spheres of Turkey have dramatically changed due to abundant internal and external crises. These include, but are not limited to, the Gezi protests in 2013[1], the corruption investigations against the key figures of the ruling Justice and Development Party (AKP)[2], the end of the "solution process" with the Kurdistan Worker's Party (PKK)[3], a series of assaults imputed to the PKK and Islamic State[4], the state of emergency in the aftermath of the failed coup attempt of 2016[5], snap elections as well as regular general and local elections[6], the diplomatic crises with the USA[7] and a number of European states[8], the constitution referendums[9] and a serious financial crisis[10], which all can be deemed as a watershed moment that has systematically undermined democracy and the rule of law in Turkey. Over the years, the democratic transition of Turkey reversed, and Turkey has transformed from being a "model" of western style democracy into an autocracy under a right-wing, religious and populist government.[11] These political and democratic backsliding caused the European Parliament for the first time in its

---

[1] See, for example, "Turkey clashes: Why are Gezi Park and Taksim Square so important?" *BBC*, 7 June 2013 <www.bbc.com/news/world-europe-22753752> accessed 10 July 2019.
[2] See, for example, Constanze Letsch, "Turkish ministers' sons arrested in corruption and bribery investigation", *The Guardian,* (Istanbul, 17 December 2013) <www.theguardian.com/world/2013/dec/17/turkish-ministers-sons-arrested-corruption-investigation> accessed 10 July 2019.
[3] See, for example, Ewen MacAskill, "Turkey says Kurdish peace process impossible as Nato meets", *The Guardian*, 28 July 2015 <www.theguardian.com/world/2015/jul/28/turkey-erdogan-not-possible-peace-process-kurdish-militants> accessed 10 July 2019.
[4] For the timeline of attacks, See "Timeline of attacks in Turkey", *Al Jazeera,*19 February 2017 <www.aljazeera.com/indepth/interactive/2016/06/timeline-attacks-turkey-160628223800183.html> accessed 10 July 2019.
[5] See, for example, "Turkey's coup attempt: What you need to know", *BBC*, 17 July 2016 <www.bbc.com/news/world-europe-36816045> accessed 10 July 2019.
[6] See, for example, "Turkish President Erdogan calls new election", *DW*, 24 August 2015 <www.dw.com/en/turkish-president-erdogan-calls-new-election/a-18664339> accessed 10 July 2019; Kareem Shaheen, "Turkey to hold snap elections on 24 June, says Erdoğan", *The Guardian*, 18 April 2018 <www.theguardian.com/world/2018/apr/18/turkey-to-hold-snap-elections-on-24-june-says-erdogan> accessed 10 July 2019.
[7] See, for example, "Turkey lira: Ankara to boycott US electronic goods" *BBC*, 14 August 2018 <www.bbc.com/news/world-europe-45179673> accessed 10 July 2019.
[8] In regards to the Netherlands, see , "Turkey row: Why has Erdogan riled Nato allies?", *BBC*, 13 March 2017 <www.bbc.com/news/world-europe-39255864> accessed 10 July 2019; in regards to Austria, see "Turkey referendum: Erdogan rallies not welcome in Austria", *BBC*, 27 February 2019 <www.bbc.com/news/world-europe-39105683" accessed 10 July 2019; in regards to Germany, Jenny Hill, "Turkish-German ties fray as Erdogan chases diaspora vote", *BBC*, 9 March 2017 <www.bbc.com/news/world-europe-39215497> accessed 10 July 2019.
[9] See, for example, "Why did Turkey hold a referendum?" *BBC*, 16 April 2017 <www.bbc.com/news/world-europe-38883556> accessed 10 July 2019.
[10] See, for the interactive chronology of the crisis, "Turkish lira crisis", *BBC* <www.bbc.com/news/topics/c6xkk152803t/turkish-lira-crisis> accessed 10 July 2019.
[11] See J. M. Rogenhofer, "Antidemocratic Populism in Turkey after the July 2016 Coup Attempt", Brill (in Populism), Volume 1, issue 2, 4 December 2018, pp 116-145.

history to adopt a report on Turkey, which calls on the formal suspension of accession negotiations between Turkey and the European Union.[12]

To highlight particular landmarks, the 2010 constitutional amendments have impaired the autonomy of judiciary against the executive branch[13], whereas the 2017 constitutional amendments have equipped the executive presidency with excessive power over the legislative branch.[14] Following this, the separation of powers and the institutional safeguards of democracy in Turkey have become fundamentally undermined. Likewise, opposition deputies were remanded in custody after being lifted their parliamentary immunity, including the co-heads of the third largest parliamentary group, the Peoples' Democratic Party (HDP), in the general election of June 2015.[15] Furthermore, roughly 4,500[16] judges and prosecutors corresponding to 30 % of the total number of the judiciary have been dismissed[17], which had chilling effect on the judiciary as a whole and induced a spreading self-censorship among the members of judiciary.[18] The elected mayors from the various cities in Turkey were replaced by government-appointed officers.[19] This centralization of power and democratic decline reached an unprecedented level with the decision of the Supreme Electoral Council in May 2019, which annulled the results of the local election of April 2019 in Istanbul won by the main opposition party with a narrow margin.[20] Following this, the European Commission indicated in its annual report that this decision went "against the core aim of a democratic electoral process – that is to ensure that

---

[12] See, for the press release, "Parliament wants to suspend EU accession negotiations with Turkey" *News European Parliament*, 13 March 2019 <www.europarl.europa.eu/news/en/press-room/20190307IPR30746/parliament-wants-to-suspend-eu-accession-negotiations-with-turkey> accessed 10 July 2019.
[13] S. E. Aytaç and E. Elçi, "Populism in Turkey", October 2018, pages 96 and 100 <www.researchgate.net/publication/328149081_Populism_in_Turkey> accessed 10 July 2019.
[14] The Venice Commission, "Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017", Opinion No. 875/2017, Strasbourg, 13 March 2017 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)005-e> accessed 10 July 2019.
[15] See, "Turkey HDP: Blast after pro-Kurdish leaders Demirtas and Yuksekdag detained", *BBC*, 4 November 2016 <www.bbc.com/news/world-europe-37868441> accessed 10 July 2019.
[16] The Constitutional Court's judgment concerning Selçuk Özdemir, Application No. 2016/49158, 26 July 2017, § 19.
[17] See, the European Commission, "Turkey 2019 Report (Staff Working Documents)", SWD (2019) 220 final, Brussels, 29 May 2019, p. 22 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-turkey-report.pdf> accessed 10 July 2019.
[18] Ibid.
[19] See, for Kurdish mayors, Kurdish Institute, "List of dismissed and imprisoned Kurdish mayors in Turkey" <www.institutkurde.org/en/info/infographics/mayors/> accessed 10 July 2019. See, for Turkish mayors, "Erdoğan: Mayors Must Do What They Have to Do", *BIA News Desk*, (Istanbul, 19 October 2017) <http://bianet.org/english/politics/190757-erdogan-mayors-must-do-what-they-have-to-do> accessed 10 July 2019.
[20] David Gauthier-Villars, "Turkey Cancels Istanbul Election Won by Opposition", *The Wall Street Journal*, 6 May 2019 <www.wsj.com/articles/turkey-cancels-istanbul-mayoral-election-won-by-opposition-11557162702> 10 July 2019.

the will of the people prevails"[21]. In other words, this decision has reflected that even the core principle of representative democracy was rendered illusory more than ever in today's Turkey.

Similarly, human rights have undergone a serious deterioration in parallel with the destruction of rule of law in Turkey, in particular the measures taken under the state of emergency proclaimed after the coup attempt on 20 July 2016.[22] The collective dismissal of public servants corresponds to an important dimension of this large-scale human rights crisis in the country without doubt. In the aftermath of the coup attempt, military and police officers, judges, prosecutors, teachers, academics, in all around 152,000 public servants were collectively dismissed by several emergency decree laws or by the decision of administrative bodies on the basis of alleged "membership of, or affiliation, link or connection with" proscribed groups without any individualized reason or specific evidence. [23] Undeniably, the implications of these measures went beyond losing a job for them. In this respect, the dismissed public sector workers have lost their post in the public sector, and in some cases, the employment opportunities in the private sector have been curtailed to those dismissed as well as housing and health care benefits. Furthermore, they have been systematically prevented from seeking jobs and medical services abroad, since their passports were annulled by emergency decree laws, which has also covered the spouses of individuals in question. Above all, they have been exposed to living a highly isolated life from the public, and their reputations have been badly damaged as they have been publicly labelled as terrorists.

In the meantime, since the Constitutional court, the fundamental guarantor of human rights in the country, has showed the considerable abdication of judicial review for emergency measures as well as lower courts, dismissed individuals could not have any recourse against their dismissals for a considerable time.[24] This judicial uncertainty led thousands of dismissed public servants to apply the European Court of Human Rights (the ECtHR or Court), which put the European Convention on Human Rights (the ECHR or Convention) mechanism in jeopardy due to the large number of

---

[21] See the European Commission, "Turkey 2019 Report (Staff Working Documents)", p. 5.
[22] For example, see the Human Rights Association (IHD) "Anti-Terrorist Repression in Turkey: Excessive and Unlawful", 2017 <http://ihd.org.tr/en/wp-content/uploads/2017/11/IHD_anti-terrorist-repression-excessive_and_unlawful-ENGLISH.pdf> accessed 10 July 2019; Human Rights Watch, "A Blank Check: Turkey's Post-Coup Suspension of Safeguards against Torture", 25 October 2016 <www.hrw.org/sites/default/files/report_pdf/turkey1016_web.pdf> accessed 10 July 2019; Human Rights Watch, "Silencing Turkey's Media: The Government's Deepening Assault on Critical Journalism", 15 December 2016 <www.hrw.org/sites/default/files/report_pdf/turkey1216_web.pdf> accessed 10 July 2019.
[23] Ibid. at pp. 9-10.
[24] See, the Venice Commission, "Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016", Opinion No. 865/2016, Strasbourg 12 December 2016, § 227 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e> accessed 29 June 2019.

applications.[25] With this in mind, as the government could no longer procrastinate to address the criticism regarding the judicial review of emergency measures due to both external and internal pressure, it issued the Emergency Decree Law No. 685[26] establishing the Inquiry Commission on the State of Emergency Measures (hereafter, "the SoE Commission") in line with the recommendation of the Venice Commission[27], which envisions an ad hoc committee to examine emergency measures. The SoE Commission is tasked with assessing the acts resulting from Emergency Decree Laws. However, the SoE Commission is sadly far from meeting the criteria foreseen by the Venice Commission and from being deemed as an effective remedy, since there exist serious shortcomings with respect to its impartiality, independence, and massive caseload.[28] Moreover, according to the SoE Commission itself, as of 28 June 2019, the nearly 40 percent of all applications made to the SoE Commission are still pending.[29] It other words, there are still individuals who could not receive a response from the SoE Commission, although they were dismissed roughly 3 years ago.[30] This seemingly supports the noteworthy and widespread claim among many human rights defenders in Turkey, which is the formulation of the SoE Commission was blatantly done in order to extend the procedure and to prevent individuals from going to the European Court of Human Rights, rather than to redress the complained situation.[31]

In accordance with that, one pure consequence of the centralization of the power is the absence of supervisory mechanism overseeing the executive branch. In the light of the legal and factual context of the country, there have exists serious concerns regarding the independence and impartiality of judiciary. This has been reasonably loomed by the Constitutional Court's highly controversial decisions

---

[25] See the ECtHR's statistics, p. 58 <www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf> accessed 10 July 2019.
[26] See the Emergency Decree Law No. 685, published in the Official Gazette on 23 January 2017 <www.resmigazete.gov.tr/eskiler/2017/01/20170123-4.htm> accessed 29 June 2019.
[27] See the Venice Commission, "Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016", § 220-223.
[28] For a detailed examination of the SoE Commission, see K. Altıparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?", 23 February 2017, <www.ihop.org.tr/en/wp-content/uploads/2017/03/IS-THE-STATE-OF-EMERGENCY-INQUIRY-COMMISSION.pdf> accessed 29 June 2019. See also The AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers", 25 October 2018, <www.amnesty.org/download/Documents/EUR4492102018ENGLISH.PDF> accessed 29 June 2019; The HUMAN RİGHTS FOUNDATİON, "The Collapse of the Rule of Law and Human Rights in Turkey: The Ineffectiveness of Domestic Remedies and the Failure of the ECtHR's Response", 12 June 2019, pp. 37-46 <https://hrf.org/wp-content/uploads/2019/06/Turkey-ECtHR-Report_April-2019.pdf> accessed 29 June 2019.
[29] See the SoE Commission, "Announcement on the decisions of the Inquiry Commission on State of Emergency Measures", 28 June 2019 < https://soe.tccb.gov.tr/> accessed 1 July 2019.
[30] See, for the broadcast of Ömer Faruk Gergerlioğlu, a deputy of the HDP, with prominent human rights activist Kerem Altıparmak <www.youtube.com/watch?v=mhEJl-0p_Uo&t=169s> accessed 10 July 2019.
[31] See, for example, Altıparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?" p. 5.

and its silence towards the allegation of large-scale human rights violations. As a result, the entire human rights community in Turkey has insistently pointed to factors indicating the ineffectiveness of domestic remedies, including the highest authority for remedying human rights violations in the country. For this reason, it has been argued that pursuing domestic remedies in Turkey would not be conducive. Despite this, the ECtHR has showed noteworthy disregard for changing its stance towards the Constitutional Court and has upheld an inflexible application of the rule of exhaustion of domestic remedies in cases pertaining to Turkey without considering the context of the severe destruction of the rule of law in the country. In doing so, the Court found the three cases inadmissible in its early judgments regarding the post-coup era on the ground of the non-exhaustion of domestic remedies.[32] In these cases, the Court stressed the subsidiary nature of the Convention mechanism, that is the Contracting states have the primary responsibility to secure human rights, whereas the Court has only supervisory function. Thus, the ECtHR held the existence of effective domestic remedies with respect to alleged human rights violations in spite of the marked abdication of domestic remedies.

In this respect, reiterating its approach, it declared in the case of Köksal[33] concerning a teacher dismissed by an emergency decree law that the SoE Commission represents one of the domestic remedies that applicants must exhaust before bringing to the Court their alleged violation of the ECHR as committed through emergency measures, in spite of the fact that by the time of the application there was no such available remedy. One cannot but wonder why the Court has interpreted the case in such a stringent way. Thus, as criticized by many human rights defenders and scholars, dismissed public officials have been deprived of effective safeguards as enshrined in the ECHR, since the Court has abstained from addressing the matter in reasonable time.[34]

---

[32] See *Mercan v. Turkey* (dec), no. 56511/16, 8 November 2016; *Zihni v. Turkey* (dec), no. 59061/16, 29 November 2016; *Çatal v. Turkey* (dec), no. 2873/17, 7 March 2017. For the critical reviews of these decisions, see Emre Turkut, "Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?" *EJIL: Talk!*, 28 December 2016 <www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/#more-14856> accessed 10 July 2019; Ulaş Karan, "Mercan v. Turkey: Waiting for the Last Word of the Turkish Constitutional Court", *Verfassungsblog*, 21 November 2016 <https://verfassungsblog.de/mercan-v-turkey-waiting-for-the-last-word-of-the-turkish-constitutional-court/> accessed 10 July 2016.

[33] *Köksal v. Turkey* (dec), no. 70478/16, § 27 6 June 2017. See, for example, Emre Turkut, "The Köksal case before the Strasbourg Court: a pattern of violations or a mere aberration?", *Strasbourg Observers*, 2 August 2017 <https://strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/> accessed 10 July 2019.

[34] See, for example, Leighann Spencer, "The ECtHR and Post-coup Turkey: Losing Ground or Losing Credibility?", *Verfassungsblog*, 17 July 2018 <https://verfassungsblog.de/the-ecthr-and-post-coup-turkey-losing-ground-or-losing-credibility/> accessed 10 July 2019; Dilek Kurban, "Think Twice before Speaking of Constitutional Review in Turkey", *Verfassungsblog*, 20 February 2018 < https://verfassungsblog.de/think-twice-before-speaking-of-constitutional-review-in-turkey/> accessed 10 July 2019.

Notably, contrary to this consistently granting deference to Turkish authorities, which is based on the assumption of good faith underlying the Convention system, the ECtHR recently found the violation of Article 18 in conjunction with article 5 against Turkey in the case, which is before the Grand Chamber for the time being, of Demirtaş[35] concerning one of the former co-heads of the HDP, who was taken into custody on 4 November 2016 together with a number of HDP members of parliament, remarking that domestic authorities have acted in bad faith while restricting the applicant's rights. It is safe to say that the Demirtaş case is a landmark case, since the Court found a violation of Article 18 by Turkey for the first time in its history and identified the Turkish authorities' practices of disrespect for the Convention values. However, despite this signal given by the Court in the case of Demirtaş, one can argue that the Court has hitherto adopted a single attitude towards the recent human rights crisis in Turkey by granting its respect to the domestic authorities, in particular the SoE Commission and the Constitutional Court. Accordingly, the questions arise as to whether this policy adopted by the Court to human rights crisis in Turkey, and whether the arguments the Court relies on, especially subsidiarity principle, are justifiable in, or applicable to, Turkish cases, taking into account that the *raison d'être* of the Court is to act as warning system in order to prevent the resurgence of totalitarianism, which do not respect the rule of law and human rights, in Europe.

To that extent, this master's thesis focuses on the attitude of the Court towards the recent large-scale of human rights crisis and the destruction of rule of law in Turkey in the context of subsidiarity principle. So-doing, the section 1 clarifies the concept of subsidiarity in the human rights context, more precisely in the ECHR, by providing its meaning and types. Section 2 elaborates the two attitudes of the Court towards its national audiences in the "age of subsidiarity", considering the case-law of the ECtHR and the emerging developments in the Convention system. Section 3 carefully examines the effectiveness of two domestic remedies in Turkey. The first one is the SoE Commission which is the authorized organ to review the state of emergency measures, while the second is the highest judicial authority in the country for examining the allegation of human right violations.

2. The Conceptual Clarification of the Principle of Subsidiarity

It is well known that the ECtHR has insistently abstained from examining the allegation of large-scale human rights violations concerning Turkey owing to the non-exhaustion of domestic remedies, placing the principle of subsidiarity at the heart of its decisions. That is to say, the Court does not consider

[35] *Selahattin Demirtaş v. Turkey* (no. 2), no. 14305/17, 20 November 2018.

itself as a competent authority in addressing alleged human rights violations in Turkey. The question thus arises as to whether this newly discovered emphasis on the principle of subsidiarity by the Court justifiably rules the possibility of the Court's examination out, or this attitude of the highest authority in the promotion and protection of human rights over the continent is really well-founded or legitimate. To be able to give an answer to these questions in the following chapters, this division of the thesis endeavors to illustrate the aspects of the concept of subsidiarity and ascertain the foundation of the principle of subsidiarity in human rights context.

2.1.What is subsidiarity in the context of human rights?

The principle of subsidiarity is one of the fundamental principles founding the entire Convention system. However, since it is invoked in several contexts[36], grasping the meaning of the principle of subsidiarity may be rather confusing. To summarize these contexts, the principle of subsidiarity can be encountered in the Catholic Church's social doctrine of subsidiarity advocating the autonomy of individuals or smaller groups in a social or political order primarily against state interventions.[37] The other subsidiarity principle exists in the Treaty of the European Union which is a supranational political and legal order.[38] It functions between the EU and the member states. Another one can be noted in federal states such as Germany and Switzerland, which regards authority and sovereignty between states.[39] Lastly, subsidiarity can also be found in the 19th Century liberal doctrine as well as in international legal institutions or regimes which have public authority over individuals.[40] That being said, due to this common usage, it is possible that there exist some overlaps with respect to the dimensions of these contexts, while comparing one context with the other, including the human rights context.

Due to its vague character, one can therefore claim that it remains highly difficult to properly understand the principle of subsidiarity, and that it often induces confusion while employing it. Unexpectedly, subsidiarity principle has more than one meaning. Its meaning differs fundamentally and corresponds to different concepts, depending on the context used. But even so, it is possible to find a common ground among them. All in all, within a hierarchy, subsidiarity concerns a lower unit on the

---

[36] See, for more detailed information, S. Besson, "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?", The American Journal of Jurisprudence, Vol. 61, No. 1, 2016, pp. 87-88.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.

one hand, and a higher unit on the other with the former claiming a priority over the latter in doing mainly its internal affairs. To put it differently, subsidiarity can be described as the allocation of power between two hierarchical units. Having provided the meaning and introduced the different contexts, I will now venture to clarify the principle of subsidiarity in the human rights context, in particular in the Convention mechanism.

International human rights law is based on the protection system established in the post-WWII era. Human rights are protected both domestically and internationally. Hence, there are international institutions on the one hand, and states on the other, within this dual protection system. According to it, human rights should be initially realized by states at the domestic level them before a probable supervision of international institutions and/or courts constituted by International human rights law. It means that while the primary responsibility lies on states to secure human rights, international institutions/courts have a duty to review and monitor states' responsibilities and obligations concerning human rights. The same applies to the ECHR mechanism as well. States parties to the ECHR have the initial obligation to secure human rights as Article 1 of the ECHR indicates while the duty to review of the Court is subsidiary to the former in the light of Article 19.[41]

Nonetheless, in practice, the boundary between these sequential obligations and duties is sometimes blurred, that is, where subsidiarity principle comes into play in human rights context. It may not therefore be easy to identify responsibilities or duties in question or to determine how to function these shared responsibilities between parties. For instance, this may be the case when the ability of State Parties to provide an effective remedy to complainants is questionable. In sum, the principle of subsidiarity in the context of the Convention mechanism means that "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task" [42].

It can accordingly be remarked that despite the existence of its substantive and remedial types, human rights subsidiarity is legal and institutional in essence, and thereby procedural, since the Court's power

---

[41] See Article 1 of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention", and Article 19 of the ECHR: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights".

[42] The Jurisconsult, "Principle of subsidiarity", Interlaken Follow-up, 2010, p. 2, <www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf> accessed 27 June 2019.

to intervene is confined to the failure of national authorities in securing the Convention rights. Keeping that in mind, to explain the principle in detail with respect to its dimensions[43], the *subject* of human rights subsidiarity does not pertain to individuals or groups, rather, it is domestic authorities and their relations with the ECtHR. As the judiciary is in principle better placed to ensure respect for the rights guaranteed by the ECHR in a country based on the rule of law, domestic authorities amount chiefly to national courts in this context. Yet, it does not mean that this responsibility lies solely on domestic courts. On the contrary, the legislative and executive branches of states continue to be responsible too as Article 1 of the Convention obliges all State authorities.

As regards to the *object* of the principle, it concerns the competence or power of the ECtHR to review alleged human rights violations, contrary to the subsidiarity within EU or federal states pertaining to legitimate authority or sovereignty between those states. In respect of the *function* of subsidiarity, in principle the Court has competence to review only after the exhaustion of domestic remedies provided that the other admissibility criteria are fulfilled by complaints. In other words, the competence of the Court to review and the States Parties' obligations to respect, promote and protect human rights are consecutive. That is to say, the former is complementary to the latter. According to Professor Samantha Besson, that is the reason *"*why some authors refer to human rights subsidiarity as "complementary subsidiarity" as opposed to "competitive subsidiarity" which is the most common one among other conceptions of subsidiarity" [44].

Furthermore, the *justification* of subsidiarity plays an important role as well as its *limit* dimension. First of all, states have a direct legitimacy in international public law, whereas the legitimacy of the Court derives from them. In this respect, the Court should not overstep the boundary delegated to it and must respect the autonomy of domestic judiciaries. Second, while the common version of justification is the autonomy of smaller unit, the protection of domestic democracy underpins the justification of human rights subsidiarity. Lastly, as a matter of fact, by their nature, the convenience of domestic authorities to assess the factors surrounding each case is presupposed as better than the ECtHR due to their proximity to cases. Notably, the Court also stressed so in its recent and notable judgment regarding the case of *SAS v. France*:

---

[43] For a comprehensive analysis regarding the dimension of subsidiarity, See Besson, "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?", pp. 88-104.
[44] Ibid. at p. 93.

> *"It is also important to emphasize the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."*[45]

Similarly, what forms the limit of subsidiarity can also be understood in the same manner as protecting democracy, and thus human rights, since democracy is an intrinsic element of human rights. In this sense, as long as the practices of national authorities are in line with the Court's well-established case-law and fundamental values of democracy, the state parties enjoy the principle of subsidiarity. Otherwise, they would be subject to the scrutiny of the ECtHR through the examination of the allegation of human rights violations made by applicants to the Court because they have accepted by becoming a party to the Convention that human rights are not a matter of domestic policy or concern. By extension, the protection of democracy is of great significance to human rights subsidiarity, forming both aspects of justification and limit.

In this regard, although the principle of subsidiarity underpins the Convention, the ECHR mechanism is also based on the doctrine of effectiveness[46], that is, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[47] This doctrine has thus enormous potential in rebutting the extreme usage of the principle of subsidiarity, more precisely, the severe employment of rule of exhaustion of domestic remedies, since the doctrine "serves as a 'counterweight' to the principle: where a failure by the Court to act would result in a denial of justice on its part, rendering the fundamental rights guarantees provided by the Convention inoperative, the Court can and must intervene in the role attributed to it by Article 19 of the Convention" [48].

Likewise, the Court's activist approach considering the Convention as a "living instrument"[49] does not deem the Convention as a static document, but rather as an evolutive one which is in tune with the times. As a result, this approach enabling the Court to interpret the Convention in accordance with the

---

[45] *SAS v. France* [GC], no. 43835/11, § 129, ECHR 2014.
[46] See, for example, M. Marochini, "The interpretation of the European Convention Human Rights", Zbornik radova Pravnog fakulteta u Splitu, god. 51, January 2014, pp 80-82.
[47] See, for example, *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32; *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37.
[48] The Jurisconsult, "Principle of subsidiarity", p. 5.
[49] See, for example, M. Marochini, "The interpretation of the European Convention Human Rights", Zbornik radova Pravnog fakulteta u Splitu, god. 51, January 2014, pp 77-79.

present-day conditions, may result in the alteration on the scope of the Convention rights over the years. To that extent, the Court can invalidate domestic interpretations through its judicial activism in order to safeguard and reinforce human rights, democracy and the rule of law, which are the establishing values of the Convention, if the circumstances of case require to override its role within the Convention mechanism. Ultimately, corresponding to negative and positive forms of an intervention, they all cannot be upheld where the likely outcome of their adoption by the Court goes against the protection of democracy and human rights, since the *raison d'etre* of the Court is to prevent the resurrection of totalitarianism. That being said, I will now continue to clarify the principle of subsidiary by presenting its sorts.

2.2. The three types of subsidiarity principle in the Convention system

This section presents the sorts of the principle of subsidiarity, namely procedural, substantive and remedial.[50] To provide their brief descriptions, procedural subsidiarity concerns the competence of the ECtHR to review. When the Court is allowed to perform its power, substantive subsidiarity characterizes the extent and content of its review. Lastly, being an extension of procedural and substantive subsidiarity, remedial subsidiarity recognizes a priority to the State Parties' preferences in regards to how to remedy a violation in case of a breach of the Convention.

2.2.1. Procedural Subsidiarity

The Court can perform its duty only if complainants fulfill the admissibility criteria[51] defined in the Convention. In this respect, Article 35 stipulates the exhaustion of domestic remedies[52] as one of admissibility criteria for the further stage of examination, stating that "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law ...". Correspondingly, there is no requirement to exhaust remedies within the framework of international organizations. It means that it concerns only domestic remedies in general. Importantly, the logic of rule of exhaustion of domestic remedies is to give the State Parties an opportunity to examine and remedy the alleged violations of the Convention rights in order to

---

[50] I have adopted this classification of the principle subsidiarity as procedural, substantive and remedial from Professor Samantha Besson. To see it, Besson, "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?" pp. 78-83.

[51] See Articles 34 and 35 of the ECHR <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 4 July 2019. To note, I have not considered inter-state cases brought under Article 33.

[52] To note, I have presented a general overview of the rule of exhaustion of domestic remedies in this section, rather than an exhaustive examination of the rule. As it constitutes a major aspect of the thesis, it is in detail discussed in the chapter 4 where I focus on the ability of Turkish domestic remedies in providing an effective remedy.

strengthen their domestic democracies, considering that the primary responsibility lies on the State Parties to secure the Convention rights by virtue of Article 1 thereof. Thus, being obliged of seeking remedy before national authorities in principle, complainants are constantly encouraged at the outset by the Court to exhaust domestic remedies in order to give the State in question an opportunity to put right the complained situation.

The Court however stressed that "The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection"[53]. Applicants are therefore not expected to follow the rule in the absence of effective remedies as a matter of principle. In this regard, the Court has emphasized "the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism" [54]. Nevertheless, the Strasbourg court has frequently stressed that the mere doubts on the part of applicants as to the success of a particular remedy do not absolve them from exhausting it.[55] In other words, the Court has not interpreted and applied the rule of exhaustion of domestic remedies in an automatic or absolute fashion on many occasion. For this reason, the exhaustion of domestic remedies rules in the presence of available and effective domestic remedies.[56]

In this connection, the Court highlighted that "The existence of such remedies must be sufficiently certain not only in theory but also in practice"[57], and ruled that there is "no obligation to have recourse to remedies which are inadequate or ineffective" [58]. By extension, this interpretation inevitably requires an examination as to the effectiveness of domestic remedies. In this examination, the capacity of domestic remedies to redress alleged violations is taken into account basically. By doing so, the Court must regard the particular circumstances of each individual case, including the general legal and political context in which domestic remedies in question operate as well as the personal circumstances

---

[53] *Vuckovic and Others v. Serbia* (preliminary objections) [GC], no. 17153/11, § 69, 25 March 2014. See also *Akdivar and Others v. Turkey*, 16 September 1996, § 65, Reports of Judgments and Decisions 1996-IV.
[54] *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 87, 9 July 2015. See also *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13.
[55] See *MPP Golub v. Ukraine* (dec.), no. 6778/05, ECHR 2005-XI; *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002.
[56] See *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009.
[57] *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts). See also *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II.
[58] *Aksoy v. Turkey*, 18 December 1996, § 52, Reports of Judgments and Decisions 1996-VI; *Selmouni v. France* [GC], no. 25803/94, § 72, ECHR 1999-V.

of the applicant.[59] In addition to this, it entails that the Court "must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies" [60].

In line with this, depending on the context, the different policies regarding the application of exhaustion of domestic remedies could judiciously be adopted by the Court. However, the practical application of exhaustion of domestic remedies unavoidably brings the following questions into existence: What is everything that could reasonably be expected? When can it be legitimately said that the Court has appropriately applied the rule? To what extent must the Court have taken into account the legal and political context in member states while assessing the application of the rule? That being said, Paul Harvey, a former lawyer in the Registry of the ECtHR, has provided five categories of cases regarding domestic remedies in order for the Court to decide whether domestic remedies are effective.[61] These categories range from cases where domestic remedies are completely absent to cases where domestic courts have properly applied the Court's case law. Notably, he has emphasized that the Court should concentrate on cases where there is *prima facie* evidence that domestic remedies are a sham, or the bad faith of national authorities is obvious in order to enhance its efficacy.[62] In such cases where there exists the strengthening of the executive branch and the weakening of judicial independence, the existence of domestic remedies is maintained, yet, in reality, they are rendered illusory through various means: such as protracted procedure, bad faith, lack of independence and impartiality, hindrance and so on.[63] Ultimately, he has warned that "it should be never forgotten that the Court's original *raison d'être* was to act as an early warning system against any slide towards authoritarianism in the Contracting States"[64].

2.2.2. Substantive Subsidiarity

Substantive Subsidiarity regards the content of the review of the Court, and it is prominently discussed under the fourth-instance doctrine and margin of appreciation, which are the approaches taken by the

---

[59] See *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 119, ECHR 2015; *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 117-19, ECHR 2015.
[60] *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-IV.
[61] P. Harvey, "The Principle of Subsidiarity: A More Positive Approach" , Human Rights Law Journal, Volume 36, No 7-12, 30 December 2016, pp 335-39.
[62] Ibid.
[63] Ibid.
[64] Ibid.

Court in relation to the principle of "judicial self-restraint".[65] The ECtHR's duty to review alleged human rights violations arises once the procedural conditions are fulfilled by applicants. During this review, in line with the fourth-instance doctrine, the Court avoids reconsidering facts and national law in question, which is assessed and considered correctly and adequately by domestic authorities, unless it amounts to a breach of the Convention. It could correspondingly be said that the application of the fourth-instance doctrine is limited with the doctrine that rights must be effective, and thus it is not absolute. In this regard, the Court can exercise its power to review substantively the allegation of the violation of the Convention rights when the decisions of domestic authorities are clearly arbitrary, flawed or manifestly ill-founded.

Further, the margin of appreciation is an eminent derivation of substantive subsidiarity as they are consistently discussed together. In border-line cases where the possibility of different and justified interpretations is acknowledged, the State Parties enjoy a margin of appreciation in regulating their own domestic laws and policies and introducing a restriction to the Convention rights. Meanwhile, as Robert Spano, a judge at the Court, stated in his article, the Court closely examines whether national authorities have "openly and in good faith engaged in the balancing of conflicting interests" [66]. If the answer is affirmative, the Court will then defer to the judgments of national authorities and restraint to substitute its view on cases. While, this deference or self-restraint is not limitless, however, the case-law of the Court does not enable one to accurately capture the boundaries of the margin of appreciation. One can thereby note that the usage of the margin of appreciation varies diversely, depending on domestic contexts.

Notably, in general, border-line cases concern the articles 8-11 of the Convention, that is, qualified rights which have a more personal sphere than absolute rights in general, for example abortion, parental rights, the freedom of religion, the protection of reputation and so on. During its examination of border-line cases, the Court considers whether there is a European consensus on the issue, and due to its nature, it is considerably rare to find a consensus because of the widespread disagreement among societies. In this sense, the Court tends to be cautious and recognize a wider margin of appreciation for national authorities while they are acting in these intertwined domains. Importantly, the width of the margin of appreciation in restricting rights may also differ within qualified rights. State parties have a

[65] See, for example, E. Bates, "Activism and self-restraint: the margin of appreciation's Strasbourg career… its 'coming of age'?", Human Rights law Journal, Volume 36, No. 7-12, 30 December 2016, pp. 261-76.
[66] R. Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" ,Human Rights Law Review, 2018, 18, p. 489.

lesser margin of appreciation with respect to political speech than commercial speech due to the nature of these speeches. In contrast to qualified rights, State Parties do not have any margin of appreciation in interpreting cases pertaining to core and absolute rights such as the right to life and the prohibition of torture, since the case-law of the Court for those rights is very clear and is not open to any discussion.

2.2.3. Remedial Subsidiarity

In cases where a breach of the Convention is established, the ECtHR does not specify any means as to how a violation shall be redressed in the course of the execution of its final judgments. Because remedial subsidiarity provides judicial discretion to the States Parties in determining the appropriate means in order to remedy the damage suffered by applicants . It is nevertheless known that in recent years the Court has been struggling for the enforcement of its judgments by a number of states such as Russia and Azerbaijan, due to mostly political reasons. Following this, the Court has occasionally begun specifying both individual and general remedial measures in its judgments and monitor the execution of judgments through a second application concerning the same case in order to promote the implementation of its judgments which has visibly been under threat.

Notably, the State Parties must abide by the final judgment of the Court pursuant to Article 46 of the ECHR as a result of the recognition of the Court's competence.[67] To that extent, the State Parties have an obligation to remedy a violation found by the ECtHR by taking general or individual measures. This obligation is three-fold. Firstly, if the violation continues, national authorities are required to cease it. For example, in the event of a judgment considering the pre-trial detention of an applicant as arbitrary or manifestly ill-founded, the applicant's pre-trial detention must be put to an end. Secondly, they are obliged to prevent further violations by any means appropriate, which means to avoid acting in any way which may cause further violations. Lastly, to remedy the consequences of a violation requires also the applicant's conditions to be restored to the extent possible which would have existed if the act had not been committed as the Court stressed in the case of Papamichalopoulos v. Greece.[68] Otherwise, the other means of satisfaction should be sought to be applied in order to remedy the violation of the Convention rights and freedoms.

---

[67] See Article 46 of the ECHR: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."
[68] See *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B.

2.3. Highlight

To encapsulate, a descriptive survey of the concept of subsidiarity conducted above reveals that the principle of subsidiarity simply pertains to the intervention of the Court irrespective of its sorts. The survey further reveals that since the protection of democracy and human rights are the utmost factors constituting both limitation on and justification of the intervention of the Court, they should set a benchmark for the assessment of the Court's intervention. Interestingly, the majority of discussions have focused on the negative aspect of the Court's intervention[69], namely when not to intervene, by urging the Court to adopt a more "hands-off" attitude.[70] However, if the principle of subsidiarity is to allocate power to the Court, when to intervene should be identified as well as when not to intervene. By extension, "in the Convention legal order, putting the principle of subsidiarity fully into practice requires the Strasbourg judge -who sits at the highest level of that order- to know not just when not to intervene, but when to intervene"[71] as well. To know both correspondingly requires the Court to develop a good-bad faith jurisprudence against the member states.

3. The European Court of Human Rights in the "Age of Subsidiarity"

In this chapter, the emergence of the principle of subsidiarity within the Convention mechanism is presented in the light of the main difficulties the Court has facing. In doing so, its inevitable outcome, that is, good and bad faith jurisprudence, is discussed respectively in order to ascertain the practical application of the principle of subsidiarity.[72] Additionally, the discrepancy between the current and traditional understanding of the Convention mechanism is mentioned with the aim of introducing an overview of the issue. Notably, the possible pros and cons of increased usage of the principle of subsidiarity on the Convention protection system is not debated, since it would go beyond the main research object of this thesis.

3.1. A greater subsidiarity comes into the existence as a solution to the Court's crises: A (large) portion of the cake to national authorities "who act in good faith"

Delivering numerous binding judgments on the States concerned, the ECtHR has been a fundamentally key factor over the years within the European human rights mechanism as the ultimate and

---

[69] See, for example, supra note 65.
[70] Harvey, "The Principle of Subsidiarity: A More Positive Approach", p. 335.
[71] Ibid.
[72] I have heavily drawn on B. Çalı-Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights-, for this discussion.

authoritative interpreter of human rights in the forty-seven member states of the Council of Europe covering more than 820 million people. Because of the Court's understanding of the ECHR as a "living instrument" and the evolution of its case-law in promoting and protecting human rights over the continent, the Convention system and thereby the Court has received remarkable support by many actors. In line with this success, the Court became a permanent institution in 1998. Further, the scope of the Convention rights was enlarged through the adaptation of supplementary protocols to the Convention as well as the jurisprudence of the Court. Due to the massive expansion of the Council of Europe into Eastern, Central Europe and the Caucasus after the dissolution of the former Soviet Union and Federal Republic of Yugoslavia, the Court now deals with a great variety and number of applications.

Although it can easily be argued that the Convention mechanism is the most effective human rights system in regards to safeguarding rights -mainly civil and political rights of individuals- it has undergone serious crises. This has been expressed by many through the cliché statement that the Court is a victim of its own success. In this regard, the significantly increasing caseload of the Court has begun one of its primary concerns after the beginning of the extension of its jurisprudence. Following this, the changes regarding the working procedure of the Court were introduced to improve its efficiency in order to provide solutions to this issue. Moreover, the pilot judgment procedure aimed at dealing speedily and effectively with repetitive cases arising from systemic flaws in the national law and practice was launched. Similarly, the establishment of single judge was initiated, and the power of a committee of three judges was expanded by the Protocol No. 14 in addition to the introduction of a rather controversial concept of significant disadvantage as a new admissibility condition for victims. To note, even though this new admissibility criterion is being used by the Court on a limited scale, it entails a great risk to the underlying principle of the human rights mechanism, that is, the indivisibility and interdependence of human rights, as it may lead to the distinction between rights. In spite of these amendments, the number of pending cases before the Court has nonetheless continued, and still continues to grow constantly as noted by the high-level conference of Interlaken on the future of the ECtHR as well as its follow-up conferences in Izmir and Brighton.[73]

---

[73] See Interlaken Declaration, adopted at the close of the high-level conference, 19 February 2010, p. 1, <www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 26 June 2019; Izmir Declaration, adopted at the close of the high-level conference, 27 April 2011, § 7, p. 1, <www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> accessed 26 June 2019; Brighton Declaration, adopted at the close of the high-level conference, 20 April 2012, § 6, p. 1. <www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 26 June 2019.

In addition to its docket crisis, the Court has faced a serious challenge, which is directly targeted at its central and authoritative role in interpreting human rights from one of the well-established democracies among the Member States, namely the United Kingdom, following its two particular judgments, which have also resulted in an upsurge in its caseload. The first one is the case of *Abu Qatada* concerning the deportation of the individuals who may pose a risk to national security. [74] In response to the serious terrorist attack on 7 July 2005 in London, the UK Government has stated to take anti-terror measures, including a policy to extradite individuals who may endanger national security. The Court's reaction was negative in respect to the receiving countries where it saw hazards of torture and inhumane treatments and unfair trials in the name of those people. The second case is the case of *Hirst* pertaining to the ban on the prisoners' right to vote in the UK. In its judgment, the Court ruled that the blanket ban was incompatible with the Convention. [75]

Demonstrating the UK's grave discontent regarding the Court, and thus signaling its intention that the UK may no longer be the part of the Convention system[76], these two judgments have drawn serious reactions from politicians and the UK Parliament as well as the senior members of the UK's judiciary.[77] They have severely criticized the Court owing to the sentiment that it was expanding the scope of the interpretation of the Convention rights, thereby overstepping its authority. In other words, the Court's intervention in these cases was seen as illegitimate. This view is reflected by Lord Hoffman, a member of the House of Lords, as "it cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge saying of a decision of the German Constitutional Court" [78].

In this sense, the Court was condemned because it had not respected the internal domestic process and national sovereignty of the State Parties, calling forth the claim that it is lacking legitimacy. It is nonetheless crucial to be aware of the ground that the Court has built its legitimacy on. For that reason, the historical role of the Court in promoting and protecting human rights is in need of a recall. By understanding the convention as a living instrument, instead of a static one, and adopting the doctrine that rights must be effective, the Court has played a significant role in the advancement of human rights

---

[74] See *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012 (extracts).
[75] See *Hirst v. the United Kingdom* (no. 2), no. 74025/01, 30 March 2004.
[76] Nicholas Watt and Rowena Mason, "Cameron 'committed to breaking link with European court of human rights", *The Guardian*, 1 June 2015 <www.theguardian.com/law/2015/jun/01/david-cameron-european-court-of-human-rights> accessed 10 July 2019.
[77] See, for example, "Concept of human rights being distorted, warns Cameron", *BBC*, 25 January 2012 <www.bbc.com/news/uk-politics-16708845> accessed 10 July 2019. See also supra note 78
[78] L. Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, (2009), p. 22.

in Europe during its mandate. In doing so, it has built up its legitimacy among civil society independently from the Contracting States.[79] Arguably, linking the Court's legitimacy only with the Contracting States would therefore be misleading due to the fact that it ignores the moral capital attracted by the Court over the years.

From the point of the UK's leading criticism, the Court is no longer seen as the ultimate power in interpreting human rights. Questioning this authoritative power of the Court, the State Parties led by the UK began demanding to share the interpretive work regarding the scope, and restrictions, of the Convention rights, and thereby the Court's central role within the Convention mechanism.[80] In other words, the State Parties call for a more inclusive place in the interpretation of the ECHR as parties.[81] To elaborate further, in the past, there was one true interpretation of a case in principle, which is made by the Court, the highest authority in the human rights domain over the continent. However, the criticism has postulated the possibility of more than one right adjudication.[82]

Notably, another rising challenge for the Court is the non-implementation of its judgments. Without doubt, it undermines the credibility and effectiveness of the Court as the Convention system depends entirely upon the prompt and effective implementation of judgments of the Court. In the recent years, there have been a considerable increase in the number of states which argue that they do not need to comply with all judgments of the Court despite Article 46 of the ECHR. In addition to this direct attack on the Court's authority, the challenge is encountered in the form of the prolonged implementation of judgments as well. In this respect, the average time taken for the full execution of a leading case revealing the complex problems or structural flaws on domestic law has increased from 3.5 years in 2013 to 5.3 years in 2017.[83]

To provide more indications of the non-implementation crisis, Russia has adopted a law allowing the Russian Constitutional Court to declare some judgments of the Strasbourg Court unconstitutional and

---

[79] See D. T. Björgvinsson, "The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual", iCourts Working Paper Series, No. 23, 2015, p. 12.
[80] B. Çalı, "Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights", Wisconsin International Law Journal, Vol. 35, No. 2, 2018, pp. 26-35.
[81] Ibid.
[82] B. Çalı, "From flexible to variable standards of judicial review: the responsible domestic courts doctrine at the European Court of Human Rights", Shifting Centres of Gravity in Human Rights Protection, Rethinking Relations between the ECHR, EU, and National Legal Orders, p.153.
[83] See the European Implementation Network, "EIN statement on the implementation of judgments of the European Court of Human Rights" (1 December 2018), <www.einnetwork.org/ein-handbooks> accessed 26 June 2019.

therefore impossible to implement.[84] Similarly, President Erdoğan indicated in his statement following the ECtHR's judgment concerning the case of Demirtaş mentioned above that "the decision delivered by the ECHR do not bind us" [85]. Moreover, this crisis has continued to such an extent that the new infringement procedure was invoked by the Committee of Ministers of the Council of Europe, which supervises the enforcement of the Court's judgment. In doing so, the Committee of Ministers referred to the Court a question as to whether Azerbaijan has failed to fulfill its obligation under article 46 to comply the Court's 2014 ruling in the case of opposition politician Ilgar Mammadov. On 29 May 2019, dealing with infringement proceedings for the first time, the Grand Chamber of the ECtHR held in this case that Azerbaijan had failed to comply with the Court's judgment.[86] In the light of all this, these challenges that are being directed towards the Court's authority significantly undermine the Convention system as a whole.

Provided the atmosphere the Court has been dealing with in recent years, under the circumstances constituted by these crises, the high-level conferences mentioned above were conducted respectively in 2010, 2011 and 2012 in pursuit of a reform on the Convention system to improve the Court's capacity in order to address the matters it has been facing and secure the future of the ECtHR. One emphasis put forward during these conferences was on the improvement of national implementation of the Convention and enhancement of the capacity of the Court in responding to serious or widespread violations and its systemic and structural problems. In other words, one indication of these conferences is that the Member States have considered a strict application of the principle of subsidiarity and a wider margin of appreciation to State Parties as a solution to the Court's caseload issue and its legitimization criticism provoked by mainly the UK.

To that extent, the Interlaken Declaration adopted in the conference "calls for a strengthening of the principle of subsidiarity"[87], and the Action Plan embraced thereof invites the Court to "apply uniformly and rigorously the criteria concerning admissibility and jurisdiction and take fully into account its subsidiary role in the interpretation and application of the Convention" [88]. Further, the Izmir conference

---

[84] See N. Muižnieks, "Non-implementation of the Court's judgments: our shared responsibility" (Human rights comment, 23 August 2016) <www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility> accessed 26 June 2019.
[85] "Erdoğan rejects European court's 'non-binding' decision over Demirtaş" *Hürriyet Daily News* (Strasbourg, 20 November 2018) <www.hurriyetdailynews.com/european-court-urges-turkey-to-free-demirtas-139022> accessed 26 June 2019.
[86] *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019.
[87] Interlaken Declaration, 19 February 2010, p. 2, <www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 26 June 2019.
[88] Ibid at 5.

expressed the view that "the admissibility criteria are an essential tool in managing the Court's caseload and in giving practical effect to the principle of subsidiarity"[89], and it was highlighted in the Brighton Declaration that "the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions" [90]. With this in mind, according to Professor Başak Çalı, this new emphasize on the principle of subsidiarity and margin of appreciation "was a call to the Court to let go of its claim to be the sole interpreter of the Convention and to recognize the domestic authorities as co-interpreters of the Convention rights"[91], and their insertion to the preamble indicates "a demand for deferential direction to good faith domestic interpreters in the jurisprudence of the Court" [92].

Correspondingly, in line with the Brighton Declaration, the Protocol No. 15 was later adapted by the Parliamentary Assembly of the Council of Europe following the Brighton Conference. Despite its long existence within the case-law of the Court[93], subsidiarity principle will therefore be embedded into the preamble of the Convention together with the margin of appreciation as Protocol 15 comes into force.[94] Moreover, it is crucial to indicate that by the time Protocol No. 15 is enacted, the time limit for the application to the Court will be reduced from 6 to 4 months, and applicants will be required to be a "concrete and individual victim" rather than just "person, non-governmental organization or group of individuals claiming to be the victim". These amendments narrowing the scope of the understanding of 'victim' and the time limit for applications will regrettably result in difficulties accessing the Court. Moreover, these amendments are worrying as they reveal that the effort to enhance the capacity of the Court to address widespread and systematic matters is to make the accession to the Court increasingly difficult, taking into account this alteration in the light of the principle of subsidiarity, the recently introduced concept of significant disadvantage, and the conferences mentioned above.

---

[89] Izmir Declaration, 27 April 2011, § 4, p. 2, <www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> accessed 26 June 2019.
[90] Brighton Declaration, 20 April 2012, § 11, p 3, <www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 26 June 2019.
[91] Çalı, "Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights", p. 17.
[92] Ibid.
[93] See Case "*relating to certain aspects of the laws on the use of languages in education in Belgium*" (merits), 23 July 1968, § 10, Series A no. 6; *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.
[94] See Article 1 of the Protocol no. 15 of the ECHR: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

Interestingly, in parallel with these amendments, Judge Spano also indicated in his article, which can be deemed as a response to Lord Hoffman, that a new phase has been entered in the Convention system, a phase that can be identified as the "age of subsidiarity" [95]. By extension, it causes the emergence of the question as to whether there is a shift in the human rights protection system provided by the Convention. According to the contribution of the Court to the Brussel Conference, the principle of subsidiarity corresponding to one of the basic principles of this reform process does not mean shifting responsibility for the protection of human rights, instead, it is about sharing that responsibility.[96] However, the outcome of this alteration that were defined harmlessly as sharing the responsibility of the protection of human rights reveals that an excessive, formalistic usage of the principle of subsidiarity provides an unjust conclusion for individuals in illiberal democracies which seldom respect the rule of law. That is, the deprivation of the Convention safeguards against the interference of the State Parties to their most fundamental rights, and thus renders the Convention mechanism highly inoperative therein. Because the Court would not address the matter in a reasonable time when an extremist view on the principle of subsidiarity is adopted. Moreover, the destiny of individuals would rest with the State Parties in such circumstances. This undeniably goes against the foundation purpose of the Court and endangers the protection of human rights as it provides an unreasonable space to State Parties within the protection system.

With this in mind, although the indication of judge Spano points to emerging developments, rather than initiating a novel discussion, it has caught the attention of many, and the principle of subsidiarity has become one of the prominent topics of academic discussions concerning the Convention system in recent years.[97] In parallel with the new popularity of subsidiarity within academic circles, there is also a notable rise in the number of judgments and decisions referencing the principle of subsidiarity as

---

[95] See R. Spano, "Universality or Diversity of Human Rights?†: Strasbourg in the Age of Subsidiarity", Human Rights Law Review, Volume 14, Issue 3, September 2014.
[96] See "Contribution of the Court to the Brussels Conference", 26 January 2015 p. 1. <www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf> accessed 26 June 2019.
[97] See, inter alia, N. O'Meara, "Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR", iCourts Working Paper Series, No. 31, 2015; M. R. Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?", iCourts Working Paper Series, No. 100, 2017; G. Butler, "A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights", Utrecht Journal of International and European Law 104, (2015) 31(81); S. Smet, "When Human Rights Clash in 'The Age of Subsidiarity': What Role for the Margin of Appreciation?" (November 25, 2015), Petr Agha (ed), Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts (Hart Publishing, 2017); M. Kanetake, "Subsidiarity in the Practice of International Courts", M. Kanetake and A. Nollkaemper (eds), The Rule of Law at the National and International Levels: Contestations and Deference (Hart Publishing, 2016).

Mowbray disclosed.[98] It is rather surprising that respondent States have not been contributing to this increase as one may expect because of their strong commitment to the principle in the above mentioned conferences. [99] On the contrary, the Court itself gave rise to it, which demonstrates that the Court does not operate its mandate without considering the political atmosphere surrounding itself. Naturally, after facing this great challenge risen by one of the well-established and rooted democracies among the Contracting Parties, it would have hardly been surprising for the Court to ignore or circumvent the challenge.

To comply with the new developments, the Court has thus developed a new attitude when its national audiences demand a voice in interpreting human rights, which would differ the Court's historical standing within the Convention system, in order to appease the critics and regain the support of the State Parties which have directed their harsh critics to the Court. To identify this historical approach, the Court used one voice to the State parties in formulating the general principles of the Convention. Further, it has established uniform standards which would have *erga ommes* effect across the Convention system in spite of the possible enjoyment of margin of appreciation by the State Parties. Nevertheless, in cases where the State Parties enjoy a wider margin of appreciation during the absence of a European consensus, the Court could no longer insist on its historical position, taken into account the increasing concerns over subsidiarity. In this context, the Court has begun to acknowledge the possibility of different interpretations of cases. In other words, the Court has refrained from developing any standard or approach having *erga ommes* effect over the Continent by granting approval to the diverse interpretations held by domestic courts.[100]

To that extent, the Court has begun to attach special importance to the resolution of disputes on the domestic level. In line with this, the Court may defer to the findings of the national authorities engaging with the Convention in good faith. Interestingly, the deference to national authorities in the operation of margin of appreciation and good faith approach differs in terms of ground. In the former, the deference is deferred because of the Convention right itself, whereas the deference in the latter is based on the quality of domestic decision makers, which can be national parliaments as well as domestic courts.[101] In principle basing the deference on the quality of domestic authorities thus requires

---

[98] See A. Mowbray, "Subsidiarity and the European Convention on Human Rights", Human Rights Law Review, Volume 15, Issue 2, June 2015, p. 337.
[99] Ibid. at 338.
[100] Çalı, "Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights", pp 25-26.
[101] Ibid.

an assessment of whether this quality is in line with the Convention standards. In this respect, since the underlying rationale of the principle of subsidiarity regardless of its kind is to consolidate the domestic democracies within the State Parties, unqualified domestic authorities should not deserve the Court's deference. As a result of this, applicants should not be reasonably expected to exhaust such domestic remedies.

In sum, the UK-leading challenge has resulted in a strong emphasis of the principle of subsidiarity within the Convention mechanism. That is to say, authorities who are deemed to act in good faith request the Court to adopt a more pacifist approach. However, it does not mean that authorities who do not respect the basic principles of the Convention can enjoy from this pacifist stance, otherwise, the raison d'être of the Court would disappear. In this light of this, the judges of the ECtHR are obliged to evaluate the intention of the respondent states in order to be able to determine when to intervene, which would bring about a significant change to the Convention legal order. As a result, deeming an authority as one with good faith compels the Court develop a bad faith jurisprudence.

*3.2.*Identifying bad faith through Article 18

As the Convention mechanism is based on the State Parties' commitments to respecting and strengthening human rights, in principle the Court refused to reverse the presumption of good faith, which assumes that all States share a common goal of reinforcing human rights and the rule of law. Undoubtedly, the relatively smaller jurisprudence of the Court in the past contributed to the adoption of this monolithic attitude by the Court towards its national audiences, and the Court could thus operate in an effective manner by assuming that all states were acting in accordance with the presumption of good faith. In line with this good faith policy, the (former) European Commission on Human Rights and the ECtHR interpreted Article 18 in a highly limited manner and laid down rather high thresholds on the applicants to prove bad faith of the State Parties. In other words, the Court was cautious and timid in identifying bad faith attitude and thereby in finding a violation of Article 18 despite the *travaux preparatoires* of the Convention in which it can be recognized that Article 18 was consciously inserted into the Convention by the drafters of the Convention in order to protect the rule of law within the member states.[102]

"[d]emocracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control… It is necessary to

[102] See Article 18 of the ECHR: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation, menaced by this progressive corruption, to war[n] them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau."[103]

As understood from this statement, the experience of the Second World War brought out the importance of the protection of the rule of law and democracy in the drafters' mind. Against this background, the drafters committed themselves to embedding Article 18 into the Convention, which functions as an "alarm" and "warning" for the rule of law backsliding in cases where European States are on the road to becoming illiberal democracies or even totalitarian regimes attempting to overthrow the rule of law and install a repressive government. [104] Notably, the drafters were logically aware that the resurgence of totalitarian regimes do not necessarily have to come into existence by means of violence, as indicated in the statement of "what we must fear today is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means" [105].

Despite these historical emphases, the Court has been rather reluctant in shifting its monolithic attitude towards the State Parties until the involvement of new states from the east and central Europe to the Convention system has necessitated a change in it. To explain in detail, with the significant expansion of its jurisprudence, the Court now deals with cases from well-respected, long running democracies[106] such as the United Kingdom, on the one hand, and countries which are being in the process of democratization, or are in the reverse wave of de-democratization, and oftentimes show disrespect for the Convention values, on the other. Importantly, this diversity of the State Parties has obliged the Court to make a distinction in its relationship with them. In addition to its good faith jurisprudence, the Court has therefore developed a bad faith jurisprudence through the lens of Article 18 of the ECHR towards national authorities since the mid-2000s in spite of its historically narrow reading of the article. In other words, the remarkable increase on the misuse of the State Parties while restricting the Convention rights and freedoms on the grounds not prescribed by the Convention and the significant collapse of the rule of law in a number of states led the Court to change its traditional interpretation of

---

[103] French representative Pierre-Henri Teitgen in a speech for the Consultative Assembly in 1949, in Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the ECHR*, Vol. I. (1975), 266, 292 [TP of the ECHR, Vol. I], cited in See F. Tan, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?", Göttingen Journal of International Law, Volume 9, Issue 1, p. 115.
[104] See Tan, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?", pp. 115-121.
[105] L. Benvenuti, in Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the ECHR, Vol. II.* (1975), 136, cited in Tan, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?", p.115.
[106] To note, I have here used democracy in its widely accepted meaning within the liberal doctrine.

Article 18. By doing so, the Court has identified the bad faith of the State Parties with the aim of addressing the matter in order to protect and promote human rights and the rule of law.

Having provided the background, Article 18 does not have an autonomous function in a way similar to Article 14, since the European Commission held in the case of *Kamma v. the Netherlands* while identifying the scope of Article 18 that it can only be applied in conjunction with other articles of the Convention.[107] Yet, it does not necessarily mean that a violation cannot be based upon only Article 18.[108] Further, other articles raised with Article 18 must have a scope enabling for restrictions to be imposed on them.[109] That is to say, a violation of Article 18 can only arise when the Convention right or freedom interfered is subject to restrictions.[110] As a result, the Court has thus far been of the opinion that the invocation of Article 18 in conjunction with absolute rights is incompatible with the Convention *ratione materiae*.[111] Even so, as a matter of fact, the Court has found a violation of Article 18 in conjunction with only Article 5 until now even though it was invoked many times with other substantive provisions of the Convention.[112]

Notably, the restriction for a purpose not prescribed by the Convention constitutes the fundamental aspect of the breach of Article 18, since the article bans improper purposes in restricting rights and freedoms. During its examination of the alleged violations of Article 18, the Court would thus establish whether national authorities pursued an illegitimate purpose while placing restrictions on applicants. Accordingly, it is likely possible to notice cases where a restriction followed both a purpose prescribed by the Convention and an ulterior one which is not defined by the relevant provision and which is different from the one proclaimed by the authorities.[113] In such circumstances, the Court would ascertain which purpose was predominant.[114] Where the Court rules that state authorities acted within the frame of an ulterior purpose and/or that ulterior purpose was the prevailing one, good faith assumption on national authorities can no longer be present. To indicate, the Court highlighted,

---

[107] *Kamma v. the Netherlands*, no. 4771/71, Commission's report of 14 July 1974, p. 9.
[108] See, for example, *Cebotari v. Moldova*, no. 35615/06, § 49, 13 November 2007.
[109] See, for example, *Gusinskiy v. Russia*, no. 70276/01, § 73, ECHR 2004-IV; *Mammadli v. Azerbaijan*, no. 47145/14, § 93, 19 April 2018.
[110] See, for example, *Rashad Hasanov and Others v. Azerbaijan*, no. 48653/13, § 116, 7 June 2018.
[111] See, for example, *Timurtaş v. Turkey*, no. 23531/94, § 329, ECHR 2000-VI.
[112] See, for Article 10 of the Convention, *Şener v. Turkey*, no. 26680/95, § 59-62, 18 July 2000; See for Article 8 of the Convention, *Gillow v. the United Kingdom*, 24 November 1986, § 54, Series A no. 109; See for Article 1 of Protocol No. 1 of the Convention, *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 663-666, 20 September 2011.
[113] See, for example, *Merabishvili v. Georgia* [GC], no. 72508/13, § 292, 28 November 2017,
[114] Ibid. § 305.

however, that the notion of "ulterior purpose" and "bad faith" are not necessarily equivalent although they are related to some extent.[115]

Importantly, a variation in the burden of proof on applicants in showing bad faith of the State Parties, which was a cumbersome effort for them due to the high thresholds imposed by the Court, has taken place in accordance with the emergence of the Court's bad faith jurisprudence. In this respect, the Court has paid attention to the contextual evidence revealing circumstances within the country in question while examining the allegation of the violation of Article 18 in some cases so as to shed light on the facts. For example, in the case of Rasul Jafarov v. Azerbaijan concerning the arrest and detention of a well-known human rights defender, the Court took into account the general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding.[116] Likewise, the Court considered numerous statements by high-ranking officials in the pro-government media which had indicated local NGOs and their leaders, including Mr. Jafarov, as fifth column for foreign interests, and the similar practices of detention and accusations towards other notable human rights defenders in the country.[117]

Additionally, in its judgment in the case of *Merabishvili v. Georgia* pertaining to the pre-trial detention of the former prime minister of Georgia, the Chamber of the Court held that the domestic courts are under an obligation to justify the deprivation of liberty by demonstrating the legitimate purposes of the state authorities.[118] That is to say, the burden of proof for disproving the accusation of illegitimate purposes of government authorities may rest on respondent states, if the circumstances surrounding the case require so. Moreover, in the same case, the Grand Chamber of the Court ruled that there is "no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations".[119] By doing so, the Grand Chamber has lowered the burden of proof concerning bad faith violations into the standard one, and hence it has given new flexibility to the application of Article 18. Nevertheless, although it has extended its interpretation of the article, one can argue that the full potential of Article 18 is still not being achieved by the Court.

---

[115] Ibid. § 283.
[116] *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 158-163, 17 March 2016.
[117] Ibid.
[118] *Merabishvili v. Georgia*, no. 72508/13, § 83, 14 June 2016.
[119] *Merabishvili v. Georgia* [GC], no. 72508/13, § 316, 28 November 2017.

To elaborate further, Article 18 has great potential where the State Parties deliberately disregard the core principles of democracy and the rule of law. The safeguards provided by the Convention are systematically deprived for the beneficiaries of the Convention by states' acts, and citizens' rights are interfered with an aim to eliminate governments' political opponents and preserve their power. Under these circumstances, one cannot hold that the State Parties' presupposed commitments to respecting and strengthening human rights as well as rule of law still stands. In this regard, it is of crucial importance to identify and condemn such practices of states, since it threatens and undermines the whole Convention system. However, it does not suffice to find an ordinary violation of the Convention rights, in addition, the Court should build its judgment on the infringement of Article 18 in order to address such systemic flaws, such as when authorities consistently suppress opponents by initiating criminal investigations to destroy them or when law enforcement officers persistently invoke practices falling the scope of Article 3. In that case, the State Parties' usual claim that the incident at stake is an isolated event or that it occurs by accident, can easily be contradicted. To be able to do so, the Court needs to determine whether the intentional misuse of state power has taken place, and it requires an assessment of state's policies and practices. This assessment cannot be carried out by presupposing that authorities act in good faith. This new interpretation thus differs from the traditional understanding of the Convention.

Accordingly, three major reasons can explain why the full potential of Article 18 could not be realized. First, despite the recent and slight expansion of the application of Article 18, the Court has not found any violation of Article 18 in conjunction with other substantive provisions yet, except Article 5, which means that the practical application of the provision covers only the deprivation of liberty for the time of being. Moreover, in principle the Court has confined the application of Article 18 to only relative rights by precluding absolute rights. Even though the wording of Article 18 and the fact that absolute rights by definition cannot be restricted seem in favor of the Court's confinement, it is hardly surprising that Article 18 can become relevant with absolute rights. For instance, it would be the case when a politically motivated violation takes place with respect to absolute rights. Secondly, since the Court has not yet developed a principle which properly elaborates on what amounts to bad faith, the application of the provision is still unpredictable. Lastly, despite the fact that the provision was meant for the drafters of the Convention to prevent the destruction of rule of law within the Council of Europe, the Article was rarely invoked, and the violations were found even more rarely by the Court. Accordingly,

considering the large-scale resurgence of undemocratic regimes over the continent, the number of the countries that the Court found a violation of Article 18 against still remains rather limited.[120]

As to Turkey, the Court has so far showed no interest in addressing the significant decay of rule of law in the country through Article 18, in particular the post-coup era.[121] Instead of taking into account the legal and factual context of the country and condemning the authorities' practices which are in contradiction with the Convention values, the Court has adopted an extremist view on the principle of subsidiarity and the exhaustion of domestic remedies during the examination of cases reflecting systemic malfunctions.[122] Applicants have been thus consistently steered to the domestic remedies by the Court.[123] This demonstrates that in the ECtHR's point of view, the Turkish courts and the SoE Commission deserve deference, and they are capable of providing fair and effective remedies. Recalling that what justifies and limits the principle of subsidiarity is to protect democracy, and that the original raison d'être of the Court to protect the rule of law in the member states, the question accordingly arises as to whether this attitude of the Court can be defensible. It is to question that I will now turn.

4. Application of the Rule of Exhaustion of Domestic Remedies in Turkey

This chapter seeks to reveal whether domestic remedies in Turkey can provide an effective remedy to individuals seeking it. By doing so, it first focuses on the SoE Commission tasked to examine and determine applications with respect to measures taken directly through the emergency decree laws issued under the state of emergency. Second, it examines the Constitutional Court which is the highest authority in the country for examining human rights violations under the domestic law.

---

[120] According to the HUDOC database of the ECtHR, these countries are Azerbaijan (5 times), Russia (3 times), Georgia (2 times), Ukraine (2 times), the Republic of Moldova (1 time) and Turkey (1 time), see <https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22JUDGMENTS%22],%22violation%22:[%2218%22]}> accessed on 28 June 2019. To note, the case regarding Turkey is before the Grand Chamber of the Court for the time of being, and thus it corresponds to an exception.

[121] I would reiterate that the case of *Demirtaş v. Turkey*, which is before the Grand Chamber for the time of being, constitutes an exception again, since the judgment is not final.

[122] For a similar policy of the ECtHR against Hungary, see D. A. Karsai, "Extremist view on subsidiarity and on exhaustion of domestic remedies? Criticism of the decision Szalontay v. Hungary", (Strasbourg Observers, 22 May 2019) <https://strasbourgobservers.com/2019/05/22/extremist-view-on-subsidiarity-and-on-exhaustion-of-domestic-remedies-criticism-of-the-decision-szalontay-v-hungary/> accessed 28 June 2019.

[123] See four particular cases: *Mercan v. Turkey* (dec), no. 56511/16, 8 November 2016; *Zihni v. Turkey* (dec), no. 59061/16, 29 November 2016; *Çatal v. Turkey* (dec), no. 2873/17, 7 March 2017; *Köksal v. Turkey* (dec), no. 70478/16, § 27 6 June 2017.

4.1. Can the Inquiry Commission on the State of Emergency Measures provide an effective remedy?

The SoE Commission was founded by the Emergency Decree Law No.685, dated on 23 January 2017.[124] This Emergency Decree Law which introduced the establishment, jurisdiction, operating principles, and procedures of the SoE Commission underwent amendments through several decrees[125], and later become permanent law through Law No. 7075[126]. The chair and members of the SoE Commission were appointed on 17 May 2017.[127] Subsequently, it became operational by receiving applications on 17 July 2017[128], which is approximately one year after the proclamation of the state of emergency, and it issued its first decision on 22 December 2017[129]. The power of the SoE Commission covers those dismissed from the public sector with lists annexed to emergency decree laws "on the ground of membership, affiliation, connection or contact with terrorist organizations, or structures/entities, or groups established by the National Security Council as engaging in activities against the national security of the State"[130].

As thousands of dismissed public servants sought a remedy in the Court due to the persistent absence of domestic remedies for their dismissals, the mass applications to the Court undoubtedly endangered the Convention mechanism. In this context, the different bodies of the Council of Europe proposed the creation of an independent *ad hoc* body for the individual examination of dismissals. [131] Accordingly, the Venice Commission indicated in its recommendation to the Turkish authorities:

---

[124] See the Emergency Decree Law No. 685, published in the Official Gazette on 23 January 2017 <www.resmigazete.gov.tr/eskiler/2017/01/20170123-4.htm> accessed 29 June 2019.
[125] See, for example, the Emergency Decree Law No. 690, published in the Official Gazette on 29 April 2017, Articles 52-57 <www.resmigazete.gov.tr/eskiler/2017/04/20170429-M1-2.htm> accessed 29 June 2019; the Emergency Decree Law No. 694, published in the Official Gazette on 25 August 2017, Articles 197-201 <www.resmigazete.gov.tr/eskiler/2017/08/20170825-13.pdf> accessed 29 June 2019.
[126] See the Law No. 7075, published in the Official Gazette on 8 March 2018 <www.mevzuat.gov.tr/MevzuatMetin/1.5.7075.pdf> accessed 29 June 2019.
[127] See "State of Emergency Chair, Members Become Clear", *BIA News Desk*, (Ankara, 17 May 2017), <http://bianet.org/english/politics/186559-state-of-emergency-chair-members-become-clear> accessed 29 June 2019.
[128] See "State of Emergency Commission to Start Duty on July 17, Says PM", *BIA News Desk*, (Istanbul, 14 July 2017 <http://bianet.org/english/politics/188283-state-of-emergency-commission-to-start-duty-on-july-17-says-pm> accessed 29 June 2019.
[129] See "Turkey's state of emergency commission makes first decisions on dismissed public sector staff" *Hurriyet Daily News* (Ankara, 22 December 2017) <www.hurriyetdailynews.com/turkeys-state-of-emergency-commission-makes-first-decisions-on-dismissed-public-sector-staff-124583> accessed 29 June 2019.
[130] Law No. 7075, Article 1.
[131] Venice Commission, "Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016", § 222. See also 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, 15 December 2016, para. 62-63 < http://website-pace.net/documents/18848/2197130/20161215-Apdoc18.pdf/35656836-5385-4f88-86bd-17dd5b8b9d8f> accessed 3 July 2019.

> "The essential purpose of that body would be to give individualised treatment to all cases. That 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."[132]

Following these developments, the Turkish authorities had to create the SoE Commission in order to prevent the flow to the ECtHR[133] and to provide a remedy to those people. The ECtHR thereupon declared in the case of Köksal v. Turkey that the SoE Commission represents one of the national remedies that the complainants must exhaust before bringing to the Court their alleged violations of the ECHR. Alas, the SoE Commission is a body which is at odds with the basic principles highlighted by the Venice Commission, as shown in the following sections.

4.1.1. The independence of the SoE Commission

The SoE Commission is composed of seven members.[134] Whereas five of them are appointed by the president, the Minister of Interior, the Minister of justice, two of them are nominated by the Council of Judges and Prosecutors (YSK), an entity considered as operating under strong government influence.[135] In principle, the members of the SoE Commission serve a period of two years. However, an initiation of judicial or administrative investigation due to the alleged "membership, affiliation, connection or links" to the proscribed groups constitutes a valid reason for members to be immediately dismissed.[136]

Importantly, the fact that the mere existence of an investigation can directly lead to the dismissal of those members would clearly influence the members' ability in taking objective decisions regarding the dismissals. 6994 public servants from the Ministry of Justice, 41,077 public servants from the Ministry of Interior, and over 4,500 judges and prosecutors were thus far dismissed.[137] This demonstrates that the SoE Commission entrusted with examining the lawfulness of the emergency measures is formed by the same authority who implemented those measures. Undeniably, this calls into question the impartiality and independence of this ad hoc body. In sum, it is evident that the appointment and

---

[132] Ibid.
[133] See the ECtHR's statistics, p. 58 <www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf> accessed 10 July 2019.
[134] Law No. 7075, Article 1(2).
[135] See, for example, the European Commission, "Turkey 2018 Report (Staff Working Documents)", SWD (2018) 153 final, Strasbourg, 17 April 2018, p. 5 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf> accessed 1 July 2019.
[136] Law No. 7075, Article 4(e).
[137] See the activity report of the SoE Commission: <https://soe.tccb.gov.tr/Docs/OHAL_Report_2019.pdf> accessed 10 July 2019 p. 10.

dismissal procedures for the members of the SoE Commission do not provide for any guarantee to the members. Under these circumstances, the members of the SoE Commission would hardly operate in an independent manner. The decision-making process of the members is therefore rather flawed.

4.1.2. Protracted procedure

The Code of Administrative Procedures stipulates that an appeal to an administrative authority is deemed as rejected if it does not receive a response within 60 days of the application.[138] This refusal enables applicants to launch litigation before administrative courts, which can be escalated the Constitutional Court.[139] However, the SoE Commission is bound by neither this 60 day period nor any other deadline.[140] Dismissed public servants are therefore unable to foresee how long they have to await a response. After reviewing 109 decisions of the SoE Commission, Amnesty International disclosed that the waiting period for applicants varied between four and 10 months from the date of their application to the SoE Commission.[141] Yet, the minimum period an applicant had to wait since the dismissal was 7.5 months, whereas some applicants waited for as long as 21 months.[142] Moreover, there are still thousands of applicants who have not received a response from the SoE Commission.

Having said that, according to the statistics provided by the SoE Commission , as of 28 June 2019, 126,200 applications have been made to the SoE Commission.[143] The Commission had issued 77,900 decisions by this date. which is 61 percent of the total number of applications, and only 6,000 cases were ruled in favor of the applicant.[144] In this respect, the percentage of positive decisions among decided cases is roughly 7 percent.[145] This number is dramatically low, considering that the Commission had intended to prioritize the application of individuals who have been acquitted in parallel criminal investigations and prosecutions initiated against them.[146] In addition, the fact that the

---

[138] See the Code of Administrative Procedures, Law No. 2577, published in the Official Gazette on 20 January 1982, Article 10 <www.mevzuat.gov.tr/MevzuatMetin/1.5.2577.pdf> accessed 1 July 2019.
[139] Ibid.
[140] See the Law. No. 7075, Article 7(2).
[141] See AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" pp. 13-14.
[142] Ibid.
[143] See the SoE Commission, "Announcement on the decisions of the Inquiry Commission on State of Emergency Measures", 28 June 2019 < https://soe.tccb.gov.tr/> accessed 1 July 2019.
[144] Ibid.
[145] According to Altıparmak, the percentage of the decisions issued by the administrative courts in favor of applicants is one percent, See <https://www.youtube.com/watch?v=mhEJl-0p_Uo> accessed 7 July 2019.
[146] See Kemal Karadağ, "OHAL Komisyonu 17 bin başvuruyu karara bağladı", *Anadolu Agency* (Ankara, 18 May 2018) <www.aa.com.tr/tr/turkiye/ohal-komisyonu-17-bin-basvuruyu-karara-bagladi/1149677> accessed 1 July 2019.

SoE Commission's decision-making process started on 22 December 2017[147] demonstrates that 77,900 decisions were delivered by the SoE Commission within approximately a year and half. In other words, the SoE Commission ruled on nearly 1,000 cases each week. Given the fact that the SoE Commission is composed of seven members, it would not be speculative to indicate that the SoE Commission has delivered duplicated decisions, rather than individualized decisions.[148]

Accordingly, dismissed public servants whose applications were rejected by the SoE Commission can only appeal to one of the four mandated administrative courts in Ankara within the 60 days from the date of the rejection.[149] If rejected again, they can bring their case before the appropriate regional administrative courts with a further appeal to the Council of State. From the moment this procedure is exhausted, they apply to the Constitutional Court. Taking into account the high number of rejected cases, these mandated courts are most likely to be inundated with a large number of applications.[150] Undeniably, The finalization of these cases will take up a considerable amount of time and requires a large expenditure which is a significant obstacle for dismissed public servants. In this regard, after calculating the likely time of this appeal process, Kerem Altıparmak, a prominent human rights defender in Turkey, indicated that the exhaustion of domestic remedies, including the Constitutional Court, could last at least ten years for a dismissed person.[151] Considering the additional time that applicants would have to wait while their cases are before the ECtHR, the overall length of this process therefore raises serious concerns. In a nutshell, given the dismissed public servants' state of affairs[152], this undetermined and extended period of time blatantly has an adverse impact on their life.

---

[147] See the SoE Commission, "Announcement on the decisions of the Inquiry Commission on the State of Emergency Measures and the Applicant Tracking System [Translation]", 19 January 2018 <https://ohalkomisyonu.tccb.gov.tr/duyurular> accessed 4 July 2019. ; See also "OHAL Komisyonu ilk kararını verdi", *BİA Haber Merkezi* (Ankara, 22 December 2017) <http://bianet.org/bianet/insan-haklari/192675-ohal-komisyonu-ilk-kararlarini-verdi> accessed 4 July 2019.

[148] Similarly, the European Commission held that "The rate of processing of applications raises concerns at whether each case is being examined individually". See, for it, the European Commission, "Turkey 2019 Report (Staff Working Documents)", SWD (2019) 220 final, Brussels, 29 May 2019, p. 10 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-turkey-report.pdf> accessed 8 July 2019.

[149] See the Law No. 7075. Article 11(1).

[150] AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" p. 15.

[151] Altıparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?" p. 4.

[152] AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" p. 5.

4.1.3. Inadequate due process

The provisions of the Prime Minister Circular preclude applicants from giving oral testimony, calling on witness and acquiring any information regarding allegations and evidence used against them both prior to and following their applications.[153] It also stipulates that the examination of cases shall be conducted through a paper review of their dossiers.[154] Since these regulations entirely eliminate the opportunity for dismissed public servants to defend themselves, they do not meet both basic standards recommended by the Venice Commission and established by the current domestic law. For example, Article 129 of the Law on Public Servants stipulates that any public servant who is subject to dismissal shall be entitled to examine investigation files, have witnesses heard and defend themselves personally or through legal representatives, orally or in writing.[155] Moreover, according to Article 130 of the law, a public servant cannot be imposed disciplinary sanctions without being given an opportunity to defend themselves.[156] Nonetheless, these safeguards are not provided to those dismissed.

Notably, as dismissals were collectively implemented through the lists appended to emergency decree laws on the ground of supposed ties to prescribed bodies, entities and groups, dismissed public servants were not provided any official and individual reason for their dismissals. They therefore had to appeal to the SoE Commission without knowing their dismissal reasons and any evidence used against them. This demonstrates that it is impossible for them to discern in which bodies, entities or groups they are allegedly involved, or which acts constitutes the links in question. Under these circumstances, "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 organizations as they see relevant"[157], which obviously goes against international principles founding the right to a fair trial.[158] In this context, Amnesty

---

[153] "Prime Minister Circular on the Working Principles and Procedures of the Inquiry Commission on the State of Emergency Measures [Translation]", published in the Official Gazette on 12 July 2017, Articles 6, 7, 8, and 13 <www.resmigazete.gov.tr/eskiler/2017/07/20170712M1-1.htm> accessed 2 July 2019.
[154] Ibid at Article 14. See also Law No. 7075. Article 9(1).
[155] Law on Public Servants, No. 657, published in the Official Gazette on 23 July 1965, Article 129 <www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf> accessed 2 July 2019.
[156] Ibid at Article 130.
[157] Altıparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?" p. 11.
[158] International Covenant on Civil and Political Rights (ICCPR), Article 14 <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 2 July 2019; European Convention on Human Rights, Article 6 <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 2 July 2019.

International reported that all applicants had to speculate about the reasons for their dismissals while making their application to the SoE Commission.[159]

In addition to the violation of applicants' procedural rights, the lack of capacity to mount an effective appeal undermines the ability of the SoE Commission to render a fair decision, since the SoE Commission is not allowed to access all relevant documents. Likewise, the prohibition of oral hearing worsens this situation. To the same degree, remarkably, government institutions as well as judicial organs are able to turn down the SoE Commission's request for all sorts of information and documents concerning dismissals when the confidentiality of investigations or state secrets require so.[160] "The possibility of withholding of information on the basis of state secrecy is all the more worrisome considering the routine and arbitrary use of such secrecy and confidentiality orders in criminal proceedings in Turkey"[161].

4.1.4. Flawed and confined review power

The scope of the review procedure is extremely narrow, since the mandate of the SoE Commission is confined to merely assessing the "membership, affiliation, allegiance, connection or links" of applicants to proscribed terrorist groups which is rather brief and vague.[162] This prevents the SoE Commission from conducting a substantive review of cases and assessing the compliance of emergency measures with both domestic and international law. Furthermore, the absence of well-established criteria elaborating what constitutes "membership, affiliation, allegiance, connection or links" with proscribed terrorist groups considerably impedes the capacity of the SoE Commission to duly review cases. Similarly, there is no guidance on the standard of evidence to be used by the SoE Commission in order to rule an association with proscribed groups.

In this respect, Amnesty International reported that their review of 109 SoE Commission's decisions shows that innocuous activities that were lawful at the time they were undertaken have been deemed as an evidence of connection to proscribed groups.[163] Accordingly, these activities include, but are not

---

[159] AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" p. 16.
[160] See the Law No. 7075, Article 5(2).
[161] AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" p. 17.
[162] "Prime Minister Circular on the Working Principles and Procedures of the Inquiry Commission on the State of Emergency Measures" Article 14(2)
[163] AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" p. 18.

limited to, depositing cash in Bank Asya linked to the Gülen movement after 25 December 2013, when Fethullah Gülen allegedly asked his followers to do so, and downloading the smartphone application of "ByLock", which was allegedly used by the members of the Gülenist movement to communicate each other.[164] Due to the low threshold implemented by the SoE Commission, the burden of proof rests on applicants to prove their innocence while the government solely point to "innocuous activities - allegedly 'publicly known to be associated with proscribed organizations' - as evidence of the applicant's guilt"[165].

In addition, the underlying aspect of the Venice Commission's recommendation is to deliver individually reasoned decisions to each case. Nevertheless, whether the decisions issued by the SoE Commission meets the standard regarding due process is highly questionable. In this regard, Amnesty International emphasized that "the assessment section of the decisions, where the Commission describes how the evidence presented led it to reach a particular conclusion, contain near identical blocks of text in all decisions Amnesty International reviewed and do not involve an analysis of the individual circumstances or situation"[166]. Correspondingly, the claim that the SoE Commission operates to rubber stamp the decisions rendered by the government during the state of emergency appears to be profoundly persuasive.

4.1.5 Restitution and Compensation

The Emergency Decree Law No. 685, which established the SoE Commission, also stipulates conditions for the reinstatement of dismissed public servants in cases the SoE Commission issues a decision ruling in favor of an applicant.[167] The introduction of the Law No. 7145 later amended the relevant provision.[168] Under the amended law, the SoE Commission must refer decisions holding the reinstatement of an applicant to the last government body that the applicant worked for. This body is the Council of Higher Education in respect of dismissed academics. That being said, prior to the introduction of the Law No. 7145, dismissed public servants were explicitly prevented from being

---

[164] See supra note 28, HUMAN RİGHTS FOUNDATİON, "The Collapse of the Rule of Law and Human Rights in Turkey: The Ineffectiveness of Domestic Remedies and the Failure of the ECtHR's Response", p. 43.
[165] AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" p. 19.
[166] Ibid.
[167] The Emergency Decree Law No. 685, Article 10.
[168] Law No. 7145, adopted by the Turkish Parliament on 25 July 2018, Article 22 <www.tbmm.gov.tr/kanunlar/k7145.html> accessed 3 July 2019. To note, the Law No.7145 amended the Law No. 7045 which transformed the Emergency Decree Law No. 685 into permanent law.

restored to the same institution they had worked for before.[169] Unlike the Emergency Decree Law No. 685, the new Law No. 7145 prioritizes the reinstatement of dismissed public servants to their previous position.[170] Nonetheless, there is no regulation concerning reinstated individuals prior to the amendments with respect to the transfer to the institution they were dismissed from. Being exposed to a demotion, those individuals must therefore seek further remedies along the way.

Importantly, restrictions for dismissed academics and individuals who have previously held managerial positions continue to exist despite the amendments. To elaborate further, those who were in managerial positions before cannot be reinstated to the same position. That is to say, they can only be reinstated in inferior posts, which means a non- managerial role.[171] In regards to dismissed academics, it is forbidden for them to be reinstated in the institution for which they have worked for before. Priority must be given to the higher education institutions situated outside Istanbul, Ankara and Izmir, and those which were founded after 2006.[172] Furthermore, the Law No. 7145 stipulates a new and special procedure pertaining to the members of the armed/security forces of certain ranks and diplomatic personnel whose reinstatement has been ruled by the courts or by the Commission.[173] In accordance with that, those individuals shall be reinstated in research centers within the Ministry of Defense, the Ministry of Foreign Affairs, the Ministry of Interior, if the responsible ministers of these departments do not grant an approval for the reinstatement of their position prior to dismissal.[174] To note, there is no obligation to indicate any reason for establishing decisions. As a result, the SoE Commission is unable to restore the situation of victims to what it was before the violation. This makes the SoE Commission's operation behind the international standards.[175]

In this respect, finding violations imposes an obligation on states to restore as far as possible the situation before the breach (*restitutio in integrum*).[176] Correspondingly, compensation cannot be an alternative to *restitutio in integrum*[177] and should be resorted only when the nature of violation or

---

[169] See the Emergency Decree Law No. 685 Article 10(1).
[170] See the Law No. 7075, Article 10(1).
[171] Ibid.
[172] Ibid.
[173] Law No. 7145, Article 23.
[174] Ibid.
[175] See United Nations General Assembly [UNGA], Res 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2016, Principle 19, p. 7 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> accessed 3 July 2019.
[176] *Assanidze v. Georgia* [GC], no. 71503/01, § 197, ECHR 2004-II.
[177] Altıparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?" p. 14.

domestic law does not provide for restitution.[178] Keeping that in mind, the Law No. 7145 reversed the original position by introducing the possibility to obtain compensation for dismissed public servants who had been restored to employment in public service by the SoE Commission.[179] According to it, they are now eligible to request compensation for the period that they were unjustly dismissed. Yet, this compensation does not cover additional financial losses or other harm, including psychological harm that one may have suffered due to the arbitrary dismissal.[180] Pursuing compensation before the administrative courts is also explicitly banned.[181] In sum, the SoE Commission falls short of the well-established standards regarding both restitution and compensation.

4.1.6. The review of the ECtHR's decision regarding the case of Köksal

To highlight the background regarding dismissals, public servants were dismissed with the lists annexed to emergency decree laws without being provided any individual reason or specific evidence on the basis of their alleged "membership of, or affiliation, link or connection with" proscribed groups. Decrees entirely precluded the possibility of reinstatement in the public sector for those dismissed although this possibility was slightly changed. In addition to their post in the public sector, they lost housing and health care benefits which they had drawn on prior to their dismissals. Their passports were cancelled as well as their spouses' passports. Employment opportunities in the private sector were considerably curtailed for them. Being exposed to the societal stigma, they have first and foremost lived through civil death.[182] In this context, the applicant, Gökhan Köksal, was dismissed from his post on 1 September 2016 through the Emergency Decree Law No. 672 together with 50,875 public civil servants who were deemed as belonging, affiliated, or related to terrorist organizations or to organizations, structures or groups which had been found by the National Security Council to engage in activities harmful to the State.[183]

---

[178] Ibid.
[179] Law No. 7145, Articles 22-24.
[180] AMNESTY INTERNATIONAL, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers" p. 23.
[181] Ibid.
[182] Unfortunately, the implications of these measures went further for some individuals. According to the BBC, 37 people committed suicide within first nine months of state of emergency. See, for it, Fundanur Öztürk, "OHAL intiharları: 9 ayda en az 37 kişi kendini öldürdü" *BBC Türkçe*, 29 Nisan 2017 <www.bbc.com/turkce/haberler-dunya-39745716> accessed 6 June 2019. According to BİA News Agency, this number was 43 as of 1 January 2018, see, for it, Sinan Ok, "OHAL öldürmeye devam ediyor". *BİA Haber Merkezi*, (Istanbul, 10 January 2018) <https://m.bianet.org/bianet/emek/193152-ohal-oldurmeye-devam-ediyor> accessed 6 June 2019. To note, these media outlets provided the information by collecting the data existed on media, which means the number may be higher.
[183] See the Emergency Decree Law No. 672, published in the Official Gazette on 1 September 2016 <www.resmigazete.gov.tr/eskiler/2016/09/20160901M1-1.htm> accessed 6 June 2019.

The applicant mounted an appeal to the Constitutional Court on 28 September 2016 challenge to his dismissal, which was pending at the time that the ECtHR delivered its decision regarding the case. Subsequently, he lodged an appeal to the ECtHR on 4 November 2016, claiming that his rights and freedoms under Article 8, 10, 11 and 13 of the Convention were breached. In the meantime, the Emergency Decree Law No. 685 establishing the SoE Commission for the review of measures implemented in connection with the state of emergency was published on 23 January 2017 in the Official Gazette. On 6 June 2017, which is before the time that the SoE Commission started to receive applications, the ECtHR delivered its decision unanimously declaring the application inadmissible for failure to exhaust domestic remedies, stressing the subsidiary nature of the Convention mechanism.

In its decision, the ECtHR noted that the Emergency Decree Law No. 685 had been adopted with the aim of remedying a large-scale problematic situation resulting not only from shortcomings in the decision-making process in respect of the impugned measures, but also from the uncertainty about judicial review of those measures.[184] For this reason, the ECtHR decided to make an exception to the general principle that the assessment of whether domestic remedies have been exhausted must be conducted according to the time when the application is lodged.[185] Indeed, the ECtHR accepted on many occasions that this rule is subject to exceptions, which may be justified by the particular circumstances of each case.[186] In this respect, one can observe that in cases when a new remedy was introduced, the Court carried out an examination into the accessibility and effectiveness of the new remedy in question.[187] Because, the exhaustion of domestic remedies rules in the presence of available and effective remedies, given the case-law of the Court.[188]

However, in its Köksal decision, instead of conducting an assessment into the effectiveness of the newly introduced remedy, that is the SoE Commission, the Court merely remarked that the SoE Commission constituted in principle [a priori] an accessible remedy and there is no reason for the Court to believe that it was not capable of providing appropriate redress for the applicant's complaint, or to offer a reasonable chance of success.[189] If the Court undertook an assessment into the availability and

---

[184] *Köksal v. Turkey* (dec), no. 70478/16, § 27 6 June 2017.
[185] Ibid at § 28.
[186] See, for example, *İçyer v. Turkey* (dec.), no. 18888/02, § 72, ECHR 2006-I; *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX.
[187] See, for example, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 88, ECHR 2010; *İçyer v. Turkey* (dec.), no. 18888/02, § 76-77, ECHR 2006-I. For a case when the new remedy is not effective in the case in question, See *Parizov v. the former Yugoslav Republic of Macedonia*, no. 14258/03, § 41-47, 7 February 2008.
[188] See *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009.
[189] *Köksal v. Turkey* (dec), no. 70478/16, § 29 6 June 2017.

effectiveness of the SoE Commission, it could have easily seen the outcome which have, even today, fallen short of not just the Turkish domestic law itself, but also the basic principles of international human rights law, in particular the ones highlighted by the Venice Commission. Moreover, despite the fact that the domestic authorities consistently refrained from providing judicial review to those dismissed for a length of time, which was indicated by the Court as judicial uncertainty, the Court did not chose to clarify the matter nor did it provide any guidance regarding the entailments of an effective remedy in its decision. Although this judicial uncertainty had required the Court to be cautious, since it had revealed the authorities' undesirable intention regarding the proper judicial review, the Court delivered the decision without even waiting for the beginning of the SoE Commission's operation. One cannot but wonder why the Court adopted such an extremist view when large-scale human rights violations have evidently occurred.

Arguably, the SoE Commission, as a domestic remedy, differs in many aspects from the other ex post facto domestic remedies accepted by the Court.[190] To explain in detail, given the case-law of the Court, the exceptions to the rule of exhaustion of domestic remedies mostly involve cases pertaining to prolonged proceedings, compensation claims due to the violation of property rights, the non-implementation of judgments, which do not require sperate investigations or examinations by the domestic remedy introduced. In such situations, it would suffice to issue the decisions based on file. For example, in regard to the reinstatement of property rights, it would not be a complication to decide pursuant to the information existed on file. However, in cases of dismissed public servants who have not undergone an investigation or have not had an opportunity to defend themselves, which is rather similar to lustration measures, an examination cannot be performed in such a mechanical way.[191] Dismissals on grounds of membership of, or affiliation, link or connection with terrorist organization correspond to criminal charges within the scope of the ECtHR's case-law.[192] Thus, a procedure that does not respect the fair trial safeguards provided by the Convention would be at odds with the principles and values of the ECHR, and would significantly undermine the whole Convention

---

[190] Altıparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?" p. 20.
[191] Ibid. To note, lustration measures refer to the measures implemented by several eastern and central European countries after the downfall of communist rule. Similarly, lustration measures resulted in the dismissals from public service of numerous individuals who were regarded to pose a threat to the state and its institutions. See also, for more comparison of lustration and Turkish emergency measures and the elaborated discussion as to whether Article 6 of the ECHR is applicable to the dismissals of public officials in Turkey, E. Turkut, "Turkey's Post-Coup 'Purification Process': Collective Dismissals of Public Servants under the European Convention on Human Rights", Human Rights Law Review, Volume 18, Issue 3, September 2018, pp. 553-562.
[192] Ibid.

mechanism. Alas, the working principles and procedures of the SoE Commission raises serious concerns on this issue.

Notably, as far as my research is concerned, no scholarly writing which argues for the availability and effectiveness of the SoE Commission has been encountered, which, in any case, would be highly speculative work under the presented circumstances. But, where he presented his concerns to commentators who launched harsh critics to the Court, Michael O'Boyle, the former deputy registrar of the ECtHR, pointed to the question as to whether the ECtHR, as an international court, can provide an effective remedy concerning the post-coup era in Turkey, and under which circumstances.[193] In other words, when should the Court intervene in the dispute? To put it simply, he has drawn attention to Article 35 paragraph 1stating that the Court cannot deal with complaints where domestic remedies have not been exhausted in accordance with generally recognized principles of international law.[194] That is to say, the Court can deal with complaints where domestic remedies have been exhausted. In the case of Köksal, the applicant did not fail to exhaust domestic remedies, since the SoE Commission was established after the application date. With respect to the rules of jurisdiction, there had been nothing that prevented the Court from performing its duty. Therefore, one can argue that the Court consciously chose to not address the matter, and "This may explain why some commentators view this case as an extra-legal decision given by the Court"[195].

Conclusively, remaining overwhelmingly within the control of the executive, the SoE Commission which was created to remedy a large-scale problematic situation does not have such a capacity. Further, its operation aggravates the unjust suffering of dismissed public servants by contributing the violations of their rights, rather than to remedy the situation of those dismissed.

4.2. Is the Constitutional Court an effective remedy?

The ECtHR has been recognizing the individual application mechanism to the Constitutional Court as an effective remedy since its decision concerning the case of Hasan Uzun v. Turkey.[196] However, the position of the Constitutional Court, the supreme authority for remedying human rights violations , is considerably controversial while human rights have been blatantly deteriorating in Turkey. This

---

[193] See, Michael O'Boyle, "Can the ECtHR provide an effective remedy following the coup d'état and declaration of emergency in Turkey?", (EJIL: TALK! 19 March 2018) < https://www.ejiltalk.org/can-the-ecthr-provide-an-effective-remedy-following-the-coup-detat-and-declaration-of-emergency-in-turkey/> accessed 6 July 2019.
[194] Ibid.
[195] Ibid. at the section of comments by Başak Çalı.
[196] *Uzun v. Turkey* (dec.), no. 10755/13, 30 April 2013.

controversial stance was inevitably noticed when the Constitutional Court dismissed two of its members in the aftermath of the attempted coup d'état and when it ruled that it does not have power to examine the constitutionality of emergency decree laws in spite of its contradictory case-law. With this decision, the Constitutional Court has undeniably provided carte blanche to the executive. In addition to the authorities' state of emergency practice, the Constitutional Court has systematically turned a blind eye to large-scale human rights violations in the country, rendering itself highly inoperative. Despite the centralization of the power and its inevitable outcome, that is, unsupervised executive, in Turkey, The ECtHR has showed no interest in reconsidering its opinion on the effectiveness of the individual application mechanism before the Constitutional Court. That being said, in this section, I will present arguments disfavoring the individual application mechanism to the Constitutional Court in the present circumstances of Turkey.

4.2.1. The Constitutional Court dismisses its two members

After the declaration of the state of emergency, the Constitutional Court unanimously dismissed two of its members, Erdal Tezcan and Alparslan Altan, from their post on grounds of their alleged links with the FETO/PDY organization, and barred them to perform their profession permanently.[197] This judgment was held through the Emergency Decree Law No. 667 that allows the Plenary of the Constitutional Court to dismiss the Constitutional Court judges "who are considered to be a member of, or have relation, connection, contact with terrorist organizations or structure/entities"[198]. As stressed by the Venice Commission, to dismiss a judge on this ground does not require any particular evidence to be analyzed in the judgment, and indeed, the above-mentioned judgment does not contain any evidence against these two judges.[199]

Importantly, in the judgment, the Constitutional Court noted that according to the Emergency Decree Law No. 667, the grounds of 'membership in' or 'affiliation with' a terror group was not necessarily required to implement a dismissal measure, instead,: 'adherence to' or a 'connection with' were

---

[197] Constitutional Court decision, E. 2016/6 (Miscellaneous file), K. 2016/12, 4 August 2016, <http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/pdf/2016-12.pdf> accessed 8 June 2019. For the human rights implications of this decision, see T. Olcay, "Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members: Decision of 4 August 2016, E. 2016/6 (Miscellaneous file), K. 2016/12", European Constitutional Law Review, Volume 13, Issue 3, September 2017, pp. 568-581.

[198] The Emergency Decree Law No. 667, published on 23 July 2016, Article 3(1) <www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm> accessed 8 June 2016.

[199] Venice Commission, "Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016", § 136.

sufficient grounds for the implementation of a measure.[200] More importantly, the Constitutional Court held that the Emergency Decree Law did not require to establish the link between the members and terror groups to the decree of legal "certitude", and that this link could be sufficiently established on the conviction of absolute majority of the General Assembly of the Constitutional Court.[201] It finally concluded that "*the information from the social circle*" and "*the collective conviction of the remaining judges of the Constitutional Court*" constituted the ground for the dismissal of these two judges.[202] This reasoning was simply formulated by the Venice Commission as a subjective persuasion.[203] With this in mind, the Venice Commission underlined that "apparently, the same approach has been used to put thousands of public servants on "dismissal lists" appended to the decree laws, as well as for their dismissal by administrative entities"[204].

Significantly, this judgment is rather worrisome as it demonstrates that the presumption of innocence, a basic principle of the right to a fair trial, was not respected by the highest judicial authority in the country. Furthermore, this effectively authorized the Court of Cassation and other supreme courts of Turkey, as well as the HCJP, in dismissing thousands of judges by using the extraordinary powers given by Decree Law no. 667.[205] The fact that every highest court invoked those measures thus proves that challenging the legitimacy of the mass dismissals before those courts would be extremely ineffective. In this regard, the Venice Commission stressed that dismissed judges and prosecutors probably still seek review of their individual cases with little chance of success, but the general legitimacy of the scheme of dismissals de facto cannot be challenged.[206] That being said, According to Article 148 of the Constitution, the Constitutional Court has not capacity to deal with criminal prosecutions or to rule whether a group qualifies as a terrorist organization.[207] However, by dismissing

---

[200] Constitutional Court decision, E. 2016/6 (Miscellaneous file), K. 2016/12, 4 August 2016, § 85, <www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/pdf/2016-12.pdf> accessed 8 June
[201] Ibid .at § 86.
[202] Ibid. at § 98.
[203] Venice Commission, "Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016", § 136.
[204] Ibid. To underline, some dismissed public servants were dismissed by the decisions of administrative institutions in which they worked, rather than by an emergency decree law.
[205] Olcay, "Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members: Decision of 4 August 2016, E. 2016/6 (Miscellaneous file), K. 2016/12", p 574.
[206] Venice Commission, "Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016", § 186.
[207] Article 148 of the Constitution: "the Constitutional Court shall examine the constitutionality in respect to both [the] form and substance of laws, decrees having the force of law, and the Rules of Procedure of the Grand National Assembly of Turkey and decide on individual applications. Constitutional Amendments shall be examined and verified only with regard to their form. However, decrees having the force of law issued during a state of emergency, martial law, or in time of war

its members, it established the link between the dismissed judges and the terrorist organization, and correspondingly brought a criminal charge against its two members. The legality of the dismissal of these two judges is therefore highly questionable.

4.2.2. The Constitutional Court rules it has no competence to review the constitutionality of emergency decree laws

A measure in the context of the state of emergency is supposed to be temporary because of its very nature. It means that an emergency decree law cannot bring a permanent order. In this connection, the People Republican's Party (CHP) lodged an appeal before the Constitutional Court, claiming that emergency decree laws introduced permanent laws, rather than temporary ones, and thus they would be subject to judicial review.[208] However, on 12 October 2016, the Constitutional Court rejected the appeal, remarking that it had no jurisdiction to examine the constitutionality of emergency decree laws.[209] In doing so, the Court relied on the wording of Article 148 of the Constitution, which defines the power of the Constitutional Court. Yet, the Constitutional Court's conclusion regarding the constitutionality of emergency decree laws was evidently at variance with its previous liberal case-law.[210]

By delivering this decision, the Constitutional Court entirely eliminated the possibility of constitutional review of emergency decree laws and the likelihood of the realization of the check and balance system, and thus provided unlimited carte blanche to the executive. As a result, this has soared up the arbitrariness in the judiciary.[211] In this respect, the following question raised by Kerem Altıparmak greatly reveals the degree of this arbitrariness: "if emergency decree laws are not subject to a constitutional review, would it not be possible to close down the Constitutional Court through an

---

shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance [the unofficial translation of the first paragraph]." <www.mevzuat.gov.tr/MevzuatMetin/1.5.2709.pdf> accessed 8 July 2019.

[208] According to the Human Rights Foundation, "Five Emergence Decree Laws were initially made permanent during the state of emergency, while a further 25 Emergency Decree Laws were also promulgated in March 2018, with a view to codifying them as permanent law before ending the state of emergency". See, Human Rights Foundation, "The Collapse of the Rule of Law and Human Rights in Turkey: The Ineffectiveness of Domestic Remedies and the Failure of the ECtHR's Response", p.30.

[209] Constitutional court decisions, E. 2016/166, K. 2016/159 and E. 2016/167, K. 2016/160, 12 October 2016. See also, "Turkish Constitutional Court rejects CHP's appeal to annul decree laws" *Hurriyet Daily News*, (Ankara, 12 October 2016) <www.hurriyetdailynews.com/turkish-constitutional-court-rejects-chps-appeal-to-annul-decree-laws-104889> accessed 8 July 2019.

[210] Constitutional Court decision, E. 1990/25, K. 1991/1, published 10 January 1991.

[211] To present the degree of arbitrariness in the judiciary, see the press release of the Council of Europe Commissioner for Human Rights regarding the report on her visit to Turkey, "Turkey needs to put an end to arbitrariness in the judiciary and to protect human rights defenders" 8 July 2019. <www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders> accessed 8 July 2019.

emergency decree law? [*translation*]"[212]. It would not be an exaggeration to give an affirmative answer to this question, given the extent and content of the emergency decree laws.

4.2.3. The independence of the Constitutional Court

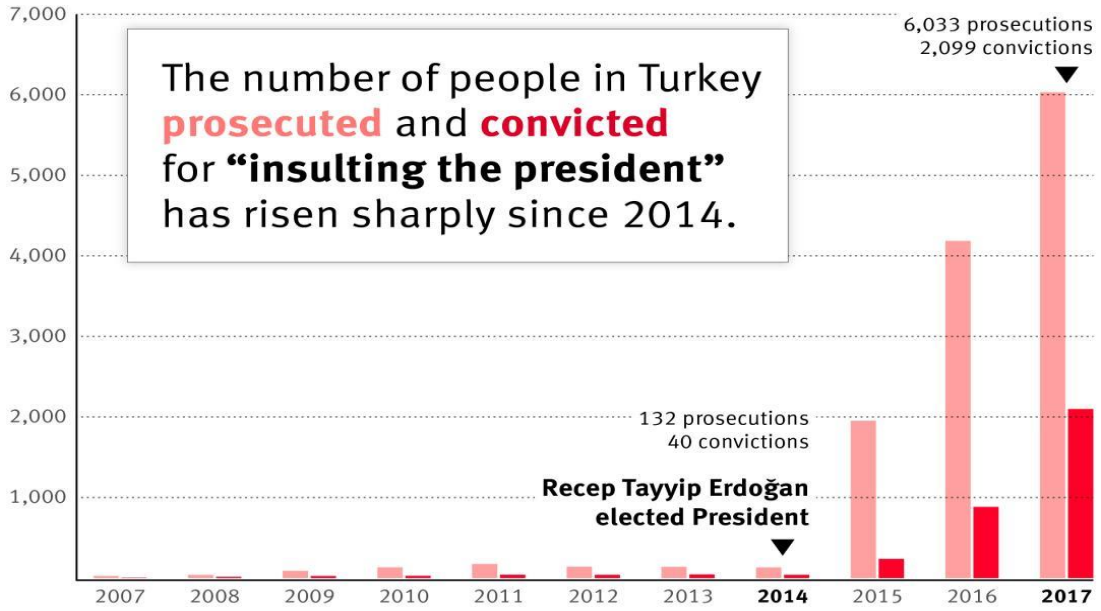
As Turkey has been undergoing an adversely significant change during the state of emergency and its aftermath, both legal and political spheres have been seriously eroded, including through constitutional amendments in 2017, which have afforded unprecedented strength to the executive. The extraordinary power held by the executive has enabled the government to bypass the judicial authority and parliamentary oversight.[213] Following this, the executive has systematically ignored the fundamental safeguards of human rights and civil liberties. One pure consequence is the absence of an effective domestic mechanism to oversee the executive acts. To show this, according to the Rule of Law Index, Turkey were placed on 123rd out of 126 countries in the 2019 report with respect to the category of 'Constraints on Government Powers'.[214] Likewise, Article 146 of the Constitution perfectly illustrates this situation in Turkey. According to that article, the President has the power to appoint 12 of the 15 judges of the Constitutional Court, whereas the Parliament can nominate the rest of the members. To note, in the Parliament, the government is overwhelmingly in the majority. This overwhelming dominance of the President in determining the members of the Constitutional Court constitutes a significant obstacle to the realization of the institutional independence of the Constitutional Court, and casts a dark shadow on its ostensible independence.

---

[212] "KHK ile Anayasa Mahkemesi de kapanır mı?" *Gazete Duvar*, 30 October 2016 <www.gazeteduvar.com.tr/gundem/2016/10/30/khk-ile-anayasa-mahkemesi-de-kapanir-mi/> accessed 8 July 2019.
[213] To provide the degree of the centralization of the power in Turkey, even the central bank of Turkey has been affected by it. See, "Erdoğan fires Turkey's bank governor amid ongoing recession" *The Guardian*, (Ankara, 6 July 2019) <www.theguardian.com/world/2019/jul/06/turkey-recep-tayyip-erdogan-fires-bank-governor-murat-cetinkaya-ongoing-recession?CMP=share_btn_fb&fbclid=IwAR2qUdkFX3wV9z-CEQ7xkopiBP1aHNx9qb3FVIAvS50mRy06I--GQP4xXvw> accessed 10 July 2019.
[214] World Justice Project, "Rule of Law Index", 2019, p. 147 <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced_0.pdf> accessed 10 July 2019.

4.2.3.4 The silence of the Constitutional Court

In the context of general deterioration, the Constitutional Court, as the fundamental guarantor of human rights and the main supervisory actor over the executive, has exhibited a complete disregard to the recent developments in the country. To draw attention to this contentious attitude of the Constitutional Court, there are some striking issues that need to be underlined. The first one[215] is the dramatic increase in the number of investigations and prosecutions under Article 299 of the Turkish Penal Code[216] for "insulting the president". [217]



This graph[218], published by the Human Rights Watch, clearly demonstrates that after the election of Recep Tayyip Erdoğan as the President, there has been a systematic rise on the invocation of Article 299 of the Turkish Penal Code since 2014. To portray the direness of the situation, the number of

---

[215] To note, I have underlined only particular issues in this chapter as it would be impossible to present the whole dimensions.

[216] Article 299 of the Turkish Penal Code: "(1)Any person who insults the President of the Republic shall be sentenced to a penalty of imprisonment for a term of one to four years. (2) Where the offence is committed in public, the sentence to be imposed shall be increased by one sixth. (3) The initiation of a prosecution for such offence shall be subject to the permission of the Minister of Justice."

[217] See, for example, K. Altıparmak and Y. Akdeniz, "TCK 299: Olmayan Hükmün Gazabı mı?", Güncel Hukuk Dergisi, October 2015.

[218] Human Rights Watch, "Turkey: End Prosecutions For 'Insulting President', 17 October 2018 <www.hrw.org/news/2018/10/17/turkey-end-prosecutions-insulting-president> accessed 10 July 2019.

prosecuted regarding Article 299 has risen up from 132 in 2014 to 6,033 in 2017, which 565 of them were minors.[219] Additionally, the number of prosecuted under Article 299 have amazingly soared by 1,335 percent in the first three years of the President Erdoğan's tenure, comparing to Abdullah Gül's, the former President, term of office.[220] In regards to the convictions, the records reveal that 40 individuals were convicted for insulting the president in 2014, whereas the number of those convicted was 2,099 in 2017.[221] The degree of arbitrariness is striking, if one glances at the number of investigations under Article 299. In this respect, the number of investigations has increased sharply from 682 in 2014 to 20,539 in 2017, corresponding in total to 68,827 for this period of time.[222] Without a further explanation of this absurd usage of Article 299, it would not be unproven to remark that Article 299 has turned to a tool for the executive to suppress the opposition of the government, given the rare invocation of the article prior to 2014 and the political climate in the country.

Accordingly, to briefly examine the case-law of the ECtHR on insulting a head of state, in the case of Colombani and Others concerning that charge, the Court held that "conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions"[223]. In the case of Pakdemirli, the Court remarked that the privileged protection of a head of State through special legislation on defamation was not, in principle, consistent with the spirit of the Convention.[224] Moreover, the ECtHR applied these principles to the relevant provisions of the penal code granting special protection to the head of State in the case of Artun and Güvener.[225] In doing so, the ECtHR emphasized that the privileged status of the head of State cannot justify the intervention in the applicant's freedom of expression. [226] Thus, the case-law of the ECtHR is very clear, since it considers that any special provision of the penal code affording a greater degree of protection than other persons is incompatible with Article 10 of the ECHR. For this reason, considering Article 90 of the

---

[219] Ibid.
[220] See Emincan Yuksel, "Cumhurbaşkanına Hakaretten Kaç Kişi Sanık Oldu?", Doğruluk Payı, 22 January 2019 <www.dogrulukpayi.com/bulten/cumhurbaskanina-hakaret-kanunu> accessed 10 July 2019.
[221] See the Human Rights Watch, "Turkey: End Prosecutions For 'Insulting President', 17 October 2018 <www.hrw.org/news/2018/10/17/turkey-end-prosecutions-insulting-president> accessed 10 July 2019.
[222] See Alican Uludağ, "Eleştiren yanıyor!", Cumhuriyet, 11 December 2018 <www.cumhuriyet.com.tr/haber/siyaset/1166075/Elestiren_yaniyor_.html> accessed 10 July 2019.
[223] *Colombani and Others v. France*, no. 51279/99, § 68, ECHR 2002-V.
[224] *Pakdemirli v. Turkey*, no. 35839/97, § 51-52, 22 February 2005.
[225] *Artun and Güvener v. Turkey*, no. 75510/01, 26 June 2007.
[226] Ibid. at § 31. For the similar interpretation of the ECtHR regarding the King of Spain, See *Otegi Mondragon v. Spain*, no. 2034/07, § 55-56, ECHR 2011.

Constitution[227], there would not be a legal base pertaining to the Article 299.[228] However, the Constitutional Court unanimously refused the claim of unconstitutionality of Article 299.[229]

With this in mind, in a country where thousands of individuals are being investigated and prosecuted on grounds of insulting the President, it would not be a misinterpretation to state that Article 299 has turned into an instrument in the hands of the authorities to deter and silence any opposition voice. Under these circumstances, the Constitutional Court is supposed to examine the serious allegations of breaches of freedom of expression. Nevertheless, the Constitutional Court has hitherto delivered only one judgment finding manifestly ill-founded.[230] Regardless of the accuracy of this judgment, the fact that the Constitutional court has showed considerable disregard to the situation of journalists, instead of issuing pilot judgments regarding the matter, fundamentally undermines the individual application mechanism to the Constitutional Court and deprives individuals of basic safeguards of freedom of expression.

Secondly, in regards to journalists, as of 1 December 2018, Turkey had the highest number of imprisoned journalists not just among the member states of the Council of Europe, but in the world. [231] The ECtHR has ruled a violation of freedom of expression against Turkey 40 times in 2018 alone, which is the highest number among the State Parties.[232] In Turkey where they have great difficulty in exhibiting their profession[233], journalists systematically suffer oppression by being investigated, prosecuted, and even sometimes physically attacked.[234] [235] Under these circumstances, the Constitutional Court is supposed to prioritize cases regarding the situation of journalists, since their protection is one of the fundamental requirements of a democratic society. However, the Constitutional

---

[227] Article 90 (5) of the Constitution: "International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional."
[228] Altıparmak and Akdeniz, "TCK 299: Olmayan Hükmün Gazabı mı?".
[229] The Constitutional Court decision, E. 2016/25, K. 2016/186, 14 December 2016.
[230] The Constitutional Court decision concerning Umut Kılıç, Application no. 2015/16643, 4 April 2018. I would note this case as controversial. For the critical examination of Article 299 and this decision, see Ö. Demir, "YENİ REJİMDE CUMHURBAŞKANINA HAKARET SUÇUNA YÖNELİK ELEŞTİREL BİR İNCELEME", Suç ve Ceza, 2018, sayı 3, pp.43-75.
[231] Niall McCarthy, "Where The Most Journalists Are Imprisoned Worldwide", *Statista*, 13 December 2018 <www.statista.com/chart/3310/china-incarcerates-more-journalists-than-anywhere-else/> accessed 10 July 2019.
[232] See the ECtHR's statistics <www.echr.coe.int/Pages/home.aspx?p=reports&c=> accessed 10 July 2019.
[233] According to the Reporters Without Borders (RSF), Turkey ranks 157 out of 180 countries in the 2019 World Press Freedom Index. Also, it is categorized under the division of massive purge < https://rsf.org/en/ranking> accessed 10 July 2019.
[234] See, for example, Reporters Without Borders (RSF), "Attackers freed after beating Turkish columnist with baseball bats", 14 May 2019 <https://rsf.org/en/news/attackers-freed-after-beating-turkish-columnist-baseball-bats>accessed 10 July 2019.
[235] See, for example, Stockholm Center for Freedom," Jailed and wanted Journalists in Turkey- Updated List" <https://stockholmcf.org/press-freedom/> accessed 10 July2019.

Court has issued only one judgment in this regard until 26 May 2019[236]. In this judgment, the Constitutional Court held on 11 January 2018 that there had been a violation of the right to liberty and security and the right to freedom of expression of the journalists, Mehmet Aslan[237] and Şahin Alpay[238]. Due to this judgment in which the Constitutional Court ruled in favor of the applicants, it was claimed that the Constitutional Court has remained an independent body.[239] Nonetheless, there exist some points to be clarified by the Constitutional Court. In this context, Mehmet Altan has been standing trial with Ahmet Altan in the same case. [240] Accordingly, the Constitutional Court and the ECtHR[241] issued their judgments regarding the case of Mehmet Altan on 11 January 2018 and 20 March 2018 respectively. But Ahmet Altan could receive a response from the Constitutional Court on 26 May 2019. This fact will continue to cause civil society to be concerned on the Constitutional Court's impartiality unless it provides meaningful explanation regarding the time difference of 18 months between these two applications.

Thirdly, another issue that the Constitutional Court has been reluctant to address is "Academics for Peace[242], which is an initiative founded in 2012 by a group of academics in the aftermath of the statement that supported Kurdish prisoners' demands for peace in Turkey. Between the years 2013 and 2016 Academics for Peace has been proactive in the peace process in Turkey by producing information on peace and conflict, publishing reports on their activities , organizing meetings including one with

---

[236] After a long silence, on 26 May 2019, the Constitutional Court delivered its judgments regarding 10 prominent journalists in Turkey. While it did not hold a violation of the applicants' right in six applications, it found a violation of their rights in three applications. Lastly, it ruled that one application is manifestly ill-founded. See the Constitutional Court's announcement on 10 individual applications. To note, the Constitutional Court published its reasoned judgments on 26 June 2019. See <www.anayasa.gov.tr/tr/haberler/bireysel-basvuru-basin-duyurulari/bazi-gazeteciler-hakkinda-uygulanan-tutuklama-tedbirlerinin-kisi-hurriyeti-ve-guvenligi-hakki-ile-basin-ve-ifade-ozgurlugunu-ihlal-ettigi-iddialari/> accessed 10 July 2019.

[237] The Constitutional Court judgment concerning the individual application of Mehmet Hasan Altan (2), Application no. 2016/23672, published 11 January 2018.

[238] The Constitutional Court judgment concerning the individual application of Şahin Alpay, Application no. 2016/16902, published 11 January 2018.

[239] See, Michael O'Boyle, "Can the ECtHR provide an effective remedy following the coup d'état and declaration of emergency in Turkey?", (EJIL: TALK! 19 March 2018) <www.ejiltalk.org/can-the-ecthr-provide-an-effective-remedy-following-the-coup-detat-and-declaration-of-emergency-in-turkey/> accessed 6 July 2019.

[240] To note, Ahmet Altan is well-known in the civil society as more harsh critic than Mehmet Altan.

[241] One can wonder why the ECtHR examined the case although the Constitutional Court found a violation. Because, the first instance courts amazingly did not comply with the Constitutional Court judgment by not releasing the applicants, which perfectly reflected the absurdness regarding the rule of law in Turkey. Therefore, the ECtHR prioritized this application and delivered its judgment, ruling the immediate release of the applicants. See *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018; *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018.

[242] See, for the detailed information, <https://barisicinakademisyenler.net/node/1> accessed 10 July 2019. See also, Judith Butler and Başak Ertür, "In Turkey, academics asking for peace are accused of terrorism" *The Guardian*, 11 December 2017 <www.theguardian.com/commentisfree/2017/dec/11/erdogan-turkey-academics-terrorism-violence-kurdish-people> accessed 10 July 2019.

several members of the Wise People Committee[243] and so on.[244] With this in mind, Academics for Peace launched an online petition "We will not be a party to this crime"[245] in January 2016. This petition, which was so far signed over 2,000 academics[246], was a call on the state of Turkey to end a state violence in many towns and neighborhoods of Kurdish provinces and to prepare negation conditions. In response to this, President Erdoğan made a call to judicial authorities and the Council of Higher Education to punish those "so-called intellectuals" and "fifth columns", and they became the target of the executive. [247]

Following this, as of 10 July 2019, 549 academics in total were removed and banned from public service through emergency decree laws, dismissed, and forced to resign and retire. [248] 505 academics also have undergone a disciplinary investigation.[249] Moreover, being accused of making propaganda for a terrorist organization under Article 7(2) of the Turkish Anti-Terror Act and Article 53 of the Turkish Penal Code, 706 academics were put on trial.[250] Approximately 200 academics were sentenced to imprisonment for various periods of time.[251] 2 academics have been imprisoned for over 2 months.[252] In sum, they have faced civil death. The fact that those academics were subject to these measures just because they signed a petition highly supports the accuracy of the allegation regarding the violation of their rights. Even though, academic freedom is one of the freedoms protected under the Convention as well as Turkish Constitution, the Constitutional Court has thus far addressed no individual application concerning the Academics for Peace.[253]

---

[243] The Wise People Committee was established by the government to guide the solution process with Kurdish Movement. See," Wise men committee members announced", *Anadolu Agency*, 3 April 2013 <www.aa.com.tr/en/turkey/wise-men-committee-members-announced/258996> accessed 10 July 2019.
[244] See <https://barisicinakademisyenler.net/node/1> accessed 10 July 2019.
[245] "We will not be a party to this crime! (in English, French, German, Spanish, Arabic, Russian, Greek)" <https://barisicinakademisyenler.net/node/63> accessed 10 July 2019.
[246] Including well-known international scholars such as Judith Butler, Noam Chomsky, Slavoj Žižek.
[247] Emine Ay, "The Heavy Cost of a Call for Peace: The Academics for Peace", *EMA Human Rights Blog*, 11 March 2019 <www.emahumanrights.org/2019/03/11/the-heavy-cost-of-a-call-for-peace-the-academics-for-peace%ef%bb%bf/?fbclid=IwAR0Ha9l8opjTrcDw-O12Nrrsyr--YpaeieFwUQLHC7lZq1plxSL7NAIgVH8> accessed 10 July 2019.
[248] "Rights Violations Against "Academics for Peace"<https://barisicinakademisyenler.net/node/314> accessed 10 July 2019.
[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] The last development concerning the issue was on 29 May 2019 when the Constitutional Court postponed the meeting as the Ministry of Justice had not submitted the request opinion. See, for it, "Constitutional Court Postpones Meeting on Academics for Peace", *BIA News Desk*, Istanbul, 30 May 2019 <https://bianet.org/english/freedom-of-expression/208984-constitutional-court-postpones-meeting-on-academics-for-peace> accessed 10 July 2019.

Last but not least, the notable reluctance of the Constitutional Court also concerns cases pertaining to conscientious objection. In this respect, Although the ECtHR condemned Turkey in the case of Ülke[254], the right to conscientious objection has not been recognized by Turkey since 2006.[255] With this in mid, similarly, the Constitutional Court has not addressed any application in this regard. All applications are still pending before the Constitutional Court. As a result of this judgment, the Turkish authorities, including the Constitutional Court as the fundamental guarantor of human rights in the country, are under an obligation to recognize the right to conscientious objection. By extension, one cannot but pose the following question: Why do individuals have to exhaust domestic remedies in spite of the authorities', including the highest court, clear and disrespectful stance for the Convention principles?

4.2.5. The Review of the ECtHR's judgment regarding the Case of Altan

On 16 April 2019, the ECtHR delivered its judgment in the case of Alparslan Altan, a former dismissed judge of the Constitutional Court, concerning his arbitrary pre-trial detention.[256] In the judgment, the ECtHR found a violation of Article 5/1 by holding that the initial pre-trial detention was not lawful and was not based on reasonable suspicion that he had committed the offence in question. To provide the background, soon after the coup attempt on 16 July 2016, some 3,000 judges and prosecutors, including two judges of the Constitutional Court and more than 160 judges of the Court of Cassation and the Supreme Administrative Court were taken into custody and subsequently placed in pre-trial detention. In this context, the applicant's pre-trial detention was ordered by a criminal peace judge (*sulh ceza hakimliği*) on suspicion of being member of the FETÖ/PDY organization on 20 July 2016, which is one day before the declaration of the state of emergency, despite the guarantees afforded to members of the Constitutional Court under the relevant legislation. On 4 August 2016, the Constitutional Court dismissed him (along with another judge) from his post, finding simply that "*the information from the social circle*" and "*the collective conviction of the remaining judges of the Constitutional Court*" constituted the ground for the dismissal.[257] On 11 January 2018, the Constitutional Court unanimously rejected the applicant's individual application. Eventually, he was sentenced to 11 years and three months' imprisonment on 6 March 2019.

---

[254] *Ülke v. Turkey*, no. 39437/98, 24 January 2006.
[255] "'ECtHR Ruling on Conscientious Objection Still Not Put into Effect by Turkey Since 2006'", *BIA News Desk*, Istanbul, 17 May 2019 <https://bianet.org/english/militarism/208574-ecthr-ruling-on-conscientious-objection-still-not-put-into-effect-by-turkey-since-2006> accessed 10 July 2019.
[256] *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.
[257] Constitutional Court decision, E. 2016/6 (Miscellaneous file), K. 2016/12, 4 August 2016, § 98.

Arguably, this judgment of the ECtHR is crucial, since the ECtHR fundamentally departed from the Constitutional Court's findings. To elaborate, the Constitutional Court held that the alleged offence punishable under Article 314 the Criminal Code, namely membership of an armed terrorist organization, falls within the jurisdiction of the assize courts.[258] This offence is a continuing offence according to the Court of Cassation's consistent practice.[259] Together with the circumstances regarding the coup attempt, this established the factual and legal basis for a case of discovery *in flagrante delicto*.[260] In the light of the evidence (statements by anonymous witnesses and a suspect, messages exchanged via the ByLock messaging service and mobile telephone signals), the Constitutional Court came to a decision that the order for the applicant's pre-trial detention could be said to have been proportionate and based on justifiable grounds.[261]

With this in mind, during its examination of the case, the ECtHR observed that according to Article 2 of the Criminal Code, the conventional definition of the concept of *in flagrante delicto* is linked to the discovery of an offence while or immediately after it is committed, whereas the Court of Cassation held that a suspicion of the offence of membership of an armed organization may be sufficient to deem a case of discovery *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act.[262] For this reason, the Court emphasized that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law in the present case were not only problematic in terms of legal certainty, but also appeared manifestly unreasonable.[263] It also emphasized that the national courts' extensive interpretation negated the procedural safeguards afforded to members of the Constitutional Court in order to protect the judiciary from the executive.[264] Moreover, the Court stressed that such an interpretation could not be regarded as an appropriate response to the state of emergency and were not justified by the exigencies of the situation.[265] Therefore, the Court found a violation of Article 5/1 on account of the unlawfulness of the applicant's pre-trial detention.

[258] Alparslan Altan v. Turkey, no. 12778/17, § 42, 16 April 2019.
[259] Ibid.
[260] Ibid.
[261] Ibid. at § 107.
[262] Ibid. at § 111.
[263] Ibid. at § 115.
[264] Ibid. at § 112.
[265] Ibid. at § 118-119.

Apart from that, the Court found that evidence in the file did not support that there had been a reasonable suspicion at the time of his detention.[266] For this reason, it held that the suspicion against him had not reached the minimum level of "reasonableness".[267] In regards the notion of "reasonableness", the Court underlined that difficulties Turkey was facing during and in the aftermath of the coup attempt cannot provide carte blanche under Article 5 to order the detention of an individual during the state of emergency without any verifiable evidence or information or without a sufficient factual basis satisfying.[268] Accordingly, the Court observed that the applicant's pre-trial detention on 20 July 2016 had based on a mere suspicion of being member of a criminal organization, which cannot be said to have been strictly required the exigencies of the situation.[269] Such a degree of suspicion could not be sufficient to justify the detention of a judge serving on a high-level court, in this instance the Constitutional Court.[270] As a result of this, the Court concluded that there had been a violation of Article 5/1 on account of a lack of reasonable suspicion.

Taking into account all of these, one can argue that the ECtHR significantly condemned and invalidated the Turkish authorities' state of emergency practice in the case of Alparslan Altan, which will have implications for all judge and prosecutors in a similar situation. However, there arguably exist two shortcomings. Firstly, the ECtHR found unnecessary to examine the claim pertaining to Article 5/3. In this regard, Emre Turkut, a PhD researcher, indicated that

> "the Court did not explain why it found it unnecessary to examine whether Altan's automatic prolongation of detention over thirty months (btw. 20 July 2016 to 6 March 2019) gives rise to a separate human rights violation. Such a finding under Article 5/3 ECHR would be of an added value, as holding individuals charged with terrorism offences in lengthy pre-trial detentions has become routine in Turkey, raising concerns that its use has become a form of summary punishment."[271]

Secondly, alas, although the findings of the Constitutional Court and the ECtHR are entirely black and white, the ECtHR has continued to deem the individual application mechanism before the Constitutional Court as an effective remedy. In this respect, one can note the fascinating judgments of

---

[266] Ibid. at § 145.
[267] Ibid. at § 148.
[268] Ibid. at § 147.
[269] Ibid. at § 148.
[270] Ibid. at § 148.
[271] Emre Turkut, "The discovery in flagrante delicto, the Kafkaesque fate of a Supreme judge and the Turkish Constitutional Court: The Alparslan Altan case in Strasbourg" Strasbourg Observers, 6 May 2019 <https://strasbourgobservers.com/2019/05/06/the-discovery-in-flagrante-delicto-the-kafkaesque-fate-of-a-supreme-judge-and-the-turkish-constitutional-court-the-alparslan-altan-case-in-strasbourg/> accessed 10 July 2019.

the Constitutional Court. Nevertheless, one can also note that these judgments belong to the pre-coup attempt era, except the judgments concerning Mehmet Altan and Şahin Alpay, which has enabled the international community to assume the Constitutional Court as autonomous against the executive. In respect to this, Turkut remarked that "while the entire international community has been trying to praise the TCC [Constitutional Court] when it issued its acclaimed decision ordering the release of Mehmet Altan on 11 January 2018, the fact that the same court rather silently rejected the application of Alparslan Altan on the same day seemingly fell of the radar and have gone virtually unnoticed"[272]. With this in mind, even though this judgment of the ECtHR reveals the Constitutional Court's role in the striking violation, it amounts to another missed opportunity for the ECtHR in considering the effectiveness of the Constitutional Court. It is therefore extremely sad to say that the ECtHR, continues to take into account too few isolated judgments of the Constitutional Court favoring applicants, rather than the whole picture of the country. In this regard, a view that greatly differs from the ECtHR's perspective was adopted by the Human Rights Committee with respect to the individual application mechanism before the Constitutional Court.

4.2.6. The Human Rights Committee finds an individual application to the Constitutional Court ineffective in the case concerning pre-trial detention

The Human Rights Committee (hereinafter the Committee) is a United Nations body that is composed of independent experts that monitor the State Parties' adherence to the International Covenant on Civil and Political Rights (the ICCPR). Under the first Optional Protocol to the ICCPR, the Committee also has an authority to deal with individual complaints alleging violations of the ICCPR. With this in mind, two Turkish men, İsmet Özçelik and Turgay Karaman who are deemed to be connected to the Gülen Movement (the FETO, PDY organization) by the Turkish authorities were detained in the first week of May by Malaysian Police, and they were later removed from Malaysia to Turkey on 12 May 2017. After they were held in incommunicado detention at an unknown place, they were brought before a judge on 23 May 2017. Following the developments, they filled an individual complaint regarding the deprivation of their freedom and right to a fair trial to the Committee. In short, after examining the complaint, UN experts found that Turkey violated the applicants' rights.[273] Notably, there exist noticeable views with respect to the exhaustion of domestic remedies in the Committee's decision.

---

[272] Ibid.
[273] UN Human Rights Committee, Communication No. 2980/2017, CCPR/C/125/D/2980/2017, published on 28 May 2019 <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24661&LangID=E> accessed 11 July 2019.

In this respect, in its submission to the communication, Turkey argued that the complainants' claims were inadmissible, since they had failed to exhaust domestic remedies, including the individual application mechanism to the Constitutional Court.[274] By doing so, Turkey referred to the ECtHR's decisions, which deemed the Constitutional Court as effective remedy.[275] In response to this, the applicants presented several arguments.[276] To summarize them, firstly, they remarked that lodging an appeal to the Constitutional Court was an ineffective remedy, since the Constitutional Court held that it does not have a power to conduct a review of emergency measures.[277] Secondly, they claimed that seeking a remedy before the Constitutional Court would have been unduly prolonged, considering that the Constitutional Court received 100,000 applications and that it delivered in the past maximum 20,000 cases a year.[278] Thirdly, they discussed that they were hindered in exhausting domestic remedies as they could not benefit from actual legal presentation and assistance.[279] Lastly, they argued that domestic remedies in Turkey should be presumed to be non-effective due to the gross and systemic violations in the country where 4,424 judges and prosecutors were dismissed, whereas 2,386 judges and prosecutors were detained.[280]

With this in mind, The Committee noted that the ECtHR has expressed its concerns as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases pertaining to pre-trial detention due to the non-implementation, by lower courts, of the Constitutional Court's findings in two cases in which the Constitutional Court had held violation of the applicants' rights.[281] The Committee further noted that the ECtHR stressed that it would be for the government to prove the effectiveness, both in theory and practice, of the individual mechanism before the Constitutional Court.[282] In the light of all this information, the Committee ultimately remarked that the State party could not prove that filling an individual application before the Constitutional Court would have been effective to challenge the applicants' detention.[283] Thus, in respect to their arbitrary detention, the

---

[274] Ibid. at § 4.7.
[275] *Mercan v. Turkey* (dec), no. 56511/16, 8 November 2016; *Zihni v. Turkey* (dec), no. 59061/16, 29 November 2016.
[276] UN Human Rights Committee, Communication No. 2980/2017, CCPR/C/125/D/2980/2017, published on 28 May 2019 at § 5.5, 5.6 and 5.7.
[277] Ibid. at § 5.5.
[278] Ibid. at § 5.5. See also Suzy Hansen, "Inside Turkey's Purge", *The New York Times*,13 April 2017<www.nytimes.com/2017/04/13/magazine/inside-turkeys-purge.html> accessed 10 July 2019.
[279] Ibid. at § 5.6.
[280] Ibid. at § 5.7.
[281] Ibid .at § 8.5. See also *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 142, 20 March 2018; *Şahin Alpay v. Turkey*, no. 16538/17, § 121, 20 March 2018.
[282] UN Human Rights Committee, supra note 259, at § 8.5.
[283] Ibid. at § 8.5

Committee rejected the State party's claim regarding the admissibility of the complaint. As a result, one can consider this ruling as vital because it held that there is prima facie evidence that the presumption of the Constitutional Court as an effective remedy was wrong. For this reason, in practical terms, the Committee's decision differs from the ECtHR's perspective on the Constitutional Court's effectiveness even though the former's view is based on the latter's judgment. To be clear, they hold different perspectives because the latter has not yet examined any application that had not exhausted the remedy of the individual application before the Constitutional Court, whereas the former did not automatically deem it an effective remedy with respect to pre-trial detention.

Nevertheless, the Committee ruled that the applicants' claim under other Articles were inadmissible since they did not exercise due diligence in the pursuit of available remedies.[284] Yet, in his dissenting opinion, Gentian Zyberi departed from the Committee's finding of inadmissibility of the authors' claims under Article 7, 10 and 14 pursuant to Article 5(2)(b) of the Optional Protocol. His reasoning is based on two grounds. The first one is the overall legal environment of Turkey, whereas the second is the argument that the applicants have tried to use the domestic remedies reasonably available to them. In this regard, he significantly remarked that

> "While I agree with the Committee that authors of communications must exercise due diligence in the pursuit of available remedies, such pursuit can only take place in an [285]environment which is conducive to such efforts. The Turkish legal system after the coup, where almost one third (4,424) of the judges and prosecutors have been dismissed on allegations of conspiring with the Gülen movement and where 2,386 judges and prosecutors have been detained ( ), does not provide an environment conducive to upholding the standards of due process."[286]

He further remarked that the fact that both applicants are in detention after almost two years without specific charges against them or a trial date constituted a valid reason that justifies the non-exhaustion of domestic remedies under Article 5(2)(b). [287]Finally, he found the Committee's findings placing the burden of proof on the applicants problematic under these circumstances.[288]

In a nutshell, the views adopted by the majority of the Committee can correspond to a watershed moment in the stance of the international community towards the Constitutional Court, since it did not

---

[284] Ibid. at § 8.7
[285] Ibid. at pp. 14-15 (Annex).
[286] Ibid. at pp. 14-15, § 5 (Annex).
[287] Ibid. at pp. 14-15, § 6 (Annex).
[288] Ibid. at pp. 14-15, § 8 (Annex).

automatically regard the Constitutional Court as an effective remedy with respect to pre-trial detention, instead, showed serious consideration to the facts surrounding the country. This watershed becomes greater in the dissenting opinion narrowing the application of the exhaustion of domestic remedies and resting the burden of proof on the State party. Above all, the outcome of the Committee's decision legally reveals the sad truth that seeking remedy before the Constitutional Court is meaningless in the present circumstance of the country.

5. Conclusion

This thesis has showed that the Court has coped with its legitimization crisis by firmly adopting the principle of subsidiarity in order to appease the critics and regain the support of the Contracting states, in particular the UK. For this reason, the current era in the Convention mechanism is defined as the age of subsidiarity. Arguably, this age of subsidiarity presents a turning point in the Convention mechanism, since it envisages a more pacifist stance for the Court when the domestic authorities respect human rights and have properly applied the Court's case-law on the mater. To be able to do so, it is necessary for the Court to identify when to intervene as well as when to not intervene. Thus, the Court has developed good and bad faith jurisprudences. In accordance with that, the Court defers to national authorities who act in good faith while it condemns the practices of bad faith which fundamentally disrespect the Convention principles. In both cases, what justifies the Court's attitude to national authorities is the protection of the Convention values, namely human rights, democracy, and rule of law. In other words, the Court is not supposed to take a "hands-off" approach where the domestic authorities clearly and systematically disregard the Convention. Otherwise, the existence of the Court would be meaningless, whose *raison d'etre* is to work as a warning system to prevent the resurgence of totalitarianism in the continent.

With respect to the large-scale crisis in Turkey where human rights records are self-evidently pathetic as well as the rule of law, the adaptation of an extremist view on the principle of subsidiarity and the exhaustion of domestic remedies by the Court would mean the denial of justice. In this case, not just the destiny of dismissed public servants and other victims of human rights violations would rest on the authorities, whose only aim is to abuse them rather than to redress the complained situation, but also the Convention mechanism would be rendered inoperative and ineffective for those individuals. This would undeniably go against the foundation of the Court. However, instead of making meaningful impact, the Court has not dealt with any cases in which complainants had not exhausted the individual

application mechanism before the Constitutional Court. Also, it deemed the SoE Commission effective remedy, which is at odds with the fundamental principles of human rights. The opposite attitude would enable the Court to increase its efficacy and legitimacy. I conclude here with a hope that in the near future, the Court would realize the legal and political contexts that requires the Court to override its role.

6. BIBLIOGRAPHY

Cases and Communications:

The United Nations:

UN Human Rights Committee, Communication No. 2980/2017, CCPR/C/125/D/2980/2017, published on 28 May 2019
<www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24661&LangID=E>

The European Court of Human Rights:

Airey v. Ireland, 9 October 1979, § 24, Series A no. 32.
Akdivar and Others v. Turkey, 16 September 1996, § 65, Reports of Judgments and Decisions 1996-IV.
Aksoy v. Turkey, 18 December 1996, § 52, Reports of Judgments and Decisions 1996-VI.
Alparslan Altan v. Turkey, no. 12778/17, § 42, 16 April 2019.
Artico v. Italy, 13 May 1980, § 33, Series A no. 37.
Artun and Güvener v. Turkey, no. 75510/01, 26 June 2007.
Assanidze v. Georgia [GC], no. 71503/01, § 197, ECHR 2004-II.
Brusco v. Italy (dec.), no. 69789/01, ECHR 2001-IX.
Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, § 10, Series A no. 6.
Çatal v. Turkey (dec), no. 2873/17, 7 March 2017.
Cebotari v. Moldova, no. 35615/06, § 49, 13 November 2007.
Chiragov and Others v. Armenia [GC], no. 13216/05, § 119, ECHR 2015.
Colombani and Others v. France, no. 51279/99, § 68, ECHR 2002-V.
D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 116, ECHR 2007-IV.
Demopoulos and Others v. Turkey (dec.) [GC], nos. 46113/99 and 7 others, § 88, ECHR 2010.
Epözdemir v. Turkey (dec.), no. 57039/00, 31 January 2002.
Gherghina v. Romania (dec.) [GC], no. 42219/07, § 87, 9 July 2015.
Gillow v. the United Kingdom, 24 November 1986, § 54, Series A no. 109.
Gusinskiy v. Russia, no. 70276/01, § 73, ECHR 2004-IV.
Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24.
Hirst v. the United Kingdom (no. 2), no. 74025/01, 30 March 2004.
Ilgar Mammadov v. Azerbaijan [GC], no. 15172/13, 29 May 2019.
İçyer v. Turkey (dec.), no. 18888/02, § 72, ECHR 2006-I.
Kamma v. the Netherlands, no. 4771/71, Commission's report of 14 July 1974.
Köksal v. Turkey (dec), no. 70478/16, § 27 6 June 2017.
Kozacıoğlu v. Turkey [GC], no. 2334/03, § 40, 19 February 2009.
Mammadli v. Azerbaijan, no. 47145/14, § 93, 19 April 2018.
Mehmet Hasan Altan v. Turkey, no. 13237/17, 20 March 2018.
Merabishvili v. Georgia, no. 72508/13, § 83, 14 June 2016.
Merabishvili v. Georgia [GC], no. 72508/13, § 292, 28 November 2017.
Mercan v. Turkey (dec), no. 56511/16, 8 November 2016.
MPP Golub v. Ukraine (dec.), no. 6778/05, ECHR 2005-XI.
OAO Neftyanaya Kompaniya Yukos v. Russia, no. 14902/04, § 663-666, 20 September 2011.

Otegi Mondragon v. Spain, no. 2034/07, § 55-56, ECHR 2011.
Othman (Abu Qatada) v. the United Kingdom, no. 8139/09, ECHR 2012 (extracts).
Pakdemirli v. Turkey, no. 35839/97, § 51-52, 22 February 2005.
Paksas v. Lithuania [GC], no. 34932/04, § 75, ECHR 2011 (extracts).
Papamichalopoulos and Others v. Greece (Article 50), 31 October 1995, § 34, Series A no. 330-B.
Parizov v. the former Yugoslav Republic of Macedonia, no. 14258/03, § 41-47, 7 February 2008.
Rasul Jafarov v. Azerbaijan, no. 69981/14, § 158-163, 17 March 2016.
Rashad Hasanov and Others v. Azerbaijan, no. 48653/13, § 116, 7 June 2018.
Ringeisen v. Austria, 16 July 1971, § 89, Series A no. 13.
Şahin Alpay v. Turkey, no. 16538/17, 20 March 2018.
SAS v. France [GC], no. 43835/11, § 129, ECHR 2014.
Sargsyan v. Azerbaijan [GC], no. 40167/06, § 117-19, ECHR 2015.
Sejdovic v. Italy [GC], no. 56581/00, § 46, ECHR 2006-II.
Selahattin Demirtaş v. Turkey (no. 2), no. 14305/17, 20 November 2018.
Selmouni v. France [GC], no. 25803/94, § 72, ECHR 1999-V.
Şener v. Turkey, no. 26680/95, § 59-62, 18 July 2000.
Timurtaş v. Turkey, no. 23531/94, § 329, ECHR 2000-VI.
Uzun v. Turkey (dec.), no. 10755/13, 30 April 2013.
Vuckovic and Others v. Serbia (preliminary objections) [GC], no. 17153/11, § 69, 25 March 2014.
Zihni v. Turkey (dec), no. 59061/16, 29 November 2016.

The Constitutional Court:

The Constitutional Court's decision concerning Umut Kılıç, Application no. 2015/16643, 4 April 2018.

The Constitutional Court's judgment concerning Mehmet Hasan Altan (2), Application no. 2016/23672, published 11 January 2018.

The Constitutional Court's judgment concerning Şahin Alpay, Application no. 2016/16902, published 11 January 2018.

The Constitutional Court's judgment concerning Selçuk Özdemir, Application No. 2016/49158, 26 July 2017.

The Constitutional Court decision, E. 1990/25, K. 1991/1, published 10 January 1991.

The Constitutional Court decision, E. 2016/6 (Miscellaneous file), K. 2016/12, 4 August 2016, <http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/pdf/2016-12.pdf>

The Constitutional Court decision, E. 2016/166, K. 2016/159, 12 October 2016.

The Constitutional Court decision, E. 2016/167, K. 2016/160, 12 October 2016.

The Constitutional Court decision, E. 2016/25, K. 2016/186, 14 December 2016.

Legislation:

The Code of Administrative Procedures, Law No. 2577, published in the Official Gazette on 20 January 1982, <www.mevzuat.gov.tr/MevzuatMetin/1.5.2577.pdf>.

The Constitution, adopted 7 November 1982, <www.tbmm.gov.tr/anayasa/anayasa_2018.pdf> .

The Emergency Decree Law No. 667, published on 23 July 2016, <www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm>.

The Emergency Decree Law No. 672, published in the Official Gazette on 1 September 2016, <www.resmigazete.gov.tr/eskiler/2016/09/20160901M1-1.htm>.

The Emergency Decree Law No. 685, published in the Official Gazette on 23 January 2017, <www.resmigazete.gov.tr/eskiler/2017/01/20170123-4.htm> .

The Emergency Decree Law No. 690, published in the Official Gazette on 29 April 2017, <www.resmigazete.gov.tr/eskiler/2017/04/20170429-M1-2.htm> .

The Emergency Decree Law No. 694, published in the Official Gazette on 25 August 2017, Articles 197-201 <www.resmigazete.gov.tr/eskiler/2017/08/20170825-13.pdf> .

The European Convention on Human Rights, <www.echr.coe.int/Documents/Convention_ENG.pdf> .

The International Covenant on Civil and Political Rights (ICCPR), <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> .

The Prime Minister Circular on the Working Principles and Procedures of the Inquiry Commission on the State of Emergency Measures [Translation]", published in the Official Gazette on 12 July 2017, <www.resmigazete.gov.tr/eskiler/2017/07/20170712M1-1.htm> .

The Law No. 7075, published in the Official Gazette on 8 March 2018, <www.mevzuat.gov.tr/MevzuatMetin/1.5.7075.pdf>.

The Law No. 7145, adopted by the Turkish Parliament on 25 July 2018, <www.tbmm.gov.tr/kanunlar/k7145.html>.

The Law on Public Servants, No. 657, published in the Official Gazette on 23 July 1965, <www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf>.

The Turkish Penal Code, published in the Official Gazette on 12 October 2004, <www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf>.

Books, Blogs, and Articles:

Ay E., "The Heavy Cost of a Call for Peace: The Academics for Peace", *EMA Human Rights Blog*, 11 March 2019 <www.emahumanrights.org/2019/03/11/the-heavy-cost-of-a-call-for-peace-the-academics-for-peace%ef%bb%bf/?fbclid=IwAR0Ha9l8opjTrcDw-O12Nrrsyr--YpaeieFwUQLHC7lZq1plxSL7NAIgVH8>.

Altıparmak K., "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?", 23 February 2017, <www.ihop.org.tr/en/wp-content/uploads/2017/03/IS-THE-STATE-OF-EMERGENCY-INQUIRY-COMMISSION.pdf>.

Altıparmak K. and Akdeniz Y., "TCK 299: Olmayan Hükmün Gazabı mı?", Güncel Hukuk Dergisi, October 2015.

Altıparmak K, Demirkent D, and Sevinç M, "ATİPİK KHK'LER ve DAİMİ HUKUKSUZLUK: ARTIK YASALARI İDARE Mİ İPTAL EDECEK?", İnsan Hakları Ortak Platformu, 8 March 2018 <www.ihop.org.tr/wp-content/uploads/2018/03/Atipik_OHAL_-KHKleri-1.pdf>

Altıparmak K, Demirkent D, and Sevinç M, "ATİPİK KHK'LER ve DAİMİ HUKUKSUZLUK: OHAL KHK'si ile erkeği kadın, kadını erkek yapamazsınız!", İnsan Hakları Ortak Platformu, 27 April 2018 <www.ihop.org.tr/wp-content/uploads/2018/04/Atipik-OHAL-KHKleri_II-1.pdf>.

Aytaç S. E. and Elçi E., "Populism in Turkey", October 2018, <www.researchgate.net/publication/328149081_Populism_in_Turkey>.

Bates E., "Activism and self-restraint: the margin of appreciation's Strasbourg career… its 'coming of age'?", Human Rights law Journal, Volume 36, No. 7-12, 30 December 2016, pp. 261-276.

Besson S., "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?", The American Journal of Jurisprudence, Vol. 61, No. 1, 2016, pp. 69-107.

Björgvinsson D. T., "The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual", iCourts Working Paper Series, No. 23, 2015.

Butler G., "A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights", Utrecht Journal of International and European Law 104, (2015) 31(81), pp. 104-110.

Çalı B., "Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights", Wisconsin International Law Journal, Vol. 35, No. 2, 2018.

Çalı B., "From flexible to variable standards of judicial review: the responsible domestic courts doctrine at the European Court of Human Rights", Shifting Centres of Gravity in Human Rights Protection, Rethinking Relations between the ECHR, EU, and National Legal Orders, pp. 144-160.

Demir Ö., "YENİ REJİMDE CUMHURBAŞKANINA HAKARET SUÇUNA YÖNELİK ELEŞTİREL BİR İNCELEME", Suç ve Ceza, 2018, sayı 3, pp.43-75.

Harvey P., "The Principle of Subsidiarity: A More Positive Approach" , Human Rights Law Journal, Volume 36, No 7-12, 30 December 2016, pp 335-339.

Hoffmann L., 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, (2009) <www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/hoffmann.pdf>.

Kanetake M., "Subsidiarity in the Practice of International Courts", M. Kanetake and A. Nollkaemper (eds), The Rule of Law at the National and International Levels: Contestations and Deference (Hart Publishing, 2016), pp. 269-288.

Karan U., "Mercan v. Turkey: Waiting for the Last Word of the Turkish Constitutional Court", *Verfassungsblog*, 21 November 2016 <https://verfassungsblog.de/mercan-v-turkey-waiting-for-the-last-word-of-the-turkish-constitutional-court/>.

Karsai D. A., "Extremist view on subsidiarity and on exhaustion of domestic remedies? Criticism of the decision Szalontay v. Hungary", (Strasbourg Observers, 22 May 2019) <https://strasbourgobservers.com/2019/05/22/extremist-view-on-subsidiarity-and-on-exhaustion-of-domestic-remedies-criticism-of-the-decision-szalontay-v-hungary/>.

Kosař D. and Šipulová K.," The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law", Hague Journal on the Rule of Law, April 2018, Volume 10, Issue 1, pp. 83-110.

Kurban D., "Think Twice before Speaking of Constitutional Review in Turkey", *Verfassungsblog*, 20 February 2018 < https://verfassungsblog.de/think-twice-before-speaking-of-constitutional-review-in-turkey/>.

Madsen M. R., "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?", iCourts Working Paper Series, No. 100, 2017.

Mariniello T., "Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system", German Law Journal (2019), 20, pp. 46-71.

Marochini M., "The interpretation of the European Convention Human Rights", Zbornik radova Pravnog fakulteta u Splitu, god. 51, January 2014, pp 63-84.

Mowbray A., "Subsidiarity and the European Convention on Human Rights", Human Rights Law Review, Volume 15, Issue 2, June 2015, pp. 313-341.

Nugraha I. Y., "Human rights derogation during coup situations", The International Journal of Human Rights, 2017.

O'Boyle M., "Can the ECtHR provide an effective remedy following the coup d'état and declaration of emergency in Turkey?", (EJIL: TALK! 19 March 2018) < https://www.ejiltalk.org/can-the-ecthr-provide-an-effective-remedy-following-the-coup-detat-and-declaration-of-emergency-in-turkey/>.

O'Meara N., "Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR", iCourts Working Paper Series, No. 31, 2015.

Olcay T., "Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members: Decision of 4 August 2016, E. 2016/6

(Miscellaneous file), K. 2016/12", European Constitutional Law Review, Volume 13, Issue 3, September 2017, pp. 568-581.

Rogenhofer J. M., "Antidemocratic Populism in Turkey after the July 2016 Coup Attempt", Brill (in Populism), Volume 1, issue 2, 4 December 2018, pp 116-145.

Satzger H., Zimmermann F, and Eibach M., "Does Art. 18 Grant Protection against Politically Motivated Criminal Proceedings? - Rethinking the Interpretation of Art. 18 ECHR against the Background of New Jurisprudence of the European Court of Human Rights", European Criminal Law Review, 11 September 2014, pp. 91-113.

Satzger H., Zimmermann F, and Eibach M., "Does Art. 18 ECHR grant protection against politically motivated criminal proceedings? (Part 2) – Prerequisites, questions of evidence and scope of application", European Criminal Law Review, 31 December 2014, pp 248-264.

Smet S., "When Human Rights Clash in 'The Age of Subsidiarity': What Role for the Margin of Appreciation?" (November 25, 2015), Petr Agha (ed), Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts (Hart Publishing, 2017).

Spano R., "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" ,Human Rights Law Review, 2018, 18, pp. 473-494.

Spano R., "Universality or Diversity of Human Rights?†: Strasbourg in the Age of Subsidiarity", Human Rights Law Review, Volume 14, Issue 3, September 2014, pp. 487-502.

Spencer L., "The ECtHR and Post-coup Turkey: Losing Ground or Losing Credibility?", *Verfassungsblog*, 17 July 2018 <https://verfassungsblog.de/the-ecthr-and-post-coup-turkey-losing-ground-or-losing-credibility/>.

Turkut E., "Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?" *EJIL: Talk!*, 28 December 2016 <www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/#more-14856>.

Tan F., "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?", Göttingen Journal of International Law, Volume 9, Issue 1, p. 115.
Turkut E., "The Köksal case before the Strasbourg Court: a pattern of violations or a mere aberration?", *Strasbourg Observers*, 2 August 2017, <https://strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/> .

Turkut E., "The discovery in flagrante delicto, the Kafkaesque fate of a Supreme judge and the Turkish Constitutional Court: The Alparslan Altan case in Strasbourg" Strasbourg Observers, 6 May 2019 <https://strasbourgobservers.com/2019/05/06/the-discovery-in-flagrante-delicto-the-kafkaesque-fate-of-a-supreme-judge-and-the-turkish-constitutional-court-the-alparslan-altan-case-in-strasbourg/>.

Turkut E., "Turkey's Post-Coup 'Purification Process': Collective Dismissals of Public Servants under the European Convention on Human Rights", Human Rights Law Review, Volume 18, Issue 3, September 2018, pp. 539-565.

The Reports of NGOs and International Organizations:

The Amnesty International, "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers", 25 October 2018, <www.amnesty.org/download/Documents/EUR4492102018ENGLISH.PDF>.

The Brighton Declaration, 20 April 2012, <www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf>

The 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, 15 December 2016, < http://website-pace.net/documents/18848/2197130/20161215-Apdoc18.pdf/35656836-5385-4f88-86bd-17dd5b8b9d8f>.

The Directorate of the Jurisconsult, "Guide on Article 18 of the European Convention on Human Rights", updated on 31 August 2018 <www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf>.

The Directorate of the Jurisconsult, "Practical Guide on Admissibility Criteria", updated on 31 December 2018 <www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf>.

The European Commission, "Turkey 2019 Report (Staff Working Documents)", SWD (2019) 220 final, Brussels, 29 May 2019, p. 22 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-turkey-report.pdf>.

The European Commission, "Turkey 2018 Report (Staff Working Documents)", SWD (2018) 153 final, Strasbourg, 17 April 2018, p. 5 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>.

The European Implementation Network, "EIN statement on the implementation of judgments of the European Court of Human Rights" (1 December 2018), <www.einnetwork.org/ein-handbooks>.

The ECtHR's statistics, p. 58 <www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf>

The Human Rights Association (IHD) "Anti-Terrorist Repression in Turkey: Excessive and Unlawful", 2017 <http://ihd.org.tr/en/wp-content/uploads/2017/11/IHD_anti-terrorist-repression-excessive_and_unlawful-ENGLISH.pdf>.

The Human Rights Watch, "A Blank Check: Turkey's Post-Coup Suspension of Safeguards against Torture", 25 October 2016 <www.hrw.org/sites/default/files/report_pdf/turkey1016_web.pdf>.

The Human Rights Watch, "Silencing Turkey's Media: The Government's Deepening Assault on Critical Journalism", 15 December 2016 <www.hrw.org/sites/default/files/report_pdf/turkey1216_web.pdf>.

The Interlaken Declaration, 19 February 2010, <www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> .

The Izmir Declaration, 27 April 2011, <www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> .

The Jurisconsult, "Principle of subsidiarity", Interlaken Follow-up, 2010, p. 2, <www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf>.

The Kurdish Institute, "List of dismissed and imprisoned Kurdish mayors in Turkey" <www.institutkurde.org/en/info/infographics/mayors/>.

The Reporters Without Borders (RSF), the 2019 World Press Freedom Index. <https://rsf.org/en/ranking>

The Stockholm Center for Freedom," Jailed and wanted Journalists in Turkey- Updated List" <https://stockholmcf.org/press-freedom/>.

The SoE Commission's activity report: <https://soe.tccb.gov.tr/Docs/OHAL_Report_2019.pdf>
The Venice Commission, "Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017", Opinion No. 875/2017, Strasbourg, 13 March 2017, <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)005-e>

The Venice Commission, "Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016", Opinion No. 865/2016, Strasbourg 12 December 2016, § 227 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e>.

The World Justice Project, "Rule of Law Index", 2019, <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced_0.pdf>.

The HUMAN RİGHTS FOUNDATİON, "The Collapse of the Rule of Law and Human Rights in Turkey: The Ineffectiveness of Domestic Remedies and the Failure of the ECtHR's Response", 12 June 2019, pp. 37-46 <https://hrf.org/wp-content/uploads/2019/06/Turkey-ECtHR-Report_April-2019.pdf>.

"Contribution of the Court to the Brussels Conference", 26 January 2015, www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf>

Newspaper articles, press releases, and other online sources:

Academics for Peace, https://barisicinakademisyenler.net/node/1>.

Butler J. and Ertür B., “In Turkey, academics asking for peace are accused of terrorism” *The Guardian*, 11 December 2017 <www.theguardian.com/commentisfree/2017/dec/11/erdogan-turkey-academics-terrorism-violence-kurdish-people>.

Gauthier-Villars D., “Turkey Cancels Istanbul Election Won by Opposition”, *The Wall Street Journal*, 6 May 2019 <www.wsj.com/articles/turkey-cancels-istanbul-mayoral-election-won-by-opposition-11557162702>.

Hansen S., “Inside Turkey’s Purge”, *The New York Times*,13 April 2017<www.nytimes.com/2017/04/13/magazine/inside-turkeys-purge.html>

Karadağ K., “OHAL Komisyonu 17 bin başvuruyu karara bağladı”, *Anadolu Agency* (Ankara, 18 May 2018) <www.aa.com.tr/tr/turkiye/ohal-komisyonu-17-bin-basvuruyu-karara-bagladi/1149677>

Letsch C., “Turkish ministers' sons arrested in corruption and bribery investigation”, *The Guardian*, (Istanbul, 17 December 2013) <www.theguardian.com/world/2013/dec/17/turkish-ministers-sons-arrested-corruption-investigation>

MacAskill E., “Turkey says Kurdish peace process impossible as Nato meets”, *The Guardian*, 28 July 2015 <www.theguardian.com/world/2015/jul/28/turkey-erdogan-not-possible-peace-process-kurdish-militants>

McCarthy N., “Where The Most Journalists Are Imprisoned Worldwide”, *Statista*, 13 December 2018 <www.statista.com/chart/3310/china-incarcerates-more-journalists-than-anywhere-else/>.

Muižnieks N., “Non-implementation of the Court’s judgments: our shared responsibility” (Human rights comment, 23 August 2016) <www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility>.

Ok S., “OHAL öldürmeye devam ediyor”. *BİA Haber Merkezi*, (Istanbul, 10 January 2018) <https://m.bianet.org/bianet/emek/193152-ohal-oldurmeye-devam-ediyor>.

Öztürk F., “OHAL intiharları: 9 ayda en az 37 kişi kendini öldürdü” *BBC Türkçe*, 29 Nisan 2017 <www.bbc.com/turkce/haberler-dunya-39745716> .

Shaheen K., “Turkey to hold snap elections on 24 June, says Erdoğan”, *The Guardian*, 18 April 2018 <www.theguardian.com/world/2018/apr/18/turkey-to-hold-snap-elections-on-24-june-says-erdogan>.

Uludağ A., “Eleştiren yanıyor!”, Cumhuriyet, 11 December 2018 <www.cumhuriyet.com.tr/haber/siyaset/1166075/Elestiren_yaniyor_.html>.

Watt N. and Mason R., “Cameron 'committed to breaking link with European court of human rights”, *The Guardian*, 1 June 2015 <www.theguardian.com/law/2015/jun/01/david-cameron-european-court-of-human-rights>

Yuksel E., “Cumhurbaşkanına Hakaretten Kaç Kişi Sanık Oldu?”, Doğruluk Payı, 22 January 2019 <www.dogrulukpayi.com/bulten/cumhurbaskanina-hakaret-kanunu> .

The Broadcast of Ömer Faruk Gergerlioğlu with Kerem Altıparmak, 26 June 2019, <www.youtube.com/watch?v=mhEJl-0p_Uo&t=169s>.

The Constitutional Court’s Announcement, 26 June 2019, <www.anayasa.gov.tr/tr/haberler/bireysel-basvuru-basin-duyurulari/bazi-gazeteciler-hakkinda-uygulanan-tutuklama-tedbirlerinin-kisi-hurriyeti-ve-guvenligi-hakki-ile-basin-ve-ifade-ozgurlugunu-ihlal-ettigi-iddialari/>.

The Human Rights Watch, “Turkey: End Prosecutions For ‘Insulting President’, 17 October 2018 <www.hrw.org/news/2018/10/17/turkey-end-prosecutions-insulting-president>.

The Rights Violations Against "Academics for Peace” <https://barisicinakademisyenler.net/node/314>.

The Reporters Without Borders (RSF), “Attackers freed after beating Turkish columnist with baseball bats”, 14 May 2019 <https://rsf.org/en/news/attackers-freed-after-beating-turkish-columnist-baseball-bats>.

The SoE Commission, “Announcement on the decisions of the Inquiry Commission on the State of Emergency Measures and the Applicant Tracking System [Translation]”, 19 January 2018 <https://ohalkomisyonu.tccb.gov.tr/duyurular>.

The SoE Commission, “Announcement on the decisions of the Inquiry Commission on State of Emergency Measures”, 28 June 2019 < https://soe.tccb.gov.tr/>.

The Stockholm Center for Freedom,” Jailed and wanted Journalists in Turkey- Updated List” <https://stockholmcf.org/press-freedom/>.

“Concept of human rights being distorted, warns Cameron”, *BBC*, 25 January 2012 <www.bbc.com/news/uk-politics-16708845>.

“Erdoğan fires Turkey's bank governor amid ongoing recession” *The Guardian*, (Ankara, 6 July 2019) <www.theguardian.com/world/2019/jul/06/turkey-recep-tayyip-erdogan-fires-bank-governor-murat-cetinkaya-ongoing-recession?CMP=share_btn_fb&fbclid=IwAR2qUdkFX3wV9z-CEQ7xkopiBP1aHNx9qb3FVIAvS50mRy06I--GQP4xXvw>.

“Erdoğan: Mayors Must Do What They Have to Do”, *BIA News Desk*, (Istanbul, 19 October 2017) <http://bianet.org/english/politics/190757-erdogan-mayors-must-do-what-they-have-to-do>.

"Erdoğan rejects European court's 'non-binding' decision over Demirtaş" *Hürriyet Daily News* (Strasbourg, 20 November 2018) <www.hurriyetdailynews.com/european-court-urges-turkey-to-free-demirtas-139022>.

"KHK ile Anayasa Mahkemesi de kapanır mı?" *Gazete Duvar*, 30 October 2016, <www.gazeteduvar.com.tr/gundem/2016/10/30/khk-ile-anayasa-mahkemesi-de-kapanir-mi/>.

"OHAL Komisyonu ilk kararını verdi", *BİA Haber Merkezi* (Ankara, 22 December 2017) <http://bianet.org/bianet/insan-haklari/192675-ohal-komisyonu-ilk-kararlarini-verdi>.

"Parliament wants to suspend EU accession negotiations with Turkey" *News European Parliament*, 13 March 2019 <www.europarl.europa.eu/news/en/press-room/20190307IPR30746/parliament-wants-to-suspend-eu-accession-negotiations-with-turkey>.

"State of Emergency Chair, Members Become Clear", *BIA News Desk*, (Ankara, 17 May 2017), <http://bianet.org/english/politics/186559-state-of-emergency-chair-members-become-clear>.

"State of Emergency Commission to Start Duty on July 17, Says PM", *BIA News Desk*, (Istanbul, 14 July 2017 <http://bianet.org/english/politics/188283-state-of-emergency-commission-to-start-duty-on-july-17-says-pm>.

"Timeline of attacks in Turkey", *Al Jazeera*,19 February 2017 <www.aljazeera.com/indepth/interactive/2016/06/timeline-attacks-turkey-160628223800183.html>.

"Turkey clashes: Why are Gezi Park and Taksim Square so important?" *BBC*, 7 June 2013 <www.bbc.com/news/world-europe-22753752>.

"Turkey HDP: Blast after pro-Kurdish leaders Demirtas and Yuksekdag detained", *BBC*, 4 November 2016 <www.bbc.com/news/world-europe-37868441>.

"Turkey lira: Ankara to boycott US electronic goods" *BBC*, 14 August 2018 <www.bbc.com/news/world-europe-45179673>.

"Turkey needs to put an end to arbitrariness in the judiciary and to protect human rights defenders" 8 July 2019. <www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders>.

"Turkey referendum: Erdogan rallies not welcome in Austria", *BBC*, 27 February 2019 <www.bbc.com/news/world-europe-39105683>.

"Turkey row: Why has Erdogan riled Nato allies?", *BBC*, 13 March 2017 <www.bbc.com/news/world-europe-39255864>.

"Turkey's coup attempt: What you need to know", *BBC*, 17 July 2016 <www.bbc.com/news/world-europe-36816045>.

"Turkey's state of emergency commission makes first decisions on dismissed public sector staff" *Hurriyet Daily News* (Ankara, 22 December 2017) <www.hurriyetdailynews.com/turkeys-state-of-emergency-commission-makes-first-decisions-on-dismissed-public-sector-staff-124583>.

"Turkish Constitutional Court rejects CHP's appeal to annul decree laws" *Hurriyet Daily News*, (Ankara, 12 October 2016) <www.hurriyetdailynews.com/turkish-constitutional-court-rejects-chps-appeal-to-annul-decree-laws-104889>.

"Turkish-German ties fray as Erdogan chases diaspora vote", *BBC*, 9 March 2017 <www.bbc.com/news/world-europe-39215497>.

"Turkish lira crisis", *BBC* <www.bbc.com/news/topics/c6xkk152803t/turkish-lira-crisis>.

"Turkish President Erdogan calls new election", *DW*, 24 August 2015 <www.dw.com/en/turkish-president-erdogan-calls-new-election/a-18664339>.

"We will not be a party to this crime! (in English, French, German, Spanish, Arabic, Russian, Greek)" <https://barisicinakademisyenler.net/node/63>.

"Why did Turkey hold a referendum?" *BBC*, 16 April 2017 <www.bbc.com/news/world-europe-38883556>.

"Wise men committee members announced", *Anadolu Agency*, 3 April 2013 <www.aa.com.tr/en/turkey/wise-men-committee-members-announced/258996>.