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The Death of Judicial Independence in Turkey: A Lesson for Others^Ψ

By Edwin L. Felter, Jr.* & Oyku Didem Aydin**

I.	INTRODUCTION	XXX
II.	BACKGROUND: THE FAILED COUP	XXX
	A. <i>States of Emergency</i>	XXX
	B. <i>The American Bar Association Position</i>	XXX
III.	THE TURKISH JUDICIARY	XXX
IV.	THE MECHANICS OF ENDING JUDICIAL INDEPENDENCE IN TURKEY: EMERGENCY DECREES LAWS	XXX
V.	CIRCUMSTANCES OF INVESTIGATION	XXX
VI.	PANIC STATE	XXX
VII.	VIOLATIONS OF THE CONSTITUTION, FUNDAMENTAL RIGHTS, CRIMINAL PROCEDURAL RIGHTS, DISCIPLINARY PROCEEDINGS AND PENITENTIARY RIGHTS	XXX
VIII.	CONCLUSION	XXX

“The first thing we do, let’s kill all the lawyers.”

William Shakespeare. Henry VI, Part 2, Act IV, Scene 2

I. INTRODUCTION

Although subject to differing interpretations, Shakespeare’s quotation is prophetic concerning the way to end the rule of law and begin an authoritarian society. Included among Shakespeare’s “lawyers” are judges. What has been unfolding in Turkey concerning its judiciary should serve as a warning to other societies—a warning that people must believe in. The people of Turkey must support an independent judiciary lest the rule of law vanish.

An independent judiciary is the fragile, unseen glue that holds democratic societies together. Maintaining an independent administrative law judiciary is even more fragile because there has always been the need for it to demonstrate its independence from the agencies whose cases it hears. Indeed, anecdotal information concerning Federal Administrative Procedure Act (APA) ALJs in some agencies, for example, the Social Security Administration (SSA) and the United States Coast Guard (USCG), illustrate that the agencies have made both subtle and not so subtle incursions on the decisional independence of the APA ALJs who hear and decide their cases.¹ . At one time, the SSA adopted a mandatory policy of “non-

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[†] Please note that the opinions expressed herein regarding controversial matters of the state in Turkey are those held solely by co-author Edwin Felter. These opinions should not be attributed to co-author Oyku Didem Aydin.

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the Council of Europe awarded Judge Arslan the prestigious Vaclav Havel Human Rights Prize. In his acceptance speech from prison, he vowed to continue the fight for judicial independence.¹ He is still imprisoned. Professor Aydin also leads a group of 100 pro bono Turkish lawyers, who represent jailed and fired judges and prosecutors.

¹ The following links are resources addressing the issue of judicial independence of ALJs. The first two links are law review articles discussing why ALJs are not judicially independent. Part IV of the first law review article discusses this issue in more depth. The third link is a letter sent to the U.S. Department of Housing and Urban Development (HUD), addressing the allegations that raise serious questions about the ability of the ALJs at HUD to maintain and exercise their decisional independence under the federal APA. The fourth link is a report published in the ABA Journal discussing the claim that was filed by an ALJ against HUD, claiming that HUD interfered with his cases after his disability claim. The last link is also a report published by the ABA Journal discussing U.S. District Judge Posner's order denying the claim of Social Security Judges for interference with judicial independence and comparing them to poultry processing workers.

1. James E. Moliterno, "The Administrative Judiciary's Independence Myth," Faculty Publications (2006), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2042&context=facpubs>.
2. Debra C. Moss, "Judges Under Fire – ALJ Independence at Issue," 12 J. Nat'l Ass'n Admin. L. Judiciary (1992), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1500&context=naalj>.
3. *E.g.*, Letter from Peter M. Davenport, President, Fed. Admin. Law Judges Conf., to Shaun Donovan, Sec'y, HUD (Apr. 22, 2010), <http://www.govexec.com/pdfs/022811k11.pdf>.
4. Martha Neil, "Admin Law Judge: HUD Interfered With My Cases After My Disability Claim," ABA Journal (Feb. 9, 2010), http://www.abajournal.com/news/article/admin_law_judge_hud_interfered_with_my_cases_after_my_disability_claim/.
5. Lorelei Laird, "Posner Ruling Tosses Social Security Judges' Grievance Claim, Compares Them to Assembly Line Workers," ABA Journal (Jan. 26, 2015), http://www.abajournal.com/news/article/posner_ruling_tosses_social_security_judges_grievance_claim_compares_them/. *See also* Walter J. Brudzinski, "Greater Independence for ALJs Plus Cost Savings for Agencies: The Coast Guard Model," 30 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2010), <https://digitalcommons.pepperdine.edu/naalj/vol30/iss1/1/>. For state incursions see Christopher Williams, "State Employees Say LePage Pressured Them to Deny Jobless Benefits," Sun Journal (Apr. 11, 2013), <http://www.sunjournal.com/state-employees-say-lepage-pressured-deny-jobless-benefits/> and William Petroski, "Feds Cite 'Perceived Pressure' to

acquiescence” to decisions of U.S. Courts of Appeal outside the Circuit in which an ALJ functioned.² It was required that the SSA’s policy be followed, as opposed to published opinions from other circuits. At an address before the NAALJ Annual Meeting in Denver in 1997, Senior U.S. District Judge John L. Kane characterized the policy as a “recipe for anarchy.”³ Indeed, the policy undercuts the “Rule of Law” and the judicial independence of the ALJs.⁴ The authors submit that subtle and not so subtle federal agency incursions into the independence of federal APA is the proverbial “camel’s nose under the tent.” Any incursion on judicial independence, which is accepted by an adjudicator, can lead to more and more incursions, the final result of which can render the ALJ (adjudicator) a mere functionary of the enforcement component of the executive branch of government. What has happened to the judiciary in Turkey since July 2016 illustrates the near-end product of incursions into the judicial component of government. If the President of the Republic is dissatisfied with the “last word” of the highest court, he can remove the “offending” judge or judges, appoint a “trainee” judge; and, the next time around, receive a more predictable and favorable outcome.⁵ In the administrative law judiciary in the U.S., judicial independence is more fragile than it is in the judicial branch of government. What has happened in Turkey should serve as a major

Rule Against Jobless Iowa Workers,” Des Moines Register (Mar. 16, 2015), <https://www.desmoinesregister.com/story/news/politics/2015/03/16/iowa-workforce-development-department-labor-letter/24878553/>.

² See Johnson, Angela M., *The Social Security Administration’s Policy of Nonacquiescence*, 62 INDIANA LAW JOURNAL 1099 (1987).

³ John L. Kane, Senior U.S. Dist. Judge, Keynote Address at the National Association of Administrative Law Judges 1997 Annual Meeting and Conference Denver, Colorado (Oct. 15, 1997), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1409&context=naalj>.

⁴ “Judicial Independence” does **not** encompass independence to decline to follow the law. Moreover, it encompasses the obligation to follow the law, according to the best lights of the judge.

⁵ Abdullah Ayasun, *For Turkey’s Top Judge, No Rights Infringed After Coup*, THE GLOBE POST (May 14, 2017), <http://theglobepost.com/2017/05/11/top-judge-defends-purge-state-of-emergency-measures/>.

warning that “judicial independence” is a value worth fighting for, strengthening, and preserving.

Judicial independence in the United States has been more of a given for the judicial branch. Most individuals would accept the proposition that prosecutors cannot dictate the outcomes of cases, because prosecutors are in the executive branch which is a separate branch of government that has no legal authority over the judicial branch. Traditionally, many have suspected that ALJs may be subservient to the agencies whose cases they hear and decide because both the ALJs and the agencies are within the same executive branch of government. The independence of ALJs and judicial branch judges is a cherished value in the American and other democratic legal communities. Usually, judges in democratic societies have neither their own police forces to enforce their judgments nor appropriate monies to do their work. They are reliant on the unspoken agreement of the citizens and the other institutions of government to respect their decisions as the final word in a disputed matter.

The late former Chief Justice of the U.S. Supreme Court William Rehnquist, once stated: that an independent judiciary is “the crown jewel of our system of government.”⁶ It is the “crown jewel” of any democratic society. Judicial independence is a cherished value wherever genuine democratic societies exist. The Preamble to the Bangalore Principles of Judicial Conduct⁷ states: “Whereas a competent, **independent**[,] and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.”⁸ Value 1 of the Bangalore Principles states: “Judicial independence is a prerequisite to the rule

⁶ Linda A. Klein, *Independent Courts Are Vital to Democracy*, ABA JOURNAL, (Mar. 24, 2018) http://www.abajournal.com/magazine/article/independent_courts_protect_democracy.

⁷ The Bangalore Principles of Judicial Conduct (2002), adopted by 25 countries including the United States, by a Round Table meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002 (emphasis added).

⁸ Linda A. Klein, *Independent Courts are Vital to Democracy*, ABA Journal, http://www.abajournal.com/magazine/article/independent_courts_protect_democracy (Mar. 24, 2018); see also *Strengthening basic principles of judicial conduct – Bangalore Principles of Judicial Conduct*, REFWORLD.ORG., <http://www.refworld.org/pdfid/46c455ab0.pdf> (emphasis added).

of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institution aspects.”⁹ Rule 1.2 of the American Bar Association (ABA) Model Code of Judicial Conduct provides that “a judge shall act at all times in a manner that promotes public confidence in the **independence**, integrity, and impartiality of the judiciary”¹⁰ The “Application” Section of the ABA Model Code states that it applies to judges, who are defined within the meaning of the Code, among others, as a “member of the **administrative law judiciary**.”¹¹

Judicial independence does not come without appropriate accountability, which is **not** political accountability.¹² It is accountability to the controlling codes of judicial conduct in the jurisdiction.¹³ NCALJ has recently revised and finalized a Model Code of Conduct for State Administrative Law Judges.¹⁴ This Code closely tracks the Model Code for the judicial branch and it espouses the value of judicial independence.¹⁵ Without an independent judiciary serving as a check on governmental power, a dictatorship will flourish.¹⁶ Indeed, the very first step to a transition from a democracy to a dictatorship is neutralizing the judiciary. Thereafter, incremental steps to “make the judiciary more accountable” to the

⁹ *Id.* at 3; see http://www.hri.org/docs/turkey/part_i.html#article9; see also Asli U. Bali, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 53 VA. J. INT’L L. 235 (2012).

¹⁰ ABA Model Code of Judicial Conduct (2007), Canon 1, Rule 1.2, American Bar Association, https://www.americanbar.org/content/dam/aba/migrated/judiciaethics/ABA_MCJC_approved.authcheckdam.pdf (emphasis added).

¹¹ ABA Model Code of Judicial Conduct (2007), Canon 1, Rule 1.2, Applicability of the Code I (B) American Bar Association (emphasis added).

¹² See Edwin I. Felter, Jr., *Accountability in the Administrative Law judiciary: The Right and the Wrong Kind*, 86 DENV. U. L. REV. 157 (2008) [Reprinted with permission in 30 J. NAALJ 19 (2010)].

¹³ *Id.*

¹⁴ ABA Model Code of Judicial Conduct for State Administrative Law Judges (2016). Available from NCALJ, ABA.

¹⁵ Resolution 113A (2018) and the Report are on file with Edwin L. Felter, Jr. and with the ABA House of Delegates.

¹⁶ This includes the executive branch (administrative law judiciary) and the judicial branch.

powers-that-be are taken.¹⁷ It may not matter what the wording of the respective constitutions provides. Many republics in the world had good constitutions—but the people, apparently, lacked a belief that the constitution was worth defending. In the United States when the Supreme Court has spoken, the other institutions of government accept its decision no matter how much those other institutions of government may disagree.

Kemal Ataturk founded the Republic of Turkey in 1922 on the central idea of a separation of religion and government.¹⁸ The Republic replaced the Ottoman Empire, an absolutist and undemocratic sultanate, in which there was no meaningful separation of religion and government.¹⁹ Thereafter, the military and the judiciary upheld the separation of religion and government.²⁰ The Republic developed a strong and independent judiciary.²¹ Beginning in 2014, however, attacks on the Turkish judges began as the influence of religion increasingly encroached more into government.²²

¹⁷ Kareem Shaheen, *Turkey Dismisses 4,400 Public Servants in Latest Post-Coup Attempt Purge*, THE GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/world/2017/feb/08/turkey-dismisses-4400-public-servants-erdogan-trump-phone-call>; see also Reuters Staff, *Turkish Government Extends State of Emergency Rule for Another 3 months*, REUTERS (July 17, 2017) <https://www.reuters.com/article/us-turkey-security-emergency/turkish-government-extends-state-of-emergency-rule-for-another-3-months-idUSKBN1A212S>.

¹⁸ *Ataturk's Speech at the 10th Anniversary of the Turkish Republic*, THE ATATURK SOCIETY, <http://www.ataturksociety.org/about-ataturk/ataturks-speech-at-the-10th-anniversary-of-the-turkish-republic/>. The Turkish Republic was established in 1923. *Id.* Followers of Ataturk's concepts are referred to as "Kemalists". *Id.* Also see, *a summary of the history of constitutionalism and the main lines of debate on constitutionalism* (in German): Oyku Didem Aydin, *Die Neue Verfassung der Turkel: Zwischen Skepsis und Hoffnung*, http://www.kas.de/wf/doc/kas_30858-544-1-30.pdf?120426131018; Pamuk, Orhan, *Snow*, VINTAGE BOOKS, FIRST VINTAGE ED., August 2005 (translated to English, 2004). Orhan Pamuk won the Nobel Prize in Literature in 2006. *Id.*

¹⁹ *A Brief History of Republic of Turkey*, UNIVERSITY OF MICHIGAN, http://umich.edu/~turkish/links/reptr_brhist.html.

²⁰ *Id.*

²¹ Bali, Asli U., "The Perils of Judicial Independence: Constitutional Transition and the Turkish Example," 52 VA.J.INT'L.L. 235 (2012) (the article analyzes the state of the Turkish judiciary before the 2016 attempted coup).

²² *Id.*

Turkey is a prime example of the possible death throes of judicial independence unfolding today. The Constitution of the Republic of Turkey provides that “judicial power shall be exercised by **independent** courts on behalf of the Turkish Nation.”²³ Before July 2016, Turkey had a strong tradition of judicial independence with a respected judiciary. The Turkish judiciary held the encroachment of religion and other populist movements into governmental institutions at bay.²⁴

Former Associate Justice Robert Cordy of the Supreme Judicial Court of Massachusetts “is worried sick about the fate of the Turkish judges” he helped train in Turkey and in Boston.²⁵ Cordy commented that the Turkish judges he helped train have been fired, jailed, or gone missing.²⁶ Cordy said: “It’s devastating . . . I don’t think anything has ever devastated me more than seeing this happen to people that I have come to know, love, [and] respect. It is just beyond the pale.”²⁷

Cordy and Federal Judges Richard Stearns and Mark Wolf regularly travel overseas In Turkey, they have shared their best practices and philosophy with the former Turkish judges. Turkey in turn has sent judges to America for language and legal training . . . Wolf and Cordy describe their younger Turkish counterparts as the best and the brightest.²⁸

²³ English translation of the Constitution of the Republic of Turkey. See The Constitution of the Republic of Turkey, Part I, http://www.hri.org/docs/turkey/part_i.html#article_9 (Mar. 24, 2018) (emphasis added).

²⁴ See Asli U. Bali, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT’L L. 235 (2012). The article analyzes the situation before the 2016 attempted coup.

²⁵ David Boeri, *Mass. Judges Express Fears Over Arrests, Firings of Judges In Turkey*, WBUR.ORG, <http://www.wbur.org/morningedition/2016/10/06/arrests-firings-judges-turkey> (Mar. 24, 2018).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Wolf has stated that “Judges in Turkey . . . [were] inspired by our example.” *Id.*

In July 2016, catastrophe struck.²⁹ After the “alleged” coup attempt in July 2016, the government arrested and jailed 4,400 judges, prosecutors, journalists, and academics whose names were on a pre-existing list of suspected associates of a terrorist group.³⁰ “Within hours of the coup attempt failing there were basically lists of names issued to arrest or detain certain judges and prosecutors, said Emma Sinclair-Webb, Director of Human Rights Watch in Turkey.”³¹ The Turkish government’s consistent theme is that all of this was necessary to combat “terrorism. “Judge Wolf and Cordy scoff at the idea that the judges they worked with were either Gulenists or terrorists Wolf says, by disabling those judges who might have proclaimed [that Turkey was] a government of laws and not men,” the Turkish government has essentially eliminated the rule of law.³²

Today, the European Union database of public alerts issued on attacks against the human rights of lawyers and judges, lists Turkey at the top of the list of countries that abuse the rights of lawyers and judges.³³ The Association of European Administrative Judges (AEAJ) has taken a strong position condemning the Turkish government for its abuse of the rights of judges and lawyers.³⁴

Turkey is the crossroads between Europe and Asia. In many ways, it has been in tune with European culture.³⁵ What has happened in Turkey since July 2016 could happen elsewhere if the unseen pillars supporting an independent judiciary are eroded and the public places its trust in a “strongman” populist leader. This threat is even more compelling for the administrative law judiciary because the pillars supporting administrative justice in the executive branch

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Boeri, *supra* note 25.

³³ *Index of Attacks and Threats Against Human Rights Defenders*, Index of Alerts, PROTECTDEFENDERS.EU, <https://protectdefenders.eu/en/stats.html> (Mar. 26, 2018) [hereinafter *Index of Attacks*]. Turkey was placed at the top of the list in late 2016.

³⁴ *Platform for an Independent Judiciary in Turkey*, Association of European Administrative Judges (AEAJ) (2017). On file with Co-Author Felter.

³⁵ Interview with Dr. Henri Barkey, Professor of Middle East Studies at Lehigh University, Pennsylvania (Dr. Barkey is considered an expert on Turkish affairs).

of government are not as deep as the **constitutional** pillars supporting the judicial branch of government.

II. BACKGROUND: THE FAILED COUP

On July 15, 2016, the failed *coup* attempt took place in Turkey.³⁶ It was quickly suppressed by the government.³⁷ The failed *coup* of July 15th was carried out by a small faction within the Turkish armed forces.³⁸ The government implicated the Turkish judiciary and Fethullah Gulen,³⁹ a Turkish businessman and cleric who has lived in Pennsylvania since 1999, and whose primary endeavor involves the propagation of Islamic schools.⁴⁰ Gulen was once a friend and ally of President Erdogan,⁴¹ and he denies having had anything to do with the *coup* attempt.⁴²

A. States of Emergency

On July 20, 2016, the first constitutional state of emergency was declared for a period of three months.⁴³ The states of emergency have continued to be renewed through the present time.⁴⁴ The state of emergency was the first step in suspending the rule of law, and firing

³⁶ Gul Tuysuz and Elliott C. McLaughlin, *Failed coup in Turkey: What you need to know*, CNN (July 18, 2016), <https://www.cnn.com/2016/07/18/middleeast/turkey-failed-coup-explainer/index.html>.

³⁷ *Id.*

³⁸ The Committee on Political Affairs and Democracy, Ad Hoc Subcommittee on Recent Developments in Turkey, Report on Fact-Finding Visit to Ankara (Nov. 2016) <http://websitepace.net/documents/18848/2197130/20161215-Apdoc18.pdf/35656836-5385-4f88-86bd-17dd5b8b9d8f>

³⁹ Twenty years ago, Fethullah Gulen and President Erdogan were friends and allies. Interview with Dr. Henri Barkey, *supra* note 35. Now it appears that they are mortal enemies and Erdogan considers Gulen as the main motivator behind the coup attempt. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Reuters Staff, *supra* note 17.

⁴⁴ Interview with Dr. Henri Barkey, *supra* note 35.

and jailing over 300 members of the Turkish judiciary.⁴⁵ A declaration temporarily imposing martial law and suspending due process rights has not happened yet in the U.S., but given the terrorist threat in our own country, it could be a possibility. The Turkish states of emergency have been repeatedly extended.⁴⁶ The Turkish government's stated reason for declaring one state of emergency after another is to deal with the threat of "terrorism."⁴⁷ This reason is reminiscent of George Orwell's novel, *1984*, where there is a fabricated enemy and an alleged, manufactured ongoing war.

The latest product of the recurring states of emergency was the referendum abolishing the Prime Minister's Office and giving President Erdogan super-Presidential powers.⁴⁸ It was approved in a very close vote on April 15, 2017.⁴⁹ President Erdogan now has the Parliament under his influence and control.⁵⁰

Three days later, the Turkish Parliament extended the state of emergency by three more months.⁵¹ The government has normalized the state of emergency itself as it pushed ahead with the plan for a constitutional amendment to replace the system of parliamentary democracy with a super-presidential system of government.⁵² The Referendum passed because President Erdogan, a populist leader, persuaded the public of the "terrorist" threat and the need to suspend the rule of law. We the authors submit that the "Rule of Law" only controls when the citizens and institutions respect it.

⁴⁵ Reuters Staff, *supra* note 17.

⁴⁶ Interview with Dr. Henri Barkey, *supra* note 35.

⁴⁷ Reuters Staff, *supra* note 17; Interview with Dr. Henri Barkey, *supra* note 35.

⁴⁸ Venice Commission Opinion on the amendments to the Constitution (of Turkey) CDL-AD 005 (2017), adopted by the Venice Commission on March 10, 2017, para, 114 *et seq.* See *Turkey's Purges Are Crippling Its Justice System*, THE ECONOMIST (May 20, 2017), <https://www.economist.com/europe/2017/05/20/turkeys-purges-are-crippling-its-justice-system> [hereinafter *Turkey's Purges*].

⁴⁹ *Id.*; Elena Becatoros, *Turkey's president Erdogan fulfills ambition, but at a cost*, THE DENVER POST (April 18, 2017), <https://www.denverpost.com/2017/04/18/turkey-erdogan-fulfills-ambition/>.

⁵⁰ *Id.*

⁵¹ See Reuters Staff, *supra* note 17.

⁵² See Aydin, *supra* note 18.

B. The American Bar Association Position

In August 2016, the ABA House of Delegates passed Resolution 10B,⁵³ which supported the independence of the Turkish judiciary and the legal profession.⁵⁴ The Resolution called for the Republic of Turkey to immediately release the detained judges, lawyers, prosecutors, journalists and any other individuals unless there was evidence establishing that such individuals had committed a crime.⁵⁵ Additionally, the Resolution provided that, before suspending or dismissing any judge from the bench, a fair hearing be held before an impartial tribunal applying established legal principles of judges.⁵⁶ Because the U.S. government considers Turkey an ally, it has not taken a position on the indefinite Turkish suspension of due process protections for judges, lawyers, journalists, and academics. It should be noted that the Third Reich came to power as a “majoritarian” movement and the independent judiciary was quickly neutralized.⁵⁷

III. THE TURKISH JUDICIARY

The Turkish judiciary has long been the “civil” castle for checks and balances against any majoritarian type of government.⁵⁸ The judiciary has been a block against majoritarian governments since as early as 1960 because a successful coup in that year was directed against a majoritarian, supremacist, single party rule in excess of constitutional power.⁵⁹ The Constitutional Court was introduced to carry out protections that the Republican (Kemalist) foundations established, perhaps, in compensation for a “premature” transition to a multi-party system in 1946.⁶⁰ Said protections led to the early signs

⁵³ ABA House of Delegates Resolution 10B (August 2016) [hereinafter *ABA Resolution*].

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *The Rise and Fall of the Third Reich: A History of Nazi Germany*, SIMON & SCHUSTER (Paperback) (2011). Chapter 7: The Nazification of Germany: 1933-34.

⁵⁸ *Id.*

⁵⁹ Constitution of the Republic of Turkey, *supra* note 23.

⁶⁰ Oyku Didim Aydin, *The Rule of Law and the Way We Are in the Aftermath of 15th of July: A Report on the Constitutional Situation*,

of a change of power structures.⁶¹ Since the 1960s, the judiciary has always been in the hands of the Turkish Republicans who, in a similar vein as in the U.S., believed that democracy would turn into tyranny unless controlled by independent protectors of the rule of law.⁶² When President Erdoğan first came to power, he started to shake the very foundations of the composition of judicial power, discovering opportunities for bringing the judiciary in line with the government.⁶³ Erdoğan and his allies have been the most successful in changing the “face,” and even the “body” of the Turkish Judiciary (for the worse). He discovered that it was the Judiciary which should line-up with “the winds of change.” The Turkish people have been experiencing this particular change in **pain**.

The Turkish judicial crisis is now at its peak, because the government, evidently has prevailed over everyone who cherished Turkey’s tradition of respect for the rule of law.⁶⁴ The government, through both the executive decrees-laws issued under the state of emergency and the new High Council of Judges and Prosecutors (HSYK), has dismissed approximately 4,400 judges, prosecutors, and public servants who have allegedly been considered to be in affiliation with a terroristic organization.⁶⁵

There was a list of names of “alleged” coup plotters that had been prepared long before the coup attempt of July 15, 2016.⁶⁶

Without exception, the Council of Bars and Law Societies of Europe (CCBE), the European Federation of Journalists (EFJ), the European Association of Judges (EAJ)⁶⁷, and the ABA have

<https://drive.google.com/file/d/0B4COQVo6NbaUen-JLOVNtTMSYq2m/VIEW> (July 15th is the date of the attempted coup); *see also* <http://justice.info/wordpress/2016/09/04/rule-law-way-aftermath-15th-july>.

⁶¹ *Id.*

⁶² Alexander Hamilton & Adam J. White, *Judicial Independence, Hamilton’s Time and Ours: Rereading Fderalist 78’s Famous Lines and Its Infamous Ones*, Federalist Paper 78, *The City Journal: Eye on the News*, August 23, 2016.

⁶³ Aydin, *supra* note 60.

⁶⁴ This is co-author Professor Aydin’s well-founded opinion.

⁶⁵ Shaheen, *supra* note 17.

⁶⁶ Documents (without the names) are on file with the Association of European Administrative Judges (AEAJ), President Edith Zeller, Vienna, Austria.

⁶⁷ *Joint Statement by Lawyers, Judges, and Journalists on the Ongoing Crackdown on the Rule of Law in Turkey*, European Association of Judges and European Federation of Journalists (2017). On file with Co-Author Felter.

condemned the Turkish government and admonished Turkey to abide by international and European Union standards regarding the Rule of Law because Turkey's actions strike at the core of judicial independence.⁶⁸ European judicial organizations have formed "The Platform for an Independent Judiciary in Turkey," the purpose of which is to help restore judicial independence in Turkey.⁶⁹

The Turkish government has been trying to purge the entire opposition.⁷⁰ The government is using the *coup* attempt as a vehicle to consolidate power in many sectors as evidenced by the fact that numerous opponents of the government, including judges, prosecutors, university professors, parliamentarians and journalists, have been detained, without due process, in the course of the emergency state.⁷¹ The government has shut down numerous non-governmental associations, including civil rights organizations, in an atmosphere of massive purge.⁷²

IV. THE MECHANICS OF ENDING JUDICIAL INDEPENDENCE IN TURKEY: EMERGENCY DECREES LAWS

To begin ending judicial independence anywhere, the best approach is to first have a long-lasting crisis and threat of "terrorism" that could justify a suspension of the rule of law because of a state of emergency.⁷³ Next is to continuously extend the state-of-emergency until it is *de facto* permanent. Part of the suspension of the rule of law would entail implicating judges and prosecutors as part of the terrorist threat in order to justify their firings, jailing, and

⁶⁸ *Id.*

⁶⁹ *Platform for an Independent Judiciary in Turkey*, *supra* note 34.

⁷⁰ *Turkey's Purges*, *supra* note 48.

⁷¹ *Id.*

⁷² *The Committee on Political Affairs and Democracy, Ad hoc Sub-Committee on recent developments in Turkey*, PARLIAMENTARY ASSEMBLY, (Dec. 15, 2016), <http://websitepace.net/documents/18848/2197130/20161215-Apdoc18.pdf/35656836-5385-4f88-86bd-17dd5b8b9d8f>.

⁷³ Consider George Orwell's novel *1984*, where people were kept in strict subjugation based on a televised fictional war as a justification for suspending basic human rights. Turkey can advance a colorable argument to justify the successive states of emergency because of the proximity of ISIS and the influx of Syrian refugees with Turkey as the first point of entry. This can be verified by watching television news.

replacements by “trainee” judges. This could happen anywhere where—the unseen pillars supporting the rule of law are weak—whereby a populist leader can persuade the populace that the emergency and all it entails is necessary. This is exactly what has happened in Turkey, as illustrated by the recurring states of emergency.

On July 23, 2016, the Council of Ministers, under the chairmanship of the President, adopted the first emergency decree-law No. 667.⁷⁴ That decree-law closed numerous organizations and institutions named in attached lists.⁷⁵ Other decrees followed the first and-measures continue to be planned.⁷⁶ These lists, most likely, can be traced back to the year 2014 when the conflicts between a political faction and the government began.⁷⁷

The constitutional provision regarding the state of emergency reads as follows:

In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.⁷⁸

⁷⁴ Aydın, *supra* note 60.

⁷⁵ RESMI GAZETTE, No. 29940 (Jan. 6, 2017)

⁷⁶ Oyku Didem Aydın, *The Rule of Law and The Way We Are in the Aftermath of 15th of July: A Report on the Constitutional Situation*, <http://tsjustice.info/wordpress/2016/09/04/rule-law-way-aftermath-15th-july/>.

⁷⁷ *Türk Vatandaşlığı Kanunu*, Law 5901, as last amended Jan. 6, 2017). Consultative Council of European Judges (EU). Opinion der Venice-Commission, No. 865/2016. Strasbourg 25.11.2016 CDL (2016) 039. <https://www.mpicc.de/shared/data/pdf/fa-systemunrecht-int.pdf>.

⁷⁸ Constitution of the Republic of Turkey, *supra* note 23, at Art. 120.

The impetus for the government's crackdown on the alleged perpetrators of the July 16 *coup* were small pockets of isolated violence in Istanbul.⁷⁹

The duration of the state of emergency may be altered, or extended for a maximum of four months at the request of the Council of Ministers, or it may be lifted.⁸⁰ During a state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency.⁸¹ There are no judicial checks on these actions.⁸² At least the U.S. has FISA as a tribunal to deal with the enforcement of the "Patriot Act."⁸³

Regarding the limits of fundamental rights, Article 15 of the Turkish Constitution provides that in times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.⁸⁴ In fact, obligations under international law have been violated in the eyes of the European community and the ABA.⁸⁵

Emergency decrees are characteristic of emergency states in Turkey.⁸⁶ Previously, the decrees had been restricted to the South-East, particularly in the 1990s, and they allowed the government to adopt far-reaching measures which escaped control by the Constitutional Court. Indeed, the Constitution states that decrees having the force of law issued during a state of emergency, martial law, or in time of war shall **not** be brought before the Constitutional

⁷⁹ Interview with Dr. Henri Barkey, *supra* note 35.

⁸⁰ Reuters Staff, *supra* note 17.

⁸¹ *Id.*

⁸² *Id.*

⁸³ U.S. Foreign Intelligence Surveillance Court, <http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court>.

⁸⁴ Constitution of the Republic of Turkey, *supra* note 23.

⁸⁵ *ABA Resolution*, *supra* note 53.

⁸⁶ Aydin, *supra* note 60.

Court alleging their unconstitutionality as to form or substance. Article 148 of the Constitution.⁸⁷

Although the overall content of these emergency decrees, which are voluminous, cannot be presented here, it is noteworthy that they include numerous provisions which:

1. Limit human rights and fundamental freedoms beyond the exigencies of the emergency state;
2. Reorganize public administration, including the entire structure of military power, in many respects;
3. Provide an economic system of urgency, collection powers and seizure of personal and institutional property, which leaves little room for remedies and procedural guarantees for people who must be considered innocent until duly proved guilty.⁸⁸

The first ordinance stipulates that organizations listed in the annexes are closed, because they are linked to a terrorist organization. FETÖ/Parallel State Structure, PDY.⁸⁹

To date, nearly a third of the judges and prosecutors have been dismissed from their offices and detained (jailed) on the basis of the above-mentioned provisions.⁹⁰

Judges and prosecutors, including the President of the Association for the Union of Judges and Prosecutors (YARSAV), Murat Arslan, were dismissed by later decrees.⁹¹ Judge Arslan has been jailed since October 19, 2016 and others have been kept in custody since that time.⁹² The Council of Europe awarded Judge

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Index of Attacks, supra* note 33.

⁹¹ *Imprisoned Turkish Judge Awarded Human Rights Prize by Council of Europe*, TURKEY PURGE, (Oct. 9, 2017), <https://turkeypurge.com/imprisoned-turkish-judge-awarded-human-rights-prize-by-council-of-europe> [hereinafter *Imprisoned Turkish Judge*].

⁹² *Id.*

Arslan the prestigious Vaclav Havel Human Rights Prize.⁹³ Usually, judges and prosecutors dismissed and detained have been treated *en masse*⁹⁴ without any individualized type of evaluation of the suspicion (probable cause) attributed to them.⁹⁵ On the other hand, lists of names had already been ready before July 16, 2016.⁹⁶ There is no oversight by an independent judiciary. Finally, an over two-hundred-page indictment against former Judge Arslan was issued in 2017.⁹⁷ It is the consensus of the European judicial community that the charges in the indictment are vague and fabricated.⁹⁸ Judge Arslan’s trial before a “trainee” judge commenced on November 2, 2017, but was continued to December 18, 2017, and there has not yet been a conclusion.⁹⁹

Another example of the Decree Law 679,¹⁰⁰ which provides for additional dismissals of thousands of civil servants, police officers, armed forces personnel, and university professors and staff.¹⁰¹ Decree Law 680, among other things, introduces a measure revoking the citizenship of individuals abroad who do not respond to judicial summons issued by courts (the new corps of judges—referred to as “trainee judges”) or prosecutors within 90 days.¹⁰²

V. CIRCUMSTANCES OF INVESTIGATION

⁹³ Acceptance Speech of Judge Murat Arslan, Accepting the Vaclav Havel (Oct. 9, 2017) [hereinafter *Arslan Speech*] Copy of Speech on file with co-author Felter.

⁹⁴ En masse means “in a group [or] as a whole.” Webster’s New World Dictionary. Popular Library Paperback Ed.

⁹⁵ *Imprisoned Turkish Judge*, *supra* note 91.

⁹⁶ Shaheen, *supra* note 17.

⁹⁷ The English translation of the Indictment (prepared under the Auspices of Austrian Civil Courts Judge Geri Reissner) is on file with co-author Felter. It is noted thereon that co-author Professor Aydin is the lawyer for Judge Arslan.

⁹⁸ Interview with Dr. Edith Zeller, President of the Association of European Administrative Judges (AEAJ).

⁹⁹ Interview with Judge Arslan’s attorney, Oyku Didim Aydin, Co-Author.

¹⁰⁰ Aydin, *supra* note 18.

¹⁰¹ *Id.*

¹⁰² See Öykü Didem Aydin, RESMI GAZETE, No. 29940, (Jan. 6, 2017), <http://www.xn--snrtanmayanavu-katlar-ibdbe.net/emergence-state-turkey/>.

In the first two weeks following the coup attempt, the picture has been dismal. A judge, who was held for five days on a basketball court in Diyarbakır, together with almost 150 judges, prosecutors, academics, officials, and similar persons reported that they had been arrested for membership in a suspected terrorist organization.¹⁰³ The hall was overcrowded and, in a very hot August, each detainee only had a very thin sleeping mat.¹⁰⁴ The jailers had not even given them a cup of coffee or tea.¹⁰⁵ Policemen watched over the hall filled with prisoners and played popular songs.¹⁰⁶ The scene resembled a scene from a Quentin-Tarantino movie.

Judge Bilal Karadağ is an example of many ex-judges of the highest courts of the nation.¹⁰⁷ Judge Karadağ was kept in solitary confinement for months for no apparent reason, allegedly in accordance with the Turkish Code of Criminal Execution.¹⁰⁸ His file is classified and the co-author, Professor Aydin (his defense counsel), has little if any ability to question the validity of the accusations because they are too vague.

Defense lawyers have serious difficulties in preparing for trial because their client interviews are under surveillance and recorded by the authorities. In Silivri prison in Istanbul, defense lawyers may only visit their clients on the particular day allocated by the prison authorities.¹⁰⁹ In Ankara, for instance, the “limited hours” principle applies.¹¹⁰ None of the above constraints apply to detainees and convicts for reasons other than membership in a suspected terrorist organization.¹¹¹ Each of these examples of difficulties defense lawyers face in preparing for trial (some trials have not yet been scheduled after one and a half years of detention) are reminiscent of

¹⁰³ Interview with Professor Aydin, Co-Author, representing jailed judges in Turkey.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Interview with Professor Aydin in her role as attorney for jailed judges.

¹⁰⁸ Aydin, *supra* note 18.

¹⁰⁹ Interview with Oyku Didm Ayden, Defense Lawyer and Co-Author.

¹¹⁰ *Id.*

¹¹¹ *Id.*

the constraints placed on defense counsel for Guantanamo detainees—in the interests of national security.¹¹²

VI. PANIC STATE

A quick glance at the text of the emergency decrees gives one an idea of the alarming situation since they contain measures which go far beyond the exigencies of the situation and include the assumption of the legislative function by the Council of Ministers (an executive branch of government).¹¹³ The emergency decrees entail consequences that go beyond the duration of the emergency and amount to a *de facto* abolition of the Turkish Constitution.¹¹⁴ For example: “Responsibility ARTICLE 9–1. There shall be no legal, administrative, financial or criminal liability for persons making decisions and carrying out tasks under this decree law in the exercise of their functions.”¹¹⁵

In a state where almost 4,000 judges, prosecutors, journalists and academics have been arrested,¹¹⁶ who would be conducting the upcoming trials without fear for their own posts and according to the principles of the rule of law? The wording of a provision of the second decree 669, gives an idea: “(2) [Trainee judges] may be appointed by the Higher Council of Judges and Prosecutors, as judges and prosecutors, beginning from the date of entry into force of this decree, on the proposal of the Minister of Justice . . . [regardless of the period they spent as trainees].”¹¹⁷

VII. VIOLATIONS OF THE CONSTITUTION, FUNDAMENTAL RIGHTS, CRIMINAL PROCEDURAL RIGHTS, DISCIPLINARY PROCEEDINGS AND PENITENTIARY RIGHTS

¹¹² Michael Karnavas, *Ethically Constrained Defense Counsel Must Withdraw (at Guantanamo Bay Prison)*, International Criminal Law Blog, <http://michaelgkarnavas.net/blog>.

¹¹³ Aydin, *supra* note 18.

¹¹⁴ Constitution of the Republic of Turkey, *supra* note 23.

¹¹⁵ *Id.* See also Shaheen, *supra* note 17.

¹¹⁶ Constitution of the Republic of Turkey, *supra* note 23. See also Shaheen, *supra* note 17.

¹¹⁷ Aydin, *supra* note 18.

The Association for Lawyers and Human Rights Defenders without Borders in Turkey points to a number of irregularities which could be linked to a "systematic wrong".¹¹⁸ Indeed, a group of ten lawyers, under the coordination of Professor Aydin, have launched a comprehensive monitoring project in order to examine the files and monitor trials regarding 200 detainees. The project is ongoing since early August 2016 and will continue in its new phase once the group engages a network of 200 Turkish consulting defense lawyers in order to actively monitor upcoming trials.¹¹⁹ Present Turkish Justice Minister Bekir Bozdogan "admitted that the purged public servants had been fired by administrative decisions, not legal proceedings or investigations."¹²⁰ Recently, the European Network of Councils for the Judiciary (ENCJ), which supports the judiciaries of European Union member states, suspended the Turkish High Council for Judges and Prosecutors from membership.¹²¹

VIII. CONCLUSION

The alarm bell is sounding loudly because of what has happened in Turkey. The cherished value of judicial independence is at stake any place where subtle encroachments curtailing it begin to occur. The signs may be there even in the U.S. All that would be necessary for a major curtailment of judicial independence to occur would be a major crisis as justification for the suspension of due process rights. This is especially true for the administrative adjudication arena, wherein the adjudicators are more vulnerable because they are creatures of statute, not constitutional officers. European judges have stood firm in opposition to the actions of President Erdogan since July 2016, and they have requested that he adhere to principles of the Rule of Law and European Union Standards concerning the dismissal, detention and perfunctory

¹¹⁸ Details of the project can be inquired from Dr. Aydin at oykudidemaydin@gmail.com.

¹¹⁹ Details of the project can be inquired from Dr. Aydin at oykudidemaydin@gmail.com.

¹²⁰ Aydin, *supra* note 18.

¹²¹ *ENCJ Votes to Suspend the Turkish High Council for Judges and Prosecutors*, EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, (Dec. 8, 2016) <https://www.encj.eu/node/449>.

transfers of Turkish judges and prosecutors.¹²² The ABA has also stood firmly against the Turkish Government's actions against the Turkish judiciary.¹²³ European standards set forth the "mission of a council for the judiciary is to defend both the independence of the judiciary and the independence of the individual judge."¹²⁴ European standards further provide that a council for the judiciary should protect the image of justice, especially against undue attacks of media and politicians.¹²⁵ United Nations Basic Principles on the Independence of the Judiciary provide for the transparency in the selection and dismissal of judges and the security of tenure of office as core elements of judge's independence.¹²⁶ Since July 2016, the ABA House of Delegates has strongly condemned the actions against Turkish judges. The Government of Turkey claims that the above restructuring of the Turkish Judiciary is necessary because a terror organization has infiltrated the highest levels of government, including the military and judiciary.¹²⁷ The late Senator Joseph McCarthy would approve of President Erdogan's analysis of the emergency situation in Turkey.¹²⁸ The Turkish Government is creating an atmosphere of fear to justify its actions against the Turkish judiciary.¹²⁹ This rationale of fear may sound familiar to many of us who have observed the beginnings of an authoritarian regime. Rudyard Kipling said: "If you can keep your wits about you

¹²² *Platform for an Independent Judiciary in Turkey*, *supra* note 34.

¹²³ Aydin, *supra* note 18.

¹²⁴ Aydin, *supra* note 60.

¹²⁵ *Id.*

¹²⁶ *Basic Principles on the Independence of the Judiciary*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (Dec. 13, 1985) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>; *Turkey's Purges*, *supra* note 48.; *For Turkey's Top Judge, No Rights Infringed After Coup*, THE GLOBE POST, (May 14, 2017) <https://www.theglobepost.com/2017/05/11/top-judge-defends-purge-state-of-emergency-measures/>.

¹²⁷ Aydin, *supra* note 60.

¹²⁸ *This Day in History; 1954 McCarthy Army hearings begin*, <https://www.history.com/this-day-in-history/mccarthy-army-hearings-begin>.

¹²⁹ *Turkey's Purges*, *supra* note 48.

while all others are losing theirs and blaming you my boy the world will be yours and everything in it”¹³⁰

Geert Corstens, former President of the Supreme Court of the Netherlands, comments that “if there is no trust in the rule of law, it ultimately will collapse and society will be endangered.”¹³¹ He further comments: “it will ultimately be upon the judiciary to withstand movements that threaten democracy and the rule of law itself.”¹³² Unfortunately, today there is no independent judiciary in Turkey to protect the rule of law in Turkey. Judge Arslan is speaking out from his jail cell.¹³³ Dismissed and exiled Turkish judges are speaking out from other countries. It is up to the judiciaries and lawyers from democratic nations throughout the world to stand up for an independent judiciary in Turkey.

¹³⁰ *Top Ten Quotes of Rudyard Kipling, Quote No. 4.*, https://www.brainyquote.com/lists/authors/top_10_rudyard_kipling_quotes.

¹³¹ Corstens, Geert, *Criticism of the Judiciary*, *Judicature*, Vol. 101, No. 2 (Summer 2017).

¹³² *Id.*

¹³³ *Arslan Speech*, *supra* note 93.