State of Emergency, State of Emergency Decree-Laws and the Legal Situation

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1. Legal regime of SOE and SOE Decree-Laws in general

Immediately after the coup attempt of 15 July, a state of emergency was declared throughout the country for a period of ninety days from 21 July 2016 by the Council of Ministers decision dated 20 July 2016 and numbered 2016/9064 under article 120 of the Constitution on grounds of "*widespread acts of violence and a serious deterioration of public order*". This Council of Ministers decision was published in the Official Gazette and submitted to the Parliament for approval in accordance with article 121/1 of the Constitution and was approved by the decision of the Parliament dated 21.7.2016 and numbered 1116; later, it has been extended for three months each time.

State of emergency (SOE) is one of the extraordinary methods of administration provided in the Constitution and leads to an enlargement of the ordinary law enforcement powers used to protect and ensure public order. According to article 15/1 of the Constitution, in cases of emergency, the exercise of fundamental rights and freedoms may be suspended in part or in whole or measures may be taken contrary to the safeguards provided

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for them in the Constitution, **to the extent required by the situation**, on condition that obligations arising from international law are not violated. At the same time, according to paragraph 2 of the same article, the individual's right to life and the integrity of his material and spiritual existence shall be inviolable; no one may be compelled to reveal his religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive; and no one may be held guilty until so proven by a court judgement. Article 121/2 of the Constitution provides that how fundamental rights and freedoms will be restricted or suspended in line with the principles of Article 15, by what means the measures required by the situation will be taken, what sort of powers will be conferred on public servants, what sort of changes will be made in the status of officials, shall be regulated by the Law on State of Emergency. The Law on State of Emergency mentioned in article 121/2 of the Constitution is the Law on State of Emergency dated 25.10.1983 and numbered 2935 (the Law on SOE). Article 11 of the said Law specifies in detail the measures to be taken in a state of emergency declared on grounds of "*widespread acts of violence and a serious deterioration of public order*".

In addition, according to article 121/3 of the Constitution, the power of the Executive to make decree-laws in SOE is extended and facilitated. **During the state of emergency**, the Council of Ministers, meeting under the chairmanship of the President of the Republic, may issue decree-laws on **matters necessitated by the state of emergency**, and additional measures may be introduced by these decree-laws where the measures provided in the Law on State of Emergency numbered 2935 prove insufficient. These Council of Ministers decisions, referred to as state of emergency decree-laws (SOE decree-laws), are subject to a very different legal regime than ordinary decree-laws, which are issued under article 91 of the Constitution. To start with, unlike ordinary decree-laws, it is not required that the Parliament should adopt a special law to empower SOE decree-laws to be issued, and it will be possible with such decree-laws to restrict the fundamental rights, personal rights and duties, and political rights and duties included in Part Two, Chapters One and Two of the Constitution, and to make arrangements which are contrary to the safeguards provided in the Constitution for fundamental rights and freedoms. In addition, the procedures and rules concerning the approval of these decree-laws by the Parliament are also different and, while it is provided that ordinary decree-laws must be submitted to the Parliament for approval on the day of their publication in the Official Gazette and must be discussed in the committees and in the Plenary Assembly of the Parliament with priority and urgency, the procedures and rules concerning the approval of SOE decree-laws by the Parliament are shown in

the Rules of Procedure of the Parliament, article 136 of which states that SOE decree-laws must be discussed and decided within thirty days. Finally, while ordinary decree-laws are subject to review by the Constitutional Court, it is not possible to allege the unconstitutionality of SOE decree-laws (article 48/1 of the Constitution).

It is true that the power of the Executive to make arrangements having force of law is very considerably extended and facilitated with SOE decree-laws. However, both article 15 and the final paragraph of article 121 of the Constitution impose certain limits on this power, as explained below.

- The power of the Executive to issue SOE decree-laws is limited first of all *in terms of location*. It will be possible to make arrangements through SOE decree-laws to be applicable only in the region/regions where SOE is declared.
- This power of the Executive is also limited *in terms of subject-matter*. SOE decree-laws may only be issued on matters necessitated by the state of emergency, and while providing for such matters, the fundamental rights and freedoms and the safeguards listed in article 15/2 of the Constitution may not be violated and the provisions made must be "*to the extent required by the situation*". In other words, if public order disturbed as a result of widespread acts of violence can be restored through ordinary law enforcement measures or the measures provided in the Law numbered 2935, it will not be permissible to introduce new and heavier measures through SOE decree-laws.
- Finally, the power of the Executive to issue SOE decree-laws is limited *in terms of time*. Just as the Law on SOE may be applied only during the state of emergency, SOE decree-laws may also be applied only during such period and will cease to apply after the SOE is lifted. In other words, SOE decree-laws may not include provisions that may also be applied after the state of emergency. In this context, it should be noted that it is also impossible to change or repeal current laws through SOE decree-laws. For, otherwise, the rules introduced by SOE decree-laws would continue to be in force after the state of emergency terminates.

2. Examination of the SOE decree-laws issued after 20 July 2016

Considering the above-mentioned constitutional limits on SOE decree-laws, it is found that the decree-laws issued after 20 July 2016 transgress those limits, as explained below.

- First, some of these decree-laws provide for matters which have nothing to do with matters necessitated by the state of emergency. For example, the Decree-Law numbered 674 which came into effect following its publication in the Official Gazette on 01.09.2016 provided for the transfer of Research Assistants covered by the Programme for Training of Members of Teaching Staff and employed under article 33 of the Law on Higher Education numbered 2577 to the position of Research Assistant specified in article 50/d of the same Law. The Decree-Law numbered 676 which came into effect following its publication in the Official Gazette on 29 October 2016 amended article 13 of the Law numbered 2547 concerning the election of university rectors and abolished their election by members of teaching staff in universities, giving the power to elect rectors to the Higher Education Council and the President of the Republic. The Decree-Law numbered 687 which came into effect following its publication in the Official Gazette on 09 February 2017 added article 65/A to the Law on Road Traffic numbered 2918, introducing the requirement of winter tyres for vehicles used in passenger and cargo transport. Many other examples can be given.
- In addition, these decree-laws have introduced additional provisions to a large number of current laws and amended certain provisions of law. Apart from what is mentioned above; for example, Decree-Law 680, published in the Official Gazette on 06 January 2017, amended Law 357 on Military Judges, Law 2797 on the Supreme Appeal Court, Law 2802 on Judges and Public Prosecutors, and Law 7271 on Criminal Trial Procedure, and changes were made by Decree-Law 682, published in the Official Gazette on 23 January 2017, to Law 6741 Concerning the Foundation of the Turkish Asset Fund Management and Joint-Stock Company and the Amendment of Certain Laws. More examples can also be given here.
- Finally, rules to be applied also after the end of the state of emergency have been introduced through many of these decree-laws, for example by closing hundreds of private health institutions and organizations, private education institutions and organizations, private student hostels and boarding houses, foundations and associations together with their economic operations, foundation-owned higher education institutions, trade unions, federations and confederations, private radio and television organizations, newspapers, magazines, publishing houses, and distribution channels, by expelling students from education institutions, or by dismissing tens of thousands of public servants from the public service, never to be employed again in the public service, on grounds that they

were found out "*to have been members or associates of or related to or connected with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the national security of the State*", without there being any court decision or even any investigation and prosecution concerning the accusations directed at them.

3. Judicial review of SOE decree-laws

According to article 148/1 of the Constitution, it is not permissible to allege the unconstitutionality of SOE decree-laws. Leaving aside the fact that this rule of the Constitution is not compatible with the principle of the supremacy of law, there is no doubt that it is applicable for SOE decree-laws issued within the limits of the Constitution. In other words, it should first be determined by the Constitutional Court whether a decree brought before the constitutional judiciary is an SOE decree-law issued within the limits of the Constitution or a decree that, although named an SOE decree-law, has been issued clearly in breach of the rules of authorization in terms of subject-matter and time. Once the Supreme Court has determined that the decree brought before it is an SOE decree-law, it will no longer be possible to review that decree with regard to constitutionality; otherwise, even if it is named an SOE decree-law, it will be necessary to review it as an ordinary decree-law and to cancel it because it lacks an enabling law. In fact, the Constitutional Court held that certain provisions of the decree-laws issued under the name of SOE decree-laws during the state of emergency applied in Southeast Anatolia in the 1990s were contrary to the principles and rules laid down in the Constitution for SOE decree-laws, and, calling those decree-laws ordinary decree-laws, decided to cancel them on grounds that they were not based on an enabling law as required in article 91 of the Constitution and were therefore contrary to the said article. Examples are given below:

The Constitutional Court in its decision of 10.01.1991 with the case number 1990/25 and the decision number 1991/1 cancelled articles 1,2 and 3 of the "*Decree-Law for Amendments to Law 2935 on State of Emergency and to Decree-Law 285*" numbered 425, amending certain provisions of Law 2935, on grounds that "*it is not permissible to amend laws through such decree-laws*".[1] In its decision of 03.07.1991 with the case number 1991/6 and the decision number 1991/20, the Constitutional Court cancelled the provisions of articles 1, 5 and 6 of "*Decree-Law 430 on the State of Emergency Regional Governorate*

[1] The Official Gazette, 05.03.1992-21162

and on Additional Measures to be Taken during the State of Emergency" which conferred on the state of emergency governor powers that he could exercise also in regions outside the regions where state of emergency had been declared.[2] Finally, in its decision of 22.05.2003 with the case number 2003/28 and the decision number 2002/42, the Supreme Court cancelled article 7 of "Decree-Law 285 on the Establishment of the State of Emergency Regional Governorate," which was rearranged by Decree-Law 425 and which provided that "*no annulment action may be brought against administrative acts involving the exercise of the powers conferred on the State of Emergency Regional Governor*", on grounds that article 125 of the Constitution permits the issuing of stay orders to be restricted in cases of state of emergency but that it is not permissible to prevent, even by law, the remedy of starting an annulment action.[3]

However, in an action brought for the annulment of the provisions of the "*Decree-Law on Certain Measures to be Taken in the Scope of State of Emergency, on the Establishment of a National Defence University, and on Amendments to Certain Laws*" dated 25.07.2016 and numbered 669, the Supreme Court completely abandoned the approach in its former case-law, stating that it had previously made an examination in terms of location, time, and subject-matter to determine whether a state of emergency decree-law was indeed a decree-law of the type specified in article 121 of the Constitution but that such an examination would be contrary to article 148 of the Constitution. According to the Supreme Court:

> "*An examination made by the Constitutional Court based on the criteria of location, time, and subject-matter, to determine whether arrangements in the form of a state of emergency decree-law actually represent a state of emergency decree-law makes it necessary to evaluate the substance of the provisions contained in the decree-law… This approach renders completely meaningless and unfunctional the ban in article 148 of the Constitution on review with regard to form and substance….*" [4]

Given this new approach of the Constitutional Court, there is not any possibility left for the constitutional review of the SOE decree-laws issued after 20 July 2016 and continuing to be issued, which clearly transgress the limits imposed by the Constitution.

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[2] The Official Gazette, 08.03.1992-21165

[3] The Official Gazette, 16.03.2004-25404

[4] See the CC decision dated 12.10.2016 with the case number 2016/167 and the decision number 2016/160, The Official Gazette 04.11.2016-29878

4. Judicial review of the acts directly established by the SOE decree-laws issued after 20 July 2016

The private health institutions and organizations, private education institutions and organizations, private student hostels and boarding houses, foundations and associations together with their economic operations, foundation-owned higher education institutions, trade unions, federations, and confederations, that were reportedly found out to be controlled by or related to or connected with the Fettullahist Terror Organization (FETO/PDY), and that were listed in Annexes I-II, III, IV and V thereto, were directly closed by article 2/1 of the "*Decree-Law on Measures Taken in the Scope of State of Emergency*" numbered 667 which was published in the Official Gazette on 23 July 2016 in its copy 29779.

In article 2/3 of the same Decree-Law, it is provided that private student hostels and boarding houses, foundations, associations, foundation-owned higher education institutions, trade unions, federations, and confederations, which are found out to be members of or related to or connected with terrorist organizations or those entities, formations or groups determined to present a threat to national security, and which are not listed in the Annexes thereto, shall be closed by minister's approval upon a proposal by the commission to be created by the minister at the relevant ministry, that is, they shall be closed by an administrative decision.

Finally, articles 3 and 4 of Decree-Law 667 provide that members of the judiciary and those who are deemed to be of this profession, and public servants, who are considered "*to be members of or related to or connected with terrorist organizations or those entities, formations or groups determined by the National Security Council to be engaged in activities against the national security of the State*", shall be dismissed from the profession/the public service again by an administrative decision.[5] To put it briefly, it is provided that members of the judiciary shall be dismissed by decision of the Supreme Council of Judges and Public Prosecutors (SCJPP), and other public servants by an administrative act to be established on the basis of evaluations to be made by a commission to be created at the administrations and institutions where they are employed.

In article 10 of Decree-Law 667, it is stated that legal actions may be brought against decisions made and acts carried out under this Decree-Law but that no stay of execution may be ordered during the course of such actions. The Council of State, the highest administrative court, has ruled that the decisions

[5] "*Decree-Law on Measures Taken in the Scope of State of Emergency*". Although this Decree-Law was adopted with changes by Law 6749 of 18.06.2016, no substantial change was made to its provisions concerning dismissals.

of the SCJPP concerning the dismissal of members of the judiciary from the profession may not be subject to review at the administrative judiciary,[6] but it has been possible to bring legal actions at the administrative judiciary against other acts and decisions.

After Decree-Law 667, a different method has been followed to dismiss public servants who are stated "*to be members of or associated with or related to or connected with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the national security of the State*". Through the Decree-Laws issued after Decree-Law 667, tens of thousands of public servants have been dismissed from the public service, never to be employed again, by including their names in the lists attached to those Decree-Laws, without the need for any other procedure. In other words, the dismissal of these public servants has been carried out directly through a regulatory executive act having force of law. However, the Council of State and, in line with its approach, the administrative courts have refused to review those dismissals on grounds that they were carried out through decree-laws having force of law issued on the basis of the power granted by article 121 of the Constitution.[7] As a result, there is no effective domestic legal remedy left against the acts established directly through decree-laws, including the acts of dismissal concerning tens of thousands of public servants. Although it might be thought that because there is no effective domestic legal remedy left, individual applications may be filed with the Constitutional Court against the acts of dismissal in question, the approach of the Supreme Court has been that SOE decree-laws may not be reviewed in any manner, as explained above.

5. Commission for the Examination of State of Emergency Acts

Probably with the aim of avoiding the tens of thousands of applications that would be filed with the European Court of Human Rights as a result of the lack of any domestic legal remedy against the acts of dismissal carried out directly through SOE decree-laws, the "*Decree-Law Concerning the Creation of the Commission for the Examination of State of Emergency Acts*" numbered 685 was issued and came into effect following its publication in the Official Gazette dated 23.01.2017 and numbered 29957.

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[6] See the Council of State Fifth Department's decision of 04.10.2016 with the case number 2016/196 and the decision number 2016/4066

[7] See the Council of State Fifth Department's decision of 04.10.2016 with the case number 2016/8136 and the decision number 2016/4076

Decree-Law 685 created the "*Commission for the Examination of State of Emergency Acts to evaluate applications concerning acts established directly through decree-law provisions, without further administrative acts, due to membership of or association, relationship or connection with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the national security of the State, in the scope of the state of emergency declared under article 120 of the Constitution and approved by the Turkish Grand National Assembly through its decision 1116*".

a. Composition, term, and working procedures and principles of the Commission

The Commission for the Examination of SOE Acts will be composed of seven members, three of whom will be appointed by the Prime Minister from among public servants, one member by the Minister of Justice from among the judges and public prosecutors working in the central organization and affiliated or related bodies of the Ministry of Justice, one member by the Minister of Interior from among personnel in the class of territorial administration heads, and one member each by the SCJPP from among the examining judges employed at the Supreme Appeal Court and the Council of State, respectively, and the Commission will elect a president and a deputy president from among its members.[8]

The term of the Commission will be two years and may be extended by decision of the Council of Ministers for periods of one year each. The initial members of the Commission will serve for two years. Should it be decided to extend the term, new members will be appointed through the same procedure. The secretarial services of the Commission will be provided by the Prime Ministry, and a sufficient number of personnel for these services will be allocated to the Commission.

It is stated that the working procedures and principles of the Commission will be determined by the Prime Ministry upon a proposal by the Commission, and these procedures and principles were announced by publication in the Official Gazette on 12.07.2017 in its copy 30122 (repeated).

[8] The members of the Commission were determined on 2 May 2017.

b. Area of duty

The Commission will evaluate and decide applications to be made concerning acts established directly through SOE decree-laws without the need for any other procedure. In this context, the Commission will examine and decide applications made concerning the acts of:

- Dismissal or expulsion from the public service, the profession or the organization where one is employed,
- Expulsion from schools or universities,
- Closing of associations, foundations, trade unions, federations and confederations of trade unions, private health organizations, private education institutions, foundation-owned higher education institutions, private radio and television organizations, newspapers, magazines, news agencies, publishing houses, and distribution channels, and
- Depriving retired personnel of their ranks,

And other acts in relation to the legal status of natural persons and legal entities, established directly through SOE decree-laws. However, it will not be possible to make applications concerning those acts for which legal remedies are open, for example the administrative acts and decisions under Decree-Law 667 as we have noted above (Decree-Law 685, art. 2/3). In addition, since judges and public prosecutors whose continued presence in the profession is found inappropriate by decision of the SCJPP and who are decided to be dismissed from the profession under article 3 of Decree-Law 667 are granted the possibility to bring a legal action before the Council of State as the court of the first instance (Decree-Law 685, art. 11/1), it will not be possible to file an application with the Commission against those decisions, either.

The Commission has the power to request all information and documents concerning its area of duty from those concerned. Public institutions and organizations must promptly send the Commission all information and documents which the Commission needs in the scope of its duty or allow the examination of the same on location, subject to legal provisions regarding the confidentiality of the investigation and State secrets (art. 5).

c. Period and procedure for applications

The period for applications to the Commission has been determined as sixty days. It is provided that this period will start to run, in the case of applications concerning those decrees which were put into force before the date on which

the Commission starts to receive applications, as from such date and, in the case of decree-laws to be put into effect afterwards, as from the date of publication in the Official Gazette. It was stated that the date on which the Commission would start to receive applications would be announced by the Prime Ministry, and this date was determined and announced as 17.07.2017.

Applications will be made through governorates. Individuals who have been dismissed from the public service may also apply to the institution where they were last employed. Governorates and institutions concerned will promptly forward applications received by them to the Commission (art. 7).

d. Initial examination, examination, and decision

It should first be noted that there is no certain period specified for the Commission to examine and decide applications. In any event, considering that the number of applications to the Commission will exceed tens of thousands, it is impossible to stipulate any such period. For this reason, it is stated in article 7/2 that applications to be made under this Decree-Law will not be subject to article 10/2 of the Law on Administrative Trial Procedure, thereby excluding the possibility that an implicit decision to reject may come into being as a result of failure to resolve an application within sixty days and that the applicant may bring a legal action at the administrative judiciary for the annulment of such implicit act.

Applications made to the Commission will be subjected to an initial examination in respect of conformity to the required conditions. If it is found at the end of the initial examination that the application has not been made within the relevant period, that the applicant has no legal interest concerning the matter, or that an application has been made regarding acts not covered by Decree-Law 685, it will be decided to refuse the application without being examined (art. 8).

Applications that have passed the initial examination will be taken into examination, and this examination will be made on documents. As a result, the applicant does not have the possibility to make oral explanations before the Commission.

Following the examination, the Commission will decide to refuse or grant the application.

It will be possible to bring annulment actions against the decisions of the Commission to refuse applications before the administrative courts of Ankara to be determined by the SCJPP. It should be noted that the contested act in

such a legal action will be not the act established directly through the Decree-Law but the act of the Commission involving the refusal of the application. Therefore, for example, when the contested act is annulled by the court at the end of a legal action brought following the refusal of an application concerning dismissal from the public service, the applicant will –at best– be able to obtain his rights for the period after the date on which his application was refused by the Commission but he will be deprived of his rights for the quite long period elapsing from the date of his dismissal to the date on which his application was refused by the Commission.

Article 10 of Decree-Law 685 specifies how to implement the decision of the Commission to grant an application when that is the case.

According to article 10/1, in the event of granting applications by those who were dismissed or expelled from the public service, the profession or the organization where one was employed, the decision will be notified to the State Personnel Department, and proposals for the appointment of the notified personnel will be made within fifteen days by the said Department to cadres and positions conformable to their former status and titles at public institutions and organizations other than those where they were previously employed (excluding those who cannot be assigned to other institutions in terms of their status, titles, and duties). As will be noted, the applicant will not be reinstated in his job but will be appointed from outside and, as a result, the act previously established by decree-law in relation to such an applicant will not be withdrawn. Therefore, such an applicant will be able to obtain only those rights which accrue after the act of appointment is established.

On the other hand, according to article 10/2, in the event of granting applications concerning closed institutions and organizations, the provisions of the relevant decree-law will be deemed to have been removed with respect to those institutions and organizations from the date of publication, and the relevant acts will be carried out by the Ministry of Interior, the Ministry of Finance, the Ministry of Health or the Directorate-General of Foundations, as applicable. In the event of granting an application concerning closed institutions and organizations, it may be said that the decision to grant will be in the nature of an act of withdrawal and that the act established by decree-law with respect to those institutions and organizations will be removed from the beginning together with all its effects and consequences.

e. Is the application that will be made to the Commission an effective remedy?

The right to an effective remedy, one of the ways to use the freedom to seek rights, is secured both in the European Convention on Human Rights (ECHR) and in the Constitution. According to article 13 of the ECHR, "*…everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*". Article 40/1 of the Constitution provides that "*everyone whose constitutional rights and freedoms are violated has the right to request prompt access to the competent authorities*". Looking at the acts established directly through SOE decree-laws, it is clear that they violate the freedom of association, the right to education, the right to union membership, freedom of the press, and the right to work, which are guaranteed both in the ECHR and in the Constitution, and that they are therefore in the scope of the right to an effective remedy.

The most important condition required for an application to be considered an effective remedy is that in the event of determining a violation, the application should have the effect of preventing the violation or removing its consequences. In addition, the nature of the authority to examine the application and the method by which the application is examined are also among the conditions for being able to speak of an effective remedy.[9]

First of all, it would be impossible to say that the decision to be given following the application made to the Commission will prevent the violation caused by dismissals in particular or fully remove the consequences of the violation. When the Commission decides to grant the application, this will lead to the establishment of an act of "*appointment from outside*" and the applicant will be able to obtain his rights only after this act of appointment is established. In the event that the Commission refuses the application, although the possibility will be opened for application to the administrative judiciary, the act to be contested in such application will be not the act of dismissal but the act of refusal by the Commission, and therefore only the latter (that is, the decision of the Commission) will be annulled by an eventual court decision and the applicant will be able to obtain his rights for the period after the date on which his application was refused but he will be deprived of his rights for a very long period elapsing from the date of dismissal to the date on which his application was refused by the Commission.

[9] For detailed information about the conditions of an effective remedy, see TANRIKULU, SEZGİN: The European Convention on Human Rights (in Turkish), Ankara 2012, p. 139 et seq.

Furthermore, the method for the appointment of the members of the Commission casts a shadow on the independence of the Commission. Just as it is problematic that the term of office of the members should be two years and that in the event of extending the term of the Commission, new members should be appointed by the same method, it is also problematic that the Commission should not have a secretariat of its own and that its secretarial services should be provided by the Prime Ministry. In addition, although it is a safeguard that the members of the Commission may not be removed from office during their term of office, the fact that one of the reasons for removing a member from office is stated as "*an administrative investigation started or permission given for investigation by the Prime Ministry on grounds of alleged membership of or association, relationship or connection with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the security of the State*" could prevent the Commission from operating independently of all influence.

Finally, the Commission, whose working procedures and principles have been determined by the Prime Ministry, will examine applications on the basis of documents. There will be no question of the applicant being heard by the Commission. Moreover, it is doubtful that the tens of thousands of applications to be made can be examined properly, and it is impossible for the examination to be completed within a reasonable period.

In brief, it is clear that an application to the Commission cannot be an effective remedy and that the grievance of those who have been dismissed cannot be fully redressed by a judiciary annulment order or an act of appointment from outside following the decision to be made by the Commission upon such an application.