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In Flagrante Delicto and Procedural Safeguards for Judges: How Far Does the European Court of Human Rights Go with the Separation of Powers? (obs. ECtHR, 16 April 2019, Alparslan Altan v Turkey, N° 12778/17)

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In Flagrante Delicto and Procedural Safeguards for Judges: How Far Does the European Court of Human Rights Go with the Separation of Powers?

(obs. ECtHR, 16 April 2019, *Alparslan Altan v Turkey*, N° 12778/17)

Aikaterini Tsampi

ABSTRACT

This article explores the reasoning of the European Court of Human Rights in the case of *Alparslan Altan v Turkey*, which concerns the procedural safeguards applicable to the removal of judges from judicial office. In the aftermath of the declaration of a state of emergency in Turkey in 2016, M. Altan, who presided on the Turkish Constitutional Court was arrested and taken into police custody without prior lifting of the immunity afforded to judges under domestic law. In finding a violation of Article 5 (1) of the European Convention on Human Rights, the Court emphasised, with explicit reference to the separation of powers in democratic societies, the need to maintain, even during a state of emergency, the procedural safeguards afforded to judges in order to ensure they effectively carry out their judicial duties. *Alparslan Altan* adds to the evolution of the Court's case law both on the separation of powers in general and on the separation between the executive and the judiciary in Turkey.

RESUME

Cet article explore le raisonnement de la Cour européenne des droits de l'homme dans *Alparslan Altan c. Turquie* concernant les garanties procédurales applicables à la révocation des juges de leurs fonctions judiciaires. Au lendemain de la déclaration de l'état d'urgence en Turquie en 2016, M. Altan, juge de la Cour constitutionnelle, fut arrêté et placé en garde à vue sans levée préalable de son immunité. En constatant une violation de l'article 5 (1) de la Convention européenne des droits de l'homme, la Cour a souligné la nécessité de maintenir, même en cas d'état d'urgence, les garanties procédurales dont les juges devraient jouir pour s'acquitter efficacement de leurs fonctions judiciaires, se référant explicitement à la séparation des pouvoirs. *Alparslan Altan* contribue à l'évolution de la jurisprudence de la Cour à la fois sur la séparation des pouvoirs en général et sur la séparation entre les pouvoirs exécutif et judiciaire en Turquie.

KEYWORDS: Courts, separation of powers, judicial independence, *in flagrante delicto*, pre-trial detention, Article 5 (1) European Convention on Human Rights, *Alparslan Altan v Turkey*

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Aikaterini Tsampi[*]

1. INTRODUCTION

On 20 July 2016 Turkey declared a state of emergency following the military *coup* attempt carried out during the night of 15 to 16 July 2016 by members of the Turkish armed forces. A day after the declaration the Turkish authorities gave notice to the Secretary General of the Council of Europe pursuant to Article 15 of the European Convention on Human Rights (ECHR or 'the Convention')[1] of its intention to derogate from Article 5, which guarantees the right to liberty and security of person. The Turkish Government blamed the organisation Gülenist Terror Organisation or 'Parallel State Structure' (FETÖ/PDY) for the attempted *coup* and subsequently undertook a large number of dismissals and arrests of public servants whom they suspected to be members of that organisation.

Government measures taken after the declaration of a state of emergency has given rise to a large number of cases before the European Court of Human Rights (ECtHR or 'the Court'). Up until the end of 2017, the Court's case law was limited to the admissibility decisions in the cases of *Mercan,*[2] *Zihni,*[3] *Çatal,*[4] *Köksal*[5] and *Bora*,[6] where the applicants, all being civil servants including judicial officers, complained of their dismissal and/or their placement in pre-trial detention in accordance with the legislative decrees passed following the attempted *coup*. The Court's decisions, which declared all these applications inadmissible for failing to exhaust domestic remedies, have been met with scepticism both

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[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5.

[2] *Mercan v Turkey* Application No 48666/98, Admissibility, 8 November 2016.

[3] *Zihni v Turkey* Application No 59061/16, Admissibility, 29 November 2016.

[4] *Çatal v Turkey* Application No 2873/17, Admissibility, 7 March 2017.

[5] *Köksal v Turkey* Application No 70478/16, Admissibility, 6 June 2017.

[6] *Bora v Turkey* Application No 30647/17, Admissibility, 28 November 2017.

by scholars[7] and civil society organisations.[8] The applications in *Mehmet Hasan Altan v Turkey* and *Şahin Alpay v Turkey* were the first arising from the circumstances surrounding the attempted *coup* to be examined on the merits by the Court, which delivered its judgments on 20 March 2018.[9] Both these cases were brought before the Court by journalists who were detained on anti-terrorism charges immediately following the attempted *coup*. For the first time the Court found a violation of Article 5 (1) of the ECHR in relation to the complaints arising from the 2016 Turkish state of emergency. It did so on the basis that the trial court had refused to release the applicants from detention despite the fact that the Turkish Constitutional Court had found their detention to be unlawful. The Court also found a violation of Article 10 of the ECHR considering the adverse effect that the applicant journalists' pre-trial detention had on the exercise of their freedom of expression.

On 16 April 2019, *Alparslan Altan v Turkey*[10] became the third such case to be examined on the merits and, as with *Mehmet Hasan Altan* and *Şahin Alpay*, the Court found violations of Article 5 (1) of the ECHR in relation to measures the Government had taken during the state of emergency. While the *Alparslan Altan* judgment builds on the Court's findings in *Mehmet Hasan Altan* and *Şahin Alpay* cases, it also allows for further analysis on the Court's stance on the human rights issues arising following the military *coup* attempt in Turkey. Unlike the previous cases, *Alparslan Altan* pertains specifically to the detention of

[7] See, for example, Karan, '*Mercan v. Turkey*: Waiting for the Last Word of the Turkish Constitutional Court', *Verfassungsblog*, 21 November 2016 [last accessed 24 September 2019]; Turkut, 'Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey', *EJIL:Talk!*, Blog, 28 December 2016 [last accessed 24 September 2019]; Turkut, 'The Köksal case before the Strasbourg Court: a pattern of violations or a mere aberration?', *Strasbourg Observers*, Blog, 2 August 2017 [last accessed 24 September 2019]; Kurban, 'Think Twice before Speaking of Constitutional Review in Turkey', *Verfassungsblog*, 20 February 2018, [last accessed 24 September 2019]; Spencer, 'The ECtHR and Post-coup Turkey: Losing Ground or Losing Credibility', *Verfassungsblog*, 17 July 2018 [last accessed 24 September 2019]. For an overview of different opinions, see *(In) Effective Remedies from Strasbourg: Turkey and the European Court of Human Rights*, Report from conference organised by the German Bar Association, the European Association of Lawyers for Democracy and World Human Rights, The Law Society of England and Wale, Lawyers for Lawyers, and Observatoire international des avocats on 5 March 2018, available at: communities.lawsociety.org.uk [last accessed 24 September 2019]. For the State of Emergency Inquiry Commission established in 2017, see, in particular, Altıparmak, 'Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?', *Human Rights Joint Platform*, February 2017 [last accessed 24 September 2019]; and Olcay, 'Turkey - State of Emergency Acts Review Commission used to hold off proper legal review' [2017] *Public Law* 316.

[8] See, for example, Stockholm Center for Freedom (SCF), *Turkey's Descent into Arbitrariness: The End of Rule of Law*, April 2017, at 40 [last accessed 24 September 2019]; Aydin and Spencer, 'Is it Fair that Judges and Prosecutors in Turkey are Held in Isolation? The ECtHR's *Bora v. Turkey* Decision', *Platform for Peace and Justice*, 21 March 2018 [last accessed 24 September 2019]; Platform for Peace and Justice, *Failure of Strasbourg against Turkish Encounter - An Investigation on the Controversial Rulings of the European Court of Human Rights on the State of Emergency Measures in Turkey*, December 2018 [last accessed 24 September 2019].

[9] *Şahin Alpay v Turkey* Application No 16538/17, Merits and Just Satisfaction, 20 March 2018; and *Mehmet Hasan Altan v Turkey* Application No 13237/17, Merits and Just Satisfaction, 20 March 2018.

[10] *Alparslan Altan v Turkey* Application No 12778/17, Merits and Just Satisfaction, 16 April 2019. The judgment became final on 9 September 2019. The Turkish Government's request to refer the case to the Grand Chamber was refused: see Press release issued by the Registrar of the Court, *Grand Chamber Panel's decisions*, ECHR 308(2019), 10 September 2019, at 3, available at: hudoc.echr.coe.int/eng-press?i=003-6499586-8573502 [last accessed 24 September 2019].

a member of the judicial branch of government.[11] The institutional implications of such a detention bring into focus the doctrine of separation of powers according to which the executive, legislative and judicial branches of government are to be kept separate. But how does the Court really address this doctrine ? The present case note will briefly present the case in *Alparslan Altan* **(Section 2)** with a view to elucidating what it contributes to the relevant case law **(Section 3)**.

2. THE CASE IN A NUTSHELL

This Section will outline the factual background of the case and the claims submitted by the applicant (Section A), and consider the findings of the Court pertaining to the interpretation of the key concepts of *in flagrante delicto* and of 'reasonable suspicion' under Article 5 (1) (c) of the ECHR (Section B).

A. The factual background and claims

Mr Alparslan Altan was one of the two serving judges at the Turkish Constitutional Court who were arrested and taken into police custody the day after the attempted *coup* in Turkey. He was placed in pre-trial detention on 20 July 2016 on grounds that as he was suspected of having sought to overthrow the constitutional order of the Republic of Turkey and of being a member of the FETÖ/PDY terrorist organisation. Essentially, he was arrested and detained under the ordinary criminal law on the basis that his case qualified as a discovery *in flagrante delicto*.

Under Section 16 of the Turkish Law No 6216, before an investigation into the conduct of a judicial officer for offences allegedly committed in connection with or during the performance of his/her official duties can be opened, a decision is required by the plenary court of the Turkish Constitutional Court allowing the investigation to proceed. An investigation under ordinary law may be conducted only in the case of discovery *in flagrante delicto*.[12]

Invoking Article 5 of the Convention, the applicant complained that he had been arbitrarily placed in pre-trial detention in breach of domestic law, namely Law No 6216 on the establishment and rules of procedure of the Constitutional Court. He further argued that there had been no evidence capable of giving rise to a reasonable suspicion that he had committed a criminal offence necessitating pre-trial detention. He also claimed that the

[11] Alparslan Altan's application is not the first to be lodged by a judge and examined by the Court; however, it is the first to be decided on the merits. The majority of applicants in the 2016-2017 admissibility decisions were also judges: see *Mercan v Turkey*, supra n 2; *Çatal v Turkey*, supra n 4; and *Bora v Turkey*, supra n 6.

[12] Article 52 of Law No 5271 of 4 December 2004 instituting the Code of Criminal Procedure defines cases of *in flagrante delicto* as 'an offence in the process of being committed'; 'an offence that has been committed, and an offence committed by an individual who has been pursued immediately after carrying out the act and has been apprehended by the police, the victim or other individuals'; and 'and offence committed by an individual who has been apprehended in possession of items or evidence indicating that the act was carried out very recently'.

reasons given by the domestic courts for the decisions ordering his detention were insufficient. In particular, he contested the *in flagrante delicto* nature of his alleged offence and consequently the legality of his pre-trial detention which took place without a decision by the plenary of the Turkish Constitutional Court to allow an investigation.

The Turkish Government responded that the applicant's detention complied with Law No 6216 based on the established case law of the Turkish Court of Cassation, according to which the offence of membership in an armed terrorist organisation is a continuing offence, and on the 2017 case law of the same court, according to which a case of discovery *in flagrante delicto* arises at the time of the arrest of judges who are suspected of membership of an armed organisation. Thus, the Government submitted, the investigation could be conducted in accordance with the procedure under ordinary law.

B. The extension of the concept of *in flagrante delicto* and the reasonable suspicion requirement under Article 5

The interpretation given by the Turkish courts to the concept of *in flagrante delicto* was considered by the Court under Article 5 (1) of the ECHR.[13] The Court's assessment was based on a number of principles, the first being the principle of legal certainty, which is connected to the requirement under Article 5 (1) that any deprivation of liberty be lawful.[14] The ECtHR noted that while the 'conventional definition' of the concept of *in flagrante delicto* in the Turkish Code of Criminal Procedure was linked to the discovery of an offence while or immediately after it is committed, the contested interpretation given by the Court of Cassation did not require that 'any current factual element or any other indication of an ongoing criminal act' be established.[15] The examination of the principle of legal certainty and the finding that the contested interpretation by the Turkish courts was 'extensive'[16] may have sufficed for the Court to find a violation of Article 5 (1). However, the Court did not confine its reasoning to a consideration of the principle of legal certainty. It also took into account the separation of powers and the principle of the independence of the judiciary.[17] It observed that the extensive interpretation of the concept of *in flagrante delicto* 'negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive'.[18] Further, it considered that the

[13] Article 5 ECHR relevantly provides: '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'
[14] *Alparslan Altan v Turkey*, supra n 10 at para 103.
[15] Ibid. at para 111.
[16] Ibid. at para 112
[17] Ibid. at para 102.
[18] Ibid. at para 112. The Court noted that '[the interpretation by the Court of Cassation] amounts to an extensive interpretation of the concept of discovery *in flagrante delicto*, expanding the scope of that concept so that judges suspected of belonging to a criminal association are deprived of the judicial protection afforded by Turkish law to members of the judiciary'. The wording in the English text could possibly suggest that the expansion of the scope of

Article 15 derogation did not alter the findings of the Court, since such an extensive interpretation was 'in no way justified' by the exigencies of the state of emergency.[19]

The unreasonable extension of the concept of *in flagrante delicto* was not the only ground on which the Court found a violation of Article 5. The Court also ruled that the applicant's pre-trial detention was based on the mere suspicion of membership of a criminal organisation and was thus deprived of the reasonableness required by Article 5 (1) (c).[20] The evidence against the applicant comprised of statements by two anonymous witnesses and a former rapporteur of the Constitutional Court, himself accused of belonging to the FETÖ/PDY organisation, and messages exchanged *via ByLock*.[21] However, the Court noted that this evidence was gathered long after the applicant's initial detention.[22] Thus at the very moment of the applicant's pre-trial detention there were not sufficient elements to satisfy an objective observer that he could have committed the offence of which he was accused by the prosecuting authorities.[23] The Court also considered the institutional characteristics of the case when examining the case under Article 5 (1) (c) of the ECHR. On the one hand, it acknowledged the Government's assertion that the FETÖ/PDY terrorist organisation had extensively infiltrated influential State institutions including the judicial system. The Court stated : 'Such alleged circumstances might mean that the 'reasonableness' of the suspicion justifying detention cannot be judged according to the same standards as are applied in dealing with conventional offences'.[24] On the other hand, however, it was highlighted by the Court that the 'required minimum level of reasonableness' was 'especially important for members of the judiciary, and in this instance the applicant, a member of the Constitutional Court at the time he was placed in pre-trial detention'.[25] The Court concluded that, even if it took into consideration the special factual circumstances connected with the attempted military *coup* and the difficulties facing Turkey in this aftermath,[26] overlooking the fact that the applicant's pre-trial detention was based on 'a mere suspicion' having committed a crime would have defeated the purpose of Article 5 of the ECHR.[27]

The findings of the Court in *Alparslan Altan* largely relied on the established case law of the Court under Article 5 (1) of the ECHR, especially with regard to the concepts of 'legal

the concept of *in flagrante delicto* was intentionally serving the purpose of depriving judges of their judicial protection. The French text, however, does not support this reading: 'une interprétation extensive de la notion de flagrant délit, qui élargit la portée de cette notion de telle manière que les magistrats soupçonnés d'appartenir à une association criminelle sont privés de la protection judiciaire offerte par le droit turc aux membres du corps judiciaire'. The deprivation of protection for judges was the result of the interpretation by the Turkish Court of Cassation, without the ECtHR suggesting that it was intentional. The judgment was given in French.

[19] Ibid. at para 118.
[20] Ibid. at para 149.
[21] Ibid. at para 137.
[22] Ibid. at para 138.
[23] Ibid. at para 126
[24] Ibid. at para 135.
[25] Ibid. at para 136.
[26] Ibid. at para 147.
[27] Ibid. at para 148.

certainty' and 'reasonable suspicion'. However, the institutional features of the case did not escape the Court's attention, thus allowing it to engage in a practical consideration of the separation of powers by way of protecting the judiciary from interference by the executive branch of government under Article 5 of the Convention.

3. *ALPARSLAN ALTAN* FROM A SEPARATION OF POWERS PERSPECTIVE

The following Sections will discuss how the Court's findings in *Alparslan Altan* contribute to the debate on separation of powers both in the case law of the Court (Section A) and in Turkey generally (Section B).

A. The Separation of Powers in the Case Law of the European Court of Human Rights: A Step Forward

Alparslan Altan is one of the latest in a series of judgments in which the Court has explicitly referred to the 'growing importance attached to the separation of powers' in its deliberations.[28] The Court stated in particular :

[28] For the cases where the 'separation of powers' is expressly considered by the Court, see *Stafford v United Kingdom* Application No 46295/99, Merits and Just Satisfaction, 28 May 2002 [Grand Chamber], at para 78; *Benjamin and Wilson v United Kingdom* Application No 28212/95, Merits, 26 September 2002, at para 36; *A v United Kingdom* Application No 35373/97, Merits, 17 December 2002, at para 77; *Cordova v Italy (No 1)* Application No 40877/98, Merits and Just Satisfaction, 30 January 2003, at para 55; *Cordova v Italy (No 2)* Application No 45649/99, Merits and Just Satisfaction, 30 January 2003, at para 56; *Kleyn and Others v The Netherlands* Applications Nos 39343/98, 6 May 2003 [Grand Chamber], at para 193; *Easterbrook v United Kingdom* Application No 48015/99, Merits and Just Satisfaction, 12 June 2003, at para 28; *Zollmann v United Kingdom* Application No 62902/00, Admissibility, 27 November 2003; *De Jorio v Italy* Application No 73936/01, Merits and Just Satisfaction, 3 June 2004, at para 49; *Pabla Ky v Finland* Application No 47221/99, Merits, 22 June 2004, at paras 29 and 34 (also, *Pabla Ky v Finland* Application No 47221/99, Admissibility, 16 September 2003); *Harabin v Slovakia* Application No 62584/00, Admissibility, 29 June 2004; *Patrono, Cascini and Stefanelli v Italy*, Application No 10180/04, Merits and Just Satisfaction, 20 April 2006, at para 59; *Sacilor-Lormines v France* Application No 65411/01, Merits and Just Satisfaction, 9 November 2006, at paras 59, 64 and 71; *C.G.I.L. and Cofferati v Italy* Application No 46967/07, Merits and Just Satisfaction, 24 February 2009, at para 69; *Kart v Turkey* Application No 8917/05, Merits and Just Satisfaction, 3 December 2009 [Grand Chamber], at para 81; *C.G.I.L. and Cofferati v Italy (No 2)* Application No 2/08, Merits and Just Satisfaction, 6 April 2010, at para 44; *Henryk Urban and Ryszard Urban v Poland* Application No 23614/08, Merits and Just Satisfaction, 30 November 2010, at para 46; *Onorato v Italy* Application No 26218/06, Merits and Just Satisfaction, 24 May 2011, at para 48; *Fruni v Slovakia*, Application No 8014/07, Merits and Just Satisfaction, 21 June 2011, at para 139; *Agrokompleks v Ukraine* Application No 23465/03, Merits, 6 October 2011, at para 131; *Oleksandr Volkov v Ukraine* Application No 21722/11, Merits, 9 January 2013, at paras 130 and 118; *Maktouf and Damjanović v Bosnia and Herzegovina* Application Nos 2312/08 and 34179/08, Merits and Just Satisfaction, 18 July 2013 [Grand Chamber], at para 49; *Hoon v United Kingdom* Application No 14832/11, Admissibility, 13 November 2014, at para 36; *Urechean and Pavlicenco v the Republic of Moldova* Applications Nos 27756/05 and 41219/07, Merits and Just Satisfaction, 2 December 2014, at para 42; *Saghatelyan v Armenia* Application No 7984/06, Merits and Just Satisfaction, 20 October 2015, at para 43; *Miracle Europe Kft v Hungary* Application No 57774/13, Merits and Just Satisfaction, 12 January 2016, at para 52; *Rywin and Others v Poland* Applications Nos 6091/06, Merits and Just Satisfaction, 18 February 2016, at para 225; *Karácsony and Others v Hungary* Applications Nos 42461/13 and 44357/13, Merits and Just Satisfaction, 17 May 2016 [Grand Chamber], at para 157 (also, *Szél and Others v Hungary* Application No 44357/13, Merits and Just Satisfaction, 16 September 2014, at paras 42 and 96; and *Karácsony and Others v Hungary* Application No 42461/13, Merits and Just Satisfaction, 16 September 2014, paras 45 and 99); *Baka v Hungary* Application No 20261/12, Merits and Just Satisfaction, 23 June 2016 [Grand Chamber], at paras 142 and 164-165 (also, *Baka v Hungary* Application No 20261/12, Merits, 27 May 2014, at para 88); *Thiam*

> Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary… , the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention.[29]

Additionally, the Court observed that the extensive interpretation of the concept *in flagrante delicto* 'negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive'.[30]

These affirmations echo findings from the Court's earlier jurisprudence dealing the separation of powers. While the separation of powers in the case law of the Court does not pertain exclusively to the relationship between the executive and judicial branches of government,[31] the Court highlighted once more the importance of separation between them. After all, the centre of *gravitas* of the separation of powers *à la strasbourgeoise* lies in the judiciary. It comes, thus, as no surprise that in *Alparslan Altan* the Court explicitly referred to the particular role of the judiciary in a democratic society. As the Court noted, the judiciary is 'the guarantor of justice, a fundamental value in a State governed by the rule of law, [which] must enjoy public confidence if it is to be successful in carrying out its duties'.[32] However, in the present case the executive branch of government interferes with the judicial,[33] thus the separation of powers demands the protection of the judiciary from those interferences by the executive. This protection serves one very specific purpose, namely the protection of the judicial function itself. As the Court acknowledged, protection of the judiciary against interferences by the executive 'is granted to judges not for their own personal benefit but in order to safeguard the independent exercise of their functions'.[34] Indeed, as the judiciary occupies a 'prominent'[35] place among State organs of government that is justified by the fact that it exercises the judicial function, it is also the

v France Application No 80018/12, Merits and Just Satisfaction, 18 October 2018, at paras 61-62; *Ramos Nunes de Carvalho e Sá v Portugal* Applications Nos 55391/13, Merits and Just Satisfaction, 6 November 2018 [Grand Chamber], at paras 144, 159 and 195-196 (also, *Ramos Nunes de Carvalho e Sá v Portugal* Applications Nos 55391/13, Merits and Just Satisfaction, 21 June 2016, at para 70); *Guðmundur Andri Ástráðsson v Iceland* Application No 26374/18, Merits and Just Satisfaction, 12 March 2019, at paras 103 and 122; *Cosmos Maritime Trading and Shipping Agency v Ukraine* Application No 53427/09, Merits and Just Satisfaction, 27 June 2019, at para 70.

[29] *Alparslan Altan v Turkey*, supra n 10 at para 102.

[30] Ibid. at para 112.

[31] See, for a general overview, Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la Cour européenne des droits de l'homme* (2019).

[32] *Alparslan Altan v Turkey*, supra n 10 at para 102.

[33] Ibid. at paras 112 and 118.

[34] Ibid. at paras 102 and 113.

[35] Ibid. at para 102. The Court opts for the same wording also in *Pitkevich v Russia* Application No 47936/99, Admissibility, 8 February 2001, at para 2 and *Albayrak v Turkey* Application No 38406/97, Merits and Just Satisfaction, 31 January 2008, at para 42.

judiciary that can effectively safeguard the protection of human rights against arbitrary interference by the executive.

Apart from the fact that the Court's judgment in the case of *Alparslan Altan* confirmed earlier findings on the separation of powers in the Convention system, it has also contributed to further developments. These advances largely revolve around two axes. Firstly, the Court extended the scope of the separation of powers between the executive and the judiciary argument by applying it to cases dealing with the protection of members of the judiciary under Article 5 of the ECHR. The very first explicit reference to the separation of powers in the case law of the Court is in *Stafford v United*, another Article 5 case but in a very different context. In *Stafford* the Court found that role of the Secretary of State in fixing the tariff for life sentence prisoners and deciding on a prisoner's release following its expiry did not comply with the Article 5 (4) requirement that decisions regarding continuation of detention be made by a 'court'.[36] The case of *Alparslan Altan* is, however, the first Article 5 case to address the rights enjoyed by judges themselves.

It should be noted that the invocation of the separation of powers in cases where the rights of judges are at stake is nothing truly novel. Indeed, the Court has invoked the separation of powers in many cases pertaining to measures which impact upon the status of judges, usually in the context of disciplinary proceedings against them.[37] In those cases, it was the right of judges to freedom of expression under Article 10 of the ECHR that was under consideration by the Court.[38] *Alparslan Altan* is the first judgment where the Court employs the separation of powers argument to decide a case of detention of a judge under Article 5. The Court clarified that the consideration of the role of the judiciary in society, 'set out in particular in cases concerning the right of judges to freedom of expression, is equally relevant in relation to the adoption of a measure affecting the right to liberty of a member of the judiciary'.[39] While this observation does not come as a surprise, it is noteworthy that the separation of powers functioned as a guiding principle in the interpretation of Article 5 in the case at hand. The Court acknowledged that in light of the separation of powers, it must be 'particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention'.[40] While the extensive interpretation of the term *in flagrante delicto* was already found to be incompatible with the principle of legal certainty in general, the Court also emphasised that the expansion of that concept's

[36] *Stafford v United Kingdom*, supra n 28 at para 78. See also, *Benjamin and Wilson v United Kingdom*, supra n 28 at para 36.

[37] *Harabin v Slovakia*, supra n 28; *Baka v Hungary*, supra n 28 at para 165.

[38] It should be noted that the Court did not always explicitly refer to the separation of powers in these cases. See *Wille v Liechtenstein* Application No 28396/95, Merits and Just Satisfaction, 28 October 1999 [Grand Chamber], at para 64; *Albayrak v Turkey*, supra n 35 at para 42; *Kudeshkina v Russia* Application No 29492/05, Merits and Just Satisfaction, 26 February 2009, at para 86; *Harabin v Slovakia* Application No 58688/11, Merits and Just Satisfaction, 20 November 2012, at paras 150-153.

[39] *Alparslan Altan v Turkey*, supra n 10 at para 102.

[40] Ibid.

scope deprived members of the judiciary of the institutional safeguards provided for by the domestic legislation to guard against interference by the executive.

The second contribution of *Alparslan Altan v Turkey* concerns the operation of the doctrine of the separation of powers during a state of emergency. As already stated, the Court scrutinised the expansion of the concept of *in flagrante delicto* in the context of Turkey's derogation made under Article 15 of the ECHR, concluding that the pre-trial detention of the applicant, which was not conducted 'in accordance with a procedure prescribed by law', could not be said to have been strictly required by the exigencies of the situation.[41] The Court placed particular emphasis on the negation of the procedural safeguards that the members of the judiciary enjoy to protect them against interferences by the executive, adding that the extensive interpretation of the concept of *in flagrante delicto* 'has legal consequences reaching beyond the legal framework of the state of emergency'.[42]

These observations by the Court are particularly important for the separation of powers between the executive and the judiciary within the State in times of emergency. Balancing the relation between the State powers during a state of emergency, where the power of the executive increases substantially, becomes a fundamental institutional challenge. The suggestion of the Court that the declaration of a state of emergency does not alter the protection required by the judiciary against interference by the executive highlights the continued and unabated relevance of the separation of powers in times of crisis, indeed even its more critical importance if a democratic society is to be maintained.

The balancing of State powers in times of emergency has been addressed, to a certain extent, by the Court in earlier cases. In the judgment of *A and Others v United Kingdom* of 2009,[43] the Court scrutinised the detention by the British authorities of foreign nationals suspected of involvement in terrorism under Article 5 (1) (f) of the ECHR. In that case, following the terrorist attacks of 11 September 2001 in New York, the Government vested public authorities with extensive powers, including the power to detain foreign nationals where the Secretary of State reasonably believed that their presence in the United Kingdom was a risk to national security and reasonably suspected that they were an 'international terrorist' under Part IV of the Anti-Terrorism Crime and Security Act 2001 ('the ATCS Act'). The British Government had also issued an Article 15 notice of derogation with respect to Article 5 of the ECHR. In *A and Others* the Court accepted that there had been a public emergency threatening the life of the nation but further examined whether the derogating measures were 'strictly required by the exigencies of the situation'. At the domestic level, the then House of Lords (now the Supreme Court) held that the measures taken under the ATCS Act were disproportionate and discriminatory as they were only

[41] Ibid. at para 119.
[42] Ibid. at para 118.
[43] *A and Others v United Kingdom* Application No 3455/05, Merits and Just Satisfaction, 19 February 2009 [Grand Chamber].

directed at non-British nationals.[44] Before the ECtHR, the Government challenged this finding, arguing that the domestic courts had afforded the State too narrow a margin of appreciation in assessing what measures were strictly necessary. The Court clarified that '[t]he doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level'.[45] For the Court the 'question of proportionality is ultimately a judicial decision', observing that the domestic court had given adequate weight to the views of the executive and/or Parliament.[46]

The findings in *A and Others* demonstrate the protective approach the Court takes towards the role of the judiciary and the pertinence of balancing the powers of the different branches of government in times of emergency. The same tendency is, *mutatis mutandis*, evident in *Alparslan Altan.* Furthermore, one can also argue that the assertion of the Court that the extensive interpretation of the concept of *in flagrante delicto* has legal consequences reaching beyond the legal framework of the state of emergency strengthens the resolve of the Court with respect to the separation of powers in times of crisis. If in times of emergency it were to be accepted that judges can be detained without procedural safeguards against interference by the executive, then such measures would have long-lasting implications for the institutional machinery of the State and would adversely affect the balance of State powers long after the end of the state of emergency. In the case of Turkey, it was exactly these long-term implications that were focal to the Court's assessment of the emergency measures.

B. The Separation of Powers in Turkey: A Misstep?

On 18 July 2018, the state of emergency in Turkey ended after seven consecutive three-month renewals. Following this period, many reports echoed[47] what had been highlighted since the introduction of the emergency regime, namely that the measures[48] taken by the Turkish authorities under the state of emergency framework relating to human rights, democracy, the rule of law and the separation of powers would not be confined to the emergency period alone but would continue to operate beyond that period.[49] As was poignantly observed in 2017 by Kaboğlu and Palluel, the state of emergency resulted in a

44 Ibid. at para 20.
45 Ibid. at para 184. For further analysis, see Shah, 'From Westminster to Strasbourg: *A and Others v. United Kingdom*' (2009) 9 *Human Rights Law Review* 473.
46 *A and Others v United Kingdom*, supra n 43 at para 184.
47 Platform for Peace and Justice, *One Year on From Turkey's State of Emergency Report*, 19 July 2019 [last accessed 24 September 2019]; Human Rights Watch, *World Report 2019*, at 588-9 [last accessed 24 September 2019].
48 For an overview of the amendments to the judiciary system under the state of emergency, see Akça et al., *'When State of Emergency Becomes the Norm: The Impact of Executive Decrees on Turkish Legislation'* (Heinrich Böll Stiftung, Istanbul, December 2018), at 64-87 [last accessed 24 September 2019].
49 Ruys and Turkut, 'Turkey's Post-Coup "Purification Process": Collective Dismissals of Public Servants under the European Convention on Human Rights' (2018) 18 *Human Rights Law Review* 539.

'restructuring of the public institutions'.[50] This was an enduring regime that had long-term effects extending well beyond the period of the state of emergency. The judicial branch of government did not escape this restructuring : Alparslan Altan was only one of 4,279 judges and prosecutors who were dismissed from their judicial office and/or were taken into detention.[51] More than one fifth of the entire Turkish judiciary was directly affected by the measures.[52]

Immediately after the adoption of the emergency measures, the Council of Europe's Venice Commission very clearly and unequivocally expressed its concerns about their impact on the judiciary and the separation of powers in Turkey, indicating that the effects of the measures may indeed be 'adverse'.[53] The Venice Commission noted that the dismissal of judges 'not only affects the human rights of the individual judges concerned, but they may also weaken the judiciary as a whole'.[54] It also highlighted the 'chilling effect' that the dismissals had within the judiciary by making other judges reluctant to reverse measures declared under the emergency decree laws out of fear of being subjected to similar measures themselves.[55]

In *Alparslan Altan* the Court acknowledged that the detention of the applicant not only affected his right to liberty but also weakened, by implication, the Turkish judiciary as a whole. However, the judgment does not allow any broader conclusions regarding the separation of powers in Turkey in general in so far as it did not address the chilling effect of the applicant's detention[56] on the independence and impartiality of the remaining members of the Turkish judiciary and the effectiveness of the proceedings before the

[50] Kaboğlu and Palluel, 'L'état d'urgence en Turquie à l'épreuve du droit européen des droits de l'homme' (2018) 113 *Revue trimestrielle des droits de l'homme* 5 at 17 (author's translation).

[51] Platform for Peace and Justice, *One Year on From Turkey's State of Emergency Report*, supra n 47 at 10. See, in general, Office of the United Nations High Commissioner for Human Rights, *Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January-December 2017*, March 2018, at 12-14 [last accessed 24 September 2019].

[52] Kaboğlu and Palluel, supra n 50 at 17. Other reports estimate that the dismissals affected approximately 30 per cent of the judiciary: see International Commission of Jurists, *Justice Suspended: Access to Justice and the State of Emergency in Turkey* (2018) at 20.

[53] Council of Europe, European Commission for Democracy through Law (Venice Commission), *Opinion No 865/2016: Turkey - Opinion on Emergency Decree Laws Nos 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016*, CDL-AD(2016)037-e, 12 December 2016, at para 148 [last accessed 24 September 2019].

[54] Ibid.

[55] Ibid. On the 'chilling effect', see also Council of Europe, Parliamentary Assembly, *State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights*, PACE report, Doc No 14506, 27 February 2018, at para 97 [last accessed 24 September 2019]; and European Commission, *Turkey 2018 Report*, SWD(2018) 153 final, 17 April 2018 [last accessed 24 September 2019].

[56] As observed in a relevant report, '[i]t is impossible for the judges in the Constitutional Court to make decisions without any anxiety when they have witnessed two fellow judges who expressed a minority opinion in some decisions being detained, arrested and denied of all legal rights': see Platform for Peace and Justice, *A Comprehensive Report on the Abolition of the Rule of Law in Turkey 2018: Non-Independence and Non-Impartiality of the Turkish Judiciary (2018)* at 52 para 132 [last accessed 24 September 2019].

Turkish Constitutional Court.[57] Thus it has been argued that *Alparslan Altan* was a missed opportunity reflecting the Court's consistent rejection of the compelling argument that the Turkish Constitutional Court has lost its impartiality.[58] While the Court examined the applicant's complaint with respect to his initial detention, it found his complaint relating to his arrest and detention in police custody inadmissible for failure to exhaust domestic remedies.[59] In the application communicated to the Government on 29 September 2017, the applicant claimed with respect to the domestic remedies that he had already lodged an individual appeal with the Constitutional Court. He added that this appeal could not be considered effective in the particular circumstances of his case because, in the decision to dismiss his appeal the Constitutional Court had already come to a conclusion regarding the charge of his belonging to a terrorist organisation.[60] This claim was not, however, discussed by the ECtHR.

Certainly, it would be unrealistic to expect that *Alparslan Altan* could act as a panacea for the current challenges with respect to the institutional landscape in Turkey and its human rights implications. The scope of the application itself was limited and did not raise all the issues that emerge from Alparslan Altan's situation. For instance, in a decision of 4 August 2016, the Constitutional Court dismissed him from his post on the basis of the powers conferred to it by the Legislative Decree No 667. These new powers conferred on the Constitutional Court by virtue of emergency legislation have been criticised on different grounds.[61] However, Alparslan Altan's dismissal from his duties did not fall within the ambit of the applicant's present application before the Court. His complaints pertained only to his arrest and detention under Article 5.

Alparslan Altan, as with *Mehmet Hasan Altan* and *Şahin Alpay,* did not tackle in a holistic manner the institutional situation in Turkey. The Court simply reiterated its earlier findings on the exhaustion of domestic remedies and, thus, it seems that in *Alparslan Altan* the time was yet not ripe[62] for the Court to question the effectiveness of the remedies domestically provided.[63] However, *Alparslan Altan*'s contribution to the assessment of the broader political-institutional context in Turkey is noteworthy because the Court introduced the separation of powers argument in its reasoning, and thereby inaugurated a clear

[57] O'Boyle, 'Can the ECtHR provide an Effective Remedy following the Coup d'état and Declaration of Emergency in Turkey?', *EJIL:Talk!*, Blog, 19 March 2018 [last accessed 24 September 2019].
[58] 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*, Blog, 6 May 2019 [last accessed 24 September 2019].
[59] *Alparslan Altan v Turkey*, supra n 10 at paras 78-80.
[60] *Altan v Tukey* Application No 12778/17, Communicated Case, 29 September 2017.
[61] 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' (2017) 13 *European Constitutional Law Review* 568 at 568; Kurban, supra n 7. See also *Opinion No 865/2016*, supra n 53 at para 136.
[62] About the argument that the evolution of the case-law in this regard needs time, see O' Boyle, supra n 57.
[63] See in particular *Alparslan Altan v Turkey*, supra n 10 at para 80, where the Court refers to its findings in *Mehmet Hasan Altan v Turkey*, supra n 9 at para 101.

institutional approach in its analysis. In this context, *Alparslan Altan* has added to the evolution of the Court's case law when it comes to the discussion of the institutional landscape and the separation of powers between the executive and the judiciary in Turkey currently.

This evolution may be slow-moving but the assertion that the examination of the general political context and its implications on human rights is not 'the ECtHR's *forte*'[64] should be rethought. The addition of the separation of powers rationale in the reasoning of the Court in *Alparslan Altan* is to be considered in conjunction with other advances that have occurred in other Turkish cases.[65] For instance, *Mehmet Hasan Altan* confirmed that the Court has not spoken its final word on the effectiveness of domestic remedies in Turkey.[66] Recent decisions on post-*coup* measures suggest the same even though they declare the relevant complaints inadmissible for non-exhaustion of domestic remedies.[67] Furthermore, the Court's concern about the 'chilling effect' of the detention of journalists on freedom of expression in *Mehmet Hasan Altan* and *Şahin Alpay* is also noteworthy. The Court reasoned that

> the pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices.[68]

Thus the Court's reasoning is not confined to a consideration of the applicants' individual rights, but also addresses the societal implications of the measures in general. It is, however, the Chamber judgment in *Selahattin Demirtaş v Turkey (No 2)* which is perhaps the most indicative of the Court's effort to holistically address the system of checks and balances between branches of government and assess the contextual circumstances in Turkey.[69] In that case, the Court found that several Articles of the Convention, including

[64] Turkut, supra n 58; Kurban, 'A Love Letter from Strasbourg to the Turkish Constitutional Court', *Vergassungsblog*, 27 March 2018 [last accessed 24 September 2019].
[65] The present article has taken into account the case law of the ECtHR and the relevant literature up to and including 24 September 2019.
[66] *Mehmet Hasan Altan v Turkey*, supra n 9 at para 102. See also Gurol, 'Resuscitating the Turkish Constitutional Court: The Alpay and Altan Judgments', *Strasbourg Observers*, Blog, 3 April 2018 [last accessed 24 September 2019].
[67] See *Baş v Turkey* Application No 66448/17, Admissibility, 19 June 2018, at para 55; and *Aksoy v Turkey* Application No 47585/16, Admissibility, 5 March 2019, at para 39. Or suggest that the applicants can resubmit their applications after exhaustion of domestic remedies: see *Aksoy v Turkey* Application No 47585/16, Admissibility, 5 March 2019, at para 48; *Yazicioğlu v Turkey* Application No 68385/17, Admissibility, 2 October 2018, at para 28; *Z.Y. v Turkey* Application No 20948/17, Admissibility, 16 October 2018, at para 42.
[68] *Şahin Alpay v Turkey*, supra n 9 at para 182; and *Mehmet Hasan Altan v Turkey*, supra n 9 at para 212.
[69] See the contextual evidence considered in *Selahattin Demirtaş v Turkey (No 2)* Application No 14305/17, Merits and Just Satisfaction, 20 November 2018, at paras 262-266. The consideration of contextual evidence by the Court in Article 18 cases was established in *Merabishvili v Georgia* Application No 72508/13, Merits and Just Satisfaction, 28 November 2017, at para 312 [Grand Chamber].

of Article 18 on the use of rights restrictions,[70] had been violated as a result of the prolonged pre-trial detention of the applicant, a prominent figure of the parliamentary opposition. The Court accepted that Selahattin Demirtaş's detention served an ulterior purpose, namely stifling pluralism, and that it prevented him from discharging his duties as a member of parliament.[71] The manner in which the Court seems to be addressing the oppression of dissent in Turkey in *Selahattin Demirtaş v Turkey (No 2)* to date is particularly important for the general discussion on the separation of powers in the country. After all, as the Venice Commission opined with respect to the 2017 constitutional reform in Turkey, which weakened the separation of powers even more,[72] 'separation of powers requires… that the different powers should be constituted in a way which also allows for divergent approaches and political emphases'.[73] The findings in *Alparslan Altan* together with those in *Selahattin Demirtaş v Turkey (No 2)* leave room for optimism that the Court might further address the current dangers to the separation of powers in the Turkish context, subject to the constraints inherent in the role of the Court in dealing with individual applications.[74]

Alparslan Altan has led the way for a consideration of the state of the separation of powers in the Turkish context and will serve as a reference point for future cases. There are, of course, more steps to be taken and more to be said on the part of the Court with respect to the judicial branch of government in Turkey. On 17 May 2019, 546 applications relating to the provisional detention of judges and prosecutors following the attempted *coup d'état* were communicated to Turkey, all of which invoke Article 5. It is noteworthy that 408 of the 546 applicants also complain under Article 5 (4) of the ECHR of the lack of independence and impartiality of the judges who ruled on the legality of their detentions.[75] One can only hope that in these cases the Court will seize the opportunity to further engage in this debate and send a strong message with respect to the maintenance of the separation

[70] While in *Alparslan Altan v Turkey* the applicant did not advance a claim under Article 18 of the Convention, in *Şahin Alpay* and *Mehmet Hasan Altan* both applicants claimed that their detention was also in breach of Article 18 in conjunction with Articles 5 and 10 ECHR. The Court, however, did not consider it necessary to examine this complaint separately (*Şahin Alpay v Turkey*, supra n 9 at para 186; and *Mehmet Hasan Altan v Turkey*, supra n 9 at para 216). In this regard, we share the criticism advanced by other scholars: Kurban, supra n 64.

[71] *Selahattin Demirtaş v Turkey (No 2)*, supra n 69 at para 273. The case is now pending delivery of a judgment by the Grand Chamber, which heard the case on 18 September 2019.

[72] Council of Europe, European Commission for Democracy through Law (Venice Commission), *Opinion No 875/2017: Turkey - 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, adopted by the Venice Commission at its 110th Plenary Session, 10-11 March 2017*, CDL-AD(2017)005-e, 13 March 2017, at para 133, available at: www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e [last accessed 24]; Şirin, 'New Constitutional Amendment Proposal in Turkey: A Threat to Pluralistic Democracy!', *Verfassungsblog*, 31 January 2017, available at: verfassungsblog.de/new-constitutional-amendment-proposal-in-turkey-a-threat-topluralistic-democracy/ [last accessed 24 September 2019]. On the drift toward authoritarianism was observed starting with the elections of 2011, see also Yazıcı, 'Turkey in the Last Two Decades: From Democratization to Authoritarianism' (2015) 21 *European Public Law* 635.

[73] *Opinion No 875/2017*, supra n 72 at para 125.

[74] For the consideration of an inter-State application in the case of Turkey, see *(In) Effective Remedies from Strasbourg: Turkey and the European Court of Human Rights*, supra n 7 at 20-1.

[75] *Altun and 45 Others v Turkey* Applications Nos 60065/16 et al., Communicated Case, 17 May 2019.

of powers in Turkey.

4. CONCLUSION

Following the Court's 2018 judgments in *Mehmet Hasan Altan v Turkey* and *Şahin Alpay v Turkey*, *Alparslan Altan v Turkey* expands the number and scope of the cases where the Court has concluded that the post-attempted *coup* measures adopted by the Turkish Government are incompatible with the exigencies of the Convention. Given the particularities of Alparslan Altan's case, the 16 April 2019 judgment leaves its distinctive mark on the case law of the Court. The unreasonable expansion of the concept of *in flagrante delicto,* which deprives members of the judiciary of the institutional and procedural safeguards they should enjoy to effectively carry out their judicial duties, violates not only the principle of legal certainty but also the protection inherent in the separation of powers. This interpretation adopted by the Court strengthens the *gravitas* of the principle of separation of powers in its case law and highlights the institutional implications of individual measures adopted in response to the attempted *coup d'état*. The Court legitimately employs an institutional approach which can be further strengthened in future cases. The source of many human rights violations in post-attempted *coup* Turkey is connected to the weakening of the separation of executive and judicial powers within the State through the interference by the executive with the functioning of the judiciary. Even if *Alparslan Altan* is not the end of the road, it has nevertheless inaugurated an approach which can be utilised by the Court to holistically address the current human rights challenges in Turkey. Institutional and human rights challenges are inter-connected and the acknowledgement of this association can be beneficial to the Court's effort to address those challenges that fall within its jurisdiction.