Austrian Platform "State under the rule of law"

Press Briefing

Turkey: Arbitrary Detention & Crash of the State of Law
Why the passivity of the European Court of Human Rights and of European States?

A. Promulgation of the state of emergency and derogation of rights of the European Convention of Human Rights by Turkey

After the failed coup attempt of 15 July 2016 against state institutions, including the government and President Erdoğan, Turkey's parliament approved on 21 July a bill declaring a state of emergency for three months and informed the Secretary General of the Council of Europe of a partial derogation from its obligations according to the European Convention of Human Rights (ECHR), which is possible "*in time of war or other public emergency threatening the life of the nation … to the extent strictly required by the exigencies of the situation*" (article 15 ECHR). Subsequently, the state of emergency has been prolonged several times and is still valid.

Based on various emergency decrees of the President, so far more than hundred thousand judges, prosecutors, civil servants, lawyers, academics, and journalists have been released and ten thousands imprisoned because being "terrorists" or spreading or promoting "terrorist propaganda" without having access to justice, in particular the guarantees of a fair trial.

The consequences of the promulgation of the state of emergency are that several rights of the ECHR have been derogated, *inter alia,*

a. the right to a fair trial within reasonable time by an independent and impartial tribunal under article 6 (1) and the right to presumption of innocence under article 6 (2) ECHR,
b. the right to have adequate time and facilities for the preparation of defence under article 6 (3) lit b ECHR,
c. freedom from arbitrary arrest or detention under article 5 ECHR,
d. the right to have detention reviewed by a judicial authority and to be tried within reasonable time under article 5 (3) ECHR,
e. the right to freedom of expression under article 10 ECHR.

B. Preconditions to apply to the European Court of Human Rights

The admissibility criteria of article 35 (1) ECHR which are regulating the procedural requirements to apply to the European Court of Human Rights (ECtHR), states: "*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.*"

1. Exhaustion of domestic remedies and possibility to seek redress

According to the case-law of the ECtHR, the current emergency decrees and the respective legal practice in Turkey do not meet the requirements of "effective domestic remedies" in the meaning of the ECHR what allows to apply directly to the ECtHR. The reasons are:

a. The ECtHR must take realistic account of the individual situation of any applicant in regard to the political and legal context of the case. The existence of formal remedies in the Turkish legal system is not sufficient where fear of reprisals or intimidation are leading to a remedy only being available in theory. The exhaustion of local remedies is not an admissibility condition with absolute content but instead a rule that must be applied with flexibility and each individual case must be judged in the light of its particular facts. It lies within the responsibility of the government to prove that remedies are sufficient and available not only theoretically, but most of all practically at the time in question.

b. In the absence of effective judicial remedies in Turkey, domestic remedies do not need to be exhausted. Lack of prospects of effective redress often goes hand in hand with human rights violations. Therefore, the ECtHR shall comply with its obligation to take also cases, in particular those based on the emergency decrees, which didn't exhaust domestic remedies.

c. In cases of serious doubt, Turkey has to prove the effectiveness of the existent remedies. An effective remedy must provide the applicant with direct redress regarding the situation complained of. If the remedy fails in giving, at least, some minimal chances of success, an applicant is not obliged to further pursue domestic remedies.

d. In cases where a state system is totally ineffective due to state connivance or acquiescence and where the abuse of state power is prevailing, what can be assumed in the case of Turkey, the rule of exhaustion of domestic remedies does not apply. In its case-law, the Court reiterated two constituent elements of an administrative practice, namely, the "repetition of acts" on a larger scale apart from the particular case and "official tolerance":

e. "Repetition of acts" is described by the Court as "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system".

f. Such a repetition of acts occurred in Turkey: The first wave of dismissals came on 16 July 2016 and was based on an administrative decision by the High Council of Judges and Prosecutors (HSYK). Investigations against 2745 judges and prosecutors were based on no evidence except for the list of suspicious persons itself, which was published by the HSYK. Occurrences during the interrogations (for instance before the magistrate court) such as adding pre-written decision forms to the protocol where only the name of the accused was added, indicate the form of interrogation and treatment of judges and prosecutors that is taking place in a systematic fashion all over Turkey. This form of interrogation and an indictment solely based on the HSYK list makes it clear that violations of article 5 ECHR remain a structural problem all across Turkey and are parts of an administrative practice. These forms of procedure certainly do not guarantee an effective, nonbiased legal protection against the Turkish state authorities.

g. The term "official tolerance" means according to the ECtHR: *"Illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied".*

h. In Turkey, officials from outside the judiciary are highly involved in the course of the proceedings. A significant example for the Turkish government's involvement is the fact that magistrate judges can only give their decision e.g. on an applicant's pre-trial detention after consulting the local chief of security. Another indication is the existence of a catalogue of questions prepared "by Ankara", which is part of every detained judge's and prosecutor's interrogation. Furthermore,

the treatment of judges and prosecutors in custody and the resulting violations of article 5 ECHR are tolerated by government officials.

i. According to the Court's case law concerning administrative practices of violations, both requirements are met in the Turkish case at hand, thus domestic remedies do not need to be exhausted. The decisions to dismiss judges and prosecutors and subsequently detain a significant number of them are based on legislative decrees created by the Turkish government which cannot be declared unconstitutional under current Turkish law. It is therefore not possible to seek any remedy against these laws from a human rights perspective.

j. It is further well-established case-law by the Court that only such remedies which are adequate and effective need to be sought. One significant requirement for a remedy to be considered adequate and effective is the possibility to provide an applicant with redress. In Turkey, all dismissals and apprehensions of members of the judiciary which are based on by-laws created by the Turkish Government in the context of the state of emergency cannot be declared unconstitutional because there are no remedies against statutory decrees under Article 148 para 1 of the Turkish Constitution.

2. Independence of the judiciary

Even if the remedies provided by the Turkish legal system should be considered as adequate and effective in theory, they cannot be considered so in the current situation, because the independence of the Turkish judiciary is a precondition for a remedy to be effective. A fair trial requires full independence of the competent courts, which is not guaranteed in Turkey:

a. At this point, a parallel can be drawn to the rulings of the European Commission of Human Rights in the case of *Denmark, Norway, Sweden and The Netherlands v. Greece*, which took place in the aftermath of a military coup. Regarding admissibility, the Commission held that it *"does not find, in the particular situation at present prevailing in Greece, the remedies indicated by the respondent Government can be considered as effective and sufficient; therefore the present allegations under Article 3 cannot be rejected for non-exhaustion of domestic remedies in accordance with Articles 26 and 27, paragraph (3), of the Convention"*. **This Commission's ruling on the admissibility regarding the exhaustion of domestic remedies can be transferred to the present Turkish situation.** The Commission's ruling on former article 26 ECHR is still relevant to the Court's rulings on article 35 of the Convention.

b. In the Greek case, the Commission initially stated that the remedies named by the government of Greece were effective as such. However, the particular situation in Greece at the time rendered them inadequate and ineffective. For one thing, a number of constitutional guarantees relating to the institution and functioning of the ordinary courts and to the procedural rights of individuals had been suspended for an indefinite period of time. At the same time, the judicial system had been severely affected in terms of staff: the judge's tenure, which was guaranteed by the constitution, had been suspended for a period of three days by the Council of Ministers, during which *"the President of the Supreme Court and twenty-nine other judicial officers were removed from office …."* The Commission found that this measure *"could not but seriously have affected the independent status of the judiciary"* and that *"such status appears to be essential for a proper determination of complaints relating to alleged violations by organs of Government"*. The Commission further held that *"administrative authorities, being under the control of the Government can, even less than judges, be in a position to deal properly in the present*

circumstances with complaints …" of violations of the ECHR. The Commission therefore concluded that under these circumstances the remedies indicated by the Greek government could not be considered as effective and sufficient and that the allegations could not be rejected for non-exhaustion of domestic remedies.

c. **While there are many parallels between the Greek case and the current situation in Turkey, the present situation in Turkey appears even more dramatic.** Exactly as it was the case in Greece, the Turkish Council of Ministers promulgated statutory decrees as part of state of emergency laws. From the time of the coup attempt 4000 judges have been suspended from their profession based on Legislative Decree no. 667. Compared to the number of citizens in Greece then and the number of citizens in Turkey today the number is still sixteen times higher. The lack of independence of the current Turkish judiciary can also be seen in the conduct of the national authorities. One significant example might be the ruling of the Constitutional Court's General Assembly of 4 August 2016, Decree no 2016/12, in which the Court dismissed two of its members. In this case the General Assembly held that even if they could not be able to prove any membership or connection between the dismissed judges and a so-called "parallel state structure", "the discretion of the simple majority of the General Assembly to be composed about the mentioned members is sufficient."
d. Thus, the Constitutional Court made clear that with regard to dismissing judges their personal opinion outweighs even basic procedural rights as the accused can be sentenced based on rumours rather than on actual evidence. Another indication of non-independence of the judiciary is the use of lists that had been pre-fabricated by HSYK, which already contained the names of the judges and prosecutors who subsequently have been dismissed and in some cases arrested. The manner in which these lists were utilised severely affected the presumption of innocence.
e. Therefore, it needs to be concluded that neither the proper functioning nor the independent status of the Turkish judiciary can be looked upon as guaranteed. Under the given circumstances no remedy provided by the Turkish legal system can be sought in an adequate and effective manner. Taking into account the Commission's decision in *Denmark, Norway, Sweden and The Netherlands v. Greece* the question of whether the Turkish judiciary is able to work in an independent fashion can be answered by looking at the numbers. If the dismissal of the President of the Constitutional Court and twenty-nine other judicial officers severely affects the independent status of the judiciary so will the dismissal of two members of the Constitutional Court and 4000 judges and prosecutors. Any other decision taken by the Court, would be a complete overruling of the Commission's decision in the Greek case. **In our opinion it is clear, that none respective application cannot be rejected on the grounds of non-exhaustion of domestic remedies due to an insufficient independence of the Turkish judiciary and thus, no effective remedies can be sought.**

C. Alarming restraint of the European Court of Human Rights

Nevertheless the Court in its decision of 12 June 2017 in the case *Köksal v. Turkey* (application no. 70478/16) dismissed an application by a public servant on the grounds of the applicant not having exhausted the domestic remedies. The court stated that the applicant "had to use the remedy provided for under Legislative Decree no. 685. That legislation provided for the setting-up of a commission with the task, in particular, of adjudicating upon appeals against measures adopted directly by Legislative Decrees issued in the context of the state of emergency, including the

dismissals of civil servants" and that "(…) civil servants affected by the relevant measures thus had the possibility of referring their cases to the commission within 60 days from a date to be announced by the Prime Minister by 23 July 2017 at the latest (six months after the entry into force of the Legislative Decree)."

In theory, the establishment of Legislative Decree no. 685 introduced a special mechanism for assessing complaints of unlawful treatment in connection to the State of Emergency Decrees to the Turkish legal system. However, in reality the situation of those concerned remains the same. While Legislative Decree no. 685 was introduced in January of 2017, the Commission in question has been established only in July 2017. Until 20 January 2018 104,789 applications have been filed. So far the Commission decided only on 920 cases, 880 of which were rejected. Therefore it can be said, that Legislative Decree no. 685 did not fulfil its alleged purpose of bringing more clarity to the situation but as a result prolonged the applicants' procedures, which decreased the chance of redress even further.

More importantly however, the introduction of Legislative Decree no. 685 did not change anything about the very nature of the current Turkish judiciary. Even if the Commission had been already introduced and had started its work it could not be considered an effective remedy. The lack of independence of the judiciary that was caused by the dismissal of a staggering number of its judges and prosecutors remains the main issue in this current situation. The Greek case has shown that such severe changes in the composition of the judiciary lead to a complete change in the legal framework. The question of whether remedies have the possibility of providing redress is no longer solely determined by procedural factors. **If the Turkish justice system itself has lost its independence, every procedural step that is being taken within this system either before a regular court or a special commission loses its chance of being effective in the long run.**

Hence, the Legislative Decree no. 685 has failed to introduce an effective and adequate remedy for applicants leaving them with no means to seek redress in the context of a domestic justice system that has lost its independence. **It should be concluded that no applicant needs to exhaust this new domestic remedy and that this application should therefore be considered admissible.**

Until end of May 2017 17,630 applications related to the coup attempt have been brought to the ECtHR against Turkey, including the application of the journalist *Deniz Yücel*. In 2017, 281 applications have been declared inadmissible. Only one (!), which has a connection to the coup attempt, has been communicated so far to Turkey, in which the ECtHR raises some detailed questions whether the applicant had a fair trial in accordance with article 6 ECHR.[1]

The restraint of the ECtHR, and the disregard of its own case-law, can only be explained by the potential fear to be buried by an avalanche of applications which would endanger the successful reduction of the enormous number of still pending cases. **However, there are procedural instruments which could be applied by the ECtHR and transfer the burden to settle all lodged applications to Turkey:** The ECtHR may initiate a **"pilot-judgment procedure"** and adopt a pilot judgment where the facts of an application reveal in a member state (here: Turkey) the **existence of a structural or systemic problem or other similar dysfunction** which has given rise or may give rise to similar applications. **In the final judgment of the pilot case the ECtHR can instruct Turkey how it could and should – on domestic level – settle all other pending equal and similar cases, so called "repetitive cases", according to the pilot judgment.**

[1] Application of 22 February 2017, *Yaşar ERİŞ v. Turkey*, no. 20458/17.

D. Possibility to file inter-state applications by other member States of the ECHR

Although article 33 ECHR provides that *"Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party."*, so far no member state of the Council of Europe ECHR (and therefore also member state of the ECHR) used the option to file such a "state application" against Turkey. **This option is a strong and important instrument to bring serious gross and systematic human rights violations to the attention of the ECtHR enabling him to take evidence, to assess the general conduct of the given state and to decide whether freedoms and rights of the ECHR have been violated by the state, and to issue a binding judgment.** Although "inter-state cases" are not common, in the past some state applications became of huge importance, because they could and can contribute to improve the human rights situation in the sued state, and support victims of human rights violations to get access to justice. In particular, general questions can be solved by the ECtHR which can help to reason and/or substantiate individual applications.

Of particular importance will be the assessment, which also has to be undertaken by the ECtHR, whether the promulgation of the state of emergency and the emergency decrees based on it are in accordance with the requirements of article 15 para 1 ECHR, namely whether these measures were and are still "strictly required by the exigencies of the situation" and matching the general principle of proportionality, which is an inherent fundament of the ECHR.

However, in the light of the gross and systematic violations of human rights, combined with a collapse of the independence of the judiciary and a serious danger for the state of law in Turkey, **member States of the ECHR *have* the moral obligation to take action in order to preserve victims from human rights violations, as well as to defend and secure basic fundaments of the European human rights system and legal order.**