

LONG STORY OF TURKISH JUDGES

by Yavuz Aydın

It is not a secret that the judiciary has always been used as an instrument or as a tool to silence the dissidents at different levels. However, the situation has never been so bad and miserable during the whole history of Turkish Republic.

As of 15 July 2016, the day of the abortive coup, there were around 14.500 judges/prosecutors in Turkey. 4.560 of them were dismissed in a few weeks following 15 July. There are currently around 21.000 judges and prosecutors. This means, having 'cleared the way' by sacking and imprisoning thousands while sowing fear among the remaining, the Erdogan government hired 11.000 "accredited" new judges in four years time.

In its 96-year history, Turkey experienced hard times. Military coups of 1960 and 1980 as well as military intervention of 1971 were the hardest times for the constitutional democracy and separation of powers. But even during those times, judges were not subject to purges at this scale. For example, after the bloody and treacherous coup d'état of 1980, number of judges and prosecutors subject to administrative or judicial proceedings was only 47 and a total number of 120 academics were sacked, 31 journalists were arrested, far less comparable with current numbers. How did Erdogan acquire such power over the judiciary? It might well be the reason why he described this treacherous attempt as "a gift of God" on that very day. At least, it is clear that he used this opportunity much more effectively than anyone could expect. How did he do this? Attacking the judges and justice at first place helped him a lot.

This reminds of Dick the Butcher, who says "*The first thing we do after the revolution, let's kill all the lawyers*" in Shakespeare's Henry IV. In the story, he believes that lawyers stand in the way of their planned revolution with Jack the Spade. For that reason, they must be eliminated. So, the priorities of authoritarian minds have remained unchanged since Shakespeare wrote that play more than four centuries ago. Actually, this has always been a well-known fact to the autocrats throughout the world. As was the case in Germany and Italy before and during the World War II; many other countries like Argentina, Uruguay, Spain, etc. went through similar dark tunnels in certain phases of their struggle for democracy. Even today and even in the EU, we still face similar problems in Poland, Hungary, Bulgaria as the most famous ones in this regard.

Yet, the scale of the attack to judiciary in the bitter experience of Turkey is not comparable to any of the examples mentioned above. The particular reason why judges and prosecutors of Turkey were subjected to such a brutal and large-scale attack was that, Erdogan knew most of those judges wouldn't bow their heads to the arbitrariness and oppression he was planning in the aftermath of the botched coup attempt of 15 July 2016. Another thing that he knew very well is, those persecuted judges wouldn't be obedient to the soldiers if that coup attempt was successful. So, there was no option for him else than eliminating one-third of the judiciary at once. Eventually, all other oppression and atrocities became possible owing to this evilly clever move to execute a mass purge in judiciary.

In the aftermath of 2016, breach of fundamental liberties of the 96-year old Turkish Republic has reached record-levels.. Now, we are talking about a country which has put more than 300 journalists, party co-chairs and tens of elected mayors of HDP (the pro-Kurdish People's Democratic Party), the head of the dissolved association of judges (YARSAV) and president of Progressive Lawyers Association (ÇHD) behind bars, as well as more than 300,000 others under the pretext of terrorism-related charges since July 2016. Currently, there are more than 50.000 people in Turkish prisons who all are jailed for non-violent, for trying to use their freedom of expression, or simply for being labeled as dissidents. Not surprisingly, what we see today is a country that is ranking 108th among 126 countries in rule of law index of 2020, whereas, it was 59th even in 2014 in the aftermath of Gezi protests and anti-corruption probes.

It is worth noting that, whatever would happen after a successful coup in a country has happened after Erdogan's ruling under "state of emergency" which lasted two years, but

became permanent through the constitutional amendments of 2017. From this aspect, it can be well said that there is a successful coup which has been staged by Erdogan.

At this point, it should also be noted that, the arrests are based on vague interpretation of Article 314 of Turkish Penal Code (membership to an armed terror organisations), which is also the sole basis to dismiss and arrest all these judges and prosecutors. This vague interpretation of the law has been repeatedly found to be illegal and arbitrary by the ECHR.

On 18 October 2020, the ECHR communicated the questions regarding the applications of 476 arrested judges to the Turkish Government. With this group of cases, applications of more than 1.000 out of 2500 arrested judges reached the communication phase after more than four years following the unprecedented dismissal and arrest of judges in July 2016. For the remaining 1.500, there is still no light at the Strasbourg end of the tunnel yet.

Actually, the ECHR had already found violations of Article 5 of the Convention in the cases of *Alparslan Altan* (no. 12778/17, 16 April 2019) and *Hakan Baş* (no. 66448/18, 3 March 2020). The first case concerned the detention of Mr Alparslan Altan, former member of the Turkish constitutional Court, and the second one related to Mr Hakan Baş, a first instance court judge at the time. They were both arrested in 2016 on groundless allegations of being a member of armed terror organization just like 2500 other colleagues. Inter alia, The Court's recent judgment of 15.09.2020 in *Ragıp Zarakolu v. Turkey* (15064/12)¹ clearly underlines this fact.

However, a recent judgment of Turkish Constitutional Court in the case of *Yıldırım Turan*² (Application 2017/10536) leaves no room for any change in the approach of Turkish judiciary. In this farcical judgment, the Turkish Constitutional Court openly reversed the ECHR mechanism by openly refusing to comply with ECHR's *Alparslan Altan* and *Hakan Bas* judgments. This decision has clearly made the ECtHR's previous finding meaningless and has demonstrated the fact that the Turkish Constitutional Court does not offer an effective domestic remedy.

In this regard, it is worth mentioning that, in a recent Opinion³ (A/HRC/WGAD/2020/51) of the Working Group on Arbitrary Detentions (WGAD) of United Nations Human Rights Council, it has been clearly stated as follows:

"In the past three years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey. The Working Group expresses its concern over the pattern that all these cases follow and recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity"

Most recently, in its judgment dated 22 December 2020 in *Selahattin Demirtas v. Turkey*⁴ case, the Strasbourg Court observed, in line with the Venice Commission's findings in its Opinion⁵ that the Turkish Criminal Code does not define the concepts of "armed organisation" and "armed group". With this decision, the ECHR openly ruled that Mr Demirtas, who was the co-chair of the pro-Kurdish political party (HDP) should be released immediately. Actually, the Strasbourg Court had already ruled in November 2018 that, the case of Mr Demirtas was based on purely political motives rather than legal. This was the

¹ [Ragıp Zarakolu v. Turkey](#) (15064/12)

² *Yıldırım Turan* [GK], B. No: 2017/10536, 4/6/2020, available at: [T.C. Anayasa Mahkemesi](#)

³ Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020, para. 102, available at: https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session88/A_HRC_WGAD_2020_51_Advance_Edited_Version.pdf

⁴ *Selahattin Demirtas v. Turkey* (No. 2), [GC], Application no. [14305/17](#), §277, 22 December 2020

⁵ CDL-AD(2016)002-e, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e)

first case in which the ECHR found a clear breach of Article 18 of the Convention by Turkey. However, he is still in prison since November 2016.

As the other case where the ECHR found Turkey in breach of Article 18, the situation of Osman Kavala is no different. He is still being kept in prison despite the ECHR ruling and the decision of the Council of Europe's Committee of Ministers. Furthermore, the appeal court in Istanbul has overturned an acquittal decision about Mr Kavala, by ignoring the said decisions of the ECHR and the Committee of Ministers of the CoE. By the way, the panel of judges who had dared to acquit Mr Kavala of the baseless charges in 2019 have been degraded and sent to different cities following a swift disciplinary proceeding conducted by the Turkish Council of Judges and Prosecutors (HSK).

In this regard, it is worth noting actions taken by the European Network of Councils for the Judiciary (ENCJ) concerning the Turkish Council of Judges and Prosecutors (HSYK). On 8 December 2016 the ENCJ General Assembly suspended the observer status of the High Council for Judges and Prosecutors of Turkey (HSYK) as it no longer complied with the ENCJ Statutes and was no longer an institution which is independent of the executive and legislature ensuring the final responsibility for the support of the judiciary in the independent delivery of justice.⁶

In its recent statement dated 8 December 2020, the ENCJ explained the failure of the HSK (previously HSYK, but changed as HSK after the constitutional amendments of 2017) to guarantee the access to independent, fair and impartial courts delivery of justice as follows:

“Four years later, unfortunately, the situation has not improved and has in fact deteriorated considerably. The Council for Judges and Prosecutors is a Council in name only, as none of its actions or decisions demonstrate any concern for the independence of the judiciary. Without a Council to protect and guarantee the independent delivery of justice in Turkey, there is little hope for the Rule of Law in Turkey in general and for access to independent, fair and impartial courts for all who come before the courts including Turkish citizens.”⁷

Thousands of dismissed judges and prosecutors of Turkey are still awaiting justice under these conditions. At least 500 are still in jail since 2016, remaining 2000 who were released after some years of detention are being re-arrested day by day as their verdicts are being upheld by the appeals courts. *Murat Arslan*, the chair of YARSAV and the laureate of Vaclav Havel Human Rights Prize, is also among those 500 who are still behind bars. Around a hundred others who managed to flee this injustice and persecution are trying to survive, adapt and start a new life in exile as refugees throughout the EU. All awaiting the day the judges in Strasbourg will eventually accept the fact that there is currently no such thing as “effective domestic remedy” in Turkey. And of course awaiting the days the country will respect the ECHR decisions after a long-lasting interruption of sweet dreams to establish rule of law.

Unfortunately, the main source of frustration in this process was the ECtHR. As if there is an independent judiciary or any other effective domestic remedy in today's Turkey, it overturned more than 30.000 Turkish cases lodged after July 2016, referring to exhaust all domestic remedies. Ignoring all the arguments in those files supported by facts in addition to respected and credible reports of CoE and UN bodies as well as international NGOs, the European Court with this attitude proved to be part of the problem rather than the solution mechanism. This means any person deprived of his/her job and career will have to wait for around 10 years to expect a decision from the ECtHR.

The latest example of ECHR's controversial attitude surfaced in its refusal of the *amicus curiae* application lodged by MEDEL, European Association of Judges–EAJ, Judges for Judges, and the European Association of Administrative Judges. This third-party intervention was meant to highlight the lack of judicial independence and rule of law in Turkey, as the pending cases of arrested judges of Turkey were solely related to this core issue. However, the ECHR (Second Section) has rejected this crucial application of the most

⁶ ENCJ Votes to suspend the Turkish High Council of Judges and Prosecutors, available at: <https://www.encj.eu/node/449>

⁷ ENCJ Board Statement on the Situation in Turkey (<https://www.encj.eu/node/578>)

important judicial associations of Europe without a proper justification. Following this unconceivable rejection, these leading associations have issued another historic statement⁸ which underlined once again, that *“The Platform for an Independent Judiciary in Turkey, composed of AEAJ, EAJ, MEDEL and Judges for Judges will continue to observe the developments in Turkey and the proceedings at the ECtHR and will not stop to support the unduly persecuted Turkish judges and prosecutors whenever and wherever it will be necessary.”*

And I say, this firm stance and support of great colleagues across Europe gives us the strength to keep our hopes alive.

Questione Giustizia

⁸ Statement of AEAJ, EAJ, MEDEL and Judges for Judges for an independent Judiciary in Turkey; <https://www.iaj-uim.org/news/statement-of-aeaj-eaj-medel-and-judges-for-judges-for-an-independent-judiciary-in-turkey/>