Mercan v. Turkey: Waiting for the Last Word of the Turkish Constitutional Court

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For the time being, the fallout of the attempted coup d'ètat of July 15th 2016 in Turkey will not reach Strasbourg. Victims of alleged human rights violations first have to exhaust domestic remedies before they can apply to the European Court of Human Rights (ECtHR). This is the result of *Mercan v. Turkey*, the first of more than 3000 applications regarding alleged violations after the attempted coup and the declaration of a state of emergency.

The applicant Zeynep Mercan is a former judge who was put in a pre-trial detention after the attempted coup for being linked to the organisation believed to be behind the coup attempt and referred to as FETO/PDY (Fettullah Gulenist Terrorist Organization/Parallel State Structure) by the Turkish Government. She had complained about the legality of her pre-trial detention in the absence of any evidence, the length of the detention and the detention conditions.

Immediately after the failed coup, which had cost nearly 300 lives, mostly civilians, and left another 3.000 wounded, the Government had declared a state of emergency and derogated from the obligations under the European Convention Human Rights. Since then ten decrees in force of law have been issued and strict administrative measures have been taken by the Government, which were heavily criticized by the COE Commissioner for Human Rights, Consultative Council of European Judges, Consultative Council of European Prosecutors, European Network of Councils for the Judiciary, UN High Commissioner for Human Rights, UN Committee on the Elimination of Discrimination against Women and UN Special Rapporteur on the Right to Freedom of Opinion and Expression as well as leading NGOs. The state of emergency was renewed for another three months by the National Assembly on the 11th of October 2016. According to the information provided by the COE Commissioner for Human Rights, around 32.000 persons were detained and 100.000 civil servants, including academics and judges and prosecutors, suspended or dismissed from their posts. More than a thousand NGOs and trade unions and more than a hundred media establishments were disbanded and liquidated without judicial proceedings.

The day after the attempted coup, the High Council of Judges and Prosecutors (HSYK) temporarily suspended and authorized prosecution of 3.000 judges and prosecutors because of suspicion of a connection with FETO/PDY. On the 24th of August, 31st of August, 4th of October, 15th of November, in total 3658 judges and prosecutors were permanently dismissed by HSYK for their ties to the FETÖ/PDY organization without a reasoned judgment. After the arrest of the applicant on the 17th of July 2016, she was taken into pre-trial detention, and on 24th of August she was permanently dismissed from the post, both based on decisions by the HSYK.

That the ECtHR declared her application inadmissable is remarkable for a couple of reasons. The applicant, after her appeal against the pre-trial detention order was overruled by the competent court, did not call upon the Turkish Constitution Court (TCC) but directly submitted an application to the ECtHR. She relied on a decision by the TCC regarding the dismissal of two judges of TCC in order to persuade the ECtHR that the TCC could no longer be relied upon to be impartial and effective. The said decision of the TCC was based only on "*the information from the social circle*" and "*the common conviction formed by the members of the TCC*" that the former judges had links with FETO/PDY. The legal basis of the decision of the TCC was Article 3 of the Decree-Law No. 667 which grants authorization to the TCC to dismiss its judges "*who are considered to be a member of, or are in relation, connection or contact with terrorist organizations or structure/entities, organizations or groups*".

The ECtHR, with an emphasis on principle of subsidiarity and taking into account the Erdem Gul and Can Dundar Case judgment of the TCC, asserted that the TCC still constitutes an effective domestic remedy, not just in theory, but also in practise. The Court considered the impartiality of the TCC just in doubt, and accepted its

accessibility as well as effectiveness. That being said, the decision of *Hasan Uzun v. Turkey* in 2013 on the effectiveness of individual application to the TCC is reaffirmed by the Court. Whether or not this decision requires an application to the TCC to exhaust domestic remedies when it relies on the Decree-Law No. 667 was controversial among jurists in Turkey. The decision by the ECtHR now clarifies that at least with applications concerning the right to liberty and security the application to the TCC is indeed required. Nevertheless the ECtHR leaves the door open for future changes in its jurisprudence, stating that with reliable information provided in the future individual application to the TCC may not be regarded as an appropriate remedy or afforded a reasonable prospect of success.

The decision of the ECtHR cannot be considered as supporting the post-coup measures taken by the Government. The decision is solely focused on the availability and effectiveness of the domestic remedies. The ultimate assessment will be carried out in the wake of a review of the cases brought by the victims before TCC. Yet, subsequent to the attempted coup, according to a statement by the Chief Justice of the TCC on 17th of October 2016, the Court has received more than 40.000 new individual application, more than the total number of applications received by the Court in the last two years. It must be noted that the TCC received roughly 20.000 applications on a yearly basis before 15th of July, and last year it could only handle 15.713 applications which already fell short of the required work load.

Another challenge before the TCC will be the execution of the possible judgments rendered by the Court. So far, there has been no supervision of execution of the judgments and administrative and judicial organs are reluctant to follow precedents. A probable intentional unwillingness may affect the approach of the ECtHR taken in the *Mercan v. Turkey* decision in the future.

Last but not least, for the first time in Turkey, civil servants, judges and prosecutors were dismissed by the means of Decree-Laws which cannot be subject to judicial review according to Article 148 of the Turkish Constitution. Nevertheless, the TCC is only incompetent to review the constitutionality of the Decree-Laws themselves, not their implementation. Violations arising from the implementation of the decree-laws can be examined by the TCC through the individual application process. However, as yet, this means has not been confirmed as an effective remedy by a judgment of the Court. In the meantime surprisingly the Council of State delivered two judgments on 4th of October 2016 concerning dismissals by the decree-laws which stipulates the competence of local administrative courts on dismissals and referred the cases to local courts. These judgments have intensified the confusion among the jurists about the legal remedies that have to be exhausted before an individual application to the TCC. Hopefully, as the memorandum of the COE Commissioner for Human Rights pointed out, according to the Chief Justice of the TCC the Court will decide on applications submitted after 15th of July very soon. Until then, the question which legal remedies for alleged violations are available and how effective the individual application process after the attempted coup will be, is left unanswered.

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