Time for Strasbourg to Open its Doors to Turkey's Purged Public Servants

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A report by the Turkey Human Rights Litigation Support Project (TLSP) provides fresh evidence that the Commission formed in 2017 to examine the mass dismissals of public servants and liquidation of media outlets and other organisations functions arbitrarily and without transparency. Together with concerns about judicial review by administrative courts and the Constitutional Court, the report casts serious doubt on whether victims of abuses committed under emergency laws have access to an effective domestic remedy – a finding with implications for the European Court of Human Rights (ECtHR) as it considers the long queue of Turkish applications before it.

A desolate landscape

The human rights landscape during the state of emergency following the July 2016 coup attempt was described by Amnesty International as "desolate". More than 130,000 public sector employees, including judges, prosecutors, teachers, doctors, police officers and academics, were subject to collective, arbitrary dismissal due to unsubstantiated links to organisations considered to be "terrorist". Concerns abound about the erosion of judicial independence and the "unwarranted and abusive targeting of lawyers for prosecution". Numerous media outlets, civil society organisations, professional associations, educational and health institutions and trade unions have been closed. Turkey remains "the world leader in jailing journalists".

The state of emergency lapsed in July 2018 but was hurriedly replaced by new counter-terrorism legislation, effectively normalising emergency rule.

Chaos in the courts

For months, individuals who were sacked or entities that were liquidated had no clear route of appeal. Thousands of applications to administrative courts, the Council of State (since January 2017, the first instance court for dismissed judges and prosecutors) and the Constitutional Court were rejected after these bodies declared they had no competence to review emergency decrees.

Some 70,000 people applied directly to the Constitutional Court, only to be told that they should first have exhausted other remedies. Others applied straight to the ECtHR, including around 30,000 sacked public servants and 2,000 applicants complaining of arbitrary detention, but had their cases declared inadmissible, mostly because they had not exhausted domestic remedies.

The fact that members of the Constitutional Court had themselves been dismissed and detained did not mean, the ECtHR argued, that the available avenues of redress were necessarily doomed to fail (see, for example, the Court's inadmissibility decisions in *Mercan*, *Zihni* and *Çatal*). The vast majority of applications against Turkey continue to be found inadmissible.

Responding to these circumstances, the Secretary General of the Council of Europe made a proposal, endorsed by the Venice Commission (paras 220-23) and the Parliamentary Assembly of the Council of Europe (para 17), for the creation of an *ad hoc* administrative body to examine individual cases. Such a body, the Venice Commission insisted, should be independent and impartial. It should "respect the basic principles of due process, examine specific evidence and issue reasoned decisions" and be given sufficient powers to restore the *status quo ante* and/or provide

adequate compensation. Further, the law should provide for judicial review of its decisions.

The State of Emergency Inquiry Commission, established in January 2017, began receiving applications in July 2017. A month earlier, the ECtHR had found the application of a sacked teacher, Gökhan Köksal, inadmissible since he had failed to exhaust domestic remedies, including the not-yet-functioning Commission, which was deemed to constitute an accessible remedy "in principle" in the absence of evidence to the contrary.

Chorus of concern

Such evidence is now mounting. The TLSP report amplifies alarm about the composition and functioning of the Commission expressed by the Venice Commission (paras 86-90), the Parliamentary Assembly (para 92), the former Council of Europe Commissioner for Human Rights (p. 20), the Office of the UN High Commissioner for Human Rights (paras 101-108), the International Commission of Jurists, the UN Special Rapporteurs on Freedom of Expression (para 30) and Torture (para 84) and the European Commission (p. 4).

These bodies question whether the Commission meets the guarantees of independence and impartiality required by the right to a fair hearing under Article 6 of the Convention. Five of its seven members are appointed by the President (before July 2018, the Prime Minister), the Minister of Justice and the Minister of the Interior – the very officials ultimately responsible for thousands of dismissals. Moreover, Commission members may be sacked for the same ill-defined crimes against "state security" or "constitutional order" as the applicants whose cases they examine.

Where the TLSP report is revelatory, however, is in its examination of 193 decisions and 71 pending applications to the Commission relating to the dismissal of public servants from some 40 institutions (supplemented by interviews with some 60 lawyers). In total, 139 (72 per cent) of the applications examined were rejected, while 54 (28 per cent) were upheld. The success rate for this (unavoidably unrepresentative) sample is, in fact, higher than average: by 25 October 2019, the Commission had delivered decisions in 92,000 cases, of which 83,900 – more than 90 per cent – were rejected.

In its latest announcement, the Commission states that: "As an effective remedy, the Commission delivers individualized and reasoned decisions as a result of speedy and extensive examination." The TLSP report refutes every aspect of this claim.

Individualised and reasoned?

Comparison between applicants' statements and the decisions reveals that the Commission's approach is far from individualised or fully reasoned. On the contrary, it is applicants themselves must prove that they have no links with proscribed organisations, without any prior knowledge about the accusations or evidence against them, and with no possibility of holding an oral hearing or obtaining information held by the Commission. The report notes that many applicants "resorted to blindly expressing their personal opinions" in an effort to refute the allegations against them (p. 20). Legal uncertainty is compounded by the failure to define terms such as "association" or "connection" with organisations regarded as "terrorist", and the imprecise nature of the "loyalty" obligation demanded of public officials.

Evidence provided by applicants is omitted from decisions and boiled down to a single, "copy and paste" sentence. The Commission's wording is remarkably – and suspiciously – uniform across decisions, regardless of the applicants' professional or personal circumstances.

The Commission appears to regard some everyday activities as automatically incriminating. For example, 66 of the 193 applications were rejected because of the applicants' suspected use of ByLock, a freely downloadable encrypted messaging application allegedly used by the Gülenist network. Again, the decisions use identical wording, neglecting to analyse how often and for what purpose each applicant had purportedly used the application.

Likewise, in 67 of the decisions, holding an account in Bank Asya – a legal entity until its seizure

by the state in May 2015 – was considered grounds for rejection due to its alleged links with Gülenists. One such unfortunate applicant held the equivalent of just 33 euros in their account.

More than 40 of the applications examined were rejected by the Commission partly on the basis of membership of certain trade unions, associations, universities or other entities, or employment in certain companies, closed by emergency decree – even if the applicant had joined when it was legal to do so. Payments made to liquidated institutions are regarded as automatically suspect – even educational fees paid to a school were deemed to be "financial support to a legal entity supporting a terrorist organisation" (p. 31). A similar fate awaited applicants who had donated to an international aid charity, or subscribed to a particular newspaper, even though both had previously been feted by President Erdoğan himself.

Rejections were also made on the basis of secret witness statements, ill-defined disciplinary procedures and information from unidentified "social circles" or "intelligence sources". One informer known as Albatross reportedly testified against 6,000 people (p. 35). The Commission's acceptance of such unverified accusations at face value, the report ventures, flouts the principle of the presumption of innocence.

Speedy?

The Commission is not required to decide applications within a certain timeframe. As of October 2019, more than 34,000 applications were unresolved.

Nor can speedy resolution be expected before the administrative courts, as indicated by newly-introduced "targeted processing times" issued by the Ministry of Justice. A report in July 2019 noted that a sacked public servant whose claim was dismissed by the Commission was given a targeted processing time for his case before the administrative court of 955 days. For its part, the Constitutional Court had a backlog of almost 40,000 cases at the end of 2018, around a quarter of which had been pending for between one and five years. Such figures lead to the TLSP's gloomy estimate that applicants rejected by the Commission who appeal all the way to the Constitutional Court can expect to wait a decade for a resolution of their case.

Restricted remit

Even applicants who succeed before the Commission may ultimately be frustrated. Restrictions apply to the re-appointment of members of the army and security forces, diplomats and academics; for example, academics cannot be re-appointed to their previous institution and may be assigned to one far away. This raises questions as to whether the Commission can be regarded as an effective remedy since it lacks the power to undo the violation or its effects (the principle of *restitutio in integrum*).

Judicial review

If the Commission is neither an independent nor effective remedy, does judicial review of its decisions ensure that the system as a whole is fair? The signs are discouraging.

A few administrative courts in Ankara are responsible for reviewing the Commission's decisions (initially four, later increased to seven). These courts were designated by the High Council of Judges and Prosecutors, which is presided over by the Minister of Justice and has four members appointed by the President. As the International Commission of Jurists argues (p. 33), this degree of executive influence taints the very courts entrusted with reviewing Commission's decisions and undermines their independence and impartiality.

Moreover, the administrative courts are not competent to review the lawfulness of the initial decisions taken under emergency decree, but only to formally review the lawfulness of the Commission's decisions. No judicial review is possible of issues outside the Commission's remit, such as the cancellation of passports.

Constitutional Court

Frustrated applicants may appeal to the Constitutional Court. Yet here, too, there is alarm about whether this avenue constitutes an effective remedy.

In March 2018, the ECtHR itself expressed such concern in cases concerning pre-trial detention, following the extraordinary refusal by lower courts to release two journalists, Mehmet Hasan Altan and Şahin Alpay, even though the Constitutional Court found they had been detained unconstitutionally (see here (para 142) and here (para 121); discussed here and here). Disturbed by this judicial insurrection, the ECtHR noted that it would be for the Turkish government to prove that the Constitutional Court provided an effective remedy, both in theory and in practice.

Notably, the Human Rights Committee, in a March 2019 decision concerning arbitrary arrest and detention, concluded (para 8.5) that the Constitutional Court is *not* an effective remedy in such cases. Among other concerns, the government had not refuted the applicants' claims that its proceedings would be unduly prolonged. The Council of Europe Commissioner for Human Rights had reached the same conclusion in her third party intervention (paras 39-43) in December 2018 in a case concerning the detention of the civil society activist, Mehmet Osman Kavala.

While the Constitutional Court has (sometimes narrowly) found violations in cases in which anti-terrorism laws have been used to stifle dissent (see here, here and here), in others it has dismissed cases that later succeeded in Strasbourg, notably those concerning the pre-trial detention of a former Constitutional Court judge, Alparslan Altan, and the Kurdish opposition MP Selahattin Demirtaş (the latter is currently pending before the Grand Chamber).

Any hope that the ECtHR's judgments in the cases of Mehmet Hasan Altan and Şahin Alpay signalled a change of direction was dashed by decisions in February 2019 to declare inadmissible cases related to events during curfews in south-eastern Turkey, since the applicants had not shown that individual application to the Constitutional Court was ineffective or inadequate.

The matter is bound to return to Strasbourg. In several cases communicated to Ankara, the Court asks whether individual application to the Constitutional Court can be considered an effective remedy having regard, *inter alia*, to the length of proceedings. One case pending before the Constitutional Court for two years relates to the blocking of Wikipedia (see also here and here).

Writing in March 2018, the former Deputy Registrar of the ECtHR, Michael O'Boyle, argued that Court had not "shut its doors irrevocably" to Turkish applicants. The question was not whether Strasbourg could offer an effective remedy, but when, and under what circumstances. The evidence adduced by the TLSP as to the opaque and arbitrary functioning of the State of Emergency Inquiry Commission, and alarm about the inadequacy of judicial review, suggest that the subsidiarity principle has now been stretched to breaking point. The time is fast approaching when Strasbourg will have to open its doors wider. The alternative is for purged public servants, liquidated organisations and those arbitrarily detained to be left languishing in a situation of virtual lawlessness, with all that entails for shattered lives and fractured institutions.

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