The Köksal case before the Strasbourg Court: a pattern of violations or a mere aberration?

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The European Court of Human Rights’ recent decision in the case of Köksal v. Turkey (http://hudoc.echr.coe.int/eng?i=001-174629) has sparked once again a fierce debate concerning the so-called availability of domestic remedies in Turkey in the aftermath of the 15 July 2016 attempted coup. The case concerns a teacher’s dismissal by emergency Decree No. 672 (https://rm.coe.int/16806a2e17), along with 50,875 other public servants who were regarded as having membership of or an affiliation, link or connection with terrorist organizations or structures, formations or groups determined by the National Security Council to engage in activities against the national security of the Turkish State.

The Court’s decision

The applicant complained of a breach of his right of access to a court, his right to be presumed innocent and his right to be informed of the accusation against him (Article 6 §§ 1, 2 and 3 (a) of the European Convention of Human Right (ECHR-)). He also complained that he had been dismissed on the basis of acts which did not constitute a criminal offence at the time they were committed (Article 7-no punishment without law), and that his rights and freedoms under Articles 8 (right to respect for private and family life), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination) had been violated.

The Court dismissed the application for failure to exhaust domestic remedies, finding that a new remedy was available to the applicant, provided by Decree No. 685 (http://www.venice.coe.int/webforms/documents/default.aspx?pdfFile=CDL-REF(2017)014-e), which was adopted on 2 January 2017. Decree No. 685 provides for the creation of a commission, namely the ‘State of Emergency Inquiry Commission’, tasked with assessing the measures adopted directly by the emergency decrees issued in the context of the state of emergency, including the dismissals of civil servants. After months of apparent stonewalling, the rules of procedure of the Commission were finally published on 12 July and the Commission finally began receiving applications on 17 July.

A systematic failure to provide effective domestic remedies

Admittedly, there are many lingering questions that cry out for legal analysis of the Commission’s operations. Perhaps, the most obvious one is whether the Commission can meet the fair trial requirements under Article 6 ECHR, as there are serious indications suggesting otherwise with regard to its impartiality, independence and enormous caseload. I do not aim to provide insights into those important aspects, referring instead to an article (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943518) by Kerem...
Altıparmak. Rather, I will confine myself to one particular – perhaps, the most striking – aspect: the question of a systematic failure to provide effective domestic remedies in today’s Turkey. I strongly believe that there is now substantial evidence that the alleged violations may be much wider than simply a denial of access to court.

In the months leading up to the creation of the Commission, there was considerable confusion as to the availability or accessibility of domestic remedies. The Turkish Constitutional Court (TCC), the apex court of the country, held in a number of judgments, that it had no jurisdiction to examine the constitutionality of emergency decrees enacted during a state of emergency. As to judicial review of the emergency measures in the aftermath of the 15 July coup attempt, more than 100,000 individual applications were lodged with the TCC. The Court, however, has ruled only in a single case (http://www.kararlaryeni.anayasa.gov.tr/Content/pdfkarar/2016-22169.pdf) concerning the applicants’ complaints of inter alia the sheer length of and the justification for their detention, in which it simply dismissed the application on 20 June 2017. It should also be recalled that the TCC dismissed two of its members based solely on “the information from the social circle” and “the common conviction formed by the members of the TCC” in a decision of 9 August. (http://www.constitutionalcourt.gov.tr/inlinenewspages/Press/PressReleases/detail/pdf/2016-12.pdf)

Similarly, in its three separate judgments on 4 October 2016 (http://www.danistay.gov.tr/arsiv.html), the Turkish Council of State also declared itself incompetent to consider an action for annulment – e.g one application lodged by a magistrate dismissed by the High Council of Judges and Prosecutors (HCJP) – and referred cases back to the administrative courts for examination. In turn, the administrative courts had previously rejected numerous cases concerning the dismissal of public servants directly by emergency decrees, holding that the emergency decrees function as laws (not administrative actions) and therefore, cannot be subjected to judicial review by administrative courts.

Despite the level of marked reluctance at the Turkish national level, in its earlier judgments arising out of alleged violations in Turkey in the aftermath of the attempted coup on 15 July 2016, the ECtHR surprisingly considered an effective domestic remedy to be “available” in each individual case (first, on 8 November 2016 in the case of Mercan v. Turkey (http://hudoc.echr.coe.int/eng?i=001-169094); then, on 29 November 2016 in the case of Zihni v. Turkey (http://hudoc.echr.coe.int/eng?i=001-169704) and finally, on 7 March 2017 in the case of Çatal v. Turkey (http://hudoc.echr.coe.int/eng?i=001-172247)). Then, relying on the principle that the safeguard mechanism established by the ECHR is subsidiary to national human rights protection systems, the Court held all these applications inadmissible. In doing so, however, the ECtHR has consistently failed to examine the context and pattern in which the alleged violations took place, as it consistently found that the individual applicants, based on the particular facts of their complaints, had a domestic remedy “available” to them.

Reacting to Mercan and Zihni cases, in an earlier post (https://www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/) on EJIL: Talk!, I argued that the Court left open the question as to whether domestic remedies are truly “effective and available” in today’s Turkey and outlined some valid reasons as to why those remedies cannot be regarded as such in a state of emergency context. I concluded the blog post arguing that the Court – even at the time of those decisions – may have failed to appreciate that ‘these dismissals may effectively deprive the applicants of any meaningful justice whatsoever, by requiring that they first try to navigate the legal chaos in Turkey.’ The total abdication by the Turkish courts of their judicial duty to perform a meaningful legal review on the emergency measures after more than one year of state of emergency rule, unfortunately, supports this conclusion.

The same appears to be true for the Köksal case in which the Strasbourg court asserted that Decree No. 685 put an end to the uncertainty as to the availability of a proper judicial review for the emergency measures dismissing public servants in the wake of the failed coup. But did it really?

The right to an effective remedy
The right to an effective remedy, as guaranteed under Article 13 ECHR, is one of the most vital provisions in the Strasbourg system of human rights control. While some judges have called it the ‘most obscure’ provision due to complex questions regarding its language and precise objective within the ECHR regime (i.e. when Judges Matscher and Farinha partly dissented in Malone v. UK [http://hudoc.echr.coe.int/eng?i=001-57533]), its importance cannot and should not be underestimated. If this right is operating effectively, a claim asserting a practice of systematic violations of other rights and freedoms is less likely to exist. Nevertheless, the remedy issue at the ECHR level has been viewed primarily as a technical issue, concerned with an uncritical scrutiny of the question of non-exhaustion under Article 35, because these two provisions have been regarded, above all, as central to the co-operative relationship between the ECHR and national legal systems. This is all the more so in light of the fact the ECHR is granting a wider margin of appreciation to states by providing more subsidiarity, particularly with regard to Article 35, over the past half-decade following the Brighton Declaration. (For an excellent analysis, please see an article [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993222] by Mikael Rask Madsen)

Generally it is also obvious that, in principle, an effective remedy for individual complaints requires a proper functioning of the overall system of national remedies and an effectively functioning judicial system in which people have trust when they seek redress for their grievances. Accordingly, in situations of gross violations, the most likely scenario is that domestic remedies are unavailable or ineffective when invoked. As the now defunct European Commission recognized in Greek case [https://www.jstor.org/stable/27878926?seq=1#page_scan_tab_contents], ‘[w]hen there is a practice of non observance of certain Convention provisions the remedies prescribed will of necessity be side stepped or rendered inadequate (…) Judicial remedies prescribed would be rendered ineffective by the difficulty of securing probative evidence, and administrative inquiries would either not be instituted or if they were, would likely to be half hearted and incomplete.’

Large-scale human rights violations

Without doubt, such is the case in Turkey. Generally speaking, the emergency measures undertaken by the Turkish authorities to date do indeed suggest that the post-coup measures have reached an unprecedented level, targeting a wide swathe of economic, social and cultural rights, and civil and political rights. More than 130,000 persons (in the appended lists of the decrees and, by decisions of the relevant administrative bodies in toto), including the applicant in the Köksal case, have been dismissed from their posts, including more than 4,400 judges and public prosecutors. Despite these massive numbers, the decrees do not set out clear criteria for the dismissals, nor do they require adversarial proceedings or individualised reasoning.

The memorandum (https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2952586&SecMode=1&DocId=2392872&Usage=2) by the Commissioner for Human Rights of the Council of Europe merits quoting in extenso: “the persons in question were not provided with evidence against them and were unable to defend themselves in an adversarial manner in many cases. Many had also not been aware of any investigation against them until their dismissal was notified to them by the administration or published in a decree. It has been reported that the operation of the administrative commissions has also been very opaque, and the Commissioner received allegations that certain decisions were based on simple hearsay or a global impression about the person, based for example, on their social environment.”

Accordingly, it would appear that the problem in Turkey may – indeed, should – be regarded as more wide ranging and fundamental than a failure to obtain relief at the national level due to lack of access to a court. The ECtHR, however, has consistently failed to examine the substance of the allegations of large-scale human rights violations to which the dismissals seem to give rise. Instead, the Strasbourg Court has adopted a narrow approach in order to reduce the overwhelming number of pending cases before it and has thus turned a blind eye to the shattered lives of the purged public servants in Turkey.