

Turkey 2020: The "purge" in the judiciary continues

by Ingrid Heinlein

I. Introduction

An important anniversary of human rights, the signing of the European Convention on Human Rights (ECHR) by 12 states on 4 November 1950, 70 years ago, has received little attention in Europe. In many states there was no reason to celebrate, especially in Turkey, which had already joined the Council of Europe on 13 April 1950 and was one of the 12 signatory states of the ECHR. In the 4th year after the failed coup of 15.07.2016, there was not even a glimmer of hope that the human rights of the ECHR and rule of law standards will be more strongly respected again in Turkey in the foreseeable future.

This is particularly true of the Turkish judiciary, which is the subject of this article. Judges and prosecutors have continued to be prosecuted for being associated with the Gülen movement (FETÖ). Some first instance sentences for membership or ringleadership in a terrorist organisation have already been confirmed by the Court of Cassation, and there are already decisions by the Supreme Administrative Court (Council of State) to dismiss judges from their posts. However, action is also being taken against judges and public prosecutors who are not suspected by anyone of sympathising with the Gülen movement. One example is the suspension of the president of the judges' union, Yargiclar Sendikasi.

The European Court of Human Rights (ECtHR) is increasingly taking over what the judiciary in the country does not do. Initially, most human rights complaints following the attempted coup failed because of the requirement that domestic legal recourse be exhausted. Now, in many cases, domestic legal recourse has ended or is about to end, and decisions are increasingly being made on the merits.

The reputation that the ECHR had acquired among the opposition in Turkey through rulings, for example in the cases of the patron Osman Kavala¹, the opposition politician Selahattin Demirtas or the scientist Mehmet Altan, sank to a low point when its president, Robert Spano, travelled to Turkey in September for talks with President Erdogan and to receive an honorary doctorate from Istanbul University. In the opposite direction, i.e. not with the aim of cultivating relations with the Turkish government, are calls, among others by the politician Cem Özdemir, to expel Turkey from the Council of Europe. This article addresses some aspects of Spano's trip and the demand for exclusion - without claiming to be exhaustive.

The best way the ECtHR can serve human rights is through its case law. In many proceedings it is complained that the complainants did not have the right to a fair trial before an independent and impartial court (Art. 6 para. 1 sentence 1 ECHR) or that their right to have a court decide on the lawfulness of a deprivation of liberty within a short period of time (Art. 5

¹ FOJ 2020, In case of doubt, the state takes precedence over the law, p. 342 f.

para. 4 ECHR) was violated. The burden of proof on a complainant as to whether a court is independent and impartial was addressed in detail by the ECtHR in a judgment of 03.03.2020 (Bas.v.Turkey, no. 66449). As it is of great importance for further complaint from Turkey, the judgement will be presented in somewhat more detail at the end.

II . Justice under AKP rule

1. Disciplinary proceedings for a compassionate tweet

Grup Yorum was one of the most popular Turkish bands. Its musicians were suspected of membership in the far-left organisation DHKP-C and were no longer allowed to perform after the coup attempt. In March 2019, singer Helin Bölek and bassist Ibrahim Gökcek - both of whom were imprisoned, as were other members of the band - began a "death fast". Helin Bölek died on 03.04.2020, Ibrahim Gökcek on 07.05.2020. Ibrahim Gökcek had broken his hunger strike 2 days earlier ². Many fans of the band hoped that he would survive.

The president of the Turkish judges' union Yargiclar Sendikasi, Ayse Pehlivan, tweeted on 03.05.2020: "Folk songs do not harm anyone". On the day of Ibrahim Gökcek's death, she tweeted, "Ibrahim no longer exists. Words have lost their meaning. We could not save his life". In another tweet on the same day, she wrote: "Death, let your name be treacherous". On 10.05.2020, she tweeted, " As a mother, as a woman and as a human being, I refer those who want to portray me as a woman of terror because of my grief over death to their conscience, to Allah. The dead cannot defend themselves. The love of the country and the nation is under no monopoly."

As a result, the Council of Judges and Prosecutors initiated disciplinary proceedings against Ayse Pehlivan and suspended her for a period of three months. The suspension was extended by two months. In the meantime, she has been suspended indefinitely. Her salary has been reduced by one third. In letters to the President of the EU Commission and the President of the EU Parliament, MEDEL has asked that this case - but also the case of Murat Arslan - be given due consideration in negotiations with Turkey.

2. Appeals against criminal court convictions to the Court of Cassation

At the end of 2019, Murat Arslan filed an appeal against the appeal ruling that confirmed his first-instance conviction to a prison sentence of 10 years. A decision on this has not yet been made. In the meantime, there are rulings by the Court of Cassation in other cases. Since cases in which the appellants are imprisoned enjoy priority in processing, most of the decisions so far concern this group of persons. Those who were released from pre-trial detention in the course of the criminal proceedings and have filed an appeal are afraid of the Court of Cassation's judgement because they expect that they will have to serve their sentences afterwards.

² Cf. e.g. Süddeutsche Zeitung v. 8.5.2020 www.sueddeutsche.de/kultur/grup-yorum-tuerkei-1.4901554.

In times of the Corona virus, this is particularly stressful, as the risk of infection in prisons is high. Those imprisoned on terrorism charges were exempted from an amnesty to protect them from the Corona virus in the spring of this year. Murat Arslan's wife Sevilay recently wrote that Murat was trying to protect himself from the disease, but unfortunately, despite all precautions, there were sick people around him. They are in separate rooms, but the virus spreads very quickly in prison. That is why Murat and she are very afraid.

3. Supreme Administrative Court on YARSAV membership and EAJ fund

The *International Legal Aid Fund: Jurists for Jurists* has had a Supreme Administrative Court judgment of 26.02.2020 translated. The ruling upholds a decision by the High Council of Judges and Prosecutors on 24.08.2016 to dismiss the appellant, a judge. As in other proceedings, the use of the communication service Bylock and statements of witnesses are used to infer his affiliation to the terrorist organisation FETÖ.

It is particularly noteworthy that the court considers the judge's membership in the YARSAV judges' association as an indication of his affiliation to the Gülen movement. In doing so, it relies on witness statements on the influence of FETÖ within YARSAV, which the first-instance criminal sentence against Murat Arslan allegedly contains. In fact, however, the Supreme Administrative Court works with insinuations and creates a picture of the association for which there is no evidence. It claims that the witness Leyla Köksül and the witness Bülent Yüçetürk testified in that trial that FETÖ members had become members of YARSAV in an organised way and that these people had gained a majority and an effective position and a say in the administration over time. In fact, however, the witness Köksül stated that it was not known at the time who had belonged to the Gülen movement and who had not. The witness Yüçetürk, on the other hand, testified that Murat Arslan had made sure that some people whom he, Yüçetürk, believed to belong to the Gülen movement were elected to the board³. So the facts are twisted. This is how legends are created.

It is downright cynical that the court considers the request for donations from the support fund of the European Association of Judges (EAJ) at a time when the persons concerned were dismissed and they and their families were in urgent need of financial help as further evidence of membership in a terrorist organisation.

III. Council of Europe/Council of Human Rights

1. Woo of exclude Turkey?

When it was announced that the President of the ECHR, Robert Spano, would visit Turkey, meet President Erdogan and receive an honorary doctorate from Istanbul University, Mehmet Altan wrote him an Open Letter, stating among other things:

I taught for 30 years at Istanbul University, where you will receive the "Honorary Doctorate of Laws". And 27 years ago I became a professor there. I heard on TV that I had been dismissed from the

³ Heinlein, BJ 2019, p. 188.

university by a legal decree on 29 October 2016, while I was sitting in my prison cell... The people who will award you the honorary doctorate are the very people who dismissed me and many other academics.... Even after the ECHR ruling...found a violation of my rights, the 2nd Criminal Chamber of Istanbul Regional Court upheld my conviction...Finally...on November 4, 2019, I was acquitted...But my ongoing case about my dismissal from the university is still waiting to be dealt with by Ankara Administrative Court Dept. 21...This case is still ongoing and it is likely that it will also come to the ECtHR, which you preside over...I am not sure how gratifying it would be to become an honorary member of a university that has unjustly thrown out hundreds of academics and driven them into unemployment and poverty....

Under normal circumstances, it would of course be pleasing to hear that you will be visiting Turkey. Unfortunately, that is not the case. ⁴

MEDEL has also been very critical of Spano's visit and acceptance of an honorary doctorate from Istanbul University in a resolution dated 19.09.2020.

In response to the allegations, the ECtHR has stated that it is customary for its presidents to meet political and judicial representatives of Council of Europe member states. The information page on the ECtHR's official visits also explains that during his meeting with President Erdogan, President Spano recalled the principles of the ECHR and stressed the importance of the rule of law and democracy and, in particular, the need to uphold the independence of the judiciary and freedom of expression. He also stressed that it is essential for the functioning of the Convention system that Member States take the necessary measures when the ECtHR has found a violation of human rights⁵.

Many aspects must be taken into account and weighed against each other when assessing such a visit, e.g. the question of how strong the political forces are that want the member state to leave the Council of Europe and would use a refusal of the invitation for their goals, what consequences a withdrawal would have for the human rights situation in the country, whether it would not be appropriate to conduct the visit at a lower hierarchical level (e.g. vice-president).e.g. vice-president), whether the impression of bias on the part of the president could actually arise in future judicial proceedings, and how the prospects of contributing to an improvement in the human rights situation and better enforcement of the Court's judgments through talks and lectures are to be assessed. Last but not least, the fact that the member states are contributors plays a role.

More so, such questions arise when the exclusion of a member state from the Council of Europe is called for. Exclusion presupposes a serious breach of the principles of the primacy of law and that everyone under the jurisdiction of a member state should enjoy human rights and fundamental freedoms (Art. 8, 7, 3 Statute of the Council of Europe).

The current discussion about a possible exclusion of Turkey from the Council of Europe was triggered by the fact that Osman Kavala is still in pre-trial detention, although the ECtHR ruled in December 2019 that he must be⁶ released. The judgment became final on

⁴ Cf. e.g. www.duvarenglish.com/human-rights/2020/09/02/an-open-letter-to-echt-president-robert-spano; translation: Andrea Kaminski.

⁵ European Court of Human Rights, www.echr.coe.int/Pages/home.aspx?p=events/official-visits&c=.

⁶ See e.g. Denis Yücel www.welt.de/politik/deutschland/article217295120/Menschenrechte-Wie-Deutschland-in-der-Tuerkei-Einfluss-nehmen-kann.html.

11.05.2020. The Committee of Ministers of the Council of Europe has urged - so far in vain - that it be complied with by Turkey⁷. Only when the member state has been admonished and the ECtHR has subsequently found, at the request of the Committee of Ministers, for which a two-thirds majority is required, that the obligation to comply has been violated, is further action against the member state possible (Art. 46 para. 5 ECHR).

As can be seen from this, the procedure for enforcing a judgement is already lengthy and difficult; the exclusion of a member state because judgements of the ECtHR are not implemented or are implemented late or not fully is *ultima ratio*⁸. However, even milder measures are not always a way out. For example, when Russia was deprived of its voting rights as a result of the annexation of the Crimean peninsula, it stopped its compulsory contribution payments of 33 million euros per year, thus impairing the Council of Europe's ability to function.

However, the less a member state is willing to implement the judgements of the ECtHR, the more urgent it becomes to take action against it. On the other hand, it is of great importance that Turkey's exclusion from the Council of Europe would put an end to legal protection under European law for Turkish citizens. Many people in Turkey are still waiting for an appeal to the ECtHR or for a decision on the complaint they have already lodged there. Another argument against exclusion is that Protocol No. 6 on the Abolition of the Death Penalty would no longer prevent its reintroduction in Turkey. Moreover, an exclusion would strengthen the ultranationalist forces in Turkey. They want to continuously detach Turkey from Europe and the West and would use even milder measures for propaganda purposes.

2. Independent and impartial Turkish courts?

In *Bas v. Turkey*, the ECtHR ruled that the complainant's rights to liberty and security and to a decision within a short period of time were violated when a Turkish court ordered pre-trial detention. It also held that there was no reasonable suspicion at the material time.

The complainant had also complained that the court had not been independent and impartial, but did not succeed. The ECtHR's arguments are: There was no evidence that the judges who made the decision had any prejudices or personal reservations towards the complainant, the Constitution and the laws regulated that they could not be subjected to instructions, there was also no evidence that the Minister of Justice could have given instructions to the judges regarding their judicial duties or that they were subordinate to him in the organisational structure.

To the extent that the complainant had alleged that the executive controlled the judiciary - either because judges were guided by executive opinions or because they were transferred, for example, for supporting the YARSAV judges' association - the ECtHR argued that this referred to the judiciary in general and not to the court that had ruled on the dispute. The complainant did not submit any information on the transfer of judges belonging to this

⁷ Council of Europe www.coe.int/en/web/portal/-/implementation-echr-judgements-council-of-europe-urges-turkey-to-release-osman-kavala.

⁸ Dzehtsiarou und Coffey, S. 443ff. , www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/suspension-and-expulsion-of-members-of-the-council-of-europe-difficult-decisions-in-troubled-times.

court, nor did the Venice Commission's opinions on the functioning of the Turkish criminal justice system provide any information on the individual case.

This means that the requirements for the burden of proof are high. Whether they are too high requires a more detailed scientific investigation, which would go beyond the scope of this article.

It should be noted that they are also relevant to the proceedings supported by the *International Legal Aid Fund: Jurists for Jurists*. These are, firstly, a complaint by Murat Arslan against the conditions of his detention, secondly, a complaint by a dismissed Supreme Court judge about pre-trial detention orders, and finally, a complaint by the first president of YARSAV, Ömer Faruk Eminagaoglu, about wiretapping and transfers in the context of disciplinary proceedings. This complaint was filed back in 2012. In 2019, the ECtHR addressed some questions to the parties, which have since been answered.

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Internal BJ

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Photo we already have

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