

" Enemies of the State " : Custodial Arrests, Turkey and the European Convention on Human Rights

.Introduction

After the failed coup to overthrow the Turkish Government, allegedly perpetrated by members of the so called Gülem movement or *Fethulah Terrorist Organisation* (FETÖ) in the Government's words, an extensive purge has taken place in the judicial system and public administration to remove, not only all those with any affiliation to that movement but also those who opposed Mr. Erdogan's policy.

That purge was accompanied by custodial arrests of judges, prosecutors, military personnel and police officers based in the large majority of cases, only on the seriousness of the crime - the coup itself and the violence that went with it.

With the argument that it is imperative to secure public order, last week the Turkish Parliament approved a bill declaring the state of emergency and the Council of Europe was informed that Turkey is partially suspending its obligations under the European Convention on Human Rights (ECHR)¹.

Not addressing political orientations or matters of public security, strictly from a legal perspective, I aim only to discuss the situation of those under detention in these circumstances and their rights under international law.

It is clear by now, that the actions taken so far, by the Turkish Government and the Turkish President have no wish to comply with the rule of law and fundamental rights of all Turkish citizens.

Although, during the state of emergency, the Turkish Government vowed to remain "*committed to respecting fundamental rights and freedoms while observing the principle of the supremacy of the law*"², there are serious concerns of breaches of Articles 3, 5 and 6 of the ECHR in the proceedings concerning those detained.

¹ Communication on the derogation of ECHR, transmitted by the Permanent Representative of Turkey and registered by the Secretariat General on 24 July 2016, accessible at : <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930086&SecMode=1&DocId=2380804&Usage=2> , (consult. 28.07.2016)

² *Ibidem*.

We as citizens of the world, but especially those of us who are citizens of Europe, neighbors and allies of the Turkish State, cannot be silent to injustice and its failure to meet the obligations imposed by the ECHR.

.Detention and the Principle of Presumption of Innocence

The presumption of innocence stated in Art. 6 § 2 ECHR is a basic and universal principle of law, common to all contracting parties of the ECHR, regardless of its expression in domestic law.

Although Article 6 § 2 ECHR seems to refer clearly only to trial, the scope of the principle is the fundamental right to be treated and tried as innocent in criminal procedure, even in the pre-trial stages, not only by the courts and the police but also by the community, until guilt is established beyond a reasonable doubt³.

This means that the scope of the principle goes beyond Article 6 § 2 ECHR and is also addressed in Articles 3 and 5 of the ECHR, referring to the prohibition of torture, inhumane or degrading treatment and to the right to freedom.

The presumption of innocence demands that the suspected/accused person, from the first moment of contact with state authority in the criminal system, must be treated as innocent. This principle of law extends its scope to all actions taken by the police and judicial authorities regarding the collection of evidence, the interrogation of the suspect/defendant, his right to legal assistance, his right to remain silent and not cooperate with the investigation and his custody in pre-trial stages (as recognized in European Court of Human Rights case law quoted above and in the proposed Directive on the Presumption of Innocence⁴).

As a fundamental principle of criminal procedure as stated above, the presumption of innocence demands that all restrictions on the freedom, intimacy, privacy, not to mention physical integrity, of the suspect/defendant are subject to criteria of

³ ECHR case law, *Salduz v. Turkey* and *John Murray v. the United Kingdom*, available at : <http://www.legalaidreform.org/european-court-of-human-rights/item/201-ecthr-case-summary-salduz-v-turkey-27/11/2008> <http://chr.ketse.com/doc/18731.91-en-19960208/> (consult. 28.07.2016)

⁴ Available at : <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013PC0821> (consult. 28.07.2016).

proportionality and minimum intervention, both necessary to the development of the investigation.

This means that either under Article 6 § 2 or under the broader sense of the principle of presumption of innocence, in reference to the treatment of suspects/defendants under Articles 3 or 5, all those detained must be treated with dignity, made aware of the reasons for their arrest, which cannot be maintained for a time exceeding that absolutely necessary for the reasonable duration of the proceedings and only to avoid the occurrence of new criminal offences or their escape from Justice.

Under no circumstances, should those suspected of participating in the failed coup or those suspected of membership in the alleged criminal organization FETÖ, be subject to torture or degrading treatments in order to obtain information about the crimes committed or about to be committed by themselves or others.

The European Court of Human Rights has repeatedly stated that the prohibition of torture is absolute, irrespective of the seriousness of the crime, its circumstances, objectives or number of victims affected by the crime, "*even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment*"⁵.

According to this statement, there cannot be any legal grounds for those detained as perpetrators or accomplices in the failed coup to be submitted to acts of physical or psychological violence by state authorities, as it alleged they have been.

In any case, unless breaching Articles 5 § 1 and 6 § 2, those detained cannot be held in custodial arrest based only upon the seriousness of their alleged crimes, without evidence of their individual participation in those crimes, for a period of time longer than that reasonably needed to conclude the investigation or to obtain a final decision in their criminal procedure⁶.

.Derogation of ECHR under Article 15

In these trouble times for Turkey and for Europe, no values or principles appear absolute and a derogation of the principles stated in the Convention is lawfully possible

⁵ ECHR *Labita v. Italy*, <http://www.refworld.org/docid/402a05eba.html> (consult. 28.07.2016).

⁶ ECHR *Kudla v. Poland*, http://law2.syr.edu/media/documents/2009/3/Kudla_v_Poland.pdf (consult. 28.07.2016).

under Article 15 ECHR. Turkey, like France when recently affected by the terrorists of *Daesh*, can use a temporary suspension of the Convention, to deal with serious events that led to the declaration of the state of emergency.

The Turkish Government, backed by Parliament, chose this path of action and informed the Council of Europe in a communication transmitted by the Permanent Representative of Turkey, registered by the Secretariat General on 24th July 2016, of its intention to suspend the application of the ECHR, stating that " *a derogation is not a suspension of rights. It brings certain limitations to the exercise of certain rights to the extent strictly required by the exigencies of the situation* ".

It further explained the need for this derogation and use of exceptional measures stating that " *more than 10,000 members of FETÖ have been taken into custody so far* " including a judges and prosecutors, for this terrorist organization has infiltrated judicial institutions, managed to take over the High Council of Judges and Prosecutors in 2010 and appointed members of the organization to critical positions in the judiciary.

The Government also claimed those members of the organization produced false evidence in several investigations in the past and are now considered accomplices to the coup attempt, stating that " *1352 judges and prosecutors have been detained so far. 312 judges and prosecutors have been released on the condition of judicial control. 366 judges and prosecutors are currently under custody.* "

These are the motives communicated to the Council of Europe for the derogation of ECHR.

They are very serious and troubling but we should ask why, on the 16th of July 2016 (the day after the coup), the Turkish authorities realized the judicial system was infiltrated by 1352 potential terrorists, clearly identified overnight, 366 apparently very dangerous ones, who need to be remanded in custody.

Besides these judges and prosecutors, there are many more " terrorists ", "enemies of the State ", 8648 to be precise, from several areas of society who also needed to be detained in order to maintain public security.

These facts officially communicated to the Council of Europe, by themselves, even without considering Mr. Erdogan track record on freedom of the press and independence of the judiciary, should make us question the intentions of the Turkish authorities and to

wonder if the real intention is to purge the State, in all its institutions, of all not loyal to the ruling party.

Considering that, without doubt, criminal actions occur in Turkey on the 15th of July, we should not argue the lawfulness of the derogation under Article 15 ECHR but we must question its extension and the proportionality of the measures taken by authorities against judges, prosecutors, police officers, members of the military and all others affected by them.

It is not the first time Turkey as used this action. Being a contracting State since the 18th of May 1954, Turkey also suspended the ECHR in 1990, in the aftermath of terrorist attacks by the PKK.

At the time, the European Court of Human Rights was called to decide on this matter in the case of *Aksoy v. Turkey* and found clear violations of Articles 3 and 5 of the Convention.

In this case, during the period of derogation under Article 15, Mr. Zeki Aksoy, an alleged PKK terrorist, was tortured and held by the police for a period of 14 days before being presented to a judicial authority. During the proceedings before the European Court of Human Rights, Mr. Aksoy was murdered after receiving death threats to drop the case.

The European Court of Human Rights has stated, on several occasions, that Article 3 of the ECHR, "*enshrines one of the fundamental values of democratic society*" and it cannot be derogated under any circumstances (Article15 § 2).

The fundamental right not to be subject to torture is absolute, not even the worst of criminals, the most barbaric terrorists should be put under torture, that should be repugnant to the law of all civilized nations.

It should also be remembered that when "*an individual is taken into police custody in good health but found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention*" (*Aksoy v. Turkey*⁷, *Tomasi v. France*⁸ and *Ribitsch v. Austria*⁹).

⁷ <http://www.refworld.org/docid/3ae6b67518.html>

⁸ https://www.unodc.org/tldb/pdf/CASE_OF_TOMASI_v_FRANCE.doc

⁹ <http://www.refworld.org/docid/3ae6b7010.html> (All consult. 28.07.2016)

The torture of a defendant, either a PKK or FETÖ terrorist is a very clear violation of Turkish domestic law and a violation of Article 3 of the ECHR.

The state of emergency declared in Turkey and the derogation of ECHR can lawfully affect the fundamental rights of suspects stated in Articles 5 and 6 but Article 15 cannot be used to erase them under international law.

The Turkish Government already passed a law extending the maximum length of detention by the police from 4 to 30 days, an act in itself contrary to Article 5 of ECHR.

The failed coup, attempted by a terrorist organization and the necessity of a state of emergency to deal with this criminal organization, does not give the Turkish Government *carte blanche* to crush fundamental rights and freedoms. As stated by the Court of Human Rights, a period of 14 days is already too long for an unsupervised detention, where violations to Article 3 may occur (Aksoy v. Turkey, Demir and Others v. Turkey, Bilen v. Turkey¹⁰).

Considering the facts known so far, there seem to be no reason to consider that the case of the FETÖ terrorist organization should be treated differently from the PKK attacks in 1990 when the derogation of the ECHR was also used.

As for other rights stated above and contained in the fundamental right to the presumption of innocence, they may be reduced under the derogation of Article 15 but a State may only take measures derogating from its Convention obligations, to the extent strictly required by the situation at hand.

All actions taken by authorities in the criminal procedures brought against those detained in the aftermath of the coup, even under domestic law, should not reduce the fundamental right to the presumption of innocence, considered in its broader sense, beyond that strictly necessary to ensure the conclusion of the investigation of the alleged terrorist actions or a final decision in due and reasonable time.

¹⁰ Available at (Consult. 28.07.2016) :
www.ictu.ie/download/pdf/case_of_demir_baykara_v_turkey_apr_09.pdf
<http://echr.ketse.com/doc/34482.97-en-20060221/>

.Conclusion

At the present time and given the situation communicated by the Turkish Government to the Council of Europe, there are grounds for the declaration of a state of emergency and for the derogation of the ECHR.

Nevertheless, the facts currently known also indicate that the Turkish Government and Mr. Recep Erdogan are using the opportunity to purge the judiciary, the media, the military and the police of all those who are not supporters of the ruling power and its vision of Turkey.

They are doing so with ruthless power, submitting to detention and even torture alleged members of FETÖ, in very clear violations of Articles 3, 5, 6 of ECHR and only time will expose the extension of those violations.

The detention of judges and prosecutors is an alarming sign that Turkey is stepping away from the path of democracy and the rule of law, for those still in office who have not been suspended or arrested will certainly feel pressured to comply with the ruling party, in its conclusion that the defendants, once their colleagues, are members of a terrorist organization.

The actions taken by the Government are also very troubling considering that Turkey has been convicted several times in the European Court of Human Rights for violations of the above mentioned Articles, without visible improvements regarding fundamental rights that now seem to be even more in peril.

We are not naive, we should be aware that the rulings of ECHR are insufficient to address the current situation of the judges, prosecutors, journalists, police, military officers under custodial arrest but nevertheless, we cannot be silent and we are certain that, one day, true Justice will be served.

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