tepav
Economic Policy Research Foundation of Turkey
June2017
N201717
POLICY NOTE

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WHAT WOULD THE EUROPEAN COURT OF HUMAN RIGHT'S KÖKSAL VS. TURKEY DECISION MEAN?

The European Court of Human Rights (ECHR) publicly announced on June 12, 2017, an important decision which would greatly affect the legal developments that which have taken place following the July 15 coup attempt. In this unanimously given decision, which was made on an application of a primary school teacher who was dismissed from work by a decree-law issued under the state of emergency (SoE-DL), the ECHR stated that; the applicant must primarily exhaust all domestic remedies and therefore must apply to the "Commission on Examination of the State of Emergency Procedures" established by the SoE Decree-Law No. 685.

In my opinion, this decision can be read in two different ways. According to the first version, one may assert that the ECHR has delayed or postponed tens of thousands cases that could come before it in the near future with this decision. This decision then can be seen as a tactical one, aiming at reducing the workload (and maybe the political load) of the Court. According to the second version, the ECHR has not abstained from hearing those potential cases, but provided Turkey with an opportunity and some time to remedy the legal shortcomings which have arisen during the SoE period. I believe that the second version of this decision's interpretation would be more sound. Let me try to explain by briefly analyzing the decision:

[1] http://www.tepav.org.tr/en/ekibimiz/s/1361/Levent+Gonenc_+PhD.

As for the principal facts, the person who has put in an application against Turkey (applicant), while serving as a primary school teacher in Erzurum, was expelled from his profession as a result of SoE-DL No. 672, issued on September 1, 2016. The applicant had filed an individual appeal with the Constitutional Court of Turkey (CCT) on September 28, 2016 and then further brought the matter to the ECHR on November 4, 2016. Along with other's similar appeals, the applicant's appeal is still pending before the CCT.

Having assessed the principle facts, the ECHR in its "final" decision has stated briefly that:

1. All domestic remedies must be exhausted in order to be able to apply to the ECHR.
2. A Commission has been established by the SoE-DL No. 685 dated January 23, 2017 to examine the procedures carried out during SoE.
3. This domestic remedy must be exhausted before an application is made to the ECHR's; that means that an application must be made to the abovementioned Commission.

The first point which should be underlined in this decision of the ECHR is that the Court has referred to the European Council Venice Commission's opinion numbered 865/2016 dated December 12, 2016. In its paragraphs 221 and 222, the Venice Commission provides the following recommendations:

> *Without prejudice to the power of the Constitutional Court to assess the constitutionality of the emergency decree laws, the Venice Commission invites the Turkish authorities to consider other options – such as, for example, the creation of a special ad hoc body, which would be tasked with the examination of individual cases related to dismissals of public servants and other associated measures. A proposal in similar terms has been made by the Secretary General of the Council of Europe to the Turkish authorities, and the Venice Commission believes that this is a path to be explored. / The essential purpose of that body would be to give individualised treatment to all cases. That body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial and be given sufficient powers to restore the status quo ante, and/or, where appropriate, to provide adequate compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body. Limits and forms of any compensation may be set by Parliament in a special postemergency legislation, with due regard to the Constitution of Turkey and its international human-rights obligations.*[2]

As can be seen, the establishment of a commission to review the state of emergency procedures is a solution proposed by the Venice Commission to Turkey within the framework of the common European public law environment, in order to eliminate the legal problems which have occurred under the SoE regime. So the ECHR, in its decision, gives the message that it finds this solution acceptable.

[2] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e

The Court considers this Commission as an acceptable solution and regards it as a domestic remedy to be exhausted for the following reasons: First of all, the decisions taken by the Commission may be reviewed and quashed by administrative courts as stipulated in the relevant SoE-DL. Secondly, the decisions to be made by administrative courts can then be taken to the CCT through an individual applications.

In summary, the ECHR has considered these judicial guarantees to be sufficient enough to deem the Commission on Examination of the State of Emergency Procedures as a domestic remedy. At this point we should be aware of the fact that the ECHR, with the decision in question, has deviated from its established case-law. That is, while assessing if domestic remedies were exhausted, the ECHR, int the past, took into consideration whether the existing remedies were "effective" (i.e. accessible and real) as of the date of application. However, in the decision we are analyzing, the ECHR qualifies a Commission that has not yet become operational as a "domestic remedy". The reason behind the Court's assessment is as follows:

> *"…the Court found that it was justified to make an exception to the general principle that the condition of exhaustion of domestic remedies must be assessed at the time when the application is lodged. It was therefore for the victim of an alleged Convention violation to test the limits of this new remedy.*

As the Court further clarifies its justification, however, it proceeds:

> *"The Court emphasised, however, that this conclusion did not prejudge, if necessary, a possible re-examination of the question of the effectiveness and reality of the remedy introduced by Legislative Decree no. 685, both in theory and in practice, in the light of the decisions to be given by the commission and domestic courts, subject to the effective enforcement of those decisions."*

Accordingly, the second version of the decision's interpretation, which I have mentioned at the beginning of this article, is based on this line of argument. The Court did not state that: "I will not look into cases brought to me from Turkey during the SoE"; but either stated that: "First, I will see whether the Commission is effective or not". Ultimately, the message has been given by the Court that: "If I am to decide that the Commission is non-effective, I will accept applications from within Turkey".

With this decision Turkey has gained time and an opportunity to eliminate legal problems that have arisen during the SoE period. Within this context, the Commission on Examination of the State of Emergency Procedures has been given a tough job. So the working principles and methodology as well as the procedures and decisions of the Commission, is of great importance as to whether the Commission is to be viewed as an "effective" domestic remedy or not within the framework of the European Convention of Human Rights and the case-law the ECHR.

Upon highlighting this point I should immediately underline that: Some existing regulations concerning the Commission are likely to make it difficult for the ECHR to regard it as an "effective" domestic remedy:

First of all, the members of the Commission have been appointed tardily and the Commission has not yet begun to work. According to the latest statement by the Government, the Commission will start to receive applications starting from the beginning of July.

Secondly, the majority of the Commission's members (five out of seven) is appointed by the Council of Ministers, which also governs the SoE process. Such a composition of members would make the Commission's independence and impartiality questionable.

Thirdly, a definite and specific period has not yet been determined for the finalization of the applications received by the Commission. This is a situation that would impair the principle of "legal certainty" which is of great importance in ECHR's case-law.

And lastly, the Commission is not a judicial body *per se* and in relation with that, it does not have the authority to take very important set of measures such as a decision of "stay of execution".

We may add the new ones to the above-listed arguments which would result in that the ECHR would fail to consider the Commission on Examination of the State of Emergency Procedures as an "effective" domestic remedy. Therefore, one may safely argue that the ECHR has adopted the "Wait and See" strategy with this decision and left an open door for now as it left Turkey with its own internal legal dynamics.

While referring to Turkey's internal legal dynamics, let us point out that the decisions to be taken by the CCT on individual appeals concerning such and similar cases have now become much more important. CCT has not yet revealed its judgement on this matter. What can be said; if only the CCT would develop its case-law in accordance with its *raison d'etre*, the principle of "State of Law", and ensure that the SoE process is carried out in line with universal legal principles. It is still not too late…