Byzantine Manoeuvres

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For the European Court of Human Rights to find an Article 18 violation is a serious matter. When the Strasbourg Court does so (in conjunction with a human right protected by the Convention) it emphasises that state authorities have pursued ulterior and illegitimate purposes when restricting human rights. The most common ulterior illegitimate motive identified by the Court in its Article 18 case law in the past decade has been to silence and punish opposition politicians and human rights defenders.

The Republic of Turkey has so far received two Article 18 judgments. These have been in the cases of Demirta# v. Turkey and Kavala v. Turkey. Both cases came before the Court as deprivation of liberty cases. When the ECtHR delivered its judgments Demirta#, the leader of the second largest opposition in Turkey had been in pretrial detention (well … it's complicated, more on that below) since 4 November 2016; Kavala – a businessman, philanthropist and human rights defender – since 18 October 2017.

In both of these cases, the applicants argued not only that their arrests and subsequent pre-trial detentions were manifestly arbitrary and unlawful under Article 5 of the Convention, but also that the detentions pursued ulterior and illegitimate motives. In the case of Demirta# these motives were to silence and punish political opposition; in the case of Kavala they were to silence and punish human rights defenders. Both applicants further stated that the government of Turkey was the actor pursuing these motives through its tight grip on both prosecutors and judges.

The ECtHR Chamber judgments found violations of Article 18 in both cases. In both cases the Turkish judges sitting in Strasbourg dissented, holding that there was no evidence of ulterior and illegitimate purposes to show that judiciaries act in bad faith in Turkey.

In Demirta# v. Turkey, the Chamber found that the detention of Demirta#, in particular after he became a presidential candidate, was to silence him. The Court was not able to understand, given the evidence, how a presidential election candidate could be kept in pre-trial detention. Both the applicant and the government referred the case to the Grand Chamber. Demirta# asked the Grand Chamber to declare that the totality of his arrest and detention pursued the illegitimate ulterior motives of silencing and punishing him as a political rival of the government. The government asked for the case to be declared inadmissible in its entirety.

In Kavala, the ECtHR went further. It was not convinced with the arrest and detention of the applicant *ab initio*. It held that there was no evidence with which to arrest Kavala, let alone detain him for so long in relation to the Gezi Park Protests of 2013. It also highlighted three irregularities as key to finding that illegitimate purposes were at work: the reference to what are lawful activities as evidence (para 223); the time it

took the prosecutors to charge Kavala in relation to Gezi Park (over four years); and the almost verbatim overlap between the speeches of the President of Turkey and the indictment against Kavala (para 229).

In both cases, the Court raised serious concerns about the general state of democracy, rule of law and human rights protections in Turkey. It also demanded the release of the applicants from their pre-trial detention.

Turkey's domestic judicial responses

An analysis of the domestic responses to these two judgments shows an emerging pattern. Turkish authorities take these judgments seriously, but not in the way the Strasbourg Court intends. The actions of the domestic authorities so far show that the Turkish authorities are taking Article 18 judgments seriously by doing all they can to give them no legal effect whatsoever.

Two types of legalist manoeuvres can be discerned from these responses.

The first manoeuvre has been to assert that, no matter what a Strasbourg Chamber judgment says, the judgment itself is not legally binding for three months after its delivery. This argument relies on Article 44 of the Convention where it states:

> The judgment of a Chamber shall become final
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> (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
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> (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
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> (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.

Article 44 clearly offers the contracting parties the option to make judgments final even on the date of their delivery by making a declaration that the case will not be referred to the Grand Chamber. The intention to follow the judgments, unless a state would like to challenge it for serious interpretive issues, as soon as possible, also flows from good faith interpretation of the Convention.

An alternative view, however, seems to have taken hold amongst Turkish government authorities: that Article 44 allows authorities the right to treat a Strasbourg judgment as if it has not been delivered for three months after they are delivered.

In the case of Demirta#, for example, in his first hearing after the ECtHR delivered its Article 18 judgment, the authorities indicated that they did not have the obligation to release him as the judgment delivered by Strasbourg was not yet binding. In the case of Kavala, too, the judges did not hurry to release Kavala, despite calls for his immediate release by Strasbourg. This then created a new and one of a

kind interpretation of the three-month rule; the right to ignore Strasbourg Chamber judgments at least for three months, even if they raise fundamental issues about bad faith restrictions of Convention rights.

The second manoeuvre is closely related to the first. Domestic lower courts and prosecutors not only think that ECtHR judgments have no effect at least for three months, but that they can be rendered as impossible to execute within those three months or before the judgment “becomes final” as in the case of successful Grand Chamber referrals. Domestic judges and prosecutors have pursued this logic to extreme ends in both cases.

Soon after the delivery of the judgment of the ECtHR finding his continued detention as unlawful and in bad faith, Demirta# was convicted in a separate case brought against him on a separate charge. This meant that while he was a detainee in one case, he simultaneously became a convict in another. Just a few days before his Grand Chamber hearing, Demirta# was released from pretrial detention and thus became a convict only. During pleadings before the European Court of Human Rights, the argument of the government was exactly that, as Mr. Demirta# was no longer a detainee, his case lost its subject-matter before the Strasbourg Court and therefore can be declared inadmissible. Even if they wanted to, there was no pre-trial detention from which he could be released.

Maybe this isn’t complicated enough yet? Do bear with me.

Two days after the Grand Chamber hearing of 18 September 2019, Demirta# was about to complete his time as a convict under domestic sentencing law. As he was no longer detained for the case he had taken before the European Court of Human Rights, there were no impediments to his freedom. But, as he was getting ready to go home to his wife and two children Mr. Demirta# was detained once again. This detention was based on exactly the same set of facts of his ongoing trial. Just the charge had changed. This latest move suggests that state authorities may be preparing to 'preempt' a potential violation judgment from the Grand Chamber. They would argue this by holding that he is no longer detained for the case that he took before the ECtHR and, therefore, cannot be released.

Domestic judicial responses to Kavala on 18 February 2020 follow this with alarming similarity. Kavala had two hearings in domestic courts since the Strasbourg judgment that demanded his immediate release. In the first hearing, the “three-month rule” was brought up. Strasbourg may have asked for immediate release, but the judgment was not yet final, the authorities said. Yet, on 18 February 2020 Kavala was acquitted by the domestic court on the grounds that there was not enough evidence against him. The court also ordered his release from pretrial detention. As Kavala’s family were on their way to the prison to pick him up, the Istanbul Public Prosecutor arrested Kavala again on a completely different charge. He was driven from his prison to a police detention facility.

Where from here?

It is a long journey from Turkey to Strasbourg. Individuals who are in pretrial detention must first pass the hurdle of the Turkish Constitutional Court to add their case to a long list of cases before the ECtHR. In cases where the ECtHR delivers a judgment, in particular an Article 18 judgment, what needs to be done in principle is crystal clear: release, remedy the injustice, and start an immediate reform of a judiciary which has lost its way.

Yet, these two cases show that a system that breeds Article 18 violations responds to these judgments through yet more Article 18 violations. Bad faith rulings in Strasbourg have so far only received bad faith responses. The authorities are circumventing Strasbourg judgments by first holding that these judgments are not immediately binding, then releasing applicants and then detaining them again on new charges. Given the number of investigation files, for example, against Demirta#, they can hypothetically do this for the rest of his life.

We as legal scholars need to document and analyse these patterns of subversive legalism and ask why it is so hard to build rule of law regimes and why it is so easy to destroy them. A serious commitment to rebuilding the rule of law in Turkey will need to think of ways to prevent these devious legal tactics. The European Court of Human Rights and the Committee of Ministers (the inter-governmental organ that monitors execution of judgments) need to do a lot more. They need to detect and call out these manoeuvres as serious and continuing violations of the European Convention on Human Rights in clear terms. Otherwise, Article 18 case law of the Court will hold no future for human rights in Europe.
