Continuing Violation

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Since the failed coup attempt in 2016, lawyers, judges and prosecutors have persistently been subject to illegal surveillance and mass arrests. The latest such arrest of 50 lawyers took place on September 11th, 2020, during police raids in Ankara in the dawn. Arrests of lawyers have become the new normal although legal professionals should enjoy strong protections by law. Turkey's Court of Cassation, however, has deprived these guarantees of any practical effectiveness by unlawfully expanding the meaning of in flagrante delicto.

Strong protections

The Turkish Code of Lawyers (No. 1136) contains fundamental rules for the legal profession. It regulates legal traineeship, the procedures to be followed for admission to the profession, lawyers' powers and duties, professional rules, the professional (bar) organisations, and the relevant disciplinary actions, penalties and procedures that should be used in criminal proceedings against lawyers. Essential safeguards are stipulated in Articles 58 and 62 of the Code which state that criminal investigations relating to lawyers that are induced by offences arising from their legal practice, or offences committed during the performance of their duties, must be conducted by the public prosecutor only when permission to do so has been received from the Ministry of Justice. Similarly, a lawyer cannot be personally searched. There is, however, a notable exception to these guarantees. When a lawyer is discovered in flagrante delicto and there is an offence that falls within the purview of the Assize (Heavy Penal) Courts, any investigation should be conducted by the public prosecutor personally, and these procedures should be carried out in accordance with the general provisions (Article 61).

The United Nations Havana Rules on the Basic Principles on the Role of Lawyers, too, offer certain guarantees in relation to lawyers' legal practices. They stipulate that governments must ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference. They should also not be threatened with, or suffer, prosecution or sanctions, whether of prosecution, of an administrative type or economic, for any action or actions that they take that are in accordance with their recognized professional duties, or their standards or ethics. Any charges or complaints against lawyers that are made in their professional capacity must be processed quickly and fairly, using the correct procedures (see Article 27).

From exception to rule

Both the Code of Lawyers and the UN Basic Principles shall enable lawyers to follow their profession freely and without concern for being prosecuted or arrested due to

their choice of mandate. It is clear that the lawmaker, who has even prohibited the searching of a lawyer's person, other than for the flagrante delicto exception, also prohibits the apprehension, detention or arrest without greater reason (argumentum a fortiori). The Court of Cassation, however, has interpreted the exception in a way that has made it possible for authorities to effectively ignore the procedural guarantees and special protections that legal professionals enjoy under the law.

In particular, the Court has offered an interpretation of cases of discovery in flagrante delicto for membership in an illegal/terrorist organization with respect to judges and prosecutors. Under laws nos. 2802 and 6216, judges and prosecutors, just like lawyers, enjoy strong protections. They must not be apprehended or have their residence or person searched, nor can they be questioned unless they are discovered in flagrante delicto committing a crime that falls under the purview of the Heavy Penal Courts. In 2017, the Plenary of Criminal Chambers of the Court of Cassation ruled that membership in an armed terrorist organisation is a continuing offence (CGK, E: 2017/997, K:2017/404). As a consequence, apprehension will always constitute a case of discovery in flagrante delicto that falls under the Heavy Penal Courts' purview when they are charged with membership in an armed terrorist organisation. Thus, they can be subject to an investigation that follows the general principles, and may be lawfully arrested.

Article 2 of the Code of Criminal Procedure (CCP) defines that a case of discovery in flagrante delicto means an offence that is in the process of being committed, or that an offence has just been committed, and that that offence has resulted in the individual being apprehended by the police, the victim, or other individuals. It may also mean that an individual has been apprehended when that individual is in possession of items or evidence that show that such an act was carried out very recently. That interpretation, however, is not compatible with the legal definition of in flagrante delicto, because, under Turkish law, membership in an illegal organisation is an abstract endangerment offence. Therefore, it does not require an action or result but, on the contrary, criminalizes a demeanor.

Violation of the ECHR

To date, over 1600 lawyers have been arrested, more than 600 remanded to pretrial detention, and 441 of those lawyers have been convicted for "being a member of a terrorist organisation". Due to the Court's extensive interpretation of "in flagrante delicto" permission of the Ministry of Justice was neither necessary nor sought. Thus, any lawyer who is accused of membership in armed organisation automatically loses his/her entitlement of the safeguards guaranteed by the Turkish Code of Lawyers. And it makes it effectively impossible to perform the legal profession independently. The exception procedure of Article 61 of the Code of Lawyers has become the default procedure, and lawyers have thus been denied the guarantees of procedure that are foreseen in Article 58.

The European Court of Human Rights (ECtHR) dealt with this extensive interpretation of the Court of Cassation in its decisions Alparslan Altan and Hakan Bas. Altan is the former Deputy President of the Constitutional Court, and Bas

was a judge purged under the State of Emergency Rule (2016-2018). Both were subjected to apprehension and arrest in contravention of the procedure stipulated in Law Nos. 6216 and 2802, because no permission was given for prosecution by either the Grand Assembly of the Constitutional Court, or the Council of Judges and Prosecutors. In its decisions, the ECtHR states that it cannot understand: “how the [Court of Cassation’s] settled case law concerning the concept of a continuing offence could have justified extending the scope of the concept of discovery in flagrante delicto, which relates to the existence of a current criminal act, as provided in Article 2 of the CCP” (paragraph 114).

The ECtHR considered

> “that an extensive interpretation of the concept of in flagrante delicto can clearly not be regarded as an appropriate response to the state of emergency. Such an interpretation, which, moreover, was not adopted in response to the exigencies of the state of emergency, is not only problematic in terms of the principle of legal certainty, but also, as already noted, negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive. In addition, it has legal consequences reaching far beyond the legal framework of the State of Emergency. Accordingly, it is in no way justified by the special circumstances of the State of Emergency” (paragraph 118).

The Court thus made clear that the Court of Cassation’s interpretation does not only contravene national Turkish law but that such apprehension decisions, based on the Court of Cassation’s interpretation, also violate the rights to freedom and security that are protected by Article 5 of the European Convention on Human Rights.
