How Many Times Can the ECtHR Turn its Head

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Thank God for Judge Egidijus K#ris. In ECtHR ruling *Ahmet Hüsrev Altan v. Turkey* of 13 April, he showed that decontextualized analysis is not inherent to supranational judicial review. Once again saucing up his dissent with Bob Dylan, he asked "how many times can [the ECtHR] turn [its] head and pretend that [it] just doesn't see" the "*pattern* and *tendency*" in the treatment of civil society and independent journalism in Turkey. K#ris was referring to the majority's failure to find ulterior motive in the prolonged pre-trial detention of a journalist –itself a "pattern and tendency in the [ECtHR's] determination of Article 18 complaints against Turkey" and beyond.

That pattern and tendency is not limited to Article 18 case law. The Court's entire jurisprudence on Turkey lacks systematic analysis. Even in the two cases where the ECtHR found Article 18 violation, *Kavala v. Turkey* and *Selahattin Demirtas v. Turkey (no. 2)*, it did not address the systemic nature of the repression of political dissent. The ECtHR's jurisprudence on Kurdish political rights exemplifies the futility of this case-by-case approach.

The *Selahattin Demirta#* effect?

In December 2020, the Grand Chamber issued its first ever Article 18 violation against Turkey. When arrested in November 2016, Demirta# was the co-chair of the pro-Kurdish Peoples' Democratic Party (HDP), the third largest party in the Turkish Parliament. The Grand Chamber held, among others, that Demirta#' detention left him unable to take part in parliamentary activities and infringed not only his electorate's free expression of opinion, but also his own right to be elected and to sit at Parliament. In addition to Article 3 of Protocol no. 1, the detention violated Article 18 (in conjunction with Article 5) because it pursued the ulterior purpose of silencing the applicant, and stifling pluralism and limiting freedom of political debate in Turkey.

Despite the Grand Chamber's call for his immediate release, Mr. Demirta# remains behind bars. Not only are Turkish courts openly defying the ECtHR, but the regime has upped the ante. On 17 March, one week after the Committee of Ministers called for Demirta#' immediate release, the Parliament stripped yet another HDP deputy, Ömer Faruk Gergerlio#lu, of his immunity. The official ground was the Court of Cassation's 19 February ruling upholding his conviction for "spreading terrorist propaganda". The actual reason was ulterior: to silence an outspoken parliamentarian who stuck a particular nerve by campaigning against the routine strip searches of female detainees. Also on 17 March, the Court of Cassation petitioned the Turkish Constitutional Court (TCC), asking for the HDP's dissolution and a five-year political ban on 700 of its members. While the TCC returned the indictment on

procedural grounds, it can (and likely will) be resubmitted after the rectification of errors.

Déjà vu or a new era?

Turkey has a history of suppressing Kurdish democratic representation. Starting with the first one set up in 1990, the TCC closed every pro-Kurdish party (five in total), liquidating them and transferring their assets to the Treasury and imposing political bans on their senior members. In one case, Kurdish parliamentarians were sentenced to up to fifteen years of imprisonment solely on the basis of protected political speech.

Recep Tayyip Erdo#an's Justice and Development Party (AKP) government expanded this into a multi-faceted disenfranchisement strategy. In 2006, it had the Mayor and Municipal Council of Diyarbakir's Sur district dismissed and dissolved by court order for providing municipal services in Kurdish. The Mayor, who belonged to the pro-Kurdish Democratic Society Party (DTP), was replaced with an appointed bureaucrat. Remaining mayors faced constant judicial harassment for speaking, writing or publishing in Kurdish. When the DTP nonetheless swept the 2009 local elections in the Kurdish region, the AKP responded with the mass arrest of new mayors.

The next target was the DTP itself. In November 2007, four months after the Kurdish movement returned to the Parliament following thirteen years of absence, the Court of Cassation initiated dissolution proceedings. The result was the TCC's 2009 ruling to close the DTP. Then came the June 2015 elections, when the Kurds defied the 10 percent threshold by running under the banner of their own party rather than through independent candidates to whom the threshold does not apply. The HDP obtained 13.1 percent, causing a hung Parliament and ending the AKP's single-party rule. Erdo#an would not accept defeat; he had the elections repeated and got back his simple majority. The HDP still passed the threshold, albeit with 10.7 percent.

Deprived by politics of the qualified majority needed to adopt a presidential system, Erdo#an resorted to 'law' to oust the HDP deputies from the Parliament. In May 2016, through a "misuse of the constitutional amendment procedure", the AKP-led bloc introduced a one-time exception to the parliamentary immunity regime. Fifty-five out of the fifty-nine HDP deputies were stripped of their immunities. The *coup* attempt in July enabled Erdo#an to seal their fate, having thirteen of them, including co-chairs Demirta# and Figen Yüksekda#, arrested in November. HDP mayors were not forgotten. Making use of the emergency powers he had bestowed on himself, Erdo#an passed an executive decree authorizing his government to dismiss, arrest or ban from office municipal officials accused of terrorism, and to replace them with 'trustees'. Put in place in September 2016, the policy remains in effect. Of the one hundred municipalities the HDP had won in 2014, eighty-four were placed under trusteeship. After the 2019 elections, these numbers were sixty-five and forty-eight. Over thirty mayors are behind bars (information received from the HDP).

The Strasbourg response

The ECtHR found a violation of freedom of association (Article 11) in every party dissolution case it was asked to review. In *Yazar and Others*, *Dicle for the Democracy Party (DEP) of Turkey*, *HADEP and Demir*, and *DTP*, it held that their criticisms of Turkey's counterterrorism methods were not sufficient to equate these parties with the PKK, since they did not advocate any policy that could undermine the democratic regime or urge or justify the use of force. In *DTP*, the ECtHR held that in stripping the co-chairs of their parliamentary seats and banning thirty-seven members from politics, Turkey violated their rights to be elected and their electorate's sovereign power in violation of Article 3 of Protocol no. 1.

In 2010, the mayors arrested a year earlier petitioned the ECtHR. Despite the urgency, the ruling came in 2019. By the time the ECtHR found their prolonged pre-trial detention to be in violation of Article 5, some of the applicants had been released, others convicted and yet others rearrested in separate cases.

In *Yumak and Sadak v. Turkey*, the Grand Chamber did not find a violation in Europe's highest electoral threshold. The applicants were two politicians from the pro-Kurdish Democratic People's Party (DEHAP). Although they had received 45.95 per cent of the votes in the Kurdish province of ##rnak in the 2002 elections, they could not enter the Parliament due to DEHAP's inability to pass the national threshold. The three seats allocated to ##rnak passed to the AKP and an independent candidate, who polled 14 and 10 percent, respectively. Nationally, of the eighteen parties that ran in the elections, only two, having totaled 55 percent, entered the Parliament. The AKP was one of them, acquiring 65 per cent of the seats with 34 percent of the votes. Its single-party rule was established under these conditions.

While considering "in general" a 10 percent threshold to be "excessive", the Grand Chamber considered "the specific political context of the elections in question" and the "correctives and other guarantees" (e.g. running as an independent candidate). In accepting the AKP's argument that the elections were held in a unique context of political and social instability rendering the risk of fragmentation too costly, the Grand Chamber overlooked the fact that the threshold was introduced in 1983 and applied to all elections before and after 2002. In endorsing "stratagems", it ignored that it is prohibitively difficult and costly for independent candidates to run against political parties (e.g. they need more votes than a party for the same parliamentary seat).

In *Abdullah Demirba# and Others v. Turkey*, the ECtHR dismissed the petition of the Sur mayor and Municipal Council. It ruled that the applicants lacked standing because they had acted in their capacity as municipal officials exercising public authority, not as individuals exercising their freedom of expression. It read the applicants' re-election in the next elections as proof of lack of political ban against them. The ECtHR did not consider that while municipalities may well be part of the state structure in liberal democracies, this is not necessarily the case in Turkey, certainly for municipalities run by pro-Kurdish parties. It also overlooked the fact

that the applicants had to wait for two years to be re-elected, during when the AKP governed an electorate who had voted for a DTP mayor.

More questions than answers

The immediate problem with the ECtHR judgments in the Demirta# case is tardiness: twenty-one (Chamber) and forty-six (Grand Chamber) months after the applicant's petition in February 2017. Moreover, the case qualified for priority treatment under the ECtHR's revised policy which, effective May 2017, considers applications concerning deprivation of liberty as "urgent cases concerning vulnerable applicants". Moreover, while Demirta# was awaiting, the ECtHR addressed the post-coup prolonged pre-trial detentions of journalists #ahin Alpay and Mehmet Altan. The reason why the ECtHR was so late in responding to Demirta#, who petitioned at around the same time, is not that innocent, as I wrote earlier.

While Demirta# is certainly a political symbol in Turkey, jurisprudentially speaking, there is no justifiable reason to exclude the remaining eleven HDP deputies, whose cases the ECtHR had joined earlier. If the reason was Demirta#' status as an opposition leader, his counterpart Figen Yüksekda#, arrested under the same circumstances and petitioned the ECtHR on the same day, should have been included. If it was rather that Demirta# had run in the June 2018 presidential elections and had to conduct his campaign from prison, and the concern was his inability to run on equal terms with the other candidates, then the Chamber should not have waited until five months after the elections.

The real incoherence lies in the ECtHR's dismissal of the HDP's petition three weeks before the *Selahattin Demirta#* judgment. If the ECtHR indeed "attaches importance to protection of the parliamentary minority from abuse by the majority" (para. 244), then it should have agreed that the lifting of the immunities of HDP parliamentarians infringed on the Party's own rights under Article 3 of Protocol no.1. Instead, applying to a political party the standing requirements it had set for associations and trade unions, the ECtHR concluded that the grievances "relate to action taken against its members", not against the HDP. For a court which has long emphasized the importance of political parties in a democracy, denying standing to a party whose influence in the Parliament has been diminished through the expulsion and arrest of its deputies does not make sense.

Continuity or rupture?

Selahattin Demirta# has important implications for the ECtHR's jurisprudence. The Grand Chamber asserted that the right to free elections is not limited to the opportunity to take part in elections and "the person concerned is also entitled, once elected, to sit as a member of parliament" (para. 391). Arguably, this means the ECtHR erred in dismissing the Sur Mayor and Municipal Council members, who were just as entitled to their elected seats. Now, the question is whether, when it finally speaks on their cases, the ECtHR will also find a violation of electoral rights in the arrest and prolonged pre-trial detention of the HDP mayors.

The broader question concerns the ECtHR's function *vis-à-vis* Turkey's "system, synergy and policy" of disenfranchising the Kurds. As I argue in my book, the ECtHR can only be effective against an authoritarian regime if it makes full and simultaneous use of its jurisprudential tools and resources. For example, in executing its priority policy, it should urgently resolve all cases concerning the HDP parliamentarians and mayors. Taking notice of the fact that the Kurds are deprived of their electoral rights at national *and* local levels, it should expand its jurisprudence on Article 3 of Protocol no. 1 to municipal elections. It should enforce Article 18 in conjunction with every single Convention article that Turkey violates – not just Article 5. Finally, it must undertake an institutional overhaul to ensure that justiciable cases are not rejected due to lack of information, coordination and communication within the bureaucratic machinery.
