Gold or stone?

"The exhaustion rule may be described as one that is golden rather than cast in stone." § 64 of the ECHR Practical guide on admissibility criteria

Here's a moment I won't forget any time soon: on 16 July 2016 – the day after the failed coup d'etat in Turkey – while attending a Beyoncé concert in the Arena Stadium, I received an e-mail message from a Turkish colleague:

"I also will be dismissed and detained. I don't know how to explain. I just have done my job and criticize the government regarding judicial developments that you already know very well. We may not see each other again. Thank you for your support up to now. We will not have any communication opportunity."

Since then, 15 months and many rounds of dismissals have passed. The state of emergency is still in place and a total of over 138,000 civil servants have been dismissed, suspected of supporting or having ties with one of the organizations, structures or groups that were co-responsible for the attempted coup d'etat.

In the first week of October 2017 another 39 judges and public prosecutors were dismissed: currently, the total number of magistrates that have been dismissed stands at a staggering 5,460. Of those, 2,700 are in detention. And for those magistrates that have 'only' been dismissed their dismissal not only means the loss of their job as judge of public prosecutor, but also the prohibition of working for the government in another capacity, the denial of social services, revocation of their passports and confiscation of their property, such as their house, car and bank accounts. They are therefore condemned to living a life on the margins and are depending on others for charity. For instance, a colleague of mine – gone underground at the time – mentioned to me he was trying to make some money for his family selling honey by the side of the road.

No wonder then, that many of the dismissed Turkish civil servants have pinned their hopes on the European Court of Human Rights (ECHR) in Strasbourg to declare unequivocally

that the Turkish government has grossly violated their human rights. The ECHR, by the way, already has enough to do regarding Turkey: the most recent figures show that 17,850 i.e. 20% of all pending cases originates from Turkey. Until now, it has been a disappointment for the complainants. In three decisions on admissibility the doors of Strasbourg have remained shut, because domestic remedies have not been exhausted, as per article 35 of the European Convention on Human Rights.

Judge Mercan (dismissed and detained) filed a complaint on 2 September 2106 relating to her pre-trial detention. The complaint was declared inadmissible by the European Court, as she had not turned to the Turkish Constitutional Court first. The European Court found that proceedings before this Court could not be outright rejected as not providing an effective remedy – despite the dismissal and subsequent detention of two of the members of this Constitutional Court. The claimant's misgivings about the impartiality of the Turkish Constitutional Court also did not justify skipping these proceedings, the European Court found.

The resigned (and arrested) **judge Çatal** filed a complaint on December 5, 2016 for her dismissal by the Supreme Council of Judges. After her objection was rejected, she immediately turned to the EHRM, as earlier jurisprudence showed that neither the Constitutional court nor the Supreme Administrative Council considered this type of post-coup dismissal procedure to be within their competence.

The fired **teacher Köksal** had already appealed to the Turkish Constitutional Court when he also filed a complaint with the EHRM on November 4, 2016 due to his dismissal. In his view, after the failed coup, the Constitutional Court could no longer be considered independent and impartial. For this reason, according to Köksal, the Constitutional Court would not offer an effective legal remedy that should be depleted, before the EHRM could consider a complaint.

It's a tactical chess game. In line with the subsidiarity principle, the EHRM first refers complainants Köksal and Çatal back to the - by Decree No 685 of 23 January 2017- recently established system of legal remedies. According to the EHRM, this might offer a remedy for the problematic situation arising from the state of emergency and the previous declarations of the Turkish

judges that they had no jurisdiction to assess the resulting issues. Therefore, it is justified to make an exception to the principle of assessing the exhaustion of national remedies at the time of filing of the complaint.

Judge Çatal must first address the Supreme Administrative Council. Teacher Köksal first needs to file proceedings before the new 7-member appeal committee and after that, before an administrative court in Ankara. The possible continuation process will then be the same for both - and for all others in similar positions - namely the submission of an individual complaint to the Constitutional Court. If all this does not lead to the desired result, a complaint can still be filed in Strasbourg.

The EHRM considers the newly introduced procedure to be sufficiently accessible and there is no reason to believe that it would not provide sufficient legal protection or that this would not give any chance of rehabilitation. With this, the EHRM expressly does not anticipate a more thorough and substantive evaluation of the assessment in a specific case.

This final decision in the Köksal case of 6 June 2017, makes clear that in the short term for the dismissed government officials, there is not much to be expected from the Strasbourg court. The national authorities are explicitly given the opportunity to repair any violations of the ECHR. But we also know that on 24 April 2017, the Parliamentary Assembly of the Council of Europe (PACE) decided to reopen the monitoring procedure for Turkey because of major concerns about respect for human rights, democracy and the rule of law. The Commissioner for Human Rights, Nils Muižnieks, stated on 7 June 2017 that the Turkish Council of Judges and Prosecutors does not provide adequate safeguards for the independence of the judiciary and that the risk of political influence has been significantly increased. Against that - grim - background, the EHRM declared the complaint of Köksal inadmissible.

Furthermore, when you take into account that the complaints regarding 138,000 dismissals are to be dealt with by a commission consisting of 7 people, no rocket science is required to see that these are anything but speedy and effective proceedings. In his speech on 1st of June 2017 the president of the Constitutional Court mentioned with concern that 103,000 individual complaints are pending in his Court.

For now, the decisions of inadmissibility taken in Strasbourg give the Turkish authorities some time and a –temporary- moral victory, which is given a lot of attention in the newspapers that support the Government. On Twitter, the disappointed tweets followed each other in rapid succession. After the Köksal decision Amnesty International's Turkey researcher Andrew Gardner tweeted:

ECHR's faith in TR's commission defies both experience + logic. Is insult to 100K arbitrarily dismissed workers. Re-assessment must come soon.

Obviously, the decisions of inadmissibility have hit those inflicted in Turkey like the abovementioned 'stone', but there is still hope of "striking gold" in Strasbourg in the future. It is now up to Turkey to show that the newly decreed legal remedies will provide for satisfactory legal protection and a real chance of rehabilitation. Should Turkey fail in this respect – which I cautiously consider to be not unrealistic- the Court in Strasbourg must thoroughly examine the contents of each individual complaint. In my view the ECHR, both while judging the admissibility of the complaint as well as while checking that there has been a fair trial, cannot close its eyes to the grip the executive powers have on the administration of justice and the incredible pressure the remaining and newly appointed Turkish magistrates suffer in politically sensitive cases.
The 'çhilling effect' of the post-coup measures against the judiciary, i.e. the fear of being dismissed and arrested as well as a reaction to politically unwelcome decisions, is after all real.
These are in my opinion exiting times, not just in Turkey but as well for the European Court, should it want to remain seen by civilians as a relevant institution in times of seemingly massive breaches of human rights in a country.

Tamara Trotman,
Judge in the Appeal Court of The Hague and chair of Judges for Judges.