THE ROYAL GAME

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1.Introduction

"The Royal Game"[1] was written by Austrian author Stefan Zweig who had been exiled by Third Reich in 1934. The title of the book references a tense game of chess between a chess world champion Mirko Czentovic and Dr.B on board of a cruise. The main part of the story focuses on the background of Dr.B, and revealing how he had learned to play chess so successfully. Following their takeover of power in Germany, the Nazi Party started to consolidate their power by eliminating all political oppositions. Dr.B was an opponent and monarchist who was also the former legal adviser and trust manager of the Austrian Imperial family. He was caught hiding valuable assets belonging to the nobility from new regime. He was not sent to a concentration camp, instead he was kept in a hotel room in which he was totally isolated from any social contact for several months. This was one of the methods of the Nazi Regime that aimed to expose its' subjects to mental anguish by isolation. Dr.B's only human contact was with his captors during interrogations, left in the middle of the "nothing" for the rest of the time; reading was not allowed, contacting was not allowed, going outside was infrequent and only under supervision by his imprisoners. Consequently, he started to lose the notion of the "time" and also his sanity. Until one day, he managed to steal a book of past masters' chess games while waiting for one of the interrogations. It was his saviour because he could maintain his sanity by playing chess. Through having this mental exercise, he was able to distract his mind from the total isolation. He memorized each game and played them consistently. Then, he began to play chess against himself by creating an imaginary competitor in his mind; 'I white' and 'I black'. However, this endless chess play also eventually led him to the edge of sanity by so-called 'chess-poisoning', eventually he suffered from a nervous breakdown and awakened in a sanatorium. He was saved by a physician and finally set free.

Following the summary of the Royal Game, this paper aims at turning that same the focus to the current situation in Turkey. The regime in Turkey was faced with an alleged coup attempt on 15th of July 2016 by the "Peace at Home Council" an organization within the Turkish Armed Forces. It was potentially a nation-wide crisis that posed a danger to entire population by armed forces

[1] Stefan Zweig, *Chess: A Novel*, translated by Anthea Bell, London, Penguin Classics, 2006.

and as consequence of the attempt over 300 people were killed and more than 2100 were injured.[2]

Immediately after the events of 15th July the Turkish authorities declared a state of emergency and has since taken several measures to overcome to this catastrophic event. Perhaps it is not surprising that the extent of the measures taken and their implementations have attracted the world's attention, in respect of the threat they pose to the fundamental rights of individuals. As the Labour Minister of Turkey has stated, the authorities have dismissed 94,867 people from public service[3] - including the police, the military, the judiciary, the education system – for an alleged connection with the coup attempt. This paper will now focus on the story of one of the public servants who has been dismissed from duty and arrested in the wake of the coup attempt.

Neslihan Ekinci was the first female general secretary of the Supreme Board of Judges and Prosecutors (HSYK). She was dismissed the day after the coup attempt with 2,744 other judges by the Turkish Government and she was taken into custody on 18th July 2016. Her husband Huseyin Ekinci -who was the former chief reporter of the Constitutional Court- and she were arrested on 21st of July. Both have been imprisoned for almost 2 years. Neither the legal proceedings against Neslihan Ekinci, nor the arrest decision, where incidentally the deciding judge[4] has been caught red-handed accepting a bribe some 9 months from that decision, will be considered in any detail. Instead, the focus will be on the treatment of Neslihan Ekinci who has been placed in solitary confinement without any written decision, by the prison authorities. As her daughter Rana Ekinci states, she has been suffering from "a severe trauma in solitary confinement". The prison authorities have not changed their treatment of her even though a prison psychologist has clearly stated in a report that the authorities must stop isolating her in a separate cell because it may lead to permanent damage on her mental health. She is not even allowed to read a book, suggesting perhaps that prison authorities are intending to cause her to lose her sanity. She is in effect in the middle of the "nothing"; reading was not allowed, contact not allowed, going outside not allowed; just like Dr.B in the Royal Game. However, there are

[2] Drew Holland Kinney, '*Civilian Actors in the Turkish Military Drama of July 2016*' (2016) EMPN No.10
[3] Reuters, '*Turkey dismissed more than 90,000 public servants in post-coup purge: minister*', Ankara, 31 January 2017
[4] Sozcu, '*50 bin dolar rüşvet alan hakim bakın kim çıktı?*', 20 April 2017

some significant differences; she is alone with her thoughts not in a hotel room but a cell at Turkish prison. She is not able to find a book of past masters' chess games, either.

What is potentially different for Neslihan from the situation of Dr.B is the statute of international law; namely the individual rights deriving from the ECHR which entered into force on 1953 aftermath of World War II and the Holocaust.[5]

2. Obligations under ECHR and the Legality of Solitary Confinement

Article 3 of the ECHR prohibits torture and inhuman or degrading treatment or punishment. The Convention not only obliges the contracting State with negative obligations such as refraining from torturing but also furnishes states with positive obligations such as protecting bodily integrity of the individuals and health against any possible harm. Besides, Article 15(2) ECHR protects certain rights, including Article 3, from a derogation[6]. Rights based on Article 3 continue to apply during time of war or public emergency regardless of any derogation to ECHR made by a state. Turkey has submitted a formal notice of derogation to the ECHR without specifying the articles that it intends to suspend.[7] Then, considering the non-derogable feature of Article 3, the question arises; does Turkey comply its obligations under the Convention in Neslihan Ekinci case?

Regarding the negative obligations, a state shall refrain from any actions which damages a person's physical health or causes them mental or psychological harm such as torment or the willful causing of anguish.[8] Before assessing whether, by putting Neslihan Ekinci in a solitary confinement, Turkey infringes its negative duty of Article 3, it is important to look at the legal basis of the solitary confinement measure in Turkey.

[5] Philippe Boillat, '*The European Convention on Human Rights at 60: Building on the Past, Looking to the Future'*, Human Rights and Legal Affairs of the Council of Europe

[66] Council of Europe, '*Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency*', 30 April 2018, para25.

[7] Council of Europe Communication; Ref. DC 132(2016)

[8] Case *Gäfgen v. Germany*, No.22978/05, Judgement, 1 June 2010, para.89.

2.1. Legal Base of Solitary Confinement

Solitary confinement was previously regulated as a "disciplinary security measures"[9] in the Turkish legal system, thus in order for being exposed to it, the detainee must act contrary to the law, regulations or any orders of the penal institution. However, the Turkish National Assembly enacted a new law on the execution of penalties and security measures in 2004.[10] The foremost amendment of this law is that solitary confinement has been prescribed as a punishment for the execution of life imprisonment.[11] Accordingly, the convict shall be accommodated in a "single room" and have the right to walk and do exercises in the open air for one hour a day. Even though the continuous execution of this punishment to aggravated life imprisonment must be criticized in another research due to its psychological impacts on the detainees[12], it is important to take a step back to the case of Neslihan Ekinci who has not yet been tried or sentenced of any crime. According to Article 4 of Law No.5275 (Law on the Execution of Penalties and Security Measures), sentences of conviction shall not be executed unless they are finalized. Thus, the execution of penalties and security measures are attached to the finalized sentence of the conviction. However, there is no finalized sentence decision that has been given for Neslihan Ekinci yet. She has still been under the pre-trial detention process. Even though Turkish law does not prescribe solitary confinement as punishment or security measures towards detainees whose sentences have not been finalized, she is continually being been held in isolation and *incommunicado*. There is no legal basis can be found for exercising solitary confinement to Neslihan Ekinci in Turkish criminal legal system.

As Article 2 of the Constitution of the Republic of Turkey states, Turkey is a state governed by the Rule of Law. Therefore, the unlawful actions of prison authorities towards a former judge Neslihan Ekinci must have legal consequences.

[9]Ceza İnfaz Kurumları ile Tevkifevlerinin Yönetimi ve Cezaların İnfazına Dair Tüzük, Article 161. Available via <http://www.resmigazete.gov.tr/eskiler/2006/04/20060406-1.htm>

[10] Law No.5275 available via <http://www.lawsturkey.com/law/the-law-on-the-execution-of-penalties-and-security-measures-5275>

[11] Article 25 Law No. 5275

[12] Gisli H. Gudjonsson, '*The Psychology of Interrogations and Confessions: A Handbook'*, Wiley Publishing, 2003, p.612.

2.1.1. Acting Without Having a Legal Base

Article 137 of the Constitution of Turkey regulates the position of a subordinate receiving an unlawful order.[13] Accordingly, if a civil servant finds out that an order given by his/her superior is contrary to the provisions of by-laws, presidential decree, laws or the Constitution, (s)he must not carry out the order and must inform the superior about its inconsistency with law. In case his/her superior insists on the order by renewing it in writing, then (s)he executes the order yet cannot be held responsible. As seen *supra*, holding Neslihan Ekinci in solitary confinement contrasts to the Article 4 in conjunction with Article 25 Law on the Execution of Penalties and Security Measures. Thus, any public servant involves in the exercise of the solitary confinement measure must not carry out this measure and informs his/her superior, i.e. a prison governor, about the inconsistency of the measure with the legislation. In Neslihan Ekinci case, any inferior cannot invoke irresponsibility from the exercise of the measure in question by asserting the insistence by superior in writing because Neslihan Ekinci has been put in solitary confinement without any written decision by the prison authorities.[14] Therefore, an inferior cannot prove a written decision by his/her superior in order for not being responsible. Hence, anyone involved in the execution of the solitary confinement to Neslihan Ekinci has acted contrary to the Constitution and the general principle of rule of law.

2.2. Prohibition Against Torture

Article 137 para.2 of the Turkish Constitution states that "*An order which in itself constitutes an offence shall under no circumstances be executed; the person who executes such an order shall not evade responsibility."*[15] Thus, if the execution of solitary confinement constitutes an offence under the Turkish Criminal Code, this order must not be executed irrespective of any situation. Therefore, any person involved in that offence cannot escape from the responsibility. Since Neslihan Ekinci has been suffering both physically and or mentally for almost 2 years due to the decision by prison authorities lacking any legal basis, this attitude may either fall under the

[13]Article 137 of the Constitution of the Republic of Turkey. Available via <https://global.tbmm.gov.tr/docs/constitution_en.pdf>

[14] İnsan Hakları Derneği İstanbul Şubesi, '*1 Ocak- 30 Haziran 2017 Marmara Bölgesi İnsan Hakları İhlalleri Raporu',* Istanbul, 2017, pp.28.

[15] Article 137 of the Constitution of the Republic of Turkey

definition of inhuman or degrading treatment, or torture which are the offences that are prescribed from Articles 94-96 in the Turkish Criminal Code[16].

Article 94(1) of the Turkish Criminal Code describes an act of torture performed by a public on a person that is incompatible with human dignity, and which causes that person to suffer physically or mentally or affects the person's capacity to perceive or his ability to act of his own will or insults them shall be sentenced to a penalty of imprisonment for a term of three to twelve years. This definition is identical with Article 1 Convention Against Torture that Turkey ratified on 2 August 1988. Thus, if the treatment of Neslihan Ekinci falls with the definition of torture, then any public officer who involved in that treatment or any competent authority who had been responsible for the proper treatment but failed to do so, cannot escape from liability according to the Article 137 of the Constitution because this unlawful order *per se* constitutes an offence under Turkish Criminal Code.

2.2.1. Does the treatment amount to torture?

Huseyin Ekinci -who was former chief reporter of the Constitutional Court- wrote a letter to the President of Constitutional Court, Prof. Dr. Zühtü Arslan on 24 May 2017 to illustrate the illegality of the treatment that has been exercised towards his wife Neslihan Ekinci. At this point, it is worth mentioning that Huseyin Ekinci has also been kept in detention to date and has been told about his wife's medical situations by his daughter Rana Ekinci during limited visiting hours. Rana Ekinci has acted as a messenger that receives the current medical situations of her imprisoned mother during the limited visiting hours and shares it with her imprisoned father during the limited visiting hours.

In his letter, Huseyin Ekinci specified that his wife has been kept in solitary confinement for 10 months (currently it has been 23 months) in a 3,5 m^2 room through underlying the lack of legal basis of the treatment. During this time period, she was allowed to go outside for only 45 minutes per day, but communication was prohibited. In the meantime, she was forbidden to write or receive any letter.[17] In March 2017, his wife was taken to the Bakirkoy Hospital for Health of

[16] Law No. 5275

[17] Tr724, '*Tutuklu Basrapörtörden AYM Başkanına Mektup: Müebbet Alanlara Uygulanmayan İnfaz Eşime Uygulanıyor*', 30 June 2017. Available via <http://www.tr724.com/tutuklu-basraportorden-aym-baskanina-agirlastirilmis-muebbet-alan-mahkumlara-uygulanmayan-infaz-hakim-esime-uygulaniyor/>

the Spirit and Illnesses of the Nerves due to the indication of major depression following 18 hours crying crisis and nervous breakdown.[18] He stated that her doctor had issued a report strongly advising to transfer her from a single room to a dormitory due to risk of permanent mental damage despite the fact that she has to use several medicines for her inconvenience for the rest of her life. With this letter, Huseyin Ekinci intended to inform the President of the Constitutional Court about this harsh situation that his wife has been exposed to. However, the treatment described in the letter must also be analyzed; considering the duration of the baseless treatment[19]and its mental effects to the state of health of Neslihan Ekinci, the treatment attains a minimum level of severity which suffices for describing the treatment as an ill-treatment which falls under the scope of Article 3 ECHR "prohibition of torture".[20] Furthermore, in order for ill-treatment to be classified as a torture, it must be carried out deliberately in an organized manner.[21]

In *Crino and Renne v Italy* judgement, the ECtHR held that ill-treatment inflicted on the victims-which had been deliberate and carried out in a premeditated and organized manner had amounted to torture because it has caused them considerable fear, anguish and mental suffering in addition to their physical suffering and that their placement in solitary confinement had intensified their feelings of helplessness.[22] As seen in the letter from her husband and also through the report of her doctor, it is clear that the ill-treatment has caused, and continues to cause, considerable fear and mental suffering to Neslihan Ekinci. Thus, if this ill-treatment is supported by the purposive element, then it would be defined as torture according to the ECtHR. To assess that, it would be compassing factor to focus on the decision of the solitary confinement.

According to Article 186 of the Regulation on the Administration of the Penal Institutions and the Execution of Penalties and Security Measures, the Board of Administration and Monitoring is charged with the determination of the room where a person will stay after the acceptance by

[18]Tr724, '*Rüşvetçi Hakim'in Yıktığı Ailenin Dramını Kızları Anlattı: Annemi Ve Babamı Whatsapp Grubuna Sorup Tutukladı*', 24 April 2017. Available via < http://www.tr724.com/rusvetci-hakim-akdemirin-yiktigi-bir-ailenin-dramini-kizlari-anlatti-annemi-ve-babami-whatsup-grubuna-sorarak-tutukladi/>

[19] It has been 23 months in June 2018.
[20] Case *Gäfgen v. Germany*, No.22978/05, Judgement, 1 June 2010, para.88.
[21] Case *Gäfgen v. Germany*, No.22978/05, Judgement, 1 June 2010, para.90.
[22] Case of *Crino and Renne v. Italy*, Nos. 2539/13 and 4705/13, Judgement, 26 October 2017, para.83.

the penal institutions.[23] The decision concerning the solitary confinement for Neslihan Ekinci has been taken by the Board of Administration and Monitoring of the Tekirdag Penal Institution, although it was not issued in writing.[24] Therefore, there is a question as to whether the decision to implement solitary confinement can be effectively challenged because there is no writing decision.[25] This practice by the penal institution cannot be considered as innocent because if the competent authority decides on the execution of the solitary confinement measure without having legal basis over 23 months despite the medical report and it prevents this measure being effectively challenged before courts, there would be a strong argument that the attitude can be described as an intentional conduct that has been systematically executed and therefore fulfills the definition of 'premeditation'. Moreover, the measure of solitary confinement has been taken by the prison authorities under the ruling of state of emergency for those who allegedly involve in/link to the coup attempt.[26] Thus, there is a strong indication that these detainees have been routinely exposed to punitive measures that exceeded the bounds of permitted disciplinary or security measures. In the eyes of the ECtHR, the existence of a broader pattern of abuse -by punishing the detainees- in the penal institutions indicates the existence of a purposive element underlying the ill-treatment. Thus, this generalized practice of ill-treatment amounts to torture.[27]

Therefore, the illegal treatment by Tekirdag Penal Institution falls under the definition of torture both in Turkish criminal law[28] and that of the previous ECtHR case-laws. Since this unlawful order constitutes a severe offense, namely torture, any person taking part of this treatment cannot escape from liability pursuant to the Article 127 of the Turkish Constitution. Consequently, in Neslihan Ekinci case, Turkey has not complied with its obligations under the Convention, alongside the fact that the prison authorities have breached the Turkish penal law.

[23] Article 186 of the Regulation on the Administration of the Penal Institutions and the Execution of Penalties and Security Measures, Ceza İnfaz Kurumlarının Yönetimi İle Ceza Ve Güvenlik Tedbirlerinin İnfazı Hakkında Tüzük, Law No. 2006/10218. Available via <http://www.resmigazete.gov.tr/eskiler/2006/04/20060406-1.htm>

[24] *Ibid*.17.
[25] *Ibid*.17.
[26] Grihat, 'Hücre hapsi, OHAL sonrası devlet eliyle işlenen bir suça dönüştü', 5 July 2017. Available via <http://grihat.com/hucre-cezasi-ohal-sonrasi-devlet-eliyle-islenen-bir-suca-donustu/>

[27] Case of Crino and Renne v. Italy, Nos. 2539/13 and 4705/13, Judgement, 26 October 2017, paras. 84-87.
[28] Article 94 of the Law No. 5275

3.Conclusion

"In life, as in chess, forethought wins" says Charles Buxton. As focusing on just one out of thousands of examples, it can be estimated that Turkey has not taken steps towards to the true path. The concerns about the inhuman degrading treatment and torture in Turkey have been voiced by several international organizations such as Amnesty International and Human Rights Watch especially after coup attempt in 2016. In that point, it is important to remember that some of the measures, e.g. solitary confinement, used by Turkish authorities was identically taken by the Third Reich in 20th century with having similar motives, namely in order to eliminate, punish and demotivate the any opponent.

Max Hoffmann, the Polish prisoner, described his days in the standing cell in the last years of the Second World War; "*It was a terrible state, as I thought that it was over for me, everything was so callous and distant for me. I couldn't lie down, couldn't crouch, the best was to stand, stand, six days and six nights long. [...] You touch the walls on both sides with your elbows, your back touches the wall behind you, your knees the wall in front of you. [...] This is no punishment or pre-trial detention, it is torture, straight forward, Middle Ages torture. I had bloodshot eyes, numb from bad air, I was just waiting for the end*".[29]As seen, when solitary confinement measure is combined with a purposive element by authorities, it leads to shameful circumstances in the future. Therefore, it is important to receive the message from the history, otherwise as Alex Haley states; "unless we learn from history, we are destined to repeat it".

[29] Karel Kasak, '*Cesi v Koncentracnim Tabore Dachau. In Almanch Dachau. Kytice Udalosti a Vzpominek'*, Prague, 1946, cited in Zamecnik, '*Das war Dachau'*, p.349.

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