

Commentary on the May 2019 judgments adopted by the Turkish Constitutional Court on the detention of journalists and a civil society leader

May 2019 was a productive month for the Turkish Constitutional Court (TCC) which delivered long-awaited judgments on eleven applications, concerning the detention and prosecution of ten journalists and a civil society leader after the attempted coup d'état of 15 July 2016. However, the outcome of the cases caused deep disappointment with the TCC only finding violations of the right to liberty and security and the right to freedom of expression in four cases concerning journalists [Ahmet Kadri Gürsel](#) (No. 2016/50978), [Murat Aksoy](#) (No. 2016/30112), [Ali Bulaç](#) (No: 2017/6592) and [Ilker Deniz Yücel](#) (No. 2017/16589). In the remaining applications of [Ahmet Hüsrev Altan](#) (No: 2016/23668), [Ayşe Nazlı Ilıcak](#) (No: 2016/24616), [Mehmet Murat Sabuncu](#) (No: 2016/50969), [Akin Atalay](#) (B. No:2016/50970), [Önder Çelik and Others](#) (No:2016/50971), [Ahmet Şık](#) (2017/5375) and finally [Mehmet Osman Kavala](#) (No. 2018/1073) the court found no violation of any rights. This note presents a summary of the background to these cases and then analyses the TCC's judgements.

Background

In the aftermath of the attempted coup d'état of 15 July 2016, journalists and media professionals allegedly affiliated with the *Gülenists* - classified as a terrorist organization under the name of *Fethullahist Terrorist Organization* (FETO) and considered to be behind the attempted coup - were detained as part of an investigation of "FETO's media network." Critical journalists from various newspapers, such as Ahmet Altan of *Taraf* newspaper, Nazli Ilıcak of *Özgür Düşünce* newspaper and Ali Bulaç from *Zaman* newspaper, were accused of attempting to overthrow the Government by force, abrogating constitutional order or being a member of or supporting FETO.

Similarly, executives, journalists and employees of *Cumhuriyet* newspaper, one of the oldest independent daily newspapers in Turkey, were detained in proceedings known as the "Cumhuriyet Trial". Accusations included support of terrorist groups, including FETO and PKK, manipulating public opinion with news and publications and forming a negative public opinion against the Government.

Prosecutions against dissenters continued extensively during and after the state of emergency, which was in force between 21 July 2016 and 19 July 2018, targeting many

more journalists, civil society activists and individuals perceived to have raised critical voices against the state's official politics or the Government. Deniz Yucel, a journalist for the German newspaper Die Welt, was detained for more than one year because of political commentaries, news and interviews which were deemed to have incited hatred or hostility and spread propaganda in support of terrorist organisations. Similarly, Osman Kavala, a philanthropist, civil society leader and activist was placed under detention in proceedings known as the "Gezi Trial" in November 2017, some four years after the Gezi protests, which he was accused of having organised and financed in 2013.

These eleven cases, which derive from similar underlying causes, namely use of criminal and anti-terrorism laws against those perceived to have acted contrary to official state interest, raise important issues of the arbitrary criminalisation and detention of dissenters and suppression of freedom of expression and other relevant rights in Turkey. Moreover, these cases raise questions about the effectiveness of response by human rights courts, including the TCC and ECtHR to protect individuals, especially those acting as public watch dogs, from arbitrary and illegitimate criminal prosecutions, and to address the problematic aspects of such practices in a timely manner given the grave chilling effect caused by these prosecutions.

Legal Developments Prior to the Judgments

Before analysing the recent judgments of the TCC themselves, it is relevant to recall the legal developments that preceded them. On 22 May 2017, the ECtHR decided to [give priority](#) to applications where "the applicant is deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights". Subsequently, the cases lodged by journalists who had been in detention [were communicated](#) to the Respondent Government within six-months after being lodged. The ECtHR [communicated](#) the cases of Osman Kavala with the Government in August 2018 and the Turkey Human Rights Litigation Support Project (TLSP), together with Pen International, submitted a third-party [intervention](#) in this case.

Whilst these proceedings were pending before the ECtHR, the TCC broke its silence and delivered two leading judgments concerning detention of journalists in the cases of [Mehmet Hasan Altan](#) and [Şahin Alpay](#) finding that their detentions were unlawful, absent convincing grounds to believe that they had committed the crimes they were charged with. The evidence forming the basis for their detention was mainly their journalistic expressions and writings on topical issues, remaining within the limits of freedom of expression. Even in the context of public emergency, the applicants' detention was not regarded as a necessary or proportionate interference with their right to liberty and freedom of expression which would be confirmed by the ruling of the ECtHR in March 2018. However, even after the TCC's judgments, the applicants were not immediately released due to the lower courts' offered resistance to the ruling of the TCC.

Following these developments at the domestic level, the ECtHR ruled on these cases, and confirmed violations of Article 5(1)(c) and 10 of the Convention, and reminded the lower courts of the binding nature of the TCC's judgements and the potential impact of non-compliance with its judgments. The ECtHR noted that the applicants' continued pre-trial detention, even after the TCC's judgments, might raise serious doubts as to the effectiveness of the remedy of an individual application to the TCC in cases concerning pre-trial detention. In both cases, the ECtHR also stressed the importance of the speedy review of lawfulness of continued detention by the TCC. It noted that fourteen or sixteen months would not be considered as "speedy" in an ordinary context, but accepted that special circumstances prevailed following the attempted coup causing considerable increase of applications pending before the TCC.

After the adoption of these leading judgments, other pending applications lodged by detained journalists raising similar complaints were expected to be speedily resolved by the TCC or ECtHR. However, in practice applicants had to wait for more than a year to obtain a legal determination by the TCC of cases raising blatant freedom of expression violations. Some were even returned to prison to serve their sentences after their convictions were upheld by higher courts. In May 2019, around three years after the arrest and initial detention of the applicants, the TCC finally delivered its rulings on the above-mentioned 10 journalists and the civil society leader cases. However, the inconsistencies with the outcome of the cases and reasoning of the judgements, resulted in more controversy than legal resolution on the issues the cases raised.

Analysis of the May Judgments

Among these eleven cases, the TCC found only in *Ahmet Kadri Gürsel, Murat Aksoy, Ali Bulaç* and *Ilker Deniz Yücel* that the applicants' detentions were unlawful amounting to an interference which could not be regarded as necessary in a democratic society. In those cases, the TCC found a violation of the right to liberty and freedom of expression. However, in the other seven cases, although raising similar issues, namely continued detention of applicants as journalists or a civil society leader based on peaceful expressions or activities, the TCC did not find any violations. All eleven cases together show disagreement among the judges of TCC and fluctuation in the TCC's performance in upholding relevant human rights standards, particularly with regard the right to liberty and freedom of expression in line with the European Convention on Human Rights (ECHR). Both the outcome of the cases as well as the variations in the number of dissenting opinions attached to those judgments (e.g. six dissenting opinions in *Mehmet Murat Sabuncu*, five in *Ahmet Altan*, one in *Ahmet Şık*) illustrate this fluctuation. The divergence from one case to another exacerbates the legal uncertainty as to the expectation that the TCC would apply human rights standards equal to those established by the ECtHR.

All the judgments reveal criminal prosecutions concerning serious charges related to state security were brought against journalists and media professionals on the basis of their journalistic activities and expressions critical of the authorities' conduct. Articles, news headings, tweets and speeches were used against them as evidence of supporting proscribed groups or terrorism or attempting to overthrow the Government. For example, in the case of *Ahmet Şık*, the applicant was accused of supporting and making propaganda by way of his writings and tweets for three different terrorist groups; FETO, PKK and DHKP-C, whose aims and methods are fundamentally distinctive from each other.

When finding violations in the *Ahmet Kadri Gürsel*, *Murat Aksoy*, *Ali Bulaç* and *Ilker Deniz Yücel* cases, the TCC challenged the erroneous interpretations of the prosecuting authorities accusing those journalists of aiding or supporting terrorist organisations. It asserted that the impugned expressions and meanings given to them should have satisfied an objective observer that the accusations had some factual basis. However, the TCC failed to uphold the same principles in the [Ahmet Hüsrev Altan](#), [Ayşe Nazlı Ilıcak](#), [Mehmet Murat Sabuncu](#), [Akin Atalay](#), [Önder Çelik](#) and *Others*, [Ahmet Şık](#) and *Mehmet Osman Kavala* cases, where overarching interpretations and applications had brought serious charges with no objective grounds or factual basis. The fact that selected phrases were taken out of context from the entirety of the text or speeches or metaphors used in the applicants' analysis of political issues were interpreted as evidence of criminal conduct by prosecuting authorities, criminal courts and later by the TCC, were criticised by several dissenting judges of the court.

In the cases of *Ali Bulaç*, *Kadir Gürsel*, *Murat Aksoy* and *Deniz Yücel*, the content of journalistic writings and expressions, deemed by the TCC to have not amounted to a call for violence, terrorism, or incitement to hatred, were taken as a decisive factor to rule out the existence of "strong indication", equivalent to "reasonable suspicion" of having committed a crime, as required by Article 5/1(c) of the ECHR. However, in other journalists' cases, the context, aim and entirety of impugned expressions were not taken into account as a whole; instead selected phrases were accepted as evidence for alleged charges, despite the absence of a call for violence or incitement or support to terrorism by the TCC. No evidence proving the links between the journalists and proscribed organisations and their intention to contribute to the pursuit of illegal conducts of those organisations, as is required for individual criminal liability, had been referred to.

Moreover, despite the legal requirement of a strict justification of the detention of journalists both under Articles 5 and 10 of the ECHR, the TCC failed to carry out a proper and careful assessment of proportionality in those six cases against journalists and media professionals, namely [Ahmet Hüsrev Altan](#), [Ayşe Nazlı Ilıcak](#), [Mehmet Murat Sabuncu](#), [Akin Atalay](#), [Önder Çelik](#) and *Others* and [Ahmet Şık](#). In accepting that detention of applicants had not been arbitrary, it limits its assessment to the necessity

of the initial detention of the applicants, referring to the “turmoil after the attempted coup d’état” and “general conditions at the time of initial detention” deemed to have heightened the risk of interference with evidence and flight of suspects. However this accepted assessment of risk were general and abstract and not linked with the applicants’ individual circumstances or their alleged conducts. Moreover, by failing to have required the judicial authorities to duly substantiate the alleged risk and demonstrate the need for the continued detention at each stage, the TCC seems to have reversed the relationship between the rule and exception in these cases going against the very idea of the right to liberty and detention as being a measure of “last resort”.

However, the TCC rejected as inadmissible the complaints about the length of detentions in these six cases on the basis of the lack of exhaustion of a compensatory remedy provided under Art. 141 of Turkish Code of Criminal Procedure and consequently did not take into account the overall length of the applicants’ detention in its assessment of lawfulness and necessity. Moreover, as to the complaint about a violation of freedom of expression, the TCC again briefly referred to its findings related to the lawfulness of initial detention, allegedly based on a reasonable suspicion and pursuing a legitimate aim, and found no violation of freedom of expression either. In this way, the TCC neither carried out a meaningful assessment of “lawfulness” nor the necessity or proportionality of interference with the journalists’ rights under Articles 5 and 10 of the ECHR. Rather, while the TCC paid lip service to standards by stating that compelling reasons and robust control are required in reviewing detention and interference with journalists’ freedom of expression, it gave no meaningful application of these principles in the cases before it.

This fragmented approach is also seen in the case of *Osman Kavala*, in which the applicant was accused of organising and financing the Gezi protests of 2013 on the basis of his activities as a civil society leader. The TCC endorsed the prosecutor’s perception that the Gezi protests had been violent and aimed at overthrowing the Government and that the applicant took part in activities and meetings contributing to this aim (para.70 of the judgment). The five dissenting judges challenged the majority on the ground that no evidence showed substantiating links between the applicant’s conduct and alleged violent incidents referred to by prosecuting authorities, and that the necessity and proportionality of his continued detention had not been justified. One dissenting judge also noted that although the Gezi protests were made the subject of numerous legal actions, no court decision or administrative actions had ever referred to them as “violent rebellion” aiming at overthrowing Government by force. However, the TCC decided by a majority that the applicant’s pre-trial detention was lawful based on a reasonable suspicion and was proportionate given the difficulties in investigating terrorism related offences.

Even though the applicant's pre-trial detention was still continuing at the time of the judgment and that he had not been brought before a judge during the 17 month-long investigation period, the TCC asserted that a compensatory remedy, which does not capable of securing a release of a detained person, was an appropriate remedy which must have been exhausted for this allegation, finding this complaint inadmissible. However, the ECtHR already found that the compensatory remedy available under Turkish law was ineffective in cases where pre-trial detention was ongoing (see for example, *Sahin Alpay v. Turkey*, § 82). Moreover, with regards the right to an effective challenge against continued detention, Article 5(4) of the ECHR requires an oral hearing of a detainee by a judge at reasonable intervals (see *Çatal v. Turkey*, § 33; *Altınok v. Turkey*, § 45). Similarly the applicant's complaint about the lack of access to the case file, including evidence brought against him by prosecuting authorities during the investigation phase, was not found to be an impediment depriving him of an opportunity to effectively challenge his continuing detention and refute the allegations against him, contrary to the principles of adversarial procedure and equality of arms, applicable as far as possible in the context of detention proceedings . In the end with this approach and reasoning, the TCC may have legitimised the ongoing detention and prosecution of the applicant, causing more harm than good in the given case.

Now the ball is again with the ECtHR. Close attention will be paid to the Court's approach on these important cases representing blatant violations of right to liberty, freedom of expression, and association. In the Osman Kavala case it may be too late to reverse the severe chilling effect already spread by these prosecutions, making any attempt to provide reparation or *restitutio integrum* impossible for the victims. But the cases certainly highlight the urgent need to critically assess and discuss the role of national and international human rights mechanisms, including the timeliness and quality of their approaches, if effective protection is to be provided not just in theory but also in practice in the future.