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APPLICATIONS LODGED AFTER JULY 15 AND THE MULTI-STANDARD APPROACH OF THE ECtHR

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REPORT PLAN

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INTRODUCTION

Compared to other international judicial institutions, the European Court of Human Rights is a much more advanced structure, especially in terms of recognizing the right to seek remedy for violations of rights and freedoms through individual application. This institution has an acquis of jurisprudence exceeding more than half a century.

Since Turkey is one of the Founding Members of the Council of Europe, it is one of the countries that recognize the right of individual application to the ECtHR. However, due to its anti-democratic approaches in the balance between state authority and personal freedoms, it has managed to be the subject of more than half of the case-laws of the ECtHR.

However, the witch hunt, with its official name the investigations and trials, which started after July 15 in its full definition, has put the ECtHR under a workload that it cannot cope with by means of its current structure. This was clearly confessed in the Turan and Others v. Turkey judgment rendered regarding the judges and prosecutors.

The pressure of the excessive workload this investigations and trials put on the existing workload of the ECtHR, which is already not few, can be understood. However, the ECtHR's application of its experience gained in 90’s to the applications in this process without any updates, and the multiple standards created as a result of this approach, cannot be understood and accepted.

While the ECtHR followed an approach that almost justified the allegations voiced by the government and pro-government media in the trials after July 15about the people who worked in public institutions and were the subject of the thesis that they were the FETÖ/PYD members that the organization sneaked into the state structure. This is an approach that almost justified the allegations. The ECtHR follows a more protective attitude against the leftist movements such as Gezi protests and the members of the Kurdish political movement who have been the victim of the current government plan that can be summarized as “If I had already started a war why not destroy all my opponents”.

Even a complete book could be written about this allegation, but since our aim is only to draw attention, we will be content with some examples based on concrete ECtHR decisions.

DIFFERENCES BETWEEN THE LANGUAGE USED IN THE ALLEGED FETO/PYD APPLICATIONS AND THE APPLICATIONS OF THE OTHER VICTIMS

In the application regarding Abdullah Öcalan, the leader of the PKK (Kurdistan Workers' Party), which does not reject the armed struggle as well as the political struggle and expresses this policy clearly in its founding texts and congresses (ÖCALAN v. TURKEY (Application no. 46221/99), the following expression was used in order to introduce the applicant: "The applicant was born in 1949 and is currently being held in İmralı Prison (Mudanya, Bursa, Turkey). Prior to his arrest, he was the leader of the PKK (Workers' Party of Kurdistan)."

While the definition of "the terrorist organization" about this structure is not even expressed as the government's allegation, its statements especially in the applications of the public officials about the FETO/PYD organisation claim, is as follows:

> *"8. The day after the attempted military coup, the national authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in Pennsylvania (United States of America) and considered to be the leader of an organisation referred to by the Turkish authorities as "FETÖ/PDY" ("Gülenist Terror Organisation/ Parallel State Structure")". CASE OF BAŞ v. TURKEY (Application no. 66448/17)*

Even the words preferred in the expressions used differ.

For example, While in the cases like the above-mentioned Öcalan decision, the government's theses were exlained with the expressions such as "**government contested**" or "**Government argued**", a jargon stating that the content of the statement was not accepted, in cases of the other party statements such as, "**government submitted**" or "**government stated**" "government expressed", a jargon reveals that the defense contents are adopted was preferred.

While in the ordinary applications, the government's claims are sometimes summarized with a general statement in a single paragraph or couple of paragraphs, such as **"the government opposed the applicant's claims",** But in decisions such as Alpaslan Altan or Hakan Baş, all the events were included in the judgment as a complete copy-paste version of the government's defense. The ECtHR while establishing the reasoning part of its judgments examines the explanations within the framework of information and documents that may be of interest to the applicant's situation and does

not include any unnecessary statements. However, it is understood from these decisions that the ECtHR fell into the trap of defense of the Government which had nothing to do with the applicant, also transferred its defenses to the decision.

ECtHR PAYS A PARTICULAR ATTENTION TO KEEP VIOLATIONS PERSONAL IN FETO/PYD APPLICATIONS AND AVOIDS RENDERING STRUCTURAL VIOLATIONS JUDGMENTS.

The ECtHR, although it is well aware that in these cases, especially the cases of public employees it is faced with an even more serious version of the Streletz, Kessler and Krenz case, about how the laws and practice in force in post-WWII East Germany differed and the administrative practice constituted serious violations of rights, it avoids approaches that hold the State structurally responsible. However, the establishment of the Criminal Magistarices of Peace, statements made by the political power's representatives that “criminal magistracies of peace will finish this job”, the president's design of the HSK(Council of Judges and Prosecutors) completely in line with by the political power’s will, the establishment and activities of the Unity in the Judiciary Platform which are the unprecedented violations of judicial independence in the world history, all of which have taken place before the very eyes of the ECtHR. While the ECHR ignores these serious violations, it can take the issue of judicial independence in Poland, which is also a member of the Council of Europe, in the same date range, which cannot be compared to Turkey, as a violation of the right to a fair trial in an ordinary commercial case. When the basic point that the relevant decision considers a violation of fair trial is examined, the position of the ECtHR judgment against the situation in Turkey particularly against the fact that the judiciary is completely under the control of the executive, the arrest and trial of thousands of judges and prosecutors on the allegation of terrorism will be better understood.

ADVANCE PHARMA SP. Z O.O V/POLAND

As in the present case, a procedure for the appointment of judges, which reveals the undue influence of legislative and executive powers on the appointment of judges, is itself incompatible with Article 6 § 1 and as such, compromising the functioning and legitimacy of a court of judges so appointed is a fundamental issue that adversely affects the whole. constitutes an irregularity

Therefore, the violations in the procedure for the appointment of seven judges to the Civil Chamber, including the three judges took place in the applicant company's case, were so severe that they undermined the very essence of the applicant company's right to "a court established by law".

(c) Whether allegations of the right to a "court established by law" had been effectively reviewed and resolved by national courts – NCJ's decision 330/2018 was subject to judicial review by the Supreme Administrative Court, which on 6 May 2021 will set a judgment annulling that decision. However, the actions of the Polish authorities in clear violation of national law had rendered this judicial review meaningless and devoid of any purpose. Moreover, having regard to the Government's decision to reject the non-exhaustion objection, a constitutional complaint against the rules applicable to the appointment procedure in these particular circumstances, as it lacked a sufficiently realistic prospect of success, the Court found that no remedy had been offered to the applicant company.

In General: The composition of the Civil Chamber of the Supreme Court, which examines the case of the applicant company, is not a "court established by law".

ATTITUDE AGAINST ALLEGED VIOLATION OF ARTICLE 18

The article that prohibits the application of the allowed limitations in the Convention with an intention other than the purpose of the Convention. In this process, this application was applied only to Demirtaş and Kavala. In the dissenting opinion in case of Ahmet Hüsrev Altan regarding this issue, Judge Kuriş drew attention to this issue and publishes a list showing the applications in which this article was not applied although requested. Accordingly, the following decisions were made regarding Article 18.

- ✓ Ahmet Hüsrev Altan v. Turkey (no.13252/1, no violation)
- ✓ Şahin Alpay v. Turkey (no. 16538/17, no further examination needed)
- ✓ Atilla Taş v. Turkey (no. 72/17), no review needed)
- ✓ Mehmet Hasan Altan v. Turkey (no. 13237/17, no further examination needed)
- ✓ Sabuncu and Others v. Turkey (no.23199/17, no violation)
- ✓ Şık v. Turkey (no. 2) (no. 36493/17, no violation)

In the decision of the ECHR Grand Chamber, Selahattin Demirtaş v. Turkey (No. 2); It was held that there had been a violation of Article 18 taken in conjunction with Article 5 of the Convention. The ECtHR first found that the applicant's detention was not based on "reasonable suspicion" and then examined whether, in the absence of reasonable doubt, there was an identifiable overriding purpose under Article 18 of the Convention. The ECtHR stated that there were reports about the applicant, who is a politician, prepared by the prosecutor's office and sent to the Parliament, but that no action was taken in this regard until the elections of 7 June 2015, when the ruling party lost its majority in the Parliament for the first time since 2002, until a political tension started between the President and

the ruling party. He noted that the applicant did not face the risk of being deprived of his liberty until the end of the “solution process” and the President's statements on 28 July 2015, for example, that “HDP leaders will pay the price”, the number and pace of investigations against the applicant started to increase. In addition, the Court noted the timing of the applicant's arrest and continued detention, noting that the applicant was deprived of his liberty during two critical election campaigns, the referendum of 16 April 2017 and the presidential election of 24 June 2018. The Court also referred to the circumstances of the applicant's second detention. The applicant was arrested for the second time on 20 September 2019 as part of a separate investigation initiated in 2014 regarding the events of 6-8 October 2014. A day later, the President made a statement to the press, accusing the applicant of being the "murderer" of 53 people, and also said that he was following the process and that they would "not let go" of the two co-chairs. In this context, the apparent purpose of the applicant's re-arrest was to investigate the events of 6-8 October 2014. However, the ECtHR considers that the local authorities did not seem to be interested in the suspicion that the applicant had committed the alleged crimes five years ago, on 6-8 October 2014, and instead they kept the applicant in prison and so prevented him from engaging in political activities. In addition to these, the ECtHR stated that the findings of the Venice Commission regarding the independence of the judicial system in Turkey, and in particular the High Council of Judges and Prosecutors, are of particular relevance to its examination under Article 18, noting that threats to the independence of the judiciary create an environment where court decisions can be influenced. In line with this information, the ECtHR considers that it has been determined beyond any reasonable doubt that the applicant's detention during the two critical election campaigns, particularly the referendum and the presidential election, pursued an overriding purpose of suppressing pluralism and limiting the freedom of political discussion, which is at the core of the concept of a democratic society. It therefore held that there had been a violation of Article 18 taken in conjunction with Article 5 of the Convention.

In the Osman Kavala decision, in which the ECtHR gave a violation of Article 18 against Turkey; Kavala's arrest was not based on reasonable suspicion, the detention was not based on acts that would be criminalized under local law, the acts subject to the accusation would be considered as the exercise of the rights protected in the Convention, and there were many years between the events that formed the basis of the detention and the decision to arrest, After the President's two speeches on 21 November and 3 December 2018, in which the applicant's name was clearly mentioned, it is important that the applicant was accused (being targeted) after the applicant was openly accused during these two speeches, It has been determined that there is a clear connection between the speeches and that he had been accused three months after the said speeches and the wording of the criminal charges in the indictment; It concluded that the measures complained of in the present case

had a hidden purpose beyond reasonable doubt, that this situation constituted a violation of Article 18, and that the secret purpose in question was to stifle the applicant's voice. In addition, the Court considers that the measures applied to the applicant may have a deterrent effect on the activities of human rights defenders in the country. The restriction on the applicant's freedom has purposes other than the purpose of bringing himself before the competent judicial authority on the basis of reasonable suspicion that the applicant has committed a crime, as stipulated in Article 5/1-c of the Convention. For these reasons, it has been decided that there has been a violation of Article 18 of the Convention in conjunction with Article 5/1–c of the Convention.

Apart from Turkey's decisions, the ECtHR is generous in finding violations of this article. For example, the Grand Chamber of the ECtHR, in the Navalnyy v. Russia decision, decided that the right to freedom and security (Article 5 of the ECHR), the freedom of assembly and demonstration (Article 11 of the ECHR) and the limitation of Article 18 of the ECHR were violated because they had political aims. The applicant, Aleksey Navalnyy, is a famous Russian political activist, opposition leader, anti-corruption campaigner and blogger. The applicant, Navalnyy, was arrested 7 times during different public actions between 2012 and 2014. The ECtHR concluded that there had been a violation of Article 5, as Navalnyy was arrested 7 times and detained 2 times. According to the same decision; In order for an intervention to prevent assemblies and demonstrations to be considered reasonable, the intervention must have a "legitimate aim", in particular, to prevent crime or to protect the rights and freedoms of others. But the 5th and 6th captures lack the mentioned purpose. The ECtHR has stated that a certain tolerance should be shown against peaceful demonstrations even if they are unauthorized, and that criminal sanctions should not be applied against people who participate in peaceful demonstrations. In its complaint under Article 18, the Court took into account in particular the 5th and 6th arrests which lacked a legitimate aim. According to the Court, the police specifically targeted the applicant during the arrests that took place in a short period. The Court noted that the increasing hardening of the authorities towards the applicant and his becoming a target were in line with the general trend continuing to suppress the opposition. According to the Court, these restrictions affect not only the applicant, but also opposition activists and supporters, and most importantly, they damage democracy, which is the essence of social organization. The Court determined that the 5th and 6th arrests had an ulterior purpose, namely "to suppress the environment of political pluralism, which is part of a democratic political regime based on the rule of law". For these reasons, the ECtHR has decided that there has been a violation of Article 18 along with Articles 5 and 11.

In its decision, the ECtHR, Navalnyy v. Russia (No. 2), stated that the purpose of keeping the applicant under house arrest with restrictions on internet use, communication and communication

rights was to reduce the applicant's social activities, including organizing protests and participating in protests, in connection with Article 5 of the Convention. It held that there had been a violation of Article 18.

However, for example, all of the ECtHR applications made by İlhan İşbilen, who was both a journalist and a former AK party deputy, resulted in a refusal, including an application for interim measures due to serious illness under Rule 39 and still he has been able to find a place for himself only within the scope of Yağcı and 245 Others/Turkey applications regarding unlawfull detention.

REGARDING THE DIFFERENCES OF JUST SATISFACTION PART OF THE DECISIONS

Although decisions made within the scope of just satisfaction are not a measure of the seriousness of the violation, they can be taken as an indicator. In this context, There is a significant difference between the decisions regarding non-pecuniary damage especially in the violation decisions made within the scope of FETÖ/PDY investigation and prosecution processes, for example; Ahmet Altan 16000 Euros for moral compensation, Nazlı Ilıcak 16000 Euros for non-pecuniary damage, Şahin Alpay 21.500 Euros for non-pecuniary damage, Alpaslan Altan 10.000 Euros for non-pecuniary damage, Hakan Baş (6000 Euros for non-pecuniary damage and 4000 Euro legal costs). The decision of the ECtHR on this issue, which is completely thrown in the towel, is the decision of Turan and Others issued about a group of judges and prosecutors (5000 Euros, the sum of all without making any division as pecuniary, non-pecuniary damages and litigation expenses).

Another contradiction under this title, as we have mentioned before, is when the applicant is a journalist or someone who is known for another reason or has a public or international figure, the approach to the ECtHR differs. One of the examples of this is the violation decision against Taner Kılıç, the head of Amnesty International in Turkey, which was given in recent days. In this decision, while it was deemed sufficient for Kılıç to work as an associate in a lawyer's office to establish a causal link between the claim for pecuniary damage and his detention, this link could not be established for the vice president and members of the Constitutional Court and hundreds of judges and prosecutors. The relevant paragraph of the judgment expressed this situation as follows:

> *173. In the present case, the Court reiterates that it concluded that the findings of a violation of the Convention stem mainly from the decisions to extend the applicant's detention. Therefore, there is a causal link between the wrongful arrest of the person concerned and the alleged loss of income.*

> *The Court further notes that the Government did not dispute the authenticity of the payrolls provided by the applicant, but contested the existence of a causal link, usually by contesting the amount claimed under this head. It is also indisputable that the applicant works as an associate lawyer in a company with a minimum monthly salary. The Court therefore considers that the applicant must have suffered loss of income as a result of his unjustified detention (see, mutatis mutandis, Assanidze v. Georgia [GC], no. 71503/01, § 200, ECHR 2004-II). Consequently, it awards the applicant EUR 8,500 in pecuniary damage.*

Since these differences are felt even within the Court, the most conscientious objection on this issue was made by Judge Kuriş in the dissenting opinion in the decision of Turan and Others.

Judge Kuriş also states that not deciding on other application articles also deprives Turkey of the chance to take measures in domestic law or practice before further violations are brought before the ECtHR in these matters. The applications made after 15 July were defined as "tsunami" by Judge Kuriş. Judge Kuriş states that the statement "did not find it necessary to examine other violations" especially in terms of the wording of the decision, causes the perception that other violations are not fundamental violations, but this is not true. One sentence of his in particular summarizes the main disappointment caused by this decision.

> "*There is a risk that some may read this judgment, by which so many complaints of so many applicants have been denied examination, as a signal that a member State can escape responsibility for violating the Convention en masse, since the Court may be flooded with complaints against that State to such an extent that it becomes unable to cope with them and decides not to examine them.*
>
> *To be frank: if a regime decides to go rogue, it should do it in a big way. And if responsibility can be escaped by "doing it big", why not give it a try*?" P.38

In addition, he accepts responsibility as one of those who caused the situation in this decision by not being able to reach the content of the file in the Hakan Baş decision and the complaints about the peace judges not being considered appropriate, by not objecting to it, although expressing this in this decision will not have a legal consequence, it is a conscientious relief for him.

> "*Finally, I seize this opportunity to admit that today I would also differently assess some of the other complaints in Baş, namely those under Article 5 § 4, regarding the restriction of Mr Baş's access to the investigation file and the alleged lack of independence and impartiality of the magistrates' courts.*

Of course, this confession is post factum, but still offers some relief." P.44

In Turan and Others decision, the Court made a choice between its procedural priorities arising from its workload and Universal Human Rights. This approach applies both to the failure to deal with all complaints and to the amount of compensation awarded, which is officially called just satisfaciton. As such, the result was neither "fair" nor "satisfactory".

As the examples were studied above, we regret to express that the policies adopted by the The Court of Human Rights of this ancient continent, whose memories of the sufferings of the Second World War and the violations of rights in that period are still fresh, are not an approach that definitely fits with its historical mission.