

TURKEY REPORT

# November 2016

**Tony Fisher**

## TRIAL OF KURDISH LAWYERS - ISTANBUL 14<sup>th</sup> November 2016

### Background to this case

- For the last five years the Human Rights Committee of the Law Society of England and Wales has been observing the trial of 46 mainly Kurdish lawyers who have been on trial in Istanbul, Turkey. In November 2011 mass arrests of Kurdish and Turkish lawyers took place in raids carried out simultaneously in many Turkish cities and provinces. The lawyers have been charged with terrorist offences related to their representation of Abdullah Ocalan, the leader of the PKK. For previous reports in relation to previous hearings see [here](#)
- The trial has continued through a period of substantial political and social changes within Turkey, perhaps the most significant of which was a failed attempted coup which took place in July 2016.
- On 14<sup>th</sup> November 2016 I attended the latest of these hearings in the central criminal court in Istanbul. This report will provide an update on the latest political and social position and the rule of law position in Turkey since the attempted coup, and confirm the latest developments in the KCK lawyers' trial.
- As with all previous hearings an international delegation of lawyers attended the hearing, this time consisting of lawyers from France, Switzerland, Holland, Germany, Italy and the UK. About 30 lawyers in all attended, the majority being from France and Italy.

### The hearing on 14<sup>th</sup> November 2016

The hearing took place in Court 19 at the Central Criminal Court. It had previously been adjourned after a reference to the Constitutional Court to determine the compatibility of the procedure adopted with the constitution. In a somewhat

tortured judgement on 7<sup>th</sup> April 2016 the Constitutional Court decided that the current court retained the right to repeat any procedural steps taken by the previous court and the existence of this discretion allowed them to proceed without there being any constitutional irregularity.

On this occasion there were three new judges and a new prosecutor, bringing the total number of different judges who have dealt with the matter since inception to approximately 15. The principle thrust of the submissions made was that the original prosecutor and principal judge who had been involved throughout the proceedings to date were both Gulenists who had pursued the trial in collaboration in order to discredit the ruling party's attempts to pursue a peace process. Complaint was made that the file was a mess, and that the new prosecutor should examine the evidence afresh. There were also allegedly parallel investigations which should be examined for other evidence.

Surprisingly, and for the first time in the five year history of the case, it appeared that the new prosecutor was prepared to accede to these representations and the trial was adjourned to 9<sup>th</sup> March 2017.

### **The Social and Political background**

Concerns with regard to the general background surrounding the independence of the judiciary were already rising prior to the attempted coup which took place on 15<sup>th</sup> July. Changing regulation which put more and more power in relation to the appointment and disciplinary procedures concerning judges had been introduced in 2014.

#### *The attempted Coup*

An attempted military coup on the night of 15 July left 241 casualties and 2,196 people wounded. The Turkish government succeeded in overcoming the coup attempt. The

Turkish Grand National Assembly held a special session on 16 July and adopted a declaration approved by all parties represented in Parliament. The government attributed the organisation of the coup attempt to the Gülen movement.

### *State of Emergency*

On 20<sup>th</sup> July a state of emergency was declared across Turkey for three months, further extended for another three months on 3<sup>rd</sup> October. Significant legislative amendments have been introduced by decree. Turkey notified the Council of Europe of a derogation from its obligation to secure a number of fundamental rights protected by the European Convention on Human Rights. Following the coup attempt, very extensive suspensions, dismissals, arrests and detentions have taken place over alleged links to the Gülen movement and involvement in the attempted coup. These measures have affected the whole spectrum of society with particular impact on the judiciary, police, gendarmerie, military, civil service, local authorities, academia, teachers, lawyers, the media and the business community. Multiple institutions and private companies have been shut down, their assets seized or transferred to public institutions. During the week prior to the hearing some 370 NGO's and trade unions had their activities suspended for three months, including four lawyers organisations.

### *Dismissal of mayors and deputy mayors in SE Turkey*

In September 2016 28 mayors and some 80 Co-Mayors in mainly Kurdish South Eastern cities were removed arbitrarily and replaced with government appointed "trustees." Government agencies claimed that they were suspected of links to the outlawed Kurdistan Workers Party (PKK) and/or the Gulenist movement. This led Turkish Nobel prize winning writer Orhan Pamuk to describe Turkey as a regime of Terror. "In Turkey, we are progressively putting behind Bars all the people who take the liberty of voicing even the slightest criticism of the government."<sup>1</sup>

### *Removal of parliamentary privilege and arrest of HDP leaders*

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<sup>1</sup> <http://www.bbc.co.uk/news/world-europe-37333041>

Further attacks on democracy had already commenced before the attempted coup. After a constitutional amendment on 12 April 2016, on 20 May 2016 the Grand National Assembly of Turkey voted to strip over a quarter of the country's MPs of their immunity. This became possible with the joint efforts of an anti-Kurdish nationalist alliance formed between the ruling AKP party and the Nationalist Movement Party (MHP). The Republican People's Party's (CHP) leadership also supported the so-called "immunity bill" while at the same time declaring it to be anti-constitutional. As a result of the passing of the bill prosecutions have been brought against 139 MPs most of whom are Kurdish MPs representing the Kurdish Peoples' Democratic Party (HDP). A report by the European Commission for Democracy through Law (the Venice Commission) published in October 2016 was highly critical of this move.

In early November 10 MPs who were all leading figures in the HDP were arrested. HDP joint leaders Selahattin Demirtas and Figen Yuksekdag were accused of spreading propaganda for militants fighting the Turkish state and being members of a terrorist organisation. The arrests caused substantial unrest in the south-eastern city of Diyarbakir and further demonstrations in Ankara, Istanbul and other cities. All of the politicians denied links to the PKK. The arrests were condemned by Germany and the EU.<sup>2</sup>

### *Moves towards executive presidency*

Recep Tayyip Erdogan the president of Turkey has long coveted an executive presidency of the kind forbidden by the constitution. Steps taken to jail the HDP's allies in the press and to isolate and subdue the Kurdish heartland in south-east Turkey by detaining mayors, cutting off the Internet and flooding the streets with police have been seen by many as part of a "road map" towards the adoption of a new constitution. The attacks on HDP follow a broader purge that has seen more than 100,000 security personnel, civil servants and others dismissed or detained in

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<sup>2</sup> <http://www.bbc.co.uk/news/world-europe-37875605>

the wake of the failed coup. Analysts expect a new constitution to be drafted by January 2017 that is likely to give the president powers to chair Cabinet meetings and introduce legislation. If Parliament passes it, a nationwide referendum would be held to approve the charter.<sup>3</sup>

## **Rule of Law concerns since the attempted coup**

### *Arrest of the judges and prosecutors*

In the days and weeks following the attempted coup, 3,508, i.e. one fifth of the total number of judges and prosecutors were suspended by judicial ruling body (HSYK) and 3,390 subsequently dismissed. 2,386 judges and prosecutors have been detained: 2,229 of first instance, 109 from Court of Cassation, 41 from Council of State, two members of the Constitutional Court, and five members of the HSYK.<sup>4</sup> The magnitude and rapidity of the measures taken raise questions on criteria applied. These large-scale dismissals as well as large-scale recruitments of new judges and prosecutors raise a serious challenge to the performance and independence of the judiciary. Following the mass dismissals of judges and prosecutors in the aftermath of the attempted coup, the appointment of new recruits in large numbers within two weeks has raised concerns about the selection procedure and their professional quality.

### *Emergency Decrees passed under the state of emergency -in particular concerning access to lawyers*

Following the coup attempt of 15 July, as stated above, a state of emergency was declared on 20 July across Turkey for three months. It was extended for another three months on 3 October. Decrees curtailing fundamental rights have been passed, including new rules surrounding pre-trial detention and freedom of expression. Security forces can now retain suspects in custody for up to 30 days pre-charge and

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<sup>3</sup> <https://www.ft.com/content/c4489616-a4f5-11e6-8898-79a99e2a4de6>

<sup>4</sup> EU Accession Report 2016 para 2.3

[http://ec.europa.eu/enlargement/pdf/key\\_documents/2016/20161109\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_turkey.pdf)

deny access to lawyers (on the decision of the prosecutor) for up to 5 days after arrest. Many lawyers described to us the practices now adopted including:-

- recording all interviews with lawyers (both video and audio);
- restricting access to one hour per week with a maximum of three lawyers;
- Confiscation of written notes made by lawyers at the end of each interview. The notes are then passed to the prosecutor and the judge of execution with the rest of the police evidence to be returned two weeks later;
- limited disclosure or in some cases no disclosure of the evidence against defendants on the basis of “confidentiality” of the prosecutors file.

Turkey notified the Council of Europe of its temporary suspension of the ECHR, in line with its Article 15 derogation provision. Apart from those rights such as the right to life under article 2 and freedom from torture and inhuman treatment under article 3, the Turkish Constitution lists inviolable rights that cannot be suspended under the state of emergency, including the right to life, integrity of corporal and spiritual existence, protection from retroactive criminal laws, and the presumption of innocence. Many allegations of serious violations of the prohibition of torture and ill-treatment and of procedural rights were reported in the immediate aftermath of the attempted coup of 15 July. The extent of the restrictions against legal counsel and the wholesale violation of legal professional privilege appear to be in clear breach of a number of ECHR provisions and could and should lead to further applications to the ECtHR over the coming months.

#### *Freedom of Expression – Cumhuriyet*

After the hearing I attended with some of the international delegation the offices of Cumhuriyet. Cumhuriyet is the oldest newspaper currently published in Turkey and was established immediately after the birth of the Turkish Republic. On the same day a Petition had been presented at the central criminal court protesting against the prosecution and arrest of 7 board members and 3 lawyers acting for the paper. The

journalists present explained the difficulties under which they now work and the pressure they now felt not to speak with a critical voice. Immediately after their own board members were arrested the HDP leaders were arrested. In the press release issued on the day the petition was presented to the court it was stressed that all citizens now have no guarantee of their security. The situation was not confined to journalists and lawyers. They felt that there was no justice, democracy or freedom. A leading paper, Zaman (accused of having links with the Gulenists), had been closed shortly before my previous visit to Turkey in March 2016. The charges against the board members of Cumhuriyet accused the paper of having links with Zaman (and consequently the Gulenists) because two headlines reporting events in the two publications were the same. At the same time they have been accused of having a link with the PKK because of the critical news they shared concerning the government's practices surrounding the curfews imposed in South East Turkey. Two entirely inconsistent allegations it appears. They also protested that the use of decrees under a state of emergency to pass what look like becoming permanent laws reflected the practice which took place after the military coup in 1980. They said that the population generally felt helpless and intimidated.

The general background which our meeting with the journalists at Cumhuriyet evoked reflects the findings of the EU Commission Staff Working document on Turkey's proposed accession to the EU which was published in October 2016. They described the situation as follows:-

“A high number of arrests, hearings, detentions, prosecutions, censorship cases and layoffs [of journalists] occurred, as the Government kept the media under heavy pressure. An increasing number of international journalists were deported or refused entry to the country. Frequent threats and various types of intimidation from state and non-state agents against journalists and media outlets continue to be a serious concern. Investigative journalists face charges for reporting on the activities of law enforcement agencies or intelligence services. A number of physical attacks on media outlets and journalists took place and no major progress was made on identifying perpetrators related to old cases of killings and assaults on journalists, including from the 1990s. The closure of media outlets and the appointment of trustees to control media groups, leading to a change in editorial policy, restrict pluralism and the right of citizens to be informed and intimidate other media outlets. Prior to the 15 July coup attempt, there were 36 journalists in prison, many of whom were charged with crimes under the anti-terrorism law. In the aftermath of the coup attempt, by the end of

October, some 90 journalists were arrested bringing the total to more than 130. Decrees taken under the state of emergency also brought the closure of some 170 media outlets.”<sup>5</sup>

*Pressure on Civil Society – the closure of 370 civil society organisations and rising pressure on lawyers*

We also met with members of the lawyers’ group OHD or Lawyers for Freedom. Theirs was one of three independent lawyers groups whose activities had been suspended during the previous week. The organisation had represented the rights of Kurdish nationals, as well defending labour rights and pursuing cases where claims of torture had been made. They had also been active in investigations concerning arbitrary killings which had taken place in SE Turkey. All of the lawyers we met were subject to a number of criminal investigations arising out of their work. Board members had an average of five investigations underway with one being the subject of no less than 20 investigations.

*Rising concerns with regard to torture in custody*

Increasing concerns have been expressed with regard to the resurgence of torture in Turkish prisons during the period since the attempted coup. In October 2016 the NGO Human Rights Watch published a major report which documented examples of such practices. During the course of their investigations they stated that:

“Lawyers, medical personnel, recently released detainees and family members of detainees described to Human Rights Watch 13 cases of torture and ill-treatment of detainees to varying degrees of severity. The cases of abuse documented by Human Rights Watch include allegations of the use of methods ranging from stress positions and sleep deprivation to severe beating, sexual abuse and threat of rape. Eight of the cases describe abuse that took place in the immediate aftermath of the failed coup attempt before the emergency decrees were published. In five cases the alleged abuse took place after the adoption of the emergency decrees.”<sup>6</sup>

One of the most worrying elements of the alleged torture was the re-emergence of certain methods of torture such as anal rape with truncheons, which have not been

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<sup>5</sup> EU Accession Report 2016 referred to above para 2.4

<sup>6</sup> Human Rights Watch Report – A Blank Cheque - <https://www.hrw.org/report/2016/10/24/blank-check/turkeys-post-coup-suspension-safeguards-against-torture>

alleged in Turkey since the early 1990's. A form of torture designed to cause maximum pain (the lawyers we met described recent cases where internees required intestinal surgery on their release to repair the physical damage caused) and where disclosure is also culturally painful. The prohibition of torture and ill-treatment and procedural rights of suspected and accused persons need to be fully observed in law and in practice, in line with Turkey's international obligations, in particular the European Convention of Human Rights.

## **Conclusion**

These are indeed dark times for Turkey which appears to be gripped in a methodical spiral towards oppression with all fundamental rights and freedoms compromised. It is not clear how much longer there can be said to be any effective respect for the rule of law, the independence of the judiciary or the rights of lawyers who are trying to uphold criminal and constitutional norms. For the most part these are now being ignored by the state. The international community of lawyers needs to redouble its support for those left fighting at the front line attempting to protect their clients' legitimate rights.

**Tony Fisher**

**Chair, Human Rights Committee**

**Law Society of England and Wales**

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