

# TURKEY REPORT

December 2017

**Tony Fisher**

## **TRIAL OF KURDISH LAWYERS - ISTANBUL 5<sup>th</sup> December 2017**

This report will deal with:-

- The hearing in the KCK lawyers case which took place on 5<sup>th</sup> December 2017
- Changes in the legal and political background since March 2017.
- The effect on Civil Society, and on the work of lawyers
- Access to lawyers, conditions in custody and in the justice system, with particular reference to the position of lawyers.
- Domestic Remedies in Turkey since the attempted coup and the role of the ECtHR

### **Background to this case**

- For the last six years the Human Rights Committee of the Law Society of England and Wales has been observing the trial of 46 mainly Kurdish lawyers 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 reports in relation to previous hearings see [here](#)
- As previously reported, the trial has continued through a period of substantial political and social changes within Turkey. In July 2016 an attempted coup, which has been attributed by the Turkish authorities to members of the Gulen movement, failed. Subsequent to this a state of emergency was declared which has continued uninterrupted since then. Wide executive powers have been ceded to the President who has made use of these to arrest tens of thousands of alleged supporters of the coup.
- On 5<sup>th</sup> December 2017 I attended the latest of these hearings in the central criminal court in Istanbul. This report, as with previous reports, 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. Whilst in Turkey I had discussions with many Turkish lawyers who continue to

operate in worsening conditions, many of whom have spent periods in detention, and most of whom are themselves the subject of ongoing criminal prosecutions or investigations.

- As with all previous hearings an international delegation of lawyers attended the hearing. However, the delegation was much reduced. I was the only lawyer from the UK attending, four Dutch lawyers from the NGO Lawyers for Lawyers attended, and a number of French lawyers. A reduced party of about 15 lawyers in all attended. In previous years approximately 25-30 lawyers have been present.

### **The hearing on 5<sup>th</sup> December 2017**

The hearing took place in Heavy Penal Court number 19 at the Central Criminal Court.

During the course of this now very lengthy trial a total of approximately 20 judges have presided. Some of those judges are now in custody themselves, as is the original prosecutor. On this occasion, the case was listed after a long morning list. The judges indicated to the representing lawyers that they did not know the case and did not want to deal with the applications which had been prepared by the defence team. So, the case was adjourned again to May 2018.

### **Changes in the legal and political background since March 2017.**

The state of emergency continues in Turkey. As reported in March 2017 President Erdogan pressed ahead with his proposed reforms to the constitution. They were passed by a very narrow majority in April 2017. The new powers, which will give the president very wide executive control, will come into effect after the next election in 2019. However, the continuation of the state of emergency means that President Erdogan already has these powers. The reforms have been widely criticised as undemocratic.

### **Lawyers and Civil Society**

As previously reported, in all nearly 400 civil society organisations have been permanently shut down since the attempted coup, including a number of lawyers associations.<sup>1</sup> As I had

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<sup>1</sup> <https://www.amnesty.org.uk/press-releases/turkey-mass-ngo-closure-attempt-permanently-silence-civil-society-criticism>

done in March 2017, I again visited one of the longer established NGO's which remains in operation - The Foundation for Society and Legal Studies - TOHAV. This organisation has been supporting the lawyers' case and has many volunteer lawyers who have been providing their services pro-bono to the defendants from the outset. Case work is not their main focus however. They have been funded for their project work by the UN and the EU amongst others. I also met with lawyers who were previously members of two other lawyers groups closed by emergency decree, namely OHD and CHD. A recent project has been started by TOHAV to monitor prosecutions arising out of the sharing of social media posts. I was told that tens of thousands of cases have been commenced over the last 12-18 months against individuals who have shared posts which may have been critical of the government or of the President. The accused are charged with four offences in all including making propaganda for terrorists and insulting the President. Many judges are now reported to be imposing extended sentences for up to 8 years imprisonment for such offences which have normal "tariff" sentence of 1yr 6months. For a single offence of "insulting the President" the sentence is normally 10 months in prison.

There were many common themes in my discussion with lawyers from these varied organisations which illustrate both the continued and rapid erosion of traditional protections of the rights of lawyers to properly represent their clients, and the lack of respect for due process in the administration of the criminal justice system in Turkey. The complaints can be grouped under various headings:-

### **Access to Lawyers**

Although some of the restrictions on access to lawyers whilst in custody have been slightly relaxed since January 2017, the lawyers explained the difficulties they are experiencing in attending clients to take instructions and to take statements:-

- They described a sort of "psychological war" being waged to keep them away from their clients. Clients have been transported to far away prisons with defendants in the same case sometimes being scattered to separate distant prisons;
- Appointments, when made, are often delayed. Delays of up to 8 hours were reported so that lawyers having travelled then have to wait for a further 8 hours to see clients for very limited periods of time;

- Appointments are being cancelled or postponed because of last minute unavailability of police to supervise visits (including sudden “calls to prayer” when the visits are due to take place).

### **Treatment and conditions in Custody**

Worrying statements were also made by lawyers concerning the increased prevalence of torture in police custody, including torture of arrested lawyers. There also appears to be a growing reluctance on the part of prosecutors and judges to record allegations of torture or allow medical evidence to be adduced. I was shown photographs of one woman who had been beaten at a recent protest against violence against women. She had been distributing leaflets when she was attacked. She was taken to the prosecutor and subsequently to a judge both of whom refused to write down her complaint.

These allegations mirror allegations made in recent reports published by other international human rights NGO's.<sup>2</sup>

Although the increased incidence of torture in custody was originally confined to cases described as “political” because they arose from the attempted coup, I was told that the general aura of impunity which the police now felt as a result of additional protections they have been given since the state of emergency have encouraged them to feel that similar treatment can be meted out to “ordinary” criminals.

Whatever the justification or lack of justification for their arrest and detention, it is true that tens of thousands of additional prisoners are now populating Turkey's jails. They were described as overcrowded, insanitary, understaffed and under resourced.

### **Due Process and the Role and position of Lawyers Generally**

It was estimated by those I spoke to that as a result of dismissals of prosecutors and lawyers arising out of the “purges” which have taken place since the attempted coup, some 5,000 inexperienced and in some cases inadequately trained judges are now in post. They are

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<sup>2</sup> See for instance the Human Rights Watch report published in October 2017 <https://www.hrw.org/news/2017/10/12/turkey-renewed-torture-police-custody-abductions>

trying to deal with the tide of prosecutions which are taking place of perceived political opponents. They are operating within a regime which is spreading fear of any opposition and their independence is clearly compromised. It is not surprising in these circumstances that the quality of justice being delivered is being questioned. The Law Society has received letters directly from prison from some of the judges who have been arrested and detained complaining of their treatment. There are other worrying aspects of the present situation which merit discussion:-

- Those lawyers who remain determined to represent clients charged with these offences, and who have the tenacity to carry on in such difficult circumstances, are further hampered by government attempts to prevent them from doing so. I was told of a list of some 120 lawyers, many of them the most prominent human rights defenders, who are prohibited from taking on cases involving terrorist allegations because they have themselves been subject to investigations and prosecutions in relation to similar offences (whether or not their guilt has been established and whilst they still enjoy full practicing rights). Older statutory provisions requiring supervision of any searches of lawyers' offices or homes are also being ignored and new regulations dispensing with these protections have been introduced.
- Delays in dealing with cases are becoming longer. Many reported that after arrest, some six or more months are passing before any indictment is prepared or defendants are first brought before the courts. During this period bail is being routinely denied. The quality of these indictments is also in question in many cases. I am aware myself from correspondence and communication with other Turkish lawyers that in some cases, despite being named as defendant in cases, and despite prosecutors demanding heavy sentences against lawyers, the indictments when they emerge contain no allegations against the lawyer in question. Often the charges are then dismissed. However, in other cases the prosecutions are continuing. Some indicated to me that they feel that this is part of a conscious policy of intimidation of lawyers so that they will no longer take on cases or represent clients who are accused of political crimes.
- Case files are routinely being classified as secret because of alleged "security issues" in order to prevent lawyers gaining access to the evidence against their clients. Even in cases where the classification is justified certain documents should be released, but

again I was told that the prosecutors and police were routinely refusing to release them, making the preparation of an adequate defence impossible.

- In certain cases, where the taking and lodgement of a statement from a client has proven impossible due to the restrictions imposed, cases are nevertheless proceeding to judgement without there being on file any statement of the defendant's position at all. A clear breach of the principles of natural justice.

The systemic persecution of lawyers in Turkey has been summarised in the final report of the Rapporteur to the Committee on Legal Affairs and Human Rights at the Council of Europe on the case for drafting a European Convention on the profession of lawyer. She comments as follows:-

“According to the CCBE, by 13 September 2017, 1343 lawyers were subject to criminal prosecution and 524 had been arrested since the coup. These included eighteen lawyers who had been representing the university lecturer and teacher dismissed under the emergency decree-laws, 31 Further mass arrests of lawyers accused of links with the Gülen movement include those of nineteen lawyers in Kahramanmaraş province, eleven lawyers in Denizli province, arrest warrants for 62 members of the Istanbul Bar Association, 22 lawyers in Izmir (including Taner Kilic, chair of Amnesty International Turkey), four lawyers and members of the Human Rights Association (IHD) in Mardin province; 22 lawyers in Antalya and 50 lawyers in Istanbul. On 9 May 2017, Mustafa Özben, a lawyer and academic at a university shut down by the Turkish government on account of alleged links to the Gülen movement, was abducted in Ankara, following which his wife filed a complaint with the Turkish Constitutional Court alleging that he was kidnapped by the Turkish intelligence services. In July 2017, 3 lawyers were imprisoned for up to 12 years on charges relating to links to the Gülen movement. The CCBE has referred to a statement by the Adana Bar Association expressing its members “‘fear’ and ‘concern’ about possible reprisals against lawyers..., the decision made by some not to provide legal assistance to people detained in relation to the failed coup, and the negative treatment they faced from the police and prosecutors if they represented the detainees.” There have also been mass arrests of lawyers associated with the Kurdish community: recent examples include nine lawyers arrested along with 210 other members of the HDP party, the arrest and physical abuse of a lawyer as one of 568 persons detained as part of an investigation into the HDP, and the arrest of nine members of the Libertarian Lawyers’ Association who were representing the 46 lawyers already on trial for participating in the defence of Abdullah Ocalan. Even more disturbing was the 2015 killing of Tahir Elci, head of the Diyarbakir Bar Association and a leading Kurdish lawyer, who was

shot dead at a press conference by unidentified gunmen, a few weeks after a criminal investigation for 'terrorist propaganda' had been opened against him.

16. More generally, the decree laws introduced under Turkey's state of emergency reduced the rights of the defence: as noted in the explanatory report to Assembly Resolution 2156(2017) on the functioning of democratic institutions in Turkey, "access by detainees to a lawyer could be restricted for up to five days, and there were also restrictions on the right to a lawyer of their own choice or their right to confidential conversations with their lawyers. In addition to these legal hurdles, [...] lawyers also face a series of practical obstacles when visiting their clients, such as restricted visiting hours, or the obligation to make an appointment with their client. While it is obvious that the scale of the arrests and detentions have put an extra burden on the police and the justice system which have limited logistical capacities, this should not be at the expense of the most basic rights of the defence, such as access to a lawyer." (It should be noted that the restriction on access to a lawyer during the first five days of detention was lifted on 23 January 2017.)"<sup>3</sup>

## **Domestic remedies and the ECtHR**

As previously reported, in January 2017 President Erdogan introduced a new appointed body (the Commission on Examination of the State of Emergency Procedures) to deal with claims arising out of the emergency decrees.<sup>4</sup> The seven-person body, appointed for the most part by the President or those who he controls has not yet made any decisions on the tens of thousands of claims submitted. It would appear on any rational measure that domestic remedies are not providing effective redress for wrongs committed since the attempted coup. Since the Catal decision referred to in my previous report numerous other claims pursued by those affected by the emergency decrees have also been determined to be manifestly ill founded. Some cases concerning detained journalists and Kurdish politicians have now passed the admissibility stage and have been communicated to the government of Turkey. Many third party interventions are being made in relation to these by UN special rapporteurs and the Council of Europe Human Rights Commissioner. The Council of State

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<sup>3</sup> For the full report of the Rapporteur: Ms Sabien Lahaye-Battheu see <http://website-pace.net/documents/19838/3254453/201712112-convention-avocats-EN.pdf/3b3cd985-6329-4fc1-a914-99425477714>

<sup>4</sup> Decree Law no. KHK/685. For a full transcript of the Decree Law in English see [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2017\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2017)014-e)



or “Danistay” – the supreme administrative court, has been named (rather than the Commission) as competent to deal with cases involving judges and prosecutors but again, to date, it has made no relevant decisions.

Notwithstanding the apparent blatant disregard the state has shown to normal principles underpinning the rule of law in a democratic country, the European Court of Human Rights has so far consistently denied any remedies to those individuals petitioning the court to protect their rights under the Convention. To date the court has held the line that domestic remedies remain effective in Turkey and that they have to be exhausted.

Important questions need to be answered concerning the ability of the court in Strasbourg to respond adequately to the present crisis in Turkey. In particular:-

- A. “does the court provide an effective remedy now for the citizens of Turkey after the attempted coup?” and;
- B. “should the court adopt a different approach, and if so, what should it be?”

An event has been arranged in collaboration between the German DAV, the Law Society of England and Wales, the Observatory for Lawyers in Danger, and Lawyers for Lawyers to highlight the pressure under which the Strasbourg court is operating and to ask these important questions. The event will be held in Berlin on 5th March 2017 and a distinguished panel of speakers has been invited to debate these questions and the wider role of the court in exerting pressure on Turkey to comply with its obligations under the Convention. A report will be published after the conference to attempt to bring further profile to the important issues raised, and further debate and attention to promote some positive change.

## **Conclusion**

The legal and political environment in Turkey has changed (for the worse) yet again over the last nine months as the case of the KCK lawyers continues to run on. Now in its seventh year there is no end in sight.

The defendant lawyers and those who defend them become ever more isolated, threatened and oppressed whilst the spotlight of international attention to their plight seems to be dimming. Impunity breeds impunity. The light needs to be shining brightly if any force for positive change is to be engendered.

**Tony Fisher**

**Chair, Human Rights Committee**

**Law Society of England and Wales**

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[\(TFisher@fjg.co.uk\)](mailto:TFisher@fjg.co.uk)