



# DARK SIDE OF THE MOON

INTERNETIONAL  
CONFERENCE ON LAW

**“The normalization of the state  
of emergency and the situation of  
judiciary in Turkey”**

**7-8-9**  
**SEPTEMBER 2018**



Istanbul Bar Association Orhan Adli Apaydın Conference Hall

*İstiklal Caddesi Orhan Adli Apaydın Sokak Taksim / İST*



Adana Bar Association - Ankara Bar Association - Bursa Bar Association - Diyarbakır Bar Association - Gaziantep Bar Association - İstanbul Bar Association - Mersin Bar Association  
Sakarya Bar Association - Şırnak Bar Association - Tekirdağ Bar Association - Trabzon Bar Association - Van Bar Association - The Association of Democratic Judiciary - Judges' Syndicate  
European Democratic Lawyers - European Association of Lawyers for Democracy and Human Rights - Day for Endangered Lawyers Foundation - International Democratic Lawyers Association



# Analysing the state of emergency through international law

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# Introduction

- Welcome and thanks to all organisers, participants and speakers, in particular the Istanbul Bar Association
- This conference is a necessary contribution of lawyers to help the victims of human rights violations and of crimes against humanity
- The conference brings together lawyers, judges, academics, medical doctors and journalist. Together they will discuss how to rebuild the judicial system and democracy
- This conference can help to end impunity
- This conference can be a step to „normalize“ the human rights situation in Turkey and in Europe

# The speaker

- Thomas Schmidt
- German labour lawyer and trade union lawyer from Düsseldorf
- Secretary General of the European Association of Lawyers for Democracy and World Human Rights (ELDH)
- Member of the Executive Committee of the German Association of Democratic Lawyers
- At the conference together with Professor Bill Bowring (the ELDH President) and Fabio Marcelli (member of the ELDH Executive Committee) among the founders of ELDH, and several other ELDH colleagues from Austria, Greece, Italy, Spain

# European Association of Lawyers for Democracy and Human Rights (ELDH)

The screenshot shows the homepage of the European Association of Lawyers for Democracy and Human Rights (ELDH). The browser window displays the URL [ejdm-online.de/home/](http://ejdm-online.de/home/). The page features a dark blue header with a menu (Datei, Bearbeiten, Ansicht, Chronik, Lesezeichen, Extras, Hilfe) and a search bar. Below the header, there is a navigation bar with links like 'Meistbesucht', 'Erste Schritte', 'Feed ansehen', 'Leo dictionary', and 'Facebook - Anmelden...'. The main content area is divided into several sections:

- ELDH European Association of Lawyers for Democracy & World Human Rights**: A large red logo on the left and a list of translations for the acronym (EJDM, EJDH, EJDH, EGDH) on the right. A stamp graphic says 'WITH LAWYERS IN 21 COUNTRIES'.
- Equality, Privacy, Social Rights, No Torture, No War, No Racism, Peace, Civil Rights, Democracy, Self-Determination of Peoples, Human Rights, Rights of Migrants**: A central banner with various human rights terms in different fonts and colors.
- HOME, ABOUT, DECLARATIONS, EVENTS, CAMPAIGNS, PUBLICATIONS, LINKS, SEARCH**: A vertical navigation menu on the left side.
- Statements**: A section with a date (04.09.2018) and a headline 'INVESTIGATION AND PROSECUTION OF THE CRIMES COMMITTED AGAINST THE PALESTINIAN PEOPLE'. It includes a link to 'Download the full letter' and a 'Read more >>' link.
- Conferences and other activities**: A section with event dates (01.01.18 to 31.12.18), location (Ankara, Gümüşhane, Istanbul, Munich, Rabat, Kiev), and a headline 'Political trials against lawyers and political activists in Turkey and other countries'. It includes a 'Read more >>' link.
- DARK SIDE OF THE MOON 2 - The normalization of the state of emergency and the situation of judiciary in Turkey**: A section with a date (07.09.18 13:30 to 09.09.18 18:00), location (Istanbul), and a headline. It includes a 'Read more >>' link.
- ELDH demands the immediate release of CHD lawyers from prison**: A section with a date (14.06.2018) and a headline. It includes a 'Read more >>' link.
- IS THE STATE OF EMERGENCY INQUIRY COMMISSION, ESTABLISHED BY EMERGENCY DECREE 685, AN EFFECTIVE REMEDY?**: A section with a date (29.05.2018) and a headline. It includes a 'Read more >>' link.

The footer of the page shows the website address [www.eldh.eu](http://www.eldh.eu) and a Windows taskbar at the bottom with the date 06.09.2018 and time 22:35.

# European Association of Lawyers for Democracy and Human Rights (ELDH)

- ELDH was founded in 1993
- members in 21 countries, also in Turkey (CHD, ÖHD)
- The activities of ELDH concern human rights, democracy, rights of refugees, anti-racism, the defence of the rights of lawyers, the future of the European Union, the defence of workers and trade union rights, peace
- what is ELDH doing: conferences, tribunals, trial observations in different countries, factfinding missions, statements, visit of prisoners
- Together with other lawyers' associations in Europe and elsewhere we organize once a year the Day of the endangered lawyer on 24 January. On this occasion demonstrations will be held outside the embassies of the respective country or some other appropriate place. Turkish lawyers were the most active in several different cities. Next year it will be dedicated again to the Turkish lawyers.

# ELDH – cooperation with Turkish lawyers

- All the time we had a close and good relationship to Turkish lawyers and lawyers' organisations
  - First members from Turkey: Hasip Kaplan, Eren Keskin
  - Later ÇHD and ÖHD, both have been banned by decree. These bans have no legal basis and should be lifted immediately. That could be one sign of normalization.
  - Already 4 conferences in Turkey: Istanbul, Diyarbakir, Ankara, Izmir (many conferences in other cities: Athens, Rome, Florence, Paris, Madrid, Berlin, London or Belfast,
  - Cooperation with the Istanbul Bar Association: meeting with former Istanbul Dean Prof. Dr. Ümit KOCASAKAL. Lawyers demonstration the evening before the first CHD lawyers trial started on 24 December 2013
  - Turkey is not only on our agenda when we are in Turkey. Conferences in Berlin, Düsseldorf, Paris, Brussels. Many of our national organisations do the same.
  - Fact finding mission in Diyarbakir in January 2016 during the curfew
  - Trials observations i.e. :
    - trial against 46 lawyers of the Asrın Law Office (going on since 2012)
    - trial against 22 lawyers, members of ÇHD (the first ÇDH lawyers' trial) (going on since 2013)
    - trial against nine board members of the Istanbul Bar Association, among them the former Dean Mr. Kocasakal (all of them acquitted)
- Many lawyers' organisations and bar associations in Europe and elsewhere have been participating in these observation.
- second ÇHD lawyers trial which starts next Monday on 10 September, with 20 accused lawyers, among the ÇHD president, Selçuk KOZAGAÇLI. He is also member of the ELDH Executive Committee.

# The second CHD trial starts next Monday

- 20 defendants, among them the CHD president
- Opening on 10 September 2018, in Istanbul
- 17 of them in pre-trial detention in 7 different prisons, some of them 6 hours away (in spite of the decision of the court in the first CHD trial to release all of them)
- Mr. Selçuk KOZAGAÇLI and Ms. Yaprak Türkmen in Silivri in solitary confinement for 9 months already (Art. 7 of the ICCPR, Art. 3 ECHR ?)
- I could visit Mr. KOZAGAÇLI in prison together with Robert Sabata in company of a Turkish lawyer
- 8 of the defendants are already accused in the first CHD lawyers trial with more or less the same charges (ne bis in idem, Art. 14, 7 ICCPR, and Art 4 ECHR ?)
- Hearing by videoconference. Court changed its order only on Tuesday
- Opportunity for the court to demonstrate that the state of emergency is over, and that normalization has begun: release from pre-trial detention, termination of the proceeding.



# Legal framework to analyse the state of emergency and the state actions

## 1. International law

- Turkey is a state party to the nine core international human rights treaties: CCPR, Torture, treatment of prisoners, Enforced Disappearance,
- Standard setting tools: Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers, Guidelines on the Role of Prosecutors
- Turkey is not a state party to the Rome Statute of the International Criminal Court

## 2. European law

- human rights treaties to which Turkey it is bound as a Member State of the Council of Europe: ECHR, ...

# State of emergency -

## - information of the UN and the Council of Europe

- On 21 July 2016, the Government of Turkey notified the United Nations Secretary-General of its derogation from several of its obligations under the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, derogation from obligations contained in articles 2, 3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27.
- At the same time Turkey has submitted a formal notice of derogation from the European Convention on Human Rights (ECHR) as foreseen under Article 15 of the Convention.

# Derogations from state obligations

- derogations allowed during the state of emergency concerns a great number of human rights (effective remedy, liberty, respect for the inherent dignity of the human person, liberty of movement, expulsion of foreigners, fair trial, freedom of expression, right to peaceful assembly, freedom of association, minority rights)
- the derogation allowed is not unlimited. It is only allowed to the extent strictly required by the exigencies of the situation and only for the necessary time to overcome the emergency

# State of emergency – the impact on human rights and the rule of law

1. **The annual UN report for 2017 on the impact of the state of emergency on human rights in Turkey**, including an update on the South-East
  - UN High Commissioner for Human Rights has not been granted access to South-East Turkey in June 2016. The High Commissioner was therefore not willing to request access to the rest of the country unless the initial request was acceded. This has not been done. The High Commissioner initiated human rights monitoring based at the headquarters of OHCHR in Geneva: interviews with victims etc.
2. **Council of Europe – Commissioner for Human Rights**
  - He does not mention any problems visiting Turkey. His last visit has taken place in April 2016, also to Diyarbakir.
3. Many NGO analyses: Amnesty, HRW, ELDH, AED, ...

# Observations during the state of emergency

## UN High Commissioner for Human Rights

- **constantly deteriorating human rights situation**, exacerbated by the erosion of the rule of law.
- many **derogations have gone far beyond the necessary**, and unrelated to the state of emergency
- **Bypassing parliamentary scrutiny and circumventing the Constitutional Court's appeal procedure** Declaration of decrees without involving the parliament by the issued emergency decrees
- **Lack of human rights safeguards**
- **Impunity of and lack of accountability** by affording legal, administrative, criminal and financial immunity to administrative authorities acting within the framework of the decrees.
- **Decrees are not subject to judicial review** due to the decision of the Constitutional Court of 4 November 2016
- **Decrees regulate various matters unrelated to the state of emergency**, for instance the closure of civil society organizations (among them also the two member organisations of ELDH: ÇHD and ÖHD/ÖHP) and medical centres, which seems to indicate that they are being used to limit various legitimate activities.
- **Interference of the executive with the work of the judiciary** and curtailment of parliamentary oversight over the executive branch of Government
- **Arbitrary detention** of people arrested under state of emergency measures
- **Torture and ill-treatment during pretrial detention**
- **Restrictions of the rights to freedoms of expression and of movement**
- **Arbitrary expropriation of private property**
- **Methods of collective punishment targeting family members of individuals** suspected of offences under the state of emergency
- **Mass dismissals and mass arrests of civil servants, teachers, judges, prosecutors**
- **Mass arrests, prosecution and prison sentences of lawyers, journalists**
- **Mass cancellation of passports**

# Additional observations during the state of emergency

## Council of Europe – Commissioner for Human Rights

- **Restrictions to the right of access to a lawyer**, including the confidentiality of the client-lawyer relationship for persons in detention, which could affect the very substance of the right to a fair trial, and restrictions to visitation rights (Article 6);
- **The scope of the Decree**, which concerns not only the coup attempt, but the fight against terrorism in general; both for physical and legal persons, punishments foreseen in the Decree apply not only in cases of membership or belonging to a terrorist organisation, but also for contacts with such an organisation (Articles 1, 2, 3 and 4);
- **Simplified procedures to dismiss judges**, including judges of the Constitutional Court and Supreme Courts, without any specified evidentiary requirements (Article 3);
- **A simplified administrative procedure for the disbanding of further organisations**
- **A simplified administrative procedure to terminate the employment of any public employee** (including workers), with no administrative appeal and no evidentiary requirements (Article 4);
- **Automatic cancellation of passports** of persons being investigated or prosecuted, without court order (Article 5);
- **Cancellation of rental leases** between public bodies and persons considered to be a member of or in contact with a terrorist organisation, a measure that is likely to affect not only the suspects but also their families (Article 8).

# The end of the state of emergency – normalization ?

- The mass trials against lawyers and other members of the opposition started long before the declaration of the state of emergency and up to now they still continue.
- The peace negotiations were also stopped before the attempted military coup.
- The violent break down of the Kurdish opposition in South-Eastern Anatolia started also before the coup
- The State of Emergency Procedures Investigation Commission had reported on June 22 this year that the number of appeals to the commission regarding the decree decisions has reached 108,905, and 21,500 of them were finalized, among which only 640 were approved to be objected.
- OHCHR concludes that the Commission of Inquiry for State Emergency Practices cannot be considered as an independent body that will guarantee full respect of due process. It regrets the lack of appropriate remedies to address thousands of dismissals of employees, liquidation of thousands of private entities, including health and education institutions, as well as trade unions.
- It seems unlikely that the ECtHR will be able to help them in due time
- Those who are kept in pre-trial detention, or who serve long term prison sentences, among them also members of parliament
- Many decrees will remain in force, in particular those non related to the state of emergency
- Criminal and financial immunity granted to administrative authorities will remain
- The draft for a new anti-terror bill will keep some national emergency provisions for another years and we don't know what is going to follow.

# Human rights mechanisms by international and European law

- United Nations human rights mechanisms, including special procedures of the Human Rights Council and treaty bodies, have regularly raised their concerns with the Government of Turkey through confidential communications, public statements and concluding observations.
- Similar concerns were raised by the human rights mechanisms of the Council of Europe, a large number of international NGOs as well as Turkish civil society and independent media.



# The European Court of Human Rights

- Individual complaints before the ECtHR have only a very small chance of getting accepted.
- In 2017 the Court dealt with 31.053 applications concerning Turkey, of which 30.063 were declared inadmissible or struck out. It delivered 116 judgments (concerning 990 applications), 99 of which found at least one violation of the ECHR.
- None of the requested interim measures was granted.
- The ECtHR can only act after domestic remedies have been exhausted, a hurdle made more difficult with Turkey's establishment of a "State of Emergency Inquiry Commission" in 2017.
- In a conference co-organized by ELDH in February this year the President of the Berlin Bar Association noted that the current state of affairs made it difficult for the ECtHR to gain the trust of Turkey and Turkish citizens. This is certainly true for the great amount of victims of human rights violations.
- another speaker pointed out that the Court is under pressure from the member states to adhere to the principle of subsidiarity
- And one speaker submitted that the ECtHR and Turkish lawyers needed to coordinate and innovate, rather than exclusively relying on previous case law
- In the two cases *Alpay* and *Altan* the Court held that for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness. But most important the court ruled that using one's freedom expression and exercising the right to criticism must not be met with either arrest or conviction. This decision is binding for all Turkish court.

# The International Criminal Court

- Although among the human rights violations committed as a result of the failed military coup and the state of emergency countless crimes will have been committed these are not the „most serious crimes“ (Art. 1 Rome Statute) within the jurisdiction of the ICC.
- For crimes committed in South-East Turkey in 2015 and 2016 prominent lawyers esteem that they are amount to crimes against humanity and war crimes as defined by the Rome Statute.
- In a tribunal organised in Paris in March this year in the tradition of the Russel's Tribunal the judges confirmed this opinion, even though their judgement was not legally binding. It had rather the character of an expert opinion. But it can be serve as a contribution for an investigation of the Prosecutor of the ICC (Art. 15 Rome Statute).
- The PPT was chosen to consider the charges presented by the Prosecution in the absence of other effective remedies
- Turkey did not sign the Treaty of Rome and there is no realistic expectation that the UN Security Council would refer the situation to the International Criminal Court. And also Art. 15 Rome Statute does not apply, because the crimes have not been committed in a state which is party of the Rome Statute.

# The European Union

- The European Union would be able to do more to end this human tragedy in Turkey and to prosecute those who are responsible for certain crimes which have been committed.
- And there was a time when it was actively supporting an development in Turkey to strengthen the rule of law
- Now the European Union has other priorities, such as refugees and economic interests
- The EU – refugee treaty is just one example
- And the governments in several European countries don't respect human rights themselves
- However the least the EU could do is to use its influence to achieve the necessary changes as suggested by the UN and Council of Europe human rights bodies

# Some legal conclusion

- As lawyers we cannot accept that human rights violations and warcrimes have been committed without significant criminal consequences, without compensation for the victims, without fundamental amendments of the law and the constitution
- Turkey must restore the rule of law, release still-detained magistrates and journalists, and lawyers, restore the rights of teachers and magistrates (judges and prosecutors) who have resigned from July 2016, restore freedom of press and information, end the state of emergency and fully implement the European Convention on Human Rights.
- The role of lawyers will be to cast light on the dark side of the moon, to analyse and to pave legal ways for the struggle for rights and freedoms.
- Sometimes lawyers can improve the human rights situation even in small steps . This is also the case for the judges who are in charge of the many trials against lawyers, journalists, judges and political opponents. Now the courts can show their responsibility for the strengthening of the rule of law and the whole judicial system. They can show that the state of emergency is over also on the field of jurisprudence. All these mass trial against lawyers have to be ended, the accused have to be acquitted and compensated.



Istanbul, Istiklal Caddesi. The evening before the first CHD-Trial, December 2013