



**ADVOKATFORENINGEN**  
THE NORWEGIAN BAR ASSOCIATION

**Observation of the  
Ankara 16<sup>th</sup> Penal Court hearing of  
case against former co-leader  
of People's Democratic Party (HDP)  
Figen Yuksekdag, July 4<sup>th</sup> 2017**

**NORWEGIAN BAR ASSOCIATION  
HUMAN RIGHTS COMMITTEE**

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# Introduction

The Norwegian Bar Association was invited by the Turkish political party HDP to observe the trial against their former co-chair Mrs. Figen Yuksekdag. The trial itself was set for July 4<sup>th</sup> 14 p.m. at Ankara 16<sup>th</sup> Penal Court Courthouse. A press and observer briefing was scheduled for 11 a.m. at the day of the trial outside the Constitutional Court in Ankara.

The assignment of travelling to Ankara on behalf of the Human Rights Committee was given to Ms. Maria Hessen Jacobsen, a lawyer practising in Bergen and a member of the Human Rights Committee. Her task was to collect facts, observe the trial and to assess the process against well-established international standards for human rights in criminal proceedings. Although invited by a political party, the Norwegian Bar Association works independently and does not hold or express opinions regarding internal Turkish political matters. The Human Rights Committee is in no capacity connected to the HDP or any other political entity in Turkey.

On July 3<sup>rd</sup> and 4<sup>th</sup> Ms. Jacobsen had meetings with the HDP international relations division. They informed her and other international observers, politicians and journalists of the charges against Mrs. Yuksekdag and the other imprisoned co-leader of HDP Mr. Demirtas.

On July 4<sup>th</sup>, Ms. Jacobsen met with several lawyers working for Mrs. Yuksekdag. Ms. Jacobsen made efforts in obtaining information from state officials and the prosecutor's office, but this had been unsuccessful. Therefore, the report is based on information from the HDP and international press and organs. The Human Rights Committee of the Norwegian Bar Association welcomes information from as many sources as possible, including the Turkish government, in our work on this and other Turkish cases.

After returning to Norway, the observer has downloaded a full copy of the indictment directly from the UPE system. She has based the report on these sources and own observations, along with documents, webpages, articles and reports on matters related to the observation's aim. All sources are mentioned in footnotes.

During her stay, Ms. Jacobsen also conducted a visit to the Human Rights Foundation Turkey.

This report is written by the observer, Ms. Maria Hessen Jacobsen. Her observations and concerns in Chapter 18 have, however, been endorsed by the Human Rights Committee of the Norwegian Bar Association.

Oslo, September 28<sup>th</sup> 2017

The Human Rights Committee of the Norwegian Bar Association

# Case background and charges

In May 2016, a provisional article was added to the Constitution, lifting parliamentary immunity for several PMs. Investigations were ongoing against amongst others the two co-leaders of the HDP. I received a 30 page dossier with details regarding the immunity cases and ECHR submissions from the lawyers at the HDP.

Mrs. Figen Yuksekdag was together with 9 other HDP elected MPs arrested on November 4<sup>th</sup> 2016. The HDP party's other leader Mr. Selahettin Demirtas was also arrested in his home on the same day. 24 pro-Kurdish mayors were at the same time removed from their positions, replaced by appointees of the government. According to Amnesty, internet services like Twitter, Facebook and WhatsApp were temporarily shut down around the time of the arrests<sup>1</sup>.

The accusations against the politicians are in short based on several statements they have made in their capacities as politicians, and they are facing charges for inciting violence and propaganda in support of a terrorist organization<sup>2</sup>. The Turkish state has long accused HDP for being the political wing of the outlawed PKK organization, which HDP denies. In addition, they are charged with being members of a terrorist organization, inciting people to commit crimes, participation in unlawful meetings and demonstrations, and for insulting the Turkish nation. Evidence cited from Mrs. Yuksekdag's speeches include<sup>3</sup>:

- Describing the demonstrations during curfews in Kurdish cities as “resistance”.
- Supporting “democratic self-administration”, a fact which is openly written in HDP's party program.
- Describing the killings of hundreds of civilians in the operations carried out by state security forces as “massacre”.
- Beside this, one of the files is related to the call to protest the siege of Kobane issued by HDP Central Executive Committee on October 6<sup>th</sup> 2014.

Mrs. Yuksekdag's indictment consists of 8 separate files compiled together. Mrs. Yuksekdag is in the current trial facing up to 83 years in prison, while her co-leader Demirtas is facing up to 142 years.

Yuksekdag's elected parliamentary position was revoked together with the forced removal of her membership in the HDP, after she in February 2017 was convicted of making terror propaganda and sentenced to 10 months prison for speaking in a funeral of a “terrorism” suspect in 2013<sup>4</sup>. Mr. Demirtas has been convicted of insulting the Turkish state and was earlier this year sentenced to five months imprisonment. According to the HDP Commission of law she has been sentenced in the following matters:

- In April 2017, she was sentenced 1 year for terrorist propaganda. (She participated in the peace rally in İstanbul.)
- In May 2017, she was sentenced 11 months and 20 days for insulting the President. Then this penalty was turned into a fine.
- In June 2017, she was sentenced 1 year and 6 months for terrorist propaganda. (In 2015 she gave an interview to German television channel Deutsche Welle.)

<sup>1</sup> <https://www.amnesty-usa.org/press-releases/turkey-hdp-deputies-detained-amid-growing-on-slaughter-on-kurdish-opposition-voices/>

<sup>2</sup> <http://uk.reuters.com/article/uk-turkey-politics-kurds-idUKKBN1601KT>

<sup>3</sup> Cited from the document “Call for the main case of Figen Yuksekdag”, prepared by the HDP Foreign affairs Commission

<sup>4</sup> <http://www.aljazeera.com/news/2017/02/hdp-leader-figen-yuksekdag-loses-seat-parliament-170222074518464.html>

## Case background and charges

Yuksekdag has been in custody since she was apprehended in November. She was according to a HDP advisor<sup>5</sup> kept in solitary confinement the first 1-2 months, but has since been able to participate in the prison community. She can receive visits from her family and her lawyers. Mrs. Yuksekdag's conferences with her lawyers have according to the same source for a long period been monitored by a state representative present in the room. After this regime was lifted her conversations are now not monitored in person but still audio recorded. She is allowed some correspondence, but this is censored.

The legal provisions and framework on which many of the accusations are built, are – according to our information – lacking in both clarity and foreseeability. Provisions and decrees criminalizing the promotion of terrorism are seen as examples. These were criticized in November 2016 by the UN special rapporteur on the right to freedom of opinion and expression<sup>6</sup>:

*“It is understandable and often necessary that a Government should restrict incitement to violence. Yet it appears nearly impossible to pin down what it means exactly to ‘promote’ terrorism, and in situation after situation brought to my attention, restrictions seemed unrelated to incitement but rather closely tied to reporting and the public’s right of access to information.”*

In Mrs. Yuksekdag's case, a main charge is membership in a criminal organisation. Article 220 of the Turkish Penal Code sanctions membership in criminal organisations, but include a number of unclear definitions. Of particular concern in the context of freedom of expression is paragraph 8, which provides for imprisonment ranging from one to three years for a person who makes “propaganda” in favour of a criminal organisation or its aims.

<sup>5</sup> The advisor wishes to remain anonymous. The name has been given to the leader of the Human Rights Committee of the Norwegian Bar Association, Frode Elgesem.

<sup>6</sup> <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891&LangID=E>

# Political and legal background

Mrs. Yuksekdag's arrest must be seen in the context of recent Turkish development, both prior to and after the attempted coup in July 2016. The international concerns on freedom of expression in Turkey long predates, however, the attempted coup of 2016.

Turkey has in recent years had to face various major challenges such as the refugee crisis, the attempted coup and terror threats from amongst others the PKK and ISIL. The international community has appreciated the challenges but expressed grave concern about disproportionate counter measures by the Turkish government.

Under president Erdogan's leadership the Turkish government declared a state of emergency on July 20<sup>th</sup> 2016. The following day Turkey notified the European Council of possible derogations from the ECHR, as "*the life of the nation in the meaning of Article 15*" was threatened, forcing Turkish government to take "*required measures*". Article 15 allows member states the right to derogate from the duties of the convention, except from articles 2, 3, 4 (1) and 7. According to article 15, derogation must be "*strictly required*" and not "*inconsistent with other obligations under international law*". Turkey also notified the UN of derogation from the ICCPR, despite clear warnings from several UN Human Rights experts<sup>7</sup>. Both conventions and the Turkish Constitution<sup>8</sup> include a requirement of necessity and proportionality. The measures derogating from the ICCPR must be of an "*exceptional and temporary measure*". A number of decrees were issued, amongst them Legislative decree no. 672 – concerning the dismissal of tens of thousands of civil servants regarded as belonging, affiliated or related to terrorist organization or to organisations, structures or groups which had been found by the National Security Council to engage in activities harmful to the state. Those dismissed can never be reinstated and have had their passports cancelled.

Shortly after the attempted coup over 2,500 judges were dismissed from their positions, to great concern from both Norwegian and international organizations, judiciary associations and Bar Associations<sup>10 11</sup>. See the joint statement signed by the European Association of judges, European lawyers, and the European Federation of journalists, strongly condemning the mass arrests of judges, lawyers and journalists<sup>12</sup>. In December, the European Network of Councils for the Judiciary voted to suspend High Council for Judges and Prosecutors of Turkey (HSYK) from its observer status due to lack of independence from the executive and legislative branch<sup>13</sup>.

<sup>7</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394>

<sup>8</sup> Article 15 of the Turkish Constitution

<sup>9</sup> Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)

<sup>10</sup> <https://www.advokatforeningen.no/aktuelt/Nyheter/2016/juli/advokatforeningen-er-bekymret-for-rettssikkerheten-i-tyrkia/>

<sup>11</sup> <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4c12eee3-bf1d-47cc-9080-9e4464d4bb85>

<sup>12</sup> [http://www.juristforbundet.no/Global/Dokumenter/EN\\_%20Joint%20Statement%20Turkey%2005%2004%202017.pdf](http://www.juristforbundet.no/Global/Dokumenter/EN_%20Joint%20Statement%20Turkey%2005%2004%202017.pdf)

<sup>13</sup> [https://www.encj.eu/index.php?option=com\\_content&view=article&id=227%3Ahsyk-suspended&catid=22%3Anews&lang=en](https://www.encj.eu/index.php?option=com_content&view=article&id=227%3Ahsyk-suspended&catid=22%3Anews&lang=en)

## Political and legal background

In the year passed, more than 110,000 people have been detained, out of which nearly 50,000 have been arrested on specific charges<sup>14</sup>. A crackdown of numbers by CNN shows that by April 2017 almost 11,000 police officers and more than 2,500 judges and prosecutors had been arrested. 2,700 journalists had been dismissed since the attempted coup and 179 media outlets had been shut down in 2016 alone. Most recently, several human right defenders including the director of Amnesty International Turkey Idil Eser Ilknur have been arrested. The OHCHR issued July 7<sup>th</sup> 2017 a statement voicing grave concern about the detentions which were deemed to be arbitrary<sup>15</sup>.

OHCHR said that in the context of the state of emergency, the Government seems to have criminalized the legitimate exercise of the rights to freedom of peaceful assembly and association, and freedom of opinion and expression, using emergency decrees that fail to meet international human rights standards. The Human Rights Commissioner of the Council of Europe has expressed several serious concerns regarding the Turkish use of state of emergency legislative decrees<sup>16</sup>.

<sup>14</sup> <http://edition.cnn.com/2017/04/14/europe/turkey-failed-coup-arrests-detained/index.html>

<sup>15</sup> [http://www.un.org/apps/news/story.asp?NewsID=57134#WV\\_vE2iLRNU](http://www.un.org/apps/news/story.asp?NewsID=57134#WV_vE2iLRNU)

<sup>16</sup> <https://rm.coe.int/t/16806db6f1>

# Constitutional reform

On April 16<sup>th</sup> 2017 a referendum was held in Turkey on constitutional reform which significantly increases the powers of the president, turning Turkey from parliamentary to a presidential republic. Thus, the President now has the power to issue decrees, declare emergency rule, appoint ministers and top state officials, and dissolve Parliament. The IBA described this as “an attempt on Erdogan’s part to legalise the de-facto powers he has assumed since last year’s failed military coup.”<sup>17</sup>

On the issue of judiciary independence after the reform IBA further wrote:

*“A major concern this reform package prompts in Turkey and abroad is the changes in the structure of the High Council of Judges and Public Prosecutors (HSYK), as well as the independence of the judiciary. The new constitution would allow the President to appoint five out of the 13 members of the HSYK. The rest will be selected through parliamentary majority.*

*The restructured HSYK will have 13 members – down from 22 at present – four of whom will be selected by the President and seven by Parliament on this occasion. In practice, however, the President is, in fact, appointing six members, since he also has the right to handpick his ministers under the revised system. The minister of justice and the minister’s deputy join the cohort of 13 members, raising the number of members directly selected by the President.”*

The reform will carry structural changes to the judiciary, which has sparked great concern for its independence.

<sup>17</sup> <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=E648C497-E55C-44EC-933F-AFFC2A8DAD31>



# UN concerns

The concerns of the UN in the past year on Turkey's reactions to the attempted coup are in short<sup>18</sup>:

- Anti-terror legislation and various decrees are used as an excuse to undermine press freedom and freedom of expression, and such laws combined with existing legislation establishes the worst environment for freedom of speech in Turkey in decades.
- Anti-defamation laws are widely used in the same manner, in plain criminalizing use of the right to expression.
- Decrees imposes unnecessary restrictions in right to legal counsel, effective judicial control with detentions, and imposes restrictions in movement through passport seizure.
- The government has arrested large numbers of politicians, journalists, lawyers, and writers based on charges for incitement.<sup>19 20 21</sup>
- The government shuts down media outlets by the hundreds, without judicial review.
- The government's use of blocks and shutdowns of online content is not meeting the requirements of ICCPR articles 19-3 and 20.
- Thousands of academics and journalists have been dismissed on charges not supported by evidence, investigations lack transparency, and the accused are not granted any remedies.
- Persons detained are not informed in a prompt manner of the accusations against them contrary to expressively formulated rights in ECHR and ICCPR.
- Shutdown of NGOs such as crisis centres for women and children, organisations working on LGBT rights increases risks of domestic violence and hate crimes.

Recommendations have been made by several acknowledged international organisations to take immediate action to improve the status for freedom of expression in Turkey today<sup>22</sup>.

<sup>18</sup> <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20892&LangID=E>

<sup>19</sup> Example: Sabuncu and Others v. Turkey (23199/17) – communicated case in ECHR

<sup>20</sup> <http://www.barhumanrights.org.uk/wp-content/uploads/2017/02/BHRC-statement-on-Taraf-journalists.pdf>

<sup>21</sup> <https://www.theguardian.com/world/2016/oct/31/turkey-detains-editor-and-staff-at-opposition-cumhuriyet-newspaper>

<sup>22</sup> Recommendation 2097 (2017) by the Parliamentary Assembly of the Council of Europe, (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23403&lang=en>); Memorandum on freedom of expression and media freedom in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights; Statements by the OSCE Representative on freedom of the media, available at <http://www.osce.org/fom/302351> and <http://www.osce.org/fom/278326>

# HDP targeted

In november 2016 the UN special rapporteur on on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey stated:

*“Of immediate concern is the situation for the HDP and other opposition parties facing, or potentially facing, terrorism-related accusations. On 20 May 2016, the parliamentary immunity of members of parliament was lifted, causing serious concern that criticism of Government may be characterized as promotion of terrorism. Several HDP leaders have been imprisoned on the bases of emergency decrees, while they also face Ministry of Interior charges of making false propaganda. 117 investigations have been initiated recently in addition to 683 existing cases. 500 cases belong to HDP and members of parliament of HDP. The co-chairs of the HDP alone face 103 cases. Since the attempted coup, approximately two thousand members of the HDP have been detained.”*

The current observation is directly linked to the rapporteur’s addressed concern. Mrs. Yuksekdag had her parliamentary immunity lifted, and when sentenced for a few of the charges in February, she had both her status as a MP and her party membership revoked.

# The trial against Figen Yuksekdag – the observation

I was together with several other international observers and journalists denied access to the court hearing. This is unfortunately both my only and at the same time my most valuable observation. (See paragraph regarding this below.) The court's reasons for this seemed to be that we had failed to adequately apply for attendance permission from the Ministry of Justice. The HDP party had in due time sent a list showing international observers<sup>23</sup> to the presiding judge, and our attendance was as such not a surprize. I was told by two of Mrs. Yuksekdag's lawyers that in most previous trials observers had been allowed.

First encounter with trouble of access came as we were bused to the announced press conference, which was scheduled to take place outside the Constitutional Court at 11 a.m. on the day of the trial. About 100 metres from the Court building the buses with lawyers, press, international observers and members of the HDP party were pulled over and we all went outside. We then walked behind Mrs. Yuksekdag's lawyers towards the courthouse. Large groups of policemen were lined up behind riot shields to make up an effective physical barrier. The policemen were heavily armed with automatic weapons, handguns, bulletproof vests and (carrying) helmets, shock grenades and teargas canisters. In the background, nearer to the courthouse armoured riot vehicles (TOMA<sup>24</sup>) were lined up with water and teargas canons mounted on top. One of the HDP party members told me the hoses contain "pepper water", which burns and stings. Mrs. Yuksekdag's lawyers tried to petition to the Constitutional Court but were told the head of the court was abroad.

The lawyers tried to discuss with the police officers, but were told only ten people at a time would be allowed to proceed to the press conference venue, accompanied by a 1-on-1 police escort. Before a new group of ten people would be allowed to enter, the first group would have to return. This made arranging a press conference impossible. After standing around for a while waiting for the situation to be resolved, we were escorted back to the busses and driven to the party headquarter.

I later arrived at the Ankara courthouse, which under emergency decrees was swarming with police officers. Larger groups of police officers were situated both outside and inside the court building. Several anti-riot vehicles were lined up on both sides of the courthouse. Inside the courthouse, I met up with representatives from the Norwegian and Swedish embassies.

The international delegation was led to a courtyard where we got food and water, presumably at the HDP party's expense. Several of Mrs. Yuksekdag's lawyers and MP's and members of the current leadership of the HDP party were present. I talked to a few of the lawyers in Mrs. Yuksekdag's legal team. They described very difficult working conditions for lawyers, prosecutors and judges. They had several colleagues who were detained on reasons the lawyers suspected were constructed to silence the voices of state critics. One lawyer stated that "we risk being imprisoned just for doing our job".

I tried getting two of the lawyers to arrange for an appointment with the prosecutor but this attempt sadly failed for unknown reasons.

<sup>23</sup> As shown in the appendix – the list does not include the embassy representatives

<sup>24</sup> [https://en.wikipedia.org/wiki/TOMA\\_\(vehicle\)](https://en.wikipedia.org/wiki/TOMA_(vehicle))



## The trial against Figen Yuksekdag – the observation

We were continuously updated via lawyers and members of the HDP on what was taking place in Mrs. Yuksekdag's case. At first, we were told she and PMs of HDP refused her attendance by video link, and that she would have to be transported to the court.

A while after we were notified that the judges would most likely not allow international observers. We were not presented with a reason at the time, and were never informed by court officials directly.

After some time, we were informed that a dispute had taken place in the court on the issue of how many lawyers Mrs. Yuksekdag would be allowed to have. The prosecutor had argued that under decree of state of emergency she should only have the right to have three lawyers present. As a reply to my question, one of the lawyers explained that they were not paid by the state nor by the defendant, but had volunteered in large numbers. 78 lawyers were present according to one of them, and more than 1,200 had signed up to represent Mrs. Yuksekdag before the Ankara 16<sup>th</sup> Heavy Penal Court. The question of how many lawyers she could have present was argued on for over an hour, before the judges denied the prosecutor's request.

We were then walked through the building where we met a large crowd of people wanting a seat in the courtroom. The police put up riot shield barricade in front of a corridor and only let through lawyers and a portion of the gathered crowd. The police officers repeatedly denied the international observers access to the corridor, despite the constant pleading by the lawyers and some of the observers.

At about 16 p.m. we were led to another corridor on the other side of the courtroom, and were standing just outside the courtroom doors. A small crowd comprised of lawyers, clerks and HDP members were in this corridor, and the lawyers kept coming out to the corridor providing us with information on the process taking place; the discussion on whether or not to allow observers. I was told that the prosecutor had requested that the judges deny access for the observers. The reasons for this request were first that we had failed to apply to the Ministry of Foreign Affairs, then that we had failed to apply to the Ministry of Justice.

Just after 17 p.m. we were notified by a court employee that the prosecutor had argued that everyone not in the courtroom had to leave the building. The judges had stated that the observers could stay in the corridor until the matter of our attendance was finally decided, but the prosecutor had argued that the judges' jurisdiction was restricted to the inside of the courtroom. Shortly after, the judges decided that five of the observers be allowed in, and the lawyers told us to choose the five. We fairly quickly decided on sending one from each country, but two from France. I was let inside the courtroom together with four others. We were placed on one of the benches in the rear of the room, with a good view of the courtroom. A great number of lawyers and prosecutor employees were discussing in the front of the room whilst the judges for a few minutes had retired to their chambers. The judges then re-entered the room, and shortly after all international observers were told to leave the room. There was some loud arguing by persons whose positions remain unknown to me, and we were led out of the room and the building.



## The trial against Figen Yuksekdag – the observation

Several of Mrs. Yuksekdag's lawyers accompanied us, and I was told by them that the judges had received a phone call from the Turkish Ministry of Justice with the final order to deny our attendance, overruling the judges' decision.

After leaving the building we encountered some minor difficulties, as the police refused our buses to stop to pick us up, sending us back and forth trying to get to them. The buses stopped further along the road and after a good walk we caught up with them.

In the evening, we were told that the court had adjourned without conclusions, setting the next trial date for September 18<sup>th</sup> 2017. According to HDP sources, the judge found reason to prolong the detention based on the strong suspicion of serious crimes and the risk of flight.





# Observations and concerns

Based on our experience from the attempted observation on July 4<sup>th</sup> and the available reports concerning the situation in Turkey, the Human Rights Committee of the Norwegian Bar Association has the following observations and concerns:

Several highly regarded international human rights organs have expressed grave concerns over the last year on the Turkish government's seemingly arbitrary dismissals, detentions and convictions of politicians, journalists, judges, lawyers and prosecutors. The Human Rights Committee of the Norwegian Bar Association shares these concerns, and wishes to express deep concern on being denied observation of a public trial contrary to well established international human rights standards.

Summed up, the Norwegian Bar Association's main concerns in Mrs. Yuksekdag's case are as follows:

- The charges and conviction seems based on law not meeting the required standards of *lex certa*. The ECHR (Grand chamber) has described the requirement of foreseeability in *Vasiliskauskas v. Lithuania* 35343/05 2015:

*“Offences and the relevant penalties must be clearly defined by law (...) This requirement is satisfied where the individual is able to determine from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.”*

- The statements of Mrs. Yuksekdag that make up evidence in the cases against her seems to fall well within the scope of freedom of expression (ECHR article 10, ICCPR article 19 and Turkish Constitution article 26). The detention, conviction and criminal charges against her for these statements constitutes a violation of her freedom of expression as they are not – to our knowledge – proved to be necessary to protect the rights of others, not necessary in a democratic society (ECHR), or necessary for the protection of national security. Neither are the severe violations of Mrs. Yuksekdag's basic rights and freedoms – to our knowledge – proven to be strictly required by the exigencies of the situation (ICCPR article 4 and ECHR article 15). The same applies regarding the freedom of association (ECHR article 11, ICCPR articles 21 and 22 and Turkish Constitution article 33).
- The actions against Mrs. Yuksekdag and her fellow party members must be seen in context of the right not to be accused on account of one's thought or opinions (Turkish Constitution article 25). This right is non-derogable under article 15 of the Turkish Constitution.

- The judiciary does not seem to meet the criteria for independence (ECHR article 6 § 1 and ICCPR article 14 no.1), and there are serious concerns on the separation of powers and the rule of law in Turkey. The ECHR has regard to the following in determining whether a body can be considered independent:

1. The manner of appointment of its members
2. The duration of their term of office
3. The existence of guarantees against outside pressure
4. Whether the body presents an appearance of independence

Neither criteria seem to be met. See sections above on mass dismissals, the constitutional reform's shift of power over the judiciary and the mentioned UN reports. There can be little doubt that there are reasons to fear the objectiveness in the judiciary's examination of decrees of men to whom the judges owe their positions. See also the briefing paper by ICJ 2016.<sup>25</sup> Given that the final order to exclude observers from the trial – as we were told – came from the Ministry of Justice, this action serves as further evidence of the judiciary's lack of independence. In addition to sections above, see the ECHR judgement (Grand Chamber) *Incal v. Turkey* 22678/93 and the recent dismissal of *Mercat v. Turkey*.

- The abovementioned will necessarily have impact on the overall fairness of the trial (ECHR article 6 § 1, ICCPR article 14 no.1 and Turkish Constitution article 36).
- We do not possess sufficient information to draw conclusions on the detention/deprivation of liberty or the conditions of detention itself, but as the charges seem to be based on domestic legislation that does not meet the well established standards and violations of the freedom of expression seems to be unwarranted, the asserted grounds for deprivation are likely to be incompatible with Turkey's international human rights undertakings.
- Provided that the information on supervision of lawyer-client conversations is a fact, this raises deep concerns regarding the overall fairness of the proceedings. Confidentiality between lawyer and the client is fundamental to the effective defence of persons accused. (ECHR article 6 § 3 (c) "practical and effective" legal assistance and ICCPR article 14 no. 3 b and d.)
- Denying access to the venue of the scheduled press conference seemed unnecessary, as the attendees (comprised of journalists, politicians, observers and lawyers) were a peaceful group. The number of heavily armed police forces in riot gear as such seemed disproportionate. The denial of access to the venue seems an unnecessary interference with the freedom of assembly and of expression.

<sup>25</sup> <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

## Observations and concerns

- Denying attendance of international observers causes deep concern. Public criminal proceedings are one of the fundamental guarantees of a fair trial, as it amongst others secures confidence in the courts and the judiciary.

ECHR article 6 § 1 states that “*In the determination of (...) any criminal charge against him, everyone is entitled to a (...) public hearing (...)*”. Exclusion of attendance by press or public may be permitted under article 6 in “*the interest of morals, public order or national security*” or “*to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*”. ICCPR article 14 likewise. Neither exceptions can be relied on in Mrs. Yuksekdag’s hearing. The reasons given for denial of access were lack of necessary applications with state bodies, which is both unnecessary and far from the scope of allowed exceptions.

The “*Trial observation manual for criminal proceedings*” by the ICJ expressly recommends that observers notify state bodies of their intended observation.<sup>26</sup> This was regrettably not the case, but is no legal requirement. Indeed, both the court and prosecutor’s office had to my knowledge been notified of my name, position and organizational affiliation several days prior to the hearing, and the judges had accepted the attendance. The UN General Assembly has expressly recognised the right of trial observers “*[t]o attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments*”.<sup>27</sup>

The hearing had numerous attendees, and to exclude only the international observers on the said grounds renders the decision of denial arbitrary and does little to promote confidence in the judiciary’s independence.

<sup>26</sup> <https://www.icj.org/wp-content/uploads/2009/07/trial-observation-manual-Human-Rights-Rule-of-Law-series-2009-eng.pdf>

<sup>27</sup> Article 9(3)(b) of the UN Human Rights Defenders Declaration

# Footnotes

<sup>1</sup> <https://www.amnestyusa.org/press-releases/turkey-hdp-deputies-detained-amid-growing-onslaught-on-kurdish-opposition-voices/>

<sup>2</sup> <http://uk.reuters.com/article/uk-turkey-politics-kurds-idUKKBN1601KT>

<sup>3</sup> Cited from the document “Call for the main case of Figen Yuksekdag”, prepared by the HDP Foreign affairs Commission

<sup>4</sup> <http://www.aljazeera.com/news/2017/02/hdp-leader-figen-yuksekdag-loses-seat-parliament-170222074518464.html>

<sup>5</sup> The advisor wishes to remain anonymous. The name has been given to the leader of the Human Rights Committee of the Norwegian Bar Association, Frode Elgesem.

<sup>6</sup> <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891&LangID=E>

<sup>7</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394>

<sup>8</sup> Article 15 of the Turkish Constitution

<sup>9</sup> Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)

<sup>10</sup> <https://www.advokatforeningen.no/aktuelt/Nyheter/2016/juli/advokatforeningen-er-bekymret-for-rettssikkerheten-i-tyrkia/>

<sup>11</sup> <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4c12eee3-bf1d-47cc-9080-9e4464d4bb85>

<sup>12</sup> [http://www.juristforbundet.no/Global/Dokumenter/EN\\_%20Joint%20Statement%20Turkey%2005%2004%202017.pdf](http://www.juristforbundet.no/Global/Dokumenter/EN_%20Joint%20Statement%20Turkey%2005%2004%202017.pdf)

<sup>13</sup> [https://www.ency.eu/index.php?option=com\\_content&view=article&id=227%3Ahsyk-suspended&catid=22%3Anews&lang=en](https://www.ency.eu/index.php?option=com_content&view=article&id=227%3Ahsyk-suspended&catid=22%3Anews&lang=en)

<sup>14</sup> <http://edition.cnn.com/2017/04/14/europe/turkey-failed-coup-arrests-detained/index.html>

<sup>15</sup> [http://www.un.org/apps/news/story.asp?NewsID=57134#.WV\\_vEziLRNU](http://www.un.org/apps/news/story.asp?NewsID=57134#.WV_vEziLRNU)

<sup>16</sup> <https://rm.coe.int/16806db6f1>

<sup>17</sup> <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=E648C497-E55C-44EC-933F-AFFC2A8DAD31>

<sup>18</sup> <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20892&LangID=E>

<sup>19</sup> Example: Sabuncu and Others v. Turkey (23199/17) – communicated case in ECHR

<sup>20</sup> <http://www.barhumanrights.org.uk/wp-content/uploads/2017/02/BHRC-statement-on-Taraf-journalists.pdf>

<sup>21</sup> <https://www.theguardian.com/world/2016/oct/31/turkey-detains-editor-and-staff-at-opposition-cumhuriyet-newspaper>

<sup>22</sup> Recommendation 2097 (2017) by the Parliamentary Assembly of the Council of Europe, (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23403&lang=en>); Memorandum on freedom of expression and media freedom in Turkey, by Nils Muiznieks, Council of Europe Commissioner for Human Rights; Statements by the OSCE Representative on freedom of the media, available at <http://www.osce.org/fom/302351> and <http://www.osce.org/fom/278326>

<sup>23</sup> As shown in the appendix – the list does not include the embassy representatives

<sup>24</sup> [https://en.wikipedia.org/wiki/TOMA\\_\(vehicle\)](https://en.wikipedia.org/wiki/TOMA_(vehicle))

<sup>25</sup> <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

<sup>26</sup> <https://www.icj.org/wp-content/uploads/2009/07/trial-observation-manual-Human-Rights-Rule-of-Law-series-2009-eng.pdf>

<sup>27</sup> Article 9(3)(b) of the UN Human Rights Defenders Declaration

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