The Turkish Judiciary's Violations of Human Rights Guarantees

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On 3 December 2019, the European Court of Human Rights (ECtHR) ruled in the case of *Parmak & Bakir v Turkey* that the Turkish judiciary's interpretation of the offence of membership of an armed terrorist organization violated Article 7 of the European Convention on Human Rights, being the absolute right to no punishment without law. Although the case deals with incidents from 2002, it shows how Turkey's post-coup terrorism trials violate Turkey's obligations under the ECHR.

Turkish Legal Framework on Terrorism

After the July 2016 coup attempt, the AKP Government accused the Gülen Movement (GM) of being the mastermind. Since then, 559,064 people have been investigated, 261,700 have been detained, and 91,287 have been remanded to pretrial detention on the accusation of membership to an armed terrorist organisation on the grounds of their alleged link to the GM.

Terrorism and membership of an armed terrorist organization are stipulated in Article 1 of the Anti-Terrorism Law (Law no. 3217), and Articles 314 § 2 and 220 § 6-7 of the Turkish Penal Code (Law no. 5237):

> Terrorism is any kind of criminal act committed by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic, as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, undermining fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health, by using force and violence and methods of pressure, terror, intimidation, oppression or threat. *(Art. 1, Law no. 3217)*
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> Anyone who becomes a member of an (terrorist) organization that is mentioned in the first paragraph of this Article shall be liable to a term of imprisonment of five to ten years. *(Art. 314 § 2, Law no. 5237)*
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> Any person who commits an offence on behalf of an organization, although he is not a member of that organization, shall also be sentenced for the offence of being a member of that organization. *(Art. 220 § 6, Law no. 5237)*
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> Any person who aids and abets an organization, knowingly and willingly, although he does not belong to the structure of that organization, shall also

be sentenced for the offence of being a member of that organization. *(Art. 220 § 7, Law no. 5237)*

Neither the Penal Code nor the Anti-Terrorism Law contain a definition of an armed terrorist organization or the offence of membership. This makes these articles prone to arbitrary application and abuse. Vague formulations of criminal provisions relating to the security of the state and terrorism, and their overly broad interpretation, make all critics, particularly lawyers, human rights defenders, journalists, and rival politicians the potential victims of judicial harassment. The Turkish government has actively used this indistinct area to investigate, prosecute and convict real or perceived opponents. Between 2013 and 2018, 337,722 charges were filed under Article 314 of the Penal Code. Over three quarters of these charges were across 2017 to 2018, showing a substantial increase following the 2016 coup attempt.

Filling Gaps Inconsistently

In the absence of legislated definitions, the Turkish Court of Cassation has attempted to formulate criteria. Regarding membership of an armed terrorist organization, the Court opined that acts attributed to a defendant should show "in their continuity, diversity and intensity" an "organic relationship" with an organization, or should prove that the defendant acted knowingly and willingly within the "hierarchical structure" of the organization. As for the definition of an armed terrorist organization, the following criteria should be met:

1. the group, which has to have at least three members, has to present continuity in time;
2. there should be a tight or loose hierarchical connection between group members;
3. the members should have a common intention to commit crimes;
4. the structure of the group, the number of its members, and the tools and equipment that are at the disposal of the group should be sufficient to commit crimes against the Constitutional Order and State Security.

However, the Court of Cassation has not been consistent in applying these criteria. This inconsistency has been a long-running systematic problem which is detrimental to the rule of law in Turkey; specifically, to the enjoyment of freedom of association, freedom of expression, and the right to liberty. International organisations such as Human Rights Watch and Amnesty International have stated concern about the vague wording and arbitrary use of terrorism charges in Turkey.

The Essence of a Law and the Foreseeability of its Effects

The ECtHR first dealt with this in the 2017 and 2018 cases of *Isikirik v Turkey* and *Imret v Turkey*. The Court decided that Article 220 § 6-7 of the Turkish Penal Code did not afford legal protection against arbitrary interference to the Article 11 right to freedom of assembly and association. An interference constitutes a breach of

Article 11 unless it is, *inter alia*, "prescribed by law" (*Isikirik* § 55, *Imret* § 41). This requires that the law in question be accessible to the accused and foreseeable as to its effects (*Isikirik* § 57; *Imret* § 42-43). In the ECtHR's view, sections 6 and 7 tie the status of membership of an illegal organization to the mere facts of a person having acted "on behalf" of that organization or "aided an illegal organization knowingly and willingly" respectively, without the prosecution having to prove material elements of actual membership. Neither sections define the meaning of "on behalf of" or "aiding knowingly and willingly" (*Imret* § 49). As the ECtHR concluded that Article 220 § 6-7 are not "foreseeable", the resulting interference was not prescribed by law, and accordingly Article 11 of the Convention had been violated (*Isikirik* § 70, *Imret* § 59).

In the recent case of *Parmak & Bakir*, the ECtHR dealt with Article 314 § 2 of the Penal Code, Turkey's main anti-terror provision. The Court examined the interpretation of this provision by Turkish courts in the context of Article 7: no punishment without law.

After summarizing the amendments made to Turkey's anti-terror provisions over 2003 to 2010, the ECtHR concluded that:

> The essence of the offence of membership of a terrorist organization is to join an association whose goal and mode of operation is to resort to the criminal use of force, violence and mass intimidation in order to advance certain political or ideological causes. The fact that the law-makers chose to single out the use of violence as a necessary means with which to commit terrorism… lends support to the conclusion that actual violence, or the intent to use such violence, is central to the definition of the offence (*Parmak & Bakir* § 68).
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> According to the wording of the amended section 1 of Law no. 3713, the act of subscribing to a form of ideology, sharing ideas or combining with others to cultivate an interest in an ideology, is insufficient to qualify as terrorism. It is necessary for the organization to intend to commit crimes by the use of force and violence, which, ultimately, implies a degree of material coercion (*Parmak & Bakir* § 75).

Referring to the facts of the case, the Court summarized that the applicants had been convicted for membership of a terrorist organization for having meetings, disseminating flyers, and possessing legal and illegal periodicals and a manifesto. The organization (BPKK/T) to which the applicants were attributed had not committed a violent act and the BPKK/T had not been previously designated as a terrorist organization.

As such, the ECtHR held that Turkey's domestic courts had unjustifiably extended the reach of the criminal law to the applicants' case in contravention of the guarantees of Article 7. They had interpreted Article 314 § 2 of the Turkish Penal Code beyond the limits of the essence of the offence and outside of what was foreseeable. The judgment of *Parmak & Bakir* regards a 2002 incident, however it may shed light on the ongoing 'FETO' investigations and trials in post-coup Turkey which have involved 559,064 individuals as a suspect thus far. 'FETO' is

the acronym for ‘Fetullahist Terror Organisation’, the term now used by the Turkish Government to describe the GM.

Unforeseeable Twists and Turns

The GM is a faith-based group founded in the 1960s by Fetullah Gülen. The GM and the AKP, including AKP leader Erdogan, were close allies between 2002 and 2013. Erdogan and his ministers praised the GM in public and granted public funds to GM-affiliated education and health institutions. During this period, the GM gained social influence and power. As the Commissioner for Human Rights of the Council of Europe (CoE) put it:

> “There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with the GM, which had a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business.”

Although secular and military elements of Turkey’s regime had been suspicious of the GM, civilian governments had had benign relations with it for decades. And although Fetullah G#len had been a target of legal probes, he was acquitted of all accusations, the most recent in 2008.

The societal position of the GM broke down after the 2013 corruption probe, and its deterioration peaked with the 2016 coup attempt. The AKP then labeled the GM as a terrorist organisation (so-called FETO) and commenced the purge of alleged members and affiliates. With a judgment dated 26/09/2017, the Court of Cassation officially designated the GM as an armed terrorist organization.

Although the Turkish Government argues that the National Security Council (NSC) designated the GM as terrorist organisation on 26 May 2016, i.e., before the coup attempt, this argument does not hold because Law no. 2945 does not empower the NSC to do so. The authority to designate a group as a terrorist organization is exclusively vested in the judiciary as per Article 138 of the Constitution. Apart from that, NSC decisions are classified and the wording of the 2016 NSC declaration was not clear and did not explicitly mention the GM.

Mehmet Yilmaz, President of the Turkish Council of Judges and Prosecutors, in statements dated 22/9/2016, 21/10/2016, and 22/11/2016, acknowledged that there were doubts and controversy in judicial circles regarding how to define the GM. His remarks can be paraphrased as follows: *“There were doubts and controversy as to whether or not the GM was an armed terrorists organisation. On July 15th, it was clearly manifested that it was an armed terrorist organization.”*

Considering all that, it should be concluded that before the 2016 coup attempt nobody could have foreseen the speedy twists and turns of political and judicial opinions on the Movement that one day any slight hint of an association would be regarded as being legally sufficient to press terrorism charges.

Beyond the Essence of the Offence of Membership to a Terrorist Organization

In *Parmak & Bakir*, the ECtHR said that the essence of membership to a terrorist organization is to join an association whose goal and mode of operation is to resort to the criminal use of force, violence and mass intimidation in order to advance certain political or ideological causes. Actual violence, or the intent to use violence, is thus central to the definition (*Parmak & Bakir* § 68).

Within the scope of Turkey's post-coup purge, the FETO-criteria are applied in order to determine GM members to be prosecuted. These criteria include:

1. being a depositor at Bank Asya, the GM affiliated financial instiution,
2. being a shareholder in companies that have been dissolved/seized under the state of emergency for alleged GM links,
3. using the messaging application ByLock,
4. police or secret service reports,
5. analysis of social media activity and websites visited,
6. donations made to relief organistions with alleged GM links,
7. being a resident or student in schools and dormitories that have been closed under the state of emergency for alleged GM links,
8. sending children to those schools that have been closed,
9. subscription to GM periodicals,
10. information received from work colleagues or neighbors,
11. being a manager, employee or member of a trade union, association, foundation or company closed/dissolved/seized under the state of emergency for alleged GM links.

These criteria are clearly nothing but lawful conduct: a lawful transaction, relation, affiliation, connection or membership with an established legal person, or the exercise of the freedom of expression or thought. They by no means fit the domestic framework of terrorism (Art 1 of Law no, 3713), nor do they fit "the essence of the offence of membership to a terrorist organization" (*Parmak & Bakir*). Additionally, the praxis against GM members contravenes Turkey's international human rights obligations such as the right to liberty and freedom from discrimination (see: the UN Human Rights Committee, Opinion No: 2980/2017; the UN Working Group on Arbitrary Detention, 44/2018, 42/2018, 53/2019, 10/2019, 78/2018, 42/2018, 43/2018, 44/2018, 11/2018).

The idea that such criteria would be regarded as evidence as membership to a terrorist organization was, therefore, not foreseeable before the coup attempt. Criminalizing these lawful conducts and relations beyond the essence of the legal provisions on terrorism, the Turkish judiciary infringed the reasonable limits of acceptable judicial interpretation contrary to the guarantees of Article 7 and should be denounced as such by the ECtHR.