

# The verdict against Murat Arslan: A decision in the tradition of political criminal justice in Turkey

by Ingrid Heinlein

On 18 January 2019, the 25th Court for "serious crimes" in Ankara sentenced Murat Arslan to 10 years imprisonment. He was found guilty of being a member of the armed terrorist organisation *FETÖ/PDY* (*Fethullah Terror Organisation/Parallel state structure*). This refers to the *Gülen* movement, formerly known in Turkey as *cemaat* (*the community*). According to Murat Arslan's defence lawyer, his appeal was denied on 18 October 2019 with a short, formulaic explanation. There is still the option of an appeal on points of law. The first instance decision was based on 8 hearings. I participated in 5 hearings for MEDEL and NRV.

Murat Arslan was originally active at the Court of Auditors and became rapporteur at the Constitutional Court on 24.03.2006. In 2015 he was transferred back to the Court of Auditors. He has been in detention pending trial since October 2016. He was the last president of the Association of Judges and Prosecutors *YARSAV*, founded in 2006 and banned 10 years later.

The first-instance verdict is 192 pages long. Former Turkish judges have summarised the main content of the ruling for this article. In addition, the International Legal Assistance Fund: *Jurists for Jurists* had the grounds and the relevant evidence translated into English. The judgment is so extensive because it not only sets out the reasons but also reproduces large parts of the statements of the accused and his defence counsel, the public prosecutor and the significant testimony of the witnesses.

An explanation of the structure and development of the Turkish judicial system is necessary in order to make explicable the statements of the parties to the trial, the testimony of the witnesses and the reasoning of the court. Therefore, the following section not only analyses which considerations and findings of the court are decisive for the conviction and whether they are convincing or plausible, but also, as far as this is necessary for better understanding, the activities of *YARSAV*, the *Gülen* movement, traditions in the Turkish judiciary and interventions of the government and political parties are dealt with.

The fact that Recep Tayyip Erdogan and his government have worked with Fethullah Gülen for a long time is not explicitly mentioned in the ruling. It is indirectly addressed, however, because *FETÖ* is alleged to be an illegal armed terrorist organisation which has given itself the appearance of a legal organisation, and therefore establishing the criminal liability of a member of that organisation would require proof of knowledge both that it was an armed terrorist organisation, and that the member had the explicit intention to serve the terrorist aims of the organisation.

However, the court immediately abandons the knowledge element, as it excludes persons who would have belonged to the hierarchical structure of the *FETÖ*. The affiliation to the hierarchical structure could be concluded from different actions such as the use of the communication service *ByLock*, contact with associations close to *FETÖ*, reading books by Fethullah Gülen, participation in meetings of *FETÖ* members or regular meetings with *FETÖ* leaders. This reasoning is plainly flawed. Why the reading of books by Fethullah Gülen or the contact with associations close to *FETÖ* is proof of membership in this organisation is not discussed. Nor does the court acknowledge the fact that the *Gülen* movement acted at least partially legally and was even courted by the government.

## **Fethullah Gülen as ringleader of an armed terrorist organization?**

Gerhard Schweizer writes in his book "Understanding Turkey":

*For some, Gülen is an extremely important Islamic scholar. He succeeds in reconciling Islam and modernity; in addition he decisively promotes the dialogue between religions. For the others Gülen is a disguised Islamist. He tries to undermine the ideals of the secular Republic of Turkey and ultimately wants to replace them with an Islamic structured state - in his attitude no different from Erdogan or even Erbakan.*

*But what unites both enthusiastic supporters and determined opponents, is that they see Fethullah Gülen as a very influential personality in Turkey with whom one has to deal. The Gülen movement includes numerous companies and institutions, private schools and universities, radio and television stations, publishing houses and daily newspapers, including Zaman (TIME), Turkey's highest-circulation newspaper for many decades.<sup>i</sup>*

Even personalities who were neither close to the *Gülen* movement nor to the AKP gave Gülen a positive assessment. For example, Bülent Ecevit, the Kemalist-oriented former Turkish prime minister, wrote:

*Gülen reminds us of that tolerant Islam which is based on the Sufi concepts of God and love for mankind. He makes it clear that Islam is perfectly compatible with modernity, democracy and progress.<sup>ii</sup>*

Since the break between Erdogan and Gülen in 2013 and even more since the failed coup d'état on July 15, 2016, the *Gülen* movement in Turkey has been regarded as an armed terrorist organization whose ringleader is Fethullah Gülen. The Supreme Court and the Constitutional Court have identified the *Gülen* movement accordingly on the basis of investigations following the failed coup d'état, in particular statements by arrested military personnel.<sup>iii</sup> The 25<sup>th</sup> Court for "serious crimes" refers to this.

The court adds that *FETÖ* had a secret and hierarchical structure. Almost all members would have had certain responsibilities and duties. The organization would act according to the instructions of its leader and would make religion the tool of its non-religious worldwide ambitions. It would like to introduce a new political, economic and social order. After its cadres who infiltrated the state institutions acquired sufficient influence, it would attempt to bring the state apparatus under its control with apparently legal methods and eliminate its opponents. The final target would be to dissolve parliament and eliminate the government and other constitutional institutions. To achieve these goals, in the opinion of the court *FETÖ* tried the coup d'état of July 15, 2016. The institutions concerned include the judicial system. As a proof the court cites Fethullah Gülen who declared that either the Supreme Court, the Council of State (Supreme Administrative Court) and the Court of Auditors *would be taken over by us or we would have to get rid of them.*

A further source of material relied on for demonstrating that the *Gülen* movement is an armed terrorist organisation is non-verifiable intelligence. A comprehensive, scientific investigation is probably still pending. On the assumption that the organisation was a strict cadre organisation based on orders and obedience, I was once told with a certain irony by a Turkish interlocutor that, if it were so, the coup d'état on 15 July 2016 should have been successful.

The respected journalist Ahmet Sik did some investigative research. He was arrested in 2011 in connection with the *Ergenekon* trial, to which I will get back later. His then unpublished manuscript *Imamin Ordusu (The Imam's Army)* was confiscated.<sup>iv</sup> In the meantime it has been published, but as far as can be seen it has not been translated into English or German.

### **Use of the communication service ByLock**

The Turkish Constitutional Court and the Supreme Court have ruled that if a person has used the communications program ByLock, this is serious evidence of hierarchical and organic links with the armed terrorist organization. Both courts assumed that the programme had been developed for *FETÖ* members and some 215,000 people had used it. The 25th court for "serious crimes" adds that only certain members of the organisation would have been able to use the programme.<sup>v</sup> The findings on the functioning, the users and the content are based on information provided by the Turkish secret service *MIT*, which is supposed to have succeeded in penetrating the programme's server in 2015<sup>vi</sup>, and Turkish Telekom.

Murat Arslan supposedly downloaded and used *ByLock* on his mobile phone. On the basis of a technical report by the Turkish secret service and the testimony of a colleague, the witness Kazim Uslu, the judges came to the conclusion that this happened from 27.08.2014 to 20.02.2015. The testimony of an expert commissioned by the defence was not taken, because the judges ruled that it was sufficient that the defence had handed over his written opinion. The expert's report lists deficiencies in the technical report of the Turkish secret service. The judgment does contain some technical remarks in this respect, from which it is supposed to emerge that these objections are unfounded. However, there is no explanation as to the source of the judges' expertise used to review these issues.

Judge Kazim Uslu, who was a member of *YARSAV* and was also a member of the board from 2011, testified that he had communicated with Murat Arslan via *ByLock*. He said that Murat Arslan knew that he, Kazim Uslu, was close to *cemaat* and that Murat Arslan treated *cemaat* members kindly because it would have been impossible to become a member of the *YARSAV* board without the support of *cemaat*.

On a question the prosecutor put to the witness, it came out by chance that the judges' belief that *ByLock* was not available to the public and could only be used by *FETÖ* members might not be correct. The witness replied to the question that the *YARSAV* board had the impression that the telephones of the board members had been bugged. A member of the board had then pointed out a programme that could not be tapped. This board member had later downloaded the program from *Google play* or *Apple* at his home. So he had installed *ByLock*.

On the other hand, the interrogation of the witness by the defence showed that Kazim Uslu is not a reliable witness. Thus, he said all board members of *YARSAV* were close to the *Gülen* movement, although there were also designated opponents of the *Gülen* movement on the *YARSAV* board. He also claimed that *cemaat* had not cooperated with *YARSAV*, although the alleged infiltration of *YARSAV* by the *Gülen* movement had taken a large part in the proceedings. Finally, he even claimed that Mustafa Karadag, a board member known as a prominent opponent of the *Gülen* movement, had been a member of *cemaat*. Nevertheless, the judges believed the witness Uslu. They gave no reason for doing so.

## Was YARSAV infiltrated by the Gülen movement?

YARSAV was founded in 2006 by some 500 judges and prosecutors. The first president was the prosecutor at the Supreme Court, Ömer Faruk Eminagaoglu. The Ministry of Justice tried to prevent the foundation, but it did not prevail in the courts. In the following years the number of members rose to about 2500. At the general assembly in 2009 Ömer Faruk Eminagaoglu again ran for the board. There were as many candidates as there were board seats. Surprisingly two unknown members declared their candidacy, and Ömer Faruk Eminagaoglu was not elected. In a later interview he explained that this was the result of an operation of *cemaat*. A similar "de-selection" took place in the board elections during the 2010 General Assembly. 13 candidates were elected for the 13 seats on the board. However, Leyla Köksal, Mustafa Karadag and Bülent Yüçetürk did not get a majority.

There is therefore evidence for the fact that YARSAV actually had a significant group of people who belonged to or were close to the *Gülen* movement. Without sufficient evidence, the court includes Murat Arslan in this group. It states that *FETÖ* instructed him to become a member of YARSAV and to recruit further members and that with the votes of these *FETÖ* members he was then elected President of YARSAV and supposedly influenced the filling of board positions for the purposes of *FETÖ*. The Chamber takes this from the statement of the public prosecutor Bülent Yüçetürk, which, however, does not support such conclusions.

The witness Yüçetürk testified that he believed that Murat Arslan had approached the *Fethullah* group in order to remain in power. He believed as well that Murat Arslan ensured that some of these people, whom he, Bülent Yüçetürk, assumed to be *Fethullah* members and to whose candidacy for the board he and Leyla Köksal would have objected, were elected to the board in 2012. At that time, however, it would not have been known that *FETÖ* was a dangerous armed terrorist organisation and a threat to the state. At that time, everyone, from justice ministers to politicians, had praised this group, but YARSAV had declared it a threat to Turkey. Also the statement of the witness Köksal, who explained that it was not known at that time who belonged to the *Gülen* movement and who did not, makes it clear, how baseless the conclusions of the court are.

The court also founds its inference that Murat Arslan had organic connections to the hierarchical structure of the *Gülen* movement on the testimony of a key witness, the witness Birol Erdem, who had an elevated position in the Ministry of Justice. This witness belongs to the so-called confessors and makes use of the possibilities of a law on effective repentance, ie, he is not imprisoned and is available as a witness for the prosecution. He and the witness Ibrahim Okur, who also held a senior position in the Ministry of Justice and subsequently chaired the 1st Chamber of *HSYK (High Council of Judges and Prosecutors)*, testified that in connection with the elections to *HSYK* in 2010 a discussion had taken place with Murat Arslan about possible cooperation in the elections. The testimony of the two witnesses differ on the content of the conversation. Birol Erdem explained that friends close to the *Gülen* movement had introduced him to Murat Arslan with the words: "This is our friend Murat Arslan, and we are a powerful group within YARSAV" and Murat Arslan confirmed this with the words: "We have between 300 and 400 friends within YARSAV". However, according to witness Ibrahim Okur, the friends close to the *Gülen* movement were not present during the conversation, and Murat Arslan did not speak about the *Gülen* movement. It had only been in such a way, so the witness Okur, that Birol Erdem and he had gained the impression that Murat Arslan also belonged to the *Gülen* movement. Two other witnesses who, according to both witnesses, were involved in the

conversation, stated during their interrogation that the conversation had not taken place at all. Nevertheless, the court accepted the evidence of the witness Birol Erdem. It does not explain why it considers his testimony credible.

The court also relied on the testimony of an anonymous witness with the code name Defne, who, like Murat Arslan, was a reporter judge at the Constitutional Court. This witness testified that he had heard from other reporters who were part of the *Gülen* movement that Murat Arslan was one of them, but was deliberately not invited to the meetings because he worked undercover for the movement. At a "discussion meeting" organised by the representative of *FETÖ* of Kayseri, he, Defne, heard that Murat Arslan had asked members of the organisation to become members of YARSAV. The court does not address the contradiction that Murat Arslan had deliberately not been invited to meetings of the *Gülen* movement on the one hand, but had nevertheless taken part in such a meeting on the other. Nor does it explain why the identity of the witness was kept secret and why the defence was unable to question him.

Finally, the judges also base their judgment on the testimony of another witness, the witness Recep Ünal, who was also a reporter judge at the Constitutional Court. This witness stated that he had worked for an "educational unit" of the *Gülen* movement, that a person named Harum Sansa had asked him to look after Murat Arslan's children and that as a result, he had spoken at several meetings with Murat Arslan about whether his children should be involved in religious programs. The witness Harum Sansa, who was also questioned, however, testified that he did not know Murat Arslan and had not given Recep Ünal such an assignment. Again, the court does not state why it considers the testimony of the witness Recep Ünal credible and not that of the witness Harum Sansa.

#### **YARSAV refuses to cooperate with "Unity in Justice" platform**

Murat Arslan is also supposed to have promoted the goals of *FETÖ* in the elections for HSYK in 2014. There is no reasoning for this given in the ruling. One can therefore only speculate on what is meant.

Murat Arslan himself declared in one of his defence speeches that he would not have been charged if YARSAV had complied with the request to cooperate with the *Platform for Unity in the Judiciary*. As the witness Birol Erdem has clearly stated, this association was founded by the Ministry of Justice after the quarrel between Erdogan and Gülen which took place before the election to HSYK in 2014. According to witness Leyla Köksal, before the election a meeting took place between a representative of the platform, Kenan Ipek, and Murat Arslan, Bülent Yüçetürk and herself, in which a possible cooperation between the two associations was discussed. She testified that she, Leyla Köksal, had stated that cooperation depended on whether the government was involved or not, but since the platform gave the impression of being under the control of the government, there was no cooperation. The witness Birol Erdem, who was questioned about this, concluded that the *Gülen* block within YARSAV was merely concerned with weakening the *Platform for Unity in the Judiciary*.

#### **A torn justice system**

This detailed presentation shows the ordeals to which the once so committed founders of the YARSAV Association of Judges and Prosecutors were subjected in the course of the short history of their association. They wanted to achieve more judicial independence and were pulled into the fight between the political forces who wanted to maintain or strengthen their influence in the judiciary.

The judgement of the 25th Court for "serious crimes" follows the tradition of political criminal justice in Turkey. Its assessment of evidence is full of omissions and contradictions, and it refrains from any credibility check. The obstruction to the defence, for example by not being allowed to question anonymous witnesses, is not new. In October 2005, Helmut Oberdiek, an attorney at law, was commissioned by *Amnesty International*, *Pro Asyl* and the *Holtfort-Foundation* to investigate whether exculpatory evidence had been accepted in a number of political criminal proceedings in Turkey since 1999, whether witnesses of the defence had been admitted and whether the evidence of the prosecution was comprehensible. His conclusion:

*The courts are not interested to investigate exculpatory material and to admit defence witnesses. Both in the negotiations and in the drafting of the judgments, it becomes clear that the courts are reluctant to admit applications for evidence that could shake the incriminating elements. This applies both to the substantiation of an allegation of torture and to the hearing of defence witnesses if they might contradict the prosecution's allegations. With regard to the weighting of evidence, none of the judgments before the Court can be considered a pros and cons of weighing the accepted evidence. The only element in a conviction where consideration takes place is the question of whether or not a reduction in sentence should be granted for good conduct.<sup>vii</sup>*

The 25th court for "serious crimes" completely ignores the fact that YARSAV was founded to improve the overall conditions for work in the judiciary and the judiciary itself. Murat Arslan, for example, did not benefit from pointing out that YARSAV had repeatedly positioned itself against the *Gülen* movement, especially with regard to the violations in the *Ergenekon*, *Balyoz*, *KCK*<sup>viii</sup> - *Oda-TV*, *Ilhan Cihaner* and *Lighthouse* trials.

The best known examples of these violations, involving prosecutors and judges close to the *Gülen* movement, took place in the *Ergenekon* and *Balyoz* trials. In both criminal procedures at least some of the accused were wrongly convicted. The trials began in 2007, when hundreds of military personnel, journalists and other professionals were arrested and accused of planning a coup d'état against the Erdogan government. In the *Ergenekon* trial in April 2013, a court in Istanbul sentenced 19 defendants to life imprisonment, including retired Chief of Staff Ilker Basbug. Other defendants were sentenced to long prison terms.<sup>ix</sup>

At the same time the *Working Group on Arbitrary Detention of the UN Human Rights Council* declared that the detention of 250 defendants in the *Balyoz* trial was arbitrary. The committee complained, among other things, that the defendants were denied access to decisive evidence and that the installation of microphones in the court had enabled the government to intercept confidential conversations between the defendants and their defenders<sup>x</sup>.

Only after the break between Erdogan and Gülen did the courts and prosecutors investigate the defence's allegations that the accusations were fictitious. In April 2016, the Supreme Court overturned the verdicts in the *Ergenekon* trial and sent the cases back to the court of first instance. Finally, 235 defendants were acquitted in July 2019<sup>xi</sup>.

Now other prosecutors and judges are continuing the unfortunate tradition. With hardly conceivable force they are not only taking action against military personnel and civilians who were involved in the failed coup d'état, but also against thousands of other people who belonged to or were close to the *Gülen* movement or who were in political opposition to Erdogan and the AKP. YARSAV's<sup>xii</sup> struggle for more judicial independence has suffered a severe setback.

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<sup>i</sup> 2nd edition 2018, p. 399

<sup>ii</sup> Ibid. P 400

<sup>iii</sup> Republic of Turkey, Constitutional Court, Judgement in the Application of Aydin Yavuz and others – 2016/22169

<sup>iv</sup> [https://de.wikipedia.org/wiki/Ahmet\\_Sik](https://de.wikipedia.org/wiki/Ahmet_Sik)

<sup>v</sup> Judgement in the Application of Aydin Yavuz and others, footnote 2

<sup>vi</sup> Online-edition of „Stern“ 3<sup>rd</sup> January 2018, [www.stern.de/digital/smartphones/bylock-diese-app-macht-in-der-tuerkei-zum-mutmaßlichen-Terroristen-7806966.html](http://www.stern.de/digital/smartphones/bylock-diese-app-macht-in-der-tuerkei-zum-mutmaßlichen-Terroristen-7806966.html)

<sup>vii</sup> Expert opinion Rechtsstaatlichkeit politischer Verfahren in der Türkei, S. 282, [www.novend.de/wp-content/uploads/2016/07/Studie\\_Rechtsstaatlichkeit\\_politischer\\_Verfahren\\_in\\_der\\_Tuerkei.pdf](http://www.novend.de/wp-content/uploads/2016/07/Studie_Rechtsstaatlichkeit_politischer_Verfahren_in_der_Tuerkei.pdf)

<sup>viii</sup> Strecker, Betrifft Justiz 2012, p. 425

<sup>ix</sup> Seufert, Überdehnt sich die Bewegung von Fethullah Gülen? SWP-Studien, 16th December 2013, [www.swp-berlin.org/fileadmin/contents/products/studien/2013\\_S23\\_srt.pdf](http://www.swp-berlin.org/fileadmin/contents/products/studien/2013_S23_srt.pdf)

<sup>x</sup> United Nations, Human Rights Council, A/HRC/WGAD/2013/6, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/159/12/PDF/GI315912.pdf?OpenElement>

<sup>xi</sup> Junge Welt online edition from 02.07.2019, [www.jungewelt.de/artikel/357827.ergenekon-prozess-in-tuerkei-beendet.html](http://www.jungewelt.de/artikel/357827.ergenekon-prozess-in-tuerkei-beendet.html)