THE TRIAL OF ŞEBNEM KORUR FINCANCI AND BARIŞ YARKADAŞ: THE CONCEALMENT OF TORTURE AND ILL TREATMENT IN TURKEY

TRIAL OBSERVATION REPORT

By Prof. Matthew Happold andErik Osvek

October 2010

Kurdish Human Rights Project
Norwegian Bar Association

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Kurdish Human Rights Project
11 Guilford Street
London
WC1N 1DH, UK
Tel: +44 (0) 207 405-3835
Fax: +44 (0) 207 404-9088
khrp@khrp.orgwww.khrp.org

The Kurdish Human Rights Project is an independent, non-political human rights organisation founded and based in London, England. A registered charity, it is dedicated to promoting and protecting the human rights of all people in the Kurdish regions of Turkey, Iraq, Iran, Syria and elsewhere, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include Kurdish and non-Kurdish people.

Norwegian Bar Association
Kr Augustgt. 9
Oslo 1, Norway 0164
Tel: +47 22 03 50 50
Fax: +47 22 11 53 25
dnapost@jus.no
http://www.advokatforeningen.no/

The Norwegian Bar Association is the representative organisation for advocates that safeguards the interests of its members and the legal profession in Norway. The Association has four priority areas: (1) To ensure good framework conditions for advocates; (2) To promote the rule of law and the principles of a state governed by law; (3) To develop Code of conduct for lawyers and to administer the advocates' disciplinary council; (4) To serve the members through counselling and membership benefits.

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I. INTRODUCTION

From 16 to 18 June 2010, the Kurdish Human Rights Project (KHRP), in conjunction with the Norwegian Bar Association (NBA), dispatched a trial observation mission to Istanbul. Mission members Prof. Matthew Happold (University of Luxembourg) and Advocate Erik Osvek (Pro Legal Law Office) were charged with observing part of the trial proceedings against human rights defender, Şebnem Korur Fincancı, the chairwoman of *Türkiye İnsan Hakları Vakfı* (TİHV, Human Rights Foundation of Turkey) and the journalist Barış Yarkadaş. As well as observing the trial, they spoke to participants and observers in the process.

The defendants have been charged by the Turkish state with criminal libel. This follows a complaint made to the public prosecutor by the alleged victim, Nur Birgen, current head of the Third Specialised Committee of the Forensic Medicine Institute (FMI). Dr Birgen made the complaint after her appointment was criticised by Dr Fincancı in an interview published on www.gercekgundem.com on 22 September 2009 (a website owned by fellow defendant, Yarkadaş). In the interview, Dr Fincancı points to the serial investigations into Dr Birgen's history of malpractice and attempts to falsify the medical reports of torture victims.

Hence the proceedings against Dr Fincancı and Mr Yarkadaş can be seen as an attempt to prevent discussion of the FMI's reforms and more generally, of the Turkish criminal justice system. The importance of the case is thus threefold. Not only does it highlight Turkey's abysmal record of violating freedom of expression and commonplace attempts to criminalise human rights defenders, but it also shines a light on continued attempts by the Turkish state to conceal the practice of torture and ill treatment within state institutions. Indeed, human rights defenders view Dr Birgen's actions as a symptom of the grave and systemic problems with the FMI. These problems in turn seriously impact on Turkey's ability to ensure due process of law and fair trials, particularly when forensic reports constitute an important part of the evidence before the court during legal proceedings.

II. BACKGROUND TO THE CASE

a. Malicious prosecutions and restrictions on free speech

In a classic example of the malicious prosecution of human rights defenders in Turkey and continued restrictions on free speech, TİHV chair, Şebnem Korur Fincancı, and journalist Barış Yarkadaş, stand accused of libel under three different articles of Turkish Penal Code.[1] This follows a complaint made by Dr Birgen to the public prosecutor in Istanbul after her appointment as head of the FMI's Third Specialised Committee was criticised in an interview by Fincancı, and published on www.gercekgundem.com (a website owned by fellow defendant, Yarkadaş).

In an interview entitled 'Why they have abolished the death penalty' published on 22 September 2009, Dr Fincancı stated as follows:

> Many things have been done in order to gain the control of permanent staff percentage in Forensic Institute. For a long time they have been spending effort in every period to get people close to them into the institutions. Why has Nur Birgen been elected in such a way and become the head of third specialist unit? She has no academic qualifications in any area that she has proved herself. How can such a person be appointed as head of third Specialist unit? Why?[2]

Regarding Dr Birgen's appointment, Dr Fincancı was also said to have remarked that 'perhaps it's a reward for her loyalty because there are investigations against her by Honorary Council of Doctor's Chambers on torture reports. As she has covered the diagnosis of torture she probably got some positive points for her record.' Meanwhile co-defendant, Mr Yarkadaş, is being prosecuted for publishing these comments without due research and analysis. Therefore in the eyes of the state, he is complicit in having committed libel alongside Dr Fincancı.

b. Concealment of torture

The TİHV (currently chaired by Fincancı), grew out of the necessity to further promote the prevention of torture in Turkey where grave human rights violations left thousands of people tortured and traumatised. It was established as a non-governmental and non-profit organisation in 1990 by *İnsan Hakları Derneği* (Human Rights Association, İHD) and the TTB, and provides treatment and rehabilitation services for torture survivors and documents human rights violations.

The FMI itself, meanwhile, is claimed to have been involved in the concealment of thousands of torture cases from the 1980 military coup, until today. As highlighted by KHRP and repeatedly relayed to the mission, Dr Birgen has a well-publicised history of malpractice. The *Türk Tabipleri*

[1] The defendants are charged under Articles 125 (125/1-2, 125/3a, and 125/4), 131/1 and 53 of the Turkish Penal Code Law Number 5237. See a full copy of the indictment in the Appendix.

[2] As contained in the translation of the statements (taken from the indictment).

Birliði (Turkish Medical Association, TTB)[3] for example, was very critical of the fact that Dr Birgen was allowed to continue practising and was promoted within the FMI despite the TTB suspending her for serious incidents of malpractice.[4] The TBB has eight files on Dr Birgen. Four of the files relate to ongoing investigations; four to those already concluded.[5]

As documented in KHRP's report on the killing in custody of Engin Çeber, Dr Birgen was suspended from practice for six months by the TBB after examining seven detainees in 1995.[6] This was after she reported the detainees to be in good health, ignoring the fact that they had been tortured. Nonetheless, Dr Birgen was subsequently appointed to her current governmental post at the FMI. In this position she produced a medical report on two hunger-strikers, confirming their continued fitness to be detained despite the fact that they were both suffering from Wernicke-Korsakov syndrome (a brain disorder caused by a lack of thiamine, or vitamin B). For her authorship of that report she was suspended from practice for one month and fined by the TTB. In December 2002, she was once again found to have issued medical reports concealing torture and was sentenced to three months in jail, although this was later commuted to a nominal fine.

Despite this record of well-publicised malpractice, the state not only maintained Dr Birgen's employment but in 2006, appointed her to lead a three million Euro EU-sponsored training programme for judges and prosecutors. She was only replaced after the TTB and TİHV spent over two years contesting her appointment and ultimately threatened to withdraw from the programme.

In relation to the practising physicians, the TTB has a disciplinary role and has the authority to suspend persons found guilty of malpractice from practise as a physician. Decisions to suspend from practice take place as a result of investigations by a disciplinary committee. Conversely, the Turkish state maintains a disciplinary system for civil servants, including medial doctors employed by the state, and takes the view that it should decide whether such persons should be sanctioned for activities undertaken in their employment. In meeting with the mission, the TTB expressed the view that these procedures lack impartiality and that such decisions can be politically motivated.[7]

c. Reliance on FMI forensic reports

The Turkish legal system, as a civil law system, places great emphasis on

[3] The TTB is the organised voice of physicians in Turkey. It undertakes studies in various fields of human rights (such as right to life, the prevention of torture, the right to health, etc). In 1997, its achievements were recognised by Physicians for Human Rights) which awarded the TTB its human rights award. In recent years, the TTB has conducted many studies on the prevention of torture, hunger strikes, and the health of prisoners.

[4] TO Interview with the Istanbul Branch Human Rights Commission, Istanbul, 17 June 2010.

[5] Six months is the maximum period which the TBB can suspend a doctor from practising.

[6] See Himsworth Mark, *The Death of Engin Çeber: Prosecuting Torture and Ill-Treatment Within the Turkish Detention System* (KHRP, London, June 2009).

[7] TO Interview with TTB Istanbul Branch Human Rights Commission, Istanbul, 17 June.

court-commissioned reports and it is the FMI that is invariably asked by the courts to produce forensic reports. Indeed, the courts need not take cognisance of forensic statements from experts other than the FMI. In a recent sexual violence case, the Supreme Court (Yargýtay) refused to accept a report submitted by one of the parties commissioned from a university medical faculty.[8] Although judgments of the Supreme Court are not binding precedents on the lower courts, in practice they tend to follow them, so its decision is likely to serve as an extremely bad example.

d. Structural problems in the FMI

The TTB expressed their view that Dr Birgen has strong support within the state and is therefore able to avoid the consequences of her malpractice.[9] In the TTB's opinion, Dr Birgen simply symbolises serious structural problems in the FMI. It sees the FMI as a centralised monopoly in forensic medicine; directly dependant on the state which it in it turn, serves to sustain. Every government appoints its 'own' people to key positions within the FMI, in the absence of any real criteria for appointment other than political malleability. As a result of these allegedly serious structural and professional weaknesses, the FMI not only serves a political tool of the state, but its inefficiencies also lead to large numbers of defendants waiting on remand for forensic reports. Further still, the FMI's forensic reports, upon with the Turkish courts so heavily depend, are often inadequate and are said to rely on flimsy scientific findings.

It the opinion of the mission, therefore, that not only is reform of the FMI needed, but the judiciary also needs to be more willing to receive reports from other expert witnesses, such as university medical faculties. This is integral to helping give voice to countless torture survivors, whose testimonies can so easily be dismissed in the absence of reliable medical reports.

e. Harassment and intimidation of human rights defenders

In meeting with representatives from İHD Istanbul Branch, we were given the Association's general perspective on the human rights situation in Turkey and for human rights activists. Albeit expressed with some reluctance, their view was that the human rights situation had improved in recent years. However, they remarked on the considerable differences between the situation in Istanbul and other big cities, and that in eastern Turkey (where five of the İHD's branch presidents are imprisoned).

In their view, the libel action against Dr Fincancı is part of the Turkish state's attempts to make it more difficult for her to publically criticise the FMI. Rather than the case itself lead to her conviction (which they consider unlikely), they regard the prosecution process itself as a tool of harassment.[10]

[8] We understand that this decision may from the basis of an application to the European Court of Human Rights.

[9] TO Interview with the TTB Istanbul Branch Human Rights Commission, Istanbul, 17 June 2010.

[10] TO Interview with İHD Istanbul Branch, Istanbul, 17 June.

This was a view shared by Dr Fincancı herself, who believed that the purpose of the trial proceedings is to intimidate her.[11] As highlighted by Dr Fincancı — who from 1997 to 2007 was head of the FMI and previously held several positions within the institution[12] — she has criticised the FMI for more than 20 years, both internally and publicly, and was several times suspended or fired from different positions as a result.

She is currently facing five criminal prosecutions for criminal libel and calumny as a result of complaints made by Dr Birgen. Dr Fincancı stated that she believed that the charges were part of a larger scheme to silence her; a situation commonly faced by human rights defenders in Turkey. According to Dr Fincancı although the FMI has chosen not to be a direct party to the libel action, and while Dr Birgen could have filed these charges as a means to protect her own job and public position, she should nevertheless be seen as acting on behalf of the state.

Dr Fincancı relayed to the mission her belief that the statements themselves were based on her professional, scientific opinion and thus construed legitimate criticism and could not be considered to be insulting of the FMI and Dr Birgen. Further, rather than seek to impose an actual jail sentence, she contends that the FMI seeks to embroil her in court proceedings in order to suppress debate and publically discredit her. She also firmly stated that she in fact welcomed the trials, and hoped that they would raise awareness about the long-standing structural problems in the FMI. She expressed that the current proceedings would not greatly affect her work, given that she had become accustomed to similar treatment in the past.

f. Repression of free speech

The appetite for malicious prosecutions as a means to silence dissent in Turkey was made repeatedly clear to the mission during meetings with various civil society groups and human rights defenders prior to and after the trial. According to journalist and attorney, Adnan Demir, independent journalism in Turkey cannot be conducted without the journalist risking long prison sentences and bankruptcy.[13] In his opinion, there exist many laws about freedom of speech and freedom of the press, but 'the more laws there are the less justice there is'. His impression is that the judiciary use the existing gaps in the law to limit freedom of expression, and that the trial proceedings launched against Dr Fincancı and Mr Yarkadaş are examples of this. While the crime of 'insult' exits in pieces of legislation worldwide, he argued that in Turkey it is used as a tool to restrict freedom of speech.

Mr Demir expressed his belief that there is a lack of political will in Turkey to change the systemic

[11] TO Interview with TİHV Istanbul Branch, Istanbul, 17 June.

[12] Dr Fincancı was the general secretary of TTB in 1996-1998 and 2002-2004, chairperson of the disciplinary committee in 2000 to 2002 and 2004 to 2006, and a member of the high disciplinary committee in 2006 to 2008.

[13] TO Interview with defendant Barış Yarkadaş and journalist and attorney Adnan Demir, Istanbul, 18 June.

hindrance of freedom of speech and of the press. He recounted how he has been charged over 100 times since he started with the Taraf newspaper in 2007, facing successive criminal penalties, including prison sentences and fines. He has been convicted in some of them, recently receiving a 16600 Turkish lira fine from the high court, although not all of the prosecutions have been for criminal libel. In relation to the case in question, he expressed the view that the prosecutions seek to silence Dr Fincancı.

Defendant Mr Yarkadaş also argued that these cases were launched to hinder freedom of speech. He explained that while Dr Birgen had not been not given a chance to comment on Dr Fincancı's statements before publication, Dr Birgen could have sought a retraction or a right to reply. However, rather than do so, she instead made a criminal complaint. He asserted that the Turkish penal code makes it possible to launch many such cases so that defendants become enmeshed in the legal system.[14]

III. THE TRIAL

a. Speculation ahead of the trial

The mission twice met with the counsel for Dr Fincancı, shortly before the hearing and immediately afterwards. Prior to the hearing, they explained that the trial was at a stage where both parties were still submitting statements and evidence.[15] The defendant had already given her statement and they were now waiting on the complainant to give hers. They explained that until he considers that sufficient evidence has been put before the court to permit him to have an informed opinion, the public prosecutor will make submissions about sentencing. In the defence counsel's view, it was currently too early in the proceedings to expect anything from the prosecutor.

b. Charge of calumny

Dr Fincancı counsel confirmed that a charge of calumny was dropped at an early stage. The complainant's lawyer was said to have challenged dropping the charge, but this was dismissed by the high court. Moreover the state itself could have complained under a provision of the criminal code, which criminalises insults to the personality of the state, but chose not to do so.[16]

c. Trial observations

A short hearing took place on 18 June 2010 at the Kadıköy Crımınal Court of First Instance in Istanbul.

The complainant, Dr Birgen, was expected to testify before the court in a trial that the lawyers were expecting to finish in one day. However after Dr Birgen failed to attend and deliver her statement, the judge decided to postpone the hearing to a date that better suited to her in September,

[14] TO Interview with defendant Barış Yarkadaş and journalist and attorney Adnan Demir, Istanbul, 18 June.

[15] TO Interview with counsel for Dr Fincancı, Ms O. Meriç Eyüboğlu and Mr Süleyman Anil, Istanbul, 17 June 2010.

[16] TO Interview with counsel for Dr Fincancı, Ms O. Meriç Eyüboğlu and Mr Süleyman Anil, Istanbul, 17 June 2010.

warning her that if she failed to attend she would be subpoenaed to do so. Counsel for Dr Birgen had excused her client's non-attendance by saying that she had meetings on Mondays, Wednesdays and Fridays, so that she could only attend court on Tuesdays and Thursdays. As a result of her the complainant's non-attendance, the entire hearing only took about five to ten minutes and was entirely procedural.

The judge, public prosecutor,[17] counsel for the complainant, counsel for Dr Fincancı and Mr Yarkadaş were all present for the hearing, which was the third in the case. Counsel for Dr Fincancı estimated that there would at least be five hearings, and possibly more.[18] Dr Fincancı and counsel for Mr Yarkadaş did not attend.

IV. SPECIFIC ISSUES ARISING FORM THE CASE

a. Possibilities for a fair trial

After the hearing, defence counsel said that the complainant's statement was necessary before the proceedings could really start and remarked on the difficultly to predict any result before that.[19] In light of their experience, their view was that 'anything can happen' in these cases.

However in their opinion even if Dr Fincancı were to be convicted, it was most likely that she would only receive a suspended sentence. Under the Turkish system this would mean that she would not receive a criminal record, provided that she avoided another conviction. Defence counsel did not consider a prison sentence or the loss of civil rights to be a likely outcome. They also expressed the view that although fair trials were rare, in this case there might be a fair trial, given the high public standing of Dr Fincancı.

This was a sentiment shared by Dr Fincancı herself. She expressed to the mission that while she sees the case going to the Turkish High court, she does not believe that it will go as far as the European Court of Human Rights (ECtHR). On the contrary, she thinks that the Turkish judiciary is capable of giving her a fair trial, and pointed to the fact that one of the prosecutors in one of the other cases did not find a reason to open criminal proceedings, and that calumny was dropped in this case. [20]

b. Civil law systems and the European Convention on Human Rights

Criminal offences such as the one with which Dr Fincancı and Mr Yarkadaş are charged are not unusual in civil law systems, even if they appear odd to those more familiar with common law systems. The French criminal code, for example, includes an offence of

[17] Who, as usual but unfortunately for the perceived fairness of the proceedings, sat next to and on the same level as the judge.

[18] TO Interview with counsel for Dr Fincancı, Ms O. Meriç Eyüboğlu and Mr Süleyman Anil, Istanbul, 18 June 2010.

[19] TO Interview with counsel for Dr Fincancı, Ms O. Meriç Eyüboğlu and Mr Süleyman Anil, Istanbul, 18 June 2010.

[20] TO Interview with TİHV Istanbul Branch, Istanbul, 17 June.

criminal libel, and proceedings can be initiated by private complainants. Consequently, it is difficult to say that the offence's inclusion in the statute book itself, rather than the manner in which it is utilised, is incompatible with Article 10 of the European Convention on Human Rights.

Once a complaint is made, however, it becomes the state's responsibility to determine whether to pursue it. We heard that Dr Birgen had made a number of complaints concerning interviews given by Dr Fincancı. And as Dr Fincancı highlighted, in at least one case it appears that the public prosecutors decided not to bring proceedings. This, in our view, was the appropriate course of action. Nothing said by Dr Fincancı was insulting or gratuitously offensive. She simply expressed her informed opinion on a matter of public interest. Even if there were factual inaccuracies in Dr Fincancı's statements, the initiation of criminal proceedings in such circumstances would seem to be wholly disproportionate. Applying an analysis utilising Article 10, either the prosecutor in exercise of his discretion when deciding whether to initiate proceedings, or the judge, should have refused to continue with the matter.

V. CONCLUSION

Insofar as the case is only one of many, it is particularly concerning, as is the fact that it seems to seek to suppress criticism of a major malfunction within the Turkish criminal justice system.

The criticisms we heard made of the FMI were undoubtedly serious. Those with whom we met echoed the general sentiment expressed by the TTB that the FMI serves as a central monopoly of forensic medicine in Turkey, which is reliant on and serves as a political tool for the state. Its failing is exacerbated by the heavy reliance placed on its forensic reports during criminal proceedings, which are considered by many to be weak and inaccurate, and the failure to consider reports from other sources by the Turkish courts.[21] The mission recognises that it is structural deficiencies such as these which enable the state apparatus to continue in their attempts to conceal the ongoing practice of torture and ill treatment. With this in mind, not only is reform of the FMI urgently needed, but the judiciary also needs to be more willing to receive reports from other expert witnesses, such as university medical faculties.

As far as we were able to ascertain, however, the conduct of the proceedings, albeit short, seems fair. Our main criticism is that the prosecution was ever initiated. This is itself of course symptomatic of the ongoing appetite to bring malicious prosecutions against human rights defenders and to silence legitimate debate in Turkey. In turn, this reinforces the need for the Turkish government to persist in undertaking a wider programme of democratic reforms, which better protect their citizen's right to free speech and provide protective measures against torture and ill treatment. This is particularly important if the country is to be considered a serious candidate for membership of the EU.

[21] This might be a fruitful subject for further study.

VI. RECOMMENDATION:

This report urges the Republic of Turkey to:

- Identify and undertake with expediency needed reforms of the FMI in order to establish greater independence from the state (such as instituting set criteria for new staff appointments), tackle its central monopoly of forensic medicine in Turkey, and ensure more accurate and reliable forensic reports are produced and admitted as evidence before the court during legal proceedings.

- Introduce further training for the judiciary, prosecutors and state officials regarding international human rights standards in order to ensure that judges and prosecutors are aware of and protect freedom of expression and measures to ensure the prohibition of torture and ill treatment as established in the jurisprudence of the ECtHR and other international human rights standards. In particular, the judiciary must be encouraged to better understand the importance of admitting into evidence, and more willingly receiving reports from, other expert witnesses in legal proceedings, such as university medical faculties.

- Uphold commitments to reform in line with EU accession negotiations and honour those obligations which follow from the negotiations, including the Copenhagen Criteria, in order to guarantee freedom of expression and protection from torture and ill treatment.

- Honour those obligations which follow from Turkey's membership of the Organisation for Security and Cooperation in Europe (OSCE), including the obligation to play a positive role in contributing to the facilitation of freedom of expression.

- Bring all legislation into line with international human rights standards regarding freedom of expression and prohibition of torture, including those laid down in the CRC, ECHR, ICCPR, ICESCR, UDHR, the Council of Europe Convention on the Prevention of Terrorism, the Declaration of the Rights of the Child, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. This should include repealing Article 301 of the Criminal Code and amending other legal provisions which impede upon the right to freedom of expression, including Article 7/2 of the Anti-Terror Law.

- In the interim period prior to formal repeal and amendments of problematic provisions, commence no further malicious prosecutions in relation to the expression of non-violent opinions and withdraw those which are pending.

This report urges the European Union to:

- Continue to closely monitor the reform process in Turkey, including the situation regarding freedom of expression and the ongoing practice and concealment of torture and ill treatment in custody, and ensure that Turkey remains committed to reform in line with the Copenhagen Criteria. Human rights issues should be kept at the heart of the accession process.

- Continue to criticise those aspects of Turkish legislation which impede upon freedom of expression, including Articles 125, 131, and 53 of the Turkish Penal Code.

- Closely monitor the number of investigations opened and prosecutions launched in Turkey in relation to the expression of non-violent opinions, including cases where these do not result in convictions.

- Closely observe prosecutions in Turkey related to the expression of non-violent opinions to ensure that the fair trial rights of accused persons are protected.

- Closely observe prosecutions in Turkey involving freedom of expression and concealment of torture and in this regard remind Turkey of its obligation, as a signatory to the UN Committee Against Torture (CAT), to ensure that measures taken in relation to defendant's accused of breaking the law are proportional to the gravity of the offence and take into consideration the personal circumstances of the accused.

- Use its good offices to urge Turkey to fulfil its obligations in terms of reporting to the UN Committee Against Torture (CAT).

APPENDIX I: ENGLISH TRANSLATION OF THE INDICTMENT

TURKISH REPUBLIC
KADIKÖY CHIEF PUBLIC PROSECUTOR

Investigation No: 2009/46991
Principal No: 2009/12727
Indictment No: 2009/7913

INDICTMENT
TO THE KADIKÖY CRIMINAL COURT OF FIRST INSTANCE No 2

PLAINTIFF: PUBLIC

COMPLAINANT: NUR BIRGEN, daughter of Yusuf Selami and Azade, born in 20/11/1960. Resides at Sinoplu Sehit Cemal Sok. Tesvikiye Mah. No: 1 Ic Kapi No:14 Sisli-Istanbul

SUSPECTS: RASIME ŞEBNEM KORUR, daughter of Kilicarslan and Birsen. Born in 21/03/1959. registered at Uskudar Ilcesi, Altunizade mahallesi. Volume 4, family no 60, list no 19. resides at Rizapasa Sk. Caferaga mah. No.30 Ickapi No:4 Kadıköy - Istanbul

BARIŞ YARKADAŞ, son of Rasim and Zulfiye, born in 02/08/1974. registered at Susuz district of Kars Province, Inkilap neighbourhood . Volume 1. family no 75 and list no 3. resides at Rasimpasa Mah. Rihtim Cad. Deniz ishani K:4/4 Kadıköy -Istanbul

OFFENCE: Insult, insulting through written and visual material

PLACE AND DATE OF OFFENCE: 22/07/2009

CHARGING ARTICLES: 1- Articles 125/1-2, 125/3a, 125/4, 131/1 and 53 of Turkish Penal Code Law Number 5237 (for both suspect on each other's account)

EVIDENCES: Claim of complainant, print copy of interview text from www.taraf.com.tr, criminal record, documents for investigation.

INVESTIGATION DOCUMENTS HAVE BEEN EXAMINED

In an interview titled 'Why they have abolished death penalty' published on www.gercekgundem.com on 22.09.2009, suspect Şebnem Korur (Fincancı) stated as follows:

> Many things have been done in order to gain the control of permanent staff percentage in Forensic Institute. For a long time they have been spending effort in every period to get people close to them into the institutions. Why has Nur Birgen been elected in such a way and become the head of third specialist unit? She has no academic qualifications in any area that she has proved herself. How can such a person be appointed as head of third Specialist unit? Why?'

It has been understood that the suspect Barış Yarkadaş, who is the owner of www.gercekgundem.com, has published suspect Şebnem Korur (Fincancı)'s allegations against Nur Bilgen, and she stated that 'perhaps it's a reward for her loyalty because there are investigations against her by Honorary Council of Doctor's Chambers on torture reports. As she has covered the diagnosis of torture she probably got some positive points for her record.' Mr Yarkadaş published these comments without researching and analysing them, therefore he has participated the offence of insult committed by suspect Şebnem Korur Fincancı.

After the examination all the evidences;

It has been determined that the above-mentioned suspects exceeded the boundaries of the criticism and made publicly defamatory statements against the complainant Nur Bilgen through the media. Hereby, it is our request on behalf of the public, that the defendant to be trialed with the offence of Insult and to be sentenced with relevant articles of the law in different accounts. 18/09/2009

Dursun Yılmaz 23251
Public Prosecutor of Kadıköy
Signed and stamped

Note: In an additional judgment, it has been decided that there is no need for an investigation into the offence of calumny against Rasime Şebnem Korur and Barış Yarkadaş

APPENDIX II - ARTICLES OF TURKISH PENAL CODE UNDER WHICH THE PROSECUTOR HAS ASKED THE COURT TO CHARGE THE DEFENDANTS

Article 53. Deprivation of exercising certain rights

(1) Where a person is sentenced to a penalty of imprisonment for an intentional offence the legal consequence of such shall be his prohibition from:

a) becoming a member of the Turkish Grand National Assembly or undertaking employment as, or in the service of, an appointed or elected public officer (permanently, temporarily or for a fixed period of time) within the administration of the state, a province, municipality or village, or institution or entity under their control or supervision;

b) voting or being elected and exercising other political rights;

c) acting as a guardian or being appointed in the role of guardianship and trustee;

d) being the administrator or inspector of a legal entity namely, foundation, association, labour union, company, cooperative or political party;

e) Conducting any profession or trade, which is subject to the permission of a professional organization (which is in the nature of a public institution or organization), under his own responsibility as a professional or a tradesman.

(2) A person shall not exercise these rights until the completion of the term of his penalty of imprisonment.

(3) The provisions in the above section shall not be applicable to an offender whose sentence of imprisonment has been suspended, or who has been conditionally released, in respect of acting as a guardian or being appointed in the role of guardianship and trustee. Where an offender has been subject to a suspended prison sentence the prohibition defined in section 1(e) may not apply.

(4) The provision of section one shall not be applicable to persons whose short term sentences of imprisonment have been suspended or to persons who were under eighteen years old at the time when they committed the offence.

(5) Where a sentence of imprisonment has been imposed for an offence related to the of abuse one of the rights or authority defined in section one, the offender

shall be prohibited from exercising such right for a period of one half to two times the length of imprisonment imposed, such to come into effect after the prison term is served. Where only a judicial fine has been imposed for an offence related to the abuse of one of these rights or authority the exercise of this right shall be prohibited for a period of one half to double the number of days stated in the judgment. The relevant time relating to the start of the prohibition (once the judgment is finalised) is that when the judicial fine has been completely executed.

(6) Where an offender is convicted of a reckless offence on the grounds of failing to discharge a duty of care and attention while performing a certain profession or trade, or while observing the necessities of traffic safety, it may be determined that the offender shall be prohibited from performing such profession, or trade, or that his driver's license be suspended for a period of not less than three months and nor more than three years. The prohibition or the suspension shall be enforced once the judgment is finalized and such period starts once any sentence is completely served.

Article 125. Insult

(1) Any person who attributes an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige, or attacks someone's honour, dignity or prestige by swearing shall be sentenced to a penalty of imprisonment for a term of three months to two years or a judicial fine. To be culpable for an insult made in the absence of the victim, the act should be committed in the presence of at least three further people.

(2) Where the act is committed by means of an oral, written or visual medium message, addressing the victim, the penalty stated in the above section shall be imposed.

(3) Where the insult is committed:

a) against a public officer due to the performance of his public duty;

b) because of declaring, altering or disseminating, his religious, political, social or philosophical beliefs, thoughts, or convictions, or practising in accordance with the requirements and prohibitions of a religion he belongs to; or

c) where the subject matter is deemed sacred to the religion the person belongs to the penalty to be imposed shall not be less than one year.

(4) Where the insult is committed in public, the penalty imposed shall be increased by one sixth.

(5) Where an insult is made which arises from the duties of public officials who are working as a committee, the offence shall be deemed to have been committed against all the members of that committee. In these circumstances the provisions of the article concerning successive offences shall be applied.

Article 131. Conditions for Investigation and Prosecution

(1) Excluding those offences committed against a public officer on account of his duty, the investigation and prosecution of an offence of insult shall be subject to the filing of a complaint by the victim.

(2) If the victim dies before filing the complaint, or if the offence is committed against the memory of a deceased person, a complaint may be filed by the ascendants or descendants of the deceased (up to the second degree) or by his spouse or siblings.

APPENDIX III – LIST OF MEETINGS THAT DID NOT TAKE PLACE

a) Meeting with Nur Birgen

In order to obtain the complainants view of the case, we sought a meeting with Dr Birgen. A request was made prior to our arrival in Istanbul but no response was received. On our arrival in Istanbul on Thursday 17 June 2010, we visited the FMI. However, we were told that Dr Birgen was in a meeting and was unable to see us and we were unable to speak to anyone else about arranging a meeting.

b) Meeting with Prosecutor Ferhat Bozkurt

KHRP had earlier faxed Mr Bozkurt to arrange a meeting before the hearing but had received no response. We attended his office on the morning of the hearing but he was not there. Via the senior prosecutor we requested an interview but were told that prosecutors could make no communications without the permission of the Ministry of Justice.[22]

[22] As Prof. Happold was able to speak to a prosecutor at the Ankara State Security Court some years ago, we are sceptical about this explanation.