

ERGENEKON AND SLEDGEHAMMER: BUILDING OR UNDERMINING THE RULE OF LAW?

Turkey's legal system was reformed significantly during the last decade, with the avowed objective of aligning it with European norms and facilitating the country's accession to the European Union. On paper, Turkey now has a legal regime that is little different from Europe's in terms of procedural safeguards and the rights of defendants. But the reality on the ground could not be more different. The author argues that the Ergenekon and Sledgehammer trials have been marred by severe violations of due process and the use of highly problematic evidence against defendants. Pro-government media have manipulated the debate in the country and prosecutors have acted in ways that are sharply at variance with European legal norms. These cases will, he argues, discredit the Turkish judiciary and set back the democratization of Turkish politics.

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For the last three years, Turkey has been gripped by an extraordinary series of legal proceedings revolving around alleged conspiracies to destabilize and eventually topple the country's conservative-Islamist government. Prosecutors, supported by leading members of the governing Justice and Development Party (AKP), have accused military officers and their supposed civilian accomplices with membership in a secret network, dubbed the "Ergenekon terror organization" after an ancient Turkish myth. The prosecutors have charged them with crimes ranging from bombings to intimidation of religious minorities and coup plots. The Ergenekon investigation along with an alleged coup plot codenamed Sledgehammer have ensnared hundreds of current and retired military officers, journalists, academics, and lawyers, as well as a chief prosecutor and even a former mayor of Istanbul. Many defendants have been kept in jail for years. None of the trials has been concluded and there has yet to be a single conviction.

To many observers, for a while it appeared as if these trials represented a nascent democracy's coming to terms with the sins of the past. It seemed that a popular, democratic regime was finally wresting itself free from the tight grip of the army and hard-line secularists, and, for the first time, was bringing the old guard to account. As late as November 2010, the Commission of the European Union would write in its progress report that the Ergenekon and Sledgehammer trials "remain an opportunity for Turkey to strengthen confidence in the proper functioning of its democratic institutions and the rule of law."¹

Perceptions of what these trials represented rapidly changed following the arrests of journalists Ahmet Şık and Nedim Şener and the confiscation of Şık's draft book, in March 2011. Şener, an award-winning reporter, had done more than anyone else to shed light on official complicity in the plot that led to the assassination of Hrant Dink, the Turkish-Armenian journalist, in 2007. Şık, a journalist with leftist views, was completing a book that described Gülenist infiltration of the national police. These journalists and others were accused of acting as the "media arm" of the Ergenekon Terror Organization, a charge that struck most people who knew these individuals, as preposterous.

In fact, the Ergenekon/Sledgehammer investigations have been riddled with severe problems from the outset. It is impossible to square the systematic violation of due process and of evidentiary standards observed in these trials with the rule of law. These flaws have been obscured by the fact that some of the defendants hold ultra-nationalist views or are widely suspected of complicity in the illicit activities

¹ European Commission, "Turkey 2010 Progress Report," Commission Staff Working Document SEC(2010) 1327, Brussels, 9 November 2010, http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf

of Turkey's infamous "deep state." In other words, the prosecution of individuals considered to have "shady" backgrounds has lent credibility to the charges. The problems have been covered up also by the intense disinformation campaign waged against the defendants by pro-government media.

Upon closer examination, it turns out that evidence for the specific charges leveled in the indictments range from highly circumstantial to patently fabricated. As Ahmet Şık argues in his banned book, there is little to suggest that these trials target real crimes and real perpetrators.² They raise disturbing questions about the behavior of the police and the prosecutors involved in these cases, and also about the nature of the evolving Turkish polity.

The Sledgehammer Case

The Sledgehammer trial is particularly instructive because the problematic nature of the evidence and its disregard by prosecutors are so blatant in this case. In January 2010, the anti-military Turkish daily *Taraf* received several CDs and voice recordings, as well as a trunk full of documents, from an anonymous informant who identified himself as a retired officer who had served under then 1st Army chief General Çetin Doğan during 2002-2003. The recordings cover the proceedings of a military planning workshop held under Doğan's command in March 2003. The workshop was designed to test the army's preparedness to deal with future threats, including a potential Islamist uprising. The deliberations revolved around a fictional scenario that assumed a severe deterioration of the situation in Iraq, a military confrontation with Greece, and an opportunistic uprising by Islamist groups. These recordings are genuine and were made under Doğan's orders at the time. Even though the antagonism of those present towards the AKP and Islamist groups perceived to be hostile to secularism comes across clearly, there are no references in the proceedings to a military coup or any other criminal activities.

But along with these voice recordings, three of the CDs delivered to *Taraf* contained details of an elaborate operation, code-named Sledgehammer, to destabilize the country and topple the newly elected AKP government. The plans included the bombings of two Istanbul mosques during Friday prayers and the downing of a Turkish jet, along with names of cabinet members to be installed following the coup, a detailed government program, a list of journalists to be arrested, and much else. *Taraf* claimed that the March 2003 workshop was a dress rehearsal for the coup, even though none of these illegal activities were mentioned during

² In April 2011, electronic copies of Şık's book, *İmamın Ordusu [The Army of the Imam]*, were circulating on the Internet.

The forgers seem to have checked to make sure that these entities existed back in 2003, but apparently forgot to see whether they might have operated under different names at the time the coup plot was allegedly hatched. These conspicuous anachronisms made clear that the documents supposedly authored in 2003 by (and for) the officers on trial were in fact produced no earlier than August 2009.

As the charges in the indictment came to be increasingly questioned in public debate,⁴ a second batch of digital files was uncovered at a naval base in Gölcük in December 2010. This new find was touted by the pro-government and Gülenist media as confirming the prosecutors' case. In truth the files, also supposedly from 2003, simply multiplied the anachronisms and inconsistencies. For example, they showed naval officers on duty in vessels that had not yet been commissioned or in units that did not yet exist. They contained countless documents prepared when their alleged authors were on duty abroad (or out at sea) and had no access to the computers on which they are alleged to have been produced.⁵

The prosecutors showed little interest in such discrepancies and made no attempt to account for them in their indictment. Even though conclusive evidence would surface during their own investigation indicating that the Sledgehammer documents were fakes, they overlooked this evidence completely. Instead, they sought, and succeeded eventually, to imprison more than 100 of the defendants pending trial.

In light of all the evidence regarding the questionable nature of the Sledgehammer documents,⁶ it is very difficult to make sense of the prosecutors' behavior. Their exertions went beyond prosecutorial zeal and were sharply at variance with European legal norms. Here are additional examples:

- Forensic experts know that it is impossible to determine the true authorship and dates of digital files on a CD since that information is easy to manipulate by altering usernames and the clock of the computer on which the CD is burned. Yet the prosecutors stretched the conclusions of reports prepared by the Scientific and Technological Council (TÜBİTAK) to interpret them as confirming the authenticity of the CDs – even though one of these reports explicitly stated that the true date of the CDs and the documents therein could not be determined by their analysis.
- They simply shelved, with virtually no comment, an exhaustive report from the military prosecutors' office indicating that the documents were forged and that

⁴ Pınar Doğan and Dani Rodrik, *Balyoz: Bir Darbe Kurgusunun Belgeleri ve Gerçekler [Sledgehammer: Myths and Realities of a Coup]*, (Istanbul: Destek Yayınevi, 2010.)

⁵ For documentation of all these inconsistencies, the reader is referred to our blog: [http://cdogangercekler.wordpress.com/category/ celiskiler-ve-kanitlar/](http://cdogangercekler.wordpress.com/category/celiskiler-ve-kanitlar/).

⁶ For a fuller listing of the anachronisms and inconsistencies in the case, the reader is referred to our blog cdogangercekler.wordpress.com

nothing improper had taken place during the March 2003 workshop.

- They failed to interview key figures, including inexplicably, the head of landed forces Aytaç Yalman who –the indictment suggested– had prevented the coup. (Yalman, for his part, has denied any knowledge of Sledgehammer and has expressed his conviction that the defendants are innocent.)⁷
- They refused to grant the defense access to digital copies (images) of the CDs containing the incriminating evidence; they even refused to provide photographs of the CDs.
- They placed under seal and hid from the defense reams of evidence, which came to light during their investigation, documenting inconsistencies beyond those that had already been highlighted in the public debate.⁸

In brief, prosecutors seem to have been following a pre-arranged script rather than trying to uncover the facts of the case.

In a well-functioning democracy such behavior would come under serious criticism from the media, the executive branch, and ultimately public opinion. In Turkey, government-friendly media and the government instead helped whip up frenzy against the defendants. A steady stream of disinformation made it very difficult to tell fact from fantasy. The newspaper that broke the Sledgehammer story, *Taraf*, for example, repeatedly wrote (falsely) that the coup plot documents carried the signatures of the defendants, and failed to retract the claim. It never reported the myriad anachronisms that threw into question the authenticity of the documents it had published with great fanfare. The Gülen movement's media flagship, *Zaman*, reported at various times that the Sledgehammer CDs carry authenticated fingerprints, that civilian staff have admitted preparing the coup documents, that military prosecutors have certified the coup plans as genuine – all of which happen to be false. As for “independent” media, self-censorship and refusal to engage with subjects that might offend the Gülen movement or the government has become commonplace. This is not just paranoia: the country's largest independent media company (Doğan Holding) was hit with a huge tax fine, for what many observers believe are political reasons, after its coverage of a corruption-tainted charity linked to the AKP drew Prime Minister Tayyip Erdoğan's ire.

⁷ Tufan Türeç, “Arkadaşlar suçsuzdur [Our friends are innocent], *Hürriyet*, 28 April 2011, <http://www.hurriyet.com.tr/gundem/17655009.asp?gid=381>.

⁸ This came to light later when the court eventually accepted the defense's petition, after repeated requests, that the material be released. See <http://cdogangercekler.wordpress.com/2011/01/14/adli-emanete-saklanan-yazilardan-neler-cikti/> (in Turkish)

The AKP government has played a more directly prejudicial role as well. Prime Minister Erdoğan and leading members of the AKP have openly supported the prosecutions and have made it clear that they regard the defendants guilty as charged, rendering a fair trial difficult. Yasemin Çongar, an editor at *Taraf*, has revealed that her confidence in the veracity of the Sledgehammer plot was reinforced by Erdoğan's early public statements on the subject.⁹ A cabinet minister accused a judge that issued a release order for the suspects of being a member of the same criminal gang.¹⁰ (The order was quickly reversed by other judges following an intense media campaign.) Egemen Bağış, minister of EU affairs and the chief negotiator, claimed in an interview that he and his AKP colleague were slated for execution by the defendants.¹¹ Following the constitutional referendum in September 2010, the High Council of Judges and Prosecutors –whose membership is now dominated by pro-government appointees– removed from the case all the judges that had previously ruled in favor of the defendants on various appeals.

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⁹ Here is part of a transcript of the interview British journalist Julia Rooke conducted with Çongar as background to a story that the National Public Radio carried on 30 June 2010. (The transcript was made available to me by Rooke):

"Question: Did you ever worry personally that some of these documents were fakes?

Answer: Yes of course I worry. I worry about anything I write about. Look, I'm not a forensic expert, I'm not a police officer, I'm a journalist and I have to be sure beyond doubt – beyond a certain level of doubt - that what I'm given is specific, certain and can be collaborated with other facts. What the Prime Minister said after Sledge story first came out, what former joint chiefs of staff said, and even what the people now accused of taking a role in this coup plan said, kind of all collaborated [sic, must mean "corroborated"] I think most of these docs and these situations." (Emphasis added.)

Incidentally, Çongar is wrong in what she says about the former chief of staff (Hilmi Özkök) or those accused of taking part in the coup plot, as all of these individuals have denied any knowledge of the Sledgehammer plan.

¹⁰ "Minister Ergün: 'The Gang Has Its Own Sentry Judge' ", *Radikal*, 5 April 2010, <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&Date=05.04.2010&ArticleID=989645>.

¹¹ "I remembered what would have been done in Sledgehammer and trembled while we were at U2 concert" *Sabah*, 30 December 2010, http://www.sabah.com.tr/fotohaber/gundem/u2yu_izledigimiz_statta_balyozda_yapilacaklari_animasdim_ve_urperdim?tc=15&albumId=22579&page=9).

Early on, prosecutors used a TÜBITAK report, which they claimed verified the authenticity of the Sledgehammer CDs, to obtain the arrest of Çetin Doğan and others. Unaccountably, the report was kept secret for almost three months, but its apparently conclusive determination became a staple of media reports on the culpability of Doğan and the other suspects. When the TÜBITAK report was finally released, it turned out to be a superficial job that had not even attempted to establish the CDs' authenticity. Most critically, it entirely overlooked the ease with which the information on the author and date on the CDs could have been altered and manipulated, omitting any mention of this possibility in the report.¹² These shortcomings were revealed in a subsequent TÜBITAK report and others undertaken by the military prosecutors' office and on behalf of the defendants. These later reports received little media coverage and no weight in the indictment.

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Similarly, the conclusions of an early report by the military prosecutor's office, somehow leaked months before it was shared with the defense, were grossly distorted by the media. The report was widely portrayed as verifying the coup plot, even though its author had made it clear that he made no attempt to ascertain whether the CDs and the documents therein were authentic. A statement of clarification issued by the military prosecutor's office received little notice. A subsequent, exhaustive military report cleared the

defendants of any wrongdoing and indicated that the Sledgehammer documents were fraudulent. This report never received any coverage in the media and was completely disregarded by the prosecutors.¹³

Common Patterns

The various Ergenekon investigations follow a similar pattern. They are typically instigated by anonymous informants who provide incredibly detailed information about the nature of the crimes and the individuals who have supposedly committed them. They point to the location of the incriminating evidence –for example,

¹² TÜBITAK's current director was appointed by the government in 2004, over the protests of pre-existing members of its scientific council, who resigned en masse.

¹³ The 1,000-page indictment is dated just a few days later than the completion of this report. It is unlikely that the military report, which is itself 3,000 pages long, could have been digested by the prosecutors before they completed their indictment. It seems safe to assume that the military report made little difference to the indictment, which includes just a crude summary of the military report.

the specific site where a cache of weaponry is buried—and, as in the Sledgehammer case, sometimes provide the “originals” of secret documents detailing criminal activities. These revelations are followed by highly publicized search and seizures by the police, arrests, selective leaks to the media about the “evidence,” and a campaign by the pro-government media to discredit the suspects and whip up public frenzy about the case. The defendants meanwhile vehemently deny the charges, any connection to the evidence to which they have been linked, and even knowledge of each other. Lawyers’ requests for revoking the detention status of suspects pending trial are typically rejected by judges after perfunctory examination of the details of the case.

After several months, the prosecutors produce mammoth indictments—some running into thousands of pages without appendices. Much space in the indictments is taken up by irrelevant material unrelated to the specific charges, such as extensive extracts from tapped but routine phone conversations. Few observers have scrutinized these indictments closely. Indeed, they are very difficult to make sense of given their length and convoluted logic. The most thorough analysis to date has been undertaken by Gareth H. Jenkins, a British journalist. His verdict on the first two indictments applies equally well to the rest: “The indictments are so full of contradictions, rumors, speculation, misinformation, illogicalities, absurdities and untruths that they are not even internally consistent or coherent.”¹⁴

The indictments produce little new evidence beyond what the anonymous informants have already provided or what has been “discovered” during searches. Strikingly, no material evidence such as fingerprints, eyewitness accounts, or other hard evidence links the defendants to the alleged crimes. Questioning of the suspects yields only denials, and no confessions. Prosecutors suspend all disbelief when it comes to the credibility of the informants. They take incredible leaps of faith in asserting the culpability of the defendants. For instance, the presence in a defendant’s phone book of a phone number belonging to a defendant in another case is taken as corroborating evidence that the two are linked in a criminal conspiracy, even though the conspiracy is yet to be established in a court of law and neither defendant has been found guilty of anything as yet. At the same time they disregard even the most telling evidence on behalf of the defendants. For example, several Sledgehammer defendants who have been linked to the alleged coup plot because their names appear on computer files have shown—to no avail—that they were out of the country with no access to the computers in question during the period the documents appear to have been prepared.

¹⁴ Gareth H. Jenkins, *Between Fact and Fiction: Turkey's Ergenekon Investigation*, (Washington D.C.:Silk Road Studies, August 2009), p. 11.

Concluding Thoughts

For years, the AKP and the Gülenists have felt themselves persecuted by the military and hard-line secularists. The AKP and its predecessors have been traumatized by the constant threat that they might be closed – a frequent occurrence in the past for parties suspected of violating the strict secular code of the old guard. They have faced hostility from the constitutional court and other high courts. Now that these groups have managed to wrest control of the police force, large parts of the media, critical segments of the judiciary, and many other state institutions, it appears many among them feel it is their time for retribution. As one AKP founding member put it, “For years, they blacklisted us. Now, it is our turn.”¹⁵ Indeed, some clearly perceive this as a battle for survival: either they will win and eliminate the old guard, or the old guard will win and they will perish.

But what about democracy, the rule of law and human rights? The AKP’s great appeal to the liberal intelligentsia and to Turkey’s friends in Europe was that it stood for a tolerant, moderate, and truly democratic brand of Islamic conservatism – a political movement much more suited to mainstream Turkish values and the modern world than the strict, hard-line secularism of the old guard. But its support for the undermining of the rule of law in the Ergenekon and Sledgehammer cases reveals how misleading the standard narrative of democracy’s victory over military tutelage is.

Beyond the gross miscarriage of justice, the problem with today’s judicial manipulation is that it makes it all the more difficult, if not impossible, for the real crimes to be uncovered and prosecuted. Once the deception is widely exposed and the full story comes out, it is not just the AKP government and the media that will take the hit. The judiciary will remain crippled for years, shorn of credibility. The eventual unraveling of these cases will discredit the judiciary, make the AKP government appear complicit in the debacle, shake the faith of the liberal intelligentsia, and set back the demilitarization of Turkish politics.

Turkey’s legal system was reformed significantly during the last decade, with the avowed objective of aligning it with European norms and facilitating the country’s accession to the European Union. The criminal code was rewritten and the national police modernized and professionalized. The parliament and the president have acquired a greater say in making judicial appointments and over the composition of the constitutional court. The jurisdiction of civilian courts over the military has expanded. On paper, Turkey now has a legal regime that is little different from

¹⁵ “AKP Deputy Doğan: It is now our turn to blacklist them”, *NTVMSNBC*, 21 February 2010 <http://www.ntvmsnbc.com/id/25060126/>.

Europe's in terms of procedural safeguards and the rights of defendants.

But the reality on the ground could not be more different. The sensational Ergenekon-Sledgehammer trials evoke Kafka rather than legal textbooks. Hundreds of individuals have been detained and are being tried in these cases on evidence that would be inadmissible in Western courts. Strong indications that documents supporting the cases are forged and defendants are being framed go uninvestigated. Many had hoped that these trials would enable Turkey's nascent democracy to hold the secular old guard and military to account for their past abuses. Unfortunately, the evidence suggests that the prosecutors and the police have had little interest in uncovering actual crimes or the real culprits. They have instead concocted implausible conspiracies that allow them to drag under their net individuals whom they perceive as opponents.

The political responsibility for the debacle that these political-military trials represent must ultimately rest with the AKP government. Unless the political leadership stands for the rule of law, the rule of law cannot sustain itself.

This article draws heavily on Pinar Doğan and Rodrik, "How Turkey Manufactured a Coup Plot," *Foreign Policy*, 6 April 2010; Doğan and Rodrik, "Turkey's Other Dirty War," *The New Republic*, 24 May 2010, and Rodrik, "Democracy in Turkey," *The National Interest*, online, 11 February 2011.