

**P E N  
N O R W A Y**

**Legal report on indictment:**

# **Demirel and Maviođlu**

**PEN Norway Turkey Indictment Project**

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## PEN Norway Turkey Indictment Project

At PEN Norway, we are studying journalist and civil society-related cases from the last six years in Turkey by examining the foundation document of the case: the indictment.

Since January 2020, with an international team of judges, lawyers and scholars we have been examining indictments in prominent media and civil society cases, including Cumhuriyet, Büyükada and the Gezi Park trials.

Each report focuses on one indictment. A group of legal and human rights experts from six different countries will have assessed 22 indictments' compliance with local regulations and international standards by the end of 2021.

Our objective is to provide a tangible ground for discussions concerning the crisis of rule of law in Turkey and support dialogues that aim to improve the standards and put in place training in indictment-writing for Turkey's prosecutors and judges. You can find all published reports and articles (including our final report of 2020) on our website: [norskpen.no](http://norskpen.no).

Caroline Stockford, PEN Norway's Turkey Adviser, leads the project and lawyer Şerife Ceren Uysal is the Indictment Reports Supervisor.

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## 1.) Introduction

This evaluation report is drafted as a part of the Turkey Indictment Project 2021, established by PEN Norway. It represents an analysis of the indictment against Çayan Demirel and Ertuğrul Mavioğlu. This report is dedicated to the documentarist, Robert J. Flaherty by its author.

## 2.) Summary of Case Background Information

1. Journalist Ertuğrul Mavioğlu and film-maker Çayan Demirel co-directed the documentary *Bakur*, picking up moments from the life of the Kurdistan Workers' Party (PKK/KCK) brigades operating in South-East Turkey, that is, in the Kurdish territory of Turkey. Following the subjects over a period covering the different seasons, the documentary was shot live in 2013. It was scheduled to premiere on 12.04.2015 at the Istanbul Film Festival, but the authorities blocked it because no application had been made for the necessary entry in the dedicated public registry, resulting in failure to obtain the relevant licence. The documentary was then aired at several foreign festivals, earning success and recognition.

Still lacking the necessary licence, during the following month (namely on 06.05.2015) the documentary was shown in the hall of a cultural centre in the city of Batman, close to the Syrian border.

2. This marks the start of the judicial issue we are focussing upon. In relation to the documentary, the Public Prosecutor's office in Batman brought an indictment against the two directors for disseminating propaganda in favour of terrorism, invoking the 1<sup>st</sup> and 2<sup>nd</sup> subparagraphs of Article 7/2 of Anti-terror law No. 3713, aggravated by the use of an audio visual medium (cinema) for such purpose.

The Court holding territorial jurisdiction rejected the charge twice for procedural reasons before holding the trial against the two directors after admitting the charge.

Mavioğlu was heard during the investigation stage and pleaded not guilty, invoking the right of assertion of thought and expression.

Demirel issued a very short statement to the Court, pleading not guilty because he had acted in the exercise of a constitutionally guaranteed right, and he didn't even understand why he had been brought to trial. Although he had been severely ill and suffering from serious mobility problems since March 2015, essentially unable to move, he still appeared

twice before the judges.

The trial of first instance ended on 18.07.2019, with the two defendants sentenced to 4 years 6 months (minimum sentence 3 years, brought to the above period because an aggravating circumstance had been found and applied).

Currently, an appeal against the ruling of the Court of Batman is pending before the Gaziantep Regional Court of Appeal.

3. The PKK is classified as a terror organisation by the Turkish judicial system, by Europe and by the USA, but not by the UN. Between 2013 and 2015, talks were held between the Turkish Government and the organisation, which had chosen to lay down arms and start a process which was supposed to result in the administrative autonomy of the Kurds and, therefore, peace between the Turkish and the Kurdish people. Such process - the *Dolmabahçe Agreements* - was abruptly interrupted in early 2015 following a unilateral decision by the Government of Turkey, which resumed the "hunt" against PKK members with extremely serious repercussions on the civilians in the Kurdish territory of Turkey.
4. We will examine the indictment against Mavioğlu and Demirel, which has led to their conviction in terms of their right to freedom of expression in general, but firstly by examining the indictment in the light of domestic Turkish legislation, in the context of a series of judgements of the Turkish Constitutional Court, and finally in the context of International legislation - more specifically, the principles expressed by the ECtHR, which has repeatedly examined Article 7/2 of Law No. 3713.

### 3.) Analysis of the Indictment

#### 3.1) The indictment in terms of Turkey's domestic legislation

5. The rule referred to in the 1<sup>st</sup> and 2<sup>nd</sup> subparagraph of Article 7/2 of Anti-terror law No. 3713 reads as follows:

*"Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or inciting the use of methods*

*constituting coercion, violence or threats shall be liable to a term of imprisonment of one to five years."*

Such phrasing comes from the amendment to the Anti-terror Law introduced by Law No. 6459 of 30.04.2013, which has limited the offence to those "*justifying, praising or inciting*" to methods involving "*coercion, violence or threats*". Said amendment was made due to numerous interventions by the ECtHR, condemning Turkey because the previous phrasing of the law contravened the right of expression.

The text of the article in question was then further amended by means of Law No. 7188 of 17.10.2019, establishing that both Article 7/2 of Law No. 3713 and Article 215 of the TPC should provide for an offence only in case of actions causing a clear and imminent threat to public order. Further specifying that any expression of thought not exceeding the limits of reporting or simply criticising do not constitute the crime in question.

Such legislative change was obviously inapplicable at the time of the indictment and the relevant judgement of first instance were issued (both before the amendment), but it will certainly apply to the appeal, which is still pending, given that the latest law is more favourable to the defendant. We simply notice that the principles inspiring the change of 2019 should have inspired the decision of first instance as well, these being in line with the general principles on this matter.

6. Note also how the wording "*any person*" refers to anyone - including those who do not belong to the organisation in favour of which the propaganda is being disseminated - while other offences, as those provided for by Article 7/1 of Law No. 3713, are specific to those who "*establish, lead, or are a member of a terrorist organisation*".
7. Over the last years, very many cases of incitement for violations of Article 7/2 of Law No. 3713 were reported in Turkey:  
10,547 in 2013  
15,815 in 2014

13,608 in 2015

15,913 in 2016

24,585 in 2017

17,077 in 2018

Please note that data from 2017 and 2018 refer to violations of the whole of Law No. 3173<sup>1</sup>.

Such data include cases, like the one in question, involving journalists, politicians, artists, teachers, opinion makers, bloggers, advocates for human and civil rights, etc.<sup>2</sup>

8. The indictment is relatively short (less than two pages) and not dozens or even hundreds of pages long, as is often the case with system in Turkey, resulting in the facts underpinning the charge getting lost and in the failure to understand what the accused must defend themselves from. And yet, regardless of the brevity, it is not clear what such "propaganda" consists of and, most of all, which parts of the movie contain such "propaganda".

9. Article 170 of the Turkish Criminal Procedure Code specifies what the content of the indictment should be - aside from formal and identification elements, paragraph 3 lists:

*"p.h) the crime charged and the related articles of applicable Criminal Code;*

*p.i) Place, date and the time period of the charged crime;*

*p.j) Evidence of the offence."*

then, and this is what we intend to underline, paragraph 4) provides that:

*"the events that comprise the charged crime shall be explained in the*

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<sup>1</sup> Cfr. Judicial Statistics of the Ministry of Justice, 2018, page 24.

<sup>2</sup> Some of the cases that have made the headlines, besides those we will be examining in detail, are: *Main Özgür Gündem* case (journalists); *Eren Keskin* case (journalist); *Selahattin Demirtaş* case (HDP member); *Figen Yüksekdağ* case (HDP member); *İdris Baluken* (HDP member, sentenced to 16 years); many other cases involving HDP administrators and MPs, especially in the South-East of Turkey; 225 cases against *Human Rights Association* (IHD); *Avesta Publishing House* cases (publisher, for books published between 2001 and 2015).

*indictment in accordance to their relationship to the present evidence”*

and finally, in paragraph 5:

*“the conclusion section of the indictment shall include not only the issues that are disfavorable to the suspect, but also issues in his favour” (the underlining is ours).*

Therefore, paragraph 5 reads that the facts representing the alleged offence must be fully detailed.

The crime of "*disseminating propaganda*" (Article 7/2 of Anti-terror Law No. 3713, as amended) in favour of a terror organisation consists in legitimising and condoning the methods used by such organisation constituting coercion, violence or threats or incitement to the use of such methods to perpetrate the crime of terrorism.

As it can easily be seen, the definition of propaganda is quite vague because "*legitimising*" and "*condoning*" violence can also simply be intended as the expression of an opinion on the legitimacy of such methods.

"*Propaganda*" actually consists of an attempt to convince others of the legitimacy of an organisation, with the main purpose (whether achieved or not) of making others adhere to said organisation. In the absence of such purpose, we are in the presence of an expression of a conviction or a free thought<sup>3</sup>.

The point is that, in criminal law, uncertainty about the incriminating rule is not admitted or should at least be kept to a minimum. This is not the case for the rule invoked by the indictment in question (Article 7/2 of Law No. 3713).

10 - More specifically, the content of the incriminating object (a documentary) is examined in a paragraph at the end of page 2 of the indictment:

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<sup>3</sup> In relation to the blurred boundary between propaganda and free expression of thought, see - among others - DUFFY et al., *Expert Opinion for the Turkish Constitutional Court in the case Ayse Celik v Turkey - appl.n.2017/36722*, p.22.

*"The documentary demonstrated that (it) featured the lives of the members of the PKK/KCK terrorist organisation, the rural activities carried out by the members of the organisation and the dialogues that would reflect the military and political ideology of the PKK/KCK terrorist organisation; that (it) recorded the opinions of Murat Karayilan - one of the top leaders of the PKK/KCK terrorist organisation on the ideology and the aim of the PKK/KCK terrorist organisation - and that almost all of the footage featured the members of the organisation with weapons in their hands."*

Therefore, the documentary is a representation of:

- 1) the lives of the members of the terrorist organisation;
- 2) more specifically, the rural activities of such members;
- 3) the dialogues that reflect their military and political ideology;
- 4) the opinions of one of its top leaders;
- 5) the fact that the footage shows the members of the organisation almost always with weapons in their hands.

Such a list shows how the documentary is an accurate picture of the way the members of PKK/KCK live and organise themselves, no more and no less.

Just as if, instead of a documentary, the two directors had used an instrument such as a journalistic reportage - which, after all, is a documentary.

The indictment seems to focus mostly on the fact that the terror organisation had turned into an organisation made up mostly of women and, therefore, a female movement.

And this is a fact, maybe a political one, but in itself, it is definitely not even a clue of a terrorist organisation. If anything, it is an element underlining the level of consideration for the civil rights of each member (be it a man or a woman) within an organisation.



The directors have reported what was before them, and it is hard to imagine that anyone watching the documentary may be induced to adhere to the terror organisation: and yet, this is exactly the dividing line between reportage/documentary (a free expression of thought) and propaganda.

11 - The indictment should have indicated which parts, statements, comments, images of the documentary were intended to incite those watching it to adhere to the terrorist organisation.

12 - Article 7/2 of Law No. 3713 itself provides for the following to be constituent elements of terrorism propaganda:

- a) covering the face, in whole or in part, during demonstrations;
- b) bearing insignia and standards of the terrorist organisation, shouting slogans or making announcements using audio systems, or wearing uniforms of the terror organisation.

These are specific hypotheses of propaganda.

It is true that the documentary often shows militants wearing uniforms or shouting slogans - nonetheless, the norm aims at punishing those committing these actions in the way provided therein, and not those who film people wearing uniforms or shouting slogans.

And indeed, in the indictment these elements are not deemed as evidence supporting the claim of dissemination of propaganda in favour of a terrorist organisation.

Therefore, it is to be assumed that the person drafting the indictment clearly felt that filming such behaviour does not represent an act of propaganda.

The point, however, is that there is no indication of any part of the documentary, albeit short, where an incitement to join an organisation or a propaganda element can be detected or understood.

And yet, this is what should have been listed in the indictment in order to put the co directors in a position to defend themselves - this is precisely what the indictment consists of: making the defendants aware of every single element they are called to give reasons for and defend themselves from.

13 - We have already seen how Article 170 of the Turkish Criminal Procedure Code provides that the Prosecutor's attention does not have to be limited to the facts against the suspect but also to those in his or her favour.

Within the *Bakur* case, it seems important to recall at least 3 facts in favour of the defendants which should have been considered by the Prosecutor while drafting his indictment:

13a - Not all of the International community agrees on considering PKK as a terror organisation. It was declared as such by Turkey, obviously, Europe and the United States, but not by the United Nations.

13b - The documentary was shot in the summer and fall of 2013, a time when serious reconciliation talks between the Government of Turkey and the ethnopolitical Kurdish community (of which the PKK is obviously a part) were in place, so much so that, following a request from their acknowledged leader Ocalan, the Kurds had laid down their arms.

13c - Most of the documentary - and here lies the difference compared to what other media had already told - is dedicated to the role achieved within PKK by women, including highest ranks and leadership level. In the indictment, this should have been considered as the acknowledgement of a civil right and not as an accusation.

Each of these three elements, and all of them as a whole, make it possible to question the presence of the crime of propaganda and, therefore, should have been taken into account within the indictment which, on the contrary, does not

deal with them.

The indictment does not take into account any of these three elements (13 a-b-c). Indeed, one of the sentences ("*PKK turned to become a women's movement*") seems to point at the ever-increasing role of women within the organisation as an element of the crime or maybe as an aggravating factor.

More specifically, as underlined by journalist Mavioğlu at his hearing, in relation to point 13-b, the indictment reads: "*the documentary was filmed in 2013 when the decision and the peace process were still ongoing, and they shot the documentary to support such peace process.*"

The statement is quoted but is not taken into due consideration or accorded any at all, while it should have been to comply with Article 170/5 of the Turkish Criminal Procedure Code.

### 3.2) The indictment in terms of the Constitution of the Republic of Turkey's provisions for the protection of the rights of freedom of thought and expression

14 – Turkey's Constitution of acknowledges the right to freedom of thought and opinion. Article 25 reads as follows:

*"Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose, nor shall anyone be blamed or accused because of his/her thoughts and opinions."*

However, we know well how freedom of thought or opinion is nothing without freedom of expression. In fact, Article 26 provides that:

*"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media. This freedom includes the liberty of receiving or imparting information*

*or ideas without interference by official authorities”;*

However, this same article provides for a system of licensing and, finally, for the possibility to restrict such freedoms on grounds of national security, public order, public security or integrity of the nation.

15- However, in the case in question, in addition to freedom of thought, what is at stake is the freedom of science and the arts, as provided for by Article 27 - and there is no doubt that we are dealing with art (film art, specifically) and science (journalism)<sup>4</sup>.

This framework of reference should have been taken into account in the indictment and be considered as the context within which to assess the alleged unlawfulness of *Bakur*.

It is understood that the Prosecutor, albeit not explicitly, intends to regard the documentary as an exercise of freedom that can be restricted on grounds of “*national security, public order, public security, and safeguarding of the fundamental characteristics of the Republic.*”

16 - In order to assess the relationship between the indictment and the provisions of Turkey’s Constitution, we benchmark it against a recent judgement by the Constitutional Court in relation to the Academics for Peace (AfP) case<sup>5</sup>.

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<sup>4</sup> Not many documentaries have actually been sent to trial after the one we are dealing with. We found:

Veysi Altay – Dicle Anter for the *Nuju* documentary (because of its poster showing a YPG flag);  
Kurbettin Cebe for the *Roza – İki Şehrin Ülkesi* documentary, for which he was sentenced to 2 years and 4 months in 2020;

Yunus Ozan Korkut, together with 4 actors for *Benim Varoş Hikayem* (which is more of a film than a documentary), all acquitted in 2019

<sup>5</sup>*Zubeyde Fusun Ustel and Others vs Turkey*, appl. No. 2018/17635 decision 26/7/19.

There are many cases in which the Constitutional Court of the Republic of Turkey has taken into account the balance between freedom of speech and expression (as granted by Article 26 of the Constitution), and the need for the State to safeguard itself from political attacks, especially for facts and events happening where groups it deems as terror groups are active.

But the AfP case actually bears many similarities to the *Bakur* case. The count of indictment (Article 7/2 of Law No. 3173) is the same, and the terrorist group around which it is built (PKK) is the same.

The main differences lie in the fact at the centre of the accusation: on the one side, for *Bakur*, a documentary showing the life of a brigade of the PKK; on the other side, an openly political declaration asking the Government to cease the “massacres”, “murders” and “tortures” perpetrated by Turkish forces against the Kurdish people (and not only) during the winter of 2015/2016 in the cities and towns of East and North-East Turkey.

It is to be acknowledged that the political impact - and, therefore, the danger (from the point of view of the Government of Turkey) - is certainly more considerable in the AfP declaration than in the documentary, which does not intend to incite to anything but rather, only to represent an aspect of the life of PKK.

And yet, on the basis of the declaration signed by 2,212 researchers and professors (both in Turkey and abroad), the Court has established that the freedom of expression provided for by Article 26 of the Constitution should prevail, despite underlining that the content of the declaration is not shared by the majority of the country. Such internal division seems to be mirrored by the division of the Constitutional Court at the time of the decision: 8 were in favour and 8 were against, with the former prevailing because of the vote of the President of the Court, who believes the limitation of the freedom of expression

is “unacceptable”, just as the Court does by means of its decision. The declarations on the AfP manifesto remain within the limits of freedom of expression: although they heavily criticise authorities with a harsh, accusatory and unilateral language, they are not such as to incite violence or to represent a threat to the society, the State and the democratic political order, so as to encourage people to perform illegal actions. Yet, it is indeed in these cases that “*considerable caution must be exercised when showing a legal reaction to such expressions*”, keeping in mind that “*a similar reaction sets a strict limit to the right of the public to be informed on particularly significant facts from a perspective other than that of the majority.*” A “*higher degree of tolerance*” is mandatory, as required by democratic pluralism.<sup>6</sup> The Court adds that this necessary caution is mandatory because the norm provides for the deprivation of liberty whenever a violation occurs, and therefore such norm cannot be interpreted in a restrictive way.

Having said this in relation to the declaration signed by AfP, it is easy to see how the *Bakur* documentary is framed within a context that is even broader and more innocuous for State security, for at least two main reasons:

- a- it does indeed contain elements that are critical towards the Government of Turkey, but there is no incitement;
- b- the declaration signed by AfP was set amid a political-military crisis (and this is what justified it), whereas *Bakur* was conceived and filmed at a time when peace talks between the Government and the PKK allowed to lay down the arms and suggested that a peace agreement was soon to be found.

17 - Another case sharing similarities with the *Bakur* one and which came under scrutiny by the Constitutional Court was the *Ayşe Çelik v Turkey* one<sup>7</sup> - a very typical case of freedom of expression. It revolves around a declaration made on 08.01.16 during a TV show, when Ayşe Çelik asked viewers “*not to keep silent*”

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<sup>6</sup>The words in quotes are by DUFFY et al. cit.

<sup>7</sup>*Ayşe Celik v Turkey* , appl.2017/36722 dec.9/5/19

about what was going on in the South-East of the country, whilst the target of government military measures, and about the conditions of minors and mothers under the curfew imposed by the Government.

A critical and heartfelt political declaration, which was certainly more immediately incisive than the *Bakur* documentary. Sentenced to 1 year and 3 months for the violation of Article 7/2 of Law No. 3713, the defendant resorted to the Regional Court of Appeal and to the Court of Cassation invoking, among others, Art. 10 of the ECHR on freedom of expression. But it was the Constitutional Court only, to which Ayşe Çelik then appealed, who acknowledge her right with the judgement of 09.05.19.

### 3.3. The *Bakur* case in the light of International legislation

18A - The indictment must be first and foremost examined in the light of UN Guidelines on the Role of Prosecutors (Principles 10-20). It can be said that such norms foresee an active role for prosecutors in ensuring the legality of the indictment.

More specifically, Principle 12 of the Guidelines provides that:

*"Prosecutors shall, in accordance with the law, perform their duty fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."*

That is to say that we expect the prosecutors in the investigation stage to be meticulous in the legality of evidence, observing reasonable doubt and taking into account the evidence in favour of the defendant as well.

Finally, Principle 18 of the Guidelines highlights the need for Prosecutors to put an end to the investigation if the accusations are unsubstantiated.

18B - While this is the context within which the Prosecutor must act to assess whether to issue or not an indictment, it is in relation to the criteria of legitimacy that one must look at the single case. On this regard, ECtHR spoke out about Turkey several times over a very long period of time, almost always and continuously censoring the country for its anti-terror rules and, more specifically, for the propaganda law (so much so that, as we have seen, Turkey had to repeatedly and significantly intervene on article 7/2 of Law No. 3173)<sup>8</sup>.

Article 6 of the European Convention underlines the need for the defendant “to be informed promptly [...] and in detail, of the nature and cause of the accusation against him/her”. Instead, as we have already seen, the indictment is generic. Not only because the crime of “propaganda” is, in itself, generic and does not meet the criterion of legal certainty - which is at the base of a (supposed) criminal liability (*nullum crimen sine lege*, as the Latins said) - but also because, in this specific case, generic reference is made to the *Bakur* documentary, but never is it specified which parts of the documentary (images, sentences, or combination of the two) can be deemed as elements of propaganda - that is, such as to incite to adhere to the terror organisation.

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<sup>8</sup> In addition to the AfP and Çelik cases mentioned above, we recall, among others:

*Halis Doğan v Turkey* – appl. No. 71984/01 – dec.25/7/06

*Özgür Gündem v Turkey* – appl. No. 23144/93 – dec.16/3/2000

*Surek v Turkey* – appl.No. 24735/94 – dec.8/7/99

*Surek v Turkey* – appl. No. 26682/95 – dec.8/7/99

*Gerger v Turkey* – appl.No. 24919/94 - dec.8/7/99 (grand Chambre)

*Karataş v Turkey* – appl. No. 23168/94 – dec.8/7/99

*Ceylan v Turkey* appl. No. 23556/94 – dec.8/7/99

*Belek v Turkey* – appl.s No. 36827/06, 36828/06, 36829/06 – dec.20/11/12

*Gündüz v Turkey* – appl. No. 35071/97 – dec.4/12/03

*Öztürk v Turkey* – appl. No. 22479/93 - dec. 28/9/99 (Grand Chambre)

*Imret v Turkey* – appl. No. 57316/10 – dec.10/7/18

*Zana v Turkey* – appl. No. 18954/91 - dec.25/11/97

*Yalcinkaya and others v Turkey* – appl. No. 5497 – dec.24/6/14

*Güzel and Özer v Turkey* – appl. No. 4870/02 – dec.8//6/10

*Yılmaz and Kılıç v Turkey* – appl. No. 68514/01 – dec.17/7/08



18C - Attention is also drawn to the fact that the International Association of Prosecutors itself, founded at the UN headquarters in 1995 (and, therefore, shared by Turkey too), calls for the guarantee of “standards to ensure fair, effective, impartial and efficient prosecution of criminal offences” in all justice systems. According to these standards, a prosecutor should only initiate a criminal proceeding if “a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence”.

### 3.4. Article 7/2 of Law No. 3713 and international legislation

19 - At the time the indictment was issued, Article 7/2 of Law No. 3713 read: “Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or encouraging the use of methods constituting coercion, violence or threats shall be liable to a term of imprisonment of 1 to 5 years.” The words from “justifying” to “intimidation” were introduced by way of an amendment on 30.04.2013, as concrete elements to identify the crime of “propaganda” in accordance with the principles of freedom of expression as outlined in the case-law of ECtHR and, in particular, with regard to Turkey. Therefore, Article 7/2 will have to be applied in line with the principles of freedom of expression, as formulated by ECtHR.

19.1 - These include the principle that the term “propaganda” lacks that specificity and concreteness that must characterise criminal provisions;

19.2 - In doubtful cases, it is not possible to resort to Article 7/2 through the analogical application *in malam partem*, that is, against the defendant

19.3 - There is then the issue of the psychological element of the crime: did the person intend to express an opinion on political or social issues (which is legitimate) or to incite violence (which is not)?

19.4 - What is the degree of connection between the action (words or images) and its legitimate intended purpose (incitement)? ECtHR is clear on this, stating that there must be a “clear and direct connection between words

*and violence in order for the restrictions to the freedom of speech to be justified.”*  
*ECtHR, Çamyar and Berkteş v. Turkey (appl. No. 41959/02, dec. 15/2/11). Gül and others v. Turkey*

19.5 - In the case in question, the issue of malice refers to the intent to damage the integrity of the country: this is not the case with *Bakur*, because just when the documentary was being shot, Turkey and the PKK were holding talks to reach an agreement and establish peace. Therefore, the documentary is simply a realistic representation of the interlocutor of the Government of Turkey.

20 - The crime referred to in Article 7/2 of Law No. 3173 can also be clarified by Article 220 of the TPC, especially by paragraphs 6, 7 and 8, which unsurprisingly, in providing for the crime of propaganda in favour of a criminal organisation, explicitly state that the action must be specific and, most of all, that it has to be put in place *“knowingly and willingly”* (c. 6).

Furthermore, it provides for a penalty ranging from 1 to 3 years, whereas in the anti-terror law, such penalty ranges from 1 to 5 years (to which, as in the case in question, the aggravating circumstance of the use of a medium other than the press applies). This makes a great difference because, even when there is no full clarity in determining it, sacrificing the right to freedom of expression can be justified if it leads to lower sanctions but not to higher ones (even 7 years and 6 months).

21 - The reasons for restricting the freedom of thought must be “relevant and sufficient”: when assessing such characteristics, the criteria and limits set forth from 1 to 5 will have to be taken into account. As stated very well in the “Expert Opinion” by Helen Duffy et al. for the Turkish Constitutional Court in the *Ayşe Çelik v. Turkey* case (appl. No. 2017/36722), this will be a “holistic” assessment that does not disregard the certainty of the indictment, the subjective element (malice or intent, generic or specific), the circumstances under which the actions representing a crime were performed, and the amount of the penalty: all these elements and several others will allow to establish whether the indictment drafted

by the Prosecutor was vitiated by illegality and, therefore, whether it could have been issued or not.

#### 4.) Conclusions and Recommendations

22 - All the pleas of illegality of the indictment we indicated (in relation to substantial Turkish law; in relation to procedural Turkish law; in relation to the indications by the Turkey's Constitutional Court; in relation to International legislation) can be summarised by two main reasons:

- A) the indictment is generic and vague; there is no indication of specific facts (declarations, comments, scenes from the documentary) that can be deemed as "disseminating propaganda" and about which or from which the defendant must or is able to defend himself;
- B) the presence of a conflict with the freedom of expression recognised by Article 26 of the Turkey's Constitution, by Articles 10 and 11 of ECHR, and Art. 19 and 21 of the ICCPR.

It must be reiterated that a documentary is a representation of a reality (in this case, some PKK formations) but that it does not identify with what it represents. The documentary can represent such aspects with a variable degree of sympathy or aversion. Still, in order for there to be "disseminating propaganda," there must be a clear intent to praise what is being represented and the purpose to cause a political or even factual adhesion to the represented organisation: objective element and subjective element or malice of the crime. Both these elements must be asserted in a precise and clear manner in order for the suspect, which is intended to become a defendant, to be able to defend himself or herself.

The fact that the indictment is generic is a symptom of how it derives from and limits itself to a political declaration. Just as it cannot support a technical defence, a mere political declaration is not enough to represent a technical accusation.

Unlike many other cases where the indictment was several pages long and it was not

clear which of these contained the facts the suspect was held to account, in this specific case it is quite short - as it should be - but still lacks a clear reference to the facts constituting the violation of a criminal law.

This is all the more serious because the norm (the concept of propaganda) has very blurred boundaries and too often it represents a violation of the right of expression or even of freedom of thought.

We would like to put forward two recommendations:

- A) When drafting an indictment, prosecutors must adhere strictly to the facts behind the accusation, without leaving out those that go towards the affirmation of non-liability, and should never limit themselves to political stances.
- B) The Turkey's political authority should re-assess Article 7/2 of Law No. 3713 as far as the expression "disseminating propaganda" is concerned: despite the changes introduced in 2013 and 2019, this term is still not as precise and concrete as international legislation demands it to be.

## **About the author**

Ezio Menzione specialises as a criminal lawyer, has been President of the Criminal Chamber of Pisa several times, has been a member of the Council of the Criminal Chambers and has worked in the role of defence lawyer in numerous trials of national importance. He has always been interested in minority rights, especially in terms of sexual orientation. On the subject he has published numerous articles and essays and in 1996 the book "Rights of homosexuals". He regularly participates in conferences and seminars on the subject of [minorities](#).