

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

**Legal report on indictment:**

**Seyhan Avşar Oğuz**

**PEN Norway Turkey Indictment Project**

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Published: 30 September 2021

## 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.

The Turkey Indictment Project is funded by the Norwegian Ministry of Foreign Affairs and the Consulate General of Sweden in Istanbul.

## 1.) Introduction

This evaluation report represents the legal analysis of the indictment issued against journalist and author Seyhan Avşar Oğuz (Avşar) by the Office of the Chief Public Prosecutor's Investigation Bureau on Press Offences in Istanbul on 19 September 2019. The indictment, with the investigation number 2019/56129 and indictment number 2019/26597, consists of two pages and charges Avşar with violating Article 125/1-3 a of the Turkish Penal Code (TPC), namely insult against a public officer due to the performance of his/her public duty. This report assesses the indictment's compliance with the Criminal Procedure Code of the Republic of Turkey and International standards for fair trials.

## 2.) Summary of the Case Background Information

Avşar was a reporter for Sözcü Newspaper. Currently, she works as a crime and court reporter at Cumhuriyet Newspaper. In 2020 she was awarded the Metin Göktepe Written News Award for her article "Cleaning in return for a mansion" in Cumhuriyet newspaper and the Uğur Mumcu Investigative Journalism Award for her article "FETÖ exchange". The article "FETÖ exchange" is the subject of this indictment. Avşar is also the subject of several criminal investigations and prosecutions because of her other articles.

The injured parties of the indictment are Lütfi Karabacak (Karabacak) and Ismet Bozkurt (Bozkurt). Both were public prosecutors in Istanbul (Çağlayan) Courthouse and dealt with a number of significant well-known cases. They were suspended in March 2019 as a result of an investigation conducted by the Istanbul Chief Public Prosecutor's Office. At the time of the suspension, Karabacak was working as public prosecutor at the Terror and Organized Crimes Bureau. Bozkurt was public prosecutor at the Unidentified Crimes Bureau. The decision of suspension was issued by the 2nd Chamber of the Council of Judges and Prosecutors and was based on the allegations that the prosecutors took bribes from members the Gülen Organization. On 16 January 2020, both were dismissed from public duty as a result of the disciplinary investigation.

At the same time, Bakırköy Public Prosecution Office conducted a criminal investigation against both former prosecutors. The prosecutors were charged with "bribery", "corruption", "trade of influence", "disclosure of the secret regarding the duty" and "violation of confidentiality"<sup>i</sup> and are facing prison time from 7 years 10 months to 28 years 6 months if they are convicted. The trials are still pending.

Avşar wrote two separate news articles on 17 March 2019 and 22 March 2019 and they were published by Cumhuriyet newspaper. In her first article, she referred to the indictments against the two prosecutors where the alleged crime was that they took money to decide on non-prosecution in the investigations related to members of the Gülen organisation. She also wrote that the prosecutors were suspended because of this issue. In her second article, she included details about the disciplinary investigations against the two prosecutors.

A criminal investigation was initiated against Avşar after she published her articles. On 8 May 2019 she gave her testimony before the public prosecutor in her case. On 19 September 2019 she was indicted with insulting public officers. Avşar's defense lawyer noticed that there were two other indictments with the same accusations against Avşar. In the end, only one trial was initiated.

On 16 January 2020 the first hearing of the Avşar case was held at Istanbul 2<sup>nd</sup> Criminal Court

of First Instance. Avşar did not participate in the hearing. Her lawyer requested the court not to proceed to the merits of the trial, since the indictment was not issued within the due date according to the Press Law. The lawyer also mentioned that there were three different indictments against the defendant with the same accusation. She requested Avşar's acquittal. In the same hearing, the court decided to drop the case related to the Press Law Article 26, as the indictment was not accepted by the court within four months after the publications of the articles.

Avşar's casefile is still pending before the Regional Appeal Court of Istanbul.

### **3.) Analysis of the Indictment**

#### **3.1 Evaluation of the indictment in terms of Domestic Law**

The indictment itself is only two pages long and thus quite short compared to several of the indictments we have examined in this project. The first impression is still that it is hard to read, as the descriptive part consist of one single sentence.

The Turkish Criminal Procedure Code (TCPC) Article 170 regulates the duty of the public prosecutor and the required content of an indictment.

##### **3.1.1 TCPC Article 170/3 - Formalities**

TCPC article 170/3-a-k describes mandatory formalities of an indictment. The indictment against Avşar conforms to most of these formalities. In the introductory section, it is clearly set out the identity of the suspect, the defense lawyer's name, the identities of the injured party, the name of the plaintiff, and their legal representation. The identity of the claimant is also mentioned, but the date of the claim is not, as it should according to TCPC Article 170/3-g. In this case, this is just a minor flaw, but it still makes the indictment appear rather sloppy.

The place and date of the crime is placed in the introductory part. This part is not complete as it contains only one date: 22/03/2019. Later, in the descriptive part of the indictment, both dates of the articles are put in, hence the indictment also conforms with TCPC Article 170/3-i. The indictment would appear more professional if both dates were put in the introductory part, but again this is just a minor issue.

The crime is described as "Insulting a Public Officer" with the applicable articles 125/1-3 a and 4, 43/2-1 and 53 of the Turkish Penal Code (TPC). The short description of the crime in the introductory part of the indictment complies with the applicable articles. The evidence of the crime is listed according to TCPC Article 170/3-j.

Avşar was not at any time in pre-trial custody. According to TCPC Article 170/3-k the indictment shall contain an explanation of whether the suspect is in detention or not. The information is mandatory for a reason and should be offered in the introductory part. All in all the flaws detected in the introductory part of the indictment are minor and have no other effect than making the indictment look less professional.

##### **3.1.2 TCPC Article 170/4 – Description of the alleged crime and the evidence establishing the offence**

TCPC Article 170/4 states that the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence. The charged crime

in this indictment is “Insulting a public officer”.

According to TPC Article 125/1 *“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»*. If the insult is committed against a public officer due to the performance of his duty, the penalty shall be not less than one year (TPC 125/3-a). The indictment also mentions TPC Article 125/4 which regulates the penalty when the insult is committed in public. According to this, the evidence must establish that Avşar by writing these articles impugned or attacked these prosecutors’ honour, dignity or prestige.

In the descriptive part, the indictment first refers to the two separate articles published on 17 and 22 March 2019. Thereafter is information about the dates the article were published, the name of the newspaper and where in the newspaper the articles were placed. This information is followed by the text from the articles that allegedly constitutes the crime. This structure would actually be good, if the whole descriptive part of the indictment did not consist of one long sentence.

The conclusion is that Avşar, by writing these articles:

- constituted a breach of personal rights of the two prosecutors
- amounted to an insult to a public officer in the sense that they depicted the injured parties as public officers who took action in return for a bribe
- violated the right presumption of innocence by publishing the names of the prosecutors and created the impression as if the public prosecutors are issuing decisions of non-prosecution in return for a bribe
- reported false news:
- when Avşar claimed that Lütfi Karabacak demanded Turhan Turunç be allowed to benefit from the provisions of effective remorse [law] whereas he never took part in the first hearing session of the said case in Istanbul 14<sup>th</sup> Assize Court-as she stated that the plaintiff incurred a relocation penalty whereas he did not.

A crucial part of any indictment is to connect the alleged criminal actions to the elements of the applicable article in TPC. In this indictment, this part is totally missing. There is no explanation why the articles represent a *breach of personal rights* or *amounted to an insult* of the prosecutors. Furthermore, there is no definition of an “insult”. That the content of articles are considered to be insulting is not sufficient to justify a criminal investigation against Avşar.

The alleged criminal act described as *“violated the right presumption of innocence”* is quite interesting. Nowhere in TPC Article 125 is violation of the right of presumption of innocence described as a criminal act. Needless to say, ECHR article 6 § 2 enshrine everyone’s right to be presumed innocent until proven guilty according to law. However, it is the obligation of the Republic of Turkey (not the journalist or the newspaper) to protect the right to a fair trial and hereunder the right to be presumed innocence. There is no obligation for the journalist to wait to report on the criminal cases against the prosecutors until their cases has been decided by the court.<sup>ii</sup>

There is no doubt that Avşar named the two prosecutors in her articles. It is understandable that the prosecutors disliked Avşar’s articles. They might even have felt insulted. However, I’m quite convinced that this is not enough to establish a violation of TPC Article 125. The indictment states that presumption of innocence was violated *by publishing the names of the prosecutors and created the impression as if the public prosecutors are issuing decisions of non-prosecution in return for a bribe*. To create an impression of public prosecutors being corrupt, can definitely be regarded as an insult. However, a closer look at the evidence (the quoted text

of the articles) shows that this is not a case of insulting public officers. It is obvious from the text that the articles merely report facts from the criminal cases against the two prosecutors. In the articles, it is written that:

*Lütfi Karabacak (...) was claimed to have given multiple decisions of non-prosecution on FETÖ files in return for money...*

*It was claimed that the prosecutors, who are now suspended, issued decisions of non-prosecution for the suspects at the inquiry stage of the FETÖ cases they handled*

*It was claimed that the prosecutors' conversations with the members of FETÖ, who have been under the surveillance of the police were wiretapped, that a lawyer filed a complaint against them and that they have been bargaining for the decision of non-prosecution and for the amount of money*

*Claims of a bargain between prosecutors and suspects facilitated by estate agents, policemen and attorneys*

The difference between *attributing an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige*, which is the criminal action according to TPC Article 125, and referring the facts of a criminal investigation against public officers should be addressed in the indictment. From the text quoted in the indictment, one cannot draw the conclusion that Avşar was offering her opinion on the ongoing investigation or that she concludes that the prosecutors are guilty of the allegations. She has carefully written that *it was claimed* that the prosecutors took bribes. It is not explained why this is an insult according to TPC Article 125. The indictment again fails to connect the elements of the crime to the articles.

Avşar is finally accused of reporting false news. This action is not mentioned in TPC Article 125. Even if it was, no evidence is offered to prove what Avşar's article contained false news. The conclusion is that it is obvious that the indictment does not fulfill the requirements in TCPC Article 170/4.

### **3.1.3 TCPC Article 170/5 - Does the indictment include not only the issues that are unfavourable to the suspect, but also issues in her favour?**

The indictment states Avşar's defense:

*The suspect stated that she acted in her capacity as a journalist and reported an incident that was being closely followed by the public and that had a public interest dimension and added that the reportage she wrote was within the limits of press freedom and she denied the accusations.*

The indictment fails to address this defence. There is no reference to Turkish Press Law Article 3 and the freedom of the press to acquire and report information. There is no reference to the right to freedom of speech, which is enshrined both in The Constitution of Republic of Turkey and in ECHR Article 10.

It is actually a serious flaw that there is no mention of the right to freedom of speech or more specific the freedom of the press in the indictment. This approach is lacking in several analyzed indictments within this project. Turkey has a bad record when it comes to cases brought before ECtHR regarding freedom of speech and free press. A more conscious approach to this part of the indictment by the prosecutor should therefore be expected. Finally, there is the defense of truth. Avşar has reported on ongoing investigation against two prosecutors. Even if the cases against the prosecutors are still pending, it is an undisputable fact that they were indicted for taking bribes. The ECtHR has held that truth should be a defence to a charge of defamation, see for instance *McVicar v. United Kingdom*.<sup>iii</sup> TPC Article

127 provides that *“Where an accusation, the subject matter of which constitutes a criminal offence, is proven, the person shall receive no penalty.”* The prosecutor should be aware of this regulation and related defense and address it in the indictment.

In this sense, the indictment is definitely not in line with TCPC Article 170/5.

### **3.1.4 TCPC Article 170/2 – Should the prosecutor prosecute?**

The answer is simple. The prosecutor should not prosecute these claims against Avşar. According to TCPC Article 170/2 the prosecutor should only prosecute in cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed.

Clearly, the analyses above show that there was no sufficient suspicion against Avşar for any criminal offense. The indictment is not based on the facts and evidence of the case and is not in line with the requirements in TCPC Article 170. The prosecutor did not fulfill his duty to closely examine the evidence and did not mention the defense that obviously was in Avşar's favour.

In addition, there is no explanation on why the articles violates TPC Article 125.

The conclusion is that the indictment does not meet the requirements set out in the Republic of Turkey's domestic law.

## **3.2 Evaluation of the indictment in terms of international standards**

The domestic law on how to write an indictment is actually very good. If the indictment were in line with TCPC Article 170, it would meet international standards. Turkey has ratified the European Convention on Human Rights (ECHR) and, according to the Constitution of Turkey article 90, ratified international law takes precedence over domestic law. This means that if the articles of the ECHR are violated, so is the Constitution of Turkey. The relevant international standards for this indictment is ECHR Article 6 “Right to fair trial” and Article 10 “Freedom of Speech”, United Nations Guidelines on the Principles Concerning the Role of the Prosecutors and ECtHR caselaw.

### **3.2.1 ECHR Article 6: Right to a Fair Trial**

ECHR Article 6 obligates all states of the convention to establish a judicial system in accordance with the article's requirements.

According to ECHR Article 6 § 3(a) everyone charged with a criminal offence has the right to be *“informed ... in a language which he understands an in detail, of the nature and cause of the accusation against him”*

According to ECHR's Guide on Article 6<sup>iv</sup> an indictment plays a crucial role in the criminal process because it is from the moment of its service that the suspect is formally put on written notice of the factual and legal basis of the charges against him or her. In paragraph 388 of the Guidelines it is stated that:

*Article 6 § 3 (a) affords the defendant the right to be informed not only of the “cause” of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the “nature” of the accusation, that is, the legal characterisation given to those acts.*

Even if the indictment is in Turkish, the descriptive part is written in one whole sentence, which makes it very hard to find the exact actions that the prosecutor has found is criminal and what parts of the applicable article in TPC are connected to these actions. In addition, the indictment does not connect the alleged criminal actions to the elements of the applicable article in TPC. In combination, this makes it almost impossible for Avşar to build her defense. It is clear that the indictment does not meet the requirements in ECHR Article 6 § 3 (a).

Failing to properly link evidence to accusations and still insisting to continue the prosecution is in addition a violation of ECHR Article 6 § 2, presumption of innocence.

### 3.2.2 ECHR Article 10: Freedom of Expression

Article 10 of the European Convention on Human Rights guarantees freedom of expression. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man<sup>v</sup>.

The right to freedom of expression is subject to exceptions. Such exceptions have to meet the requirements foreseen in ECHR Article 10 § 2. The exception must be prescribed by law and be necessary in a democratic society. The protection of the reputation or rights of others may be such an exception. In balancing competing rights, the ECtHR has clarified that there must be *“just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter”*<sup>vi</sup>

The States are also required to establish an effective mechanism for the protection of journalists in order to create a favourable environment for participation in public debate. To enable journalists to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter.<sup>vii</sup> Freedom of the press is enshrined in the Constitution of Republic of Turkey Article 28, which clearly states that the press is free and shall not be censored.

Article 10 of the ECHR states that right to freedom of expression includes *freedom to receive and impart information and ideas (...)*. Avşar is a journalist and the articles were published in a newspaper, still the indictment does not mention if ECHR Article 10 was an applicable defense. In the Lingens judgement<sup>viii</sup> ECtHR ruled that

*Whilst the press must not overstep the bounds set, inter alia, for the “protection of the reputation of others”, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.*

The indictments against the two prosecutors are clearly of public interest and Avşar had the right and the duty to report on the ongoing investigation against them. The ECtHR has emphasized that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press, one of society’s “watchdogs”, in the public debate on matters of legitimate public concern.<sup>ix</sup> To indict a journalist for defamation/insult when s/he reports on misconduct by public officers, surely has a chilling effect.

Finally, it must be stressed again that it is not an insult to report on criminal charges against public officers, even if the facts of the case are unpleasant. It is a fact that the prosecutors were indicted and it was in the public interest to report these facts. The conclusion is that the



indictment against Avşar for insulting a public officer violates her right to freedom of expression enshrined in Article 10 of the ECHR. The indictment also violates the Constitution of Republic of Turkey.

### 3.2.3. UN Guidelines on the Role of Prosecutors

Principles 10 to 20 in the Guidelines outline the role of the prosecutors in criminal procedures. According to Principle 12 the prosecutors shall:

*... in accordance with the law, perform their duties 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.*

The analysis above shows that the prosecutor did not act in accordance with TCPC Article 170 or in accordance with international human rights standards when Avşar was indicted. Furthermore, according to UN Guidelines Principle 13 (b) the prosecutors shall:

*(...) protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;*

The prosecution of Avşar is a violation of the public interest in being informed about possible misconduct of public officers. The indictment is not objective, as it pays no attention to circumstances that were favourable to Avşar.

The International Association of Prosecutors, which was established in 1995, has issued a set 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 criminal proceedings 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." The conclusion of this analysis is that the indictment does comply with the rules set out in TCPC Article 170, thus it is clear that the prosecutor should not initiate criminal proceedings against Avşar.

## 4.) Conclusion and Recommendation

The indictment against Avşar is not in line with neither domestic law nor international standards.

Again, as in the other reviewed indictments in this project, it must be stressed that the language of the indictments must be better. The descriptive part of Avşar's indictment is one long sentence. That is unnecessary and gives the indictment an unprofessional appearance. As this is the third indictment I have evaluated, it seems to me that there is no consistency in how the indictments are written. I would suggest the development of templates, where the different part of the indictments can be filled in. The introductory part of the indictments will then look more or less the same with name, dates, numbers, if the defendant is in pre-trial detention etc. In the descriptive part of the indictment, I will suggest that first the applicable article in the TPC is cited, then the alleged criminal action and its connection to the applicable article and finally the evidence and its connection to the alleged crime. In this way, the prosecutors will be forced to do the evaluation that TCPC Article 170 requires.

It could also be helpful to the prosecutors to develop a checklist on international human rights standards. For instance, there could be questions like:

Is the indictment written in an understandable language?  
Is the defendant's right to be presumed innocent violated?  
Is the evidence properly cited and dated and connected to the alleged crime?  
Are the articles of public interest?  
Is it true what is written?

In my opinion, templates could make the indictments look more professional and ensure that all the elements of the indictments are according to the law. Checklists would help the prosecutors to evaluate if the indictment complies with international standards.

### About the author

Heidi Heggdal is a judge at the Oslo District Court, Norway. She is a member of the Human Rights Committee at the Norwegian Judges Association. Heggdal has worked with Turkish cases for many years.

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<sup>i</sup> <https://www.cumhuriyet.com.tr/haber/feto-borsasindaki-savcilar-icin-meslekten-cikarma-karari-1714792>

<sup>ii</sup> *Flux v Moldova (no.6)*, par. 31

<sup>iii</sup> ECtHR: *McVicar v. United Kingdom*, Par 84 and 87

<sup>iv</sup> ECHR's Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), Updated in April 2021

<sup>v</sup> ECtHR: *Handyside v. the United Kingdom*, par. 49

<sup>vi</sup> ECtHR: *Belgium Linguistic Case*, par. 5

<sup>vii</sup> ECtHR: *Dink v. Turkey*, par. 137 and *Khadija Ismayilova v. Azerbaijan*, par. 158

<sup>viii</sup> ECtHR: *Lingens v. Austria*, par. 41

<sup>ix</sup> ECtHR: *Österreichische vereinigung zur erhaltung, stärkung und schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen grundbesitzes v. Austria*, par 33