PEN NORWAY

Legal report on indictment:

Hikmet Kumli Tunç

PEN Norway Turkey Indictment Project

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PEN Norway Turkey Indictment Project

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1.) Introduction

The scope of this study covers the assessment of the 3-page indictment with the investigation no. 2019/421 and indictment no. 2020/156 issued by Fatma Yıldız, the Public Prosecutor of Muradiye on 02.04.2020 against the journalist Hikmet Tunç Kumli and Leyla Balkan.

To be fair, the indictment in question contains many legal problems similar to the indictments previously examined within the scope of the project. It is once again observed that the basic principles of press freedom are not considered in a criminal investigation where the suspect was a journalist and that the basic provisions in the Code of Criminal Procedure of Turkey are not taken into account in the indictment. In this sense, many legal problems identified in the indictment inevitably contain some common characteristics that the previous indictment assessment reports had already pointed out.

However, there are certain unique elements to this indictment and the proceedings that followed it. First of all, the news agency (Jin News) where Hikmet Tunç Kumli, the suspect in the indictment, works is an exceptional news agency unmatched in Turkey and around the world. Jin News is a women-only news agency, founded and managed by women at every level, including its technical staff, its reporters, and editors. In this sense, the inclusion within the scope of the project of such an indictment issued against a female journalist from this news agency could be taken as the sign of agency's importance for us.

In addition, considering the proceedings following the indictment, it can be argued that the trial of Hikmet Tunç Kumli points to a new form of an already incessant and systematic legal repression targeting the journalists in Turkey. Because Tunç was the first journalist in Turkey to be tried under the so-called simplified proceedings method.

The Law on Amendments to the Criminal Procedure Law and to Certain Laws no. 7331 came into force in October 2019, and there it was prescribed that the method of simplified proceedings could not be applied in cases that were prosecuted, ruled or finalized as of 01.01.2020. However, the Constitutional Court annulled the phrase "where the criminal lawsuit was initiated" with its judgement no. 2020/16 E.2020/33 and dated 25.06.2020.[i] Referring to the aforementioned judgement of the Constitutional Court, the Court in charge of the proceedings of the case against Hikmet Tunç Kumli decided that in her case the method of simplified proceedings shall be applied.

This is extremely worrying. Because, as has been underlined by many lawyers, the method of simplified proceedings amounts to the open violation of the "habeas corpus" principle of the criminal law, of the right of defence to which this principle is strongly connected and therefore of the right to a fair trial.

2.) Summary of Case Background Information:

One of the suspects in the indictment, Hikmet Tunç Kumli, is the provincial affairs correspondent of Van province for Jin News Agency. On 13.05.2019 Tunç wrote a story titled "*Muradiye Waterfall was abandoned to its fate by the contractor company which was paid 4,5 million*" and this story was published on the website of Jin News News Agency.[ii] The next day, the same story was republished by the *Yeni Yaşam* newspaper.

This story in question featured some sections of a certain report prepared by the People's Democratic Party on the restoration process of Muradiye Waterfall and the opinions of Leyla Balkan, then the Co-Mayor of the municipality. Following the publication of the story, Harun Yücel issued a complaint against both the journalist who wrote the story and the Co-Mayor of the municipality, Leyla Balkan, whose opinions were featured in the story. The indictment indicated that Yücel was then the District Governor of Muradiye and had also been acting as the appointed trustee who superseded the elected co-mayors during the period when the construction operations at Muradiye Waterfall mentioned in the report had been taking place.

The indictment does not provide any information as to the exact date of the letter of complaint. The prosecutor provides only a summary of the contents of it. Accordingly, Leyla Balkan was claimed to allege that Harun Yücel was involved in corruption and Harun Yücel stated in turn that he was insulted by this account.

In accordance with the Articles 125/1, 125/3-a and 125/4 of the Turkish Penal Code, the indictment in question has been issued against Leyla Balkan and journalist Hikmet Tunç Kumli on 02.04.2020, with the allegation that they have committed the crime of publicly insulting a public officer. Muradiye Criminal Court of First Instance approved the indictment, and the proceedings began. On 20.10.2020, however, the court issued a preliminary proceedings report and notified the parties that the case would be handled using the method of simplified proceedings.

The preliminary proceedings report provided a different date of crime than the indictment itself. Although this issue is not directly related to the theme of this report, the fact that the court gave an incorrect date of crime by about 2 months must be noted here as a small sample of numerous judicial mistakes caused by the "copy-paste" working style that seem to have been dominating the judicial system in Turkey. The previous assessments carried out within the scope of this project revealed some further examples where the names of the suspects were incorrect. Even at this stage of the project, it can be comfortably said that the "factual mistakes" of similar nature are not singular examples regardless of whether they have a concrete impact on the bases of the criminal investigation/prosecution processes. It is well known that the criminal proceedings are directly related to public order, and in many cases they affect the lives -and to a certain extent, the freedoms- of individuals involved. Therefore, these recurrent factual mistakes cannot be dismissed as insignificant, considering at stake are the rights of the suspects and the legal interests that must be protected. This and similar cases of negligence could be taken as an indication of the arbitrary conduct a field can engage in especially when it is granted an exemption from all kinds of legal control mechanisms.

The mechanism of simplified proceedings starkly contradicts the principles of criminal proceeding and infringes especially the principle of habeas corpus and in that sense the right of defence to a great extent. The following statements in the relevant preliminary proceedings report reveal the extent of the violations this method could generate:

> [It is decided that] this preliminary proceedings report, in accordance with the CCP Article 251/2, be served to the addresses of the suspects together with the indictment by way of a warning; [that] the suspects be asked to submit their defence, if any, in WRITTEN form within 15 days starting from the issue date of the notification and [that]

it be noted in the notification that a judgement could still be handed down without a hearing even if a written defence is not submitted in due time.

The method of simplified proceedings is debatable, but the criterion and the focus of all debates should be the relationship between the method in question and the right to a fair trial. Since this report aims to assess the indictment itself, we do not intend to provide a comprehensive criticism of the simplified proceedings method. It is essential, however, to briefly mention the violations that already occurred or that are highly likely to occur following the adoption of the simplified proceedings method, as this report deals with the very first example of such a method employed within the framework of a series of proceedings that has been targeting the journalists.[iii]

The existence of a significant incongruity becomes even more obvious when the method of simplified proceedings is contrasted with the ECHR Article 6. It can be concluded that a structural contradiction exists between the ECHR Article 6 and a method where the judge alone can decide whether to hold a hearing, and where the suspect has only a single written statement to discuss the evidence and allegations levelled against her.

As a result, following the day Tunç received the court's notification that the method of simplified proceedings were to be instituted, she did not appear before a judge, listen the complainant who issued the complaint nor did she experience a process where she can debate in-person the evidence and her defence with the court. Following this process, on 12 August 2021 and without even her defence being heard, Tunç was sentenced to prison sentence of 8 months and 22 days the pronouncement of which was suspended.

3.) Analysis of the Indictment

3.1. Evaluation of the Indictment under the Code of Criminal Procedure:

The indictment in question consists of 3 pages in total. The brevity of the indictment cannot be a subject of criticism as the suspects of the file are facing an inquiry and evidence that are simple enough to be assessed within a couple of pages. There is a story written by journalist Hikmet Tunç Kumli. There is a report cited in the story and a person whose opinion was obtained. The report that constituted the basis of the news story and Leyla Balkan, then the Co-Mayor of Muradiye Municipality who offered her opinions both level criticisms against the nature of the project itself and against the individuals who were in charge of the tendering and implementation of the Muradiye Waterfall project. The person -the complainant- who was then the acting mayor of the municipality as a government trustee, issued a complaint claiming that the statements regarding his alleged corruption constituted the 'crime of insult'.

The whole background of the case could of course be explained concisely in a couple of paragraphs. However, even if such a concise narrative is preferred, it should be ensured that all the requirements of Code of Criminal Procedure Article 170, with the subtitle The Duty of Filing a Public Prosecution are completely met. An indictment is not only expected to summarize an incident. On the contrary, indictments must include details about the alleged crime that could be linked with the incident in question, a definition of that crime together with its elements, the specific actions of the suspects that constituted the crime, the relationship between the evidence and the crime and finally, the exculpatory evidence. A text without such

elements cannot be regarded as an indictment in the legal sense of the term, even if it contains an allegation.

In accordance with the CCP Article 170/3, an indictment should contain information about the identity of the suspect, the defendant, and the charged crime, as well as about the applicable articles of the law. The indictment contains those elements. Due to the unsystematic way the indictment summarizes the incident, however, without a background study, it becomes impossible to understand the exact nature of the relationship between the subjects of the indictment and the Muradiye Waterfall restoration project mentioned in the news story. One has to research and figure out the facts such as the complainant and Balkan had consecutively served in the same municipality, that the complainant had then been the officer in charge of the authority that invited the tenders for project in question, that the suspect assumed the position in the same institution while the tender contract was still in force, and that Tunç has been working as a journalist and wrote a news story based on a quoted report and on the statements of an open news resource.

According to the CCP Article 170/3, all the indictments should also contain information about the date, place, and the time period of the charged crime. The indictment in question specifies those elements as 14.05.2019, Van/Muradiye. The indictment is clear in this respect.

Another fundamental element an indictment is expected to have according to the CCP Article 170/3 is the evidence of the offence to be clearly stated. In the evidence section of the indictment, it is seen that the following documents are listed: "The defences of suspects, letter of complaint by the complainant, criminal record and population registration copies of the suspects and the scope of the entire file". This could be regarded as a formal breakdown of all the evidence; but clearly, one cannot claim that this way of composing fulfils the requirements in CCP Article 170/3. This is because the fundamentally important evidence that should be included in the file are omitted from the list. The most important omission is Hikmet Tunç Kumli's news story which the prosecutor presumed to be the instrument of the crime. The story in question is not mentioned in the evidence section. The main body of the indictment maintains the same omission. In the indictment, the prosecutor did not quote even a single passage from the story. The indictment indicates that in his letter, the complainant has complained about the term "corruption" which led the public prosecutor to the conclusion that a crime of insult has been committed, as his remark refers to "*the charges of corruption that have factual imputations*". However, apart from stating that the suspects used the term 'corruption', the indictment does not use the 'citation' method, which is the only way to present to the suspects or to the other readers the context in which the relevant statement took place.

The news story as the alleged instrument of crime is not the only omitted item in the evidence list. Another evidence as important as Tunç's story is the report prepared by the Peoples' Democratic Party on the restoration of Muradiye Waterfall, which is also mentioned in Tunç's defence and constitutes the main body and the source of the news story. This report is important in the sense that it clarifies the issue of 'factual imputations', which is the main argument used by the prosecutor when explaining the crime of insult, as well as an important exculpatory evidence in that it was prepared by a political party and it formed the basis of the news report by the suspect, who is a journalist. It is obvious that that the prosecutor completely omitted the report in the indictment. The aim of the CCP Article 170/3 is not only to have an item-by-item list of all the evidence, but to ensure that their contents are explained in a way to allow the suspect to understand them and defend herself. In that sense, it is impossible to claim that the indictment in question presented the evidence in accordance with the CCP Article 170/3.

An evaluation of the CCP Article 170/4 suggests that the prosecutors are expected to explain the events that constituted the alleged offence in relation with the existing evidence. As mentioned earlier, the subject matter of the indictment in question is hardly complicated. Therefore, it shouldn't have been very challenging to fulfil the CCP Article 170/4 requirements. Since, however, the indictment is found to contain a huge gap in terms of the proper listing and citing of the evidence, it would not be realistic to expect that it would fulfil the requirements of the CCP Article 170/4 either.

As the alleged offence is insulting the public officer due to the performance of his/her duty, it is relevant to examine within the context of this offence if the requirements of the CCP Article 170/4 were fulfilled or not.

> TPC Article 125/1 is as follows:
>
> 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.
>
> Article 125/3-a provides for the crime committed against a public officer and Article 125/4 for the crime committed publicly.

It is understood from the whole indictment that the prosecutor concluded a crime of insult was committed by way of a 'factual imputation'. The following passage from the final section of the indictment shows that the prosecutor presumed that the crime was committed when a factual imputation about "getting involved in corruption" was cast:

... Considering all the points in question together with the entire scope of the file, it is understood that the suspects' statements about [his] involvement in corruption lacks evidence and as such constituted a factual imputation where no firm evidence against the complainant that seems reliable at face value was presented, considerably exceeding the limits of freedom of expression...

In this quote, there are two questions that should be addressed. The first question is about the research that a prosecutor is supposed to carry out before issuing an indictment on a case of 'factual imputation'. This question must absolutely be treated in relation to the prosecutor's claim that the suspects presented 'no firm evidence that seems reliable at face value'. The second question is about why the prosecutor chose to avoid making any points about the freedom of press and the relevant legislation whereas she rather preferred to discuss the freedom of expression and its limits throughout the indictment.

Firstly, it is imperative to understand the source of the factual imputation. The news story in question mentions the word 'corruption' once:

Sharing her views on the matter, Leyla Balkan, the Co-Mayor of Muradiye from HDP, pointed out that they took over a debt-ridden municipality from the trustee. Adding that what the trustee brought was not only corruption and debt, Balkan said that "he had also destroyed the natural look of Muradiye Waterfall which was an important waterfall of Van province and our district as it was a natural beauty."[iv]

As it can be seen, the imputed fact is that an alleged corruption took place and debt incurred during the period when the complainant had been in charge as the trustee. Moreover, the news story features an extensively quoted report which was prepared by the elected co-mayors of the municipality and was stated to have documented the corruption in question. Apparently, the prosecutor deemed this report to be "worthless at face value", since it was not mentioned among the list of evidence. It was, however, a main duty of the public prosecutor to examine a document on which both the factual

imputation and the news story were based, especially if on trial was a news story that was based on the report in question. This is not only a requirement of the CCP Article 170/4 but also of the CCP Article 170/5 which regulates the collection of exculpatory evidence. This requirement can also be considered as a requirement of TPC Article 127. TPC Article 127 is a special provision that provides for instances where crime of insult is committed through a factual imputation which is then proved to be true. According to the article in question, "where an accusation, the subject matter of which constitutes a criminal offence, is proven, the person shall receive no penalty." The article continues as follows:

The accusation shall be assumed to be proven upon the finalisation of a guilty verdict against the insulted person concerning such accusation. Otherwise, where there is an application to prove the accusation is true the acceptance of such will depend upon whether there is a public interest to determine whether the accusation is true or whether the complainant consents to the process of proving the accusation.

Since, according to the indictment, the factual imputation is an alleged corruption in a municipality, it is clear that there is a matter of public interest which must be investigated further to prove the imputation. The indictment, however, does not provide any data that would allow the reader to make her own evaluations.

After all the evaluations, it can easily be concluded that an evaluation of the indictment in accordance with the CCP Article 170/2 demonstrates that the prosecutor did not make any effort to support the reasonable doubt with evidence.

3.2. Remarks about the Supreme Court Judgement that was Referred to in the Indictment

In the indictment, prosecutor extensively explained why the news story in question could not be treated within the scope of freedom of expression. In that section of the indictment, the prosecutor directly refers to the court decision no. 2018/6590 E, 2020/430 K dated 14.01.2020 by the 18th Chamber of the Supreme Court. The prosecutor's choice is quite interesting. Because the court decision that is referred as an inculpatory decision could in fact be interpreted in an exculpatory way.

Before demanding a punishment for the suspects, the prosecutor quoted heavily from the decision and then wrote “considering all the points in question together with the entire scope of the file”, and concluded that the suspects committed the crime of insult on the grounds that they cast factual imputations without presenting any evidence that seems reliable at face value.

At this point, it is necessary to take a closer look at Supreme Court decision in question which constitutes the main body of the indictment. The Supreme Court summarized the relevant case as follows:

In the concrete case that was subject to the review; as regards to the news reports published in *Taraf* newspaper on 25/08/2014 with the title “The Mole in the Presidential Palace” which read “it has been revealed that information about the then-President Abdullah Gül and his family had been passed by M.K., an employee of the Palace, to the counsellors of the Prime Minister’s Office that was in charge of the internet trolls”, the defendant was sentenced on the grounds that the article he/she wrote has been a solid case of the violation of the honour, dignity and the reputation of the party.[v]

As it can be seen, the case in question was also related to a journalist and a news report, and in that case the local court ruled that the journalist committed the crime of insult through a factual imputation.

Following the summary of the case, the Supreme Court underlined that a statement, albeit a disturbing one, must be examined to see whether it exceeded the limits of freedom of expression as defined under the Constitution and the ECHR. In the indictment, the prosecutor quoted heavily from this decision and especially bolded the paragraph that began as “however”.

However, freedom of expression is not absolute and unlimited either. Both the national and international legislations state that, in the exercise of these rights, any attitude and behaviour that will violate the rights and freedoms of individuals should be avoided.

As a matter of fact, the freedom of expression protected in Article 26 of the Constitution may be limited for the reasons specified in the second paragraph of the same article. Therefore, according to the article in question and Article 13 of the Constitution, restrictions on freedom of expression can only be imposed by law and

cannot be contrary to the requirements of a democratic social order and the principle of proportionality, nor can it interfere with the essence of rights and freedoms.

The prosecutor, however, skipped the next part and then carried on with the quotations. Unfortunately, the prosecutor's choice calls in question whether she acted in accordance with her responsibility to carry out her duties without any bias. This is because while the prosecutor bolded the part about the possible restrictions that could be imposed on the freedom of expression, she still left out the part which discussed the limitations to such a restriction. Some of the omitted paragraphs of the Supreme Court decision are as follows:

Paragraph 2 of Article 10 of the Convention stipulates the regime of restrictions that public authorities can impose on the exercise of this freedom. In view of its importance, interventions against freedom of expression are only admissible in very exceptional circumstances and the conditions of such a restriction as stipulated by paragraph 2 of Article 10 of the Convention are narrowly interpreted. Therefore, the "necessity" of a public authority's interference with freedom of expression must absolutely be explained in a convincing manner. The condition of “necessity” as framed by the aforementioned article of the Convention means that an intervention must correspond to a pressure exerted by a social need and be especially proportionate to the legitimate purpose it intends. That an intervention meets the criteria in question and therefore is justified could be inferred from the fact that the justifications offered by the national authorities are “relevant and adequate”.
Any failure to comply with both the provisions of the Constitution and the Convention may mean that the state acts in violation of its positive and negative obligations. Because the competent authorities, in line with their negative obligations, shall not prohibit and sanction the freedom and dissemination of expression; and in line with their positive obligations, shall take the necessary measures and maintain the balance for the real and effective protection of the freedom of expression. Otherwise, the ECHR may rule a violation of Article 8 of the Convention on the grounds of insufficient protection by the national courts for the dignity and reputation of the person in the face of unfair attacks targeting them. Because from the point of view of the ECHR, right to respect for private life and freedom of expression of the applicants

are of equal importance. According to the case law of the Court, the basic principles to be considered in the maintenance of the balance are the contribution of the statements to the discussion regarding the public interest, the reputation and the previous attitude of the speaker, the content, form and effects of the statement. In many of its decisions, the ECHR stated that Article 10 of the Convention guarantees not only the essence of the opinions or information expressed, but also the way they are conveyed. In this sense, in the case law of the ECHR, the press is recognized as one of the spokespersons of the society and a particular importance is attached the freedom of the press, which allows information and opinion exchange on issues of public interest, with the underlying idea that everyone has the right to obtain information of public interest.

As it is immediately obvious, the relevant case law, which we had to quote as heavily because of the prosecutor's omission, underlines the role of the press in a democratic society and the right of the public to obtain information. Therefore, it is not unreasonable to expect the prosecutor to pay a special attention to the relevant parts of the Supreme Court's decision in an indictment where one of the subjects is a journalist. Unfortunately, the prosecutor picked and chose only certain parts of the decision that fit into the narrative of the indictment and omitted the rest. For these reasons, we get the growing impression that the prosecutor opted for a selective method of inculpatory citation. In a nutshell, it can be said that all the paragraphs of the decision the indictment referred to, except for the part quoted by the prosecutor, was essentially about why the indictment under review should not have been issued at all.[vi]

Unfortunately, the Supreme Court's decision leaves us with two possibilities. Either the prosecutor did not completely read the decision of the Supreme Court, or as mentioned above, the fact that the indictment referred only to parts of the Supreme Court decision that supported the restriction of freedom of expression was because the prosecutor was "motivated" to issue an indictment under any circumstances. Regardless of which of these possibilities is true, unfortunately they render the structure and motives of the indictment in question controversial as a result.

3.3. The issue of whether the terms in the Press Law are observed:

In addition to all the legal findings presented so far, the indictment has another flaw. As is known, Article 26 of the Press Law is titled 'trial periods'. According to the legislation, it is essential that cases of crimes entailing the use of printed matter should be opened within a

period of four months for daily periodicals and six months for other printed matter. It is provided that these periods begin with the delivery of the printed matter to the Office of the State Chief Prosecutor. It is obvious that if the material is not submitted to the Prosecutor's Office at all, then the date when the act was ascertained would be the basis of the trial. Similarly, for the offences linked with complaints the date of the offence would be the date of ascertainment, which could be taken as the beginning of the period. The accusation in the case in question, however, is of insulting the public officer which is a qualified offence, and it should be kept in mind that such an offence does not warrant a complaint.

In the case in question, it is clear that the news story was published in *Yeni Yaşam* newspaper, a daily publication. Even the indictment itself recorded that the story was published in the newspaper on 14.05.2019. The date of the indictment is 02.04.2020.

This is where the problem begins. Unfortunately, the defence is forced to make assumptions since the indictment presented no other information that would clarify the procedural issue in question. Furthermore, in the indictment there is no information that is vital for a criminal proceeding, such as whether the prosecutor's office was informed about the publication, if so when, if not, then the date of the complainant's complaint which would constitute the date of the ascertainment.

3.4. Evaluation of the Indictment under the International Law:

An indictment that failed to fulfil the requirements of the CCP Article 170 cannot possibly comply with the right to a fair trial under Article 6 of the ECHR. Even some simple examples would confirm this premise. The Article 6/3-a of the ECHR prescribes that people have the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her. Considering that this analysis dwelled less upon the details that are included in the indictment and more upon the ones that are omitted from it, it can be said that the indictment failed to fulfil its duty to inform "in detail", which was prescribed the Article 6/3-a of the ECHR.

The prosecutor's scepticism towards the freedom of expression is demonstrated by her purposeful effort to put a journalist on trial because of a news story that was clearly in the public interest and with an identifiable source, and, as her choice of quotations suggested, by her biased willingness to find justifications for a trial rather than impartially searching for the element of reasonable doubt.

At this point, the UN Guidelines on the Role of the Prosecutors Principle 12, which we have been frequently citing within the scope of the project should be kept in mind. According to that principle,

> 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.

It can comfortably be claimed that the prosecutor completely ignored the Principle 12, given that the indictment has an attitude that specifically seeks to restrict the freedom of expression. The Principle 13/b of the same Guidelines should absolutely be kept in mind. According to this

principle, the prosecutors shall protect the public interest, act with objectivity, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect. Her choice to ignore the exculpatory evidence and her omissions of the parts of the Supreme Court decision that were favourable to the suspect mean that the prosecutor deliberately chose to act against the principle in question. It must also be noted that this indictment acts against the Principle 14 of the Guidelines as well. Accordingly, prosecutors shall not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded. In fact, the principle underlines that they must make every effort to stay proceedings. Unfortunately, the legal findings above reinforce the impression that the prosecutor of the indictment made a deliberate effort in the opposite direction.

4. Conclusion and Recommendations

This conclusion section will not repeat the critical remarks that were already specified under the previous sections. It is of particular importance, however, to remind the reader of the simple structure of the subject matter that the indictment is dealing with. The failure to write a successful indictment even for such an uncomplicated case with straightforward evidence in hand, and the existence of a biased motivation in the indictment to restrict the freedom of expression rather than to present the facts, charges and the evidence are matters of serious concern. This indictment alone reveals the prevalent motivation behind the 'subliminal message' allegations in Ahmet Altan indictment, or the fabrication of crimes based on the travel logs of the person in Osman Kavala-Espionage indictment, or the criminalization of a meeting that was held in a glass-covered transparent room in Büyükada indictment. Because the common feature of all those indictments are their clear willingness and motivation to charge rather than investigating the criminal suspicion.

Even the fact itself that this indictment was issued heavily impaired the freedom of expression and curtailed the right to a fair trial, which makes the question how this indictment could be improved more crucial. In fact, this question has been answered many times. As we have underlined over and over before, the prosecutors may work with a template, which would not solve all the problems but at least could prevent them from 'forgetting' or 'omitting' the fundamental information as it was the case with the indictment in question. The use of such a template can help overcome the shortcomings such as the lack of a complaint date, inadequate summarization of the evidence and failure to provide verbatim citation of the quotes. Introducing a legal obligation to use subtitles in the indictment could be useful as it would make it easier to comprehend the indictment and therefore contribute to the effective exercise of the right of defence. Because even with this very short indictment, the reader has to make a serious effort to follow the train of thought.

However, as we all know, these recommendations will not be enough to solve the structural problem. At this point, a reference could be made to the Recommendation Rec (200)19 presented to the Member States by the Committee of Ministers of the Council of Europe under the title The Role of Public Prosecution in the Criminal Justice System. Article 7 of the relevant Recommendation lays out a basic framework for what needs to be done. That article says that training is both a duty and a right for the public prosecutors before their appointment as well as on a permanent basis and then goes on to list the topics of such a training.[vii]

Considering both the indictments analysed within the scope of the project and the daily rising numbers of investigations in Turkey, it is obvious that there is an urgent need to address this need for such a training that the relevant Recommendation of the year 2000 stated as a duty and a right for all public prosecutors and as an obligation for the states to undertake. As to the indictment against Hikmet Tunç Kumli, it would be unthinkable for a prosecutor to issue such an indictment if he/she had enough knowledge about the right to freedom of expression and the necessary awareness to protect the constitutional rights of the suspect.

Many articles of the Recommendation referred to here can be discussed in relation with the indictment in question. For example, the Article 26 highlights the public prosecutors' duty to ensure equality before the law and notes that this duty includes making themselves aware of favourable circumstances including those affecting the suspect. Article 27 stipulates that the prosecutors should not continue prosecution when an impartial investigation shows the charge to be unfounded.

Finally it is worth referring to the Venice Commission Report on the Independence of the Judicial System (494/2008), Part II titled as The Prosecution Service.[viii] Subtitled "Qualities of Prosecutors", the 15th paragraph of the report states that the prosecutors must act fairly and impartially, and goes on to emphasize that it is not the prosecutor's function to secure a conviction at all costs but that she must put all the credible evidence available before a court. The following phrase in the relevant paragraph is especially striking: "The prosecutor (...) cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case."

In conclusion, as stated by the United Nations guide on The Status and Role of Prosecutors, the rule of law cannot be upheld, nor can human rights be protected, without effective prosecution services that act with independence, integrity and impartiality in the administration of justice.[ix]

About the author

Şerife Ceren Uysal is a human rights lawyer from Istanbul. An executive board member of the Progressive Lawyers Association since 2015, Ceren Uysal was awarded the Dr.Georg Lebiszczak Prize for Freedom of Speech in Austria in 2016 December. She is researching at the Gender Studies Master Program of the University of Vienna, focusing on gender issues within the context of human rights law, and is currently the co-secretary general of The European Lawyers for Democracy and World Human Rights (ELDH). In 2021, Ceren is working as Indictment Reports Supervisor for PEN Norway.