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Legal report on indictment:

Necla Demir

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.

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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

The subject of this report is the indictment issued against Necla Demir, former editor-in-chief of the Gazete Karınca Newspaper news website, on 3 February 2020 with investigation number 2020/10389 and indictment number 2020/2683. It consists of one page, which is assessed in terms of Art 170 Criminal Procedure Code of Turkey (TCPC), Art 6 and Art 10 European Convention on Human Rights (ECHR), Art 14 and Art 19 International Covenant on Civil and Political Rights (ICCPR) as well as the United Nation's Guidelines on the Role of Prosecutors.

2.) Summary of Case Background Information

Necla Demir is a journalist from Turkey, who started her career as a reporter for Dicle News Agency until it was shut down by an Emergency Decree-Law during the State of Emergency in 2016. She became editor-in-chief of Gazete Karınca Newspaper and was responsible for the publication of the articles on the newspaper's website.

An investigation was launched against her in 2020, following anonymous complaints via the Communication Service of the Prime Ministry (BİMER), which in 2018 was renamed and is now better known as Communication Service of the President (CİMER). The platform is usually used by the citizens of Turkey to ask for information, voice concerns or submit complaints.

These anonymous complaints insinuated that some of the articles and shared items on the newspaper's website potentially fall within the scope of "insulting the President" as stated in Art 299 Turkish Penal Code (TPC).

In order to open a lawsuit against an individual for the crime of "insulting the President" it is required to obtain permission from the Republic of Turkey's Ministry of Justice. In this respect the obligatory permission was granted on 2 January 2020, which was followed by the issuance of the indictment on 3 February 2020.

The first hearing was supposed to take place on 13 May 2020, but had to be postponed to October due to the COVID-19 pandemic.

On 8 and 28 October 2020, the second and third hearing took place. The President's lawyer did not participate in any of the proceedings. In the third hearing, not only Necla Demir herself but also the trial's prosecutor asked the judge for an acquittal because according to them the cited articles did not contain any insulting statements and were merely constituting permissible criticism. Bearing in mind that the prosecutor who represents the public prosecutor's office at court, is generally a different person than the prosecutor who issued the indictment. Following this prosecutor's opinion, the court ruled to acquit Necla Demir.

3.) Summary of Case Background Information

In this chapter we will assess whether the indictment meets legal requirements in terms of Turkey's domestic law as well as international standards. We will look at the structure and formalities of the indictment, analyse the evidence, closely examine the charge of "insulting the President" and finally address some procedural concerns.

3.1. Structure and Formalities

In accordance with Turkey's domestic law an indictment has to contain a wide range of elements. These elements are clearly listed in Art 170/3 TCPC and should be included in the document as exhaustively as possible to help the suspects understand the claims made against them.

The reviewed document consists of only one page with a structured first part, indicating the most important information about the complainant, the injured party and its legal counsel, the suspect, place and date of the offence, applicable law and evidence. This introductory section to the case is followed by only half a page of continuous text under the headline "the investigation documents were examined and it was found that", which is supposed to offer a transparent and comprehensible explanation as to why the indictment had been issued and how the found evidence can be linked to the alleged crime. Unfortunately, this section is missing a clear format and rather creates the impression that the prosecutor did not invest a lot of time and effort into the drafting process.

The paragraphs are kept short and simple, which of course does not automatically indicate an inadequate working method. Even quite the opposite, short and clear sentences could help suspects without a legal background to better understand the charges. However, this requires a prosecutor to know how to properly summarise legal arguments and be able to use it for comprehensible formulation.

In this case, we found that the short paragraphs are mere narrations of past events and lack legal argumentation all together as will be discussed in the next chapter. Therefore, the first impression of a hurried and careless working method proves to be true and the brevity of the whole document does not do justice to the seriousness of the accusations.

One of the biggest flaws of the indictment is linked to the information about the date and place of the offence. Naturally, specific details about the criminal act in question are indispensable and have to be correctly included in the indictment according to Art 170/3 TCPC. The date and place of an alleged crime, above all, play an immensely important role in a criminal process as statutory periods and the choice of place for further proceedings depend on it. It lies within the role of a prosecutor to collect this information before drafting the indictment and sending it to the authority in charge. Getting the date or place of the offence wrong could highly influence the outcome of a process. Consequently, a prosecutor is expected to carry out his job with diligence.

In the present indictment, date and place are stated as "11/01/2019 ISTANBUL/CENTRAL". The unspecified nature of the information is immediately noticeable. No further details are given as to what event the prosecutor is referring to. On second glance, an even bigger deficiency becomes apparent. The date "11 January 2019" can neither be matched with the date of one of the two articles presented as evidence (6 and 10 October 2016) nor any other date mentioned in the document. No further explanations are made in this respect and the suspect is left to wonder what had happened on 11 January 2019 and what it has to do with the allegations made against her. Such a scenario must never happen in a criminal process and strongly indicates the defectiveness of the indictment.

As cannot be stressed enough, a well-structured indictment which contains all necessary details lies at the heart of a criminal process. Oftentimes, it is through this document that the suspects are confronted with the allegations against them for the first time. They should therefore be able to get a full picture of the situation by only reading the indictment. A clear structure and format as well as a correct depiction of the circumstances, including all necessary details, are essential for a fair criminal process.

In this respect, we want to bring attention towards the international standard of the "right to a fair trial" as stipulated in Art 6 ECHR and Art 14 ICCPR. Every person has the right to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them.

The European Court of Human Rights (ECtHR) observes that this provision "points to the need for special attention to be paid to the notification of the 'accusation' to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him [or them]"[1].

As has been shown above, the indictment does not only lack relevant details but also leads to confusion as to some of the most important facts of the case. This document is indisputably neither in line with Turkey's domestic law nor international law.

3.2. Evidence

There is no crime without evidence. There is no indictment without a crime.

According to Art 170/3 TCPC all evidence must be included in the indictment. Art 170/4 TCPC stipulates that all events that comprise the charged crime must be explained in accordance with their relationship to the present evidence. Subsequently, a prosecutor does not only need to list all the incriminating evidence but has to link the collected evidence to the alleged crime through legal argumentation. This process should occupy the main focus of a prosecutor's work and surely represents the most important part of an indictment. It

should clearly display the prosecutor's thoughts and findings to understand the circumstances that ultimately lead to the issuance of the indictment.

In the introductory section of this indictment, the following is cited as evidence: "full contents of case file". No more details are given as to what the case file contains. From the continuous text of the indictment, it becomes clear that the prosecutor is basing his allegations on two newspaper articles, which were published online in 2016. The articles were cited alongside their publication dates, headlines and short excerpts, which allegedly are insulting to the President.

Turkey's domestic law requires the evidence to be clearly stated. General statements like the above-mentioned "full contents of case file" do not provide enough information about the events that lead to the indictment. The prosecutor did not elaborate on the content of his abstract reference neither in this part nor later in the indictment.

Despite the fact that the pieces of evidence are mentioned later in the indictment, the introductory section with its simple structure would be the ideal place to introduce the newspaper articles with additional information about the publication date and place.

Nevertheless, the most striking aspect about this indictment is the sheer lack of legal arguments. Following newspaper articles are mentioned as evidence with an excerpt of one sentence each:

> 1) On 10.10.2016, in the article titled
>
> 'RedHack members speak out: Why did they hack Albayrak?'
>
> *If only the present administration was a competent and solid organisation, they don't even have the capacity to hand over responsibility of switching off the lights to anyone, even the President, so much so that they leave the lights on all night…*
>
> 2) On 06.10.2016, in the article titled
>
> 'From Wikileaks documents: Erdoğan is dragging the country towards civil war'
>
> *After Erdoğan came out of the last elections with a victory, he put an end to talks with the PKK and is taking the country to the brink of civil war*

The introduction of the evidence is followed by one paragraph about the defence statement of the suspect, one paragraph about the confirmation obtained by the Ministry of Justice and finally the concluding paragraph with the simple note that the crime of "insulting the President" had been committed "by way of damaging the character, honour and respectability of the President via the internet in an overt manner".

This in fact is a very weak example of drafting an indictment because no link was made between the evidence and the claim. The prosecutor did not further elaborate on how and why he came to the conclusion that cited sentences constituted the crime of "insulting the President" for example by consulting the definition of "insulting the President" and in a next

step subsuming the wording of the newspaper articles under this definition. By doing so, the connection between evidence and claim would be strengthened and would provide support for the line of argumentation. Instead, the prosecutor fell short of providing any argumentation and rather half-heartedly supported his claim with a trivial standard wording.

As mentioned in the background information, Necla Demir had been acquitted of all charges. In fact, even the prosecutor present at the third hearing had been of the legal opinion that the elements of the alleged crime were not fulfilled and that the articles had merely been voicing criticism. According to Art 170/2 TCPC an indictment shall only be prepared in cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that the crime has been committed. In light of the fact, that even a fellow colleague of the prosecutor had requested the acquittal of the suspect, it seems arguable that the indictment should not have been issued in the first place due to lack of evidence. Additionally, it seems odd that two articles dating back as far as 2016 were brought forward in an investigation that started in 2020. Therefore, the whole document gives the impression that the allegations against the defendant might possibly be the outcome of a constructed case.

3.3. Insulting the President

The crime of "insulting the President" has been defined in Turkey's penal codes since 1961 (formerly under Art 158 of the previous Penal Code of Turkey), but a significant increase in trials and convictions for this crime can be observed in recent years. In 2018, Human Rights Watch published statistical results, confirming a sharp rise in prosecutions for Art 299 TPC from 132 cases in 2014 to more than 6,000 in 2017:

> "According to the Ministry of Justice's General Directorate of Judicial Records and Statistics, the number of people prosecuted for article 299 has rapidly increased since 2014. The records reveal that 132 people (including 1 minor) were prosecuted in 2014, that there was a sharp increase to 1,953 (including 76 minors) in 2015, and that in 2016, the number of cases more than doubled, with 4,187 persons (including 148 minors) prosecuted. In 2016, 54 of the minors prosecuted were aged between 12 and 15. A further huge leap occurred in 2017, when prosecutions rose to 6,033, with 340 cases concerning minors (42 aged between 12 and 15). According to the ministry's statistics, the number of convictions also rose over the same period. While 40 persons were convicted for insulting the president in 2014, 238 were convicted in 2015, the number almost quadrupled to 884 in 2016, and jumped to a staggering 2,099 convictions in 2017."[2]

Comparing this situation to other European countries, many penal codes do not recognise the criminal offence of "insulting the President" and exclusively prosecute incidents in relation to general "insult", whereby investigations usually only take place on grounds of an

individual complaint by the insulted person. In fact, the offence of "insult" is often not even disputed in criminal trials but rather settled through civil procedures. Additionally, public figures like politicians are subject to increased public interest and must therefore be able to receive harsher criticism than private individuals and are generally expected to tolerate lower protection against insults to their character.

Whereas under Turkey's domestic law, "insulting the President" does not only exist as a criminal offence but is also actively and regularly indicted. Additionally, the prosecution is able to initiate the investigation phase without a preceding complaint, merely with permission of the Ministry of Justice.

In its "Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey", the Venice Commission stated in March 2016: "The developments in Europe indicate that there is an emerging consensus that states should either decriminalise defamation of the Head of State, or limit this offence to the most serious forms of verbal attacks against heads of States while at the same time restricting the range of sanctions to those not involving imprisonment."[3]

In light of these international analyses on Art 299 TPC as well as the alarming lack of evidence found in this particular investigation, the indictment raises overarching concerns with regard to international human rights standards, particularly touching the "right to freedom of expression" and "freedom of the press", as protected by Art 10 ECHR as well as Art 19 ICCPR.

Turkey is party to the European Convention on Human Rights as well as the International Covenant on Civil and Political Rights, both legally binding Instruments of international law. Nonetheless, these recent statistics raise legal and ethical concerns with regard to free speech and potential censorship. In its observations, Human Rights Watch furthermore confirmed that Art 299 TPC was being predominantly used "to prosecute journalists, academics, juveniles, and ordinary people for social media postings".[4]

The prosecutor who prepared this indictment exhibits no awareness of the conflicting legally protected rights of this investigation. International human rights standards refer to the "margin of appreciation doctrine" as a tool to weigh competing legal goods. As defined by the ECtHR in 1968, the margin of appreciation must be derived from "a 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."[5] The foundation for this balance must be rooted in plurality, tolerance and freedom as core values of a democratic society while any restriction of the "right to freedom of expression" and the "right to freedom of the press" can only be based on a compelling social need within the public interest. Our analysis of this indictment however, reveals a sheer lack of assessment between the accused violation of the President's personal rights and the "right to freedom of expression".

Furthermore, the ECtHR clarified in 2004 "the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of 'public watchdog'"[6] and has reconfirmed that statement in 2014:

> "The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised 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."[7]

A media outlet criticizing the actions of leading political figures is therefore merely serving its purpose as 'social watchdog'. An assessment of the published article under criminal law must not depend on whether those political actions are being portrayed positively or negatively, since the ECtHR established already in 1976, that the "right to freedom of expression" is applicable "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"[8] and reconfirmed in 2009 that the function of any press includes the creation of forums for public debate[9].

As mentioned above, the Court ruled to acquit Necla Demir after the trial's prosecutor announced his judicial opinion about the case in which he voiced concerns regarding the elements of the crime and consequently requested the acquittal of the defendant. Looking at the context and circumstances of this particular investigation as well as the previously analysed evidence, it is irritating that charges were brought forward against Necla Demir in the first place. Moreover, the Court declared that the newspaper articles in question were in fact not insulting under Art 299 TPC but amounted merely to political criticism. In its verdict the Court goes on to confirm that the scope of criticisms towards politicians is wider than for private citizens. Referencing rulings of the Constitutional Court of the Republic of Turkey as well as the ECtHR, the Court clarifies that individuals engaged in politics may indeed have to endure harsh, strong and even offensive criticism, and that this is an indispensable element of life in a democratic society. The Court further elaborates on the reason behind this principle being that politicians willingly choose to assume public positions that are open to scrutiny by journalists and the public. Unlike private citizens, politicians can therefore be expected to tolerate a greater degree of criticism. By using this line of argumentation, the ruling Court of this case once more confirms a shared point of view with the ECtHR.

3.4. Procedural Concerns

As has been mentioned in the background information, the investigation is based on anonymous complaints via the communication service BİMER. No details on the quantity nor the contents of these allegations were included in the indictment.

Even though the complaints do not constitute evidence they are still essential for the progression of the case as they lay the ground for the initiation of the investigation. Therefore, it is astonishing how little information about the nature of the complaints has been disclosed in the indictment.

The prosecutor mentions that the complaints were submitted via BİMER, which since July 2018 is better known as CİMER. Since the old version of the communication service is mentioned in the indictment, we can conclude that the complaints must have been made before July 2018. Following the natural course of proceedings, it could be assumed that the investigation phase was initiated shortly after the complaints became known. However, the number of the investigation "2020/10389" suggests otherwise and leaves us puzzled as to why it took presumably more than 1,5 years to commence the investigation.

Furthermore, according to the indictment the prosecutor got the permission to "initiate the proceedings against the suspect" on 2 January 2020. Even though the domestic law of Turkey speaks of a "permission to initiate the investigation", in practice the permission is rather given with regards to the "issuance of the indictment". This means that in most instances investigations are already ongoing when the permission of the Ministry of Justice is obtained. Therefore, to be able to get a permission on the second day of 2020, an investigation must have been ongoing at least since 2019 - maybe even before that.

When taking a closer look at the following chronology, a mysterious scenario presents itself: the start of the investigation, the application for permission to issue the indictment as well as the confirmation by the Ministry of Justice presumably all took place within the first two days of 2020 (nota bene 1 January 2020 is a public holiday). This scenario seems almost impossible and leaves doubts regarding the correct and lawful implementation of the proceedings.

While we positively recognise the Court's verdict as well as the trial prosecutor's request to acquit the defendant, we need to emphasise our concerns with the prosecutor who initially submitted the indictment for this case, since these observations suggest that he neglected to respect the "right to a fair trial" and "presumption of innocence".

In this context we want to refer to the United Nation's Guidelines on the Role of Prosecutors, particularly to principle 13 (a) and (b) as well as principle 14 as they lay out a set of standards to ensure a fair, impartial and efficient prosecution of criminal offences in all justice systems:

13. In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) 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;

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

Both Principles were disregarded within this indictment, as the prosecutor failed to discontinue his prosecution even after it became evident that a clear link between evidence and accused crime could not be established.

This in turn heavily violates Art 6/2 ECHR, the presumption of innocence, an essential core function of the "right to a fair trial" as guaranteed by Art 6 ECHR. Without this principle, a judicial system cannot be expected to appropriately protect and uphold national law nor international human rights standards within a democracy, as its citizens would lose all trust into the country's institutions and the rule of law could not be upheld. Therefore, it is of utmost importance that prosecutors, when conducting the investigation as well as drafting the indictment, meet the requirements of the fair trial principle with appropriate care and respect.

4.) Conclusion

In conclusion, this indictment does not only fail to meet international standards but additionally violates domestic standards as has correctly been recognised by the trial's prosecutor as well as the ruling Court of Turkey.

Firstly, the implementation of an effective criminal justice system begins with a duly conducted investigation phase and the successive issuance of a well-argued indictment. In this case, however, our main concern is precisely the fact that the indictment had been drafted in the first place. Looking at the evidence as analysed in detail above, this case should have been dismissed at the end of the investigation phase. By failing to do so, the prosecutor demonstrates not only grave disregard for international human rights standards like the Guidelines on the Role of Prosecutors, but additionally violates Art 170/2 TCPC which clearly states that an indictment shall only be prepared in cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that the crime has been committed.

This leads directly to the second flaw of this indictment. Not only did the prosecutor fail to provide sufficient evidence to lawfully continue with the proceedings, but he subsequently neglected to link the supposed evidence to his accusations entirely. Failing to properly connect evidence to the criminal charges constitutes yet another infringement of Art 6/2 ECHR, the presumption of innocence.

Lastly, the entire indictment has not been sufficiently well structured, the most severe flaw being the incoherent date of offence as filed by the prosecutor. This choice of date cannot be explained and does not trace back to any piece of evidence, as discussed in detail above.

These deficiencies leave us with severe doubts regarding the proper implementation of international guarantees of fairness and transparency in Turkish judicial proceedings.

We therefore recommend to follow a structured format throughout the indictment, to be diligent with elements like the exact date of the crime and most importantly, to be mindful of the necessity of a full list of evidence in the introductory section. These elements can be structurally implemented by using a common template across the prosecutor's office.

Beyond that, it is the fundamental core of any indictment that the evidence is properly linked to the accused crime, otherwise there is no legitimacy in the criminal charge and therefore in the indictment itself. In this context it is absolutely crucial for any prosecutor to acknowledge the elements of a fair trial, in particular the presumption of innocence as stipulated in Art 6 ECHR. We cannot emphasize enough how vital these principles are for any democracy's judicial system and hope to see a more diligent approach by Turkey's law enforcement to issue indictments in line with the requirements of legally binding international human rights standards.

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