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N O R W A Y**

Legal Report on Indictment

Cengiz Çandar

Author: Barbara Spinelli

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PEN Norway Turkey Indictment Project

PEN Norway's Turkey Indictment Project has been running since January 2020.

During that time, with an international team of judges, lawyers and academics we studied 25 indictments in cases involving freedom of expression. These include the prominent Cumhuriyet newspaper trial, the Büyükada human rights defenders' trial and the five-year Gezi Park trial.

Each report takes a single indictment and compares it to Turkey's domestic law and to international law. The deepening crisis in the rule of law in Turkey since 2016 has meant that not one indictment has yet met domestic procedural standards or the tenets set out in Article 6 of the European Convention on Human Rights, concerning the right to a fair trial.

With this in mind, we continue to work with leading human rights lawyers globally to study indictments in the cases of journalists, civil society actors and lawyers and will continue to make recommendations for training of judges and prosecutors and for the continuing improvement of the indictment writing process in Turkey.

The importance of this work was demonstrated in 2022 when the defendants in the Gezi Park trial were all convicted and jailed for long sentences based upon facts in an alarmingly inadequate and flawed indictment. The project continues in 2023.

All reports can be accessed via our website: www.norskpen.no
And the two final reports of 2020 and 2021 are available at:

2020: <https://norskpen.no/wp-content/uploads/2021/06/PEN-Norway-Turkey-Indictment-Project-Report-2020.pdf>

2021: https://norskpen.no/wp-content/uploads/2022/03/PEN-Norway-Turkey-Indictment-Project-Report-2021_Eng.pdf

The project is conceived and led by PEN Norway's Turkey Adviser, Caroline Stockford and the indictment reports are supervised by PEN Norway's Legal Adviser on Turkey, human rights lawyer Şerife Ceren Uysal.

Legal Report on Indictment

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1- Introduction

This evaluation report is part of the Turkey Indictment Project established by PEN Norway. The scope of this legal report is to examine the indictment issued against the journalist Osman Cengiz Çandar by the Istanbul Chief Public Prosecutor's Office on 26 February 2018, with investigation no. 2018/71818 and indictment no. 2020/12491 in light of Turkey's domestic laws and international human rights laws in order to ascertain whether the indictment complies with these standards.

The case against Osman Cengiz Çandar was based on his publication of a tweet commenting the death of Ayşe Deniz Karacagil.

The indictment consists of two pages and charges Osman Cengiz Çandar with violating Articles 215/1, 218/1 and 53/1-a of the Turkish Penal Code (TPC), namely praising criminal offence and offender with this tweet.

Thus, the core of the case is his exercise of freedom of expression.

Section 2 of the report includes a brief summary of the case background information. Section 3 presents the legal analysis of the indictment. Section 3.2 evaluates the indictment against Turkey's domestic law focusing on Article 170 of the Turkish Criminal Procedure Code (TCPC) and on Article 215 of the Turkish Penal Code (TPC). Section 3.3 assesses the indictment in light of international

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standards, specifically Articles 6, and 10 of the European Convention on Human Rights (ECHR), the United Nations (UN) Guidelines on the Role of the Prosecutors. The report concludes, in section 4, with recommendations on what can be done to improve the quality of the indictment.

2- Summary of Case Background Information

Cengiz Çandar is a journalist, a senior columnist, and a Middle East expert from Turkey. Çandar began his career as a journalist in 1976 for the newspaper Vatan after living in the Middle East and Europe due to his opposition to the regime in Turkey following the military intervention in 1971. Being an expert on the Middle East (Lebanon and Palestine) and the Balkans (Bosnia and Herzegovina), Çandar worked for the Turkish News Agency and for the leading Turkish newspapers Cumhuriyet, Hürriyet, Sabah, Referans and Güneş as a war correspondent. He also worked as a senior columnist for Radikal and a columnist of Al-Monitor. During his 40-year long career of journalism, he was considered as one of the leading Middle East experts in Turkey. He was also a Special Advisor to President of Turkey, Turgut Özal on Foreign Policy between 1991 and 1993. He is author of seven books and several chapters of other books and he also has contributed to American periodicals like Journal of Democracy, Wilson Quarterly and Journal of Palestine Studies.

On the 30 May 2017 Çandar posted from his personal twitter account the following tweet :

The girl in the red scarf, the most beautiful smiling angel that warmed our hearts, fell to the ground, rose to the stars in front of Raqqa, and blazed in our hearts once again.

The twitter was referred to the death of Ayşe Deniz Karacagil, who had been jailed in Turkey after her detention during Gezi protests for wearing a red scarf which was made a basis for her being labelled a terrorist by authorities and judiciary of Turkey. A prison sentence of 103 years was sought for Karacagil, who was released on February 6, 2014. After her release, Ayşe Deniz Karacagil who then became known as *'the girl with the red scarf'*, was fighting in the ranks of the International Freedom Battalion in the battle against ISIS in Rojava. She was killed by ISIS in the morning of May 29, one day before the tweet posted by Çandar.

Three years later, on the 30 Jun. 2020, an indictment, a little over a page long, was written against Çandar. The indictment alleged that Çandar committed the offence of praising a criminal offence and offender with this tweet. It was seen that the date of the offence was written as 2019 in the indictment. However, the tweet was posted in 2017.

Apart from Çandar, there is another suspect named K. J. in the indictment who tweeted on the same subject.

The indictment was accepted by the Istanbul 30th High Criminal Court During the first hearing on the 19 January 2021, the court board accepted the request of the prosecutor and ruled that the statement of the journalist should be taken via rogatory letters, as Çandar was residing abroad during the investigation. After several hearings, at the 16 Jun. 2022 hearing, Çandar's lawyer requested that the completion of the rogatory proceedings be awaited. The court decided to wait for Çandar's statement to be taken by rogatory letter. On the 29 September 2022 hearing the court rejected the request for immediate acquittal and ruled that the documents as to the letters rogatory should be completed.

In November 2022, the court decided to separate Çandar's file from that of the other defendant. The other defendant K. J. was sentenced to 7 months and 15 days in December 2022. The trial against Çandar is still ongoing.

3- Analysis of the Indictment

3.1 Evaluation of the indictment in terms of Turkey's Domestic Law

The indictment consists of less than one page.

The Criminal Procedure Code of Turkey (TCPC) Article 170 regulates the duty of the public prosecutor and the required contents of the indictment. In fact, Article 170 of the relevant law clearly defines the basic criteria to be expected from a criminal procedure in general and an indictment in particular. It is understood that the criteria sought in indictments are also in line with international law. In this respect, a qualified and meticulous application of the relevant article is highly favourable for the preparation of a good indictment.

However, at first glance, the indictment against Çandar does not fulfil the criteria of Article 170. Moreover, it is possible to determine that the indictment contains factual errors. Therefore, even without a detailed examination, one gets the impression that the indictment prosecutor has not fulfilled the requirements of the law.

The first page provides general information about the indictment, the complainant and the suspects. The wording of the indictment is concise and imprecise. It only states the name of the offence, without describing it. It only reports the year (2019) and the place of the offence, without stating the day, date and month, as well as the time, on which the offence was committed. As it is possible to realise from reading the investigation report, the date given, 2019, is also wrong, because the tweet have been posted on 30.05.2017. The applicable articles as well as collected evidence is given in the indictment as it is expected in Article 170.

This general section is followed by less than one page of 6 paragraphs of text with the heading «The investigation report was examined” and concludes with the prosecutor’s request to sentence the 2 suspects under the article written above that are applicable to the act .

As formally required by Article 170, the indictment is addressed to the 30th Istanbul High Criminal Court and is signed electronically by the Istanbul Public Prosecutor along with the date of issue: 30.06.2020. Because of its position at the end of the text body, this date is not immediately noticeable, even though it plays a crucial role in the timeline of the judicial proceedings and should therefore be clearly displayed. The date of the alleged crimes (30.05.2017) and the date of issue of the indictment (30.06.2020) lie more than 3 years apart. The indictment is only based on the report dated 26.02.2018 by the Department of Security of the Security Forces, the survey by the Department of Combating Cybercrime, and the suspect K’s statement, so, the question arose why the investigation phase and drafting of the indictment extended over a period of more than 3 years. According to Art 160 TCPC, public prosecutors should immediately start an investigation as soon as they are informed of circumstances that give sufficient reason to assume that a crime has been committed. The indictment’s investigation number 2018/71818 suggests that the prosecutor started the proceedings

“ Turkey leads the Council of Europe member states in the number of hostile judgements from the Court in freedom of expression cases under Article 10 ECHR.

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already in 2018 (based on the report dated 26.02.2018 by the Department of Security of the Security Forces). Moreover, as soon as prosecutors are notified of a possible crime, it is their duty to “investigate the factual truth, in order to make a decision on whether to file public charges or not”. They have to collect all necessary evidence in relation to the events and have to decide whether there is sufficient suspicion to indict.

An extremely diligent method of conducting the investigation might explain the delay in issuing the indictment, but this should have subsequently led to an equally diligent drafting. We cannot know for sure why the prosecutor took so long to draft the indictment, however, the structure and incomplete format of the indictment suggest that the document was put together in a rather sketchy manner.

A simple syllogism is used in the indictment: A. D. Karacagil is a terrorist, she was praised on social media by Çandar, therefore Çandar is guilty.

However, Çandar in his tweet merely recites words of remembrance for the ‘girl in the red scarf’, who, regardless of the fact that she was considered a terrorist by the authorities without a decision from judiciary, was nonetheless one of the protagonists of Turkey’s recent history.

One of the conditions under Article 215 of TPC for the conduct of ‘praising a criminal offence and offender’ to be punishable is that any explicit and imminent danger to the public order occurs therefore. In this respect, the reason given in the indictment, that this condition must be deemed to exist in this case because Turkey is still under the threat of terrorism, appears to be wholly insufficient and extremely general, given that the words of Çandar’s tweet does not contain any praise of A. D. Karacagil’s actions, nor any direct or indirect incitement to any action aimed at endangering public order. It should also be mentioned that from the day the tweet was published in 2017, until the day the indictment was formulated in 2020, no violent action occurred as a result of the words contained in the tweet by Çandar or the other suspect. Since the prosecutor did not explain how Çandar’s condolence tweet violated the cited articles of the law, it is up to the reader to interpret whether Çandar’s tweet was in praise or not. At the risk of repetition, it should be emphasised that Çandar’s social media post was merely an expression of sorrow over the death of a young woman. It is worrying that the expression of sincere sorrow in the face of death, without praise for violence or a violent act, is defined as a criminal offence. As worrying as it is, it is also worth noting that it brings Antigone to mind.

The condition that the act of praising should constitute a clear and close threat in terms of public order has been added to the article text which was amended by the Law on Amendment of Some Laws in the Context of Human Rights and Freedom of Expression no. 6459. In this way, it was aimed to establish a structure in harmony with precedents of the European Court of Human Rights.¹ Considering that this amendment to the law was made to protect freedom of expression, the prosecutor’s disregard of the legislature’s intentions is also thought-provoking.

The Turkey’s Constitution acknowledges the right to freedom of thought and opinion. Article 25 reads as follows:

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

At the same time, The Turkey’s Constitution acknowledges the right to freedom of expression. In fact, Article 26 provides that:

Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities.

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

1 Devrim Aydın, “Praising Crime and Propoganda of Terrorism in Turkish Law”, Journal of Law and Judicial System, 2(4), 2019, p. 1

Despite the constitutional protection of the right to freedom of expression and the right to freedom of thought and opinion, and despite the legislative reform of TPC. Article 215, numerous lawsuits have been filed in Turkey against many people with the claim that they praise crime due to their statements in social media and many penalties have been imposed in recent years. Which statement falls into the scope of freedom of expression and which one is praising an offence and/or offender is the most commonly debated issue in many criminal investigations.² There are also criticisms that almost all people tried for these crimes are dissenting writers, journalists, academics and human rights activists, as Çandar is.

Çandar's lawyer Erselan Aktan stated that the court should evaluate the social media post in question together with the fact that Çandar is a journalist and an investigative author and therefore his post should be considered within the confines of freedoms of expression and the press. Continuing his defense, lawyer Aktan stated:

“ However, in my opinion, even in its current form, the issuance of an indictment against Çandar's tweet is a grave violation of freedom of expression. Considering the findings in the reports on the indictments analysed by PEN Norway in 2020 and 2021, it is clear that prosecutors should adopt an approach that puts human rights and freedoms at the core. ”

It is clear that the elements of the offense stipulated in the Article 215 did not occur. The court has the authority to immediately acquit Cengiz Çandar considering the judgments of the European Court of Human Rights and the Constitutional Court which dictate that courts should consider expressions together with their context and related facts.³

At this point, it is impossible not to agree with the statements of Çandar's lawyer that are quoted above. Because, as summarised before, there is an indictment that does not comply with Article 170 of the Code of Criminal Procedure. But more than that, there is no criminal offence.

At this stage, summarising the findings may be useful to understand the gravity of the situation. Imagine an indictment; the date of the action in 2017 is written as 2019. Again, although the entire allegation is based on only one tweet, that is, there is actually no evidence to be collected, it took 3 years to write. The indictment defines Çandar's action (tweeting about a person the state considers a terrorist). It also defined the article of the law. But it did not feel the need to do the most important work it should have done according to Article 170 of the Criminal Procedure Code: How did the person's action (i.e. the tweet) violate the relevant article of law? The indictment does not answer this question. It is not possible to accept an indictment as an indictment that does not contain a cause-and-effect relationship and does not relate the elements of the article of law with the evidence. If such a practice becomes generalised, no individual in a society can be expected to speak freely under the legal protection.

In this short indictment written at the end of 3 years, the prosecutor,

2 Devrim Aydın, "Praising Crime and Propoganda of Terrorism in Turkish Law", Journal of Law and Judicial System, 2(4), 2019, p. 1.

3 <https://www.mlsaturkey.com/en/the-court-rejected-the-request-of-cengiz-candars-lawyer-for-immediate-acquittal/>

while explaining that Çandar should be punished, mentions only the fact that a person whom he claims to be a terrorist was brought up on social media. Then he says that Turkey is under terrorist threat. This is a very weak and unfortunately legally unacceptable reasoning. A prosecutor who makes such an allegation is expected to first refer to a finalised court decision stating that the person in question is a member of a terrorist organisation. It is not clear from the indictment whether there is such a judgement about the woman who lost her life. In other words, it is not clear from the content of the indictment whether the prosecutor decided on his own that the young woman who lost her life was a terrorist or whether there is a finalised court decision against her. This is a major deficiency.

Assuming for a moment that this deficiency does not exist, for example if we assume that the person concerned is a person convicted of membership of a terrorist organisation, we expect the prosecutor to explain how Çandar praised this person with his words. And of course, he must also explain how the imminent danger, which is an element of the related crime, was created. The prosecutor does none of this. It is clear from the sloppy language of the indictment that the fact that Turkey is under terrorist threat is a sufficient threat for the prosecutor.

In conclusion, it should be noted that the indictment clearly violates Turkey's domestic law.

3.2 Evaluation of the Indictment in the light of International Standards

According to Art 6/3-a ECHR and as well to Art. 14/3-a ICCPR, everyone has the minimum rights "to be informed promptly, in a language which he [or she] understands and in detail, of the nature and cause of the accusation against him [or her]". The underlying purpose of this article is to enable the defendants to prepare their defence accordingly and in good time before the first day of their trial. It should be a number one priority for a prosecutor to conduct the investigation as fast as possible and conclude the findings in a reasonable and well-argued indictment. The slow progress of the proceedings, the generic nature of the charge against Çandar are not in line with the international standards of a fair trial. The suspects and their lawyers have to put in extra effort to understand what is the accusation and to prepare their defence and start the trial already with a clear disadvantage.

The passage of 2 years between the starting of the investigation and the date on which the indictment was compiled constitute also a violation of Principle 12 of the United Nations Guidelines on the Role of Prosecutors.

In the second part of the indictment, it is noted that "Therefore, it has been concluded that the suspects did commit the alleged crime". This statement clearly expresses a violation of the principle of the presumption of innocence, guaranteed by Art. 6/2 ECHR as well as Art. 14/2 ICCPR. Moreover, it constitutes also a violation of Principle 13 of the United Nations Guidelines on the Role of Prosecutors, which stated that a prosecutor should always be impartial and objective, taking into account a defendant's position and interest.

It has been noted by several international associations that the application of TPC Article 215 frequently exceeds the permissible restrictions on the freedom of expression set out in international standards.⁴

Turkey leads the Council of Europe member states in the number of hostile judgements from the Court in freedom of expression cases under Article 10 ECHR.⁵

The previous chapter highlighted how in Çandar case a simple syllogism is used in the indictment, and the only reason reported in the indictment why Mr. Çandar's tweet is considered to lead to and an explicit

4 *Turkey: Decriminalize dissent; Time to deliver on the right to freedom of expression*. 27 March 2013 | Publisher: Amnesty International, p.13.

5 https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf

and imminent danger to the public order is because Turkey is still under the threat of terrorism. In a very similar case⁶, the ECtHR stated that

The fact of basing a conviction on circular reasoning, as the court in question had done in the instant case, amounted to an excessively broad interpretation of the law and a circumvention by the court in question of the obstacle set up by the legislature to ambiguous accusations punishing the expression of peaceful opinions in a public debate. The Court took the view that such a broad interpretation of Article 215 of the Penal Code had been unforeseeable for the applicant at the material time.

Consequently, the interference in the applicant's exercise of his right to freedom of expression had failed to meet the "quality of the law" requirement under Article 10 of the Convention.

The Court pointed out that an interpretation of criminal law leading to confusion between, on the one hand, criticism levelled at the government in the framework of public debates, and on the other, pretexts used by terrorist organisations to justify their acts of violence, was necessarily incompatible with both Turkey's domestic law, which recognised public freedoms, and the Convention provisions protecting individuals against arbitrary infringements of those Convention freedoms.

The Court further noted that TPC Article 215/1 laid down safeguards against excessively broad interpretations of the law to the detriment of persons charged with offences, in particular making the criminalisation of statements considered as praising crime or criminals subject to the condition that those comments gave rise to a clear and present danger to public order.

4- Conclusion and Recommendations

The indictment against Çandar is a document constructed to look like it fulfills the formal requirements set out in Turkey's law, and that there is sufficient suspicion of a crime committed. On a closer inspection, however, serious procedural violations of TCPC Article 170 emerge, such as the omission of the day, month and time of the offence and the necessary connection between the act and the elements of the crime.

It does not take much analysis to detect that the content of the tweet is not capable of causing an explicit and imminent danger to public order, and that the reasoning of the indictment concerning this requirement of punishability of the conduct is tautological, and therefore non-existent.

While potential for abuse of the TPC Art. 215 would be reduced

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6 *Yasin Özdemir v. Turkey* (ECHR application no. 14606/18).

by clear guidelines to prosecutors on the human rights compliant application of such an offence, legitimately prosecutable acts could be brought under other Articles of the Penal Code. Amnesty International therefore recommends that Article 215 of the TPC be repealed in its entirety.⁷

However, in my opinion, even in its current form, the issuance of an indictment against Çandar's tweet is a grave violation of freedom of expression. Considering the findings in the reports on the indictments analysed by PEN Norway in 2020 and 2021, it is clear that prosecutors should adopt an approach that puts human rights and freedoms at the core. This is constantly reiterated in international legislation and guidelines on the duties and obligations of prosecutors. In order to fulfil this need, it is seen that a rights and freedom orientated training is a must in addition to a training in the field of criminal procedural law.

In conclusion, as has been elaborated in detail above, the present indictment violates a number of international and domestic standards and leaves us with serious concern for the guarantees of fairness and transparency of judicial proceedings in Turkey.

⁷ *Turkey: Decriminalize dissent; Time to deliver on the right to freedom of expression.* 27 March 2013 | Publisher: Amnesty International, p.14.

About the Author

Barbara Spinelli is a human rights lawyer from Bologna (Italy).

She is ELDH Co-President and she is also member of the Human Rights Commission of the Bologna Bar Council and of the Commission for Relations in the Mediterranean Area of the Italian Bar Council. She has monitored trials in Turkey over a number of years and is author of a book on femicide and co-author of an handbook for legal international observers.