PEN NORWAY

Legal Report on Indictment

Sedef Kabaş

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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.

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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

Sedef Kabaş

Author: Ezio Menzione

1. Introduction

This evaluation report is drafted as a part of the Turkey Indictment Project, established by PEN Norway. It represents an analysis of the indictment against Sedef Kabaş.

2. Summary of Case Background Information

Sedef Kabaş is a journalist and TV host, who has worked for several TV channels in Turkey since 1997. Born in London in 1968, she studied in Turkey and then in the USA: here she graduated in broadcast journalism, and then specialised in the same subject back in Turkey. She started her career as a television journalist in 1992 working also for CNN as correspondent for the Middle East and for the Balkan wars. Kabaş then returned to Turkey in 1997 where she began a career working for different broadcasters, including by hosting a renowned program (*Portreler*, portraits) interviewing well-known personalities from Turkey, which earned her the Diyalog Award for best anchor-woman in 1999. She has taught journalism in various universities of Turkey and has published six books, in addition to having hosted cultural programmes.

In 2015 Kabaş was tried for some articles and posts regarding the 2013 corruption scandal in Turkey, but was acquitted of all charges.

"Sedef Kabaş is a journalist and TV host, who has worked for several TV channels in Turkey since 1997.

In 2019 she was tried for insulting the President following some declarations made during a TV broadcast, and was sentenced to 11 months 20 days in prison, with suspended sentence."

In 2019 she was again tried for insulting the President following some declarations made during a TV broadcast, and was sentenced to 11 months 20 days in prison, with suspended sentence.

On 14th January 2022, during a Tele 1 broadcast, Kabaş made some critical comments about Erdoğan and some Ministers of his government and, within the context of a very complex discourse, she quoted a popular proverb that goes "*when cattle enter a palace, they do not become king but rather, the palace becomes a stable".*

Criticism began to pour in immediately, including from the Minister of Justice, and she was accused of having "crossed the line" and having "incited hatred", receiving a warning that she "would be held accountable for this in court".

A few days later, again within the context of a more articulated discourse, on her social media account Kabaş clarified that the quoted sentence was an ancient Circassian proverb that sounded like "*when an ox enters a palace, it does not become king but rather, the palace becomes a stable*", and that she had replaced the word "ox" with "cattle" out of consideration and kindness.

At 2 a.m. on 22nd January, police raided Kabaş's residence and took her away to be interrogated. She was arrested on charges of having insulted the President and then brought to Bakırköy prison.

On 11th February the charge against her was formulated, namely violation of Art. 299 of the Turkish Penal Code (insulting the President), and 3 days later the Court accepted the indictment. The trial was held on 11th March 2022 and Kabaş was sentenced to 2 years and 4 months in prison, although she was later released following 49 days in prison.

The defence appeal before the İstanbul Regional Court of Appeal is still pending.

3. Analysis of the Indictment

3.1. Insulting the President

3.1.1- Regulation on Insult of the President in Turkey

The indictment brought against Kabaş relates to the crimes of "insulting the President" (Art. 299 TPC) and "insulting a public officer in the performance of his/her public duty" (Art. 125/3-a) TPC).

Art. 299 of the Turkish Penal Code reads as follows:

> *(1) Any person who insults the President of the Republic shall be sentenced to a penalty of imprisonment for a term of one to four years.*
>
> *(2) (Amended on 29.06.2005 by article 35 of the Law no.5377) Where the offence is committed in public, the sentence to be imposed shall be increased by one sixth.*
>
> *(3) The initiation of a prosecution for such offence shall be subject to the permission of the Minister of Justice.*

The case provided for in the first article (299 – insulting the President) is punished with imprisonment from 1 to 4 years, increasing by one sixth when the person is offended in public. The prosecution is initiated *ex officio*, although an authorisation from the Minister for Justice is required.

For cases covered in the second article (125 – insulting a public officer), the sentence ranges between 3 months and 2 years, and this cannot be less than 1 year when the person in question is a public officer defamed by reason of his/her office.

Here we will focus on the crime of "insulting the President" (Art. 299) and only marginally on the crime of

"insulting a public officer" (Art. 125). The 1961 Turkish Penal Code provided for both crimes - however, the first type of offence moved from Art. 158 to Art. 299 (offence against the symbols of State sovereignty and the reputation of its bodies), whereas the second one was amended by Art. 15 of law No. 5377 of 29/06/2005.

Part 3 of the Turkish Penal Code, which encompasses Art. 299, also contains the much-discussed Art. 301 (as amended by Art. 1 of law No. 5759 of 30.04.2008), punishing the degrading of the Turkish nation, as well as the State of the Turkish Republic and the State's bodies and institutions. One could notice that, from a substantial standpoint, this article expressly provides that the expression of an opinion for the purpose of criticism does not constitute an offence, whereas Art. 299 makes no such exception. From a procedural standpoint, while under Art. 299 the authorisation of the Ministry of Justice is required to initiate the prosecution, Art. 125 provides that such authorisation is necessary even to simply start the investigation.

One may be tempted to smile when analysing some actual cases of insults to the President:

- Some journalists were convicted under Article 299 for having criticised the Government's actions in relation to matters of the utmost importance, such as the 2013 corruption scandal, the supply of arms to Syria, or the reception of Syrian refugees. All issues on which the political debate was right to develop, including in heated tones, as they are vital for the country.
- One journalist (Birgün) was convicted for having called Erdoğan a "thief and murderer", adding that "we'd rather be among the 35 million you hate and consider enemies".
- The opposition leader was prosecuted for calling Erdoğan a "shameful dictator";
- Cartoonists from the periodical "*Penguen*" were convicted for some comic strips on Erdoğan's rise to power.
- Years later, an opposition politician took up those same strips in a social media post, and was convicted as well.
- A member of the opposition was convicted for having said that Erdoğan is "an enemy of Kurds and women".
- Even those who had criticised Erdoğan because of the gold-plated faucets he had had installed in the bathrooms of his presidential palace have been convicted.
- Art. 299 should be used in case of insults not just against the President, but also against his wife Emine Erdoğan, whose connections with a contracting company for a large state contract were exposed by a journalist, Gökay Başcan.

> "The President will therefore be subject to criticism (and satire, we would add) just like any other politician, and limiting such forms of criticism means limiting the free expression of democracy."

We could go on, of course, but it is not easy to find information about the thousands of cases for which complaints are filed every year, criminal cases are opened, trials are held and sentences are passed on the basis of Art. 299, which is used as a cudgel against political

opponents (whether journalists, opposition politicians or ordinary citizens who dare to criticise the head of government, who is also the President of the Republic).[1]

3.1.2. The Crime of Insult of the President in Other European Systems

Almost all European criminal systems provide for sanctions against anyone who offends the President of the Republic or in any case the Head of State. The crime of *lese majesty* was already contemplated in Roman times, when it was heavily punished.

However, the question arises whether these types of offences can still exist in the face of the provision for freedom of expression, enshrined in the constitutions of several countries.

Let's take, for example, the case of Italy, where Art. 278 of the Italian Criminal Code expressly provides for the crime of *vilipendio* (insults) to the President of the Republic, with a punishment ranging from 1 to 5 years, therefore an even heavier one compared to that of Art. 299 TPC: the Italian Article requires that the offence be directed "to the honour or consideration" of the President, therefore both to his/her professional profile and to the office held. However, the articles sanctioning any offence to the honour of the Head of Government or attacks to his/her freedom have long since disappeared (namely since September 1944, right after the fall of the Fascist government). It's clear how, looking at case law and including at constitutional case law (as is the case with crimes of opinion, the Article was brought before the Constitutional Court several times), in order for there to be criminal liability the facts reported must not correspond to the truth; furthermore, the criticism must be voiced with words that are not excessive and, most of all, its target must be the highest office of the State, thereby harming the integrity of the State itself.

However, what is striking is how in Italy the offence of insulting the President is rarely invoked and very rarely applied, only in the face of insults involving the consideration of the Institution. Two examples:

- the President having moral responsibility in the death of Hon. Aldo Moro, killed by the *Brigate Rosse* organisation, "sending mafia messages", "doing nothing while holding office";

- the President (before becoming one) being promoted as a judge because "he was asked to simply convict poor people without fuss" and not having been "a real Catholic but rather, a reactionary, a bigot from that Pharisaic tradition of the whitewashed sepulchres, those Pharisees whom Jesus branded a 'kind of viper'".

No one has ever been charged with insulting the King in Spain, despite the offence being provided for in the Spanish Criminal Code. There have been some individual cases very recently, with the immediate mobilisation of the entire Spanish intelligentsia because some artists were involved. Rapper Valtony (from Mallorca) was charged with the offence and sentenced to 3 years and 6 months because of a song that was deemed offensive towards the monarchy. To avoid serving the sentence, the singer took refuge in Belgium: when faced with a request for extradition by Spain, the Belgian judiciary denied such request with a decision underlining how the singer's words fall under freedom of expression. Another rapper, Pablo Hasél (from Catalonia), was charged with insulting the King and sentenced to 2 years and 1 day (later reduced to 9 months) and, without parole, was then arrested. In the face of these cases, public opinion has asked for the crime of insults to the King to be eliminated.

In other European systems, *e.g.* in Hungary or Czech Republic, there is no offence relating to insulting the President; France only provides for a fine; the last case recorded in the Netherlands dates back to the 1960s, and we find a similar situation in Belgium, Greece, Portugal, Romania.

1 These cases are expressly referred to by Venice Commission, Opinion No. 831/2015, published on 15th March 2016;

3.1.3. The Numbers of Indictments, Trials and Convictions for Insulting the President in Turkey

If these are the criteria by which Prosecutors' offices operate in Italy or in other European countries, those guiding the actions of the prosecutors seem to be completely different in Turkey. Let us analyse figures from 2014 onward - that is, since Erdoğan became President and cumulated the powers of the Head of Government).

Things were clear right from the start: between 2007 and 2014, during the seven-year term of President Gül, 1,359 investigations were opened, but only 545 were prosecuted and no one was arrested. In the first seven months of Erdoğan's presidency alone (August 2014 - March 2015) 236 people were investigated, with 105 prosecuted and 8 arrested. Furthermore, the number of cases submitted to the Minister of Justice for the issuing of the relevant authorisation rose from 397 in 2014 to 962 in the first six months of 2015. In the first six months of 2015 the Minister for Justice granted the authorisation in relation to 486 cases, whereas only 107 were granted in all of 2014.[2]

> "In the case of Kabaş, the Prosecutor failed to take into account domestic (Constitutional Court) and international (ECtHR) case law, as well as the recommendations of the Council of Europe and the opinion of the Venice Commission, thereby violating Art. 170 TCPC: where favourable to the suspect, case law and (authoritative) opinions cannot but be taken into account in the indictment."

It's been an avalanche since then: 132 trials for insulting the President were initiated in 2014; 7,216 in 2015; 38,254 in 2016; 20,539 in 2017; 26,115 in 2018; 36,066 in 2019: over the course of 6 years, a total of 160,000 investigations were initiated for this offence. Of these, 35,507 cases (involving 38,608 people, including 1,107 minors) were brought to trial, with 12,881 ending up with a conviction (involving 3,625 people) and 5,660 with an acquittal. Astronomical figures, clearly.[3]

3.1.4. The Presidential System and the Political Use of the Crime

We must ask ourselves, then, why numbers have soared from 2014 onward (with no drop in the two-year period of the pandemic).

There are two main reasons for this:

- In 2017 a presidentialist constitutional reform was passed, whereby the same person became President of the Republic, President of the relative majority party and Head of Government: anyone who does not identify with the governing party and criticises the majority's political line runs the risk of being investigated for having insulted the President, given that the offices coincide. The accumulation of power into one and the same person is enormous and therefore attracts lots of criticism whereas before, in a parliamentary Republic, the President of

2 Ministry of Justice, General Directorate of Criminal Affairs, 17th May 2015.

3 Human Rights Watch Turkey, based on Ministry of Justice, General Directorate of Criminal Affairs. The Presidency of the Republic has contested the data provided by the Ministry of Justice, but these have been confirmed by the Ministry itself and by the most authoritative observers.

the Republic had very limited powers and basically represented the whole Nation, the whole State: therefore, it was perhaps more appropriate for the State to be protected through its figure.

- The crime of "insulting the President" is clearly used by the Head of State/Head of Government/ Leader of the majority party to silence the opposition and any criticism in two typical ways: by silencing with trials and imprisonment of those who raise criticism, and by intimidating those who would like to raise criticism but dare not for fear of the consequences.

The facts of 14th December 2022 show clearly how crimes such as the ones envisaged in Art. 299 TPC and in its "parallel" Art. 125 TPC (insulting a public official) lend themselves to a political use by those in Government: the then-mayor of İstanbul, Ekrem İmamoğlu, was sentenced to 2 years and 7 months, with the accessory penalty of being banned from holding public office, for having insulted the Supreme Election Council by calling those who had cancelled the March 2019 Istanbul local elections "foolish" only to have the elections rerun three months later. It should be noted that İmamoğlu himself had been called "foolish" by the Minister of the Interior in relation to the same facts. But most of all, the particular timeliness of the verdict should be noted: should it be upheld on appeal, and therefore be made enforceable, it would eliminate İmamoğlu from the presidential election candidature in June 2023, for which he was credited as Erdoğan's most dangerous opponent: the timing of the verdict gives rise to many doubts. Furthermore, the judge delivering the verdict had been changed shortly before the trial, and the sentence imposed using the various aggravating circumstances provided for in Art. 125 TPC deviated from the one usually imposed (ca. 11 months) so as to avoid it being suspended under the law.

3.2. The Form of the Indictment

The indictment is well written. It is short and, therefore, easy to understand.

The examination of the investigation report shows not only the incriminated sentences, but also large excerpts of the speech given by Kabaş in the TV broadcast and some of her posts, thus allowing us to understand the context within which the incriminated sentences were pronounced.

The indictment acknowledges that a balance must always be achieved between freedom of expression, the need to provide news (the right-duty of information for journalists), freedom of the press and the good protected by Art. 299 TPC.

The examination of these often-conflicting interests is conducted in the light of European jurisprudence first and of domestic jurisprudence then - including (very briefly) constitutional jurisprudence, with reference to Articles 25 and 26 of Turkey's Constitution. The analysis also takes into account the world of social media.

The indictment seems above criticism. But are we sure it complies with all criteria set forth in Art. 170 TCPC and fulfils all the obligations contained therein?

3.3. The Indictment and the International Law (ECHR)

The Public Prosecutor who drafted the indictment in February 2022 could not have been unaware of the fact that a few months before, namely in October 2021, a European sentence had been published by the ECtHR regarding the *Vedat Şorli v. Turkey* case:[4] precisely a case similar to that of Kabaş In the case brought before the European Court in 2017, Şorli had been sentenced to 11 months and 20 days (sentence suspended for 5 years) for having insulted the President because of 2 posts exchanged on Facebook - one in 2014 with a cartoon, and the other in 2016: both posts had a clear satirical meaning.

4 Vedat Şorli v. Turkey, application No. 42048/19, ECHR 313 (2021) dated 19th October 2021

The Regional Court of Appeal had rejected his appeal and the Constitutional Court, to which Şorli had resorted, had rejected his appeal in 2019 on grounds that it was manifestly unfounded. For the offence, Şorli had been detained pending trial for 2 months and 2 days.

The European Court's decision was unanimous and, therefore, it must have been shared also by the judge from Turkey, Saadet Yüksel.

The judgment states that:

1. Art. 299 TPC violates Art. 10 of the European Convention on Human Rights;

2. just like any other person, the President of the Republic enjoys the protection granted to anyone by the crime of defamation (Art. 125 TPC);

3. there is no reason to grant the President a higher degree of protection, one which would also entail a prison sentence;

4. the preventive custody and the prison sentence, albeit suspended, had had a "chilling" effect on the freedom of expression of the convicted person;

5. in any case, criminal procedures involving the right to freedom of expression must be resorted to with restraint, and this was not the case in Turkey.

The Court also noted how there was indeed a precedent dating back to 2007, which went in the same direction, therefore somehow anticipating the judgment made:[5] Turkey should have taken this into account and adjust accordingly.

There is no trace of this in the indictment drafted by the Prosecutor, although he boasts about having taken into consideration the dictates of the European Court.

Let us add an annotation: not only does the very broad, illegitimate and unscrupulous use of the offence of insulting the President have a chilling effect on all information tools, on journalists, on opinion makers and more generally on citizens, who may be expressing their opinions on social media; it is first and foremost an actual gag put for 5 years on those sentenced to imprisonment with such sentence suspended for that period. It is an effective signal intended to be sent to the convicted person: do not dare to criticise the President's actions again, because not only will you be convicted, but you will also serve time for the statements for which you are being convicted today. We must add that the standard in case of violation of Art. 299 TPC is a sentence of less than a year with sentence suspended for 5 years: the same sentence imposed on Kabaş.

In essence, the European Court ruled that:

> *The State, Government or any other Institution of the executive, legislative or judiciary power may be criticised by media. These Institutions as such should not be protected by criminal laws against defamatory and offensive opinion because of their dominant position. Where, however, these Institutions are granted such protection, the latter should be used in a restrictive sense, avoiding under any circumstance its use to limit freedom of expression. Individuals representing these Institutions are mostly protected as individuals* (by norms on defamation - Ed.).
>
> *Political figures should not be granted a higher protection of their reputation compared to other individuals… Exceptions should be made only when strictly necessary to allow a public officer to properly perform his or her duties.*
>
> *Defamation or insults in the media should not lead to imprisonment, unless the severity of the violation of rights or of the reputation of others make it a strictly necessary and proportionate*

5 Artun and Günever v. Turkey, (No. 755510/01, §31, 26th June 2007)

punishment, especially when other rights have been seriously violated through defamation or insults in the media, as is the case of hate speech.

The Prosecutor does not regard nor cite this decision by the ECtHR, which was well known and commented on since its publication (5 months earlier), but he refers to no less than 8 other European verdicts (none of which concerning Turkey).

3.4. The European Parliament and the Venice Commission

The ECtHR verdict we reported is also based on a European Parliament regulation calling for the abolition of prison sentences for the crime of insulting the President.

Above all, this verdict involves the opinion expressed by the Venice Commission, an advisory board of the Council of Europe, composed of independent experts in Constitutional Law: moving from the fact that Turkey (in addition to Azerbaijan) had failed to revise its domestic rules on defamation and insults, the Commission had thoroughly analysed Articles 216 (provoking hatred, hostility and degradation), 299 (insulting the President), 301 (insults against the Turkish Nation, the Turkish State or the Turkish Republic, or to State bodies and institutions) and 314 (armed conspiracy) of the Turkish Criminal Code. All these offences, except the last one, can be labelled as "opinion crimes". In an opinion from 2016,[6] the Venice Commission found that all such norms did not comply with European standards as regards their current wording or practice.

> "The Court that will have to analyse the indictment and rule on it must be enabled to do so, not just by examining the facts but, indeed, especially by examining the legal issues. Remaining silent about the existence of national and international case law (to the highest degree) is like inventing an offence that does not exist or a circumstance of an offence that is not considered in the Code."

In particular, for the crime of insulting the President, the Venice Commission had found that:

> *… with respect to Article 299 (insulting the President of the Republic), no progress has been made and its use has recently increased substantially. The Article fails to take into account the European consensus which indicates that States should either decriminalise defamation of the Head of State or limit this offence to the most serious form of verbal attacks against them, at the same time restricting the range of sanctions to those not involving imprisonment. Having regard to the excessive and growing use of this Article, the Commission considers that, in the Turkish context, the only solution to avoid further violations of the freedom of expression is to completely repeal this Article and to ensure that application of the general provision is consistent with these criteria.*

It is true that the 2016 document of the Venice Commission is only an opinion, but it does indeed represent a trace for future ECtHR decisions (who in fact fully complied with it in 2021) and of the Council of the European Parliament.

Such opinions cannot be left out when, as is the case with this

6 Venice Commission, Opinion No. 831/2015 published on 15th March 2016;

indictment, one wishes to make a comprehensive review of the doctrine as well, in addition to the jurisprudence, only to simply recall the greatest advocate of the regimen and of Italian fascist legislation, namely Vincenzo Manzini (p. 6 of the indictment) who, furthermore, was writing on the basis of fascists and authoritarian laws that are now largely outdated even in his own country.

It may be useful to underline a further passage of the opinion of the Venice Commission.[7] In relation to Art. 301 TPC (the discussion also covers Art. 299), the Commission notes how the authorisation of the Minister of Justice, required to proceed against those who have insulted the President, ends up being contrary to the independence of the judiciary and to the separation of powers, thus representing a real interference of the executive power in the judiciary one, with the risk for this authorisation to be the expression of political choices, or even of political retaliation, which allows for arbitrary prosecutions.

3.5- The Indictment and the Domestic Law: The Constitutional Court

The Prosecutor also failed to take into account three decisions made by the Turkey's Constitutional Court in September 2014[8] and that had preceded the drafting of the indictment against Kabaş.

In the *Diren Taşkıran* ruling, the Constitutional Court clearly explains how the judge must ponder the balance between freedom of expression and the possible insult to the Head of State, and does so by dictating several criteria to be taken into account:

> i. Whether the allegedly offending statement was a statement of facts, or a value judgement. [See the European Court of Human Rights (ECtHR) Guide on Article 10 of the European Convention on Human Rights (pp. 38-40) for an overview of the distinction drawn between statements of facts and value judgements in the freedom of expression jurisprudence of the ECtHR, from which the Constitutional Court draws its test.]
>
> ii. The identity of the person who has made the statement.
>
> iii. The identity of the target of the statement; the degree of notoriety of the target; and whether the limits of acceptable criticism that the target of the statements must tolerate is wider than that for ordinary citizens.
>
> iv. Whether the statement contributes to debates on matters of public concern, and the relative importance of the rights of the public and other persons that conflict with the statement.
>
> v. The value of the statement in informing the public, the existence of public interest, and whether the subject matter of the statement is current.
>
> vi. Whether the complainant had the opportunity to respond to the statement that was directed at him.
>
> vii. The effect of the statement on the targeted person.
>
> viii. Whether the risk of being sanctioned would create a chilling effect [in the enjoyment of the freedom of expression] for the petitioner who has the statement.

As trial judges did not analyse the above criteria in any of the three cases considered by the Court, the Constitutional Court annulled the three convictions, imposing to hold a new trial compliant with the criteria it had set forth.

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7 VC cit. § 91

8 The cases were: Diren Taşkıran, B. No.: 2017/26466, 26th May 2021; Şaban Sevinç (2), B. No.: 2016/36777, 26th May 2021; Yaşar Gökoğlu, B. No.: 2017/6162, 8th June 2021).

Among the three, the *Şaban Sevinç* case is the most interesting one, because it takes into account **the issue of presidentialism,** although he rejected it. It was the first time the issue was addressed, and we must acknowledge that it is an absolutely essential one.

The appellant argued that Art. 299 TPC was established when the Head of State was a neutral figure in the political arena; however, following the constitutional reform of 2017, the President of the Republic coincides with the head of the executive and may also be (as is the case of President Erdoğan) the leader of the majority party. Therefore, the President of the Republic is no longer a third and neutral figure (at least in principle) compared to the political arena and no longer represents the totality of the nation but rather, a part of it - albeit the majority one.

The President will therefore be subject to criticism (and satire, we would add) just like any other politician, and limiting such forms of criticism means limiting the free expression of democracy.

> "One cannot ignore that criminal cases of insulting the President have been soaring since 2016-2017 onward, that is, since the 2017 presidentialist constitutional reform cumulated the office of President of the Republic and the office of Head of Government into the same person."

As noted, the Constitutional Court rejected such considerations in the *Şaban Sevinç* ruling explaining how, although the President (as a public figure) should tolerate criticism more than ordinary citizens, the legislator had used its discretionary power in increasing the level of protection on grounds that an insult directed at the President - elected by a national popular vote - may be considered as directed at the symbolic significance of the Presidency, representing the unity of the Nation.[9]

Many objections may be raised against such a reasoning. First, the most obvious one: how does one decide which is **the point of differentiation** between an insult to the representative of the whole Nation (also assuming it is such, and it is not) and a simple insult to a partisan politician (and in the current set-up, the President of Turkey is such)? It should be noted that, since this is a case of application of a criminal rule, it needs to be clear and precise, in line with the criteria of legality presiding over the application of criminal law rules. When such concrete precision is lacking because it is not given to the judge to determine whether the indicted is guilty or not, it is precisely the rule itself that cannot be applied.

One cannot ignore that criminal cases of insulting the President have been soaring since 2016-2017 onward, that is, **since the 2017 presidentialist constitutional reform cumulated the office of President of the Republic and the office of Head of Government into the same person,** so that the application of Art. 299 TPC, which was reserved to cases of insults to the President, was applied to criticism and satire against the Head of Government, with an ambiguity and an unjustified blurring of the norm itself - which at this point, as the Venice Commission says, cannot be modified nor amended but rather, will simply have to be abolished.

In fact - argues the Venice Commission in its previously cited opinion[10] - under Art. 90/5 of the Turkey's Constitution, the ECHR is already an integral part of the Turkey's legal system, and both its

9 §33 Şaban Sevinç cit.

10 VC cit. § 93.

courts and its prosecutors have a legal obligation to apply the Convention and the rulings directly from the ECtHR into domestic law.

Let us keep in mind paragraph 5 of Art. 170 TCPC: when drafting the indictment, "*in the conclusion section of the indictment* [the Prosecutor] *shall include not only the issues that are disfavorable to the suspect, but also issues in his favour*".

In the case of Kabaş, **the Prosecutor failed to take into account domestic (Constitutional Court) and international (ECtHR) case law,** as well as the recommendations of the Council of Europe and the opinion of the Venice Commission, thereby violating Art. 170 TCPC: where favourable to the suspect, case law and (authoritative) opinions cannot but be taken into account in the indictment. The Prosecutor who is able to and deems it useful, may try and challenge them, but they may not be purely and simply omitted.

The Court that will have to analyse the indictment and rule on it must be enabled to do so, not just by examining the facts but, indeed, especially by examining the legal issues. Remaining silent about the existence of national and international case law (to the highest degree) is like inventing an offence that does not exist or a circumstance of an offence that is not considered in the Code.

The Prosecutor has "**cheated**" also in point of fact:

- **The Prosecutor did not mention the number of cases of insults to the Presidents**, representing *per se* an alarming framework for the Kabaş case that cannot be ignored by the judge called upon to rule

  There is a clear difference between inserting the Kabaş case within the context of a few cases per year instead of thousands and thousand of cases. The assessment of the fact cannot but take into account an assessment of the pretextual and illegitimate existence of thousands of similar cases, prosecuted with the sole purpose of silencing political opposition in violation of Article 10 ECHR and Articles 25 and 26 of Turkey's Constitution;

- In reporting the *de facto* elements, the Prosecutor did not even note nor underline that reporting a popular proverb was an element not just of political criticism, but a more properly element of **satire**; and as is always the case with satire, it is not just **necessarily an expression of the opposition** but rather, it also feeds on "coarse" and vulgar elements,

  This is not the case with the position expressed by Kabaş which, aside from reporting the Circassian proverb, is entirely legitimate under the rules of correctness of language and of its "continence". But even if it went beyond the criteria of continence, within certain limits this would be justified and legitimized by the fact **this is a case of satire and not just criticism**.

It is good to read the indictment in full, right in the part where it reports Kabaş's speech extensively.

Her intent, in fact, is to criticise Erdoğan for the language he uses - a language that knows no half measures and that singles out political opponents as real **enemies**: Kabaş deploys a very complex and subtle argument.

It is paradoxical that the intention was to strike and then punish with a heavy prison sentence the overall cautious and measured language used by the journalist, who was criticising the President's language.

Kabaş's words have likely struck a chord with Erdoğan, who reacted by reporting her and has (easily) found a Prosecutor willing to ask to initiate the prosecution and has (even more easily) found a Minister of Justice willing to grant the authorisation for the prosecution.

4. Conclusions and Recommendations

Our conclusions are primarily addressed to the political authority of Turkey:

- in line with ECtHR case law , the political authority should intervene and: a) at the very least amend Art. 299 by providing **only for a fine and only for very serious hypotheses** of insults to the President; b) identify certain and clear hypotheses of insults to the President, quite distinct from cases where the insult is directed against the Head of Government or the leader of the majority party;

- in conforming to the opinions expressed by the Council of Europe and the Venice Commission, it may even **repeal Art. 299** and refer the hypothesis contained therein to Art. 125 TCC (common defamation) without granting any higher protection to those holding public offices (and in particular to the President)

Some recommendations should also be proposed to the Prosecutor:

- given the dubious legitimacy of Art. 299 under both domestic law (the Constitution) and international law (ECHR), the representative for the prosecution will invoke Art. 299 **with the utmost restraint**, keeping in mind how this is clearly conflicting with freedom of expression;

- such restraint is all the more incumbent when dealing with declarations made to exercise the right to **political satire** which, by its very nature, is the expression of a moment of opposition to the ruling power and resorts to coarser, albeit perhaps more subtle, forms than simple political criticism;

- in citing recent cases, **it is not licit to avoid recalling the cases contrary to one's thesis**, especially when these are more pointed and recent: this is outright cheating and, in any case, **it is prohibited by Art. 170 TCPC**.

About the Author

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