

Legal Report on Indictment:

Turkey V Berzan Güneş

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This report was commissioned by PEN Norway as part of their Turkey Indictment Project, 2020. The project examines a series of indictments written by prosecutors in Turkey over the past 5 years, focussing on cases involving the media, civil society figures and human rights defenders. PEN Norway are working with a global team of lawyers and judges to study the compliance of these indictments with Turkish law and international standards. The project is sponsored by the Norwegian Foreign Ministry, Swedish Consulate (Istanbul) and Heinrich Böll Foundation. The project aims to make recommendations that will assist in the reform of the indictment-writing process in order to support the rule of law in Turkey.

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1. Introduction

Summary of the case:

To give some background information (and especially an understanding for the timeline of this case, beyond what can be drawn from the indictment itself) Berzan Güneş started his professional career as an editor of the news website of the by presidential decree now closed Özgürlükçü Demokrasi newspaper. He then started working as a reporter for pro-Kurdish Mezopotamya Agency. The Iğdır Public Prosecutor's Office issued against him in scope of an ongoing investigation. The police raided Güneş' family home in Iğdır on April 4, 2018. His father was taken into custody when Güneş himself wasn't found on the premises. After learning that his father was in custody, Güneş went to the District Police Department of Cizre to testify.

On June 1, 2018 an arrest warrant for Güneş was issued, followed by the indictment accusing Güneş of "making propaganda for a terrorist organisation" on June, 6 2018. On June 11, 2018 he was taken into custody during a routine identity check. Another arrest warrant was issued against him in the scope of the same investigation due to his social media posts. He was sent to Şırnak T Type Closed Prison for pre-trial detention.

The first hearing of his trial took place on August 7, 2018. Berzan Güneş testified to the Iğdır Criminal Court of Peace via the SEGBİS Audio and Video

Information System (a teleconference system). The court ruled to release Güneş on probation considering the duration he had already spent in prison. In total, he was in pre-trial detention from June 11, 2018 until August 7, 2018.

The second hearing of the trial was held on September 4, 2018, but was postponed due to lack of attendance of Güneş at the hearing.

The third hearing of the trial was held on October 16, 2018. The Iğdır 2nd Heavy Criminal Court decided to merge Güneş' case with another case against him at the İstanbul Anatolia 2nd Heavy Criminal Court. This case centered around his time as a university student from 2011 until 2015, when he was tried on charges of being a member of a terrorist organisation. The two cases against him seem to have been merged in order to judge him not as a journalist but as a criminal. After the merger decision, İstanbul Anatolia 2nd Heavy Criminal Court handled all his cases.

On November 5 2019, the last proceeding was held without the participation of Berzan Güneş. During the hearing he was acquitted from "membership of a terrorist organisation" due to lack of evidence, but was sentenced to 3 years 1 month and 15 days of prison for "making propaganda for a terrorist organisation".

The decision made against Güneş is now at the 27th Criminal Court of Istanbul Regional Court of Justice. The Istanbul Regional Judiciary Court 27th Penal Office will decide

if the sentence imposed on the defendant is approved or not. The outcome of the appeal has not been decided yet.

2. Analysis

Evaluation of the indictment in terms of Turkish Laws:

The indictment accuses reporter Berzan Güneş of “making propaganda for a terrorist organisation”. The document consists of two pages which give the first impression of a well-structured document, however as soon as diving into the document the overall chaotic composition becomes apparent. The format of the indictment in general as well as the presentation of important facts and details play a crucial role for a fair and transparent judicial process. A clear layout helps the defendant to grasp its content directly and without misconceptions and therefore ensures lawful continuance of the proceedings.

As required by Art. 170 Turkish Criminal Procedure Code, the indictment is addressed to İğdır Criminal Court. Furthermore, it is signed by the Prosecutor for the Republic along with the date of issue as a formal requirement. However, at first glance the date of issue is not immediately noticeable because of its position at the end of the text body, instead of clearly separated by use of a paragraph at the bottom of the indictment. The date of issue of an indictment is central for the defendant’s responses to the accusations and therefore, should clearly be made visible.

The indictment states that investigations were conducted by the Security Directorate of the Province of İğdır, which was looking into individuals who were suspected to be involved in terror group propaganda.

According to the indictment the investigation was mainly conducted online. Therefore, no informants were mentioned. Various social media posts on the platforms Facebook, Instagram and Twitter were cited as evidence.

The indictment clearly mentions “making propaganda for a terrorist organisation” as the charged crime, referring to the applicable Art. 7/2-2 Turkish Anti-Terrorism Law. Additionally, Articles 43 (1), 53 of the Turkish Penal Code and Article 325 (1) of the Criminal Procedure Code are cited in relation to the length of the punishment as well as the rights and duties of the defendant. Even though all relevant Articles are mentioned; for a person without professional knowledge of the Turkish legal system it is not immediately apparent which legal text is referred by “43(1) and art.53” because of the format of the citation: “Anti Terror Law 7/2-2, 43/1, art.53, Criminal Procedure Code 325/1”.

The way the Articles as well as the legal texts are placed in relation to each other, the reader could easily get the impression that the first three Articles are to be found in the Anti-Terror Law and the last Article is part of the Turkish Criminal Procedure Code. The poor formatting leads to confusion on what the defendant is accused of and therefore seriously threatens the fair-trial principle of Article 6 of the European Convention on Human Rights.

Furthermore, according to the Turkish Criminal Procedure Code place, date and the time period of the crime need to be addressed by the prosecutor. In the present indictment place and date are given, however, very unspecified and unclear in relation to the alleged offence of “making propaganda for a terrorist organisation”.

Firstly, “İğdir /Central” was named as the place where the crime has been committed. To the reader it is not clear whether the home of the defendant or any other place was addressed due to the lack of details.

Secondly, the date of the offence was claimed to be April 4, 2018. This date can neither be matched with one of the social media posts nor with another event mentioned in the indictment. The search of Güneş’ family home, where five books in relation to the PKK/KCK were found, was briefly mentioned, however, the indictment does not present information about the exact occurrence of the event. Therefore, by only reading the indictment without having any background information of the case, the reader is left in the dark as to why April 4, 2018 is stated as the date of the committed offence.

Finally, the time period of the alleged crime was not mentioned by the prosecutor at all, even though applying Art. 43 (1) Turkish

Penal Code (one penalty for multiple offences of the same nature) suggests that the crime of “making propaganda for a terrorist organisation” has not been committed only once. Some of the social media posts listed as evidence date back as far as 2014, the newest social media post listed dates June 30, 2018. Therefore, the date given in the indictment is misleading by suggesting that the alleged crime was committed on April 4, 2018.

The Criminal Procedure code also intends for the indictment to contain information about possible arrest warrants as well as reference to detention time. It is made clear by the prosecutor that an arrest warrant had been issued and that Güneş himself could not be found for questioning before issuing the indictment. No further details on the date of the arrest warrant were mentioned.

As can be seen from all the above mentioned, the document is lacking detail in regards to some of the most important aspects of the indictment. Surely, one of the biggest flaws of the present indictment in terms of Turkish Law is its unavailability of information about the exact date and time of the committed offence that comes with uncertainty about what the defendant is accused of exactly.

Evaluation of the indictment in terms of International standards:

An indictment is a key element of a criminal process due to the fact that as soon as the document is served the defendant is able to understand what he or she is accused of and on what legal basis. This knowledge is essential for the process of preparing a suitable defence for the upcoming proceedings according to the principle of fair trial as it is enshrined in Art. 6 European

Convention on Human Rights.

Especially Art. 6 (3a) ECHR emphasises the need “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]”. In light of this legal requirement, the question arises whether the present indictment fulfils the criteria

of prompt, comprehensible and detailed information about the accusation. Firstly, there seems to be no problem with the requirement of prompt information.

The first proceeding of the trial took place on August 7, 2018. Therefore, between June 6, 2018 – the issue of the indictment – and the start of the trial enough time had passed to prepare a defence strategy. Furthermore, even though it is sometimes hard to grasp the content of the indictment because of the unstructured way it was drawn up, the document was originally written in Turkish, a language Güneş speaks. However, the indictment lacks sufficient detail on the cause of the accusation. In the head section the prosecutor speaks of “making propaganda for a terrorist organisation” on April 4, 2018 in Iğdır Central. No further details are given as to why April 4, 2018 is considered to be the date of offence and therefore, the head section only further contributes to the general confusion. Güneş

is not provided with adequate details to fully understand the extent of charges against him and therefore the fair trial principle of the European Convention on Human Rights could be seen as violated.

Furthermore, the International Association of Prosecutors, which was established in 1995 at the United Nations offices in Vienna came up with a set of standards to ensure “fair, effective, impartial and efficient prosecution of criminal offences” in all justice systems. According to these standards, a prosecutor should only initiate criminal proceedings if “a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.” In light of this standard, the evidence presented in the indictment as well as its link to the individual events that comprise the charged crime is evaluated below.

Evaluation of the evidence presented in the indictment:

Art. 170 (4) Turkish Criminal Procedure Code states that the events, which comprise the charged crime, shall be explained in the indictment in accordance to their relationship to the present evidence.

The indictment identifies a Facebook page with the name of the defendant, where two posts with supposed prohibited content were found. One of these posts dates back to 2015, the other one however lacks any date in the indictment.

The next paragraph cites one post from 2016 on Instagram with similar content. However, the name of the Instagram account is not mentioned.

The following passage lists eighteen

allegations of offences on Twitter, again without an account name. However, most of these posts contain no content on PKK or KCK (the Kurdistan Worker’s Party/Kurdistan Communities Union), which are the two organisations the indictment accuses Güneş of making propaganda for. Instead most of his posts are focused on the organisations YPJ and YPG, both of which are initially not mentioned in the first paragraph of the indictment.

Additionally, the Twitter posts are not chronologically listed. Only the first seven posts are chronological, dating from 2014 to 2015. They are followed by seven posts from 2014, jumping back and forth between the months of that year. Finally, the list concludes

with four posts from 2018, which are chronological again. This lack of consequent order makes the list of accusations quite confusing to read and gives a disorganised impression.

Regarding the specific content of these overall twenty-one social media posts and their legal status, it is noticeable that less than half actually include an approving message about Kurdish groups by the defendant. The following twelve posts lack any personal statement by Güneş on his political views or any personal opinion regarding these posts, and can therefore not be seen as incriminating in terms of the Turkish Anti-Terrorism Law.

- The first Facebook post shows a photograph of a woman wrapped in a fabric with the colours of the PKK/KCK flag but without any contextualising comment by the defendant regarding whether or not he approves of the PKK/KCK ideology. This post also lacks, as mentioned above, its date in the indictment.
- The second Facebook post, according to the indictment, shows a woman terrorist with the sentence “and those women, have come back to Şemgaş with their weapons” - again without indicating whether the defendant perceives this as positive or negative.
- The Instagram post shows a picture of a PKK/KCK group member who had been killed in France. Once again, the indictment fails to deliver an incriminating comment by the defendant in regards to this picture. The sharing of a picture alone cannot sufficiently suggest whether the defendant approves or condemns this person’s passing.
- On Twitter he stated on October 17,

2014 that “Rakka is in the complete control of the QSD”, on June 14, 2015 that “YPG forces have passed the River Cellab”, on December 30, 2015 “the 107th day of the resistance Biji YPG”. None of this shared information allows for any conclusion on his political views or his personal position in this conflict.

- On Twitter he shared a video on April 3, 2014 showing members of the YPG/YPJ group and their flag. He furthermore shared a photograph on April 10, 2014 of the headman of the PKK/KCK and another photograph on October 7, 2014 showing two YPG women. All three of these listed offences lack again any approving comments by the defendant.
- On Twitter he shared on January 22, 2018 a photograph of 5 women with the comment “The mothers of Şırnak and Mardin: We will not leave Efrin to them”. Since this comment does not specify who the defendant means by “them”, the interpretation remains open and can with reference to Art. 6 (2) ECHR (presumption of innocence) not legally be part of the allegations against him.
- On Twitter he posted on January 29, 2018 in relation to children’s shoes that landed on a wall “Robert Fisk’s impressions of Efrin: Murdered refugees, babies, women and children”, as well as on January 30, 2018 he shared a photograph of a woman holding the photograph of a child on her lap “When I see the children who have died in Efrin my Cemil comes to my mind”. Again, both of these posts contain only information, but no personal statement by the defendant about his political view on this or his opinion on who might be to blame.

Following this list of supposedly incriminating

social media posts, without adding a new paragraph, the indictment goes on to mention five books supporting the PKK/ KCK organisations, that were confiscated during a search conducted at the home of the defendant. These books however, are not mentioned in the head section of the indictment under the category for evidence. It is unclear why they are mentioned later in the indictment, but are not listed as evidence.

Overall, the list of offences in this indictment is inconsistent on many levels. Starting with the formatting, as the sections and paragraphs don't seem to follow any logical pattern, the specific Facebook page is mentioned in the very first section of the indictment. This information is followed by a paragraph, and only in the next section the actual Facebook posts are listed. However, the list then continues without any formatting or additional paragraphs, while it also includes the Instagram posts as well as the Twitter posts, both without mentioning account names. This lack of a properly structured layout is then combined with the fact that not all posts are dated. Additionally, the aforementioned issue of chaotic chronology within the list of posts makes it difficult to follow a clear timeline of the indictment's claims against the defendant. The list of evidence then transitions seamlessly (meaning without the use of paragraphs) into a statement about the defendant's whereabouts and the section of requested punishment.

The combination of poor formatting, a lack of account names, missing dates, and improper chronology certainly indicate a concerning level of carelessness and inconsistency. Much more alarming however is the fact that more than half of the listed accusations have no legal grounds. As argued in detail above, they cannot be seen

as propaganda in terms of the Turkish Anti-Terrorism Law, due to a lack of political comments on the posts by Güneş himself. Since there are nine remaining accusations that might appear to violate the Turkish Anti-Terrorism Law, the question arises why the list consists of a total of twenty-one alleged offences. Perhaps nine accusations are not considered as sufficiently convincing evidence to support the charges against the defendant. This seems to be contradictory to Art. 170 (2) Turkish Criminal Procedure Code, which states "In cases where, at the end of the investigation phase, collected evidence constitute sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare". Furthermore, it is noteworthy that most of these posts date back to 2014. It seems unusual to focus on posts dating back this far, in an indictment written many years later. The impression is created that the prosecutor might not have been certain whether there was sufficient evidence and subsequently an excessive amount of evidence has been included to lend weight to the indictment. Since the majority of the evidence lacks clear reasoning for linking the defendant's social media posts to the charged crime, it appears that the list of evidence was unnecessarily expanded beyond any factually incriminating content. This of course raises overarching concerns in regards to Art. 6 (2) ECHR, as the inclusion of irrelevant posts in the list of evidence against the defendant severely compromises his right to presumption of innocence. Artificially fabricating an extended list of evidence against the defendant might additionally result in creating the risk of negatively impacting the suppositions against him in court, again clearly violating his right to a fair trial according to Art. 6 ECHR.

In light of these concerns regarding some

of the unnecessarily included evidence, it surprises even more that neither the aforementioned five books, nor the house search during which they were confiscated find any reference in the head section of the indictment under the category for evidence.

Additionally, the indictment's head section states April 4, 2018 as "date of offence". As mentioned above, this date matches with none of the social media posts listed, or any other event mentioned in the indictment. The indictment also failed to mention a date for the house search. However, our background research on the case resulted in finding the date of the house search to match the indictments official "date of offence": April 4, 2018. Perhaps this is the missing link to choosing this particular date as "date of offence". Doing so seems counterintuitive though, since the first paragraph of the indictment states that the investigation was in reference to making "terror group propaganda via social media" and the last sentence of the indictment requests an increased punishment "due to the fact that the crime was committed by way of press". Since the indictment is therefore clearly focused on the social media content, and neither mentions the date of the house search, nor states the house search or the confiscated books as evidence, it seems heavily contradictory to then use this particular date as official "date of offence."

3. Conclusion and Recommendations

This indictment, as it is currently written, would under no circumstances be issued by an Austrian prosecutor as it displays highly unprofessional work performance on multiple levels. If it were for whatever reason issued in this form, the defendant's attorney would immediately lodge an appeal on grounds of formal defects. The concerned High Court would then request a statement by the chief prosecutor's office, before coming to a judicial decision in which it will presumably not accept this indictment and send it back to the prosecutor's office to reopen the investigation proceedings. To summarize the elements that need improvement, please refer to the following list:

- Improvement of the head section through including further details and better structure to avoid uncertainty in regards to the alleged crime as well as its legal base.
- There needs to be a proper use of paragraphs to make the indictment's content logically comprehensible.
- The official "date of offence" needs to have an actual correlation with any of the dates of the offences he was accused of.
- If there is evidence mentioned in the indictment, like the confiscated books, they need to be mentioned in the head section as well.
- Every piece of evidence, whether concerning social media posts or a conducted house search, needs to be clearly dated.
- There needs to be an accurate chronology throughout the list of evidence.
- Social media accounts need to be

consistently identified through a user name.

- It is indisputably unacceptable to include legally irrelevant social media posts that lack any reasoning for linking them to the charged crime, in order to create a seemingly longer list of evidence.

In conclusion, the flawed format of the indictment as well as the prosecutor's approach regarding the evaluation of evidence leaves us with serious concern for the guarantees of fairness and transparency of judicial proceedings in Turkey, as these principles are protected by the European Convention on Human Rights. We therefore urge the Turkish Ministry of Justice to take our recommendations into consideration, especially in terms of training and qualifying public prosecutors, as this could contribute to an improvement in the state's judicial system and help guarantee a fair trial for all defendants.

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