

Is this your world of justice?

PEN Norway's Turkey Indictment Project

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Turkey Indictment Project by PEN Norway

As PEN Norway, we're bringing up press and civil society related cases from Turkey with an innovative approach: The Turkey Indictment Project.

In 2020, with a team of judges, lawyers and scholars we are examining indictments from 12 prominent media and civil society cases, including Cumhuriyet, Büyükkada and Gezi Park trials. Each report focuses on one indictment. An excellent group of legal and human rights experts from five different countries have assessed the 12 indictments' compliance with local regulations and international standards.

Our objective is to provide a tangible ground for discussions concerning the crisis of rule of law in Turkey and support dialogues that aim to improve the standards. You can find all published reports and articles on norskpen.no.

Caroline Stockford, PEN Norway's Turkey Adviser, leads the project. Aşkın Duru is the Turkish coordinator for the project.

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Besides her current work with Civic Space Studies Association, Berna Akkızal has also been active in the field of freedom of expression for many years. She was elected as a member for the IFEX Council in 2017 and served one year. Prior to focusing on freedom of expression, she was a member of the Socialist Feminist Collective and contributed to the feminist movement in Turkey.

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The peace process, launched on Newroz 2013, was declared officially over with the discovery of the bodies of two police in their homes in Şanlıurfa's Ceylanpınar district in 2015.¹ At the time, then-Prime Minister Ahmet Davutoğlu said: "The jets flying over Qandil are in response to Ceylanpınar". With the conclusion of the peace process, Turkish civil society entered a merciless period in which freedom of expression was heavily restricted, people who used certain phrases were immediately arrested and especially people and organizations that showed solidarity with the Kurds were systematically oppressed in a way that went beyond what was just in terms of law.

Most of the trials launched in the final days of 2015 were intended to silence those expressing outrage over the curfews imposed on Southeastern provinces and were declared using vague legal statements in copy-and-paste indictments. Following the coup attempt of 2016, however, the country began to be governed through Statutory Decrees.

Some of the most high profile cases in this period included those launched against the Özgür Gündem Editor in Chief Campaign, Cumhuriyet newspaper, Academics for Peace, 131 separate journalists and a teacher called Ayşe, who appeared on a television program to denounce the killings taking place in the east of the country.²

Most of the cases were filed upon the accusation of having carried out propaganda for a terrorist organization as per article 7, clause to of the Anti-Terrorism Law. The law describes those guilty of having supported terrorism as anyone who *"conducts propaganda in a way that portrays the methods of terrorist organizations, including its force, violence or threats as legitimate or praises these methods or encourages a resort to such methods"*, outlining the sentences for such crimes as one to five years of prison, but adding that *"If this crime is committed through a media publication, the*

¹ All defendants in the file were exonerated

² Bia Medya Observation Report - 2016

sentence shall be increased by half. Furthermore, publication authorities who have not participated in the crime committed by a media organ will be charged with paying the administrative fees for the trial for between one and five thousand day". As stated, the law says that the punishment is to be increased if the crime is committed through the press, thereby the threat that journalists are under is even greater. The highest degree of punishment would see a journalist sentenced to up to 7 and a half years in prison.

Other than the accusations of carrying out propaganda for terrorist organizations, the question of whether the charges outlined in Turkish Criminal Code's article 301 (which deals with publicly defaming the Turkish People, the Republic of Turkey, the Turkish Grand National Assembly, the Government of the Republic of Turkey and the judicial organs of Turkey) was going to be sought by the Ministry of Justice was in discussion for a long time. This article crops up especially so in the case against Academics for Peace. The trials were directed at over 200 academics in a joint case. The academics' defense was rejected. Meanwhile, another series of cases were launched against those who participated in the campaign launched by the Özgür Gündem Editor in Chief Campaign, and even those who wrote and published articles in support of the defendants were put on trial.

The amount of spotlight given to trials at the Istanbul Courthouse brought those few of us working tirelessly on the cases together, like members of a family going through particularly rough ordeal.

If we wanted to attend all of the hearings, which generally took place on Tuesdays and Thursdays, we were forced to split up, as each of the cases took place simultaneously in smaller courtrooms. It was not a coincidence that cases with multiple defendants and/or audiences and supporters were assigned to various tiny courtrooms in that huge courthouse; on the contrary this was an attempt to violate the right to due process. According to the bylaws of the European Human Rights Convention, trials must be held publicly other than in certain exceptions. Furthermore, if you were watching one of the many cases against journalists you had to get in line

as an observer according to your profession and try to enter at the mercy of the security guards on duty at the turnstiles every day. Even if one of the defendants was a relative, you had the most gut-wrenching and most likely possibility of not getting in. It was only possible to watch the trial of a colleague who was arrested for trying reporting news like yourself, if there was any room left after the international committees took their seats. After the yellow card-holders among the press, employees of non-governmental organizations and friends of the defendants were generally unable to enter the courtroom or were able to enter alternately and transform their observations into reports and tweets.

International committees from various different countries were waiting in the corridors with all of those showing solidarity and to write up on yet another disastrous verdict. This wait could sometimes last for hours and people would have to wait in the corridors, which were so empty there was no possibility to find seating, for the previous hearing to end and the committee to take their places.

This crowd could sometimes build up considerably depending on the profile of the defendants being put on trial. Sometimes, in lesser reported-on cases, we observed firsthand how sharply the panel of judges could change their manner and form of address. Even chief justices who addressed the defendant in a manner that lacked the most basic courtesy quickly corrected their attitude when it appeared that a large group was outside the courtroom. The presence of foreign and local supporters seeking to enter the courtroom was beneficial in terms of making cases heard, allowing public opinion to form and keeping it in the public eye.

This period is one of the darkest periods in the history of freedom of expression in Turkey and we are actually still living through it. Those from any professions who criticize the government, show solidarity with another suffering oppression and unlinked to any act of violence are being put on trial one by one, receiving the punishments standard for killings and abuse.

Attorneys, academics, doctors, rights groups, journalists, those who stand in solidarity with journalists; all are liable for punishment.

Meanwhile, those whose punishments are not finalized are faced with fines and suspended sentences. Ayşe Çelik ended up having to go to prison with her newborn because her sentence would not be postponed. Ayşe Çelik's defense that her prison sentence for the crime of carrying out terrorist propaganda was in conflict with her freedom of expression was found to acceptable by the Constitutional Court and in the same verdict it was stated "in order for an interference with basic rights and freedoms to be considered acceptable to the requirements of a democratic society, it must fulfill a social need and proportionate response". While this ruling, issued in 2019 was a relief in terms of justice, this does not change the reality that the political decisions made beforehand caused a woman exercising her right to freedom of expression to be forced to go to prison with her child.

Çelik was accused of conducting terrorist propaganda for having voiced opposition on a TV show to military operations in Southeastern and Eastern Anatolia, saying: "We can't let the children die." During proceedings, she was even asked by the prosecutor why she didn't condemn the PKK, thus becoming a rare example in Turkish judicial history of being put on trial not for what she said, but for what she did not.

The arrests of the group "Academics for Peace" came after they released a statement saying: "We will not be complicit to this crime," in reference to the ongoing operations. In the meantime, the arrest of those from the Özgür Gündem Editor in Chief Campaign and Cumhuriyet Newspaper case, those tried in the Büyükada case and Osman Kavala are actually all efforts to wear down the energy of those individuals and organizations fighting for their rights through long drawn-out proceedings and arbitrary arrests. Launching investigations on flimsy evidence, with neither witnesses nor sufficient grounds and based on anonymous reports has become the most effective instrument in the government's tool belt in terms of

silencing the free press. Thus, many objective nongovernmental organizations and rights advocates have tended toward self-censorship to a large degree.

Almost every morning we would wake up to the news that one of our friends, acquaintances or a public figure had been taken into custody. Speaking of waking up, these detainments were mostly conducted in the form of early morning raids on homes by law enforcement agents, sometimes even armed with long-barrel weapons. After the initial trauma inflicted on children, spouses and relatives present in the homes of those taken in by fully equipped anti-terrorist police, we would be notified by a simple tweet saying: "I'm being detained".

It was not important that these "individuals" were leading academics, journalists or rights advocates. Everyone suffered the same treatment, more or less. Our friends who were called to the courthouse to give a statement and went in on their own accord were cuffed and detained. Our professors, who despite being deans in their university with a permanent address and a definitive position in the school, were subjected to these early morning home raids rather than being called in to provide a statement.

Most of the cases associated with freedom of expression are based on membership to a terrorist organization or the charge of carrying out terrorist propaganda. Even though the definition of terrorism and how propaganda is conducted for it is specifically outlined in law, its interpretation can vary according to the political climate. Prosecutors generally demand that our colleagues, friends and professors be remanded in custody before a procedure gets underway. While the indictments never seem to have been prepared and only appear in the form of detainments, these are punishments in and of themselves, with the courts justifying this based on the possibility of tampering with evidence. It is important not to forget that most of the time the evidence being referred takes the form of a newspaper article, a news report or a tweet. Therefore, the question of how a screen shot, a newspaper clipping or

even personal computers or telephones could be tampered with while one continues about their possession still remains unanswered. Sometimes, even a photograph displayed in a government-sponsored project can be regarded with suspicion based on assumption the Syrian children in the picture are Kurdish or the fact that the detainees name happens to match a telephone number taken from a phone directory but never registered, or even a vague association is used as justification. You could be in prison for months before finding out what you have been accused of and can be declared guilty immediately by government media.

Once the indictment is prepared, the first session is held fairly quickly. Sometimes the months between being taken into custody and being put on trial without remand do not happen in the first hearing and even if you are released, your passport can be seized. Sometimes, as in the example of Can Dündar, even if the accusation is against you, they can still seize your spouse's passport.

If a hearing is postponed or a statement not taken in the initial proceedings, you are likely to remain in detainment for at least another month, especially in the case of defendants that are already in custody. Postponements of hearings can happen due to defendants not under remand having failed to attend a hearing, living abroad, or the translations of documents not being completed in time. Because of the unending proceedings and the long recesses in between hearings, a case can go on for years. In fact, all in all, the proceedings constitute a punishment in and of themselves.

The ability to question witnesses during hearings and dispute evidence with a prosecutor on equal grounds – some of the basic criteria for due process according to EHRC bylaws – is not always provided on the basis that, especially after the coup attempt, the number of police officers was insufficient and defendants were often not brought to hearings but forced to submit their defense via video call, which formed another violation. Defendants were forced to give their defense from a room in their prison and were unable to hear what was being discussed in the courtroom intermittently and unaccompanied by their attorney. Sometimes, when internet connection was lost the defense would be interrupted. This was especially difficult

for defendants who had been waiting for months to submit their defense and be released.

The ever-changing panel of judges due to the government efforts to clean out the judicial staff, especially after the coup attempt, was also a cause for drawing out trials. Seeing a new panel of judges at every hearing not only created a lack of trust in the judicial system but actually kept taking the legal process back to square one. The first task of the new panel would generally be postponing the hearing to examine the files yet again.

Serious restrictions were imposed with the Statutory Decree issued in October 2016. The meeting of a defendant and their lawyer could be restricted to 24 hours by judicial order if an investigation or case was opened against the attorney themselves, who could sometimes be ejected from the profession. This decree stipulated that: “In proceedings concerning crimes carried out in the course of FETÖ activities, a maximum of three attorneys may be present at the hearing”. This regulation was custom-made to leave defendants without representation and to hinder politically active lawyers specialising in freedom of expression. There were aspects of the regulation that impacted both sides. In terms of freedom of expression, the lawyers representing in cases that the government considered to involve the question of anti-terrorism were generally always the same. If the lawyers could be proven to have been pro-freedom of expression advocates in their personal lives could also be charged with terrorism, they could not take on such cases in the future, and thus were persuaded to quiet their activities.

In addition to all of this, a person against whom an investigation or case has been filed is innocent until sentenced. It is unclear what the justification is for placing restrictions on a lawyer, who is only being investigated, defending a client on trial without a finalized sentence against them. This decree is clearly an attempt to break the solidarity of those of a like-mind and advocating for the same causes.

If you have a lawyer not being investigated on grounds of terrorism, you are being fairly tried swiftly, and the chief justice speaks with you with the informal “you” form and doesn’t treat you as already guilty during your defense means you have arrived at that very sensitive stage.

Speaking of the prosecutor and panel of judges, while a person should be treated equally before the prosecution and panel of judges, in Turkey, unfortunately, the prosecutor and panel of judges sit at the same level and in fact, when the courtroom is emptied for a verdict to be reached, the prosecutor and judges remain in the room together.

This situation, in addition to the others, is a practice that marks a deep violation to the carrying out of due process, yet not often criticised.

Okay so then what happens to the rights advocacy instruments that are the components of civil society, to the final point of our advocacy activities, at the point of not of poetic justice but what we call the international norms? It would be useful to take a look.

When and how can ruling governments who have lost any sense of balance pay the price of arbitrary arrests?

It is our most natural right as advocates of the international human rights agreements Turkey is a party to that lawyers defending freedom of expression be protected to the fullest. This must be given the utmost priority.

If domestic law is completely powerless against a government that collects legislation, execution and justice in a single hand by changing in laws through statutory decrees, we have no other option but to trust in international agreements, solidarity and norms. The belief that justice will eventually prevail does not have much meaning when justice arrives after such a long delay. If you are spending years seeking justice in confinement, the injustice of your suffering cuts even deeper. Long

term arbitrary detainment turns into a punishment of its own. Most of the time, the European Court of Human Rights bylaws are overlooked, too.

Where they should have been making things easier for high courts and helping to shorten the process, the courts of appeals invented in the wake of State of Emergency laws, created an even bigger barrier to justice being achieved at the European Court of Human Rights. The courts of appeals formed in July 2016 are aimed at lightening the workload not of the judiciary alone, but the supreme court and council of state.

When the appeals court came into play after the coup attempt, the means of applying to the European Court of Human Rights, appealing and then finally as a result of the application being reviewed by the Constitutional Court took years.

In some cases, related to freedom of expression, some trials were conducted swiftly by domestic legal institutions. The European Court of Human Rights gives priority to cases regarding the press, as in the case of the Altan brothers.

Even though these cases were reviewed with priority and verdicts were given in favor of the victims, soon enough new accusations were lodged at the defendants and arrest warrants re-issued. For defendants and their families, it was extremely distressing for them to be arrested again under different charges as much as ten minutes after release.

Even if, after years have gone by and your trial is finished you get the news of your exoneration in the final hearing, this does not mean you have reached the final stage. The right to appeal is outlined in Article 267 of the Turkish Criminal Law and states: "Court decisions may be appealed in cases specified by a judicial rulings and by law". This right, which is generally exercised by the defendant if sentenced, can also be exercised by the prosecution against an exoneration ruling from the court.

Long detentions and unjust trial conditions not only affect the personal lives of defendants but also restrict the mobility of all civil society. We will remember Osman Kavala's detention exceeding 1,000 days, with its purpose to put those in place who are struggling for their rights.

No matter how much we try to make a short evaluation of or summarize the past five years of the right to due process, there will always be something missing. As nongovernmental organizations, journalists, professional organizations and individual activists, we have stood together and raised our voices against this current state-of-affairs, in which rights and freedoms are literally being torn away and we are encountering most of these practices for the first time. We have experienced firsthand that when the scales of justice break down, international protections are useful, even if in the long term, and maintain a belief in the power of international solidarity. We will continue to advocate for the need to make a fairer system possible, in which the requirements of due process are fulfilled for all those journalists, rights advocates, academics, doctors and every individual who thinks critically and expresses critical thought put on trial.