

**P E N
N O R W A Y**

Legal report on indictments against

**Şebnem Korur Fincancı,
Erol Önderođlu,
Ahmet Nesin**

PEN Norway's Turkey Indictment Project

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Turkey Indictment Project by PEN Norway

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1: Introduction

This evaluation report is drafted as a part of the Turkey Indictment Project, established by PEN Norway. It represents analysis of the indictments in the criminal cases against journalists Şebnem Korur Fincancı, Erol Önderoğlu and Ahmet Nesin. All indictments issued by Istanbul Chief Public Prosecutor's Office, Terror and Organized Crimes Investigation Bureau on 21 June 2016.

2: Summary of the case

2.1 The Newspaper Özgür Gündem

Özgür Gündem ("Free Agenda") was an Istanbul-based daily newspaper. It started publishing in 1992 and closed down in 1994, due to a publishing ban. In 2011, the newspaper relaunched and after facing numerous difficulties, it finally closed down on 29 October 2016.

The newspaper was very popular. For a long time, it was regarded as the only newspaper that published objective news about the Kurdish issue in Turkey.

Due to the political circumstances, 2016 was an exceedingly difficult year for the newspaper. There was an ongoing curfew in many Kurdish provinces in the East part of Turkey. Almost every day there were reports about the civil deaths. Özgür Gündem was one of the main resources to access information from the region. Many journalists were prosecuted during this period and the newspaper itself faced a significant number of prosecutions.

On the World Press Freedom Day in 2016 (3 May), the campaign "Editor in Chief on Watch" was launched by a several organizations. Volunteers acted as Editor in Chief at Özgür Gündem for the duration of one day each. The campaign lasted for 100 days and 56 people volunteered as Editor in Chief on Watch. Out of the 56 volunteer

Editors in Chief, 50 were prosecuted. Decisions of non-prosecution were given for 11 of the prosecuted, one case was dropped due to statute of limitation (Deniz Türkali), 38 were put on trial and by October 2017, 22 had received various sentences.

A court decision closed down the newspaper temporarily on 16 August 2016. At the same time 22 journalists, members of the newspaper's consultant board (including the authors Aslı Erdoğan, Eren Keskin and Ragip Zarakolu) and the editors were arrested and prosecuted.

The newspaper was closed down permanently on 29 October 2016 by a Presidential Decree.

2.2 The three indictments

Şebnem Korur Fincancı, Erol Önderoğlu and Ahmet Nesin did all participate in the Editor in Chief on Watch campaign and acted as an Editor in Chief for Özgür Gündem for one day each.

Şebnem Korur Fincancı was the President of Human Rights Foundation of Turkey (TIHV). She is also chairperson of the Turkish Medical Association and she was a signatory of the petition: "We shall not be a part of this crime". This petition was published by 1128 academics in January 2016, under the name of "Academics for Peace". All the signatories were prosecuted and tried, included Fincancı, but prosecution of her regarding this matter is not a subject for this evaluation. Fincancı was the Editor in Chief on Watch on 30 May 2016. There were four different parts of the articles in the newspaper on this day, which according to the indictment were criminal offenses.

Erol Önderoğlu is the Turkish representative of Reporters without Borders (RSF). Önderoğlu was the Editor in Chief on Watch on 18 May 2016. On his watch there were four different articles, which had a content that according to the indictment were criminal offenses.

Ahmet Nesin is an author and a column writer for several newspapers. Nesin was the Editor in Chief on Watch on 7 June 2016. There were also on his day in charge four different parts of the articles in the newspaper, which according to the indictment were criminal offenses.

All three were arrested on June 20 2016 and an investigation was launched against them. They were put in pre-trial detention on the charge “disseminating propaganda for a terrorist organization”

Three separate indictments were issued on 21 June 2016. The indictment against Fincancı and Önderoğlu was sent to the 13th High Criminal Court of Istanbul. The indictment against Nesin was sent to the 14th High Criminal Court. Nesin’s case file was later merged with the case of Fincancı and Önderoğlu on the grounds of “legal and de facto connection” between the case files.

İnan Kızılkaya, the responsible managing editor of *Özgür Gündem*, was also a suspect in all three indictments due to his responsibility regarding all news material published in the newspaper. His case was later merged (at the 2nd hearing on 11 January 2017) with the case against the newspaper itself.

The 13th High Criminal Court of Istanbul, which accepted the indictments, ordered the release of Fincancı and Önderoğlu from pre-trial detention on 30 June 2016. Nesin was released the day after. Nesin lives in France and he returned to France after his release. Kızılkaya remained in pre-trial detention.

As the three indictments are quite similar, they will in the following analysis only be evaluated separately on the parts where they differ.

The indictments accuse the defendants of “Public provocation to the commission of an offence, praising an offence and offender and making propaganda for a terrorist organisation”. The indictments are quite short, each about three pages long.

The first part consists of formalities, such as crime date and place, detention date, applicable articles in the Turkish Anti-Terror Law, the Turkish Criminal Code (TCC) and the Turkish Press Law and finally a list of evidence.

The next part in each indictment describes the text of the various newspaper articles that the prosecution considers criminal offenses. This is the part where, naturally, the indictments differ.

In the last part, the indictments consist of the defendant's defense and a long, very complicated and hard to read paragraph, with more accusations and an argument for why the Press Law article 11/3 is applicable in this case.

As the evaluation under will show, the indictments are seriously flawed and are not in line, neither with Turkish Criminal Procedure Code (CPC) nor with international standards. The prosecution of the three defendants violates basic human rights, such as freedom of speech and the right to a fair trial.

2.3 The hearings

There were altogether 11 hearings in the 13th High Court of Istanbul over a period from 8 November 2016 until 17 July 2019.

It took more than 3 years from the arrest until the defendants were acquitted. In this period, there were no new investigations or new evidence presented. The only evidence of the case were the articles in Özgür Gündem.

3: Analysis

3.1 Evaluation of the indictments in terms of Turkish Laws

The Turkish Criminal Procedure Code (CPC) Article 170 regulates the duty of the public prosecutor and the required content of an indictment.

3.1.1. CPC Article 170/3 - Formalities

All three indictments conform to the requirements in Article 170/3 in respect of most of the pure formalities. In the introductory section, it is clearly set out the identity of the suspect, the defense lawyer's name, and the date of the indictments, the crime charged and the applicable articles in Criminal Code and Anti-Terror Law, the place and date and duration of the charged crime. Hence, the requirements in CPC article 170/3- a), b), g), h) and i) seems to be fulfilled.

170/3- k) requires information about detention. The indictments only inform about the date of the detention, not the duration or if the defendants were arrested with a warrant. The lack of information on this matter is not important to the overall evaluation of the indictments.

According to CPC Article 170/3-j, it is required to present the evidence of the case. The evidence is listed on page one of the indictments. As the analyses below will show, there is no evidence presented in the favor of the defendant. Furthermore, even if the indictments present quotes from the different newspaper articles (the evidence), the connection between the elements of each alleged criminal act and what is referred from the news articles is poorly documented.

3.1.2 Article 170/4 – Description of the alleged crime and the evidence establishing the offence

According to article 170/4 “the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence».

As mentioned above, the charged crime is described equally in the indictments as:

“Public provocation to the commission of an offence, praising an offence and offender and making propaganda for a terrorist organisation”.

The relevant articles applicable are in the indictments listed as follows:

Article 7/2 of the Turkish Anti-Terror Law through Article 11/3 of the Press Law No. 5187, Articles 214/1, 215/1, 44, 53, and 63 of the Turkish Penal Code.

According to the Anti-Terror Law article 7/2 it is a criminal offense for any person to make “propaganda for a terrorist organisation”. The offense under TCC Article 214/ 1 is to “publicly provoke the commission of an offence”.

The offense under TCC Article 215/1 consist of two cumulative elements:

- publicly praise an offence or a person on account of an offence he has committed and
- any explicit and imminent danger to the public order occurs therefore.

The three indictments have the same structure in the descriptive part. The date of the newspaper issue is mentioned. Then for each accusation, you will find the page where the article is placed in the paper, the headline of the article and then a reference to the text of the article. This is actually in general a good structure for presenting the evidence. The text is quite short and appears uncomplicated and informative. However, there is no consistency in the indictments in how the text in the news articles are referred. In some of the accusations, the text is quoted in the exact wording. In others it is explained what is written in the article, without the exact quotation. This inconsistency makes the indictments appear unprofessional. In addition it is unclear if the description of the text is the prosecutors interpretation or if it reflects the actual content of the news articles.

To illustrate this point, let us look at the first accusation in Fincancı’s indictment:

The news, which covers half of the page 8th of *Özgür Gündem* issue dated 30 May 2016, has the following title: “*Nisebin Düşmanı Yerle Bir Etti*” [Nisebin, the name of the district, smashed the enemy] and says “...KCK [Kurdistan Communities Union] Presidential Council member *Sozdar Avesta* comments on the ongoing bombing and presenting civilians as terrorists although YPS [Civilian Defense Units] withdrew from Nisebin; *Sozdar* says “The State lost in Nusaybin. Nusaybin smashed it [the State].” Avesta’s (a senior leader of the PKK/KCK) comment is followed by her praising/blessing the actions by the organisation and by a photo of people with arms who stand behind barricades/walls; and showing the security forces of

the Republic of Turkey as enemies who were smashed by the PKK/KCK terrorist organisation in Nusaybin (Nisebin),

The accusation has the exact wording of some of the text in the news article. However, the crime seems to be found in a part of the article that is not quoted, namely where Avesta allegedly praises/blesses the actions of PKK/KCK. This makes the accusation confusing and illustrates why it is important to be precise in describing what part of the article is considered to be a specific criminal act.

The most severe flaw of the indictments appears in the attempt to connect the referred texts to the elements of the alleged crime. This is the second part of the requirement in CPC Article 170/4. None of the referred texts, in none of the indictments, are linked directly to the applicable article in TCC or the Anti-Terror Law. This part is crucial in any indictment. If an act cannot be connected to the crime described in the law, there is no crime committed. It is as simple as that.

The alleged crime in the above referred accusation in Fincanci's indictment seems to be that Avesta is "praising/blessing the actions of the PKK/KCK". In the three indictments the alleged crimes are described quite similar and in summary as:

- praising/blessing of actions and/or persons committing actions
- functioning as a media organ of a terrorist organisation
- praising and encouraging actions by militants
- praising of actions and try to keep the terrorist organisations spirit high
- present the PKK/KCK subunits' armed rebel/attacks on security forces legitimate, praises and encourages them
- blesses the terrorist organisations and present the actions as if it is resistance to an enemy

Firstly, it is obvious that TCC article 214/1 does not apply to any of the alleged crimes. It is not shown for any of the texts cited in the indictments that there has been an act of "publicly provocation of the commission of an offence", which is the criminal element of TCC article 214/1.

Secondly, the different variations in the indictment over "praising and encouraging actions by PKK" cannot be a crime according to TCC article 215/1. The praising itself

is not enough. The praising must cause *explicit and imminent danger to the public order*. The indictments do not mention this element of the crime for any of the accusations.

Thirdly, it is not explained where in the articles there are “propaganda for a terrorist organisation”, according to Anti-Terror Law article 7/2. The only accusation where this article seems relevant is in Fincanci’s indictment:

The news on the 9th page of which title is as follows: “*HPG [People’s Defense Forces]: 40 soldiers were killed.*” The report publishes the HPG Press, Contact Center’s statement that says “*...HPG warns that ‘village guards are on the move with the TC [the Republic of Turkey] Army in Caldiran district, Van and they try to determine the locations of guerrilla forces. The guards must immediately stop these actions.’*” Publishing this content with a photo of people, who can be identified as the members of the organisation, with arms who stand in trenches. In this respect, the newspaper functions as the media organ of the armed terrorist organisation.

As there is no reference to the Anti-Terror Law article 7/2, it is not possible to know if “the newspaper functions as the media organ of the armed terrorist organisation” is meant to cover the criminal element in article 7/2.

In summary it must be concluded that the accusations in the three indictments is not presented according to the requirements in CPC article 170/4.

On the last page of each indictment, a long paragraph explains the criminal responsibility of the defendants as Editor in Chief and why Article 11/3 of the Press Law is applicable. In addition, this paragraph seems to be a summary of the alleged criminal offenses. This paragraph has only one long sentence and is both unreadable and incomprehensible. The accusations in this paragraph are formulated as follows:

considering the fact that news in question makes the propaganda of PKK/KCK and/or its subunits’ actions that rebel against security officers in some parts of the State of the Republic of Turkey territory, deploys armed militants in urban areas; instructs them to dig trenches, attacks on security forcers, and aims to establish its authority as oppose to the legitimate legal institutions and figures’ authorities; in this respect, praising offences related to these actions, provoking some segments of the society to commit an offence, presenting these

actions and activities as legitimate; aim to achieve credibility for these actions in the eye of public; it is a clear fact that the content of news, which is the subject of this investigation, aims to legitimise the PKK/KCK terrorist organisation and its members' actions as well as praises and encourages armed attacks/rebel/violence/pressure; in this respect, Özgür Gündem does not criticise policies in force or serve as a political opponent entity but has an editorial policy that is connected to the PKK/KCK terrorist organisation; the news and photos of the PKK/KCK and/or its subunits rebel and attacks on the State of the Republic of Turkey cannot be viewed within the scope of the freedom of thought, and expression or freedom of media; all the photos and news, which officers investigate, amount to the propaganda of the PKK terrorist organisation

In this paragraph, there are accusations of *making propaganda of PKK/KCK* and *provoking some segments of the society to commit an offence* and several other accusations, but again the accusations are not linked to the evidence of the case. It does not show where in the articles these alleged criminal acts are committed or even where the text appears.

Finally, if there was a praising/blessing/encouraging etc. of the actions of PKK/KCK, it must be proved that the defendants have committed a crime by being the Editor in Chief on Watch. There must be a reference to the freedom of the press and why this article exceeds the limits of this freedom.

To be fair, at the end of the paragraph, the indictments mention freedom of speech. However, the conclusion is that the news and the photos in the articles cannot be viewed within the scope of freedom of thought and expression or freedom of media. The reason for this conclusion seems to be that *Özgür Gündem does not criticise policies in force or serve as a political opponent entity but has an editorial policy that is connected to the PKK/KCK terrorist organisation*. The prosecutor should know that ECtHR has ruled that freedom of speech includes the free expression by prohibited organisations of their views, provided that these do not contain public incitement to commit terrorist offences or condone the use of violence¹. Especially since

¹ Şık vs. Turkey (No.2)

Önderoğlu stated in his defense that Turkey has been convicted by ECtHR for launching investigation into such news. There is no evidence in the indictments that even remotely supports the existence of public incitement to commit terrorist offenses or condone the use of violence.

The conclusion is that the indictment does not fulfill the requirements according to CPC article 170 /4.

3.1.3 Article 170/5 Does the indictment include not only the issues that are unfavourable to the suspect, but also issues in her favour?

In all three indictments have a short paragraph with the defendant's statements. They all state that the articles are covered by freedom of expression. The indictment has mention freedom of speech, but dismisses this objection to the indictment without any deliberation. Hence, the indictments also fail to include and discuss issues that are favorable to the defendants.

3.1.4 Article 170/2 – Should the prosecutor prosecute?

According to CPC article 170/2 the prosecutor should only prosecute in cases where, at the end of the investigation phase, collected evidence constitute sufficient suspicion that a crime has been committed. Clearly the analyses above show that there was no sufficient suspicion for any criminal offenses by the defendants. The fact that all three defendants were acquitted supports this conclusion.

The indictments are not based on facts and evidence of the case and are not in line with the requirements in CPC. The question must be raised whether the prosecutors are independent enough to make their decisions based on the law and the evidence, or if they feel obliged to prosecute without sufficient suspicion.

3.1.5 Summary

It is clear that the indictments do not meet the requirements set out in CPC article 170. The main

defects are the failure in connecting the alleged crime to the evidence, the complicated and incomprehensible language used in the last paragraph describing the responsibility of the defendants as Editor in Chief and last but not least, the lack of deliberation on the freedom of speech and the freedom of press defense.

3.2 Evaluation of the indictment in terms of international standards

Normally, when an indictment is not in line with domestic criminal procedure law, it also violates international standards on criminal procedure. These indictments are no exception.

According to the Constitution of the Republic of Turkey article 90, ratified international law is taking precedence over national law. Turkey has ratified the European Convention of Human Rights (ECHR).

ECHR article 6 § 3 on the rights to fair trial, § 2 on presumption of innocence, article 10 on freedom of speech, United Nations Guidelines on the Principles Concerning the Role of Prosecutors and the Standards set out by International Association of Prosecutors are the relevant international standards that apply to this indictment.

3.2.1 ECHR Article 6, Rights to a fair trial

According to ECHR article 6 § 3 a) everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

The European Court of Human Rights (ECtHR) has published a “Guide on Article 6 of the European Convention on Human Rights”² points out that

In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.

The accusations are not connected to the applicable articles in TCC or the Anti-Terror Law and are not supported by the evidence. This makes it almost impossible to build a defense against the accusations. Hence, the indictment does not meet the standards for a fair trial.

Even if it is not part of the evaluation of the indictments, it should also be mentioned that it took more than three years from when the indictments were issued until the defendants were acquitted. This is another violation of the right to a fair trial, as ECHR article 6 § 1 enshrine that everyone shall be entitle to a fair public hearing within reasonable time.

3.2.2 ECHR Article 6 § 2, Presumption of innocence

The indictments violate the presumption of innocence enshrined in ECHR article 6 § 2. The indictments conclude that there is reasonable suspicion of crime committed, even if there is no evidence or applicable law that can lead to such a conclusion. The defendant’s free speech defense is mentioned, but not properly evaluated. This is clearly not because of lack of knowledge about this defense, as it is quite basic knowledge and Turkey has had many cases before the ECtHR on this issue.

The defendants’ rights according to ECHR Article 6 to a fair trial is clearly violated.

3.2.3 ECHR Article 10, Freedom of speech

² https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

ECHR article 10 that states that everyone

has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Turkey's Constitution article 28 is in line with ECHR Article 10 as it states that the press is free and shall not be censored.

In *Şık vs. Turkey (No.2)* the Court repeated previous definition of fundamental principles in paragraph 173:

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"

The defendants had the right (and duty) to report on the ongoing conflict between Turkey and Kurdish groups in East Turkey. It is obvious that the Turkish government was offended by the articles, but the defendants was in their right to publish and their right and duty according to ECHR Article 10 is clearly violated.

3.2.4 United Nations Guidelines on the Principles Concerning the Role of Prosecutors³

Articles 10 to 20 in the Guidelines outline the role of the prosecutors in criminal procedures. According to article 12 the prosecutors shall:

³ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

... in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

As concluded above the indictments are not in accordance with CPC Article 170. The defendant's human rights are not respected. It is clear that the indictments are not fair and balanced documents that ensure a due criminal process.

UN Guidelines article 13 (a) stated that in the performance of their duties, prosecutors should:

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

It seems apparent that the prosecutions of the three defendants were politically motivated and not by any standards impartial.

According to UN Guidelines art 13 (b) the prosecutor shall:

Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

The prosecution of the defendants was a violation of the public interest in being informed about the situation in eastern Turkey from both sides of the conflict. The right of the public to be informed is states in Şık vs. Turkey (No.2), paragraph 177

The public has the right to be informed of the different ways of viewing a situation of conflict or tension; in that regard the authorities must, whatever their reservations, allow all parties to express their point of view. In order to assess whether the publication of material emanating from prohibited organisations entails a risk of incitement to violence, consideration must be given, first and foremost, to the content of the material in question and the background against which it is published, for the purposes of the Court's case-law (see, to similar effect, Gözel and Özer, cited above, § 56).

The International Association of Prosecutors, which was established in 1995, has issued a set of standards to ensure "fair, effective, impartial and efficient prosecution

of criminal offences” in all justice systems.⁴ 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.” The fact that the three defendants were acquitted, clearly shows that there was no crime to prosecute and the prosecutor simply did not meet his obligation not to prosecute in these three cases.

4: Conclusion and Recommendations

It is clear that the indictments against the Fincancı, Önderoğlu and Nesin lack any legal base and violates both national law and international standards. A closer analysis of the indictment shows there was not sufficient suspicion that a crime has been committed, the indictments appear unprofessional and biased. The prosecutor should not have prosecuted, and the indictments should not have been accepted by the courts.

The first recommendation is to write indictments in a simpler and more readable language. The initial structure of these indictments is quite good, but it is crucial to pay attention to the connection between the alleged crime and the evidence.

The indictment should also discuss whether the articles exceed the limit of the freedom of speech, both according to national law and international standards. Freedom of speech and freedom of the press are mentioned in the indictment, however not discussed just dismissed.

At last, the prosecutor should evaluate if the indictment is in line with ECHR rights, especially the right to be presumed innocent.

⁴ [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx)

CPC Article 170 is in fact a very good instrument for writing indictments of good quality in line with established international standards. The article is like a checklist of points that if followed will result in an objective, impartial, readable and functional indictment.