

PEN Norway: Turkey Indictment Project

Final Report 2020

The study of 12 Indictments in Freedom of Expression
Cases in Turkey, with Articles on the Rule of Law.



PEN Norway Turkey Indictment Project Final Report, 2020

© PEN Norway, 2021

Authors of this report:

Akbaş, Kasım
Akkızal, Berna
Beck, Hannah
Dent, Kevin
Ertekin, Orhan Gazi
Fondi, Clarissa
Fujita, Aska
Heggdal, Heidi
Lila-Mehta, Sarah
Stockford, Caroline
Uysal, Şerife Ceren

List of Abbreviations

AKP - Justice and Development Party
BHRC - Bar Human Rights Committee (of England and Wales)
CCPE - Consultative Council of European Prosecutors
CEPEJ - Council of European Commission for the Efficiency of Justice in Europe
CoE - Council of Europe
DHKP/C - Revolutionary People's Liberation Party/Front
DİHA - Dicle News Agency
ECHR - European Convention on Human Rights
ECtHR - European Court of Human Rights
FETÖ/PDY - Fetullah Gülen Terror Organisation/Parallel State Structure
HDP - People's Democratic Party
HPG - People's Defence Force
HRC - Human Rights Committee
HSK - Council of Judges and Prosecutors
HSYK - High Council of Judges and Prosecutors
ICCPR - International Covenant on Civil and Political Rights
ICIJ - International Consortium of Investigative Journalists
ICJ - International Commission for Jurists
ICTA - Information and Communication Technologies Authority
KCK/KCU - Kurdistan Communities Union
METU - Middle Eastern Technical University
MIT - National Intelligence Organisation
NGO - non-governmental organisation
PKK - Kurdistan Workers' Party
RSF - Reporters Without Borders
TCPC - Turkish Criminal Procedure Code
TPC - Turkish Penal Code
TSK - Turkish Armed Forces
YPS - Civil Defense Unit (Kurdish)
UN - United Nations
UTBA - Union of Turkish Bars Associations
(UN) WGAD - Working Group on Arbitrary Detention

PEN Norway: Turkey Indictment Project

Final Report 2020

**Study of 12 Indictments in Freedom of Expression
Cases in Turkey, with Articles on the Rule of Law.**

Index Page

	FOREWORD TO THE FINAL REPORT	Page 1
01	INDICTMENT INTRODUCTION	Pages 2-7
02	TURKEY V BERZAN GÜNEŞ	Pages 8-14
03	TURKEY V OSMAN KAVALA & OTHERS	Pages 15-34
04	TURKEY V NEDİM TÜRFENT	Pages 35-45
05	TURKEY V PELİN ÜNKER	Pages 46-54
06	TURKEY V DENİZ YÜCEL	Pages 55-68
07	MIT NEWS TRIAL	Pages 69-80
08	THE BÜYÜKADA TRIAL	Pages 81-92
09	CUMHURİYET INDICTMENT	Pages 93-113

10	ŞEBNEM KORUR FINCANCI, EROL ÖNDEROĞLU, AHMET NESİN	Pages 114–122
11	TURKEY V. OSMAN KAVALA AND HENRI JAK BARKEY. ‘THE ESPIONAGE CASE’	Pages 123–136
12	TURKEY V AHMET ALTAN & OTHERS	Pages 137–148
13	REYHAN ÇAPAN, HÜSEYİN AYKOL, EMİRE EREN KESKİN	Pages 149–158
14	JUDICIAL ADMINISTRATION	Pages 159–168
15	IS THIS JUSTICE IN YOUR WORLD?	Pages 169–175
16	LEGAL PRACTICE AND BAR ASSOCIATIONS – WHERE TO NOW?	Pages 176–185
	WHAT IS THE COUNCIL OF JUDGES AND PROSECUTORS IN TURKEY (HSK)	Pages 186–191
17	POINT ZERO OF A TRIAL: THE INDICTMENT	Pages 192–201
18	CONCLUSION AND RECOMMENDATIONS	Pages 202–207

PEN Norway Turkey Indictment Project 2020

Foreword to the Final Report

“As President of PEN Norway I am pleased with the performance of the Turkey Indictment Project. It combines both our main objective of monitoring and supporting human rights, especially the rights of freedom of expression and freedom of the press with the vitally important right of every citizen in Turkey to receive a fair trial. We are proud to be working with outstanding lawyers and hope that our efforts will demonstrate to the global community our determined support of the human rights of our colleagues and friends in Turkey.”

Kjersti Løken Stavrum
President, PEN Norway

PEN Norway is an independent and non-profit membership organisation founded in 1922, dedicated to defending international rights of freedom of expression, linguistic rights and to supporting writers at risk and writers in prison. PEN Norway is the Norwegian branch of PEN International - the world's largest writer and freedom of expression organisation.

PEN Norway's goal is that everyone should have the right to express themselves freely.

PEN Norway has been monitoring trials in Turkey for 30 years. The trial monitoring side of the work increased significantly following the attempted-coup of 2016 and ensuing lengthy State of Emergency, during which time 185 media organisations were shuttered by decree and great numbers of journalists were imprisoned and subsequently put on trial. PEN Norway monitored a large number of trials at Çağlayan courthouse and at Silivri prison and from this work the indictment project was designed, to record the apparent injustices befalling our colleagues working in the field of journalism, the media and civil society in a practical way that could lead to supporting their right to a fair trial.

Twelve indictments in cases involving freedom of expression, the media and civil society were studied in 2020 by a team of legal experts from Norway, Austria, Turkey and the United Kingdom.

The methodology, of determining whether the indictments met with the Turkish standards laid out in Law 170 of the Turkish Procedural Code and Article 6 of the European Convention on Human Rights, to which Turkey has been a signatory since 1954, was developed by the team as a whole. In addition to the twelve indictment reports herein, three academic legal articles and one opinion piece were commissioned. In addition, in order to elucidate aspects of the judicial system and legal defence profession that underwent drastic changes in 2020, a series of infographics were produced to present clearly the judicial process in Turkey, the makeup of the body charged with selecting and appointing prosecutors and judges, the HSK, and to demonstrate the wide-reaching changes made to the selection of representatives of bar associations in Turkey for the Union of Turkish Bar Associations.

The project was launched to a global audience, online, on September 30, 2020.

The aim of the project is to study the potential shortcomings in indictments in cases involving freedom of expression in Turkey and to make recommendations for the improvement of standards in their writing. We are proud that our reports are already being cited in cases at High Criminal Court level in Turkey and in applications to the Turkey's Constitutional Court and the European Court of Human Rights.

The project was sponsored in 2020 by the Norwegian Ministry of Foreign Affairs, the Consulate of Sweden in Istanbul and the Heinrich Böll Foundation.

PEN Norway expresses its gratitude to the team working on the Indictment Project; to all the legal experts involved in 2020; to the Bar Human Rights Committee of England and Wales, the Clooney Foundation for Justice at Columbia University, to our Turkey Coordinator and to the authors of the articles and infographics presented in this report. The project continues in 2021.

Caroline Stockford
Turkey Adviser
PEN Norway

February, 2021

01

PEN Norway Indictment Project Introduction

by Sarah Mehta, Columbia Law School
Human Rights Clinic & Institute,
TrialWatch



PEN Norway Indictment Project Introduction

by Sarah Mehta, Columbia Law School Human Rights Clinic & Institute, TrialWatch¹

The right to a fair trial is often thought of as protection for the accused but it also guards the justice system against government abuse. Courts and their officials—in particular, judges and prosecutors—play an essential role in upholding the rule of law, serving as a bulwark against excessive or arbitrary executive power. Nevertheless, governments around the world have upended this traditional role of courts, instead employing them to punish critics and consolidate power. Journalists, activists, academics, and others have increasingly been the target of arrest and prosecution, with governments creating new laws to censor speech and using the criminal justice system to punish dissent. Using the legal system (both figuratively and literally) allows states to perform to the public and other states an outward showing of respect for legal process and norms. In fact, this manipulation has a corrosive impact on the rule of law, undermining the integrity of courts and the laws they enforce as well as public confidence in the justice system.

In recent years, the judicial system in Turkey has faced numerous assaults on its independence, with the executive expanding its control of the judicial and prosecutorial institutions.² After the failed coup attempt in 2016, approximately 20 percent of judges and numerous prosecutors were removed from office and replaced with pro-government appointees,³ and the independence of the judiciary was further corroded by a 2017 law that put the Council of Judges and Prosecutors (which appoints and removes judges and prosecutors in Turkey) more firmly under the authority of the President.⁴ In the years since the failed coup, hundreds of lawyers have been arbitrarily detained and prosecuted, often facing charges ostensibly for their representation of government critics and other clients facing pretextual terrorism charges.⁵

More recently, the government has moved to undercut attorney bar associations, which, beyond licensing attorneys, have played a critical role in documenting fair trial and other human rights violations in Turkey.⁶ In July 2020, the Turkish Parliament passed a controversial law changing the bar association system to allow for multiple new associations, thereby diluting the voices of existing and active bar associations and, as the Venice Commission warned, threatening to further politicize the legal profession and so endanger the independence of lawyers.⁷

Beyond these structural and institutional challenges to Turkey's justice system, human rights bodies and experts have documented troubling violations of the right to a fair trial in Turkish courts, including for example, violations of the right to counsel⁸ and the right to a speedy trial.⁹ In cases monitored by TrialWatch in Turkey, TrialWatch documented violations of the right to be presumed innocent (where a government official issued public statements claiming a defendant to be guilty)¹⁰ and—similar to some of the reports included in PEN Norway's Indictment Project—of defendants' substantive human rights where individuals are prosecuted and convicted of speech that is protected under international human rights law.¹¹

As an overarching concern, these cases have been marred by a troubling politicization whereby the decision to charge, detain, and prosecute a particular person—be they a journalist, academic, or lawyer—appears less a product of objective and independent investigation than a political calculus to silence critics. For instance, in the Tuna Altinel case, the TrialWatch concluded the case was an “abuse of prosecutorial discretion for ulterior purposes, more precisely to stifle free expression, given that there was no reasonable foundation to either of the charges directed at Mr. Altinel, in violation of Article 18 of the ECHR.”¹²

Trials—meaning both who is prosecuted for what and how the trial is conducted—tell us a lot about

a country. They demonstrate who is entitled to state protection or censure. And the way judges and prosecutors in particular respect or otherwise ignore fundamental rights is important for the credibility and viability of the justice system. The cases examined in PEN Norway's reports, like those we have monitored through TrialWatch, not only expose problems within the court process but also suggest that from the outset, that charges in these cases seek to punish lawful exercise of the right to freedom of expression.¹³

PEN Norway's collection of reports focus on the indictment, the formal legal document that informs an accused person of the charges against them, under what laws and factual grounds. The indictment is only one slice of the trial process, but it is functionally critical, as the indictment sets in motion the narrative of the case, alerting the court and the accused to the charges, and notifying the accused what evidence and legal arguments to defend against. Without that clear statement of the factual allegations with facts specific to the accused, and a concise and lucid explanation of how the alleged actions violate a particular criminal law, defendants face a number of fair trial issues from the outset—including the right to be informed of the charges against them;¹⁴ the right to adequate time and facilities to present a defense;¹⁵ the right to call and examine witnesses and confront evidence;¹⁶ and potentially, as discussed in several Indictment Project reports, the right to be presumed innocent, where for example the indictment only lists lawful activity but assumes criminal conduct or assumes guilt by association.¹⁷

Turkish law does require that an indictment include necessary detail, such as the date, location, and evidence of the alleged offense.¹⁸ However, the reports in PEN's Indictment Project outline a troubling series of features that undermine the credibility of the indictment, from the absence of essential details such as the dates of alleged crime to the failure to show or even allege intent or other elements of the crime. In several indictments evaluated by this project, for example, journalists accused of various crimes on account of materials they published were not informed of the specific news articles or facts therein that led to the charge.

Some of these omissions can be easily remedied. But more troubling, they contribute to an overall impression that the indictments are conclusory; they state rather than demonstrate that an accused person has violated a law without explaining what they allegedly did, what evidence supports this conclusion, or how the alleged activity violated the law in question. The result is not just confusion for the defense but a real threat to the rule of law and potentially the presumption of innocence, particularly in a system that relies so heavily upon this one document.

As noted by the UN Human Rights Committee, the presumption "imposes on the prosecution the burden of proving the charge,"¹⁹ and allowing the prosecution to assume without evidencing or even fully alleging criminal liability violates this right and may also implicate the principle of legality.²⁰ Judge Heggdal, reviewing the indictment for Şebnem Korur Fincancı, Erol Önderoğlu, and Ahmet Nesin, observes: "If an act cannot be connected to the crime described in the law, there is no crime committed. It is as simple as that."²¹ And yet, several indictments analyzed by this project failed to meet this basic test, resulting in indictments where there was no clear connection between the individual or acts described and the law violated or, as in the case of reporter Deniz Yücel, no law criminalizes the conduct at issue—essentially, there was no crime.²²

As some of the reports in this project note, the deficit in the indictment is not only deeply harmful for the accused in attempting to prepare a defense but also to the public and the justice institutions and officers more broadly. Reviewing the indictment against Osman Kavala and others (the "Gezi Park" case), Kevin Dent observes; "Not only do badly constructed and unbalanced indictments bring about legally poor and unsustainable conclusions, they can do immense damage to the public prosecutor's office of the country which drafts them."²³

As part of Columbia Law School's collaboration with the Clooney Foundation for Justice's TrialWatch initiative,²⁴ the Columbia Human Rights Clinic has monitored criminal trials around in a number of countries where defendants have been arrested on baseless charges²⁵ or under vague or problematic laws,²⁶ prosecuted in trials that violate basic fair trial principles, and then convicted.²⁷ This monitoring has focused on whether core fair trial rights—e.g., the right to counsel, the right to an impartial tribunal, and the right to appeal—are being respected or flouted in trials; these procedural rights are not only critical for the accused but also indicate the health of a country's justice system. Fair trial rights are important in and of themselves but also because of the other human rights they protect, such as

freedom of expression. Our work on Turkey—in particular, on the trials of journalist Cansu Pişkin²⁸ and academic Tuna Altınel²⁹—and similar to the reports included in this Indictment Project, suggests that some core fair trial principles are at risk given the politicization of the legal system, resulting in both unfair individual trials but also a deeper chilling effect on civil society and an erosion of freedom of expression.

Around the world, and despite differences in legal systems and procedures, prosecutors play a pivotal role in all stages of a criminal proceeding. As outlined in the UN Guidelines, beyond their specific roles in instituting and supervising criminal proceedings, prosecutors act as “representatives of the public interest.”³⁰ Article 18 of the ECHR specifically aims to proscribe politically-motivated prosecutions by incorporating into international human rights law the doctrine of ‘détournement de pouvoir’ or misuse of power.³¹ It provides that “[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”³² Under Turkish law, prosecutors similarly have an obligation to determine whether, based on the evidence compiled during the investigation, there is sufficient suspicion that a crime had been committed.³³ As such, they have a duty to ensure that any indictment submitted—and consequently, any prosecution initiated—is legally robust and respects the right to a fair trial, including the accused’s right to a presumption of innocence and to be informed of the charges against them.

The reports in this project leave a troubling impression, particularly through the conclusory nature of the indictments, that many charges were brought with the intent of criminalizing dissent and silencing criticism. Such prosecutions have consequences not only for individual defendants but also for the broader public and civil society whose rights to freedom of expression under international law are undermined by such prosecutions. This presents a deeper challenge to the Turkish legal system. Nevertheless, PEN’s Indictment Project brings together detailed and thoughtful analysis, and it provides specific recommendations to improve the quality of indictments in Turkey. These recommendations and attention to related fair trial rights can support prosecutors, judges, and others working to ensure a just and credible court system that not only protects individual defendants but upholds the rule of law in Turkey.

Endnotes

1 Sarah Mehta is the Director of the TrialWatch® Project within Columbia Law School’s Human Rights Clinic and an Associate Research Scholar with the Columbia Law School Human Rights Institute. The views expressed here are those of the author and do not reflect those of Columbia Law School.

2 See United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3 (2017); International Commission of Jurists, Turkey’s Judicial Reform Strategy and Judicial Independence, (Nov. 2019).

3 See United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3 (2017); Tom Ruys & Emre Turkut, “Turkey’s Post-Coup ‘Purification Process’: Collective Dismissals of Public Servants under the European Convention on Human Rights,” *Human Rights Law Review*, Vol 18 Issue 3, pp. 539-565 (Sept. 2018); Fair Trials, “Journalists, judges, and fair trial rights following Turkey’s attempted coup,” (Aug. 2016), <https://www.fairtrials.org/node/882>.

4 In January 2017, the Grand National Assembly of Turkey passed Law No. 6771, which amended the Turkish Constitution by, for example, changing the composition and function of the Council of Judges and Prosecutors (CJP). With the 2017 amendments, the President now directly appoints four out of thirteen members of the CJP; previously, the President directly appointed only three out of 22 members. See Law No. 6771 (Jan. 21, 2017), https://www.legislationline.org/download/action/download/id/6899/file/Turkey_law_amending_Constitution_2017_en.pdf; see also ARTICLE 19, P24, PEN International, English PEN, Reporters Sans Frontiers (RSF), International Press Institute (IPI), Freemuse, European Centre for Press and Media Freedom (ECPMF), IFEX and PEN Norway, Joint submission to the Universal Periodic Review of Turkey, 35th Session (2020), https://www.article19.org/wp-content/uploads/2019/07/Turkey-UPR-submission_July2019.pdf.

5 See Human Rights Watch, *Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey* (2019), <https://www.hrw.org/report/2019/04/10/lawyers-trial/abusive-prosecutions-and-erosion-fair-trial-rights-turkey>; The Arrested Lawyers Initiative, *Incarceration of Turkish Lawyers: Unjust Arrests and Convictions (2016-2019)* (2019) (documenting over 1500 arrests of lawyers in Turkey since 2016), <https://arrestedlawyers.org/2019/04/01/new-report-incarceration-of-turkish-lawyers-unjust-arrests-and-convictions-2016-2019/>; International Commission for Jurists, “Turkey : End detention of lawyers held for representing clients,” (Sept. 14, 2020), <https://www.icj.org/turkey-end-detention-of-lawyers-held-for-representing-clients-says-icj/>

- 6 See Human Rights Watch, *The Reform of Bar Associations in Turkey: Questions and Answers* (2020), <https://www.hrw.org/news/2020/07/07/reform-bar-associations-turkey-questions-and-answers>; Reuters, "Turkish parliament passes disputed bar associations law," July 11, 2020, <https://www.reuters.com/article/us-turkey-lawyers/turkish-parliament-passes-disputed-bar-associations-law-idUSKCN24C08L>;
- 7 European Commission for Democracy Through Law, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the July 2020 Amendments to the Attorneyship Law of 1969, (Oct. 9, 2020) at para. 72, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)029-e)
- 8 The Law Society of England & Wales et al., International Coalition of Legal Organisations, Joint Stakeholder Submission to the UN Human Rights Council's Universal Periodic Review, Turkey, 35th Session (Jan.-Feb. 2020).
- 9 ECtHR, *Selahattin Demirtaş v. Turkey* (no. 2), Application no. 14305/17 (2018), referred to the Grand Chamber Dec. 22, 2020 <http://hudoc.echr.coe.int/spa?i=001-207173>; ECtHR, *Kavala v. Turkey*, Application no. 28749/18, (2020), <http://hudoc.echr.coe.int/spa?i=001-199515>.
- 10 Clooney Foundation for Justice with Columbia Law School, TrialWatch Fairness Report: Turkey v. Tuna Ahmet Altinel (2020), <https://cfj.org/wp-content/uploads/2020/08/Fairness-Report-on-the-Trial-of-Tuna-Altinel-in-Turkey.pdf>.
- 11 Columbia Law School Human Rights Clinic, TrialWatch Fairness Report: Turkey v. Cansu Pişkin (2019), <https://cfj.org/wp-content/uploads/2019/07/Turkey-Piskin-Fairness-Report.pdf>. Another TrialWatch report has found violations of the right to an impartial tribunal. See Clooney Foundation for Justice, TrialWatch Fairness Report: Turkey v. Veyisel Ok (2020), <https://cfj.org/wp-content/uploads/2020/01/01272020-Turkey-Veyisel-Ok-Fairness-Report.pdf>.
- 12 Clooney Foundation for Justice with Columbia Law School, TrialWatch Fairness Report: Turkey v. Tuna Ahmet Altinel at 14, (2020), <https://cfj.org/wp-content/uploads/2020/08/Fairness-Report-on-the-Trial-of-Tuna-Altinel-in-Turkey.pdf>.
- 13 ICCPR, Article 19(1)(2); Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), Art. 10, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, https://www.echr.coe.int/documents/convention_eng.pdf.
- 14 International Covenant on Civil and Political Rights, Art. 14(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter "ICCPR"]. Turkey has binding obligations under the ICCPR which it has signed and ratified.
- 15 ICCPR, Art.14(3)(b).
- 16 ICCPR, Art.14(3)(e).
- 17 ICCPR, Art. 14(2); European Convention on Human Rights, Art. 6(2). See Kevin Dent, QC, "Report on the Indictment 'Turkey v Osman Kavala & others,'" at para. 112, in PEN Norway's Turkey Indictment Project (2020); Clarissa Fondi & Hannah Beck, "Legal report on indictment: Büyükada trial PEN Norway's Turkey Indictment Project," at 19-20 in PEN Norway's Turkey Indictment Project (2020); Heidi Heggdal, "Legal report on indictment: Turkey v Pelin Ünker," at 13 in PEN Norway's Turkey Indictment Project (2020).
- 18 Turkish Criminal Procedure Code, Art. 170, https://www.legislationline.org/download/id/4257/file/Turkey_CPC_2009_en.pdf
- 19 Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para.
- 30; see also Human Rights Committee, *Larranaga v. Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.4 ("[a] criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is for the prosecution to dispel any such doubt.").
- 20 See ICCPR, Art. 15 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); Case of *Parmak & Bakir v. Turkey*, Applications nos. 22429/07 and 25195/07, ECtHR, Final Decision 03.03.2020, <http://hudoc.echr.coe.int/eng?i=001-199075> ("The domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence. [...] they therefore infringed the reasonable limits of acceptable)."
- 21 Heidi Heggdal, "Legal report on indictments against Şebnem Korur Fincancı, Erol Önderoğlu, Ahmet Nesin," in PEN Norway's Turkey Indictment Project (2020).
- 22 Şerife Ceren Uysal, "Legal report on indictment: Turkey v Deniz Yücel," in PEN Norway's Turkey Indictment Project (2020).
- 23 Kevin Dent, QC, "Report on the Indictment 'Turkey v Osman Kavala & others,'" at para. 112, in PEN Norway's Turkey Indictment Project (2020).
- 24 TrialWatch is an initiative of the Clooney Foundation for Justice to monitor criminal trials around the world that pose a significant risk to human rights and to advocate on behalf of individuals unjustly convicted. Columbia Law School's Human Rights Clinic and Institute are partners of TrialWatch and have monitored trials and produced reports on Thailand, Turkey, and Zambia to date. TrialWatch reports on trials monitored are available at <https://cfj.org/project/trialwatch/>.
- 25 Columbia Law School Human Rights Clinic, TrialWatch Fairness Report: Trial Monitoring of People v. Miti et al. (2019), <https://cfj.org/wp-content/uploads/2019/08/Zambia-People-v-Miti-final.pdf>.

26 Columbia Law School Human Rights Clinic, TrialWatch Fairness Report: Government of Thailand & Chaiwat Limlikhitaksorn v. Wuth Boonlert & Samak Donnapee (2020), <https://cfj.org/wp-content/uploads/2020/07/Fairness-Report-on-the-Trials-of-Wut-Boonlert-and-Samak-Donnapee-in-Thailand.pdf>.

27 Columbia Law School Human Rights Clinic, TrialWatch Fairness Report: Thailand v. Does 1-5 of the Organization for Thai Federation (2020), <https://cfj.org/wp-content/uploads/2020/08/OTF-Fairness-Report-July-2020.pdf>.

28 Columbia Law School Human Rights Clinic, TrialWatch Fairness Report: Turkey v. Cansu Pişkin (2019), <https://cfj.org/wp-content/uploads/2019/07/Turkey-Piskin-Fairness-Report.pdf>.

29 Clooney Foundation for Justice with Columbia Law School, TrialWatch Fairness Report: Turkey v. Tuna Ahmet Altinel (2020), <https://cfj.org/wp-content/uploads/2020/08/Fairness-Report-on-the-Trial-of-Tuna-Altinel-in-Turkey.pdf>.

30 UN Office of the High Commissioner on Human Rights, Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, para. 11, Havana, Cuba, 27 August to 7 September 1990, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

31 ECtHR, Merabishvili v Georgia (GC), Appl. No. 72508/13, ¶ 154 (2017).

32 European Convention on Human Rights, Art. 18.

33 Turkish Criminal Procedure Code, Art. 170/2, https://www.legislationline.org/download/id/4257/file/Turkey_CPC_2009_en.pdf. They also have authority to decline to pursue a case if the evidence is insufficient although, as TrialWatch found in the Cansu Pişkin case, that decision may in practice be ignored or overruled. See Columbia Law School Human Rights Clinic, TrialWatch Fairness Report: Turkey v. Cansu Pişkin at 9, (2019), <https://cfj.org/wp-content/uploads/2019/07/Turkey-Piskin-Fairness-Report.pdf>.

02

Legal Report on Indictment:
Turkey v Berzan Güneş

Written by Hannah Beck & Clarissa Fondi,
10 August 2020



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 Özgürlükçü Demokrasi newspaper, now shuttered by presidential decree. He then started working as a reporter for pro-Kurdish Mezopotamya Agency. Iğdır Public Prosecutor's Office issued a warrant for his detention as part 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 as part 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 at Iğdır Criminal Court of Peace via the SEGBİS Audio and Video Information System (a tele-conference 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 absence of Güneş at the hearing.

The third hearing of the trial was held on October 16, 2018. Iğdır 2nd Heavy Criminal Court decided to merge Güneş' case with another case against him at İstanbul Anatolia 2nd Heavy Criminal Court.

This case centred 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 in absentia. 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 in prison for "making propaganda for a terrorist organisation".

The decision made against Güneş is now at the 27th Criminal Court of İstanbul Regional Court of Justice. İstanbul 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 over-all 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 in a fair and transparent judicial process. A clear layout helps the defendant to grasp its contents directly and without misconceptions; and therefore, ensures the 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, it should be made clearly visible.

The indictment states that investigations were conducted by the Security Directorate of the Province of İğdır, which investigated individuals who were suspected of being 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 such as 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 concerning 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 to 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 of the crime need to be addressed by the prosecutor. In the present indictment, place and date are given, however, in a very unspecified and unclear manner concerning the alleged offence of “making propaganda for a terrorist organisation.”

Firstly, “İğdır /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, and without 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 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, and the newest social media posts

listed date back to 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 a 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 the above mentioned, the document is lacking in detail regarding 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 exactly accused of.

Evaluation of the indictment in terms of international standards:

An indictment is a key element of a criminal process because as soon as the document is served, the defendant can 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 a 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 the 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 contents 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 İğdır Central. No further details are given as to why April 4, 2018, is considered to be the date of the 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 the 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 the 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 with their relationship to the present evidence.

The indictment identifies a Facebook page with the name of the defendant, where two posts with supposedly prohibited contents 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 contents of these, in total, 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 under 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 head of the PKK/KCK; and another photograph on October 7, 2014, showing two YPG women. All three of these listed offences again lack 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 according to Art. 6 (2) ECHR (presumption of innocence), cannot legally be part of the allegations against him.

On Twitter, he posted on January 29, 2018, concerning children's shoes that landed on a wall "Robert Fisk's impressions of Efrin: Murdered refugees, babies, women and children." Also, 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 views 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, which 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 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 nine remaining accusations might appear to violate the Turkish Anti-Terrorism Law, the question arises as to 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 an indictment." 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 the light of these concerns regarding some of the unnecessarily included evidence, it surprises us 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 "the 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 indictment's 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 counter-intuitive though since the first paragraph of the indictment states that the investigation was about making "terror group propaganda via social media," and the last sentence of the indictment requests an increased punishment "because the crime was committed by way of the 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 the 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 a 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.

03

**Legal Report on Indictment:
Turkey v Osman
Kavala & others**

The Gezi Park trial

Written by Kevin Dent QC

Member, Bar Human Rights Committee of
England and Wales For PEN Norway's Turkey
Indictment Project.

Published: 9 October 2020.



PART A: INTRODUCTION

This legal report is drafted by Kevin Dent QC as part of the Turkey Indictment Project, established by PEN Norway, and represents an analysis of the indictment in the case of Turkey v Osman Kavala and others, popularly known as the “Gezi Park” trial. These proceedings concerned the prosecution and trial of 16 individuals (made up of civil society activists, lawyers, and artists) for their alleged role in the protests that took place in Turkey in 2013 against the redevelopment of Gezi Park, a green space in the center of Istanbul. These proceedings ostensibly ended in February 2020 with the acquittal of all nine of the defendants who attended their trial. It is understood, however, that the prosecution have appealed the acquittals and this appeal process has not yet concluded.

The lead defendant in the proceedings, Osman Kavala, who is a well-known philanthropist, former advisory member of the board of Open Society Turkey and civil society activist, successfully referred his case to the European Court of Human Rights (ECtHR). This court ruled, on 10 December 2019, that Turkey had violated Mr. Kavala’s rights under the European Convention on Human Rights (hereafter “ECHR”) in respect of Articles 5.1 (a lack of reasonable suspicion that Mr. Kavala had committed a criminal offence) article 5.4 (right to a speedy determination on the lawfulness of detention) and article 18 (limitation on the use of restriction of rights) and called for him to be immediately released.¹

Despite this, and in defiance of this clear judgment of the ECtHR, Mr. Kavala remains in detention and has now been detained for more than 1000 days. On 4 September 2020, the Committee of Ministers of the Council of Europe urged Turkey once again to ensure the immediate release of Mr. Kavala.²

The Bar Human Rights Committee of England and Wales (BHRC) observed the hearings of the trial as part of its international trial monitoring program and have reported extensively on the proceedings.³ This report draws on the experiences of BHRC in Turkey and in observing this trial in particular.

About the Bar Human Rights Committee of England and Wales

BHRC is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. It has a membership of lawyers, comprised of barristers practicing at the Bar of England and Wales, legal academics and law students. BHRC’s Executive Committee members and general members offer their services pro bono, alongside their independent legal practices, teaching commitments and/or legal studies. BHRC also employs a full-time Project Officer and a part time administrator.

BHRC aims are:

- to uphold the rule of law and internationally recognised human rights norms and standards;
- to support and protect practicing lawyers, judges and human rights defenders who are threatened or oppressed in their work;
- to further interest in and knowledge of human rights and the laws relating to human rights, both within and outside the legal profession; and
- to advise, support and co-operate with other organisations and individuals working for the promotion and protection of human rights.

The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally-qualified observer, critic and advisor.

PART B: SUMMARY OF THE CASE AND INDICTMENT

The protests in 2013, which stemmed from plans to redevelop Gezi Park in central Istanbul, are already widely-reported and are well summarised in the ECtHR judgement. In September 2011, the Istanbul Metropolitan Municipal Council (Istanbul Büyükşehir Belediye Meclisi) adopted a plan to pedestrianise Taksim Square in Istanbul. This plan included blocking traffic routes around Taksim Square and rebuilding barracks (demolished in 1940) in order to create a shopping centre in the new premises. These barracks were to be built on the site of Gezi Park, one of the few green spaces in the centre of Istanbul.⁴

Professional bodies such as the Chamber of Architects and the Chamber of Landscape Architects brought administrative proceedings in an attempt to have this project set aside. In 2012, several demonstrations were organised to protest against the planned destruction of Gezi Park. Platforms bringing together several associations, trade unions, professional bodies and political parties, including the "Taksim Solidarity" (Taksim Dayanışma) collective, were accordingly set up to coordinate and organise the protests. Following the start of demolition work in Gezi Park on 27 May 2013, about fifty environmental activists and local residents occupied the park in an attempt to prevent its destruction. The protest movements were initially led by ecologists and local residents objecting to the destruction of the park. On 31 May 2013, however, the police intervened violently to remove the persons occupying the park. There were confrontations between the police and the demonstrators. The protests then escalated in June and July and spread to several towns and cities in Turkey, taking the form of meetings and demonstrations which sometimes led to violent clashes. Overall, four civilians and two police officers were killed, and thousands of people were wounded.

An outline of the indictment

The indictment was filed by the public prosecutor on 19 February 2019. It accused the defendants of having attempted to overthrow the government by force and violence within the meaning of Article 312 of the Criminal Code⁵, and of having committed numerous breaches of public order – damaging public property, profanation of places of worship and of cemeteries, unlawful possession of dangerous substances, looting, etc.⁶

The indictment is made up of three sections.⁷ In the first part, the prosecutor's office set out the context underlying the Gezi events. It specified at the outset that it would present "elements which would show that the Gezi insurrection had been organised by Turkish "distributors" trained by Serbian "exporters" who were professional revolutionaries with financial support from the West".⁸

In the second part of the indictment⁹, the prosecutor listed the acts that it accused the defendants of having committed prior to and during the Gezi Park events, and the evidence that it considered relevant. It alleged that the defendants had supported the Gezi insurrection, and that their aims had been to generalise such actions across Anatolia and to popularise so-called "civil disobedience", with the aim of creating generalised chaos in the country. It claimed that this evidence showed that the Open Society Foundation, of which Osman Kavala was a former advisory Board member, had provided financial backing for the Gezi events. It also claimed that Osman Kavala and others organised secret and public meetings with persons who had played an active role in organising those events, and that he had cultivated relationships with several individuals with a view to setting up a media outlet.

In the third part of the indictment¹⁰, the prosecutor's office referred, in particular, to the evidence that it had gathered in respect of the defendants other than Osman Kavala; included photographs of the symbols used and provided information about them; quoted from articles published during the Gezi events, submitted photographs of the damage caused by acts of vandalism, and summarised related events in areas outside of Istanbul.

PART C: ANALYSIS OF THE INDICTMENT

Executive Summary

The fundamental flaws in the indictment in the Gezi case have been effectively summarised by the ECtHR in *Kavala v Turkey* (ECtHR 429 (2019)) as follows:

This document, 657 pages in length, does not contain a succinct statement of the facts. Nor does it specify clearly the facts or criminal actions on which the applicant's criminal liability in the Gezi events is based.

It is essentially a compilation of evidence – transcripts of numerous telephone conversations, information about the applicant's contacts, lists of non-violent actions, some of which have a limited bearing on the offence in question.

It is important to note, as emphasized above, that the prosecutor's office accused the applicant of leading a criminal association and, in this context, of exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government.

However, there is nothing in the case file to indicate that the prosecuting authorities had objective information in their possession enabling them to suspect, in good faith, the applicant at the time of the Gezi events.

In addition, the prosecution's attitude could be considered such as to confirm the applicant's assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging in such activities and to paralyse civil society in the country.

*Further, BHRC concluded the indictment in this case was seriously defective and gravely flawed at an early stage during its trial observations.*¹¹

At the heart of this 657-page indictment is the presumption that the Gezi Park protests were orchestrated by a single person or organisation. There is simply no evidence presented in the indictment to support that presumption, or that person was any of the defendants. The indictment was described by Mr Kavala as a "fantastic fiction" in his statement to the Court on 24th June 2019. BHRC concurs with this assessment, not least because it frequently appears to tout conspiracy in place of any credible or substantive evidence.

In place of a cohesive and well-structured narrative, there is endless repetition, grand political theorising and the expounding of conspiracy theories about Turkey and its role within Europe and the wider world. It is a profoundly ideological document and as such it is almost impossible for the public to understand or, crucially, one to which the defendants can properly respond.

Moreover, the indictment is a document which lacks crucial fairness and balance.

Instead the predominantly political thesis that runs through the indictment appears to be that;

1. The defendants organized the Gezi Park protests as part of an agreement by them to try and overthrow the elected government of Turkey by force;
2. The defendants sought to mask this attempt by pretending that it was really an environmental protest about a park;
3. Whilst the defendants always expressly declared support for non-violent protest, they were secretly advancing violent ends;
4. Despite their declared support for and calls for the protest to be non-violent, they were secretly orchestrating those who were carrying out acts of violence at the protests;

5. By doing so, the defendants were carrying out the orders or directions from powerful forces outside of Turkey, who were seeking to de-stabilise the country;
6. Otherwise perfectly lawful contact between the defendants and NGOs and European bodies was actually part of this secret coordinated plan, directed by forces outside of Turkey.

The key factual deficiency in the indictment is not only that it presents such a theory but, despite its length, that it does not ever connect such theories to concrete evidence. Moreover, it does not objectively consider or analyse the volume of evidence that runs contrary to such a thesis. As such, the indictment does not consider or evaluate in a balanced way even the possibility that;

1. The defendants supported the protests, but only in so far as they involved non-violent means;
2. The defendants only ever advocated non-violent means;
3. That different members of the public supported the Gezi Park protests for a variety of different reasons and, in doing so, were expressing their own myriad of views, values and concerns rather than simply being followers manipulated by the defendants and/or forces outside of Turkey;
4. That the violence at the protests may have been conducted by elements who infiltrated the protests, from various groups with their own aims and agendas, different and separate to those of the defendants;
5. And/or that the violence used may, to some degree, have been a spontaneous reaction to force used by authorities in seeking to dispel protests;
6. That the various meetings and communications, involving the defendants and NGO's and European groups and bodies referred to in the indictment, were part of the everyday lawful business of NGO's and civil society activists.

The failure to consider such possibilities renders the indictment wholly lacking in balance. As such, even just for this reason, it is manifestly defective.

Further, there are other significant flaws, namely that:

1. It is highly repetitive; theories are expounded a number of times without explanation as to why they are repeated or, indeed, mentioned at all;
2. It is excessive in its length. Although the allegations are complex ones and calling for detailed exposition, there is no need for it to be 657 pages long. The defect is not insignificant; for both the judges evaluating the evidence and the lawyers seeking to test and challenge it, the sheer volume of the indictment would make that task much more difficult;
3. Notwithstanding that this is a public prosecution, the indictment lists 773 complainants, including Recep Tayyip Erdogan and the entire Turkish cabinet. It is very difficult to ascertain any legitimate legal requirement to include so many plaintiffs. In the absence of any proper reason for this (and none is ascertainable), this appears an overtly political gesture; to seek to present the case as one being brought by the aggrieved masses of Turkish society, who are structurally co-joined with the government in seeking to prosecute the defendants;
4. Indeed, the 440th listed complainant is Mevlut Saldogan, a police officer who was convicted of unlawfully killing 19-year-old Gezi protestor Ali İsmail Korkmaz. The portrayal of an officer convicted of unlawfully killing a protestor as an 'aggrieved' party in an indictment is hard to countenance in a democratic society. Indeed, Saldogan had already been sentenced to 10 years' imprisonment for the killing before the indictment had been presented.

Further and crucially, there are elemental legal flaws in the indictment in terms of its lack of adherence to international human rights law, particularly in its approach towards peaceful and lawful activity in relation to the rights of freedom of association and expression, rights essential to the preservation of a democratic society. This is explored further below.

Evaluation of the indictment in terms of Turkish Laws

The indictment is evaluated in this report by reference to Article 170 of the Turkish Criminal Procedure Code, which concerns the duty of filing a public prosecution:

Article 170

1. The duty to file a public prosecution rests with the public prosecutor.
2. In cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare an indictment.
3. The indictment, addressed to the court that has subject matter jurisdiction and venue, shall contain:
 - a. The identity of the suspect,
 - b. His defence counsel,
 - c. Identity of the murdered person, victim or the injured party,
 - d. The representative or legal representative of the victim or the injured party,
 - e. In cases, where there is no danger of disclosure, the identity of the informant,
 - f. The identity of the claimant,
 - g. The date that the claim had been put forward,
 - h. The crime charged and the related Articles of applicable Criminal Code,
 - i. Place, date and the time period of the charged crime,
 - j. Evidence of the offence,
 - k. Explanation of whether the suspect is in detention or not, and if he is arrested with a warrant, the date he was taken into custody and the date of his arrest with a warrant, and their duration.
4. The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence.
5. The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his/her favour.
6. At the conclusion section of the indictment, the following issues shall be clearly stated: which punishment and measure of security as foreseen by the related Law is being requested to be inflicted at the end of the adjudication; in cases where the crime has been committed within the activities of a legal entity, the measure of security to be imposed upon that legal entity.
7. This report considers firstly the formal aspects of the indictment and whether the indictment conforms to these formalities. It then considers the key qualitative requirements of the indictment, as set out under Article 170(4) and (5), namely whether the charges are properly explained in the indictment and whether the document has the required balance.

Article 170 (2) – Is there enough evidence constituting sufficient suspicion that a crime has been committed prior to filing the indictment?

It is worth noting at the outset, however, in respect of 170(2) and the requirement that before an indictment is filed there is evidence constituting sufficient suspicion that a crime has been committed, the ECtHR came to the clear view that there was no evidence that gave rise, in good faith, to a reasonable suspicion that an offence had been committed.¹²

As such the indictment is arguably legally defective as a whole, in that the investigation had not uncovered sufficient evidence that a crime had been committed and that, therefore, it was a breach of

Article 170(2) to file such an indictment. In short, this was an indictment that should never have been filed because there was no evidence that, in good faith, could support it.

Although this is a fundamental aspect, the primary purpose of this report is not to comment on the weight of the evidence, or lack of it. There are two reasons for this. Firstly, this issue has already been resolved. Both the ECtHR and the judges of the Gezi Park trial came to the view that the evidence gathered did not support the allegation charged. Secondly, the analysis in this report focuses upon the other aspects of the indictment; whether it conforms with legal formalities, clearly sets out and explains the evidence on which charges are brought and presents the evidence in a balanced way. It further sets out a summary and analysis of the international law standards applicable.

Article 170 (3) – Does the indictment comply with the formalities required?

The indictment conforms with the requirements under Article 170 in respect of a number of formalities. It clearly sets out the identity of the suspects. It does not detail who the defence lawyers representing the suspects are, but no criticism is made of this as it may not have been known by that point who were representing the defendants. The indictment does, however, clearly set out the remand status of the defendants as required, indicating when they were arrested and/or detained.

The indictment also sets out the names of over 700 'injured parties' or complainants, although it does not set out in respect of all of these people who they are and/or how they have been injured.¹³ A number of plaintiffs are listed as such but without explanation in the indictment as to nature of their injury. The same can also be said for the 27 names of the members of the Turkish cabinet named as aggrieved parties. What, for instance, the defendants and/or the Gezi Park protests had to do with Veysel Eroglu, the 61st Government Minister of Forestry and Water Works, is not explained in the indictment.

Regarding identities of informants, there are three references in the indictment to informants¹⁴, but no names are provided. Again, no criticism is made of this as there may be legitimate law enforcement reasons why the identities of these informants are not revealed. Indeed, at section 2.1.9.1. a person named Murat Papuç is referred to as having provided information in a role akin to that of an informant. Although this individual was to become a controversial figure in the trial and subject to adverse comments by the ECtHR¹⁵, he is correctly named here in the indictment, in accordance with 170(3)(e).

The crime charged here, being under Article 312/1 of the Turkish Criminal Code and ancillary offences, is set out in the introductory section. The indictment does not, however, set out the various elements of an offence under Article 312/1, nor what is required to be proved and/or any applicable statutory defences to the charge. In the context of this indictment, this is not merely a formal defect; setting out clearly the elements of the offence and what must be proved is an effective and reliable way for a prosecutor to consider and/or check for him or herself whether all aspects of a charge can be proved and/or whether certain defences may apply.

The indictment refers to various other Articles under the Turkish Criminal Code which it says are applicable, but does not set out how they are applicable. It also does set out the date of the crime alleged as 'before 2014'. This could be said too vague and lack particularity, but it is perhaps explained by the fact that the Gezi protests took place on a number of different dates during the course of 2013.

It follows that there is only limited adverse comment in relation to these basic formalities in the Gezi indictment. In general, it conforms with the Code in this respect.

Article 170 (4) – Does the indictment properly explain the crime alleged and the evidence establishing the offence?

In this respect, the indictment is seriously defective. There are different aspects of concern, which are here broken down into different headings as follows:

A political indictment

The indictment presents a number of grand political (conspiracy) theories which appear to have replaced

any objective, forensic and legal analysis of the evidence. It should be acknowledged that the subject matter of the indictment is to a degree political, involving an allegation of an attempt to overthrow the political order by force. Therefore, it is at least understandable that the indictment would make reference to political institutions and instruments of government.

In such a case, however, it is even more important to forensically examine the evidence and present it in a clear way, free of political ideology and animus. If the evidence supports such a charge, it should be possible to present it in a clear and concrete way. Here, however, we have the opposite; conspiracy theory appears to have substituted itself for evidence. For practical purposes, this report considers only a few examples of the very many amidst the 640 or so pages of the (translated) indictment.

One such example can be found in the introduction section (Page 24/640), which makes comments about the Arab Spring:

The Arab Spring is a movement with major political consequences that occurred in the Arab world. This is a common name given to a public movement in the Arab regions that started in 2010 and still continues at the present. The Arab spring emerged from the democracy, freedom and human rights demands of the Arab people it is a regional, societal, political and armed movement. Protests, meetings, demonstrations and internal conflicts took place. The people overtook governments in the name of freedom... In our country, as a different reflection and adaptation of these events, the suspects, about whom the indictment has been prepared, used the protests against the transferring of some trees in the Taksim Gezi Park within the scope of the Istanbul Taksim Region Pedestrian Area Creation project on 27 May 2013 to turn the event into violent demonstrations throughout the country and an attempt against the government through provocation.

Another passage (25/640) is typical, suggesting that the aim of the defendants and the protests was to bring down the elected government, but without indicating the evidence which supports this thesis:

It has been determined based on the evidence obtained in the investigation and the events that have occurred throughout the country in general that these actions did not occur randomly, they were conducted with organisation in a systematic and planned manner, that despite being portrayed as democratic rights and innocent protests, they actually aimed to create chaos and disorder throughout the country and remove the Republic of Turkey government or prevent it from carrying out its duties by these means with the intention of launching an armed revolt against the Republic of Turkey Government.

The indictment frequently advances the highly political theory that the Gezi Park protests were orchestrated by international powers but without indicating the evidence to support this. For instance, one passage (26/640) reads:

The fact that Gezi Park Demonstrations (Attempts) process matches exactly the events that occurred in Eastern Block and Arab countries where civil conflicts led to revolutions shows that the events that occurred in our country were orchestrated with the support of international entities.

Elsewhere, the political theories of unnamed others are presented as facts. One such passage (26/640) reads:

The influence of SOROS on the Gezi Attempt was greatly discussed both in the press and in political and academic circles; therefore, it is clear that George SOROS, the founder of the Open Society Institute, was influential in the Gezi Attempt that occurred in our country, just like he was in the other countries where uprisings took place.

In numerous instances, the indictment contains references to a global conspiracy on a grand scale. At (91/640) the indictment reads:

This has been stated by Government members and a variety of people and organisations through the press and also in the statement of Can PAKER, a former chairman of the Open Society Foundation who used to be a member but later departed from the foundation, as follows; "George SOROS, President of the Open Society Foundation, forces the foundation to act according to Israeli policies because he is Jewish, and has also pushed opposition against the AK Parti government during the Turkey-Israeli crisis."

This clearly shows the influence and guidance of the Open Society Foundation in these events.

The relevance of George Soros being Jewish, nor the influence of Israel on these events, is entirely unexplained. No evidence is presented in support of such a theory. Perhaps more crucially, how is the court supposed to evaluate this point and how are the defence able to challenge it? On its face, it is another example of baseless—and inherently prejudicial and discriminatory—political theory.

By way of further example, it is consistently advanced that the Gezi protests were organised by 'global capital' to undermine Turkey. At (89/640) the indictment reads:

It is understood from this that the forces behind OTPOR or its derivatives that rule global capital, are making attempts towards governments that do not accept the political maps of regions like the Middle East that do not think like them, that do not serve at their bidding or what they are trying to force on the countries of the world; and that the objective of these forces is not to establish democratic governments.

Further, at (89/640), the indictment continues:

It is obvious that these forces are hypocritical in severe police response to demonstrations in countries that are locomotive powers like Europe and America, where they are trying to branch out in a similar way because when it comes to Islamic regions or countries against globalization, they exaggerate the events through the media and supposed democratic leaders who make themselves heard and try to work the situation to suit their own political purposes. The events surrounding the Gezi attempt must also be considered within this global ideology that has been explained above, and to a certain extent, the demonstrations were successful; and it appears that the objective was to wear down the Justice and Development Party and the Prime Minister of the Republic of Turkey, Recep Tayyip ERDOĞAN in particular.

Once again it is unclear how a court is in a position to evaluate such a political proposition or how the defence could be said to be able to challenge it. Instead, such comments provide evidence that this indictment proposes a political rather than legal-criminal trial and was advanced, as the ECtHR concluded, for political purposes.

Further passages of the indictment suggest the Gezi events are, somehow, connected to a global bid to suppress Turkey's bid to host the Olympic games (272/640):

IMAGES IN FOREIGN MEDIA

As observed, foreign press publications sent their reporters to our country to cover the uprising. Their reports made headlines due to their exaggerated nature. To prevent our country from hosting the 2020 Olympics, they ran smear campaigns on social media by distributing handouts and pasting flyers around about the events in various countries.

Once again, on page 89/640, one of many passages which, without explanation, are set out in capitals. This seeks to portray the Gezi events as part of a global conspiracy:

IN THE LIGHT OF THIS INFORMATION, IT IS APPARENT THAT THE GEZI ATTEMPT WAS GUIDED AND ENCOURAGED BY STRUCTURES WITH GLOBAL GOALS THAT COULD DISSOLVE ARMED TERRORIST ORGANIZATIONS AND LEGAL AND LEGAL APPEARING ILLEGAL ENTITIES WITHIN THEIR STRUCTURE AND TAKE CONTROL OF THEM, ANALYZE THE SOCIAL FORM VERY WELL AND INFLUENCE THE PUBLIC IN LINE WITH THE PERCEPTION THEY CREATED. IT IS APPARENT THAT THE GEZI ATTEMPTS WERE ACTIONS ORGANISED IN THE WAY WE HAVE TRIED TO EXPLAIN, ORCHESTRATED BY THE SUSPECTS IN THE INDICTMENT AND PRESENTED ON STAGE. THE FACT THAT THESE INCIDENTS ARE NOT EXPERIENCED IN MANY COUNTRIES OF THE WORLD IN THE EXISTING POLITICAL STRUCTURE THAT ARE GOVERNED BY ANTI DEMOCRATIC METHODS OR KINGDOMS BUT ARE CONSIDERED THEIR ALLIES OR STRATEGIC PARTNERS SUPPORTS THIS THESIS.

It cannot be overlooked that such comments are likely to have a profound effect on the fairness of the subsequent proceedings. When an indictment is so firmly rooted in the political ideology of a ruling political party, for the judges under a duty to evaluate it, any rejection of such an indictment through

acquittals becomes a perilous course, tantamount to a repudiation of this ideology. Indeed, it is of grave concern that the judges who acquitted the Gezi Park defendants in February 2020 were immediately put under investigation following the verdicts.

The acquittals were later described by the President of Turkey as a 'maneuver', which clearly reflects the real dangers of loading an indictment with political ideology.

Another adverse effect of this political theorising is that it obscures any proper objective analysis of the evidence because to do so would represent doubt or criticism of the ideology.

For all the reasons above, the indictment reads more like a blunt attempt to silence any opposition within Turkish civil society. Such an indictment, and its pursuit by prosecutors, is not consistent with a plural democracy where the rule of law is observed.

Lack of clarity and coherence

Another key failing is the lack of clarity and coherence in this indictment, which renders it almost impossible for the defendants to properly understand and challenge the case against them and as such to have a fair trial.

In particular, there are a number of rambling and unexplained comments that litter this indictment and appear to be wholly unconnected or relevant to any of the charges. The following passage from the introduction section (page 24/640) is typical. It concerns a record of conversation between two suspects:

For the purposes of explaining the gravity of the actions that are the subject of our indictment, which was a movement started in 2011 and attempted to be placed on stage in May of 2013, referred to as the Gezi Park events by the public but was actually an action of attempt; we will explain how in a telephone conversation between the suspects Mehmet Osman KAVALA and MEMET ALİ ALABORA (ID: 2189170193) Mehmet Osman KAVALA said "...THE EUROPEANS ARE ASKING AT EVERYTHING I SEE THAT'S ALL FINE AND WELL BUT HOW WILL THIS CHANGE THE POLITICAL SITUATION..." and also Memet Ali ALABORA said on the social media "THE ISSUE IS NOT JUST GEZI PARK MY FRIEND, HAVE YOU STILL NOT UNDERSTOOD THIS" indicating both suspects were functioning as INFLUENCERS posting provocative shares.

The significance of the such an ordinary conversation asking how the protests may affect the political situation, at least on its face, is nowhere explained, nor shown how this is connected to a social media post made by one of them.

The connection, if any at all, is simply not made.

It is a common feature of this indictment that broad, and unsubstantiated comments and accusations are made, without any evidence in support. For instance, there is a comment (31/640) about trips made by Osman Kavala and the suggestion that these were for the purpose of organising the protests with foreign entities, but entirely unevidenced, over and above the fact that he went to those places. On the face of it, therefore, ordinary lawful travel is criminalised, without any explanation:

Therefore, it has been determined that the group was receiving training on civil uprising from OTPOR director Ivan MAROVIĆ while they were in Cairo while Mehmet Osman KAVALA was travelling as mentioned in Belgium, Germany and the United States to coordinate another aspect of the attempt.

In the same vein, a comment is made (38/640) to the effect that Osman Kavala visited Hungary and that George Soros is active in that country, to suggest that this provides evidence that the trip to Hungary was for the purpose of some criminal activity involving him and George Soros, but without providing any evidence over and above the fact of the trip. Thus, the act of travelling to a country is, without explanation, criminalised:

Mehmet Osman KAVALA went to Hungary between 05 April 2012-06 April 2013, and it was understood that this trip happened right before the Gezi protests, that the founder of the Open Society Foundation,

George SOROS is very active in this country, and had to move the foundation university in this country to another country due to similar allegations during the preparation of the case file; and it was understood that the suspects' travel was a coordination trip for the Gezi protests.

The flight records of various defendants and other named individuals are reported on, but without any attempt to explain the relevance of the trips. The following (37/640) is typical:

Mehmet Osman KAVALA went to France between 15 November 2012-18 November 2012, Mehmet Osman Kavala traveled to France on flight number TK1823 on 15 November 2012, and suspect named Meltem Aslan Çelikkian (TC: 19489865864) who had a decision of separation of the case also traveled to France on the same plane.

Either the travel to France is linked by evidence to the Gezi Park protests, in which case this should be provided for in the Indictment, or it is not, in which case it should not be included.

One section of the indictment seeks to demonstrate similarities between 198 methods of non-violent protest described by an American academic Gene Sharp in a book and the Gezi Park protests, in order to show how the events were part of a pre-ordained playbook. Leaving to one side that the author of the Indictment seems at no point to have reflected on the very significant irony, in the context of the charge under Article 312, that these were forms of non-violent protest, this leads to a number of bizarre passages in the indictment. One of the 198 forms of non-violent protest involves staying at home and, in this light, the author presents the evidence of one defendant (54/640) staying at home during the Gezi Park protests as evidence of his participation in them:

WITHDRAWAL FROM THE SOCIAL SYSTEM

Staying at Home (Many people, mainly Mehmet Ali ALABORA did not leave the house for a while during these events.)

Other items on the list of 198 forms of non-violent protest are merely listed but without any explanation of how they occurred during or relate to the Gezi Park protests:

LIMITED STRIKES

108. Detailed Strike

109. Buffer Strike

110. Slowdown Strike

111. Slowdown of Work by Abiding by the Rules

112. Not Going to Work by Taking a Sick Report

113. Resignation Strike

114. Limited Strike

115. Selective Strike MULTIPLE-INDUSTRIAL

Other forms on the list of 198 are commented on in a selective way. For instance, in a section on 'symbolic sounds' comment is made about people going onto balconies at 9pm to make sounds with kitchenware in support, but without mentioning that this is a form of protest that has been used historically in Turkey for a number of years (51/640):

28. Symbolic Sounds

(From the first day of the events until the last, in many regions of the country, particularly our city, people went out to their balconies around 9 pm, and made noises with their kitchenware to support Gezi protests.

In this section, fairly banal comparisons are included as somehow relevant. For instance, one of the 198 forms concerns support of the protests by musicians. The following is included:

36. Plays and Music Events (Many music bands such as Kardeş Türküler and Duman composed songs, Roger Waters' "The Wall" concert tour displayed the photos of people who died in Istanbul during the riots.) Logical questions immediately arise: How are Roger Waters' actions on his concert tour reasonably capable of providing support for the thesis that these defendants were involved in

an attempt to overthrow the Turkish Government by force? It is difficult even to countenance that the public prosecutor sought aggravated life sentences on the basis of such allegations contained within this indictment. That individuals have spent considerable time in detention on the basis of it is unsupportable.

The lack of balance and reflection in such comments is telling. Having considered all 198 forms of non-violent protest, without indicating how a large number of them apply to Turkey and Gezi Park, the following comment is made in the indictment:

All of the 198 Passive Action Methods stated in GENE SHARP's "From Dictatorship to Democracy" book were used in different ways in the Gezi Uprising in our country.

Nowhere is there a comment or reflection in the indictment that any similarities between the Gezi protests and a handbook for non-violent protest might actually be an indication that the primary aims of the protests were non-violent.

In some parts, records of conversations between defendants are referred to but with no reference to their date in order to understand their context or meaning, whether they are before, during or after the Gezi events. This (94/640) is typical:

Also in the phone call between MEMET ALİ ALABORA and MEHMET OSMAN KAVALA on this subject (ID: 2189170193) Mehmet Osman KAVALA was detected saying "AT SOME POINT LIKE ABOUT WHAT THIS EVENT IS GOING TO LEAD TO IN THE FUTURE, LIKE THESE EUROPEANS KEEP SAYING FOR EVERYTHING I SEE THAT'S ALL WELL AND GOOD BUT HOW WILL THIS CHANGE THE POLITICAL SITUATION THEY KEEP ASKING. SHOULD WE AT SOME POINT, A FEW FRIENDS, SIT DOWN AND TALK ABOUT THIS?"

The context of these comments is entirely unclear and incapable of logical evaluation. Equally, it is entirely unclear how passages like this are claimed to provide any support for violent purposes.

There are a large number of comments in the indictment which are made unsupported by or connected to any evidence (94/640):

When considered with all the collected evidence, it is apparent that the suspects were in contact with each other, that there were relations based on a hierarchy, although loose, and delegation of duties between them.

A great number of portions of the Indictment appear to lack any rational or relevant connection to the apparent charges. In one example(97/640), significance is given to a 2005 newspaper article where Osman Kavala is referred to as the "Turkish Soros." This is, somehow, considered relevant:

An Interesting Portrait: "Turkish Soros" who met with the Prime Minister: Osman Kavala: There was someone with the "businessman" in his title among the delegation that met with the Prime Minister last Wednesday: Osman Kavala. Among journalists, authors, poets and intellectuals—a 'businessman' was searching for contact with the Prime Minister concerning the 'Kurdish Problem'...Osman Kavala was probably a businessman with intellectual aspirations!

The indictment frequently refers to meetings involving the defendants and various individuals or groups outside of Turkey. The relevance of these meetings and how they indicate support for violent means is never explained. This passage (148/640), concerning meetings months after the Gezi Park events, is typical:

Based on Communication ID: 2453774465 on 22 November 2013 at 15:58, in which MEHMET OSMAN KAVALA (905322221xxx) called ASENA GÜNAL (905336859xxx), the text read: "Asena hi, there is a possibility that the socialist group leader Swobodan from the European Parliament might come to the exhibition. This may be either at 19.30 or 21.30-22.00. It will become clear at 19:00. I'll call you. How is your part doing?"

Another theme within the Indictment is the suggestion that certain pronouncements made by the

defendants are false or represent disinformation, but without providing the evidence that they are false. Consider this passage (178/640):

It was determined that, after the start of the riots, the members of Taksim Solidarity were engaged in significant disinformation using written, visual and social media with statements such as “they are declaring a state of siege”, “intensive gas and water sprayed with (anti-riot) water cannon vehicles”...that they shared many fake news on purpose, that they were engaged in provocative activities, abusing the sensitivity of the public, thus provoking the public to participate in illegal acts and protests against the security forces.

Additionally, the Indictment seeks to make a connection between the Gezi Park protests and the attempted coup three years later in 2016 (230/640). How this is relevant to the defendants is left entirely unclear and, consequently, would be impossible for the defence to challenge or the court to evaluate:

In the light of this information, one can conclude that, at the time, with the Gezi uprising intending to spread across the country as far as possible, the armed terrorist organisation FETÖ/PDY saw the uprising as an opportunity for itself. In the event that such uprising should succeed, resulting in the resignation of the government or early elections, the organization hoped to benefit from such a result. Shortly after the Gezi Park protests failed and no such uprising was expected to repeat itself as an uprising with sympathetic coverage as the Gezi Park events, aiming at the government, the organisation, which considered the government of the Republic of Turkey a danger to itself, initiated a judicial coup against it on 17-25 December along with the conspiracy investigations. Afterwards, hoping to prevent re-election/re-nomination of the current President of the Republic of Turkey Recep Tayyip Erdoğan, who acted as Prime Minister at the time, just as it has been achieved by the same formation abroad, on 15 July 2016, when they made an attempt against his life, the organization frustrated any effective, proportional, and appropriate interventions in the uprising viewed sympathetically as the Gezi Park events through its cells within the security circles.

Otherwise, if needed, it intervened inappropriately and disproportionately to draw the society's justified reaction and to incite with the intention of setting ground for creating the perception of this group's victimisation. Thus, in terms of their ambitions, the armed terrorist organisation FETÖ/PDY hoped to pacify the current President of the Republic of Turkey Recep Tayyip Erdoğan, who acted as Prime Minister at the time and whom the organisation viewed as their main obstacle, and then to take over the government by means of its militants, sadly present in almost every office of the government. As this attempt failed, the organisation decided to take the stage by itself, first as the 17-25 December coup attempt and then as the second 15 July 2016 attempt.

The indictment reaches, at points, the furthestmost boundaries of irrelevance. At page (289/640), the indictment refers to an image of a map found on Osman Kavala's mobile phone as follows:

In the examination of the suspect's mobile phone: there has been obtained a photograph taken by the suspect's mobile phone on 27 February 2016, depicting the borders of the Republic of Turkey that were redrawn, thereby breaking its integrity.

Once again, it is not possible to identify or understand the point being made in this passage of the indictment and accordingly to challenge it.

The cumulative effect of these, and many similar passages, is that it is almost impossible to find or evaluate any coherent or logical evidence that actually supports the charges. Indeed, when you look underneath the political theorising, unsubstantiated and irrelevant points, the repetition and the verbiage, there is a total lack of concrete evidence to connect the defendants to a charge that they attempted to overthrow a government by violent means.

There are a number of possible explanations for the inclusion of all this irrelevant material. Either the author or authors of the indictment got so carried away with the political theorising, and their belief in the soundness of the political ideologies underpinning it, that they failed to properly and objectively analyse the evidence gathered, or the endless repetition and inclusion of irrelevant material is actually a deliberate attempt at obfuscating and masking the lack of any cogent evidence. Either way, it is clear that Turkey has failed to comply with proper legal prosecutorial standards in the preparation and formulation

of the indictment in this case.

Article 170 (5) – Does the indictment properly balance evidence both favourable to and unfavourable to the defendants?

This Article requires the indictment to have balance and to weigh points both favourable and unfavourable to the suspects. This is no more than to reflect the general norms as set out in Principles 13(a) and 13(b) of the Basic Principles on the Role of Prosecutors and Article 3 of the Standards of the International Association of Prosecutors. Article 3 states that:

Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In particular, they shall:

- 3.1 carry out their functions impartially;
- 3.2 remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- 3.3 act with objectivity;
- 3.4 have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

Unfortunately, such balance is nowhere to be found in this indictment.

There are a number of aspects to the evidence that require comment and evaluation in the indictment in order for there to be due balance, aspects which are entirely absent here. They include:

1. None of the many comments made by the defendants referred to in the indictment indicate any support for violent means of protest. This point is of profound significance as the sources of the indictment include intercepted communications involving the defendants and emails between them and others. If, despite all of this, not a single comment (public and private) is found where support for violence is indicated, this would be an important matter to be made clear in the indictment and would require careful rebuttal;
2. On the contrary, there are a very large number of comments (public or private) referred to in the indictment that indicate support for purely non-violent means of protest. This is neither acknowledged nor commented on;
3. Likewise, the significance of any similarities between the Gezi protests and a book espousing 198 forms of non-violent protest is not evaluated or commented on in the context of an allegation under Article 312 of the Turkish Penal Code;
4. There is nowhere to be found any evaluation of the possibility that acts of violence committed by some at the Gezi Protests were actually carried out by groups not in any way associated to the defendants and/or their civil society groups;
5. There is nowhere to be found any evaluation of the possibility that different people took part in or supported the Gezi Park protests for many different reasons, including the defendants;
6. There is no balanced evaluation of the possibility that various trips abroad were in support of legitimate activities, indeed the contrary assumption is made;
7. Much is made of attempts to purchase or obtain gas masks during the protests but there is no evaluation as to whether this was actually a defensive measure as protestors were being tear gassed, consistent with human rights activism. On the contrary, it is presumed in the indictment that this is an indication of support for violence;
8. There is no balanced assessment of whether meetings with European civil rights groups and parliamentarians were in pursuit of lawful aims and/or legitimate lawful criticisms of the Turkish Government and its handling of the Gezi Park protests. On the contrary, this activity is cast within a presumption that this is all in pursuit of a global criminal conspiracy. Within this framework, all criticism is criminalised;
9. Much is made of an attempt to make a video, after the events, about the Gezi Park protests after the event but there is no balanced assessment as to whether this is part of legitimate lawful criticism of the government and the exercise of rights of freedom of expression;

10. The indictment suggests that the defendants all acted together as part of a group with defined agreed aims with an informal hierarchy, but the indictment never balances this an analysis of the possibility that different defendants had different motives, nor comments on the lack of evidence to suggest that they were a concrete group;
11. The activities of certain NGOs and civil society groups are all cast within a framework that presumes them to be involved in illegitimate criminal activity. Neither the contrary possibility, that these were legitimate lawful groups conducting ordinary civil society activism, nor the lack of evidence that they were involved in criminal activity, is ever commented on;
12. No assessment or comment is made about some defendants having already been acquitted on previous charges relating to the Gezi Park events;
13. No assessment or comment is made to the effect that none of the defendants are ever seen to be involved in acts of violence or present at the protests and inciting them.

This profound lack of balance runs through the 640 pages of the (translated) indictment. As such, it is impossible to illustrate all the examples of this within the framework of this report. The following represent, therefore, merely a couple of examples of very many, and are indicative of the predominant approach that runs throughout the indictment:

One passage contains a recording of a conversation involving two defendants where they discuss engagement with Human Rights bodies in relation to an embargo regarding the use of gas canisters (122/640):

MEHMET OSMAN KAVALA (90532xxx xxxx) called YİĞİT ALİ EKMEKÇİ(90532xxx xxxx) said, "Okay I'll say something, I mean it's a little inappropriate, but would you like to meet with the Human Rights Commissary when he arrives... the first week of July," Mehmet Osman said "of course I'd be happy to... We're making preparations for a request for the embargo of gas exports to Turkey unless the State doesn't change the methods for using gas.

This is taken, somehow, as indicative of support for violent means but there is no analysis or evaluation on the fact that this may be legitimate and lawful civil rights advocacy in connection with human rights groups to limit the use of CS gas. Consistent with the slightly fevered approach of the authors of the indictment, the contrary is assumed, without any supporting evidence.

In a similar vein, a passage refers to a video produced about the Gezi Park protests in conjunction with a film festival but without, for some reason, any date attached. This is presented as evidence of criminal intent rather than a legitimate exercise of making a documentary as part of the ordinary rights of freedom of expression, and despite seemingly taking place after the protests:

Çiğdem Mater UTKU, a person working at Anadolu Kültür A.Ş. connected with the Open Society Foundation, which was under the direction of suspect Mehmet Osman KAVALA. In the phone call with ID: 2223204847 and ID: 2223229208, she states that they have talked to Rada SEZİÇ (film producer) from Sarajevo with Mehmet Osman KAVALA about a 15 minute film called VIDEO İŞGAL (VIDEO OCCUPY) concerning the filming of Gezi events and documentaries; that this conversation took place at the Erivan film festival; that these types of work by the Open Society Foundation were funded through Anadolu Kültür A.Ş.; that the 15 minute film about GEZI called VIDEO OCCUPY was taken and shown accompanied by Osman KAVALA.

It is plain that this very lengthy indictment does not engage with any evidence that runs contrary to its central political thesis. Most significantly, it refuses to engage with the evidence that none of the defendants are ever recorded to have called for or expressed support for violence. Neither does it engage with the preponderance of evidence where defendants expressly support (in public or private conversation) non-violent means.

Other instances in the indictment reveal a sheer lack of fairness and objectivity. As reported on above, one of the plaintiffs was a police officer who was convicted of the unlawful killing of a protestor. This is entirely covered up in a passage (87/640) concerning the killing of the student.

July 10 2013: An individual named Ali İsmail Korkmaz, a student of the Eskişehir Anadolu Lisesi, ran to a back road with a group of demonstrators to escape the response by the police with water cannon and pepper spray on June 2, 2013 where he was attacked by 5-6 people in civilian clothes. After being treated in Mavi Hastanesi, he was sent to Yunus Emre Devlet Hastanesi. Here he was sent home after a tomography was taken. After collapsing at home, Korkmaz was taken to Eskişehir Devlet Hastanesi where it was determined that he had bleeding in his brain. Korkmaz was kept in the intensive care ward hooked up to a ventilator. Korkmaz died around noon on July 10, 2013.

Overall, there is a total lack of balance and fairness in the indictment. Again, there are two possibilities; either the authors of the indictment were so carried away with the grand political thesis that they were unable to objectively assess their own evidence and/or it was not an indictment drafted in good faith.

Certainly, the ECtHR ruled that the evidence in the indictment could not, in good faith, provide a reasonable suspicion of an offence:

However, there is nothing in the case file to indicate that the prosecuting authorities had objective information in their possession enabling them to suspect, in good faith, the applicant at the time of the Gezi events.

Resolving these two possibilities goes outside of the scope of this report, but suffice it to say that the complete lack of balance in the indictment is such that it hardly resembles a legal document at all. Indeed, given the consequences of filing an indictment such as this, it represents a profound abuse of state prosecutorial power.

Evaluation of the indictment in terms of international standards

In addition to failing to comply with the Turkish Code for indictments, the indictment is also profoundly at odds with rights enshrined within the ECHR and the International Covenant on Civil and Political Rights ("ICCPR") to which Turkey is a signatory. What follows is necessarily only a summary of the international law principles which apply. More detailed exposition of these principles can be found set out in, for example, other BHRC reports which consider many of the same failings within the context of trials observed by BHRC.¹⁶

Right to a fair trial

The right to a fair trial is protected in both Articles 5 and 6 of the ECHR and Articles 9 and 14 of the International Covenant of Civil and Political Rights ("ICCPR") to which both Turkey is a signatory.¹⁷

A fundamental component of the right to a fair trial is the right of a Defendant to know the case against him/her and to challenge it. International human rights law is clear that if a defendant does not know the nature of the case against him/her, he/she is unlikely to be able to properly instruct his/her lawyer, obtain relevant evidence to support his/her defence or properly prepare for his/her defence.¹⁸ He/She is, therefore, highly unlikely to be able to have a fair trial. He/She is also unable to challenge his/her detention.¹⁹

General Comment 32 of the United Nations Human Rights Committee, dated 23 August 2017 (CCPR/C/GC/32) provides clearly at paragraph 31 that this right includes being provided with "both the law and the alleged general facts on which the charge is based."

Furthermore, established case law of the ECtHR affirms that it is a fundamental aspect of a fair trial that proceedings be adversarial with equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.²⁰

In this case the lack of clarity and coherence, and the failure of the indictment to disclose any real evidence unnecessary repetition and unexplained theory and comments in the indictment is such as to render it incapable of proper objective analysis or response; and accordingly is an indictment which, in every respect, violates articles 6 and 14 of the ECHR and ICCPR, respectively.

Likewise, the right to a fair trial protects the cardinal principle of the “presumption of innocence.” In this case, a considerable amount of material in the indictment describes activity which is on the face of it lawful activity (making trips

abroad, meeting with individuals from both Turkey and abroad, private telephone communications, work within ordinary lawful civil society groups etc.) but which in the indictment is presumed, without any or any concrete evidence to the contrary, to be criminal activity.

Of course trips abroad, etc., can be in pursuit of criminal ends but this needs to be clearly indicated by concrete evidence, which is wholly lacking in this indictment.

As such, the whole premise of the Indictment runs contrary to the presumption of innocence enshrined within the right to fair trial in Articles 6 and 14 as above. It further fails to meet the minimum guarantees within those provisions as to the information to which a Defendant is entitled in responding to a criminal charge against him/her to such an extent that a fair trial on this indictment is simply impossible.

Freedom of expression and association

Of further concern in the context of this indictment is that it appears to fundamentally undermine the rights of freedom of expression and freedom of association as enshrined in Articles 10 and 11 of the ECHR and as enshrined in 19 and 21 of the ICCPR. The indictment fails to consider, balance or evaluate any of these rights in the context of the evidence and allegations.

Nearly all, if not all, of the activity of the defendants as described in the indictment was *prima facie* lawful activity protected by these rights (performing a play, producing a documentary video, human rights activism, commenting on government policy, meeting with parliamentarians from the European parliament, going on trips abroad, working in and running open society groups, etc.). In most instances where such activity is detailed in the indictment, it is done without reference to any concrete evidence that such activity was in pursuit of criminal purposes.

On the contrary, in the indictment, the exercise by these defendants in these basic rights was wholly criminalised and presumed to be criminal. Within such a framework, all opposition to the development of the park, the handling by the Gezi Park protests by the authorities and all criticism of the government is cast as part of some overall plot to overtake Turkey by force. The total lack of appreciation or evaluation of the rights under Article 10 and 11 ECHR and 19 and 21 ICCPR respectively is a further indication that this indictment falls far below proper and ordinary prosecutorial standards. It is an indictment drafted in profound contradiction to fundamental standards of international human rights to which Turkey has agreed to be bound.

As the ECtHR noted in its ruling²¹:

However, the facts imputed to the applicant, which were used as the basis for the questions put to him in the interview and with which he was subsequently charged by the prosecutor’s office, are either legal activities, isolated acts which, at first sight, are unrelated to each other, or activities which were clearly related to the exercise of a Convention right. In any event, they were non-violent activities.

On the same point, the ECtHR further noted²²:

It further notes that the measures were essentially based not only on facts that cannot be reasonably considered as behaviour criminalised under domestic law, but also on facts which were largely related to the exercise of Convention rights. The very fact that such acts were included in the bill of indictment as the constituent elements of an offence in itself diminishes the reasonableness of the suspicions in question.

Indeed, the ECtHR noted that the inclusion of activity in exercise of ECHR rights undermined its legitimacy²³:

As to the relations between the applicant and the NGOs referred to in the bill of indictment, the Court notes that none of the parties dispute that the NGOs in question are lawful organisations which continue

to conduct their activities freely.

With regard to the individuals with whom the applicant was in contact or with whom he had telephone conversations, and who were charged with various offences, the mere existence of contacts between the applicant and those individuals can hardly be used to justify inferences as to the nature of their relations. In addition, it must not be overlooked that, in the absence of a criminal conviction, those individuals, described in the prosecution documents as members of a criminal association which had conspired against the Government, enjoy the presumption of innocence under Article 6 § 2 of the Convention.

In any event, the Court finds no sign in the conversations in question of any indication that the applicant, in collaborating with those individuals, was seeking to transform peaceful demonstrations into a widespread and violent anti-Government insurrection.

Arbitrary detention

A pressing concern with this indictment is an obvious but crucial one: it is the basis upon which those charged have been detained pending trial and upon conviction.

The right to liberty and protection from arbitrary detention, including excessive pre-trial detention is protected in both article 5 of the ECHR and article 9 of the ICCPR. These rights also provide for the need for sufficient and clear reasons to justify detention and for any detention to be for a proper and lawful purpose.

In the absence of such clear, easily-identified reasons, and in the face of concerns about improper motives in this case, including as concluded by the ECtHR, it is clear that the detention of the defendants in this case on the basis of the current indictment is arbitrary, unlawful and contrary to Turkey's obligations under both article 5 (3) of the ECHR and article 9 ICCPR.

This is all the more pressing in light of the continued detention of Mr. Kavala and others and BHRC joins calls for the immediate release of the defendants in this case.

The effectiveness, impartiality and fairness of prosecutors in criminal proceedings

Finally, reference should be made to the UN Guidelines on the Role of Prosecutors ("Guidelines") which outline the role of prosecutors in upholding the rule of law. Principle 12 requires prosecutors to perform their duties "fairly, consistently and expeditiously" in a way that upholds human rights and protects human dignity. Principle 13(a) requires prosecutors to carry out their functions impartially and without discrimination, and 13(b) requires prosecutors to "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 Guidelines are complemented and expanded on by the International Association of Prosecutors Standards of Professional Responsibility and Statement on the Essential Duties and Rights of Prosecutors. The Guidelines add specificity to fundamental principles of international human rights law including the right to equality before the law, the presumption of innocence, and the right to a fair and public hearing before an independent and impartial tribunal.

As outlined above at paragraph 80, there is a profound lack of balance that runs through the indictment such that the indictment as a whole can only be said to constitute a profound breach of international prosecutorial standards.

Other issues concerning the indictment

As commented above, the indictment is excessive in length. There must also be a concern as to whether the length and level of detail in an indictment such as this may be used as justification for the length of time given to draft it, particularly when suspects are being held in detention. If there is cogent evidence, presenting it in an indictment should not be a matter of constructing a grand elaborate thesis; it should be clear, straightforward, concise and, therefore, capable of being drafted within a reasonable period of time.

PART D: CONCLUSIONS AND RECOMMENDATIONS

The Gezi Park indictment marks a low watershed in the drafting of indictments in complex and sensitive cases. Not only do badly constructed and unbalanced indictments bring about legally poor and unsustainable conclusions, they can also do immense damage to the public prosecutor's office of the country which drafts them.

Politically sensitive investigations demand a balanced evaluation by prosecutors. In this particular indictment, ideological fervor has clearly overtaken sound prosecutorial judgement and analysis of evidence. Here, the indictment lacks all balance and has, within a highly politicised perspective, substituted ideology for evidence. The result is a shoddy and embarrassing document which fails to comply with fundamental standards of international human rights law to which Turkey is bound.

Steps should and must be taken to avoid its repetition. In particular:

1. There should be rigorous oversight of such indictments by those within the public prosecutor's office to ensure that a prosecutor does not get
2. 'carried away' and end up drafting an indictment in line with any official or
3. personal ideology but with scant adherence to the law or objective assessment of the evidence. This is a question of proper management. It is impossible to think that this indictment was properly or sufficiently managed and checked by a competent officer of the law;
4. Such indictments should also consider and, if the evidence justifies it, carefully rebut the evidence that may be favourable to the defendants. If the points favourable to the defendants cannot be rebutted by cogent evidence, the case should not be brought;
5. Such indictments must take account of fundamental standards of international human rights law, and the standard to which Turkey is bound as a member of the Council of Europe. If there are good reasons why the presumptions of innocence should not apply to ostensibly lawful activity, this should be spelt out by reference to clear and cogent evidence rebutting it. Likewise, the indictment must be clearly drafted and based on proper lawful purpose and with a clear evidential basis. If it cannot be, the indictment should not be brought.

The Gezi Park indictment is, regrettably, a textbook example, as to how not to draft indictments in complex cases.

Endnotes

- 1 Kavala v Turkey (ECtHR 429 (2019)).
- 2 https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?objectId=09000016809f7230
- 3 https://www.barhumanrights.org.uk/wp-content/uploads/2020/05/BHRC-Trial-Observation-Report_Osman-Kavala_May-2020_forweb.pdf
- 4 See Kavala v Turkey (ECHR 429 (2019) at paragraphs 15-16.
- 5 An unofficial translation of this appears here: https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/040926TurkeyCriminalCode.pdf
- 6 Turkey v Kavala (ECHR 429 (2019) paragraphs 47-48.
- 7 See Turkey v Kavala (ECHR 429 (2019) paragraphs 49-56 for an excellent and detailed summary of the indictment and observations in respect of it.
- 8 Turkey v Kavala (ECHR 429 (2019) paragraph 49.
- 9 Turkey v Kavala (ECHR 429 (2019) paragraph 50.
- 10 Turkey v Kavala (ECHR 429 (2019) paragraph 55
- 11 BHRC: The “Gezi Park trial forms part of a chilling clampdown on human rights defenders and civil society in Turkey, 17 July 2019, <https://www.barhumanrights.org.uk/bhrc-raises-concern-over-the-narrowing-of-an-increasingly-hostile-space-for-human-rights-defenders-in-turkey-following-observation-of-gezi-park-trial-calls-indictment-g/>
- 12 Turkey v Kavala (ECHR 429 (2019) at paragraph 153
- 13 See Paragraph 3 above for comments about the excessive number of complainants and the inclusion as complainant of a convicted killer of a protestor.
- 14 At section 2.1.4. regarding Mine Özerden’s links to the Open Society Foundation, at section 2.1.9.3 regarding information received which the indictment suggests indicates that the pharmaceutical firms Biofarma had supported the protests and at 3.1. concerning the identity of an individual shown on photographs.
- 15 Turkey v Kavala (ECHR 429 (2019) paragraph 227.
- 16 See BHRC, Trial Observation Interim Report, ZamanNewspaper: Journalists on trial, June 2018, available at <http://www.barhumanrights.org.uk/wp-content/uploads/2018/07/Zaman-TRIAL-OBSERVATION-INTERIM-REPORT-FINAL-1-1.pdf>
- 17 Turkey ratified the ECHR in 1954 and the ICCPR in 2003.
- 18 Mattoccia v Italy, App. no. 23969/94 (judgment 25th July 2000) (ECtHR), para 60.
- 19 Fox, Campbell and Hartley v UK, App. nos. 12244/86; 12245/86; 12383/86 (judgment 30th August 1990) (ECtHR); (1991) 13 EHRR, paragraph 40
- 20 Natunen v Finland, App. no. 21022/04 (judgment 31st March 2009) (ECtHR); (2009) 49 EHRR 810, paragraph 39, citing Rowe and Davis v UK, App. no. 28901/95 (judgment 16th February 2000) (ECtHR); (2000) 30 EHRR 1 and cases therein.
- 21 Turkey v Kavala (ECHR 429 (2019) paragraph 146
- 22 Turkey v Kavala (ECHR 429 (2019) paragraph 150
- 23 Turkey v Kavala (ECtHR 429 (2019) paragraph 157

04

**Legal Report on Indictment:
Turkey V Nedim Türfent**

Şerife Ceren Uysal
5 August 2020



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.

1 - THE SUBJECT OF ASSESSMENT:

The scope of this assessment is to examine the indictment issued against Nedim Türfent by Prosecutor İlyas Abukan on behalf of the Hakkari Chief Prosecutor on 07.03.2017 with investigation no. 2017/544 and indictment no. 2017/116, comprised of 22 pages, to legal assessment in the scope of Article 170 of the number 5271 Criminal Procedure Law and article 6 of the European Convention on Human Rights.

2 - DETERMINATIONS CONCERNING THE INVESTIGATION AND PROSECUTION STAGE:

- Nedim Türfent was arrested suddenly on 12.05.2016¹ after publishing a video image of nearly 50 Turkish and Kurdish workers being handcuffed and made to lie on the ground by Special Operations Forces in the Yüksekova district of Hakkari in April 2016, and was charged on 13.05.2016. On the date that the news in question was broadcasted Türfent was working for the Dicle News Agency.
- The indictment against him was issued 9 months and 24 days after his arrest. Türfent was only able to appear before the court over 14 months after his arrest on 14.06.2017.
- According to trial observation reports and lawyers' statements² that were publicized on the basis of 19 out of the 20 witnesses whose statements were included in the indictment having changed their initial statements upon trial. The 19 witnesses in question stated that their statements were taken from them at the interrogation stage under duress and/or torture and they were forced to give testimony against Türfent.³
- The Hakkari 2nd Criminal Court sentenced Türfent to 8 years 9 months in December 2017 and the sentence was approved by the Supreme Court of Cassation on 21.05.2019. Türfent's file is still under moderation by the European Court of Human Rights⁴.
- On 16.06.2020, 45 organizations, including PEN International, International Press Institute (IPI), Media and Law Studies Association (MLSA) released a joint statement to draw attention to the trial of Nedim Türfent and they underlined the fact that on the date in question Nedim Türfent had been in custody for 1,500 days.⁵
- Born in 08.02.1990, Nedim Türfent was 26 on the day he was arrested.

3 - ASSESSMENT CONCERNING THE INDICTMENT:

3-1 : DETERMINATIONS ON THE GENERAL STRUCTURE AND CONTENT OF THE INDICTMENT:

- a. The indictment (excluding the signature section that exceeds the last page) comprises of a total of 22 pages. It is apparent that the crimes alleged include being a member of a terrorist organization and conducting terrorist propaganda.
- b. The section starting on page 2 of the indictment until the middle of page 18 contains summary information about the terrorist organization the defendant is accused of being a member of or conducting propaganda for. The name of the defendant is not in any section of the content in these first 18 pages. In addition to this, no connection is made between the defendant and the first 18 pages of the indictment in the remaining sections of the indictment.

The headings that are investigated by the Prosecution in this section are as follows:

- THE ESTABLISHMENT OF THE PKK/ KCK TERRORIST ORGANIZATION YPS (YEKÎNEYÊN PARASTÎNA SÎVÎL- CIVILIAN DEFENSE UNIONS) UNIONS STRUCTURE:

In this section information is provided about the establishment of the organization in question between 1977 and 2000 and its evolution over the years. The period that is summarized here covers a time that starts before the defendant was even born up to when he was 10 years old.

- A SUPPOSED LONG TERM PEOPLE'S WAR STRATEGY:

This section describes a strategy associated with the organization between the years of 1978 and 2000. The time range again covers a period starting before the defendant's birth until he was 10 years old.

- RURAL BASED URBAN GUERRILLAISM:

This section summarizes a book by an individual named Duran KALKAN that was published in 2012. It has not been explained in the indictment whether or not there is a connection between this book or this author and Türfent and why this summary is in the indictment. This section continues with the synopses of other books written by this author.

- SUPPOSED DEMOCRATIC AUTONOMY STRATEGY:

This section states that the organization has made a change in strategy and explains this strategy. Not only is the defendant's name not present in any part of this section but why the summary is in the indictment and whether or not there is any connection with the crimes the defendant is being accused of has not been explained whatsoever.

After these sections, a number of news items about the organization are featured but it is observed that all of these items are irrelevant to the defendant and are completely related to certain periods regarding the concerned organization.

In this sense, it is apparent that the written content of the first 18 pages in this indictment do not establish any kind of connection between the defendant and the crimes the defendant is being accused of.

- c. In the middle of page 18 of the indictment, after the phrase "IN THE SCOPE OF THE INVESTIGATION FILE" the statements of 20 witnesses, summarized to a paragraph each, are featured. The points that were not considered in the indictment but draw remark in these statements are as follows:

It is apparent that witness H. Ş. E.'s statement was taken on 21.02.2016, witness

E. Ş.'s on 23.03.2016, witness E. D. K.'s on 22.03.2016, witness D. B.'s on 19.03.2016, witness C. G.'s on 20.03.2016, witness Z. A.'s on 16.02.2016, witness M. Ç. V. Y.'s on 14.03.2016, witness U. C. N.'s on 19.03.2016, witness A. S. T.'s on 30.03.2016, witness R. T.'s on 25.03.2020 and witness N. Ö.'s on 05.02.2020. In this respect, it is apparent that 11 out of the 20 witnesses who gave statements during

the investigation gave the statements before the date of the crime specified on the indictment as 13.04.2016 and are related to the actions of the defendant before the period in question. It is clear from the content of the remaining witness statements that they have made declarations about the relevant actions before they allegedly took place. In this respect, since the statements cannot technically be accepted as evidence due to not being relevant to the specified crime, they should not be included in the indictment.

- Although it is apparent from the content of the indictment that these witness statements have been taken during the identification stage, the indictment does not provide information about what investigation this identification process was based on or under what conditions it was carried out. This indicates a structural deficiency concerning the indictment. The indictment does not contain any information about the date the investigation started and why it was deemed necessary.
- Furthermore, all of the witnesses' own testimonies give the impression of either having been involved in the various activities of the organization mentioned or that they are the subject of an investigation or proceeding based on this. Some of the witnesses refer to weapons training that they themselves participated in. It is clear from the indictment that some witnesses have code names, however there is no information provided on the legal status of these witnesses, whether or not there is a prosecution or investigation being lodged against them or whether or not they are under any threat of any prosecution. Throughout the entire indictment it is clear that there is no evidence against the defendant other than witness testimonies, and the fact that the Prosecution did not discuss the conditions under which these witness statements were conducted during the identification process, the legal validity of the statements or whether or not the statements were reliable under the conditions they were subjected to, indicates a very significant deficiency.
- Plus, it was observed that 4 of the witnesses stated such remarks as: "a journalist for DİHA [Dicle News Agency]", "DİHA reporter", "he works with the DİHA agency" concerning the defendant, 1 [E. D. K.] said: "he is a journalist in Yüksekova", 5 said he "conducts press activities", "I saw him doing interviews", "I know him as a journalist". But it was determined that in the indictment the Prosecution did not mention that the defendant was a journalist. This also indicates a significant deficiency. This fact gives the impression that evidence in the defendant's favor was not mentioned and only sentences that could be interpreted as being against the defendant were selected and used as the basis for the indictment.
- In the statement of witness 1 [U. C. N.], the following was submitted concerning the identity of the defendant: "I found out from you right now that the clear identification of the [Individual] was Nedim TÜRFENT".
- After inserting the testimonies of 20 witnesses, the indictment continues with the defendant's statement. But in this section only the statement as follows is included: "To surmise the statement taken from the defendant, he declared that he did not accept the accusations made against him". The fact that the evidence submitted by the defendant during the investigation or his defense were not included in the indictment prompts the question as to whether the statement and evidence were subject to consideration.
- The section in which the Prosecution assesses the evidence concerning the defendant in the scope of the indictment consists of only one paragraph on the last page. The following statements were made in this section:

"When the entire file is considered all- together, it is clear that the photograph identifications made by witnesses identifying the defendant in the presence of the Public Prosecutor are congruent and consistent, it is apparent that the defendant made contact with organization members, was in the youth structure of the organization, acted on the orders of the organization, provided terror organization members with places to stay, food and clothing, operated as the person in charge of the terrorist organization's media and by these acts showed that he had established an organic tie in complete unity of thought and action with the organization and that this tie was constant, intense and divergent; thus it has been determined that the defendant was a member of the armed terrorist organization from the investigation and identification file dated 13/04/2016 where the defendant is shown using the social media channels of www.facebook.com/qubane?fref=ts, Nedim Türfent (@nturfent) and

www.youtube.com/watch?v=ZCoS9mpLB8c to share and praise the acts carried out by the YPS/ YPS JİN terrorist organization making it clear that he has indeed committed the crime of doing propaganda for a terrorist organization that he is accused of..."

The investigation dated 13.04.2016 and detection records as well as the content of the links that are referred to in this section related to the defendant are not included in the indictment. Furthermore, the content of the indictment does not explain how the Prosecution arrived to the conclusion that the defendant "...operated as a person in charge of the terrorist organization's media operations and by these acts showed that he had established an organic tie in complete unity of thought and action with the organization and that this tie was constant, intense and varied; thus it has been determined that the defendant was a member of the armed terrorist organization ...", what actions of the defendant are being referred to, the place and time of these actions; and the causality that is required to be established between action, evidence and the individual, just as the hierarchical structure of the organization and the defendant's position in this hierarchy have not been established in the indictment.

3.2: SCRUTINIZING THE INDICTMENT IN THE SCOPE OF TURKISH CRIMINAL PROCEDURE LAW ARTICLE 170:

Article 170 titled The Duty of Filing a Public Case in Criminal Procedure Law (CPL) 5271 outlines the basic regulations concerning the conditions and elements relevant to the indictment. The assessment in this respect firstly considers whether or not the indictment against Nedim Türfent is included in these elements. As per CPL article 170/3, every indictment must include the identity and attorney information of the defendant. This indictment fulfills the relevant structural requirements.

- a. It is also a requirement of the CPL that the indictment include; the identity of the deceased, victim or person suffering from the crime, the attorney or representative of the victim or person suffering from the crime, the identity of the person reporting the crime if there is no objection to disclosing their identity, and the identity of the person filing charges and the date that the charges are filed are included in the indictment. When we examine the indictment in question it is clear that the accused crime is being a member of a terrorist organization and conducting propaganda for the terrorist organization. The crime is not one subject to complaint and it is clear that the investigation is being conducted on behalf of the state within the scope of the indictment. That being said, there is no information in the indictment concerning as to what tip-off launched the investigation.
- b. Furthermore, as per CPL 170/3 the crime the defendants are accused of and what articles of which law apply must be written clearly in the indictment. It is observed that in the indictment being scrutinized the alleged crime is membership of a terrorist organization and conducting propaganda for the terrorist organization. It is observed that in terms of applicable law articles Turkish Criminal Law article 314/2 with reference to Turkish Civil Code article 5 is referred to pertaining to organization membership and that TCC article 7/2 is referred to concerning the propaganda charges; thus the pertinent articles and the alleged crimes have been written consistently and there is no deficiency in the indictment in this sense.
- c. According to CPL article 170/3, the place, date and time range of the crime being alleged must be included in all indictments. In the indictment in question, it is observed that the date of the crime is provided as 13.04.2016. However, throughout the entire indictment, the place of the crime is only mentioned to be Hakkari-Yüksekova and not detailed any further, and the action of the defendant on 13.04.2016 in regard to the accusation remains unclear.

The fact that the material aspects and conditions of the two accusations in the indictment differ, definitely should be considered when examining the matter of the date of the crime.

First of all, the fact that the date of 13.04.2016 is specified as the crime date in terms of the accusation about organization membership brings up a problem in itself from the aspect of the indictment. Organization membership has to be considered in the scope of an abstract crime in terms of its nature. In this sense, the occurrence of a crime is dependent on the existence of continuity that includes intent-based intensity. Being an organization member requires

participation and loyalty. The most important measure of loyalty is continuity. In this aspect, the crime of membership in a terrorist organization against anyone in an indictment that specifies the crime date as a single day indicates a conflict.

Conducting terrorist propaganda is one of many typical crimes. In order to direct the accusation of propaganda, what date the crime was committed, where and with what instruments it has been committed must definitely be specified. In this aspect, if the crime date specified in the indictment is to be accepted in terms of criminal propaganda, this means that in a case filed based on this indictment, the suspect can only be subjected to judgement if there is an action he carried out on the specified date and that this action should be the subject of prosecution.

It has been determined that due to one single date being stated in the indictment pertaining to the date of the crime and no place being mentioned, this creates ambiguity about the accusation being made against the defendant when the entire indictment is examined. The fact that the action and evidence has not been discussed in terms of criminality throughout the entire indictment deepens this ambiguity and makes it highly likely that this will lead to a violation of the right to defense.

- d. Another required element in the indictment within the scope of CPL article 170/3 is that the evidence of criminality be clearly documented. These documents are seen to be listed in the indictment scrutinized here:

“Defendant statement records, identification from photograph records, interrogation notes, arrest warrants, registration and criminal records and all of the investigation documents”.

While it is apparent that the evidence has been submitted in valid form, the detection record dated 13.04.2016 referred to in the conclusion of the indictment and Facebook and Youtube content are not among the evidence. Furthermore, as shown above, since the testimony of 11 witnesses was taken before the date that is specified as the date of the crime, it can be expected that there must have been an investigation being conducted on the defendant before that date and that this investigation was being conducted due to suspicion based on these documents. Although it could be assumed that these documents were being referred to when citing all investigation documents, the purpose for CPL article 170/3 is not writing the evidence one by one but to ensure that the content is written clearly enough so that the defendant can understand it and defend themselves. In this sense, the initial evidence that led to the launch of an investigation in the scope of this indictment and the content of the record dated 13.04.2016 that the indictment and the arrest warrant are based on is incomprehensible. Therefore, although it appears that the evidence has been listed in form, it is clear that the requirement mandated by CPL article 170/3 to specify evidence has not been fulfilled.

- e. CPL article 170/3 also outlines that whether or not a defendant has been arrested, the date they were taken into custody and the date they were charged must be included in the indictment. The indictment ascribes to the relevant information.
- f. In terms of indictments, CPL 170/4 expresses one of the most important regulations. According to the relevant regulations, any indictment requires explaining the events that constitute the alleged crime with relation to existing evidence. It can be seen that the indictment being scrutinized here does not carry the examination or assessment required.

Naturally, every indictment will require different intensities and different types of details as per this regulation. However, it can be claimed that there are certain minimal criteria here. For example, in a situation where the defendant is being accused of carrying out terrorist organization propaganda, an indictment must definitely provide;

- the date that the action or actions of propaganda have been carried out,
- the place that these actions have occurred,
- the tools with which these actions have been carried out,
- and topics provided.

In terms of organization membership, indictments must present at a minimum the defendant's position in the organization's hierarchy and the relational elements that show they are a member of the organization and within the hierarchical structure.

When we examine the indictment at hand, despite the Prosecution concluding that the defendant was in the youth structure of the organization and expressing this twice in the indictment, not only is there no indication of a single piece of evidence supporting this in the indictment, how this conclusion has been reached and the factual determinations establishing reasonable doubt leading the Prosecution to issue this indictment cannot be followed by the reader. The fact that it is incomprehensible as to how the conclusion has been reached that the suspect was in the youth structure of the organization, even while the witness testimonies submitted against the defendant speak about his press activities, is not an insignificant detail; on the contrary it points to a main issue in terms of the indictment.

It is at this point that the reason for the amendment made to article 174 of CPL 5271 by the Law Amending Criminal Procedure Law no 5353 must be taken into account. It has been stated in this amendment that justification of events and evidence are outlined without the necessity of establishing the connection between the events and evidence, and this can be caused to renege the indictment. The objective of the lawmaker here is to ensure it is clear what evidence the conclusion the indictment reaches is based on and that the presence of reasonable doubt of a crime is presented in lieu of an abstract claim. The duty of the Prosecution is to interpret the case presented together with evidence. Doubt is a natural part of the duty assigned to the institution of the prosecution, however, the lawmaker has made a distinction here between doubt and reasonable doubt and required that doubt is present to conduct an investigation and that in order for that investigation to be turned into an indictment there must be reasonable doubt. In this sense, proof of reasonable doubt can be considered the most essential duty of Office of Prosecution and indictments.

As per the legal provision previously referred to in this report:

"In a number of submitted indictments it has been observed that events have been listed one after the other, people and evidence have not been not connected to the events and discretion on these has been left to the court. With this provision an attempt was made to prevent this. Therefore, the prosecution must submit solid accusations concerning the defendant and defendants. This is a natural result of the indictment being the document that opens a case".⁶

In this respect, the indictment that is being evaluated appears not to solidly identify the crime and does not meet the requirements of CPL article 170/4.

- g. In the scope of CPL 170/5, it has been clearly stated that in the conclusion section of the indictment not only matters against the defendant but also the matters in favor of the defendant must be outlined. It has been determined that this requirement has not been met either. While the defendant's testimony and witness testimonies are listed by name under the evidence, the defense of the defendant and their attorneys have not been included in the indictment text. They have only sufficed to say that the defendant does not accept the accusations. From this aspect it can be said that this indictment is not suitable for review whether or not the evidence in favor of the defendant has been assessed. In the context of CPL 170/5, the issue needing special attention in this indictment is that a significant portion of the witnesses that are being considered the main basis for issuing this indictment, have stated the defendant is a journalist. A portion of the witnesses stated not just that he was a journalist but used clarifications like 'he works at the DiHA news agency' or 'he is a reporter'.

It cannot be claimed that the professions of defendants are significant in the cases of every accusation, but in this indictment, conducting interviews, taking photographs and publishing articles – as a required part of the defendant's profession – have been considered acts that are the basis of the crime and claimed as such, whereas not a single other act has been claimed related to the accusations being made and therefore it is clear that the defendant's profession must be considered. Here, the defendant's profession constitutes indisputable evidence as to the defendant's advantage. The fact that this issue has not been discussed in the indictment

makes the legality of the indictment questionable in the context of CPL article 170/5.

- h. When we look at CPL article 170/6 we see that it is required to clearly state in the indictment the committed crime in order to assess as to what kind of sentence or security measures set forth by law are required. The indictment we are assessing here has deficiencies in this regard. The prosecution is demanding a punishment in general, but is not describing punishments that correspond to the crimes the defendant is being accused of and is referring directly to a general provision without clarifying which of the security measure(s) are applicable in this situation. In this respect, the indictment in question has been determined to constitute far from a fulfillment of the requirements of the CPL article CMK 170/6.
- i. Finally, the CPL's article 170 clause 2 needs to be considered in relation to this indictment while taking into account all the assessments made above. According to this regulation, the existence of "reasonable doubt" is required in order to file a public case. This provision states that "the relation between suspicion of a crime and the concept of evidence must be emphasized and the suspicion that a crime has been committed must be based on evidence". In fact, "reasonable doubt is discussed when, according to the evidence at hand, the possibility that the defendant will be sentenced at the end of the trial is more likely than the possibility that they will be exonerated"⁷. However, in the indictment we are scrutinizing not only in that there is no action with the place, time nor content described in relation to organization propaganda, there is also no direct action described to establish membership of the individual in the organization and the a hierarchal relationship between the individual and the organization to constitute the basis for this crime. Therefore, since the actions that are the basis for the alleged crimes are not clear, it has been determined objectively that there is no discussion to be had of the existence of reasonable doubt.

3.3. EXAMINING THE INDICTMENT IN THE CONTEXT OF INTERNATIONAL LAW:

The examination of the indictment in question in the context of international law should be done based on the principle of fair trial regulated under ECHR article 6 and the United Nations Guidelines Concerning the Role of Prosecutors.

- a. When we examine article 6/1 of the European Convention on Human Rights we can clearly see that everyone is entitled to a fair and public hearing within a reasonable time⁸. In the case of Nedim Türfent, he was detained 9 months and 24 days before the indictment was written and he was brought before a judge for the first time in his 14th month of detainment giving the impression that a violation was committed in the very first stage according to ECHR article 6/1.
- b. ECHR art. 6/3 outlines the minimum rights of individuals faced with charges. In this context, every defendant must 'be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. As pointed out in the previous article, the fact that the indictment was prepared 9 months 24 days after the defendant was detained shows that Türfent was not informed about the accusations against him for 9 months and 24 days. This also creates a risk of violating ECHR article 5/3 because there is no question of this being a reasonable amount of time. The European Court of Human Rights has outlined the waiting period for an indictment preparation in a number of verdicts. In the case of Punzelt v. the Czech Republic⁹, the ECHR characterized the period of 8 months that had passed between the indictment being prepared and the first trial date as being 'excessively long'.

Furthermore, as expressed in detail in the examination of the indictment in terms of CPL article 170, whether it was the accusations not being associated with concrete actions, the lack of establishing connections between actions, for which no place and date had been specified, and the evidence, or whether there was no mention of the sentences set forth by law corresponding to the accusations in the conclusion of the indictment, or whether it was the lack of clear identification of some documents listed in the evidence section of the indictment content, it cannot be considered that Türfent clearly understood the scope and nature of the accusations against him. While the indictment language was one spoken and understood by the defendant,

the fact that the content did not fulfill the requirements set forth by law leads to the opinion that there may be a violation in the context of ECHR article 6/3.1.

- c. The witness testimonies, understood to comprise of the main basis for the indictment, are another heading that needs to be scrutinized in relation to ECHR applications. In a verdict by the ECHR it is stated that: 'The Court emphasizes that using statements given by witnesses to attain immunity or another advantage may create doubt about the fairness of the trial being conducted against the defendants and due to the nature of such statements they are vulnerable to distortion and may be given for the purpose of personal revenge or to acquire advantages being presented to them. Therefore, the risk that a person could be accused and put on trial due to irrelevant and unconfirmed claims must not be overlooked'¹⁰. The ECHR is originally referring to the trial stage here; but what is expected from the indictment prosecutor here is to conduct an investigation at the initial stage on the situation of witnesses who carry the risk that is referred to by the ECHR. This investigation is an inseparable part of collecting evidence in favor as defined in CPL article 170. This points to a deficiency in the indictment and therefore the investigation phase in this context.
- d. The ECHR's verdict on the case of Ecer- Zeyrek v. Turkey is especially significant in terms of the indictment under examination. In this verdict, the ECHR states; "... the committed crime having the quality of "continuation" concludes that the crime in question was committed within a certain period. According to the opinion of the Court, when a person is accused of committing a crime that has the quality of "continuation" the actions constituting the crime must be clearly stated in the indictment as a requirement of the legal security rule'. As specified in the section where the indictment is examined according to CPL article 170, the crime of being an organization member is an abstract crime so the continuation factor is an inseparable part of this crime. Therefore, the ambiguity determined in this indictment is a violation of the legal security rule in ECHR verdicts.
- e. Lastly, it is necessary to look at the United Nations Guidelines on the Principles Concerning the Role of Prosecutors as a whole. The regulations ranging from article 10 to 20, in which the role of Prosecutors in criminal procedures is outlined, is especially significant. According to the concerned Guidelines prosecutors; "take an active role" in filing proceedings for criminal procedure and if they are authorized by law or it is in accordance with local practices, investigating crimes and monitoring the legality of these investigations (...)"¹¹. As we can see here monitoring the legality of the investigation has been defined as a judicial role and duty of the office of prosecution. In this respect it should be thought that the indictment prosecutor is directly responsible for the legality of an indictment and the legality of evidence referred to in the indictment.
- f. In article 12 of the same Guidelines it states: "Prosecutors shall, 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 frequently emphasized in this report, the fact that 9 months and 24 days went by between the arrest of the defendant and preparation of the indictment, as well as the investigation against the defendant being on a prior date (unknown) although not clearly written in the indictment, shows that the prosecution has not met the requirement of acting expeditiously. In terms of contributing to ensuring due process and the smooth functioning of the criminal justice system, what is expected from a prosecutor in the investigation stage is being meticulous in the legality of evidence, observing reasonable doubt and taking into account the evidence in favor of the defendant as well. The deficiencies identified on this subject have been listed in the section where the indictment is evaluated in the scope of CPL.
- g. Article 18 of the Guidelines refers to the need for prosecutors to end an investigation when the accusations are groundless. The requirement of this regulation is to establish reasonable doubt and a connection between the act and the perpetrator supported by sufficient evidence. The deficiencies identified on this subject have been listed in the section where the indictment is evaluated in the scope of CPL.

4. CONCLUSION

As explained in detail above, the indictment contains, upon scrutinization, almost none of the properties required of an indictment both in terms of internal legal regulations and in terms of international legislation.

Almost no subheadings have been used in the indictment. The 18 pages devoted to the organization not having any subheadings carries the risk of presenting the defendant in a negative light. Not explaining why this section is included in the indictment is also a similar deficiency. Especially when accusations about organization membership are involved, to the degree that the prosecution supports their own claims and in order to ensure that the factual suspicions they are describing are understood it pays for them to include information about the concerned organizations in the indictment; but this information must be related to the crime and act the defendant is being accused of. For example, if the indictment contained information about the organization's structure and then established a connection between this structure and the defendant, this could have been interpreted as fulfilling a need concerning this stage of prosecution. The fact that there is around 18 pages of content about the organization covering the years between 1977 and 2000 in an indictment against a person born in 1990 cannot be thought to make any kind of contribution to justice.

Given a lack of suitable subheadings, those examining the indictment are forced to search for evidence and actions in the text. A qualified indictment is one which contains actions and evidence separately and connects them to one another clearly.

The greatest deficiency in the indictment is that it contains no actions, and this takes precedence over a sufficient discussion of a number of topics. It is clear as to which legal articles the accusations against the defendant are based in the indictment, but it is not clear which of their actions other than journalistic activities (conducting interviews, taking photographs, etc.) have led to the charges. There is reasonable doubt over what characterizes journalism as membership to an organization or conducting propaganda. As we know, Turkish Civil Code article 7/2 has gained clarification in recent years and in order for the conduct of propaganda to be lodged articles must contain a call to action such as armed force and violence. Not only are such actions not described but there is no mention in the indictment that the suspect has issued calls for force and violence.

In order to overcome similar problems in the application and in investigation processes that are significant in terms of achieving justice, when this indictment is examined there are a number of points that need to be pointed out. The first of these is that prosecutors fulfilling the requirements of CPL article 170, must outline their cases as required and, in this respect, it should be encouraged that indictments, just like individual application forms in the Constitutional Court, be associated each with a required format. The second is the necessity for first decree court judges to be encouraged to return indictments that do not meet requirements. Use of the return mechanism will not only lighten the judicial load but also serve to encourage more qualified and meticulous preparation of indictments on the part of prosecutors.

Şerife Ceren Uysal

Endnotes

- 1 See: <https://freeturkeyjournalists.ipi.media/tr/nedim-turfent-bir-gazeteci-davasi-onlarca-hukuksuzluk/> (access date: 02.08.2020)
- 2 a.g.e.
- 3 a.g.e.
- 4 See: <https://ifex.org/kurdish-journalist-nedim-turfent-passes-1500-days-behind-bars-in-turkey/> (access date: 02.08.2020)
- 5 a.g.e
- 6 Özkan Gültekin, Öğretide ve Uygulamada İddianame ve İddianamenin İadesi (The Indictment in Doctrine and Application and Return of Indictment), Seçkin Publications, 2011, p.99
- 7 Nur Centel/Hamide Zafer, Criminal Procedure Law, Beta Publishing House, 2008, p. 441
- 8 European Convention on Human Rights art. 6/1 [first sentence]: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
- 9 ECHR Punzelt v. The Czech Republic, Application No. 31315/96, paragraph 81-83, 25.04.2000
- 10 ECHR. Habran and Dalem / Belgium, Application no: 43000/11 and 49380/11, par. 100, 17.01.2017

05

Legal report on indictment:
Turkey v Pelin Ünker

Şerife Heidi Heggdal
Published: 29 October 2020



About the author:

Heidi Heggdal is a judge at the Oslo District Court, Norway. She is a member of the Human Rights Committee at the Norwegian Judges Association. Heggdal has worked with Turkish cases for years.

1: Introduction

This evaluation report is drafted as a part of the Turkey Indictment Project, established by PEN Norway. It represents an analysis of one of the indictments against Pelin Ünker.

2: Summary of the case

Pelin Ünker is a Turkish journalist and a member of the International Consortium of Investigative Journalists (ICIJ). She joined Cumhuriyet newspaper in the late 2000s, and never worked for any other newspaper until the criminal investigation against her.

The German newspaper Süddeutsche Zeitung, obtained in 2016 a set of 13.4 million confidential electronic documents relating to offshore investments. The documents are widely known as “Paradise Papers”. Süddeutsche Zeitung called in the ICIJ to oversee the investigation.

Cumhuriyet published the first of Ünker’s articles based on the Paradise Papers in November 2017. The article revealed that the sons of Binali Yıldırım were listed in the papers. Binali Yıldırım was Turkey’s Prime Minister from 2016 to 2018. The sons, both doing maritime business, officially set up two companies in Malta.

Ünker wrote another article showing that the government had awarded a \$7 million contract to a company listed at the same Istanbul address as Erkan Yıldırım’s Maltese company Nova Warrior. That company happened to belong to a good family friend to the Yıldırım’s.

After the articles, Binali Yıldırım and his two sons sued the journalist and one of her colleagues along with the newspaper for allegedly violating their personality rights, arguing that Ünker had created “a false image” in public.

Berat Albayrak and Serhat Albayrak also sued Ünker for defamation, together with Ahmet Çalık. Berat Albayrak was Turkey’s finance and treasury minister and is President Erdogan’s son-in-law. Additionally, Çalık Holding (a holding company closely tied to Erdogan and Berat Albayrak, and mentioned in the articles) sued Ünker claiming for damages.

By the beginning of 2018, Ünker had two civil suits for damages and three prosecutions under the criminal law against her, all connected to her Paradise Paper articles.

The criminal cases where Ünker was charged with insulting a public officer (Binali Yıldırım) and defamation (Bülent Yıldırım and Erkan Yıldırım) got merged. On 8 January 2019, Ünker was sentenced to 13 ½ months in prison for insulting Binali Yıldırım, and to a fine of 8 660 TL in the defamation case.

On 19 March 2019, the court of appeal decided to cancel the prison sentence. The reason for this was that the charge was not filed within the first four months after the related article, which is a requirement according to Turkish press law. However, the court decided no irregularity existed concerning the

defamation case, and confirmed the fine, reducing the amount to 7080 TL.

The third criminal case is the prosecution for defamation of Berat and Serhat Albayrak and Ahmet Çalık. This report evaluates the indictment regarding this case. The first proceeding was supposed to take place on 21 June 2018, but was postponed to 22 November 2018 due to the judge's absence. On 22 November 2018, the defense lawyer requested the merger of this case with the others. The court decided to examine the cases and postponed the proceeding to 21 February 2019.

On the third proceeding on 21 February 2019, the defense lawyer requested an acquittal due to undue filing of the case. On the last hearing on 28 March 2019, the court decided to dismiss the case due to the Statute of Limitation in the Turkish press law.

Ünker left her job in Cumhuriyet newspaper in the aftermath of her reporting on Paradise Papers.

3: The indictment

The indictment accuses journalist Pelin Ünker of "Defamation via Press". Turkish Criminal Code (CC) Article 267/1 and Article 53 are cited as the relevant articles. The document is about three pages long. The first page consists of formalities. These formalities, such as the place, date and time period of the alleged crime, the date that the claims have been put forward, the evidence of the offence etc., are very significant for the criminal procedure and need a closer examination.

The next two pages have a description of the complainants' petition, Ünker's defence, a short description of the procedural decisions made in the case, a description of the crime and the conclusion to start a criminal case. In contrast to many other indictments in freedom of speech cases in Turkey, this indictment is quite short. However, short is not equivalent to well-structured and comprehensible. The indictment is poorly written and does not meet the basic purpose of an indictment, namely to give the defendant an understanding of the accusation, the legal basis and the relevant evidence that support the accusation.

4: Analysis

4.1 Evaluation of the indictment in terms of Turkish Laws

The Turkish Criminal Procedure Code (CPC) Article 170 regulates the duty of the public prosecutor and the required contents of the indictment:

Article 170

1. The duty to file a public prosecution rests with the public prosecutor.
2. 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 an indictment.
3. The indictment, addressed to the court that has subject matter, jurisdiction, and venue, shall contain:
 - a. The identity of the suspect,
 - b. His/Her defence counsel,
 - c. Identity of the murdered person, victim or the injured party,
 - d. The representative or legal representative of the victim or the injured party,
 - e. In cases, where there is no danger of disclosure, the identity of the informant,
 - f. The identity of the claimant,
 - g. The date that the claim had been put forward,

- h. The crime charged and the related Articles of applicable Criminal Code,
 - i. Place, date, and the time period of the charged crime,
 - j. Evidence of the offence,
 - k. Explanation of whether the suspect is in detention or not, and if he/she is arrested with a warrant, the date he/she was taken into custody, and the date of his/her arrest with a warrant, and their duration.
4. The events that comprise the charged crime shall be explained in the indictment in accordance to with their relationship to the present evidence.
 5. The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his/her favour.
 6. At the conclusion section of the indictment, the following issues shall be clearly stated: which punishment and measure of security as foreseen by the related Law is being requested to be inflicted at the end of the adjudication; in cases where the crime has been committed within the activities of a legal entity, the measure of security to be imposed upon that legal entity.

4.1.1 Article 170/3 - Formalities

The indictment conforms to the requirements in Article 170/3 in respect of most of the formalities. In the introductory section (page 1), it clearly sets out the identity of the suspect, the defence lawyer's name, the complainant's name and their legal councils.

There is no mention in the indictment whether the suspect has been in detention or not. As the defendant was not in detention, the lack of information on this matter is not important to the overall evaluation of the indictment.

The crime charged, described as "Defamation via Press" and the related articles applicable (the Turkish Criminal Code (CC) Article 267/1 and Article 53), is set out in the introductory section. However, the indictment does not describe the various elements of an offence under CC Article 267/1, or why it is applicable. This is a serious defect, both according to Turkish law and to international fair trial standards.

A very important requirement in CPC Article 170 is the "evidence of the offence (170/3-j). The list of evidence in the indictment is presented as follows:

Original copies of Cumhuriyet newspaper dated Nov. 06-11, 2017, plaintiff petitions, suspect's defense, the ruling against prosecution, Istanbul 7th the Court of Peace Judgeship dated Feb. 15, 2018 sundry business no. 2018/771 removal of ruling of no further prosecution, ruling of no further prosecution, criminal record, civil registry and the entire file scope.

The list of evidence does not fulfill its purpose. It is the duty of the prosecutor to connect the evidence to the alleged crime. If there is any part of the articles that can be considered a crime according to CC Article 270, these parts must be cited accurately and in the whole of the indictment. The lack of this information is a serious violation of CPC Article 170, and leaves the defendant in total ignorance of both her alleged crime and the evidence that is supposed to support the allegation. As shown below, this is also a violation of international standards for fair trial.

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

The offence under CC Article 267/1 consists of four elements:

1. accusation of another person of committing an unlawful act
2. the accusation is made in order to secure the implementation of an administrative sanction or the commencement of an investigation and prosecution
3. the accusation is made through the press or broadcasting

4. the accusation is made despite the fact that the accuser knew the person did not commit such an act

All four elements must be present. It is also a condition that the criminal act is committed intentionally.

The Indictment's descriptive part describes the alleged crime as follows:

As per Turkish Criminal Law Article 267, it is outlined that actions of an illegal accusatory nature lodged through the media, which may prompt an investigation despite prior knowledge that the action was not committed constitutes a crime, in the case at hand, the defendant who authored the series of articles published in the Cumhuriyet newspaper and website under the title "Off-Shore Brothers" referencing the source Paradise Papers, wrote that using off-shore accounts was not legitimate; that corruption and money laundering needed to be prevented; that in order to ensure tax justice and prevent global inequality, the tax laws needed to be reviewed; that tax laws were evaded by defrauding corporate tax, and taking advantage of attractive tax breaks offered for companies established in other countries, and thereby the defendant wrote about actions to steer the public into accusing the plaintiffs of these actions. Contrary to the articles, the plaintiffs owned companies that were established transparently and managed in compliance with national laws and were not included in the off-shore accounts. In conclusion, the lodging of behavior that could be characterized as tax avoidance, tax evasion or money laundering exceeded the limits of freedom of the press and it is apparent from the evidence shown above and the entire scope of the file that reasonable doubt has been established for the accused crime to have taken place, therefore a public case has been filed in response to the aforementioned finalized court ruling.

Even taking into consideration that some of the contents and structure is lost in translation, the indictment is utterly unreadable and incomprehensible. The sentences are very long. In-between all these words, it is hard to find the alleged crime. However, it seems that Ünker's alleged crime is that she

- wrote that using off-shore accounts was not legitimate
- had an opinion on the consequences of the practice of establishing companies in countries with attractive tax breaks
- by writing her opinion on these consequences, she steered the public into accusing the plaintiffs of these actions
- The accusation of behavior that could be characterized as tax avoidance, tax evasion or money laundering exceeds the limits of freedom of press
- The evidence shows that there was reasonable doubt about the crime the claimants were accused of.

As mentioned above, there is no attempt in the indictment to connect the allegations to the wording in the articles. Ünker stated in her defence (a defence that is referred to in the indictment):

that not only was there was no accusation being directed in association with the commercial activities being carried out; and that the honor and reputation of those involved was not being questioned; that no violation of any law lodged against the plaintiffs occurred when the case is examined; that the necessary questions were presented to the concerned parties some time before the articles were written; and the answers to these were also included in the articles.

Again, the language is unnecessarily complicated and hard to read, but there is no doubt about the meaning. Ünker explained that she did not accuse the claimants of illegal activities, nor did she question the honor of the claimants, the claimants got to comment on the article before it was published, and the comments from the claimants were included in the article.

The indictment does not argue against Ünker's defence, it simply ignores her arguments. The lack of referral to the parts of Ünker's articles where she allegedly accuses the claimants of illegal activity is striking, and clearly indicates that there is no such accusation to be found in the articles. Consequently, the prosecutor has also failed to show that Ünker intentionally aimed to convince the authorities to start

a criminal or administrative investigation against the claimants.

It is the prosecutor's duty to determine and justify the concrete connection between the elements of the crime, the evidence and the act. In addition to pointing out the objective elements, the prosecutor must prove that Ünker intentionally committed the criminal act regulated in Article 267/1. The indictment defines the possible accusations against the claimants, but not whether it was Ünker's intention to accuse them. Without this intention, according to the law, Ünker cannot be accused.

Eventual intention (*dolus eventualis*) is not sufficient for conviction.

The prosecutor has failed his duty in this indictment. The indictment does not fulfill the requirements according to CPC Article 170/4. Consequently, Ünker is left in total ignorance of the connection between the evidence (the articles) and the alleged crime. This makes it impossible to prepare a defence.

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

As mentioned above, the indictment included some of Ünker's defence. In fact, about one third of the descriptive part of the indictment is reserved for Ünker's defence.

One could say that the referral to Ünker's defense will raise the judges' awareness concerning issues that are favorable to Ünker. It could also give an incentive to read the articles (that are included as evidence), and thus notice that Ünker did not accuse the complaints of committing crimes.

However, the fact is there is not a shred of evidence in Ünker's favour in the indictment. This is not in line with the mandatory requirements in CPC Article 170/5. The main issue in favour of Ünker is the fact that she did not accuse the claimants of criminal activities. Regardless of this fact, the indictment states that she wrote that using an off-shore account was not legitimate.

4.1.4 Article 170/2 – Should the prosecutor prosecute?

According to Article 170/2, it is the prosecutor's duty to determine whether the collected evidence constitutes sufficient suspicion that a crime had been committed. A plain suspicion of a crime committed is not enough. The prosecutor must do the exercise of controlling if there is evidence supporting both the objective and subjective element of the criminal act described in the law. If there is not enough evidence to support sufficient suspicion, the prosecutor must decide on non-prosecution.

The Office of the Chief Prosecutor made a decision of non-prosecution upon the investigation of the case on 3 January 2018. Originally, it seems like the prosecutor found there was not sufficient evidence to support that a crime had been committed, and then followed the requirements in the law not to prosecute. The claimants objected to the non-prosecution decision and Istanbul 7th Criminal Court of Peace decided on 15 February 2018 to prosecute upon the claimants' objection.

As the analysis above shows there was not any evidence in the indictment that supports sufficient suspicion of a crime committed. It is a possibility that the prosecutor found it difficult to issue an indictment for actions that the prosecution office initially decided not to prosecute. This could, so to some extent, explain the defective indictment. However, the prosecutor must follow the law and perform his duty according to Article 170/2. It is clear that the decision to prosecute was political, and not based on the facts and the evidence of the case.

The conclusion is that the indictment does not meet the requirements set out in CPC Article 170. The main defects are the complicated and incomprehensive language and the lack of connection between the evidence and the alleged crime.

4.2 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. This indictment is 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). Turkish citizens are, therefore, directly protected, through the Constitution, by the fair trial standards enshrined in ECHR Article 6 and the freedom of speech in ECHR Article 10.

Other relevant international standards can be found in “The United Nations Guidelines on the Principles Concerning the Role of Prosecutors” and the standards set out by the International Association of Prosecutors on the principle of a fair trial regulated under EHRC.

4.2.1 ECHR Article 6 § 3

According to ECHR Article 6 § 3 a) enshrines the defendant’s the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her.

The European Court of Human Rights (ECtHR) has published a “Guide on Article 6 of the European Convention on Human Rights;”¹ and this Guide 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.

Even if the indictment is written in Ünker’s mother tongue, the indictment is very difficult to understand. It is hard to read and incomprehensible due to long and complicated sentences. It is almost difficult to decipher the accurate contents.

Furthermore, the indictment fails in connecting what exactly Ünker wrote in her articles that violates CC Article 267/1.

The incomprehensible language and the failure to connect the alleged crime to the evidence, leave the defendant in ignorance about where the crime is located in her articles. The preparation for her defense is almost impossible.

4.2.2 ECHR Article 6 § 2, Presumption of innocence

The way the indictment is set up seems to violate the presumption of innocence enshrined in ECHR Article 6 § 2. As mentioned above, the indictment fails to consider the fact that Ünker did not write in her articles that establishment of off-shore companies is illegal according to Turkish law. The indictment simply states that Ünker accused the claimants of illegal activity, and that the content of her articles exceeded the limits of the free press, without any further evaluation. Ünker is presumed guilty, even if a closer examination of the evidence would have shown that she did not commit any criminal act.

Ünker’s right according to ECHR Article 6 to a fair trial, according to ECHR Article 6, is clearly violated.

4.2.3 ECHR Article 10, Freedom of speech

Even if Turkey is one of the worst countries in the world when it comes to imprisoned journalists, the freedom of press is clearly stated in Article 28 in the Constitution.

The constitution is in line with 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.

In the Lingens judgment (July 1986), the European Court of Human Rights ruled the following: Whilst the press must not overstep the bounds set, inter alia, for the “protection of the reputation of others”, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.

ECtHR made a guide on the interpretation of the Conventions Article 10; and the following is outlined in this guideline:

According to the Court, “freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.” In this context:

the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself/herself open to close scrutiny of his/her every word and deed by both journalists and the public at large, and he/she must consequently display a greater degree of tolerance (§42).²

News articles about the contents of the so-called “Paradise Papers” were published all over the world. Pelin Ünker was the only journalist who faced criminal charges³. Freedom of expression constitutes one of the essential foundations of a democratic society. It was within Ünker’s job description as an investigative journalist to write these articles; and it is clear that her rights according to ECHR Article 10 was violated. The indictment fails to show any part of the articles that are false or of any accusatory art. The reference to the limits of freedom of press in the indictment does not have any evaluation of Ünker’s rights as a citizen and as a journalist to report news and give her opinion on the consequences of tax havens.

4.2.4 The United Nations Guidelines on the Principles Concerning the Role of Prosecutors⁴

The Article 10 to 20 in the Guidelines outline the role of the prosecutors in criminal procedures. According to Article 12, the prosecutors shall:

... 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 mentioned above, it seems like the prosecutor initially did act in accordance with both Turkish criminal procedure legislation and international standards, as the first decision on the claimants demand was a decision of non-prosecution.

After Istanbul 7th Criminal Court of Peace decided on prosecution, and the prosecution office issued an indictment, the process had not been in line with the basic standards for prosecutors set out in the UN guidelines. It is clear that the indictment is not a fair balanced document that ensures a due criminal process. As mentioned above several times, the indictment is unreadable, incomprehensible, unbalanced, and violated both the rights to fair trial and freedom of speech.

The 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 reason for the criminal prosecution of Ünker is that the subjects of her article were politicians in power in Turkey and close relatives of these politicians. As mentioned above, ECtHR stated in the Lingens judgment that the press has the task of imparting information and ideas on political issues just as on those in other areas of public interest. Clearly, the indictment is not impartial, but is in fact a result of political discrimination.

According to the 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 Ünker was a violation of the public interest in being informed about political issues. Furthermore, it was not by any means objective; and it did not pay attention to circumstances that were

favourable to Üner. As frequently mentioned above, the most obvious flaw of this indictment is the lack of connection between the alleged crime and the accurate contents of the articles.

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 systems⁵. 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 prosecutor in Istanbul initially decided on non-prosecution in a highly political case like this one, clearly shows that there was nothing to prosecute.

5: Conclusion and Recommendations

The indictment against Üner lacks any legal base. It’s a document constructed to look like it fulfills the formal requirements set out in Turkish law, and that there is sufficient suspicion of a crime committed. It does not take much analysis to detect that the crime does not exist. The most likely purpose of this indictment is to censor the press and intimidate Üner.

The first recommendation is to keep render the contents of the indictments in a simpler and more readable language. Prosecutors in many countries, Norway included, write indictments in a complicated and unfamiliar language. However, the indictment against Üner is extraordinary.

The next recommendation is simply to follow CPC Article 170 down to the last letter. If that is done, the indictment will give the defendant the necessary information.

In this particular indictment, it is crucial to connect the evidence to the alleged crime. Each element of the alleged crime must be supported by evidence. Furthermore, the indictment must show the evidence that is in favour of Üner.

The indictment should also discuss if the articles exceed the limit of the freedom of the press.

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

If the prosecutor followed these recommendations, he would find that the first decision of non-prosecution was correct.

Oslo 18 September 2020

Heidi Heggdal

Endnotes

- 1 https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf
- 2 [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf)
- 3 <https://www.icij.org/investigations/paradise-papers/turkish-journalist-sentenced-to-prison-over-paradise-papers-investigation/>
- 4 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>
- 5 [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)

06

Legal report on indictment:
Turkey v Deniz Yücel

Şerife Ceren Uysal
Published: 29 October 2020



Legal Report on Indictment: Turkey v Deniz Yücel

About the author:

Şerife Ceren Uysal is a human rights lawyer from Istanbul. During her practice in Turkey, she worked on many cases related to systemic human rights violations. She has been an executive board member of the Progressive Lawyers Association since 2012. She is also an active member of the international relations committee of the association and represents the association in several international organisations. As part of her activities at the committee, she has organized numerous fact-finding and trial observation missions together with her colleagues. Based in Vienna since December 2016, she took up the position of guest researcher at the Ludwig Boltzmann Institute for a year. She has participated in several conferences and seminars in different countries to draw attention to the situation in Turkey, particularly in relation to lawyers and human rights defenders. She was awarded the Dr. Georg Lebiszcak-Prize for Freedom of Speech in Austria. She is currently studying at the Gender Studies Master Program of the University of Vienna during which she has been focusing on gender issues within the context of human rights law.

1: Subject of the analysis

This study constitutes a probe into the legality of the indictment running to a total of three pages compiled by the Republic Deputy Chief Prosecutor Hasan Yılmaz under investigation number 2018/28713 and indictment number 2018/1395 against the suspect İlker Deniz Yücel, on 13.02.2018, within the scope of Article 170 of the Code of Criminal Procedure number 5271 and Article 6 of the European Convention on Human Rights.

2: Findings on the investigation and prosecution stages

Die Welt newspaper reporter Deniz Yücel was arrested on Feb.14, 2017 at Police Headquarters, where he had gone of his own volition to give a statement on learning that there was an investigation against him. Yücel was detained for fourteen days, maximum periods of detention having been extended under the state of emergency law. At the end of this confinement, a prosecution statement was first taken; and he was subsequently detained on Feb. 27, 2017 following interrogation procedures conducted by Istanbul Penal Court of the Peace No. 9, before which he was brought by the prosecution, who sought his detention to continue.

Over the course of the process of the delivery of a prosecution statement and interrogations, Deniz Yücel was accused of the crimes of “inciting popular hatred and enmity” and “terrorist organisation propaganda.” However, from information that found its way into the press on the dates concerned, the questions addressed to him related in their entirety to articles published in Die Welt newspaper.

Similarly – on a point frequently raised in the defences by one of Yücel’s lawyers, Veysel Ok – Yücel was arrested as part of the investigation commonly known as the Albayrak/Redhack investigation. However, it turned out that he was asked absolutely no questions about this matter during the compilation of either his police statement, prosecution statement or interrogation procedures. It is known that prior to Deniz Yücel’s case, proceedings had also been launched in Turkey on six journalists who had covered the story – three of whom were detained.¹

Deniz Yücel’s detention was not an agenda-topping issue merely in Turkey, but also in Europe. Campaigns on the issue were organised by many press organisations. Featured among pronouncements made by President Erdoğan regarding Yücel’s detention and the debate raging over his extradition to

Germany was the statement, “It will not happen in any way. Never as long as I am in this office. We are in possession of footage, and everything. This (individual) is fully a spy and a terrorist.”² Statements of this kind with prosecution still pending were greeted with concern by many press organisations—particularly in terms of the principles of the presumption of innocence and independence of the judiciary.

Deniz Yücel reportedly spent ten months of the one-year long detention in solitary confinement. Moreover, Deniz Yücel stated in an interview he gave following his release that he underwent torture for three days.³

The indictment against Deniz Yücel was issued on Feb. 13, 2018, i.e. a full year from the date on which he was arrested. Following the acceptance of the indictment by Istanbul High Penal Court No 32, Deniz Yücel was released along with the court’s scheduling order.

The one year it took to draft the indictment was a source of frequent criticism. Making a statement in response to the criticism, Minister Çavuşoğlu averred: “(...) However, we could only encourage the judiciary to speed up the process. And we have in fact done this. What we are told is the situation is complex and the investigation is drawn out. Hence the process extracts a toll. This is not a personal thing.”⁴

Deniz Yücel’s trial was ushered in with the first hearing of June 28, 2018. Istanbul High Penal Court No 32 announcing its ruling in the nine-session trial on July 16, 2020.

Although Yücel was acquitted of the offences of inciting popular hatred and enmity and making Gülenist Organisation/PDY propaganda, he was handed down a jail term for making PKK/KCK propaganda. A criminal complaint was also filed by the court against Yücel for the crimes of defamation of the President and publicly insulting the State of the Republic of Turkey.

Months prior to the passing of judgement by the local jurisdiction court, a ruling had been passed on May 28, 2019 on application number 2017/16589 to the Constitutional Court that there had been a violation of the right to personal liberty and security due to the unlawfulness of the detention and, due to detention, a violation of the freedom of expression and the press had been enacted.

3: Analysis of the indictment

3.1 Findings on the general structure and content of the indictment

- a. The indictment (based on the electronic format) consists of around three pages. The imputed offences are claimed to be of successive acts of terrorist organisation propaganda (twice) and incitement of popular hatred and enmity. The nature of the evidence given in the indictment, the lack of hearing of witnesses during the investigation and the absence from the indictment of the original and translated content of the cited written content ascertained to be Yücel’s, as well as the mere three pages to which the ensuing indictment comprise, raise question marks as to why the indictment could not have been drafted sooner than within one year. Even if combined consideration is given to nothing but the extent of the indictment, as testified to by the number of its pages and the time Yücel underwent prosecution under detention, a practice is seemingly evident that is contrary to the principle that detention has been used as a measure and the right to personal liberty and security has thereby been violated.
- b. On the first page of the indictment, after having made the political assessments that the terrorist organisations active in Turkey had common aims and that each one of them served the goal of dividing the State of the Republic of Turkey, it is stated that there are court rulings in which all the organisations listed successively in the indictment are terrorist organisations. Subsequently, such expressions are employed as if they were “in collaboration” or “virtually in collaboration;” and it was summarily concluded that these organisations were in unity in terms of aims. As such, absolutely no connection is seen to have been established between the suspect and the charges laid against the suspect through the written content of the first page of the indictment.

- c. It was stated at the end of this first page that the investigation into Deniz Yücel had been severed from the investigation being conducted jointly into the other suspects, yet no further mention was made of this point within the indictment. It is also public knowledge, that prior to severance, the matter under investigation in which Yücel was included and that also basically constituted grounds for the arrest was the procurement by Redhack through the hacking of emails relating to Berat Albayrak⁵. The indictment makes no reference to this matter. Furthermore, absolutely no connection was made in the overall contents of the indictment between this first investigation and the charges contained in the indictment.
- d. The second page moved on to the allegations against Deniz Yücel. Having stated that a portion of Yücel's articles written in German had been translated into Turkish as part of the investigation, the entire page is devoted to a summary of the contents of Deniz Yücel's articles or reports having seven different dates and with one undated.

Two points merit mention in this regard.

First, absolutely no information is provided in the indictment as to the translation procedure. Moreover, neither the original articles nor the translations of the articles are included in the indictment. It is consequently impossible to determine the accuracy of the translations to the original texts within the indictment. It was frequently averred during the trial that mistakes sufficient to corrupt the meaning were made in the translations in question.⁶

As to the second important point, this relates to the dates, subject matter and nature of the reports qualified in the indictment as being basic evidence. The following are from this section of the indictment:

There is reference to an article penned by Yücel dated June 19, 2016. No section of the article is included. It is indicated that statements emanating from various people who are PKK/KCK members are contained within the article and comments having the nature of praise were made with reference to top-level echelons of the organisation in question by means of such expressions devoted to these people as "a high-ranking PKK commander-in-chief." It emerged in the course of the trial that there had been a translation error in this regard. No link was made between the cited report and organisation propaganda or the crime of inciting popular hatred and enmity. For, as is known, the use of a qualifying adjective on its own does not constitute the offence of organisation propaganda, nor does such usage fall within the scope of the offence of praising crime and criminals under the Turkish Criminal Code. Consequently, no causal link appears to have been established between this report and the charges in question.

It was subsequently stated that administrative and military measures taken by Turkey were portrayed in Yücel's article (or articles since this is unfathomable from this portion of the indictment) as the destruction of graves; and it was thereby wished to portray the operations the state was waging against the said organisation as unlawful. It is incomprehensible from the linguistic structure of the indictment, whether reference is made through the comments here to a single article or more than one article, or whether these comments pertain to the said article dated June 19, 2016 or an article from another date. It is not apparent here, either, which crime the act imputed to Deniz Yücel is subsumed under because it appears not only that the contents summarised here have not been linked to the charges, but that the contents or, put differently, act does not involve the material elements of either offence on which the indictment is founded. It is also known that nowhere within Turkish Criminal Code legislation is there a crime defined as portraying any operation the state conducts as being unlawful. The principle of legality in crime and punishment is a universal principle of penal law; and this lends itself to the conclusion that the contents of the section in question of the indictment are not thereby legally compliant.

A further report to which reference is made dated July 18, 2016 is declared in the contents of the indictment, apparently showing that Yücel spoke in the article in question confidentially about who was responsible for the coup attempt staged on July 15, 2016. The indictment alleges that Yücel engaged in Gülenist Organisation/PYD propaganda by penning this article. However, even if it is apparent from sample sentences forming part of the contents of the

article that Yücel made various observations regarding the coup attempt, no reference was made in the indictment to his having penned a positive sentence about the coup attempt or a force and violence-inciting pronouncement.

Yet another report, dated July 24, 2016, alleges that Yücel, by using the expression “ethnic cleansing” with reference to operations conducted against the PKK/KCK by Turkey, conducted propaganda on behalf of the said organisation. However, even if the expression “ethnic cleansing” was used in inverted commas, the sentence and the context in which it was used does not appear in the indictment. Even if this expression can be assumed to have been treated as such, in inverted commas, it does not involve the material elements of the crime expressly provided for under Article 7/2 of the Anti-Terrorism Law. No palpable explanation was given as to how the suspect’s intent was to showcase a resort to violence, force or threat, as imputed from the expression “ethnic cleansing” and how the act was construed as such by the prosecution.

Subsequently, references were made to an article by Yücel dated from Nov 06, 2016. Initial mention was made here of a photograph used as the background to the article upon publication. It was then stated that in the contents of this article, Yücel made pronouncements from within the Gülenist Organisation/PDY’s discourse and ideology and thereby conducted the said organisation’s propaganda with the intention of creating the impression that the PKK/KCK organisation was a political structure by publishing the interview he made with the individual named Cemil Bayık; and it was opined that the offence of conducting propaganda was thereby committed. The analysis made by the prosecution in this section once more speaks to it having violated the principle of legality in crime and punishment and, concurrently, not subjecting favourable evidence to analysis because there exists no crime stipulated in either the Turkish Criminal Code or Anti-Terrorism Law regarding the classification of any organisation – even if recognised as a terrorist organisation in a judicial system – as a political structure. At the same time, when even the prosecution indicated in the indictment that an interview had been made with the said individual named Cemil Bayık, the failure to determine that this act had been carried out under the aegis of journalism as a profession puts the objectivity of the indictment into question.

Moving on, reference was made to an article by Yücel dated from Dec 12, 2016. In this, it was stated that in this particular article Yücel once more committed the crime of conducting PKK/ KCK propaganda through coverage of the death of Hacer Aslan, who lost her life in Cizre. Here yet again no reference was made by the prosecution to any pronouncement whatsoever on the part of the suspect in the contents of this report or article that amounted to inciting violence, force and threat.

It was then stated that Yücel related a joke about Kurds and Turks in an article of his dated Oct 26, 2016; and part of the joke was included in the indictment. However, the context and positioning within the text as a whole of this joke cannot be ascertained since the entire article was once more not included in the indictment. Given the absence of the introduction, discussion and concluding sections of the article in which the joke in question was included, it is impossible to make a self-styled analysis by passing on a joke.

Finally, making reference to an article by Yücel dated Oct 27, 2016, he stands accused of committing the crime of inciting popular hatred and enmity with the phrase “genocide committed against the Armenians” by way of concluding remarks:

Reference was apparently made to seven different dated articles entirely from 2016; and reference was made to the contents of a report of indeterminate date.

Even though it is evident from the content of the indictment that Deniz Yücel is known to be a journalist, no explanation appears as to the reasons whereby the reports, articles or interviews in question are not construed as falling under press freedom. This state of affairs creates the impression that evidence favourable to the suspect was not taken into account and, additionally, that from among the commentary on which the indictment was founded, purely that unfavourable interpretations were selected and used.

At this point, there is another issue that merits special mention. The provision in Clause 1 of Article 26 headed “Prescriptive Periods” of the Press Law is known to take the following form:

Penal proceedings in respect of offences committed by means of printed works or otherwise specified in this Law must by way of procedural requirement be brought up within four months in the case of daily publications and six months in the case of other printed works.

The articles, interviews or reports which are listed above and form virtually the sole foundation of the indictment are in their entirety from 2016; and on both the date of the indictment of Feb.13, 2018 and the date upon which Yücel was detained, the cited prescriptive period had expired in respect of the entirety of these acts. Even if debate rages in the literature over the simultaneous publication on the internet of similar contents, what is certain is that two different prescriptive periods cannot run in respect of the same and single act. The moment content is published on a website, the act is committed; and the pertinent prescriptive period will start to run. Furthermore, it is also manifest that, if the same content is printed, the periods in Article 26 of the Press Law must be invoked in such cases.

Consequently, by virtue of procedural law, the drafting of the indictment against Deniz Yücel is devoid of legal foundation by virtue of statute of limitation from its very outset.

With the exception of the text of one joke and two sentences questioning who was responsible for the coup attempt, absolutely no citations are made from the contents of these reports numbering eight in total and in which phrases alone were transported into the indictment. The impression is created in such a way that words were cherry picked given the absence of the original texts or the translations of these texts from the indictment.

The Constitutional Court ruling issued in 2014 in this respect points to a fundamental source with reference to indictment drafting processes. It is expressly stipulated in the relevant Constitutional Court case law that a text, provided as it does not, by leaving out certain sections but adding the preface “examined as a whole that: “praising violence or inciting and encouraging people to adopt terrorist methods or, put differently, resort to violence and hatred, extraction of revenge or armed resistance” is to be construed as freedom of expression⁷. Moreover, the Constitutional Court has decreed the penalisation of the comments: “What the nation states that share Kurdistan are waging is a war of genocide”⁸ “As opposed to the peoples of other parts of the world, having endured all manner of physical and cultural genocide, the existence, history and right to exist of the Kurds has been denied”⁹ and “regardless of whether the assaults take the form of assimilation, denial and cultural and physical genocide or are through violent means or ideologically political institutions, the society that undergoes assault will defend its innate rights, that is, the fundamental rights that give rise to its existence and organise itself on this axis of defence”¹⁰ constitutes a violation of freedom of expression.

There is a compelling expectation for indictments to be drafted in accordance with these criteria since the prosecution also has a duty to protect basic rights and freedoms; however, in addition to this, there can be no expectation for the load on the judiciary to lighten wherever the texts of indictments fail to dwell on the material elements of crimes.

As has been stated above, it must be noted that linguistic considerations come to the fore under circumstances in which all charges are based on articles, reports and interviews written by the suspect in German. Silence over the translation procedure and oversight of the translation procedure speaks further to an absence in terms of the indictment.

Finally, the prescriptive period notwithstanding, the date of 2016 carried by all the reports also exposes a huge contradiction relating to the indictment because the crime date has been specified in the indictment to be 2017.

- e. On the heels of the reports, it was stated that the HTSs and call records were counted among the evidence against Yücel and that within these records were calls made to 59 people with police records. However, the people in question were not listed in the indictment, nor was there any commentary included as to the contents of these calls. Even though the suspect was

known to be a journalist, it is not discernible from the text of the indictment if checks were carried out as to whether the calls in question were made as part of professional activity. Nor can it be discerned from the indictment whether a comparison was made between the call record dates and the dates of the interviews or articles contained in newspapers.

- f. In the final section of the indictment, it was stated that Yücel's articles were analysed in conjunction with the records in question; and a determination was made that the suspect wrote articles informed by the discourse and ideologies of the Gülenist Organisation/PDY and PKK/KCK organisations. Moreover, his trial was sought for the crimes of conducting propaganda for terrorist organisations and inciting popular hatred and enmity.
- g. The contents of the indictment additionally pass over Deniz Yücel's statement at the Police Headquarters, his statement at the prosecution and his defence before
- h. the interrogating bench. The absence from the indictment of the evidence the suspect adduced at the investigation stage (if any), or even his defence casts doubt as to whether the statements and evidence in question were subject to examination at all.

Given the absence of any intermediary headings in the indictment, one cannot speak of the existence of a distinct section in which the prosecution examines the evidence relating to the suspect. In summary, the following comments were included by the prosecution to serve as a conclusion:

As ascertained from the contents of the evidence gathered that the suspect İlker Deniz Yücel successively committed the offences of propagandising for the PKK/KCK armed terrorist organisation and the FETÖ/PDY armed terrorist organization, and similarly, that the offences of publicly inciting one segment of certain part of public to hatred and enmity, ... for the indictment drafted against the suspect İlker Deniz Yücel to be accepted and for him to be tried and sentenced for his actions pursuant to the cited relevant statute.

3.2 : Examination of the indictment within the scope of Article 170 of the Turkish code of criminal procedure:

Article 170 of the Code of Criminal Procedure No. 5271 headed "Bringing Publicly Prosecuted Proceedings" contains basic provisions on the requirements for and components of indictments. The assessment in this respect will initially be conducted as to whether the indictment against Yücel's alleged crimes meets these components.

- a. Pursuant to Article 170 of the Code of Criminal Procedure, every indictment must include particulars of the suspect's identity and counsel. This particular indictment conforms with the said formal requirement.
- b. It is also a requirement of Article 170 of the Code of Criminal Procedure for the identity of murdered persons, victims or those harmed by the crime, that the attorney or legal representative of victims or those harmed by the crime, the identity of the person who made the report if there is no objection to their being revealed, the identity of the person who made the complaint and the date the complaint was made to find inclusion in the indictment. Upon examination, it should show the charges to be the conducting of popular hatred and enmity and making of terrorist organisation propaganda and the imputed crime is not one subject to complaint; and that it is evident from the contents of the indictment that the investigation was also conducted in the name of the public. At the same time, there is mention of a report record among the evidence, but the identity of the person who made the report and the contents of the report, which require being specified in accordance with this particular article, is not contained in the indictment. Had it been deemed objectionable for the person who made the report to be revealed, this point obviously needed to be set out in the indictment. However, no comment or discussion is made in the indictment on this point, either.
- c. Pursuant to Article 170 of the Code of Criminal Procedure, the charges laid against the suspect

and the statutory articles whose application is warranted must be expressly laid down within the indictment. Mention is seen to be made within the indictment in question that the imputed crimes are inciting popular hatred and enmity and constitute a form of terrorist organisation propaganda. An examination of the relevant statutory articles reveals that the relevant statute and imputed crimes have been cited consistently with reference made to 216/1 of the Turkish Criminal Code in connection with the crime of inciting popular hatred and enmity and reference made to Article 7/2 of the Anti-Terrorism Law in connection with making terrorist organisation propaganda and the indictment appears to display absolutely no deficiency in this regard.

- d. As per the provision of Article 170 of the Code of Criminal Procedure, in indictments as a whole, the date, place and time frame of the commission of the imputed crime must find inclusion within the indictment. It is seen in the indictment under scrutiny that the crime date is stipulated to have occurred in 2017, while the place of the crime is stipulated to have been Istanbul. This situation renders the charges in the indictment abstract and calls its foundations into question.

In the first place, the evidence listed by the prosecution consists in its entirety of articles penned in Germany, but these articles are not included by way of evidence in the file. Then, a second important point is that these articles appear from the indictment to date in their entirety from before 2017. Not a single report dated 2017 features in the indictment.

Reference is made once to 2017 in the entire contents of the indictment. The prosecution has specified that the HTS and call records were dated as having occurred between the dates of 2014 and 2017. However, the elements of both imputed crimes preclude them from being committed in the course of phone calls. This means that, while the crime date in the indictment is 2017, a reference has not been made to a single act of the suspect dating from 2017.

The offence of terrorist organisation propaganda is a typified crime. To lay the charge of propagandising specification must absolutely be made as to the date and place of the committing of the crime and the means used. As such, if the crime date specified in the indictment is deemed to relate to the crime of propagandising – since this clearly means that the suspect can only be tried for an act he/she committed on the specified date in a trial brought under this indictment, – none of the reports contained in the file should be prosecutable.

The specification of an entire year such as 2017 with respect to the crime of inciting popular hatred by itself contradicts one of the most basic elements of this crime. For, according to article 216/1 of the Turkish Criminal Code regulating the offence in question, there must be clear and present danger for the offence to be constituted. Determination is hereby required of a danger that evokes the expression “clear and present.” Furthermore, at the same time, this danger needs to be certain to cause damage, and do so imminently, if no precaution is taken. Just as no act is specified in the indictment apart from writing articles and phone calls, the specified acts have been determined as not to fall within the scope of this article. Even if there was a threat that fell within the said scope in 2017, the indictment is also silent on this.

The specification of an entire year by way of crime date and the way the entirety of the evidence upon which the charges are deemed to rest as per the final paragraph relates not to this year but to other years obfuscate the accusations made against the suspect in the context of the entire indictment. There is a high likelihood of this situation giving rise to a violation of the right of defence.

- e. A further component sought in indictments under Article 170/3 of the Code of Criminal Procedure is for the evidence of the crime to be expressly set out in the indictment. The following documents are seen to be listed in the evidence section of the indictment under scrutiny:

Report record

The making of a reference to a report within an indictment may not affect the substance of the indictment. However, knowing the identity of the maker of the report constitutes a part of the right of defence. The express provision in this regard has been contravened.

Search-Seizure and Arrest Order Records

The absence of the contents of these documents points to another deficiency related to this case. In addition to its failure to cite these documents, it also excludes from the indictment the circumstances under which Yücel was subjected to arrest procedures and subsequently detained, i.e. the information that he went to the police of his own volition to give a statement. It is also manifested that, under the circumstances in which it was determined that no crime elements were detected in the seizure and search documents, this consideration constitutes favourable evidence. No finding to this effect is contained in the indictment, either.

Expert reports [No expert report is referred to in the indictment.]

HTS Records [Reference is made to such records in the indictment.]

Reference was made to such records in the indictment and the number of people having police records was also specified. However, it is impossible to access any information at all from the indictment as to the frequency and contents of the calls. Particularly, bearing in mind that the suspect is a journalist, the failure to specify which of the contents of these calls were professionally related begs the question as to whether favourable evidence was identified.

The suspect's defence and interrogation records

Not a single word in this regard is included in the indictment. This means that it is indiscernible from the indictment as to whether the prosecution took account of the suspect's defence and the evidence he adduced or requested be gathered.

Other evidence:

The other evidence listed in this section consists fully of documents relating to the suspect's identification particulars along with a number of records and writs; a portion of these documents [e.g. writs] amount to paperwork involved in judicial procedure.

In conclusion, even if the evidence appears to have been listed in a formal sense, the newspaper articles and interviews underpinning the entire indictment do not find inclusion within the evidence. It may well be considered that these documents be encapsulated by the expression "the entire contents of the file," but the purpose of the provision of Article 170/3 of the Code of Criminal Procedure is to ensure not just that the evidence is set out individually, but that its contents are articulated with sufficient clarity to enable the suspect to understand and conduct his/her defence. In such terms, neither the initial suspicion and evidence supporting the suspicion that gave rise to the launching of the investigation nor the newspaper articles and reports along with the translations of the reports in question were listed among the evidence as other fundamental prosecution evidence apart from the phone records. Additionally, there is a portion of the evidence whose very contents cannot be ascertained. Consequently, even if the evidence appears in formal terms to have been listed, the requirements for specifying evidence of Article 170/3 of the Code of Criminal Procedure appear not to have been fulfilled.

- f. Article 170/3 of the Code of Criminal Procedure also contains a requirement for inclusion within the indictment as to whether the suspect was detained and, if so, the arrest and detention dates and their duration must be added. The indictment under scrutiny contains the relevant documents.
- g. Article 170/4 of the Code of Criminal Procedure lays down one of the most fundamentally important provisions governing indictments. As per the said provision, an indictment must set out the events constituting the imputed crime such that they are linked with the available evidence. No examination or assessment satisfying the requirement of this provision was seen to be made in the contents of the indictment under scrutiny.

In the section in which the articles are summarised one by one along with their dates, the prosecution essentially appears to have adopted a method of drafting the indictment along

the lines of “terrorist propaganda was determined to have been made in the contents of the article XX, dated XX, by means of the wording XX.” However, pronouncing any act by a person to constitute a crime does not amount to establishing the connection of causality required by statute. The statute is looking not for criticism of the crime in deed but for evidentiary support of the link between the deed and the crime. The current indictment subjects the suspect’s articles that constitute part of his professional activities to interpretation and criticizes them as a crime.

Naturally enough, each indictment calls for both a different degree of attention and requires various kinds of details to satisfy this requirement. However, it can be argued that there are certain minimum criteria in this regard. For example, there are known to be three fundamental elements in connection with the offence of conducting terrorist organisation propaganda and these three elements must be integrated in their entirety with the offence. The first is for the act to serve as propaganda and the second for the subject matter to deal with a terrorist organisation. As to the third, and most importantly, this refers to the terrorist propaganda to constitute a nature that may incite methods of force, violence or threats. Even if within the indictment, the prosecution has qualified certain statements as propaganda relating to a specific organisation, no comment or justification has been made as to how these statements constitute an incitement to force, violence or threats.

As to the material object of the offence of inciting popular hatred and enmity, this consists of various segments of the populace who exhibit different traits in terms of social class, race, religion, sect or region, and who are made the butt of incitement and exposed to incitement. However, along with this, in the contents of the article, a definition is provided whereby incitement posing a clear and present danger to public safety is a necessary condition for the constitution of the offence. In such terms, this does not mean that the contents of the articles the suspect penned and the phrases he selected in the process on their own invite adequate suspicion of this offence having been committed. The prosecution must establish the facts that the act of writing in question posed such a clear and present danger and that there was a high likelihood of harm occurring if measures were not taken. It is not apparent from this particular indictment as to which statement by the suspect caused a clear and present danger of this kind because a charge on this count is laid within the indictment despite no contention that a danger of such kind arose.

According to the justification text for the amendment made to Article 174 of the Code of Criminal Procedure number 5271, the legislator’s aim is for the evidence informing the conclusion reached in the indictment to be discernible and for sufficient suspicion of guilt to be adduced without fail rather than an abstract allegation. It is received wisdom that the “prosecution must lay concrete charges against the suspect and suspects. This is a natural consequence of the indictment as the document that launches the proceedings”.¹¹ In view of this, the indictment under scrutiny has visibly failed to substantiate the offence and satisfy the requirements of Article 170/4 of the Code of Criminal Procedure.

- h. Express provision is made within the ambit of Article 170/5 of the Code of Criminal Procedure whereby not only matters to the detriment of the suspect, but also matters favourable to him/her must be put forward in the concluding section of the indictment. Newspaper reports or articles bearing his signature constitute the entirety of the evidence against the suspect. Although the prosecution has not included information in the indictment about the publication, issue, etc. in which the articles in question were published, it can be unarguably ascertained from the indictment in its entirety that the suspect is a journalist. As such, if acts such as the composition of articles and conducting of interviews, which are a necessary component of the suspect’s profession, are deemed and adduced to be culpable acts, and if not a single other act has been asserted in connection with the imputed charges, then it is evident that consideration must absolutely be given to the suspect’s profession. Here, the suspect’s profession indisputably amounts to favourable evidence. The non-inclusion of this point in the indictment places the legality of the indictment in question within the context of Article 170/5 of the Code of Criminal Procedure.
- i. Inspection of the provision of Article 170/6 of the Code of Criminal Procedure reveals that

the requirement has been imposed for the sentence sought from among the penalties and security measures sanctioned in the relevant statute for the crime committed to be set out expressly in the concluding section of the indictment. The indictment under scrutiny also contains deficiencies in this regard. The prosecution calls for punishment in general terms but does not specify the penalties that may be envisaged for the imputed crimes and, likewise, with reference to security measures directly cites the general provision without fleshing out which security measure or measures are required. As such, the indictment in question has been determined to fall far short of satisfying the requirements of Article 170/6 of the Code of Criminal Procedure.

- j. Finally, the second paragraph of Article 170 of the Code of Criminal Procedure warrants consideration with reference to all the above discussion. The provision in question mandates the existence of “sufficient suspicion” for the bringing of publicly prosecuted proceedings. It has been stated that this provision “has emphasised the relationship between suspicion of crime and the notion of evidence, and the commission of a crime must be supported with evidence.” Indeed, “if, according to the evidence at hand, the suspect is more likely to be convicted than acquitted in the prospective trial, sufficient suspicion can be spoken of”.¹² However, it has been seen in the indictment in question that, in connection with organisational propaganda, selected statements were merely included without contextual examination, and the most fundamental element of the offence, i.e. the force, violence and threat element, was not supported with evidence, either. As to the offence of inciting popular hatred and enmity, in reiteration of what has been stated above, the existence of a clear and present danger has not been posited in this respect. The upshot of this is that the existence of sufficient suspicion cannot be said to have been expressed in this particular indictment, either.

3.3. Examination of the indictment within the context of international law

Examination of the indictment in question within the context of international law must be conducted with reference to the principle of fair trial as regulated in Article 6 of the European Convention on Human Rights (ECHR) and the United Nations Guidelines on the Role of Prosecutors.

- a. Examination of the provision of Article 6/1 of the European Convention on Human Rights clearly reveals that the holding of individuals’ trials within a reasonable time is subsumed within the right to a fair trial¹³. As such, the drafting of the indictment following the passage of one year from İlker Deniz Yücel’s detention and, moreover, the mere two and a half pages to which the text ran, and the holding of the first hearing sixteen months after the arrest date creates the impression that the right to a fair trial in the sense given in Article 6/1 of the ECHR was violated from the very outset.
- b. Article 6/3 of the ECHR specifies the minimum rights of those charged with a crime. Everyone in this situation must ‘be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her.’ As mentioned in the above item, the one year the current indictment took to be drafted means that Yücel had no knowledge of the concrete charges for that whole period. This situation at the same time poses the risk of a violation under Article 5/3 of the ECHR because a reasonable time cannot be said to have been given.

Additionally, for reasons discussed in detail in the section in which the indictment was analysed in the context of Article 170 of the Code of Criminal Procedure, such as both the failure for the offences to be linked to concrete events and for a connection to be established in this sense between acts whose place and time were specified and the evidence, and for penalties that may be envisaged by way of statutory sanctions for the charges to be stipulated in the concluding section of the indictment, as well as for the contents of certain of the documents listed in the evidence section to find coherent inclusion in the text of the indictment, it is inconceivable that Yücel could have reached a detailed understanding of the scope and nature of the charges against him. While the language of the indictment is a language the suspect speaks and understands, the failure of the contents to satisfy the statutorily stipulated requirements raises the prospect of a possible violation of 6/3.1 of the ECHR.

- c. The contents of the articles, reports and interviews which apparently form the basic foundation of the indictment merit attention in a separate item in relation to the practice of the European Court of Human Rights (ECtHR). In particular, the manner the cited contents in question finds inclusion in the indictment may give rise to a fundamental breach of the law because no opportunity is furnished for the overall context of any of the articles to be ascertained. There is no possibility of checking the contents apart from the phrases selected from the texts by the prosecution. ECtHR case law, in this respect, offers significant clarity. For example, in the Ceylan/Turkey ruling, the ECtHR deemed penalisation for such statements as “We must oppose murder and state terror and achieve unity using all the strength of organisation and cooperation” to be a freedom of speech violation. It ruled that Turkey had violated freedom of speech in that the writer’s article, which “despite its virulence, does not encourage the use of violence or armed resistance or insurrection.”¹⁴ In another of its judgments in a dispute condemning the harsh tone of a press statement in which the state was accused of engaging in “burning villages,” “murder and extrajudicial killings” and “arbitrary arrests,” it stressed that the signatories of the press statement had brought the events to attention for the public good and found the statement in question neither to have encouraged popular violence and insurrection nor to have targeted the military, ruling that, on the contrary, that the duty of alerting the public to concrete events had been fulfilled and that penalization constituted a violation of basic rights¹⁵. Once more stressing that the applicant who criticised government policy in the province of Tunceli by using such phrases as, “war machine,” “burning villages,” “genocide,” “murder,” “torture,” “duress” and “fire of retribution” had called for the waging of “peace and freedom campaigns,” the ECtHR concluded that the penalisation of these expressions was in violation of the freedom of speech¹⁶. In yet another judgement, it found expressions the applicant had used such as “the war in Turkey’s south-east” or “the state’s murder” posed no threat to national security, territorial integrity, and public safety, and concluded there had been a violation of the freedom of speech¹⁷.
- d. It was also established that, along with Yücel’s right to freedom during his unjust detention, his right to the presumption of innocence had been violated by means of press statements made by various political authorities including the President while the trial was pending, and to conclude from all the analyses in this report that the prosecution may have abused its power of discretion with ill-intent and a clear aim of suppressing free expression, and that the indictment was based on an interpretation that extended beyond the concrete facts. Given that no reasonable justification was specified for any of the crimes imputed to Yücel, it must be considered highly likely that Article 18 of the ECHR was violated.
- e. Another matter which must in turn be addressed concerns the contention in the indictment that propaganda was made concurrently for two organisations, namely the PKK/KCK and Gülenist Organisation/PDY, yet in the realm of political science, these cannot be conflated in terms of ideology and discourse. Even if the prosecution endeavours to justify this position by pronouncing there to be a concrete unity of aims involving both organisations, it fails to draw a link between the suspect and this abstract pronouncement. The contention that the suspect successively made propaganda concurrently for two organisations that cannot be conflated in ideological terms must be absolutely accounted for within a basic logical chain. Otherwise, the indictment will remain within the bounds of abstract conceptualisation and the making of contentions like this in the absence of reasons is suggestive of disregard for the matter of sufficient suspicion, which is a precondition for the drafting of an indictment.
- f. Finally, there is a need to examine holistically the United Nations Guidelines on the Role of Prosecutors. The provisions from Article 10 to Article 20 in the said guidelines delineating the role of prosecutors in criminal proceedings are of special importance. According to the said Guidelines, prosecutors “shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations.”¹⁸ It will be noted that supervision over the legality of investigations has been stipulated to be the prosecuting office’s judicial role and duty. As such, the indictment prosecutor must be considered directly responsible for the legality of an indictment and the legality of the evidence cited in the indictment.

- g. It is stated in Article 12 of the same Guidelines that “Prosecutors shall, 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 has been stressed frequently in this report, the passage of one year between the suspect’s detention and the date on which the indictment was compiled speaks to an inability to meet the expectation for the prosecution to act expeditiously. When it comes to contributing to ensuring due process and the smooth functioning of the criminal justice system, what is to be expected of a prosecutor at the investigation stage is for them to be alert to the legality of evidence, attend to the matter of sufficient suspicion, and give consideration to favourable evidence. The deficiencies detected in these regards have been listed in the section analysing the indictment within the scope of the Code of Criminal Procedure.
- h. Reference is also made in Article 18 of the Guidelines regarding the need for prosecutors to discontinue investigations where charges are unfounded. Satisfaction of this provision once more requires sufficient suspicion linking the act and perpetrator, and this being supported with evidence. The deficiencies detected in this respect have also been listed in the section analysing the indictment within the scope of the Code of Criminal Procedure.

4: Conclusion

As has been expounded on in detail above, the indictment under scrutiny contains virtually none of the attributes that it is required to possess under either domestic legal regulations or international legislation. Especially when consideration is given to the prescriptive period provision, this indictment should never have been drafted.

Organization under intermediary headings is virtually absent from the indictment. There is no reliance on concrete evidence, especially with regard to the charges laid against the suspect. Reference is simply made to phrases from newspaper reports and articles by the suspect; and not only has the requisite contextual and holistic examination not been made, but a practice has been followed that lends itself to inculpatory interpretation through cherry picking. By referring to two organisations which are contradictory in ideological terms throughout this process, the basic logical consistency required in the indictment was also found lacking.

Similarly, with reference to the charge of inciting popular hatred and enmity, absolutely no effort appears to have been expended by the prosecution to demonstrate the existence of a clear and present danger.

Lack of organisation under intermediary headings leaves those who examine and read the indictment scrambling to find the evidence and acts. A quality indictment is an indictment that clearly lays out the acts and evidence within, links them to one another and at the same time carries logical consistency.

However, in a manner that brings into question of its quality in all the sections stated above, the indictment’s biggest deficiency as it stands is the absence of any illegal actions. Which statutory articles the suspect stands charged under are discernible from the indictment, but it cannot be ascertained as to which acts apart from those required by the nature of journalistic activities (such as conducting interviews or writing articles) have given rise to these charges. The source of the sufficient suspicion that leads to journalistic activities being qualified as organisational propaganda also defies comprehension. Clarity is known to have been attained in recent years as to implementation of Article 7/2 of the Anti-Terrorism Law; and there must also be a call to actions such as force and violence for propaganda activity to be constituted. The suspect’s acts are neither specified, nor has any finding been detected in the indictment whereby the suspect called for force and violence.

Examination of this indictment has unearthed various points that must be dwelled on under all circumstances to facilitate the surmounting of similar problems in practice, and in this sense, the surmounting of similar problems in investigations, which are of crucial importance in terms of accessing justice. As has also been noted in previous reports, it should initially be made mandatory for prosecutors to satisfy the requirements of Article 170 of the Code of Criminal Procedure and, to act as an incentive in this regard, indictments should be integrated into a compulsory format in each case like

the Constitutional Court individual application forms. Secondly, first- instance court judges should for their part absolutely be encouraged to return indictments. The mechanism of returning indictments will both reduce the judicial load and will serve a supervisory function with a view to prosecuting offices issuing indictments in a higher quality and more meticulous manner. A further point that absolutely warrants mention in connection with this indictment is the responsibility incumbent on the executive to avoid infringement of the principle of the presumption of innocence. Comments on the merits made by people who are permanent fixtures in the executive while a case's investigation and prosecution stages are pending augment the impression that the progress of the indictment, or in other words, of judicial activity, is under the influence of the executive.

Endnotes

- 1 Veysel Ok's defence on the merits can be accessed at the following URL: https://pressinarrest.s3.amazonaws.com/documents/deniz_yucel_avukat%C4%B1_veysel_ok_esas_savunma.pdf
- 2 See: <https://www.dw.com/tr/erdo%C4%9Fan-deniz-y%C3%BCcel-iade-edilmeyecek/a-38425494>
- 3 For details see: <https://www.dw.com/tr/gazeteci-deniz-y%C3%BCcelin-savunma-metni/a-48683409>
- 4 See: <https://www.dw.com/tr/%C3%A7avu%C5%9Fo%C4%9Flundan-deniz-y%C3%BCcel-a%C3%A7%C4%B1klamas%C4%B1/a-41988228>
- 5 For details, see: <https://tr.sputniknews.com/columnists/201703011027446120-die-welt-muhabiri-deniz-yucel-redhack/>
- 6 For details, see: <https://artigercek.com/haberler/deniz-yucel-hakkindaki-suclamalara-yanit-verdi>
- 7 Constitutional Court, Fatih Taş Application, Application Number: 2013/1461, Ruling Date: 12/11/2014, § 106; Mehmet Ali Aydınlar Application, Application Number: 2013/9343, Ruling Date: 4/6/2015, § 82.
- 8 Constitutional Court, Abdullah Öcalan application, Application Number: 2013/409, Ruling Date: 25/6/2014
- 9 Constitutional Court, İbrahim Bilmez application, Application Number: 2013/434, Ruling Date: 26/2/2015
- 10 Constitutional Court, BejderRoAmed application, Application Number: 2013/7363, Ruling Date: 16/04/2015
- 11 Özkan Gültekin, The Indictment and Return of the Indictment in the Doctrine and Practice, Seçkin Publishing House, 2011, p.99
- 12 Nur Centel/Hamide Zafer, Criminal Procedural Law, Beta Publishing House, 2008, p.441
- 13 Article 6/1 [first sentence] of the European Convention on Human Rights: In the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
- 14 ECtHR, Ceylan/Turkey, 23556/94, 08 July 1999.
- 15 ECtHR, Karakoç and others/ Turkey, 27692/95 28138/95 28498/95, 15 October 2002.
- 16 ECtHR, Mehmet Hatip Dicle/Turkey, 9858/04, 15 October 2003.
- 17 ECtHR, Karkın v. Turkey, 43928/98, 23 September 2003.
- 18 ECtHR. Ecer and Zeyrek / Turkey, Application no: 29295/95 and 29363/95, paras. 32-37, 27.02.2001

07

Legal report on indictment:

MIT News Trial

PEN Norway's Turkey Indictment Project

Şerife Ceren Uysal
Published: 13 November 2020



About the author:

Şerife Ceren Uysal is a human rights lawyer from Istanbul. During her practice in Turkey, she worked on many cases related to systemic human rights violations. She has been an executive board member of the Progressive Lawyers Association since 2012. She is also an active member of the international relations committee of the association and represents the association in several international organisations. As part of her activities at the committee, she has organized numerous fact-finding and trial observation missions together with her colleagues. Based in Vienna since December 2016, she took up the position of guest researcher at the Ludwig Boltzmann Institute for a year. She has participated in several conferences and seminars in different countries to draw attention to the situation in Turkey, particularly in relation to lawyers and human rights defenders. She was awarded the Dr. Georg Lebiszcak-Prize for Freedom of Speech in Austria. She is currently studying at the Gender Studies Master Program of the University of Vienna during which she has been focusing on gender issues within the context of human rights law.

1: Subject of the analysis

This study consists of an analysis of the investigation document no. 2020/43545 and indictment no. 2020/3499, totalling fifty pages drafted on 23/04/2020 by Istanbul Public Prosecutor Yasin Erkal, Istanbul Deputy Chief Prosecutor Hasan Yılmaz and Istanbul Chief Public Prosecutor İrfan Fidan against suspects Aydın Keser, Barış Pehlivan, Barış Terkoğlu, E.E., Erk Acarer, Hülya Kılınç, Mehmet Ferhat Çelik and Murat Ağirel.

2: Findings on the investigation and prosecution stage

In February 2020, reports circulated that a person or persons connected to the National Intelligence Agency (MİT) was among those military personnel who had lost their lives in Libya. Following these reports, a criminal complaint was filed by MİT on 04 March 2020 citing the disclosure of the identities of MİT employees. This was followed by the launch of a penal investigation against a number of journalists by Istanbul Chief Public Prosecutor's Office.

Hülya Kılınç was detained in Manisa on March 04, 2020, with her report posted on March 03, 2020 on the Odatv website cited as grounds for arrest. On the same date and within the same investigation, Odatv News Chief Barış Terkoğlu was also arrested in Istanbul. Both journalists were ordered to remain in custody by the examining bench on the same date. These events were followed by the blocking of access to the Odatv website by the Information and Communication Technologies Authority (ICTA).

Following Kılınç and Terkoğlu's detention, Yeni Yaşam Newspaper's Chief Editor Ferhat Çelik and Acting Chief Editor Aydın Keser, Odatv Executive Editor Barış Pehlivan and Yeni Çağ Newspaper columnist Murat Ağirel were arrested. Çelik, Ağirel and Keser were detained on March 8, while Pehlivan was arrested on March 6.

A written statement was made by Istanbul Chief Public Prosecutor's Office while the investigation continued containing the remark that:

As part of the investigation into an 'attempt to expose National Intelligence Agency personnel thereby endangering the lives of their families and close acquaintances and undermining state intelligence

activities', the detention of the suspects B.T, B.P, H.K, A.K, M.F.Ç and M.A was ordered pursuant to Article 100 et. seq. of the Code of Criminal Procedure and 27/3 first sentence of the MİT Law following examination by Istanbul Criminal Courts of the Peace no. 8, 4 and 5.¹

It was also indicated in the same statement that the matter under investigation was, in common with the halting of the MİT trucks carried out on Jan. 1 and 19, 2014, an intentional breach of Article 27 of the MİT Law, was committed with awareness of the law as part of a counterintelligence plan and an attempt to expose MİT personnel, endangering the lives of their families, close acquaintances and colleagues, while undermining state intelligence activities.²

The indictment drafted against the seven journalists—six while they were in detention—was accepted by Istanbul Court of High Crimes Court No 34 on May 7, 2020. The trial commenced on June 24, 2020.

At the conclusion of the first hearing, defendants Murat Ağirel, Hülya Kılınç and Barış Pehlivan were ordered to remain in custody. As for the released journalists, these were subjected to various judicial orders. The arrest warrant for Erk Acarer, whose statement could not be obtained, was also reordered.

Following the first hearing, the prosecutor was given time to offer a recommendation. The recommendation was submitted to the file merely a day before the second hearing. In sum, this stated that given the suspects had published, disseminated and disclosed the identification details of MİT personnel—and thereby that of their families—while also distributing information on their duties and activities, punishment was sought, going on to state that had the offence allegedly committed proved successive, the enhanced penalty under Article 43 of the Turkish Criminal Code would be sought.

At the second hearing, on Sept. 09, 2020, the statements in opposition to the recommendation and final defences were completed in the course of the same hearing, despite the recommendation only having been submitted to the file one day earlier. The trial was then brought to an end with the announcement of the verdict. As per the verdict:

- Aydın Keser, Ferhat Çelik and Murat Ağirel were sentenced to four years, eight months and seven days' imprisonment for the offence of "disclosure of information and documents relating to intelligence activities in a successive manner" pursuant to Article 27/3 of the MİT Law.
- Barış Pehlivan and Hülya Kılınç, in turn, were sentenced to three years and nine months' imprisonment for the offence of "disclosure of information and documents relating to intelligence activities" pursuant to Article 27/3 of the MİT Law.
- The remaining defendants were given full release as part of the verdict.
- The separation of the case against Erk Acarer, who had fled abroad, was ordered.
- Municipal employee E.E. was acquitted, and the charge laid against E.E. was stated to be "not defined as a crime by law."
- Barış Terkoğlu was also acquitted on all charges, while the charge laid against Terkoğlu was stated to be "not defined as a crime by law."

A review of the appeal lodged against the verdict is pending as per the date the report was compiled.

3: Analysis of the indictment

Overview of the indictment:

The indictment (excluding the prosecution memorandum on the separated investigation) runs to fifty pages and involves eight suspects. All suspects stood charged of disclosing information deemed confidential in view of the state's security and political interests and exposing information and documents relating to intelligence activity as per Article 329/1 of the Turkish Criminal Code (TCC) and Article 27/3 first sentence of the Law on State Intelligence Services and the MİT Law.

The indictment starts out with a brief section touching on the (Feb.07, 2012) events known publicly as the "MİT Crisis" and the incident in which MİT were halted in 2014. However, it is apparent when the

indictment is taken as a whole that these sections have no bearing on the charges laid against either the suspects or the suspects' acts. There was no identifiable legal requirement for the inclusion of this section in the indictment.

Information is provided here on the way the indictment has been laid out, which is as follows:

1. Description of the Event
2. MIT Directorate's Criminal Complaint
3. Acts of Disinformation Waged in the Investigation Process
4. Legal Assessment
5. The Alleged Acts

A detailed analysis of the text accompanying each of the intermediary headings reveals that a number of matters are broached that are not directly related to the investigation and a large number of long citations are made. This state-of-affairs seriously inhibits a comprehensive reading of the indictment. For example, under the heading 'description of events', virtually two pages are devoted to a summary of the parliamentary resolution no. 1238 dated Jan. 02, 2020 –known more commonly as the "Libya Resolution." The prosecution has probably referred to this resolution simply due to its providing the legal basis for the military and MIT personnel's presence in Libya. However, it soon becomes clear that this consideration has no bearing on the charges laid against the suspects. The text of the second and third sections run to some four and a half pages. With the indictment prosecutors contenting themselves with briefly summarising the suspects' defences or witness testimony, they have cited verbatim the two separate criminal complaints made by MIT, including the "conclusion and requested" sections. As for the third heading, this amounts to an intermediary heading that ought not to be included per se in the indictment. Not only are either events recounted in this section related to the subject-matter of the indictment, but the classification of events that are subject to other legal proceedings by the prosecutors as "disinformation" is problematic in its own right. The "interpretation" of events that do not directly originate from the acts attributed to the suspects, which are the subject of separate legal proceedings, is redolent of an effort to engender a negative perception of the suspects.

Since the sections "Legal Assessment" and "Alleged Acts" contain a more detailed discussion, they will be dealt with in later sections. However, there is a point that may be worth touching on here with reference to the latter section. Within the contents of the indictment, the suspects' alleged acts are initially set out under the first heading—namely, "Description of Event." However, for each suspect, the same sentences have been penned again and again over the course of the fifty-page piece. This repetition has been made five times with reference to certain suspects (a double-entry has been made each time in the "Description of Event" alone). Hence, the fifty-page extent of the indictment creates an illusion. Certain indictments may of course exceed others in terms of length due to the complexity of the web of events or requirements in terms of juristic classification. However, the conclusion has been made that a text of no more than 10-15 pages could have emerged had the indictment been drafted in plain fashion, confining itself to all the prosecutors' arguments, references and classifications (including the first four pages of this indictment containing the suspects' names and identity information).

To simplify the analyses and findings made in the later stages of the report, the acts imputed against the suspects will be briefly summarised here:

Murat Ağirel (total of 6 paragraphs) is charged, in sum, with committing the act of disclosing confidential information, as the person who made the initial post concerning MIT personnel named S. C. and O.A. by identifying them as "case officers" in the tweet posted on Feb. 22, 2020. There is also reference to the suspect having spoken on the phone to somebody from the Sputnik news agency on the same day.

Erk Acarer: (total of 3 paragraphs) is also charged, in sum, with tweets he posted on Feb. 22, 2020; and it is stressed that he made these tweets at the same time as Ağirel.

Mehmet Ferhat ÇELİK and Aydin Keser (total of 2 paragraphs), in turn, are charged with exposing MIT personnel by, in this case, posting their photographs and identification details, as cited in reports

published in Yeni Yaşam newspaper, and that daily's website www.yeniyasamgazetesi1.com on Feb. 23, 2020 and Feb. 24, 2020 and upon the allegation that this information was published for the first time in the written press.

Hülya Kılınç (11 paragraphs), for her part, stood charged with publishing photographs secretly taken at a funeral, and including certain details within the report concerning the deceased MİT member, of disclosing the identity of the MİT personnel in question, and also exposing other MİT personnel in attendance at the funeral through photographs. It is also stressed that some of the photographs were published for the first time on the news site in question.

Meanwhile, E.E. was identified among these eleven as the person who took the photographs and sent them to Kılınç, though it is essentially not discernible what the charge is.

Barış Terkoğlu was charged by virtue of being the chief editor as part of the eleven paragraphs devoted to Hülya Kılınç.

Barış Pehlivan, conversely, in the same paragraphs, was charged after Pehlivan had been identified as being the chief editor of the relevant website.

In the middle of the section, in which the offences imputed against the suspects are summarised, the press statement made by parliamentarian Ümit Özdağ on Feb.26, 2020 has been cited verbatim; and reference has then been made to the case report filed against him. However, the relevance of this section to the indictment has not been established, either. This speaks to an important shortcoming. If the indictment prosecutors are of the opinion that Özdağ exposed MİT personnel through this press statement, it is clear that under such circumstances, a section on the suspects should not find its way into this indictment, as the idea that Özdağ committed an act of breaching confidentiality becomes tantamount to saying that anyone who spoke of this same matter after the date in question could no longer objectively have committed the act of breaching confidentiality. This is the meaning of the word "disclosure" both in a linguistic and legal sense. The failure to draw a temporal and contextual connection between Özdağ's comments and the subject of the indictment invites discussion as to the requirement under Article 170 of the Code of Criminal Procedure that evidence favourable to the suspect also be taken into consideration. However, given that such consideration, neglected in this event, would by itself have prevented the charge from being laid, its importance must also be considered in these terms because the neglect of such considerations has given rise to a chain of serious legal violations--including the lodging of accusations against people who can no longer feasibly be suspected of the offence, the holding of these people in pre-trial detention and the inclusion of allegations against them.

Finally, the following finding with reference to the suspects in their entirety has been made by the prosecutors in the event description:

The suspects' acts do not in fact amount to the pedestrian act of reposting exposed information, but the act of lifting the lid on confidential information in a coordinated manner with designs on the National Intelligence Agency Directorate's activities and MİT personnel, the disclosure, publishing and dissemination of state information that ought to remain confidential in line with MİT's duties and activities, thereby endangering the lives of both MİT personnel and their families through exposure of their identities, duties and assignments.

Nowhere in the indictment is there an explanation of the detail that removes the journalists' actions from the realm of that deemed "pedestrian." Similarly, it is also totally unfathomable from the indictment as to what underpins the allegation of the act being planned and coordinated. It is clear that a journalist speaking on the phone to the editor-in-chief of the newspaper they work for is a necessity born of their professional duties. Likewise, the posting of a tweet on a similar subject on similar dates by two unrelated people is initially suggestive of coincidence. Here, the presence of tweets posted within a certain timeframe and merely having the same subject manifestly does not give rise to an adequate suspicion of the existence of a coordinated, planned activity. Over and above these points, what both offences mentioned in the indictment actually entail is the disclosure of information, but whether or not this is a planned and coordinated action is of no importance as far as the statutory provisions cited in the indictment are concerned. The paragraph in question cited above is featured verbatim twice in the indictment (page 15 and page 22). It is also stated on page seven of the indictment that the act was

committed “as part of a plan and in a systematic and coordinated manner.” The repeated raising this idea is of absolutely no importance as to the classification of the offence imputed; and given no worthwhile effort has been made in the indictment to produce evidentiary support for this, it strengthens the impression that effort has been made to foster a negative perception of the suspects.

Can both Article 329/1 of the TCC and Article 27/3 of the MiT Law be invoked with respect to the suspects’ acts?

As has been stated above, each suspect has been charged with violating the articles of two laws with a single action. The articles in question are:

Article 329/1 of the TCC: One who discloses information deemed confidential in view of the state’s security or domestic or foreign interests shall be sentenced to a term of imprisonment of between five to ten years.

Article 27/3 of the MiT Law: In the event of the publishing, dissemination or disclosure of such information and documents outlined in the first and second paragraphs via radio, television, the internet, social media, newspapers, magazines, books and all manner of written, visual, audio and electronic mass media, those held responsible as per Article 11 of the Press Law no. 5187 of 9/6/2004 and Articles 4 and 6 of the Law on Regulating Publications made Online and Combatting Crimes Committed by means of such Publications no. 5651 of 4/5/2007 and those who disseminate them shall be sentenced to a term of imprisonment of between three and nine years.

The first two paragraphs of the same article to which reference is made in Article 27/3 of the MiT Law govern the offence of disclosing information or documents relating to MiT’s duties and activities or disclosing information or documents relating to the identity of MiT personnel or their families. Hence, provision is essentially made through the third paragraph for situations in which the acts regulated in Article 27/1 and 2 of the MiT Law have been committed via mass communications media such as radio, television or newspapers.

Upon examination of Article 4 of the MiT Law regulating the duties of the intelligence agency, it can be seen that everything pertaining to the institution is essentially deemed to be objectively related to the state’s security. As such, when Article 329/1 of the TCC and Article 27/3 of the MiT Law are considered in conjunction, the nature of the disclosed information and documents does not appear to vary. Given the variance of the media (and perhaps method) of the disclosure, it can be argued that Article 27/3 of the MiT Law is a specific norm that regulates a qualified version of an offence for which a general provision is made.

If one concedes that Article 27/3 of the MiT Law is a specific norm and that Article 329/1 of the TCC is a general norm, then one must concede that there is no legal basis for the simultaneous invocation of both with respect to each of the suspects’ individual actions. Moreover, given that the norm that must be applied here is the specific norm, it is beyond dispute that Article 27/3 of the MiT Law must be invoked. It is contrary to the law for both a general and specific norm to be invoked separately in the charges.

To elaborate a little further, a specific norm possesses further properties and elements as opposed to the properties of the general norm that characterise it as a specific norm³. It is clear that, in the case at hand, this specific element is the disclosure of information relating to MiT personnel or their families under Article 27/2 of the MiT Law. Kayhan İçel, in his article published in the Istanbul Bar Association Journal, has starkly set out the legal consequences of an implementation contrary to this procedure:

(...) there is absolutely no possibility of applying general norms containing similar elements to the act falling under the ambit of the specific norm. (İÇEL, Concurrence of Offences, p. 187). Since to think otherwise would amount to the formation of offences by analogy, this would constitute a blatant breach of the principle of legality.⁴

It is also clear that the charges invoking both a general and specific norm are in contradiction to Article 170/3-h of the Code of Criminal Procedure. According to the provision in question, every indictment must contain the imputed offence and statutory articles whose implementation is warranted. This does not mean the prosecutor randomly assembling statutory articles, but compiling an indictment by

“determining” the statutory articles related to the imputed offence.

It would be beneficial to refer once more to the Istanbul Chief Public Prosecutor’s Office’s statement from March 09, 2020 referred to in the section on the findings on the investigation and the prosecution stage. The Chief Prosecutor’s allegations are stipulated in the statement in question to invoke Article 27 of the MİT Law. As such, it can be said that the prosecution has been aware from the outset of the existence of a specific norm and the need for the investigation to be conducted within the scope of this norm.

It is crucial to grasp that this discussion on the relationship between specific norms and general norms is not a discussion that lies purely in the realm of theory. An examination of the judgement passed at the trial held subsequent to this indictment shows that judgement was passed on the defendants, who were sentenced under Article 27/3 of the MİT Law, while the defendants were acquitted with reference to Article 329/1 of the TCC. Had legal classifications been made correctly in the indictment, the trial would not have been heard before the criminal court in the first place. As such, this point—that was ignored by the prosecutors—has clearly entailed a whole host of other illegalities.

Can previously disclosed information be ‘re-disclosed?’

An analysis of this intermediary heading will be conducted with reference to both offences, one of which is a general norm, and the other of which refers to the disclosure of information regulated under the confidentiality law. For starters, the existence of confidential information must be proven for the commission of this offence to be possible. Subsequently, the information that is confidential must be disclosed. The offence only takes place with the disclosure of the relevant information. Thus, the act in question here is not just “disclosure,” but the “disclosure of information that is confidential.”

Consequently, there exists two prior questions that must be posed before drafting the indictment: 1) Does the act involve information whose disclosure is an offence pursuant to any statutory regulation? and 2) If so, who disclosed this information?

The indictment replies with a resounding “yes” to the first question. However, in my opinion, the answer to this question is not so clear. When the question is formulated as: “Is it an offence to disclose MİT agents’ identities?” the reply “yes” can quickly be given. However, if this question is asked within an indictment, then there is an absolute need to make an analysis in terms of the event at hand. For example, within the indictment, four persons, three of whom are journalists, have been included in the investigation in relation to photographs taken at a funeral and a related report. However, the indictment is silent as to exactly what “undisclosed” information was disclosed as a result of taking images at an event that was open to the public—and to which the MİT institution in fact sent wreaths—and the reporting of this funeral. It must immediately be noted at this juncture that neither the TCC nor the MİT Law has stipulated a quantitative criterion with reference to disclosure in defining the offence. As such, the legislator has not differentiated between speaking of the information whose disclosure is forbidden on the phone and presenting it at a lecture. Hence, the question of whether the taking of images at a funeral open to the public can be treated, as such, as a criminal act must be answered convincingly by the prosecution, as—in this case—the existence of protected information can no longer be spoken of. It must be considered the prosecutor’s duty to prove the contrary pursuant to Article 170/4 of the Code of Criminal Procedure.

Turning to the second question, if protected information does exist, both norms by their nature demand an investigation into who this information was disclosed regarding, as – as is also apparent from the dictionary definition – information that has already been disclosed cannot be re-disclosed! This point is one of basic importance as far as the indictment is concerned. The indictment prosecutors have, in fact, continually circled this point throughout the fifty-page text.

For example, on page 23 of the indictment, under the heading “Legal Assessment,” the prosecutors have had to make two important citations. One of these citations is the observation, “Things known to all cannot be subject to confidentiality,” as contained in judgement number 1987/762-747 of Chamber 2 of the Military Court of Cassation. The second, conversely, is the pronouncement contained in the European Court of Human Rights Sunday Times/United Kingdom Ruling of 26/11/1991, i.e. “As confidentiality is a realm that is closed to others and not made public, the maintenance of whose secrecy is deemed beneficial, information that has now lost its confidential nature and has come into the public domain

cannot be treated as being confidential.” If the stressed criteria in the judgements cited here had been applied, the offence would clearly have been devoid of subject matter with no trial warranted as far as a section of the suspects were concerned. An examination conducted purely into the dates without addressing the merits would palpably have produced this conclusion.

Even though these citations were made by the indictment prosecutors, two separate interpretations were adopted in the indictment that are at odds with these citations on disclosure and the notion itself. Both interpretations will be discussed through the notes below. But it must be noted that the issue here is not the prosecutors engaging in interpretation, but their embarking on the endeavour of alleging a crime through their interpretation.

The stress on “first time / initially” laid in the indictment:

In describing the suspects’ acts, repetition is made of the expressions “first time” or “initially” a full 36 times. A number of the suspects are accused of revealing information “for the first time” on social media that military personnel who lost their lives in Libya were MİT personnel, while another section talks of posting funeral photographs on the internet for the “first time”, and other parts of the text highlight the suspects having published similar information in the written press for the “first time”. A chink has thereby been opened for “disclosure” to be debated anew in a legal sense. Instead of testing whether the “information” featured in the report or tweet had previously been disclosed – that is “whether it had lost its confidentiality” – the indictment has set out to test “whether this information had previously been published on a specified platform [newspaper, website, twitter, etc.]” However, the legal interest whose protection is sought by means of this type of offence is clearly above all “the preservation of the confidentiality of the information protected by the law.” With reference to this same context:

(...) It is not possible due to the nature of the act for the act of disclosing the identities of MİT personnel and their families and their posts, duties and activities to have been committed successively because, once the act of disclosure has been committed once, this means there no longer remains any matter to be disclosed, which is a requirement for the act to be committed for a second time⁵.

The wording “even if disclosed it is still an offence” contained in the indictment

As has been discussed in detail above, the meaning of the notion of “disclosure” and the fact that the passing of information that has been disclosed does not constitute an offence are of basic importance for this indictment. The need arises at this very point to briefly touch on a paragraph contained in the indictment.

The following comments are made on page 2 of the indictment:

(...) It was ruled in the content of the decision of the Constitutional Court number 2014/122 E. 2015/123 K. of 30.12.2015, and promulgated in edition 29640 of the Official Gazette dated March 01, 2016 with respect to the annulment action brought against the Law on Amending the Law on State Intelligence Services and the National Intelligence Agency no. 6532 of April 17, 2014, “This matter as is laid down in the third paragraph that is at issue of the same article was examined under a separate heading and the provision for a separate offence of publishing, disseminating or disclosing activities arising under the National Intelligence Agency’s Duties and Powers and information relating to its assigned personnel, even if disclosed, is not unconstitutional.

Special importance ought to be attached to the Constitutional Court ruling cited in the indictment. As will be seen in the above citation, the sense is created by placing inverted commas before part of the paragraph [highlighted in yellow by me] that a citation is being made, but these inverted commas are not subsequently closed. It is thus in the first place incomprehensible as to which part of the text is citation and which part, conversely, is the indictment prosecutors’ interpretation or analysis. Under circumstances in which the impression is created that a Constitutional Court ruling is cited here, this matter clearly cannot be brushed off as a simple punctuation error because it is known to all who have graduated from law faculty that in legal texts, even a single word or conjunction has an importance that alters the outcome.

The expression “even if these have been disclosed” finds inclusion in the sentence apparently cited verbatim from the ruling, as per the impression created in the wording of the indictment. In this manner, the impression has been created that the Constitutional Court has declared the use of information whose disclosure has been forbidden to also constitute a crime following disclosure. However, on examination of the said Constitutional Court ruling, it has been determined definitively that the expression “even if these have been disclosed” formatted in bold type in the text of the indictment is not included. This expression was neither included by the Constitutional Court, nor is there any indirect or direct discussion in the ruling that would lead to this conclusion.⁶ In this context, trust in the indictment has been seriously impaired with a manner of punctuation and discussion chosen by the indictment prosecutors that presents their own interpretations as to the content of a Constitutional Court decision.

Legal violations resulting from neglected juristic classification in the indictment:

Even if discussion of the allegations underpinning the whole indictment is left to one side, one can encounter problems in the indictment arising from the absence of juristic classification. An important example that warrants discussion in this regard is the standing of Barış Terkoğlu, who is included as a suspect. In an investigation in which seven of the suspects are journalists, it is clear that legal responsibility must be absolutely argued. However, no such argument has been embarked on in the indictment. Had such a test been performed, the indictment prosecutors would have had to examine the Press Law and the Law on Regulating Publications made Online and Combatting Crimes Committed by means of such Publications no. 5651 (Internet Law). Most crucially, had this examination been made by the prosecutors, there would have been a clear perception that the present indictment could have been drafted with reference, not to eight people, but just seven. For, while the Odatv website is a news site, it would have been determined to be subject, not to the Press Law, but the Internet Law. The expression “responsible manager” does not appear in the statute in question and responsibility for publications falls to “content providers” along with the author—or the former, if the author is anonymous. Having determined the content provider to be Barış Pehlivan, no charges could have been laid against Barış Terkoğlu, who is alleged to be responsible for content that is not his. This means that Terkoğlu was tried despite bearing no responsibility in legal terms and, moreover, was held in lengthy detention under pandemic conditions. As such, this case has been marked by the “neglect” in the indictment of one of the juristic tests of most crucial importance for identifying suspects, giving rise to numerous rights violations. As concerns the indictment, this point may be deemed indicative of a breach of Article 170/5 of the Code of Criminal Procedure because express provision is made under the article that not only matters detrimental to the suspect, but also matters favourable to them, must be presented. However, I am of the view that the issue here is of a nature that goes beyond a breach of Article 170/5 of the Code of Criminal Procedure. The assigning of suspect status to a person whose non-suspect status in this investigation would clearly have been established through a simple juristic classification has also caused serial violations including – when the length of pre-trial detention is taken into consideration – a breach of the presumption of innocence.

4: Is the object of scrutiny truly an indictment in a legal sense?

Finally, Paragraph 2 of Article 170 of the Code of Criminal Procedure warrants consideration with reference to all the above analysis of this indictment. Under the provision in question, the existence of “adequate suspicion” is a requirement for the bringing of public cases. Articulation is given in this provision to the precept, “the relationship between suspicion of guilt and the notion of evidence has been emphasised and suspicion that a crime has been committed must be supported by evidence.” Indeed, “Adequate suspicion can be spoken of if, in view of the available evidence, the probability of the defendant’s conviction in a potential trial is greater than that of his or her acquittal.”⁷ As has been discussed in detail above, the present indictment cannot be said to adhere to Article 170/2 of the Code of Criminal Procedure.

By way of summary of the entire analysis, it has been concluded that the prosecution has, through its acts and omissions, failed to act in adherence to Article 170/2 of the Code of Criminal Procedure. Viz:

- Consideration has not been devoted by the prosecution, with a single act being involved, to the existence of two separate provisions, one specific and one general, applicable to this act and the need for the specific provision to be applied in the instance at hand.

- Due to the incorrect performance or non-performance by the prosecution of juristic classification regarding the Odatv website at which Barış Terkoğlu worked, he was nominated as a suspect in the indictment despite the absence of a legal basis for his being charged in this indictment.
- An expansionary interpretation essentially contrary to the elements typifying the offence under both the general and specific provision through the repeated use of the expression “even if disclosed” has been adopted; and an offence has more or less been created by the prosecution.
- It defies comprehension as to what the offence E.E. stands charged with from the total content of the indictment and, despite no charge having been lodged against E.E, the impression has been formed that E.E. has been nominated as a suspect in the indictment.
- Finally, the matters as to whether “the information had previously been disclosed” or whether “the information was information that ought to be confidential,” the two most crucial juristic tests with regard to this type of offence were not subject to qualitative examination. On the contrary, the prosecution initially adopted an expansionary interpretation with resort to the phrase “even if disclosed” and subsequently neglected to entertain a whole host of basic facts, such as the funeral upon which reporting provided the crucial basis for the entirety of the Odatv suspects being held, which was– anyway–open to the public.

In the context of international law, it is worth recalling the United Nations Guidelines on the Role of Prosecutors. According to these guidelines, prosecutors “shall perform an active role in criminal proceedings, including institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations.”⁸ It will be noted that supervision over the legality of investigations has been stipulated to be the prosecutors’ judicial role and duty. As such, the prosecutor must be considered directly responsible for the legality of an indictment and the legality of the evidence cited within.

It is stated in Article 12 of the same guidelines that “Prosecutors shall, 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.” Unfortunately, the findings set out one-by-one above indicate that the precise opposite of these requirements has been performed.

Rather than making a detailed analysis according to the European Convention of Human Rights (ECHR), it will simply be pointed out that the indictment in question manifestly violates a number of articles of the ECHR. Heading the list of such violations is the right to a fair trial as governed under Article 6 of the ECHR. However, the taking of action in a manner that cements the violation of Article 6 in breach of the no-unjust-punishment principle provided for in Article 7 of the ECHR – the action of expanding the offence through interpretation–is a distinguishing feature of this indictment. Additionally, it merits underlining that Barış Terkoğlu’s right to Liberty and Security governed under Article 5 of the ECHR has also been violated.

By virtue of satisfying a number of elements of Article 170/3 of the Code of Criminal Procedure, adopting a system of intermediary headings and including the two distinct headings of “Alleged Acts” and “Legal Assessment,” the indictment can be said in formal terms to rank positively above the average for indictments in Turkey.

However, as described above, the effort expended to expand a typified offence through interpretation or to create a new offence backed up by a false citation made from a Constitutional Court ruling places the legality of the indictment in question as a whole.

As has been determined in virtually all the reports issued up-until now, in the case of this indictment, too, accusatory comments concerning this investigation and the suspects’ acts were ascertained to have been made by executive-level politicians before the indictment had even been drafted.⁹ The encountering of a similar phenomenon as in virtually all the scrutinised indictments begs investigation as to whether this demeanour by the executive branch has been made into a vehicle for bringing decisive pressure to bear on prosecutors as a component of the judiciary in determining the content of the aforementioned indictments.

Sadly, a portion of the deficiencies identified in this report relate to the most basic legal principles and, as has been stressed in the report, as much as the errors that were made, the omissions of what has been required have further compounded the injustice faced.

In this regard, the emphases in verdict no. 2011/17629 E and 6976 K. dated 11/30/2011 of Penal Chamber no. 13 of the Court of Cassation are of significance:

Pursuant to the “People’s Right Against Self-Incrimination” and “Exhaustive Investigation and Single-Session Hearings” principles adopted in the New Turkish Penal Justice System, Public Prosecutors conducting investigations must gather all evidence within a reasonable time, and simply bring into issue the points they consider will result in conviction and not bring into issue acts they consider to result in acquittal, which performs a kind of filtering duty.¹⁰

What has been concluded in this examination, conversely, is not the effort to perform a filtering duty but, on the contrary, a tendency to put oneself in the position of the legislator. In conjunction with this, despite the absence of a provision attributing unlawfulness to a portion of the suspects’ actions and that this matter be determinable from a simple analysis, the ignoring of these phenomena can be accounted for either by defective legal knowledge or the strong desire on the part of the prosecutors for the suspects to be punished notwithstanding the statutory provisions. Either situation is manifestly unlawful.

Finally, it is worth recalling the following observations contained in verdict no. 2015/15916 E and 2016/765 K. dated Jan.20, 2016 of Penal Chamber no. 12 of the Court of Cassation:

(...) An indictment drafted without gathering evidence and without relating the evidence to the act imputed to the suspect (or to the suspect) breaches the suspect’s right to a fair trial (right against self-incrimination). The right to a fair trial is most certainly not a right purely related to the prosecution stage.

Not bringing a case (drafting an indictment) that is unjust must be the concern that most befits a Public Prosecutor’s duties. An unjust or unwarranted indictment drafted against the suspect is the violation of a personal right. The unjust assigning of defendant status to a person and condemning them to a trial process that can sometimes last for years creates psychological trauma.¹¹

The last citation made from the Court of Cassation verdict may serve as a summary of the analysis of the indictment in question. Not bringing up unjust cases – that is, not issuing needless indictments – should indeed be paramount alongside the basic concerns of a Public Prosecutor.

The most basic proposal that suggests itself, given the analysis of this indictment, is for the said indictment to be open to discussion at the educational level of law faculties as an example as to “how an indictment should not be drafted” because, due to the deficiencies that have been discussed in detail above, it does not even satisfy the minimum criteria expected of such a document.

Endnotes

- 1 For the report in which the statement in question is included, see: <https://www.aa.com.tr/tr/turkiye/istanbul-cumhuriyet-bassavciligindan-sehit-mit-mensubu-sorusturmasina-iliskin-aciklama/1759280> (date accessed: 20.10.2020)
- 2 Same cited report
- 3 Icel, Kayhan, Implementations that do not Accord with the Legal Character and Properties of the General- Specific Norm Relationship in Penal Law, Istanbul Bar Association Journal, September-October 2015, pp. 15- 30, Istanbul, <https://www.istanbulbarosu.org.tr/files/Yayinlar/Dergi/doc/ibd20155.pdf>
- 4 Op. cit., p.18
- 5 Cetin, Soner Hamza, The Commission of Offences Through Information and Documents Relating to MİT's Duties and Activities and the Offence of Fraud Committed Through the Disclosure of MİT Personnel's Identities and their Identities (27/1 and 2 of Law number 2937), Izmir Bar Association Journal, May 2020, pp. 65-116, <https://www.izmirbarosu.org.tr/pdfdosya/mit-in-gorev-ve202092810323752.pdf>
- 6 The Constitutional Court's decision number 2014/122 E. 2015/123 K. of 30.12.2015. The decision can be examined at the link below: <http://kararlaryeni.anayasa.gov.tr/Karar/Content/004ab030-da02-462b-9990-84cad78525c9?excludeGerekce=False&wordsOnly=False/>
- 7 Nur Centel/Hamide Zafer, Penal Procedure Law, Beta Publishing House, 2008, p.441.
- 8 European Court of Human Rights. Ecer and Zeyrek / Turkey, Application no: 29295/95 and 29363/95, paras. 32- 37, 27.02.2001
- 9 For Süleyman Soylu's statements: <https://tr.sputniknews.com/turkiye/202003051041535344-soyludan-odatyve-devlet-sirri-denilen-bir-sey-vardir-hadi-bu-haberi-almanyada-yapsinlar/>
- 10 Judgement number 2011/17629 E. and 6976 K. dated 11/30/2011 of Penal Chamber No 13 of the Court of Cassation
- 11 Judgement number 2015/15916 E and 2016/765 K. dated 01/20/2016 of Penal Chamber No 12 of the Court of Cassation

08

Legal report on indictment:

The Büyükada trial

PEN Norway's Turkey Indictment Project

Clarissa Fondi & Hannah Beck
Published: 27 November 2020



Legal Report on Indictment: The Büyükada trial

About the authors:

Mag.a iur. Hannah Beck is a young human rights lawyer from Vienna, Austria. She studied law with specialisation in human rights law and law of international relations at University of Vienna, Austria, and University of Pretoria, South Africa; and is representing the Vienna-based Ludwig Boltzmann Institute of Human Rights as one of two Austrian legal experts in PEN Norway's Turkey Indictment Project.

Mag.a iur. Clarissa Fondi is a Sociocultural Anthropologist and dedicated Human Rights Lawyer from Vienna, Austria. She is one of the two Legal Experts representing the Austrian Ludwig Boltzmann Institute of Human Rights in PEN Norway's Turkey Indictment Project.

1: Background

This legal report is an analysis of the "Büyükada indictment", issued on 4 October 2017 (Indictment No 2017/4842), concerning the prosecution of the eleven human rights activists Ali Gharavi (Swedish national), Günel Kurşun, İlknur Üstün, Muhammed Şeyhmus Özbekli, Nalan Erkem, Nejat Taştan, Özlem Dalkıran, Peter Frank Steudtner (German national), Veli Acu, as well as Amnesty International Turkey Director Idil Eser and Amnesty International Turkey Chair Taner Kılıç. All defendants, including the two foreign workshop trainers, have been charged with crimes related to being suspected of affiliations with terrorist organisations. The case centres on the arrest of the so called "Istanbul 10", following a human rights workshop about dealing with stress as an activist as well as about protection of digital information.

The workshop was held on the Turkish island Büyükada, off Istanbul in July 2017. On the third day of the workshop, ten defendants were arrested. Taner Kılıç was later added to the indictment by the prosecutor, because he was suspected of having been aware of the preparations for the workshop, even though he was not physically present on the island, since he had already spent one month in prison at that time, on grounds of "membership of the Fethullah Gülen Terrorist Organisation" following another on-going investigation.

2: Investigation Phase and Pre-Trial Detention

2.1. Access to a Lawyer

When the police arrested the ten defendants in Büyükada on 5 July 2017, they were denied access to their lawyers for more than 24 hours. Nobody was informed of their exact whereabouts, and only a day later, it was revealed where they were held.¹

Immediate access to a lawyer from the moment there is a criminal charge is an essential characteristic of the right to a fair trial and is guaranteed in Art. 6(3)(c) of the European Convention on Human Rights (ECHR) and Art. 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR).

As the European Court of Human Rights put it: "Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused."²

Even under national law, the right to access a lawyer cannot be restricted for more than 24 hours as it is enshrined in Art. 154(2) Turkish Criminal Procedure Code.

By denying the defendants access to their lawyers, an important procedural right has been disregarded, which resulted in an unfair disadvantage for the defendants arising from their exploitable vulnerability. International as well as national law were violated.

2.2. Adverse Media Campaign

As has been reported by Amnesty International³ and Human Rights Watch⁴, from the moment of their arrest, the defendants were subjected to an adverse media campaign, suggesting links with numerous outlawed organisations and alleged plans to divide the Republic by anti-government protests. The claims were based on pieces of information, which only people involved in the investigation had access to.

Therefore, it is believed that details about what had been found and heard during the raid in Büyükdada were intentionally given to the media.

Prejudicial attention like this is likely to have a direct impact on the general fairness of a trial. Not only could it violate the principle of presumption of innocence as it is enshrined in Art. 6(2) ECHR and Art. 14(3) ICCPR, but it could also affect the impartiality of the court required by Art. 6(1) ECHR and Art. 14(1) ICCPR.

For its assessment whether such a media campaign impacts the fairness of a trial, the European Court of Human Rights evaluates different factors. One of those factors is whether “the impugned publications were attributable to, or informed by, the authorities.”⁵

Therefore, if the defendants can prove the involvement of the authorities in leaking information, the fair trial principle could be violated. Public opinion must be free from unlawful influence by public officials.

2.3. Detention

As mentioned above, ten defendants were arrested in the morning of 5 July 2017. They were separated and moved to different police stations. Only on 17 July 2017, they were interrogated by the public prosecutor—after twelve days of detention without charges. The same day, the prosecutor requested pre-trial detention for all ten of the defendants on the grounds of “strength of the evidence, seriousness of the crime, need to protect evidence from interference and risk of flight”.⁶ Subsequently, the judge ordered pre-trial detention for six of them (Ali Gharavi, Günel Kurşun, İdil Eser, Özlem Dalkıran, Peter Frank Steudtner, Veli Acu) with the arrest warrants dating 17 July 2017. Upon the appeal of the prosecutor, on 23 July 2017, the judge issued further arrest warrants for İlknur Üstün and Nalan Erkem, sending them back into custody.

Only Muhammed Şeyhmus Özbekli and Nejat Taştan remained on bail, but were kept under judicial restrictions.

The right to liberty is a principle protected not only by international law but also Turkish law. Art. 5 ECHR, Art. 9 ICCPR and Art. 19 of the Turkish Constitution all provide protection from arbitrary detention. Especially prompt judicial review of police detention serves as a guarantee to avert unjustified interference with individual liberty and protects from abuse of power by state authority.

With the requirement of promptness, a strict time constraint has been constituted which leaves no room for interpretation. As the European Court of Human Rights noted in its ruling on Oral and Atabay v. Turkey, any period between the arrest of the accused and the time before he or she is brought before a judge exceeding four days is *prima facie* too long.⁷ Similarly, the Human Rights Committee found that a period of four days without justification was in violation of Art. 9 ICCPR.⁸

In the light of this, keeping the ten defendants in detention for twelve days before presenting them to a judge was contrary to international standards. The procedural guarantee of having prompt access to a judge in order to challenge the legality of the detention was violated, leading to the deprivation of liberty in an arbitrary way.

The eight defendants, who remained in detention were finally released on bail on 25 October 2017 after having spent 113 days in prison. Taner Kılıç, who was arrested by the police one month prior to the Büyüka workshop on 6 June 2017, was released on 15 August 2018 after 432 days in prison.

Under Art. 5(3) ECHR, the authorities are given two choices: either bringing an accused to trial within a reasonable time frame, or allowing provisional release pending trial. Therefore, keeping defendants in pre-trial detention must be justified, and is generally only acceptable if the public interest outweighs individual rights, for example on the grounds of “danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee”.⁹ The burden of proof lies with the authorities.

Even if some of those reasons were brought forward to keep the defendants in pre-trial detention, the time the defendants, especially Taner Kılıç, spent in prison seems to be excessive. Alternative measures like release on bail or guarantee for appearance should have been considered. Art. 9(3) ICCPR specifically states that people awaiting trial in custody shall be the exception rather than the rule.

2.4. Sufficient Suspicion

The investigation phase usually ends with assessing the evidence. According to Art. 170(2) of the Turkish Criminal Procedure Code, it lies within the prosecutor’s responsibility to determine whether enough evidence has been collected to constitute sufficient suspicion that a crime has been committed. Only then, the prosecutor shall proceed.

On 4 October 2017, the prosecutor issued the indictment accusing the eleven defendants of “membership of a terrorist organisation”, additionally accusing ten defendants (except Taner Kılıç) of “aiding armed terrorist organisations”. The fact that it took him three months to produce the indictment indicates difficulties to uncover reasonable evidence to support the allegations.

As will be analysed in detail in the following chapters, the prosecutor failed to produce any evidence of criminal wrong doing and even worse based his allegations on unverified and fabricated evidence.

3: Structure and Format

The indictment (Turkish version) consists of 17 pages. The first four pages contain information about the defendants, listing all eleven in alphabetical order with additional information about their lawyers and date of detention/date of judicial control decision. The list is followed by an overview of information in relation to the alleged offence, which is structured clearly.

The main part under the heading “Investigation documents were examined” seems to be divided into different parts:

- introductory paragraph
- general allegations against each individual
- allegations against four individuals in relation to bank transactions
- paragraph about seizure of mobile phones
- concluding paragraphs

These different sections are not separated by headlines, which makes it hard to get an easy overview of the indictment.

The prosecutor starts with an introductory paragraph about the alleged offence in relation to two witness statements, followed by a list of organisations which the defendants supposedly stand in connection with. By using phrases like “operating against the constitutional order of the country”, “aim to establish a theocratic state based on their distorted understanding of sharia by threatening, debilitating and diverting state authority by using force, violence and other unlawful methods”, “overthrowing the

Republic of Turkey” or “people’s armed uprising” the prosecutor, at the beginning of the indictment, already establishes a tone, which manages to stir up fear.

The first paragraph is followed by different sections that seem to be divided in relation to each individual. Again, there are no headlines to mark the beginning of a new section. Some defendants are mentioned multiple times, which makes it even harder to understand the indictment’s structure. Whatsapp chats, meeting notes and other documents are excessively cited in between sections. Some parts are highlighted in bold and with underlining, indicating particular importance for the prosecution.

The prosecutor continues with citing exact money transfers in relation to the bank accounts of Günel Kurşun, Özlem Dalkıran, Veli Acu, Nejat Taştan and concludes the indictment in the same manner he started it: by appealing to emotion with phrases like – “social chaos”, “threatening public order with acts of violence”, “targeting the Constitutional Order and public peace”.

The format of the indictment in general, as well as the presentation of important facts and details is not satisfying. Particularly, headlines would be necessary to clearly set out a structure, and consequently to make it easier to understand the indictment’s contents faster.

An indictment plays a crucial role for a fair and transparent criminal process because from the moment of its service, the defendants are formally given notice about the allegations against them. Therefore, producing a well-structured indictment which is clear in its allegations should be of high priority for the prosecutor.

4: Analysis in terms of Turkish Law

We analysed and evaluated this indictment on the basis of Art. 170 of the Criminal Procedure Code of the Republic of Turkey regarding the duty of filing a public prosecution.

4.1. General Assessment, 170(3) Criminal Procedure Code

The indictment does correctly include the basic requirements like identity of the suspects, their defence counsels, date of detention and date of judicial control decision.

However, when it comes to the charged crime and the related articles of the applicable Criminal Code, there are some inconsistencies. Listed as “Offence” is “membership of an armed terrorist organization, aiding armed terrorist organizations.” But in the section “Related Article,” there are not only the relevant Articles for membership cited (“Turkish Penal Code Articles 314/2, 53/1 and 58/9 on the basis of Anti-Terror Law No 3713 Article 3 and 5”), but also “Turkish Penal Code 220/6”, which relates to the crime of committing an offence on behalf of an armed terrorist organisation. The relevant article for aiding such an organisation (Turkish Penal Code 220/7) is completely missing, even though it is mentioned as an offence.

An indictment’s section of “Offence” and “Related Article” should always be consistent. In this case, both offences of Art. 220(6) as well as Art. 314(2) carry maximum sentences of 15 years. Art. 314(2) (membership offence), however, is much more serious; and sentences upon conviction are on average up to seven years’ imprisonment, while those under Art. 220(6) are oftentimes half that. For this reason, it is of utmost importance that the prosecution is clear on which exact offences the defendants are charged with.

Furthermore, it is not clear why Taner Kılıç was added to the indictment. The fact is, at the time the Büyükada workshop took place, he was already in prison, having been detained one month earlier after an unrelated investigation. The Prosecutor accuses Taner of having been aware of the preparations for the Büyükada workshop and having been in communication with some of the other defendants in the Büyükada case, thereby linking Taner to the Büyükada case and justifying his inclusion in the indictment. Since many of the defendants are members of Amnesty International and therefore colleagues of Taner, it is not unusual for them to be in contact with one another. Additionally, this line of argumentation fails to explain how his mere “awareness” of the preparations of a workshop incriminates him or links him to the cases of the others.

4.2. Evidence, 170(4) Criminal Procedure Code

Our analysis and evaluation of this indictment show high concerns in regard to the presentation of evidence, more precisely in linking the evidence to the charged crimes. In order not to go beyond the scope of this report, we will not be able to analyse in detail every single evidence listed in the indictment. We will, however, give a general overview of the points that sparked our concern and connect them to a few specific examples.

4.2.1. A Human Rights Workshop

The whole indictment is built around a supposedly secret workshop on the island of Büyükada. Factual circumstances, however, do not support the claim of the workshop being secret at all. On the contrary, having been organised by a network of human rights organisations in Turkey, this meeting was generally known about within the human rights community, as well as widely covered in pro-government media.

Furthermore, the event was held in a public hotel, and the actual workshop took place in a glass structure room next to other public areas of the hotel. The participants were, therefore, clearly visible; and through the open door of the seminar room, anyone could overhear their discussions.

These outlined factual conditions surrounding the workshop clearly indicate that it was anything but secret. To the reader of the indictment, this brings up the question why the event is repeatedly referred to as “secret” throughout the indictment. Could the purpose be to make this workshop sound more incriminating to begin with? Since the whole indictment is based around the organisation of this workshop, it seems like there has been a certain pressure to carve out circumstances that constitute sufficient suspicion for the prosecutor to have grounds for preparing an indictment at all. This impression ties into another phrasing we found within the indictment, which is used to describe events like this workshop as “organized meetings and activities in order to generate movements that would give rise to social chaos.” The particular circumstances of this workshop, as outlined above, do not objectively create the impression of an underground secret meeting with the sole purpose of organising social chaos.

4.2.2. Incriminating Communications

It was highly noticeable that many of the defendants were suspected of having committed a crime solely because of so-called “communications” with someone who was at the time of the indictment suspected to have connections to a terrorist organisation. However, there was no actual incriminating content in any of these “communications”, or at least it was not made clear what kind of accusations are being made in these regards.

To give an example, one of these conversations is simply about a mutual friend visiting and needing a place to stay. The reader of the indictment is left puzzled as to why a conversation like that is included in the indictment. The mutual friend is, as also mentioned in the indictment, an LGBT activist. But no claims have been made that there is anything illegal or incriminating about them. It is unclear what the prosecutor is trying to suggest by including this conversation, unless he wants to impose a general suspicion against valuable members of the queer community. If that was the case, it would certainly raise concerns of the utmost severity against this prosecutor on multiple grounds of violating any understanding of discrimination and human decency.

Regarding another defendant, the prosecutor mentions that there are “records available documenting her telephone conversation” with someone who was arrested in an unrelated operation. The actual content of the telephone conversation is not mentioned, as it apparently did not include any incriminating content. Similar to the other example mentioned above, it is once again unclear, why this conversation is even listed in the indictment as evidence against the defendant or more precisely what the defendant is accused of in this context.

To include conversations like that in the indictment’s list of evidence seems to be used as a basis for the theory that the defendants can somehow be connected to people who might or might not have been involved in any illegal activities. Listing these conversations, citing seemingly random content or not

mentioning their content at all once again give the impression that the indictment tries to fabricate any connection imaginable, or much rather wants to suggest guilt by association. Having been in contact with someone who at some point has been arrested in unrelated incidents is certainly too far-fetched to be used as evidence against any of the defendants. Suggesting guilt by association of course also stands directly in conflict with the presumption of innocence as stipulated by Art. 6(2) ECHR.

In its "Report on the impact of the state of emergency on human rights in Turkey", the Office of the United Nations High Commissioner for Human Rights (OHCHR) observed "a pattern of application of punitive measures not prescribed by the Penal Code that have targeted not just the primary 'suspects' (such as civil servants or human rights activists) but also people associated with them". The OHCHR goes on to explain: "This raises concerns that the Government may be applying the illegal standard of guilt by association or collective guilt, which violates principles of individual legal responsibility, fairness and legal certainty."¹⁰ This statement is in line with the Council of Europe's Commissioner for Human Rights, who voiced similar concerns in its "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey". The Commissioner reflected upon a series of measures which seemed to target not just suspects directly, but also people who are in some ways connected to them, leading to the following conclusion: "The Commissioner is worried that such measures will inevitably fuel the impression of 'guilt by association.'" In the opinion of the Commissioner, these measures "should not exist in a democratic society, even during a state of emergency."¹¹

4.2.3. Possession of Files

For some of the defendants, the main evidence against them are documents obtained from their computers or hotel rooms. Similar to the above-mentioned communications, the reader of the indictment is left in the dark regarding their incriminating status.

In one instance, it seemed important to the prosecutor to point out that a document included the note "Please do not share this document with anyone, do not leave it open on your computer or on your desktop." The indictment goes on to explain that this particular document included a list of names and phone numbers of many artists for a campaign. Since it seems quite reasonable to be asked not to share other people's personal contact information, the incriminating effects of having this document on one's computer stays unclear.

Other documents found concerned the well-known incident of two teachers who went on hunger strike after being arbitrarily fired and who were later arrested for suspicion of membership to a terrorist organisation. Given the fact that many of the defendants have been openly campaigning for the release of the teachers, especially since they had not even been convicted of any terrorism charges at that point, it is not unusual to have material about the case on their computers. Again, the indictment seems to view contact with someone merely accused of terrorism as equivalent to convicted of terrorism itself. In fact, this brings up severe concerns in regard to every other case the prosecutor mentioned in this indictment. If he is charging defendants in the present indictment simply for being in contact with defendants of other cases, we are left to assume that the presumption of innocence for all those other cases has already been neglected, leading to multiple cross- connected violations of Art. 6(2) ECHR.

Many pages of the indictment are then dedicated to protocol notes of a meeting unrelated to the actual workshop. In this meeting, some of the defendants were present; and various topics were discussed. The topic of the two arrested teachers as well as others on hunger strike came up, but it was mainly an exchange of thoughts on how to sustain momentum after protests or campaigns. In particular, they talked about their unsuccessful campaign against the April 2017 constitutional referendum on expanding presidential powers. It was even discussed how many of the participants do not generally share common political views, but want to overcome their differences in order to prioritize the points on which they agree upon: demanding justice, freedom and democracy. To the legally objective eye, none of these demands seem to lead to the conclusion that they must all be involved with any of the alleged terrorist organisations. To the reader of the indictment, it is once again unclear how the prosecutor came to the conclusion that this protocol incriminates any of the defendants unless of course he sees a terrorist agenda in demanding justice, freedom and democracy.

In fact, the prosecutor interprets these notes as an effort "to generate new uprisings similar to Gezi Park through the initiatives of organisations acting like NGOs but led by terrorist organizations." The

prosecutor's idea seems to be that people who wish to campaign against government policies are automatically affiliated with terrorist organisations simply because terrorists are also against the government. This implication that even the discussion of organizing peaceful anti-government protests must be considered a threat to the constitutional order is of course highly problematic in the light of Art 11 ECHR, the freedom of assembly and association.

4.2.4. Possession of the Phone Application “ByLock”

Throughout the indictment, there has been the recurring issue of the phone application “ByLock” playing a seemingly important role for the prosecution. ByLock is an encrypted messaging app. For elusive reasons, using or even downloading the app has repeatedly been seen as evidence for associating a suspect with terrorist organisations in past judicial cases in Turkey. In this indictment, however, many of the defendants are not even accused of using the App, but of having contact with someone allegedly using the application.

In this context, we would like to immediately refer to Opinions 42/2018¹², 44/2018¹³, 29/2020¹⁴ and 30/2020¹⁵ of the United Nation's Working Group on Arbitrary Detention (WGAD), as well as the Communication 2980/2017¹⁶ of the Human Rights Committee (HRC) concerning Arbitrary arrest and detention and access to justice. Both the WGAD and the HRC strictly dismiss the mere use of the ByLock mobile application as sufficient basis for an arrest and detention of an individual.

In the analysed indictment, the prosecutor often refers to the fact that there are records available, documenting a defendant's conversation with someone who is “known to be a ByLock user.” The conversations, however, do not seem to be relevant enough to be included in the indictment, once again leading to the conclusion that there was nothing incriminating in those conversations. It is also important to take into account that the conversations have not been taking place via ByLock. They were merely with someone who was—according to the prosecutor—known to be a ByLock User. To the reader of the indictment, it is quite confusing why being in contact with an assumed ByLock user is repeatedly listed as evidence—in some cases even the only evidence against a defendant. The allegation that a defendant merely knows someone who is claimed to be a ByLock User is nothing short of absurd to be charged with. Additionally, the government's system of identifying ByLock users has been known to be flawed in general.

To conclude: mere possession of an internationally available and widely downloaded phone application does not represent a criminal offence. But to prosecute someone, not for actually using the app, but instead for simply knowing someone who possesses or uses the application certainly eludes any comprehensible logic, and more importantly, lies far outside any legal scope of action.

4.2.5. Bank Accounts and Transfers

Then, there is the repeated issue of supposedly incriminating bank transfers made by some of the defendants. However, the indictment does once again fail to make any further claims as to how these transfers could possibly be linked to committing a crime. Some of the transfers were made to or from people or organisations who are under investigation for unrelated incidents. Again, it seems like an attempt to construct a connection to possible terrorist organisations without any factual proof or reason.

Also listed as evidence against some of the defendants is the simple fact that they had bank accounts at the Gülen-linked “Bank Asya” even though this was a mainstream bank used by people across Turkey. Having an account there by itself is certainly no evidence for being involved in any criminal activities.

4.2.6. Other Offences

Other accusations are based on the fact that some of the defendants sent their children to a Gülen-linked school. This alone does not necessarily suggest any ideological view or link to the organisation.

Another incident mentioned in the indictment concerned documents addressed to the South Korean Embassy in Ankara to end the export of “gas” to Turkey. After some additional research, we found out that this was in reference to tear gas. This might only be a subtle difference in wording, but certainly a

big difference in meaning, and said difference should be properly made clear in an indictment.

5: Analysis in terms of International Law

5.1. Presumption of Innocence

Art. 6(2) ECHR as well as Art. 14(2) ICCPR embody the principle of presumption of innocence: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.” This fundamental right to the protection of defendants in criminal trials imposes the burden of proof on the prosecutor¹⁷ and guarantees that anybody accused of a crime has the benefit of doubt. Where circumstantial evidence is used, it is considered crucial to show that the causal relationship between evidence and crime has been properly assessed.¹⁸ Moreover, it should be unambiguous¹⁹ and substantial.²⁰

For multiple defendants, the only evidence mentioned in the indictment is either possession of not necessarily incriminating documents found on their computers or records of conversations with people under investigation for unrelated incidents or mere contact with people presumed to have been using the mobile application ByLock. The indictment fails to further argue how the contents of those conversations or documents link the defendants to the charged crimes or any incriminating behaviour for that matter.

Including unrelated records as evidence and making unclear accusations against the defendants severely compromise the fair trial principle of presumption of innocence as guaranteed in Art. 6(2) ECHR.

5.2. Prompt Information about Nature and Cause

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]” is emphasised in Art. 6(3)(a) ECHR as well as Art. 14(3)(a) ICCPR. This constitutes a right to full and detailed information about the allegations and subsequently enables the defence to prepare accordingly. The European Court of Human Rights established in its decisions many times that a defendant should not only be informed “of the cause of the accusation, that is to say, the acts he/she is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts.”²¹ Therefore, in as much detail and accuracy as possible, it is the prosecutor’s job to provide the related articles to the alleged crime(s).

At this point, we also need to go into detail of an issue we briefly touched on above—in the indictment, the prosecutor accused the defendants of “membership of an armed terrorist organisation” and “aiding armed terrorist organisations,” citing Art. 314(2) and Art. 220(6) of the Turkish Penal Code (TPC).

Art. 220(6) TPC, however, reads as follows: “Any person who commits an offence on behalf of an organisation, although he [or she] is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation.” As a prosecutor, when referring to this specific article, it seems to be more appropriate to use the phrase “committing an offence on behalf of an organisation” rather than “aiding armed terrorist organisations.” It is more so given the fact that the latter is covered by Art. 220(7) TPC stating: “Any person who aids and abets an organisation knowingly and willingly, although he/she does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation.” In both instances, defendants are punished as though they were members although two different allegations are described by the law.

The prosecutor’s language should always be clear and comprehensible, and should not leave any room for speculation or misinterpretation. By referring to Art. 220(6) TPC as “aiding armed terrorist organisations,” the prosecutor was in violation of Art. 6 ECHR and Art. 14 ICCPR, depriving the defendants of their right to be informed of the charges against them to prepare defence accordingly.

5.3. Guidelines on the Role of Prosecutors

The United Nations with its Guidelines on the Role of Prosecutors (UN Guidelines) sets out a set of

standards to ensure a fair, impartial and efficient prosecution of criminal offences in all justice systems. Rules on qualification, selection and training of prosecutors as well as on their position and duties in criminal proceedings were established.

Especially principles 10 to 16 on the active role of prosecutors in criminal proceedings are of major importance for the analysis of the prosecutor's approach to drafting the present indictment. In line with those principles, a prosecutor is expected to perform his or her 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" (principle 12 UN Guidelines). More specifically, a prosecutor should always be impartial and objective, take into account a defendant's position and interest, and treat the information that emerges during the process confidentially (principle 13 UN Guidelines).

Unfortunately, the prosecutor who drafted the present indictment did not comply with these standards. Evidence in favour of the defendants was not included. Baseless allegations were made without managing to link them to unlawful conduct, as has been shown above. Basic human rights like the right to liberty and security or the right to a fair trial were ignored and violated in various ways. Already in the first paragraph, it becomes apparent that the prosecutor did not act objectively or impartially. Before even elaborating on the collected evidence, the prosecutor painted a colourful picture of how the defendants are linked to destruction, violence and plans to overthrow the Republic of Turkey. However, as analysed in depth above, the indictment did not manage to reveal any substantial evidence for these harsh allegations.

Instead of continuing the prosecution and drafting the indictment, the prosecutor should have stopped the investigation as soon as it was clear that the allegations against the defendants were unfounded. Rather, it seems that the prosecutor resorted to coming up with whatever kind of "evidence" he could find, may it be lawful actions depicted as something they were not.

Therefore, the prosecutor did not proceed in good conduct with the standards of the UN Guidelines; on the contrary, he seemed to actively violate them.

6: Conclusion and Recommendations

Throughout this indictment, the circumstances around the incriminating actions of the accused are largely exaggerated; and most of them lack any legal reasoning. It seems there was no sufficient evidence linking the workshop and its organisers or participants to any illegal activity, and subsequently, an excessive amount of circumstantial evidence has been included to lend weight to the indictment.

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

Right from the start of the investigation against the eleven defendants, grave violations of human rights were observed, which persisted throughout the proceedings and reached a first peak with the issue of the indictment that has been analysed. In that respect, the indictment's many deficiencies came to light, comprising formal as well as material inaccuracies.

First of all, the indictment is not sufficiently structured; and headlines are missing altogether leading to difficulties in understanding the allegations. The prominent tone of the prosecutor raises serious doubts about his objectivity and presents the defendants in a negative light.

Secondly, the prosecutor failed to come up with sufficient evidence to continue with the proceedings, let alone issue an indictment. Legal activity of human rights defenders should under no circumstances be criminalised. A conviction could have far-reaching consequences for civil society in Turkey, leading other human rights defenders to stop their work because of fear of prosecution. The prosecutor did not only fail to provide sufficient evidence in the first place, but also did not manage to successfully link the evidence to the alleged crimes, which is a prerequisite for a legally correct indictment.

Lastly, when referring to Turkish law, the prosecutor used misleading language. At all times, a prosecutor should be aware of the major impact his or her words have and how they affect the defendants. Clear language, which leaves no room for interpretation, is crucial to understanding the accusations made and serves as guidance for the preparation of defence.

We strongly urge the process of criminal prosecution in Turkey to be reviewed and improved. The following steps could be taken:

1. Drafting a standard template that can be used by prosecutors when drawing up the indictment. Thus, a clear format and headlines would already be predefined, helping the prosecutors to put together a structured document, which provides all necessary details.
2. Legal training of prosecutors especially in regard to evidence based reasoning and how to connect them to the alleged crime. It seems to be no problem for the prosecutor to list the relevant charges on the one hand and evidence on the other. However, what the indictment clearly lacks is a section on how they are connected. As this is the most important part of an indictment, a prosecutor needs to understand the system and must be able to apply the necessary skills.
3. Regular awareness training that includes discussing the UN Guidelines on the Role of Prosecutors, especially in the light of the duty to carry out their function as prosecutors fairly, consistently and expeditiously, and to respect and protect human dignity and uphold human rights. Discussions could be centred around these standards and how they contribute to ensuring due process and the smooth functioning of the criminal justice system.

Endnotes

- 1 Amnesty International <https://www.amnestyusa.org/press-releases/absurd-terrorism-investigation-launched-into-amnesty-internationals-turkey-director-and-nine-others/> (accessed 6 November 2020) 2
- 2 Simeonovi v. Bulgaria, ECtHR no. 21980/04 (12 May 2017) para. 112
- 3 Amnesty International <https://www.amnesty.org/download/Documents/EUR4473292017ENGLISH.pdf> (accessed 6 November 2020)
- 4 Human Rights Watch <https://www.hrw.org/news/2020/07/06/turkey-politically-motivated-conviction-activists> (accessed 6 November 2020)
- 5 Beggs v. the United Kingdom, ECtHR no. 15499/10 (16 October 2012) para. 124
- 6 Amnesty International <https://www.amnesty.org/download/Documents/EUR4473292017ENGLISH.pdf> (accessed 6 November 2020)
- 7 Oral and Atabay v. Turkey, ECtHR no. 39686/02 (23 June 2009) para. 43
- 8 Michael Freemantle v. Jamaica, Human Rights Committee no. 625/1995 (24 March 2000) para. 7.4
- 9 Buzadji v. The Republic of Moldova, ECtHR no. 23755/07 (5 July 2016) para. 88
- 10 OHCHR Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East (March 2018) para 72
- 11 CommDH(2016)35 (7 October 2016) para 41
- 12 A/HRC/WGAD/2018/42 Opinion No. 42/2018 concerning Mestan Yayman (Turkey)
- 13 A/HRC/WGAD/2018/44 Opinion No. 44/2018 concerning Muharrem Gençtürk (Turkey)
- 14 A/HRC/WGAD/2020/29 Opinion No. 29/2020 concerning Akif Oruç (Turkey)
- 15 A/HRC/WGAD/2020/30 Opinion No. 30/2020 concerning Faruk Serdar Köse (Turkey)
- 16 CCPR/C/125/D/2980/2017
- 17 Capeau v. Belgium, no. 42914/98 (13 January 2005) para. 25 and Navalnyy and Ofitserov v. Russia, no. 46632/14 (23 February 2016) para. 105
- 18 H M A v. Spain (dec.), no. 25399/94 (9 April 1996)
- 19 Mambro and Fioravanti v. Italy (dec.), no. 33995/96 (9 September 1998)
- 20 Český and Kotík v. Czech Republic (dec.), no. 76800/01 (7 April 2009)
- 21 Pélissier and Sassi v. France, ECtHR no. 25444/94 (25 March 1999) para. 51

09

Legal report on the
Cumhuriyet Indictment
PEN Norway's Turkey Indictment Project

Aska Fujita Barrister
Published: 3 December 2020



About the Bar Human Rights Committee of England and Wales

The Bar Human Rights Committee ("BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. It has a membership of lawyers, comprised of barristers practicing at the Bar of England and Wales, legal academics and law students. BHRC's Executive Committee members and general members offer their services pro bono, alongside their independent legal practices, teaching commitments and/or legal studies.

The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer and critic.

About the author:

Aska Fujita is a barrister at 5 King's Bench Walk in London, United Kingdom. She specialises in crime and fraud but has also appeared in coronial proceedings. She was called to the Bar of England and Wales in 2011 and is a member of the Bar Human Rights Committee of England and Wales.

A translated version of the indictment was used to carry out the analysis. The translated version was abridged by the legal consultant who felt sections were not necessary for the exercise. Nevertheless, the translated version comprised over 150 pages and we are confident that this provided more than adequate material to demonstrate the content and allegations contained in the indictment.

Executive Summary

1. The indictment under examination, indictment no. 2017/1480, charges 19 defendants connected to the Cumhuriyet newspaper in various roles, including the chief editor, journalists, members of the Cumhuriyet Foundation Board of Directors / Executive Board members and accountants, with terrorism offences, by supporting FETO/PDY¹, PKK/KCK² and DHKP/C³.
2. The indictment outlines that each of these defendants have expressed political views in disagreement with or criticising the State. However, it fails to properly set out why this constitutes a crime as opposed to a lawful exercise of the defendants' right to freedom of expression. The indictment, therefore, improperly equates disagreement with the State with supporting terrorism and thus a criminal offence. This plainly breaches Article 170(4) of the Turkish Criminal Procedure Code,⁴ ("TCPC") which provides, "The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence". Moreover, it violates the Article 6(3) ECHR/Article 14 ICCPR right for a defendant to know the nature and cause of the charges brought against them, and the Article 10 ECHR/Article 19 ICCPR right to free speech.
3. Further, although the indictment purports to present many forms of "evidence", including articles published in the Cumhuriyet newspaper, social media posts, phone data, financial records and witness testimony, it fails to point to any evidence capable of proving that the defendants have committed a crime. This constitutes a breach of Article 170(2) of the TCPC, which requires that there is sufficient suspicion that a crime has been committed before an indictment is prepared.
4. Additionally, the indictment does not set out the issues in the defendants' favour, in breach of

the requirement for balance under Article 170(5) of the TCPC. The indictment fails to consider or take into account any of the aspects of the case which may be construed in favour of the defendants.

5. Significantly, the legal analysis in the indictment of key judgments of the European Court of Human Rights ("ECtHR") is inaccurate and distorted. In particular, there is a tendency to overlook passages in judgments, including the ratio, in favour of citing obiter which may assist the prosecution. This risks the Turkish courts being misled and falling into error. Crucially, the limited scope to which expression on political matters in the media can be curtailed through restriction and prosecution is erroneously presented. The ECtHR in the case of *Sabuncu v Turkey* has in fact recently reviewed the evidence in this very case and concluded that it demonstrates legitimate commentary by the press, such that the prosecution violates the Convention rights of the Defendants.
6. The indictment makes an essentially political statement, using highly emotive language, rather than a legal pleading. It is repetitive and rambling, omitting relevant material and including irrelevant material, none of which should occur in a legal document.
7. There is a danger that the political colour of the indictment will adversely affect the fairness of proceedings. Any opposition to the indictment, whether through disputing the facts or challenging its legality, could be taken as disagreement with the political views expressed therein, risking a conviction based wholly on the defendants' political views as opposed to whether the defendants have committed any criminal offences. As it stands, it is difficult, if not impossible, to set out a defence without appearing to reject the political assertions in the indictment. Purely political charges cannot be contested on a legal basis, and that is the problem with them.
8. Of particular concern is that the association of press commentary with terrorism asserted in this indictment risks broader interference with the right to a fair trial. By implication, were the trial judges to acquit the Defendants, this could be taken as disagreeing with the State, which in turn could be seen as tantamount to supporting terrorism. Given that members of the judiciary in Turkey have been arrested and charged for making independent findings with which the State does not agree, this is a genuine cause for concern. An indictment such as this risks undermining judicial independence.
9. The indictment clearly reflects an intention by the Public Prosecutor to expand restrictions upon freedom of expression without recognising the solid body of law confirming that the press has the right, and also the duty, to impart information on political issues.

Summary of the background to the indictment

10. Cumhuriyet newspaper was founded in 1924, and is one of Turkey's oldest newspapers. It has been owned by the Cumhuriyet Foundation since 2001. Described by British media as a newspaper which was "left-leaning and pro- secular"⁵ and "having maintained fierce independence in an increasingly State-controlled media environment"⁶, Cumhuriyet newspaper was awarded the Freedom of Press Prize by Reporters Without Borders in 2015⁷.
11. The indictment under examination, indictment no. 2017/1480, charges 19 defendants connected to the Cumhuriyet newspaper in various roles, including the chief editor, journalists, members of the Cumhuriyet Foundation Board of Directors / Executive Board members and accountants, with terrorism offences, by supporting FETO/PDY⁸, PKK/KCK⁹ and DHKP/C¹⁰. This has been regarded as part of the government's response to the coup attempt in July 2016; indeed, the indictment refers to the coup attempt and alleges the defendants' support for it.

Evaluation of the indictment in accordance with Turkish law

12. Article 170 of the TCPC sets out the requirements for filing a public prosecution, the responsibility for which rests with the public prosecutor.
13. Article 170(2) provides, "In cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed, the public prosecutor shall prepare an indictment."
14. Article 170(3) sets out the formal requirements for a valid indictment, which include:

- a. The identity of the suspect [170(3)(a)];
 - b. His defence counsel [170(3)(b)];
 - c. The crime charged and related Articles of the applicable Criminal Code [170(3)(h)];
 - d. The place, date and time period of the alleged offence [170(3)(i)]; and
 - e. Evidence of the offence [170(3)(j)].
15. Article 170(4) states: "The events that comprise the crime charged shall be explained in the indictment in accordance to their relationship to the present evidence."
16. Article 170(5) stipulates: "The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his/her favour."
17. From the legal requirements of a valid indictment set out above, the basic expectation of a Turkish indictment would be a document which:
- f. Provides clarity as to what has been charged;
 - g. Presents a sound legal basis for bringing the charges; and
 - h. Strikes a fair balance between the allegations raised and the defence case.
18. This report now examines each of the sections in the indictment where translations have been provided, to assess what, if any, breaches of Turkish law are present.

The formalities of the indictment

19. Prima facie, the requirements of Article 170(3)(a), (b), (h), (i) and (j) are met in the first nine pages of the indictment, which list the defendants' names, attorneys, arrest dates, as well as the offences each defendant is charged with:
- a. Can Dünder, Akın Atalay, Mehmet Orhan Erinc, Bülent Utku, Mehmet Murat Sabuncu, Ahmet Kadri Gürsel, Güray Tekin Öz, Önder Çelik, Turhan Günay, Hacı Musa Kart, Hakan Karasinir, Mustafa Kemal Güngör, Aydın Engin, Hikmet Aslan Çetinkaya, Bülent Yener, Günseli Özaltay, and Ahmet Şık are charged with assisting an armed terrorist organisation though not a member of that organisation, under Article 314(2) of the Turkish Criminal Code¹¹ ("TCC") pursuant to Article 220(7) of the TCC¹²;
 - b. İlhan Tanir is charged with being a member of an armed terrorist organisation, under Article 314(2) of the TCC;
 - c. Ahmet Kemal Aydogdu is charged with management of an armed terrorist organisation, under Article 314(1) of the TCC¹³;
 - d. Akın Atalay, Mehmet Orhan Erinc, Bülent Utku, Güray Tekin Öz, Önder Çelik, Turhan Günay, Hacı Musa Kart, Hakan Karasinir, Mustafa Kemal Güngör and Hikmet Aslan Çetinkaya are also charged with abuse of trust in the provision of a service, under Article 155(2) of the TCC¹⁴.
20. However, when looking at its substance, the indictment is fundamentally defective in the following ways:
- a. The elements which constitute the offences are not set out;
 - b. There is no explanation of what must be proved for a defendant to be convicted of the offence;
 - c. There is no reference to any applicable statutory defence; and
 - d. There is no explanation of what conduct constituted the offences in each defendant's case.
21. Accordingly, a defendant would be left entirely unclear as to the basis of any charge against him/her, or as to the availability of any statutory defence.

22. Further – and quite fundamentally – the indictment fails even to give a clear date for the alleged offences. The only references provided are to “The year 2016 and prior” which is wholly inadequate to enable the defendants to understand the case against them.
23. This section of the indictment gives a cursory nod to fulfilling the requirements of Article 170(3)(j) by listing, in generic terms, the evidence relied upon as:

Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.

Any person who becomes a member of the organisation defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years.

- a. The ByLock communication record and analysis report of the Directorate General of Police;
- b. Istanbul Police Directorate Anti-Terrorism Branch ByLock analysis reports;
- c. Historic Traffic Search base station analysis records;
- d. Inspection reports of the Directorate General of Foundations;
- e. Expert reports;
- f. Financial Crimes Investigation Committee reports;
- g. Open source detections records;
- h. Search, apprehension and seizure records;
- i. Suspect and witness testimony;
- j. Copies of Cumhuriyet newspaper;
- k. Column articles written by the defendants;
- l. Printouts of news in the internet content of newspapers;
- m. Copies of judicial record statements for the defendants; and
- n. The entirety of the investigation documents.

24. Such a list would not be adequate to fulfil Article 170(3)(j) on its own. However, the indictment runs to 246 pages, in which the evidence – or what is purported to be evidence – is fleshed out in greater detail.

“The investigation document was examined” section of the indictment

25. The next section is headed, “The investigation document was examined”, and contains a summary of the history of Cumhuriyet newspaper, culminating in how it “exercised manipulation in order to conceal the truth, and acted in line with the objectives of the FETO/PDY, PKK/KCK and DHKP/C terrorist organisations in order to provoke civil unrest and render the country ungovernable by presenting these articles and stories” which are critical of the government and, the indictment suggests, legitimises the violence of terrorist groups.
26. In direct contrast to the factual tone of the indictment preceding this section, this language is inflammatory, and strays far from the legal and – unnecessarily for a legal document – deep into the political arena.
27. This section contains no legal basis and provides no evidence against the defendants, but sets the scene for the backdrop of the allegations, alleging Cumhuriyet had broken with its 90-year-old history by “attempt[ing] to influence the agenda in a way that is not in keeping with its readership’s worldview”, through “producing news items which sought to manipulate with destructive and separatist effect”.
28. The indictment states Cumhuriyet newspaper was taken over by the armed terrorist organisation FETO/PDY in 2013, when Can Dündar became chief editor.

29. A number of significant assertions are made here without supporting evidence:
- a. "It is commonly known that any coup attempt will be preceded by an effort to prepare the country for the coup, using organs of press and media". No support is provided to back such a sweeping statement or how this conclusion – presented as common knowledge – has been reached;
 - b. "Manipulation is a way of imposing upon the public. It is also a method of influencing, steering and confusing people. Today it is the most important secret tool of psychological operations." Again, nothing is provided to substantiate this claim;
 - c. "It has been determined from the many articles which have been published that the suspects in our case file are responsible for using this method to present various terrorist organizations ... and their members as innocent and to present their actions as legitimate". There is no explanation of who reached this determination, when it was reached, and on what basis;
 - d. "In short, it is apparent that the defendants, with the radical change they made after 2013, intended to bring the Republic of Turkey and the Government into difficulties, to ruin their reputation domestically and internationally, and to expose the country to civil and criminal liability before international judicial institutions by creating a perception that the government had aided and supported terrorist organizations such as ISIS". This is just as disturbing, given that no basis is provided as to how the defendants' intend to carry out such serious and specific allegations was suspected, let alone made apparent.
30. While this section may intend to be an executive summary of the case rather than a conclusion, it nevertheless contravenes Article 170(5) TCPC in that it lacks any semblance of balance and in particular fails to outline or consider any factors in the defendants' favour. For example, the indictment fails to make reference to any innocent explanation given by the defendants, or strikingly to principles concerning the freedom of the press and the right to freedom of expression. As raised earlier, the matters presented in this section appear to criminalise political expression and commentary – conflating criticism contrary to government's views with alignment with a terrorist organisation. The indictment fails to consider the issue of intent entirely.
31. The problems for the defence are manifest: any admission of simply having an alternate political view automatically becomes, within such a framework, an admission to the guilt of assisting an armed terrorist organisation. Likewise, any judge receiving such an indictment will also be receiving a forceful implicit message: a not guilty verdict could be construed as disagreement with the government's political views, and judicial assistance to a terrorist organisation.

Section I: "Introduction"

32. The indictment then has a section headed "Introduction", which purports to be an analysis of the law regarding freedom of the press, the right to publish periodicals and non-periodicals, the right to use media other than the press owned by public corporations and the right of rectify and reply (Articles 28, 29, 31 and 32 of the Turkish Constitution, respectively).
33. These rights are then scrutinised in the context of the case law stemming from the ECtHR regarding freedom of expression as set out in Article 10 ECHR, as well as domestic case law and a number of academic publications.
34. The indictment states, "Since freedom of the press can only find meaning in a democratic society, merely the act of not condemning the acts of a terrorist organization operating with the objective of destroying the constitutional order and seriously damaging public order shall mean implied support for terrorism". The case of *Batasuna v Spain*, nos. 25803/04 and 25817/04, §88, ECHR 2009 is cited as the basis for this proposition, quoting from the judgment:
- The Court agrees with the grounds on which the Constitutional Court ruled that the refusal to condemn violence against a backdrop of terrorism that had been in place for more than thirty years and condemned by all the other political parties amounted to tacit support for terrorism.

35. The legal analysis in this section ignores the key sections from the authorities it cites which contradict the indictment's central arguments, even where those same authorities are cited.
36. As an example, the indictment cites paragraph 88 of *Batasuna v Spain*, but glosses over the fact that:
- a. The failure to condemn violent actions was not the only reason *Batasuna* was dissolved, there had also been a series of serious and repeated acts and conduct; and
 - b. It was such conduct in combination which had made it possible to conclude there had been "an accommodation with terror going against organised coexistence in the framework of a democratic State".
37. Instead of recognising that purely passive non-condemnation would be insufficient to constitute support for terrorism, the indictment uses this case to suggest that the same responsibilities which apply to political parties should apply to the media.
38. The indictment's reading of *Sener v Turkey*, App. no. 26680/95, (Judgment 18th July 2000), is equally erroneous. The indictment quotes an extract from paragraph 42 of the judgment:
- Particular caution is called for when consideration is being given to the publication of views which contain incitement to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.
39. However, the passage immediately following it has been excised:
- At the same time, where such views cannot be so categorised, Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media".
40. In *Sener*, when determining whether or not there was a breach of Article 10 ECHR, the Court considered as essential: a) whether or not the article taken as a whole glorified violence; and b) whether or not it incited people to hatred, revenge or recrimination or armed resistance [para 45].
41. The indictment also cites the case of *Zana v Turkey*, App. No. 69/1996/688/880 (Judgment 25th November 1997) where the Court noted at para 60, the interview in question was published by a major national daily newspaper, i.e. *Cumhuriyet*, on 30th August 1987. The indictment extrapolates from this judgment, asserting, "therefore, all publications and social media posts from the national daily newspaper *Cumhuriyet* must be considered taking into account their capacity to cause impact in our present day", with no further explanation. At the same time, it completely ignores the reasoning in the judgment that Article 10 ECHR protects information or ideas which "offend, shock or disturb", as well as those which are favourably received or are regarded as inoffensive or as a matter of indifference; exceptions to Article 10 are to be construed strictly and any restrictions to be established convincingly [para 51].
42. Likewise, in *Surek v Turkey (No.3) (GC)* App. no. 24735/94 (judgment 8th July 1999), the only part of the judgment which the indictment refers to is that to the effect that those with the power to shape the editorial direction of the review are vicariously subject to the duties and responsibilities which the editorial and journalist staff undertake. However, the indictment pays no heed to the central finding by the Court that:
- "...in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of legislative and judicial authorities but also of public opinion" [para 37], and that "the dominant position which the government occupies makes it necessary for it to display restraint in reposting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries [para 37].
43. The fact that case-law is cited selectively in this indictment, whether through design or negligence, is highly problematic not only because it appears impartial but also because it risks misleading the tribunal, thereby allowing the tribunal to fall into error.

Evaluation of the evidence presented in the indictment

44. The indictment then moves on to deal with the details of the evidence against the defendants. Section II lists the professions of the defendants. Sections III to VI provide information about the FETO/PDY, PKK/KCK and DHKP/C terrorist groups and does not contain evidence against the defendants.

Section VII: “KOM (Department of Anti-smuggling and organised crime) branch analysis reports - A: ByLock use”

45. The indictment lists the registered phone numbers of the defendants. In the case against Orhan Erinç, the indictment states Mr Erinç’s number had “connections” to eight other phone numbers registered to / used by eight individuals / companies, all of whom are suspects in various investigations. No further information is provided.
46. This section of the indictment is defective because:
- a. It does not point to any evidence to support the assertion that the phones were registered to the individuals / companies;
 - b. It does not point to any evidence to support the assertion that the phones were used by the alleged individuals / companies;
 - c. There is no description of any of the investigations into the individuals / companies;
 - d. There is no explanation of what is meant by Mr Erinç’s phone having “connections” to the other phone numbers referred to; and
 - e. There is no evidence as to what “connections” exist between Mr Erinç’s phone and the other numbers.
47. Contrary to Article 170(4) of the TCPC, the indictment fails to exhibit any concrete evidence of a criminal offence, but also any balance such as required under Article 170 (5) of the TCPC. The defence is therefore inevitably prejudiced because it is not clear what the prosecution case is that they must meet.
48. The indictment refers to ByLock, an app which was widely available on Apple’s iTunes Store and Google Play from 2014 (prior to it being shut down in March 2016 by the Turkish National Intelligence Organisation (“MIT”))¹⁵. The indictment describes it as an “encrypted communication tool determined to be used by the FETO/PDY armed terrorist organisation leaders and members”. In support of this assertion, the indictment refers to a report prepared by the Istanbul Provincial Police Headquarters Department of Anti-Smuggling and Organised Crime, dated 25th March 2017. However, no further details about the report are provided.
49. The indictment takes matters a step further when it puts forward as part of the evidence against Mr Erinç, the allegation that his registered phone had connections to three separate phone numbers, each of which have been determined to be ByLock users. No specifics are given in respect of what kind of “connection” Mr Erinç’s phone had with any of the other phone numbers. The indictment does not point to any evidence in support of the assertion that the users of those numbers were ByLock users, less still that they were misusing Bylock for nefarious purposes. Further, there is no evidence about the use of ByLock in the general population to establish anything incriminating about Mr Erinç’s alleged connection with it.
50. The above represents but one of many instances in the indictment where propositions are not linked to any evidence. For these reasons, the indictment fails to comply with Articles 170 (4) and (5) TCPC.

Section IX A: “Social Media Posts”

51. The indictment suggests that FETO/PDY used social media effectively, including a Twitter account called “Fuat Avni.” “It is apparent that the [FETO/PDY] first started spreading this false information for manipulative purposes through its social media accounts using hashtags, then popularised them through retweets, before finally moving them to the organisation’s written and

visual press on websites to reach even wider audiences". The indictment, however, does not refer to any evidence in support of this "apparent" process of manipulating false information.

52. The indictment continues, "It has been concluded that the baseless and false claims made on the account of "fuatavni" were shown special interest by the Cumhuriyet newspaper in a column created for this very purpose in the newspaper, which thereby assisted in conveying them to a wider audience".
53. This sentence alone makes several contentions, none of which are supported by evidence:
- a. There is no clarification of who has reached this conclusion, why, when or how;
 - b. The content of the "baseless and false claims" made from the Fuat Avni account is unspecified;
 - c. There is no evidence of what kind of "special interest" the Fuat Avni account was shown by the Cumhuriyet newspaper.
54. The indictment then lists a catalogue of posts on social media made by Akin Atalay and Mehmet Murat Sabuncu, and notes, "most of these posts are regarded as attempts to shape perceptions in favour of the FETO/PDY". None of the posts listed, however, suggest any support for violence or terrorist groups.
55. A post by Ahmet Kemal Aydogdu, using the account "JeansBiri", referring to #Aksilahlanma (white armament), and articles on Cumhuriyet newspaper on "White Armament Provocation" are introduced in the indictment, as is an article by Aydin Engin titled, "AKSK(AK Armed forces)". Again, there is nothing in the article which could reasonably be construed as supporting violence.
56. The indictment does not explain why these posts go beyond media reporting and a free press and give rise to a criminal offence. This failure is critical as the indictment, as it stands, does not establish on what legal basis the defendants are being prosecuted and once again is in breach of Articles 170 (4) and (5) TCCP.

Section IX B: "Can Dünder being the Chief Editor and the MIT trucks article"

57. On 1st January 2014, MIT trucks were stopped in the Hatay province; on 19th January 2014, MIT trucks were stopped in the Ceyhan district of Adana. A ban on publication concerning the MIT trucks was issued under Press law 5187 Article 3(2) by the Adana Court of Peace Judgeship, on 14th January 2015, case file no. 2015/197.
58. The indictment states that due to Mr Dünder and Mr Gul publishing the images and investigation files in respect of the MIT trucks in the 29th May 2015 and 12th June 2015 editions of Cumhuriyet, a public case was filed against them. They were both charged with disclosure of information relating to the security and political interests of the State under Article 329(1) TCC. The Istanbul 14th Criminal Court ruling no.2016/162 dated 6th May 2016 sentenced Mr Dünder to 5 years and 10 months' imprisonment.
59. The indictment then declares, "It appears the file accusing defendant Can Dünder of assisting an armed terrorist organisation without being a member has been filed as a separate case".
60. There is nothing in the indictment which suggests there is any additional element (over and above what Mr Dünder has already been convicted for) to give rise to the allegation that Mr Dünder is now assisting an armed terrorist organisation. This presents serious prima facie concerns that Mr Dünder is facing in this indictment a further prosecution based on the same facts. As Protocol No. 7 to the ECHR has entered into force in Turkey from 1st August 2018¹⁶, any Turkish indictment must comply with Article 4 (1):
- No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
61. Another striking aspect of this section of the indictment is its conclusion, which reads, "Although Cumhuriyet newspaper attempted to shape perceptions to show the Republic of

Turkey as having worked in aid of ISIS, given Turkey directed a heavy blow against this terrorist organisation as part of its Operation Euphrates Shield, launched in August 2016, it is clear that the truth over its claims Turkey aided ISIS, an organisation it was at war with, are clear to the public¹⁷. This appears to be a wholly political statement and certainly does not amount to a proper legal pleading.

Section IX C: “News and Articles that are Chronologically Accepted as Evidence”

62. Reliance is placed on an expert report provided by Unal Aldemir on the topic of “manipulation”. No credentials are provided, nor is the exact scope of the report, the report itself, or its methodology explained. A full page of this report is quoted in the indictment, including the following excerpts: “Interest groups, illegal organisations and terrorists wish to achieve their goals at zero cost through media organs. Responding to these wishes is not journalism, but serving the objectives of these interest groups, being instrumental in their illegal organisation and distributing terrorist propaganda”. The indictment continues to expound on this theory: “Concealing the truth through manipulation, acting in line with the objectives of terrorist organisations, creating internal conflicts and making the country ungovernable is not journalism. Attempting to destroy the Republic of Turkey and its government or partially or entirely preventing them from carrying out its duties in the same way, through media ... is not freedom of the press, it is a psychological operation carried out under the guise of freedom of the press”. The report suggests, “Cumhuriyet newspaper has released news to manipulate and conceal the truth, to act in line with the objectives of terrorist organisations (FETO), to create unrest and to make the country ungovernable”. The indictment appears to rely upon this expert report to prove facts which are not properly the subject of expert opinion, such as the intentions of those behind the Cumhuriyet newspaper.
63. The indictment turns to Hikmet Çetinkaya and articles and statements in respect of the Fetullah Gulen Organisation. The reader’s attention is drawn to a statement made by Mr Çetinkaya on 31st October 2015, concluding, “I have never said and could never say, in my articles, that the Gulen movement is a terrorist organisation¹⁸”. As his defence, Mr Çetinkaya declares, “he defends law, democracy and human rights”.
64. The indictment lists a series of articles penned by Can Dündar, Aydın Engin, Ahmet Kadri Gürsel from December 2013 to August 2016. Read objectively, none of these articles can be said to be inciting violence or supporting terrorism. The indictment provides no explanation of the significance of the articles, or how they relate to the charges against the defendants.
65. In respect of the article authored by Mr Engin, published on his website T24 on 3rd February 2014, the indictment makes the following assessment: “While it appears that the writer is presenting some criticisms directed at both AKP and the FETO/PDY terrorist organisation in his article, when the article is considered in general, it is apparent that phrases supporting the FETO/PDY terrorist organisation have been used”. This is confusing, as the passages the indictment suggest are supporting the FETO/PDY are unspecified, and also ignores Mr Engin’s proposition, “We should only be on the side of democracy and the legal state”.
66. An interview with KCK Co-Chairman Cemil Bayik, published on 2nd June 2015 is described as being an “article that appears to praise and try to enamour sympathy for the PKK/KCK terrorist organisation by appealing to young people and non-governmental organisations through subjects like ‘environmental sensitivity’ and male-female equality”. The purported connection between reporting on environmental issues or gender equality and raising sympathy for a terrorist organisation is entirely unclear.
67. Some articles are referred to only by their titles. The headline, “War in the Country, War in the World”, dated 25th July 2016 is said to be “worth noting” in the indictment as those behind the 15th July 2016 coup attempt used the phrase, “Peace in the Country Council”. The indictment has also picked out some headlines which were published simultaneously in both the Cumhuriyet and the Zaman newspaper, the latter is described as “the FETO/PD’s media organ”. An article published on 13th July 2016 by Mr Engin with the headline, “Peace in the World, but what about at Home?” is linked to another phrase used by the coup attempters, “The Peace at Home Council”.
68. Whilst the prosecutor is entitled to rely upon the evidence they determine relevant, the

weight to be attached to each sentence in an article is not a judgment for the prosecutor and ascribed meaning should not be presented as a foregone conclusion, especially without further supporting evidence. The quality of the indictment as a legal document would be much improved by it specifying how each of the articles amounts to criminal behaviour, as opposed to expressing a view with which the prosecutor – or the State – does not agree. A failure to do so, as in this case, gives the overwhelming impression of serving to criminalise legitimate dissent.

Section X: “Other indications connected to the change in publication policy”

A: “Drop in Newspaper circulation”

69. The indictment records the readership of Cumhuriyet newspaper fell by approximately half when comparing July 2008 and July 2016. The source of the figures is provided as an attachment to a letter from the Press Announcement Association no. E.435/2016-112127, dated 4th November 2016. It is unclear whether Cumhuriyet newspaper provided any figures of its own or was requested to do so.
70. This decline in circulation is put down to the “readers have clearly shown their reaction to the radical change in publication policy of Cumhuriyet newspaper”. No other factors, economic or otherwise, are raised or considered. Assuming that this bold assertion is correct, there is no explanation for how the readership showing their reaction to a change in publication policy indicates the commission of a criminal offence.

B: “CUMOK’s Reaction”

71. The Cumhuriyet Newspapers Readers Platform (CUMOK) is a non-governmental organisation, which has been communicating with the Cumhuriyet newspaper since 1995.
72. The indictment refers to a statement by 330 of the readers sent to the Cumhuriyet newspapers on 11th February 2015, citing concerns about the changes in the Cumhuriyet Foundation. During an interview, the Istanbul Coordinator Namik Mela Boya suggested that if the management were concerned about circulation, “they would not be trying to ruin, shake and damage with a series of Imperialist policies and postmodern attitudes, the organic relationship that the Cumhuriyet newspaper needs to establish with the republic of Turkey”. Again, this is the opinion of Mr Boya, and not a fact. The indictment provides no assistance as to how this opinion is evidence of a criminal offence being committed.

C: Various complaints that have come into our public prosecutor

73. The following complaints are referred to in the indictment:
- a. Complaint made on 19th July 2016, claiming the Cumhuriyet newspaper was distorting events and reporting news with the intention of protecting FETO/PDY;
 - b. Complaint made on 14th August 2016, claiming the Cumhuriyet newspaper had published news in favour of HDP.
74. The individuals who made the complaints are not disclosed, nor is the evidence upon which the complaint is based. The status of the complaints – whether dismissed, pending an outcome, upheld, or otherwise – have not been provided.
75. An investigation, and subsequently indictment no.2016/4302, dated 14th November 2016 was issued in respect of an article covering the interview of PKK/KCK member Murat Karayilan by the Cumhuriyet newspaper on 21st December 2015. The indictment states that the case was filed “due to the publication and distribution of statements and claims that legitimised or praised the violent, forceful and threatening acts committed by terrorist organisations and encouraging a [sic] resort to these methods”. What the indictment fails to indicate is how that separate indictment demonstrates a crime being committed by the defendants in this indictment.

D: "News and articles accepted as warnings and evidence released in the national press and internet news websites"

76. Thirteen articles in the press have been listed in the indictment, but without any further indication of how they amount to evidence of a crime being committed. The veracity of the listed articles has not been examined (or if it was, this is not set out in the indictment), leaving a large question mark over what weight, if any, can be attached to them.
77. The indictment focusses upon one article entitled, "The headlines of deceit by the scraps of terrorism" from the Medyagundem news website, dated 1st November 2016, summarising its assertions that "for the past three years the Cumhuriyet Newspaper had forged an alliance with terrorist organisations FETO and the PKK", in turn listing twenty articles published in the Cumhuriyet newspaper as examples. The accuracy of this comment is not questioned or otherwise substantiated in the indictment.

E: "Ilhan Tanir be made the US reporter"

78. Ilhan Tanir is also a suspect under investigation no. 2014/107276 on the media structure of the FETO/PDY armed terrorist organisation. The indictment states that the investigation document on Mr Tanir is relevant to this indictment; however, no explanation of how it is relevant, nor particulars of the document are provided.
79. The indictment declares, "It has been determined that in articles written by the defendant targeting the Esteemed President personally for some time and by creating the impression of a journalist that has influential connections in the U.S. and reliable sources, the defendant tried to portray an image of Turkey as a country isolated from foreign relations and which did not show the necessary decisiveness in combating terrorist organisations and ... was an ungovernable country that turned a blind eye to, or assisted ISIS". Who has determined this; how the conclusion was reached and how that determination gives rise to Mr Tanir being guilty of being a member of an armed terrorist organisation are all unexplained.
80. Articles criticising Mr Tanir are provided in the indictment, again, without establishing the veracity of their content, and are presented as fact. The indictment has its own views, "It is clear that the ties defendant Ilhan Tanir has with the FETO/PDY terrorist organisation are not limited to what is described above. He has apparently been active in trying to forment [sic] international public opinion against the operations carried out by the government on the organisation". This statement is followed by some articles critical of Mr Tanir's activities in Washington, but once again, the indictment does not go any further and fails to demonstrate how the articles can be linked to any criminal behaviour.

F: "News and Posts belonging to Ahmet Şık"

81. The indictment focusses on an interview with Cemil Bayik, described in the indictment as "ringleader" of the PKK/KCK terrorist organisation, published on 14th March 2015. The indictment observes, "... the use of the phrase 'guerrilla' in many places referring to the armed terrorist organisation PKK/KCK, aimed to ferment [sic] a perception among the public that the latter were pursuing a legitimate struggle", and that "the interview was conducted as though with a legitimate armed power dealer rather than a terrorist ringleader and tried to instil this perception with the public". The result was that Ahmet Şık "carried out propaganda for the group by presenting statements made by the armed terrorist organisation PKK/KCK's agenda to the public and thereby challenging the existing democratic legal order by trying to portray their final objective as the objective of any honourable person without mentioning the strategy embraced by the terrorist organisation or violent acts they had committed". This is entirely a subjective value judgment, even though the indictment presents it as a statement of fact.
82. The indictment deals with articles by Mr Şık covering the death of Mehmet Selim Kiraz, a prosecutor who was killed in the Istanbul Court of First Instance on 31st March 2015. The indictment once again uses emotive language, concluding, "the media announcing terrorism incidents to the public with such phrases as 'This act was a method we were forced into' to show the perpetrators as innocent people serves the objectives of terrorists and no democratic legal system will allow this". The indictment then cites *Leroy v France*¹⁹, recommending, "the press should be required to use responsible language that does not degrade the memory

of victims especially in terrorist attacks that cause social trauma". However, Leroy v France does throw light on how the articles constitute a criminal offence, and the indictment equally discloses no proper basis for such a conclusion.

83. The indictment refers to posts on Mr Şık's Twitter account. These are characterised by the indictment as Mr Şık "using posts on social media to present the state as a weak structure that terrorises the public and by these means misguided the public to create the setting the terrorists sought to achieve their final objective". Again, this appears to have no rational connection to the alleged charges or indeed to constitute a criminal offence.
84. The indictment addresses how one defendant can be accused of assisting multiple terrorist organisations with conflicting ideological agendas: "when [terrorist organisations] take action based on a common perception of the enemy, this does not prevent them from acting with ideological and intent unity in the performative sense". In this case, "their common goal is to wear down and destroy the Republic of Turkey and the Government". Therefore, "any support provided to one of these terrorist organisations fortifies the same common focus". The indictment appears improperly to equate criticism of the government with support for a terrorist organisation.

Section XI: Witness testimony describing the changes in publication policy and the process of eliminating former writers and other writers at the Cumhuriyet newspaper

85. The statements of seventeen witnesses are summarised in the indictment. The topics in the statements cover the electoral practices in the Cumhuriyet Foundation Board of Directors and Advisory Board the resulting personnel changes; the sale of properties which were owned by the Cumhuriyet newspaper; comparisons between the headlines in the Cumhuriyet newspaper and those connected to the FETO/PDY; connections between Fethullah Gulen and Cumhuriyet and general unhappiness with the direction of Cumhuriyet newspaper.
86. Many of the statements which are critical towards Cumhuriyet newspaper and the defendants come from former board members or former journalists who no longer have any association with the newspaper.
87. The fact that the date of the offence is set as "The year 2016 and prior" poses particular difficulty when dealing with these allegations as it is unclear whether the witnesses would have been in a position to witness first-hand the editorial decisions which are impugned by the indictment.
88. Much of the witness testimony concerning Fetullah Gulen appears to be hearsay. This is sometimes made clear from the indictment; at others, Mr Gulen's motives are presented as fact.
89. As with other parts of the indictment, this section also fails to set out how any of the witness statements amount to evidence of a crime being committed by the defendants, rather than mere criticism as to the running of the newspaper.

Section XII: "Suspicious find movements in the MASAK (Financial Crimes Investigation Board) reports"

A: Yeni Gun Haber Ajansi Basin ve Yayıncılık A.S.

90. The indictment looks at the accounts of Yeni Gun Haber Ajansi Basin ve Yayıncılık A.S. It determines that there are transactions between this company and five other companies which are identified by the police as "having connections to FETO/PDY". Similarly, the indictment alleges there are three individuals who are respectively described as being "connected to the TUSKON confederation" / "on the list of suspicious individuals in investigations" / "suspected of financing the FETO/PDY" / with whom the company has had transactions.
91. The dates and the values of the transfers have been specified. Only initials have been provided for the individuals, making identification potentially difficult. However, the main issue is that there is nothing in the indictment which corroborates the allegation that these specific transfers constituted criminal conduct. Even where individuals and companies/organisations are guilty of financial crimes, it does not automatically lead to the conclusion that all transactions involving

that individual / organisation constitute criminal offending. Without further financial detail, merely listing these transactions falls far short of evidence capable of proving guilt.

92. Another allegation against Yeni Gun Haber Ajansi Basin ve Yayincilik A.S. is that it was sending “money wires as salaries and ‘National Insurance Company Employees’ data”, and that an individual called M.O. was working there between 17th June 2006 and 20th April 2008. The indictment records that M.O. was charged (with others) of aiding a terrorist organisation in an Assessment Report 2010.DR/77/1-1, dated 25th January 2010, for providing aid to the families of members of the KONGRA-GEL (PKK) terrorist organisation. The only evidence from this set of facts against Yeni Gun Haber Ajansi Basin ve Yayincilik A.S. appears to be that they hired M.O. before he was charged with an offence. How that has any bearing upon this indictment is not elaborated.

B-H: Concerning individual defendants

93. The allegations concern Can Dündar, Akin Atalay, Aydın Engin, Önder Çelik, Turhan Günay, Bülent Utku and Ahmet Kemal Aydogdu. Individual transactions with the date and value are listed. Similarly, to the allegations against Yeni Gun Haber Ajansi Basin ve Yayincilik A.S., the individuals referred to concerning transactions are identified only with initials, which can create difficulties in identification.
94. However, the main issue is that it is unclear and unexplained as to how the following transactions referred to in the indictment can properly be regarded as proof of any crime committed by the defendants:
- a. A property transaction involving Can Dündar;
 - b. Akin Atalay transferring TL 2,500 to an individual whose son was involved in a company which belonged to S.A., who was involved in sending wires, EFTs and cash deposits after withdrawing funds from ATMs abroad;
 - c. Önder Çelik transferred TL 345.00 on 1st December 2011 from an individual employed between October 2006 and February 2009 by a company which was then “investigated for making transfers to any organisations, foundations or institutions due to its being connected with to [sic] Fetullah Gulen Organisation” in 2016;
 - d. Turhan Günay receiving TL 600.00 from an individual employed by a company which was alleged to have been “carrying out efforts to establish an Istanbul-based television channel run by the Terrorist Organisation PKK/KADEK”;
 - e. Bülent Utku having been employed prior to 14th December 2004 with an individual named E.D., who had sent a total of TL 66,000.00 to P.B., who was a partner and administrator of a news agency affiliated with the terrorist group KONGRA-GEL (PKK)’s KCK-TM; and
 - f. Mr Utku receiving TL 4,619.00 on 26th March 2013 from an individual called A.K.G, who began working as a judge in March 2014. A.K.G. had transferred TL 1,020.00 on 17th October 2014 to an individual called S.B., who was under surveillance due to claims they had cheated the exam to be a judge.
95. The indictment refers to Mr Utku being employed pre-December 2004 with E.D., who had sent money to P.B. No further information is provided about E.D. or P.B. The relevance of this is entirely unclear.
96. It is also unclear why it is relevant that Mr Utku apparently received TL 4,619.00 from A.K.G. Neither Mr Utku nor A.K.G. appear to be under suspicion, but S.B., to whom Mr Utku has no direct connection, is under investigation for a completely unrelated allegation.
97. Thus, the prosecution has once again neglected its obligation to explain how any of these transactions constitute an offence, in breach of Article 170(4).

Section XIII: “Defence of the defendants”

98. The “defences” of all Defendants save Can Dündar and Ilhan Tanir have been summarised. No criticism is made for this, as it is explained that neither Mr Dündar nor Mr Tanir submitted

defences as they had not been detained.

99. The summaries for Ahmet Kadri Gürsel, Akın Atalay, Bülent Utku and Ahmet Şık are very brief, essentially stating they do not accept any of the charges against them.
100. The other defendants deny any association between the Cumhuriyet newspaper and terrorist organisations. In addition, Günseli Özeltay, Hacı Musa Kart, Hakan Karasinir, Hikmet Aslan Çetinkaya and Mustafa Kemal Güngör add they were not in positions to influence the editorial content and / or had no control over financial matters at the Cumhuriyet newspaper.
101. Aydın Engin explains the phrase from the article "Peace in the Country, Peace in the World" is taken from Mustafa Kemal, and was not associated with Fethullah Gulen. Mr Karasinir, Mr Çetinkaya and Mehmet Orhan Erinç stated that news about "Fuat Avni" had been in all the newspapers. Turhan Günay confirmed that no articles were written in favour of FETO/PDY between 2011 and 2013 when he was a Board member. Mr Erinc confirmed no donations were received from groups and companies associated with FETO/PDY or the PKK/KCK. He also explained the Cumhuriyet newspaper was experiencing financial difficulties, which was why the foundation board of directors had made the decision to sell some properties. Ahmet Kemal Aydogdu denied being the owner of the Twitter account "JeansBiri" as the accounts had been sold.
102. This section goes some way to address the requirements of Article 170(5) TCPC. However, it is unclear when the defences were provided to the prosecution and whether any further enquires were made to follow up on the Defendants' accounts. As such, the requirements have, again, not been adequately met.

Section XIV: "Conclusion and assessment"

103. It is worth being reminded of the prosecutor's obligation under Article 170(5) of the TCPC: "The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his/her favour." The issues in the suspect's favour are not summarised in this section in any way, in breach of 170(5).
104. The indictment repeats its assertions that after Can Dünder became the chief editor on 8th February 2015, the policy of the Cumhuriyet newspaper changed radically, with the newspaper becoming "a press organ that served the objectives of FETO/PDY, PKK/KCK and DHKP/C armed terrorist organisations" by spreading "manipulative news" and "creating the image that the Government of Turkey and the President is 'a government and president that supports terrorism'".
105. The indictment asserts that all defendants on the Foundation Board of Directors are responsible for the change in publication policy as it was the Board who appointed Mr Dünder as the chief editor. This is said to be based on the ruling in *Surek v Turkey* (No.3), Application No: 24735/94, 08/07/1999, where the property owner was found to have the right to shape the editorial work of a magazine, and therefore responsible, by proxy, for the duties and responsibilities of the magazine's editorial and correspondent staff, which was even more significant in times of conflict and tension.
106. The indictment insists, once again, that "when terrorist organisations with different ideological approaches and bases act according to the perception of the common enemy, it is known that this will not prevent them from acting within ideological and wilful unity in terms of actions". It is on this basis, the indictment proclaims the defendants can be rightly accused of helping more than one terrorist organisation, since they "are tied by a higher force and their common goal is to wear down and destroy the Government and State of the Republic of Turkey. " This cannot be an accurate position in law – a defendant must know which terrorist group they are accused of aligning with, and evidence must demonstrate this to the requisite criminal standard.
107. The indictment considers in conclusion the limitations to the freedom of the press and Article 17 ECHR²⁰. The indictment identifies "intentionally providing incorrect or incomplete information" and "displaying manipulative approaches" when determining the limits of freedom of the press. It concludes, "Freedom of the press should mediate on the side of the state to stay away from becoming tools in malicious intentions." The way the indictment suggests this

should be done is expressed as follows: “It is possible to see examples in history of states and governments that were first worn down under strong criticism and then overturned. Even if propaganda that targets the indivisibility of a country is concealed behind an innocent demand like freedom of expressions, [this] can be sustenance for terrorism”. This suggests that no press freedom is countenanced by the Prosecutor and that press commentary in itself supports (any) terrorist acts.

108. This is the fundamental flaw in the prosecution presentation of the charges. The indictment does not appear to differentiate between legitimate criticism of a State and what it labels “manipulative approaches”, which it asserts are “sustenance for terrorism”. The indictment suggests that the “defendants carried out press activities towards creating a perception in favour of the FETO/PDY terrorist organisation”, assessing the articles, social media posts and headlines as “not innocent and legitimate actions”, but “obvious that they served the objectives of the terrorist organisation”. It is anything but obvious from the indictment how such journalism supported terrorism or terrorist organisations.
109. Article 170(2) of the TCPC states: “In cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed, the public prosecutor shall prepare an indictment”. In this case, the indictment does not appear even to disclose any reasonable grounds to suspect that any of the defendants committed a crime, never mind sufficient suspicion.

Evaluation of the indictment in terms of international standards

110. In addition to failing to comply with the Turkish Code for indictments, the indictment is also profoundly at odds with rights enshrined within the European Convention on Human Rights (“ECHR”) and the International Covenant on Civil and Political Rights (“ICCPR”) to which Turkey is a signatory.²¹ What follows is necessarily only a summary of the international law principles which apply. More detailed exposition of these principles can be found set out in, for example, other BHRC reports which consider many of the same failings within the context of trials observed by BHRC.²²

Right to a fair trial

111. The right to a fair trial is protected by Article 6 ECHR and Article 14 ICCPR.
112. A fundamental component of the right is for a defendant to know the nature of the case against them and to be able to challenge it. This includes the defence having the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.²³ Without this fundamental starting point, the defendant is unlikely to be able to properly instruct their lawyer, obtain relevant evidence to support their defence or properly prepare for trial.²⁴ It is therefore highly likely that a fair trial will not be possible.
113. Moreover, General Comment 32 of the United Nations Human Rights Committee, dated 23 August 2017 (CCPR/C/GC/32) affirms at paragraph 31 that this right includes being provided with “both the law and the alleged general facts on which the charge is based.”
114. In this case, the indictment has failed to link the evidence it relies upon with the offences it alleges that the Defendants committed. Likewise, the lack of clarity and coherence, and the failure of the indictment to disclose any real evidence other than unexplained theory is such as to render it incapable of proper objective analysis or response. As such, it violates Articles 6(3) (a) ECHR and Article 14(3)(a) ICCPR, respectively.
115. Linked to the requirement that a defendant know the case against them is the presumption of innocence protected by Article 6(2) ECHR. The right requires that the burden of proof rest on the prosecution, in that it is for the prosecution to inform the accused of the case that will be made against them, so that they may prepare and present a defence accordingly. It is also the obligation of the prosecutor to adduce evidence sufficient to convict.²⁵
116. The UN Guidelines on the Role of Prosecutors 1990²⁶ (“Guidelines”) further outline the duties of prosecutors in upholding the rule of law. Principle 12 requires prosecutors to perform their duties “fairly, consistently and expeditiously” in a way that upholds human rights and protects human dignity. Principle 13(a) requires prosecutors to carry out their functions impartially and

without discrimination, and 13(b) requires prosecutors to “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 Guidelines are complemented and expanded upon by the UNODC and International Association of Prosecutors Guide.²⁷ The Guidelines add specificity to fundamental principles of international human rights law including the right to equality before the law, the presumption of innocence and the right to a fair and public hearing before an independent and impartial tribunal.

117. The lack of balance in the indictment, and with it the failure to consider any factors in favour of the defendants indicates that the Public Prosecutor has failed to objectively apply their duties to uphold international human rights standards. Much of the evidence advanced in the indictment in fact are *prima facie* legitimate actions, be they the publication of articles, social media posts or financial transactions, which have been deemed evidence of criminal activity with no further explanation. Thus, the indictment has completely disregarded the presumption of innocence, guaranteed by Article 6(2) ECHR.
118. Finally, a fundamental aspect of the right to a fair trial is to be heard by an independent and impartial tribunal. There is a clear risk of violation of this right given the overtly political tone of the indictment. The Defendants risk conviction for terrorism offences merely by disagreeing with the political views advanced in the indictment. There is a pattern of interference with judicial independence in Turkey with judges being arrested for alleged support and association with terrorist groups.²⁸ The trial judges in this case may be at risk of being compromised as an acquittal may also be taken as dissent from the political perspective being asserted by the Public Prosecutor. As such, this could result in a tribunal being pressurised to convict a defendant out of fear of being persecuted themselves, as opposed to reaching a verdict of guilt after independent and objective consideration of the evidence before them.

No punishment without law

119. Article 7 ECHR and Article 15 ICCPR guarantee that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. In other words, *nullum crimen, nulla poena sine lege*: only the law can define a crime and prescribe a penalty.²⁹
120. Furthermore, criminal law must not be extensively construed to the detriment of a defendant, it must be sufficiently clear and certain to enable a defendant what conduct is forbidden before he/she does it, and what act would make him/her liable.³⁰
121. Legally downloading a publicly available messaging app is an instance where there is insufficient clarity and certainty about what actions constitute a crime. There is no law which forbids such an action, which is done by millions on a daily basis. By criminalising this behaviour, the indictment is in breach of Article 7 ECHR and Article 15 ICCPR.

after independent and objective consideration of the evidence before them.

Freedom of expression

122. The right to freedom of expression is enshrined in Article 10 ECHR and Article 19 ICCPR. It is a qualified right that in the pursuance of a legitimate aim can be limited. However, even where risks to national security are under consideration, restrictions must still be justified by relevant and sufficient reasons and respond to a pressing social need in a proportionate manner.³¹ In this instance, it is necessary to consider whether criminal charges founded almost entirely on press publications constitute that legitimate aim.
123. Contrary to the assertions made in the indictment, the ECtHR consistently recognise the press’ crucial role in a democratic society, and has found that authorities have only a limited margin of appreciation to decide whether a “pressing social need” exists to restrict this freedom.

Furthermore, there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate or questions of public interest. The most careful scrutiny is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.³²

124. Moreover, the Court has observed that in a democratic society based on the rule of law, political ideas, challenging the existing order and advocated by peaceful means, must be afforded a proper opportunity of expression.³³
125. When considering the need for interference by a national authority, due consideration is given to whether the expression in question is likely to exacerbate or justify violence. The Court will consider the following factors as a whole, not taking any in isolation³⁴:
- a. Whether the statements were made against a tense political or social background;
 - b. Whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance;
 - c. The manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences.
126. In *Gozel and Ozer v. Turkey*,³⁵ the Court held that when striking a balance between competing interests, the national authorities must have sufficient regard to the public's right to be informed of a different perspective on a conflict situation to that of one of the parties to the conflict, irrespective of how unpalatable that perspective may be for them.
127. In our view, the indictment neglects to appreciate, balance or consider the rights in the context of the evidence and allegations set out within it. The emphasis of the indictment is upon citing the limitations of freedom of expression, declaring, "Freedom of the press should mediate on the side of the state to stay away from becoming tools in malicious intentions". The limited and self-serving analysis of ECtHR authorities and the evident disregard the indictment displays towards the right to freedom of expression shows the depth of the problem.
128. The ECtHR has, in fact, as recently as on 10 November 2020 in *Suleyman and Ors v. Turkey*,³⁶ determined the weight of the evidence in this indictment, in the course of an application from a number of the defendants in this case.³⁷ While the application primarily concerned whether the applicants' right to liberty in the context of pre-trial detention was violated, it considered the same material relied upon in this indictment.
129. Relevant to the analysis in this report, the ECtHR concluded that:
- a. The articles and messages constituted contributions by the journalists of *Cumhuriyet* to various public debates on matters of general interest [para 172];
 - b. The articles and messages did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities [para 173];
 - c. The stance taken by the articles and messages was broadly one of opposition to the policies of the government of the day [para 174];
 - d. Detailed examination of the applicants' alleged acts show they fell within the exercise of their freedom of expression and freedom of the press. There was nothing to indicate they were part of an overall plan pursuing an aim in breach of the legitimate restrictions imposed on those freedoms and were not capable of grounding a reasonable suspicion that the applicants had committed criminal offences [para 175].
130. Of particular relevance is the finding of the ECtHR in relation to the commentary published by *Cumhuriyet*:
- ... the judicial authorities concerned created confusion between, on the one hand, criticism of the government in the context of public debate and, on the other hand, the pretexts used by the terrorist organisations to justify their violent acts. They characterised criticism levelled legitimately at the authorities in the context of public debate, in accordance with freedom of expression and press freedom, as assisting terrorist organisations and/or disseminating propaganda in favour of those organisations.

In the Court's view, such an interpretation of the criminal law is not only difficult to reconcile

with the domestic legislation recognising public freedoms, but also posed a considerable risk to the Convention system, resulting in any person expressing a view at odds with the views advocated by the government and the official authorities being characterised as a terrorist or a person assisting terrorists. Such a situation is incapable in a pluralist democracy of satisfying an objective observer of the existence of a reasonable suspicion against journalists who are aligned with the political opposition but do not promote the use of violence [paras 178-179].

131. The Court concluded that there had been a violation of Article 10 on the evidence presented:

It has not been demonstrated that the evidence added to the case file after the applicants' arrest, in particular the evidence in the bill of indictment and the evidence produced while they were in detention, amounted to facts or information capable of giving rise to other suspicions justifying their continued detention.

In particular, the Court notes that the acts for which the applicants were held criminally responsible came within the scope of public debate on facts and events that were already known, that they amounted to the exercise of Convention freedoms, and that they did not support or advocate the use of violence in the political sphere or indicate any wish on the applicants' part to contribute to the illegal objectives of terrorist organisations, namely to use violence and terror for political ends [paras 181, emphasis added].

Conclusions

132. This indictment is fundamentally flawed and fails to comply with international and domestic standards. In particular:

- a. It lacks concision and focus, does not fulfil the basic requirements for a legal document and amounts instead to a lengthy political thesis;
- b. It violates Article 170(2) of the TCPC and Article 6(2) ECHR as there is a fundamental lack of evidence that the defendants committed a crime;
- c. Further, the indictment violates Article 170(4) of the TCPC and Article 6(3) ECHR as it fails to explain how the alleged "evidence" presented constitutes a crime under Turkish law;
- d. Certain alleged conduct does not amount to an offence under national or international law (namely the use of a messaging application), in violation of Article 7 ECHR;
- e. The political assertions in the indictment may jeopardise the fairness of proceedings by indicating that any defence to the charges or any acquittal on those charges would also support terrorist acts, thus violating Article 6(1) ECHR;
- f. The indictment contravenes Article 10 ECHR by failing to recognise that the acts for which the applicants were held criminally responsible came within the scope of legitimate public debate and did not support or advocate the use of violence by terrorists.

133. A prosecutor's duties when filing a public prosecution under Turkish and international human rights law are clear, as are the requirements for presenting a valid indictment. Prosecutors must adhere to their obligations to act objectively and in accordance with the rule of law. The failure to do so in this case amounts to a fundamental violation of the right to a fair trial and, as the ECtHR has recently confirmed, the right to freedom of expression.

Endnotes

- 1 The Turkish government officially designated the religious movement of Fethullah Gulen a terrorist group under the names Fethullah Terrorist Organisation (Fethullahci Teror Orgutu) and Parallel State Structure (Paralel Devlet Yapilanmasi): <https://www.reuters.com/article/us-turkey-gulen/turkey-officially-designates-gulen-religious-group-as-terrorists-idUSKCN0YM167>
- 2 The Kurdistan Worker's Party (Partiya Karkeren Kusidstane) was formed in the late 1970s, calling for an independent Kurdish state within Turkey. The Kurdistan Communities Union (Koma Civaken Kurdistan) serves as an umbrella organisation which includes the PKK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866092/Turkey_country_policy_and_information_note_Kurdistan_workers_party_PKK_February_2020.pdf
- 3 The Revolutionary People's Liberation Party-Front (DHKP/C) is an extreme-left group aiming to replace the Turkish Government with a Marxist one, and has been branded a terror organisation by the US and the EU: <https://www.bbc.co.uk/news/world-europe-21296893>
- 4 Translated version accessed at: https://www.legislationline.org/download/id/4257/file/Turkey_CPC_2009_en.pdf
- 5 <https://www.theguardian.com/world/2016/oct/31/turkey-detains-editor-and-staff-at-opposition-cumhuriyet-newspaper>
- 6 <https://www.bbc.co.uk/news/world-europe-43899489>
- 7 <https://rsf.org/en/news/reporters-without-borders-tv5-monde-prize-ceremony>
- 8 The Turkish government officially designated the religious movement of Fethullah Gulen a terrorist group under the names Fethullah Terrorist Organisation (Fethullahci Teror Orgutu) and Parallel State Structure (Paralel Devlet Yapilanmasi): <https://www.reuters.com/article/us-turkey-gulen/turkey-officially-designates-gulen-religious-group-as-terrorists-idUSKCN0YM167>
- 9 The Kurdistan Worker's Party (Partiya Karkeren Kusidstane) was formed in the late 1970s, calling for an independent Kurdish state within Turkey. The Kurdistan Communities Union (Koma Civaken Kurdistan) serves as an umbrella organisation which includes the PKK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866092/Turkey_country_policy_and_information_note_Kurdistan_workers_party_PKK_February_2020.pdf
- 10 The Revolutionary People's Liberation Party-Front (DHKP/C) is an extreme-left group aiming to replace the Turkish Government with a Marxist one, and has been branded a terror organisation by the US and the EU: <https://www.bbc.co.uk/news/world-europe-21296893>
- 11 Translated version accessed at: https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf
- 12 Article 220/7 stipulates: Any person who aids or abets an organisation knowingly and willingly, although he/she does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation.
- 13 Article 314 of the TCC states:
- 14 Article 155(2) of the TCC states: Where the offence is committed in relation to property which was submitted and delivered as a requirement to confer authority to administer such property, and this authority is derived from a professional, trade, commercial or service relationship or any other reason, the offender shall be sentenced to a penalty of imprisonment for a term of one to seven years and a judicial fine of up to three thousand days.
- 15 A detailed analysis of the difficulties with attributing the ByLock app usage solely to FETO/PDY and thus the dangers of using the app as evidence of being a member of / supporting a terrorist organisation is set out in "Opinion on the legality of the actions of the Turkish State in the aftermath of the failed coup attempt in 2016 & the reliance on use of the ByLock app as evidence of membership of a Terrorist Organisation", William Clegg QC and Simon Baker, 25th July 2017, which can be found at: <http://20q5cg28288838bmfu32g94v-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/Redacted-Opinion.pdf>.
- 16 Ratified by Turkey in 2016, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR>.
- 17 In the translation I have been provided with, this conclusion is in bold and the font is enlarged from, "It is clear that...".
- 18 This portion is UNDERLINED AND IN BOLD CAPITALS.
- 19 App. no. 36109/03, (judgment 2 October 2008) (ECtHR).
- 20 Article 17 ECHR: Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.
- 21 Turkey ratified the ECHR in 1954 and the ICCPR in 2003.
- 22 See BHRC, Trial Observation Interim Report, Zaman Newspaper: Journalists on trial, June 2018,

available at <http://www.barhumanrights.org.uk/wp-content/uploads/2018/07/Zaman-TRIAL-OBSERVATION-INTERIM-REPORT-FINAL-1-1.pdf>

- 23 Natunen v Finland, App. no. 21022/04 (judgment 31st March 2009) (ECtHR); (2009) 49 EHRR 810, paragraph 39, citing Rowe and Davis v UK, App. no. 28901/95 (judgment 16th February 2000) (ECtHR); (2000) 30 EHRR 1 and cases therein.
- 24 Mattoccia v Italy, App. no. 23969/94 (judgment 25th July 2000) (ECtHR), para 60.
- 25 Barberà, Messegué and Jabardo v. Spain, App. no. 10590/83, (judgment 6th December 1988) (ECtHR)
- 26 Available at <https://www.un.org/ruleoflaw/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf> 27 UNODC and IAP, 'The Status and Role of Prosecutors', Vienna, 2014, available at [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx)
- 27 UNODC and IAP, 'The Status and Role of Prosecutors', Vienna, 2014, available at [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx)
- 28 See Council of Europe Commissioner for Human Rights 'Country Report following visit to Turkey 1-5 July 2019', Strasbourg, 2020, available at <https://www.coe.int/en/web/commissioner/-/turkish-authorities-must-restore-judicial-independence-and-stop-targeting-and-silencing-human-rights-defenders>
- 29 Kokkinakis v Greece, (1993) App. No. 14307/88 (judgment 25th May 1993) (ECtHR), at [52].
- 30 Ibid.
- 31 31 Doner and Others v. Turkey, App. no. 29994/02, (judgment 7th March 2017) (ECtHR), at [102].
- 32 Stoll v Switzerland [GC], App. no. 69698/01, (judgment 10th December 2007) (ECtHR) at [106].
- 33 Egitim ve Bilim Emekcileri Sendikası v. Turkey, App. no. 20641/05, (judgment 25th December 2012) (ECtHR) at [70].
- 34 Perincek v. Switzerland, [GC], App no. 27510/08, (judgment 15th October 2015) (ECtHR) at [205-208].
- 35 Gozel and Ozer v. Turkey, App Nos. 43453/04 and 31098/05, §56, (judgment 6th July 2010) (ECtHR), at [56].
- 36 Suleyman and Ors v. Turkey, App. no. 59453/10, (judgment 10th November 2020) (ECtHR).
- 37 Sabuncu and Ors v. Turkey, App. no. 23199/17, (judgment 10th November 2020) (ECtHR).

10

Legal report on indictments against
**Şebnem Korur Fincancı,
Erol Önderoğlu,
Ahmet Nesin**

PEN Norway's Turkey Indictment Project

Heidi Heggdal
Published: 17 December 2020



Legal report on indictments against Şebnem Korur Fincancı, Erol Önderoğlu, Ahmet Nesin

About the author:

Heidi Heggdal is a judge at the Oslo District Court, Norway. She is a member of the Human Rights Committee at the Norwegian Judges Association. Heggdal has worked with Turkish cases for years.

1: Introduction

This evaluation report is drafted as 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 Eastern parts of Turkey. Almost every day, there were reports about 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 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 people 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 Ragıp 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 all participated 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, including 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 contents 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. On his day in charge, there were also 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, in the following analysis, they will 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 below 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 of roughly three years 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 contents 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) seem 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 favour of the defendants. Furthermore, even if the indictments present quotes from 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 with 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 consists of two cumulative elements:

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

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 to. 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 prosecutor's interpretation or if it reflects the actual contents 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 page 8 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 texts 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 Fincancı'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 similarly and in summary as follows:

- 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 organisation's spirit high
- present the PKK/KCK subunits' armed rebel/attacks on security forces legitimate, praises and encourages them
- blesses the terrorist organisations and presents 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 "public 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 is "propaganda for a terrorist organisation", according to Anti-Terror Law article 7/2. The only accusation where this article seems relevant is in Fincancı's indictment:

The news on the 9th page of whose 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 Caldıran 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, standing in trenches with arms. 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 opposed 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 the public; it is a clear fact that the contents of the news, which is the subject of this investigation, aim to legitimise the PKK/KCK terrorist organisation and its members' actions as well as praise and encourage 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 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 Önderoğlu stated in his defense that Turkey has been convicted by ECtHR for launching investigations 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, there is a short paragraph with the defendant's statements. They all state that the articles are covered by freedom of expression. The indictment mentions 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 favourable 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 defence.

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 takes precedence over national law. Turkey has ratified the European Convention of Human Rights (ECHR).

ECHR article 6 § 3 on the rights to a fair trial, § 2 on presumption of innocence, article 10 on freedom of speech, the 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/she understands and in detail, of the nature and cause of the accusation against him/her.

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 case 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 entitled to a fair public hearing within a reasonable time frame.

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 defence is mentioned, but not properly evaluated. This is clearly not because of lack of knowledge about this defence, as it is quite basic knowledge and Turkey has had many cases before the ECtHR on this issue.

The defendants' right according to ECHR Article 6 to a fair trial is clearly violated.

3.2.3 ECHR Article 10, Freedom of speech

ECHR article 10 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 v 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 were in their right to publish; and their right and duty according to ECHR Article 10 is clearly violated.

3.2.4 The 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:

... 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.

The 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 the 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 stated in *Şık v 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 contents 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 Fincancı, Önderoğlu and Nesin lack any legal base and violate 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.

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 indictments.

Endnotes

- 1 *Şık v Turkey* (No.2)
- 2 https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf
- 3 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>
- 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)

11

Legal report on indictment

Turkey v. Osman Kavala and Henri Jak Barkey. 'The Espionage Case'

PEN Norway's Turkey Indictment Project

Kevin Dent QC
Published: 22 December 2020



Legal report on indictment

Turkey v. Osman Kavala and Henri Jak Barkey. 'The Espionage Case'

About the author:

Kevin Dent QC is a barrister based in London and practicing in the field of financial and organised crime. He was called to the Bar of England and Wales in 1991, and is an author of the Bar Human Rights Committee of England and Wales' trial report on the Gezi Park trial, as well as the author of an earlier report for this Indictments Project on the Gezi Park indictment.

1: Executive summary

1. The indictment under examination, indictment no. 2020/7041, jointly charges Osman Kavala and Henri Jak Barkey with two offences, namely:
 - Article 328 of the Turkish Penal Code ('TPC'), namely Procuring State Information that Should Remain Confidential for Political or Military Espionage Purposes,
 - Article 309 TPC, namely Attempting to Change the Constitutional Order by Force, Threat and Arms.
2. It alleges that both were jointly involved in espionage, with Turkish businessperson and civil society activist Osman Kavala acting under the direction of American citizen and researcher Henri Jak Barkey to 'procure for political or military espionage purposes information that by its nature in view of the State's security or domestic and foreign political interests should remain confidential'. Further, it alleges that they jointly played a role in organizing and directing the attempted military coup in July 2016. The indictment was filed on 28 September 2020.
3. The Article 328 TPC offence:

Article 328

(1) A person who secures information that, due to its nature, must be kept confidential for reasons relating to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage, shall be sentenced to a penalty of imprisonment for a term of fifteen to twenty years.
4. Article 309 TPC offence:

Article 309

(1) Any person who attempts to abolish, replace or prevent the implementation of, through force and violence, the constitutional order of the republic of Turkey, shall be sentenced to a penalty of aggravated life imprisonment.
5. This indictment follows an earlier indictment brought against Osman Kavala and 15 others in what became known as the 'Gezi Park' case, centering around the protests that took place in Turkey in 2013. In February 2020, Osman Kavala and other defendants were acquitted of all charges on that indictment, following trial. The indictment in the Gezi Park case has earlier been analysed as part of the Indictments Project. As set out in this report, there is a problematic factual nexus between the two indictments as essentially the same facts are relied upon to support the allegations in both indictments.
6. There are a number of serious problems with this indictment, chiefly:
 1. It does not present evidence such as to give rise to a reasonable suspicion of the offences

alleged. As such, the indictment violates the requirement for 'reasonable suspicion' under Article 170(2) Turkish Criminal Procedure Code ('TCCP').

2. Like its predecessor regarding the Gezi Park protests, this indictment is written in predominantly ideological rather than legal terms. This renders it problematic for the court to assess, and for defence counsel to challenge, what appear to be essentially political accusations.
3. Rather than setting out cogent evidence to connect the defendants to the offences alleged, the indictment presents an all-encompassing political theory that seeks to connect all major political dissent within Turkey as part of an, almost mystical, single conspiracy against the state. Through such a prism, all protest or involvement in civil society activism is viewed as 'evidence' in support of this overarching plot. Such a perspective has replaced the need to provide a coherent analysis and presentation of evidence to support charges.
4. In particular, although the indictment presents evidence that Henri Jak Barkey has visited Turkey on a number of occasions and, taken at its highest, may have met or been in proximity to Osman Kavala on a few occasions over a number of years, it does not set out any evidence of them doing anything together, or separately, that would be in furtherance of a crime, let alone the serious offences of espionage and seeking to overthrow the state by force.
5. This lack of a coherent connection between the offences alleged and the evidence presented in the indictment is in breach of Article 170(4) TCCP, which provides that 'The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence.' Consequently, it likewise violates Article 6(3) ECHR and/or Article 14 of the International Covenant on Civil and Political Rights (ICCPR) right for a defendant to know the nature and cause of the charges brought against them.
6. Further, the indictment proceeds without any acknowledgement of the verdicts in the Gezi Park case. Notwithstanding that Osman Kavala and others were acquitted at trial of the accusation that they organised the Gezi Park protests in 2013 as part of an attempt to overthrow the state through force, this new indictment recites the same accusations and uses these as the basis of the charges against Osman Kavala, but without reference to the acquittals. The silence regarding these acquittals is a glaring omission.
7. Further, because the new indictment relies upon essentially the same evidence as presented in the Gezi Park trial so far as Osman Kavala is concerned, it raises the issue as to whether the new indictment represents a breach of Article 4 of the 7th Protocol of ECHR as representing further trial on matters that a defendant has already been acquitted of. Article 4, to which Turkey is a signatory, sets out: "...a person may not be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he/she has already been finally acquitted or convicted." Not only has Osman Kavala been acquitted in relation to the Gezi Park protests but, when considering that earlier case, the ECtHR evaluated the evidence as to whether Osman Kavala had conspired with Henri Jak Barkey and found that it was insufficient to provide reasonable suspicion of any offence.
8. The lack of reference in the indictment to the Gezi Park trial acquittals is one of a number of aspects where the indictment does not adequately set out material in the defendants' favour, in breach of the requirement for balance under Article 170(5) of the TCCP. The indictment signally fails to consider or take into account the aspects of the case which may be considered as objectively running contrary to the allegations.
9. The paucity of evidence presented, taken together with the political context of the filing of the indictment (Osman Kavala's continued detention is contrary to a decision for his immediate release by the European Court of Human Rights ('ECtHR') in December 2019, together with repeated public pronouncements against him by Turkey's President Erdoğan) give rise to a strong inference that these new proceedings have been brought not for legitimate law enforcement purposes but are, rather, designed to perpetuate his detention and serve as continued deterrence on the activities of rights and civil society activists. Consequently, the indictment is likely to represent further violation of Article 18 of the European Convention on Human Rights ('ECHR').

2: Evaluation of the indictment under Turkish law

7. Article 170 of the Turkish Criminal Procedure Code sets out an indictment's legal requirements:

Article 170-

- (1) The duty to file a public prosecution rests with the public prosecutor.
- (2) In cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare an indictment.
- (3) The indictment, addressed to the court that has subject matter jurisdiction and venue, shall contain:
 - a) The identity of the suspect,
 - b) His defence counsel,
 - c) Identity of the murdered person, victim or the injured party,
 - d) The representative or legal representative of the victim or the injured party,
 - e) In cases, where there is no danger of disclosure, the identity of the informant,
 - f) The identity of the claimant,
 - g) The date that the claim had been put forward,
 - h) The crime charged and the related Articles of applicable Criminal Code,
 - i) Place, date and the time period of the charged crime,
 - j) Evidence of the offence,
 - k) Explanation of whether the suspect is in detention or not, and if he/she is arrested with a warrant, the date he/she was taken into custody and the date of his/her arrest with a warrant, and their duration.
- (4) The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence.
- (5) The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his/her favour.
- (6) At the conclusion section of the indictment, the following issues shall be clearly stated: which punishment and measure of security as foreseen by the related Law is being requested to be inflicted at the end of the adjudication; in cases where the crime has been committed within the activities of a legal entity, the measure of security to be imposed upon that legal entity.

8. Prima facie, the indictment conforms with the requirements under Article 170(3) in respect of a number of the formalities (a, b, d and h) in that it clearly sets out the identity of the suspects, details who the defence lawyers for Osman Kavala are and indicates the remand status of the defendants, indicating when they were arrested and/or detained. As Henri Jak Barkey has not been detained and does not reside in Turkey, any proceedings against him, therefore, would be brought in absentia.

9. This report focusses on what might be termed the substantive requirements of an indictment; whether the evidence collected constitutes sufficient suspicion that a crime has been committed (170(2)), whether the events that comprise the charged crime are properly explained in the indictment in accordance to their relationship to the present evidence (170(4)) and whether there is balance under 170(5).

Article 170(2) – Does the evidence presented provide reasonable suspicion that a crime has been committed?

10. The indictment and the evidence presented in it has not yet been tested in a court of law. Likewise, unlike the earlier Gezi Park indictment, there has not yet been a full evaluation of the new indictment by ECtHR. Therefore, considerable caution should be exercised before making an assessment of the indictment in the context of Article 170(2). Nonetheless, there are strong indicators of a lack of reasonable suspicion of the offences, given that:
- Although the indictment alleges joint offences in which both defendants colluded to overthrow the state and share state secrets, there is little clear evidence of them ever meeting, other than one public dinner event in 2016, to which others were invited;
 - The indictment presents no evidence of the defendants talking or communicating to each other about any of the events in question in the indictment or at any times considered significant in the indictment. The indictment acknowledges that there is little evidence of ‘direct contact’ between the defendants;
 - The indictment does not explain in any meaningful way what espionage activities either defendant was involved in;
 - The indictment is silent on what sensitive/secret information was either obtained or passed on by either defendant;
 - No secret state information was found on either defendant. Any information on Osman Kavala’s phones or other devices appears *prima facie* to be information already within the public domain.
 - The indictment does not set out how either defendant actually sought to organise or progress the attempted coup in 2016. Indeed, it is entirely silent on what either did to actually advance the coup;
 - The indictment presents no evidence that either defendant spoke in support of the coup attempt, either before, during or after. Indeed, the only pronouncements by either highlighted in the indictment are Henri Jak Berkey’s comments on the night of the attempted coup, to the effect that it was a bad thing;
 - It presents no evidence of either defendant at any point expressing views in support of violent means or the coup attempt. Not that to do so would in itself be evidence of any crime but, in the context of an indictment alleging from circumstantial evidence that both sought to support an attempted coup, the lack of either saying anything in support of it must be significant;
 - It presents no evidence that either were involved in any activity other than that in exercise of lawful and protected rights of freedom of association as a civil society activist and researcher;
 - In place of any such evidence, as is set out below, the indictment instead presents a series of pseudo-political theses to seek to portray both as masking under ‘guises’ of legality in order to (in an unspecified way) cause harm to Turkish society and prepare the groundwork for the coup attempt;
 - Rather than presenting concrete evidence, the indictment narrates a chronology in which the movements of each are claimed, without explanation or obvious logic, to be part of a coordinated movement.
11. The preliminary assessment that the indictment does not meet the reasonable suspicion test under 170(2) is bolstered by the ECtHR’s earlier assessment of Osman Kavala’s detention regarding the Gezi Park trial. To consider this aspect, it is necessary to analyse the new indictment in the context of ECtHR’s ruling in *Kavala v. Turkey* (Application no. 28749/18). In the course of ECtHR considering Osman Kavala’s claim that his detention was arbitrary and

that the proceedings had been pursued for the ulterior purpose of silencing human rights and civil society activists, ECtHR noted that Osman Kavala had been detained in relation to two accusations:

1. Related to the Gezi Park events which occurred between May and September 2013 (Article 312 of the Criminal Code)
 2. Relating to the attempted coup of 15 July 2016 (Article 309 of the Criminal Code, the same article as in the new indictment).¹
12. ECtHR considered in detail the facts giving rise to detention under Article 309² including the same evidence repeated in the new indictment from phone base receiver sections that Osman Kavala's and Henri Jak Barkey's phones emitted signals from the same base station on 18 July 2016, that is two days after the attempted coup. ECtHR noted that Osman Kavala had submitted regarding such evidence that this phone station covered a large central district in which many hotels and his office were located.³
13. ECtHR then assessed whether the evidence presented gave rise to reasonable suspicion of offences under Article 312 (the Gezi Park protests) and Article 309 (the attempted coup)⁴. Having assessed that there were no reasonable grounds for suspicion in regard to the Gezi Park protests, the ECtHR likewise determined that there was no reasonable suspicion of involvement in the attempted coup. The court stated as follows:

iv) Reasonableness of the suspicions in respect of the attempted coup

154. With regard to the accusations concerning the attempted coup of

15 July 2016, the Court observes that these were predominantly based on the existence of "intensive contacts" between the applicant and H.J.B., who, according to the Government, was the subject of a criminal investigation for participation in organising an attempted coup.

In the Court's view, however, the evidence in the case file is insufficient to justify this suspicion. The prosecutor's office relied on the fact that the applicant maintained relationships with foreign nationals and that his mobile telephone and that of H.J.B. had emitted signals from the same base receiver station. It also appears from the case file that the applicant and H.J.B. met in a restaurant on 18 July 2016, that is, after the attempted coup, and that they greeted each other briefly. In the Court's opinion, it cannot be established on the basis of the file that the applicant and the individual in question had intensive contacts. Further, in the absence of other relevant and sufficient circumstances, the mere fact that the applicant had had contacts with a suspected person or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order.

155. In the Court's opinion, it is quite clear that a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence, given the nature of the offence in question. However, it does not appear from the decisions of the domestic courts which ordered the applicant's initial and continued detention, or from the bill of indictment, that the applicant's deprivation of liberty was based on a reasonable suspicion that he had committed the offences with which he was charged."

14. It is important to note that the new indictment essentially seeks to conjoin the accusations in the Gezi Park protests, for which ECtHR found there was no reasonable suspicion of an offence, together with the accusation of involvement in the attempted coup, for which ECtHR also found there was no reasonable suspicion of an offence. The result of the synthesis of two accusations already determined to be without reasonable foundation must, likewise, be highly likely to be without foundation. Given this previous determination by ECtHR on the offence under Article 309, there must be a strong inference that the new offence of espionage under Article 328 has been brought for the purpose of creating a 'new' charge that can be argued to be not already within the ambit of ECtHR's decision that Osman Kavala be 'released immediately'⁵ for the offences under Article 309 and 312.

15. The lack of evidence that would, objectively, give rise to a reasonable suspicion of an offence is both contrary to Article 170(2) TCPC. Further, the paucity of evidence supports other factors indicating that the prosecution is brought for 'ulterior' rather than legitimate law enforcement purposes and, therefore, contrary to Article 18 ECHR. It cannot be overlooked that this indictment is a successor to the Gezi Park indictment, about which the ECtHR ruled in December 2019 to have been brought without reasonable suspicion of any offence and for ulterior motives in violation of Article 18.
16. Given that the filing of this indictment has had the effect of perpetuating Osman Kavala's detention, contrary to a ruling of ECtHR for his immediate release in December 2019, the ostensible lack of evidence of any offence provides further indication that the new indictment is brought for ulterior political purposes and is, in its way, an aggravated form of violation of Article 18; an indictment brought for the purposes of outrunning the ECtHR's condemnation of an earlier indictment for violation of Article 18. Indeed, the filing of the indictment on 28 September 2020 was one day before the Turkish Constitutional Court was due to rule on the lawfulness of Osman Kavala's continued detention and had the effect that the Constitutional Court postponed its determination. At the time of writing, Osman Kavala remains in detention.

Article 170(4) – Does the indictment properly explain the crime alleged and the evidence establishing the offence?

17. In this respect, the indictment is defective. The principal areas of concern are that the strong ideological slant of the indictment goes hand in hand with a lack of a coherent causal connection of evidence to charges in such a way as to make the charges unintelligible. Consequently, it would be difficult or impossible for a court of law to fairly assess and for the defence to properly challenge the indictment. This indicates not only a breach of this requirement of TCPC but also that the defendants' rights to a fair trial under Article 6 ECHR are being breached.

The ideological nature of the indictment

18. The indictment presents a grand political theory which appears to have replaced objective, forensic and legal analysis of the evidence.
19. In cases such as this, it is important to forensically examine investigation material and present it in a clear way, free of political ideology and animus. As ECtHR said concerning an offence under Article 309, "it is quite clear that a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence, given the nature of the offence in question." For instance, if evidence supports charges such as espionage under Article 328, it should be possible to present this in a tangible way. For instance, where Suspect A is seen to meet with Suspect B, and then to hand over a memory card containing sensitive secret information, a case of espionage can be understood.
20. In this indictment, however, we have the opposite; conspiracy theory appears to have substituted itself for evidence. This report considers only a few examples of the very many instances where ideology has supplanted the need for evidence.
21. The following passage from the introductory section of the indictment (page 3/71) sets the ideological tone:

“As has been stated on numerous occasions, it is a known fact that the Gezi Park Uprising incident was an event which took place in the very wake of the processes whereby FETÖ/PDY had striven for about forty years to take over all areas of the state of the Republic of Turkey alongside the important ones such as the social, economic, judicial, military and civil areas, and had infiltrated the tiniest units of the machinery of the state; by means of which it openly endeavored to weaken the legitimate government through the Ergenekon, Sledgehammer and 7 February National Intelligence Organization plot attempts in which it tried to usurp state rule with initial recourse to judicial procedures; and in which, following the ending in failure of the Gezi Uprising, it staged a judicial coup attempt comprising the creation of false evidence in the 17/25 December 2013 proceedings courtesy of its structure inside the judiciary; and, by way of continuation, it organized the National Intelligence Organization’s Trucks Plot with a view to creating the perception that terrorist organisations were being aided again to strain the circumstances of the legal and legitimate government in the international arena; and, upon the failure of all these plots, it engaged in a coup attempt with the aim of taking hold of and changing the constitutional order on 15 July 2016 by placing trust in the force it had created in all units of the machinery of state and particularly the structures inside the police and military.”

22. Thus, in one long sentence, the indictment presents not just the Gezi Park protests but all of the upheavals and protests of recent years as different aspects of one alleged heterogeneous yet homogenous conspiracy. Within such an all-encompassing ideological perspective, any support for protests and/or criticism of the ruling government at any point over the last seven years can be viewed as evidence of encouragement or support of the plot.

23. The indictment repeats, without evidence, essentially the same theories about George Soros organizing and directing dissent within Turkey that formed the basis of the earlier Gezi Park indictment; the following passage is one of many similar (3/71):

“It has been determined that the suspect Mehmet Osman KAVALA has connections with George Soros, director of the Open Society Foundation which organised and financed the supposedly freedom-themed events popularly known globally as the Arab Spring that started in 2013 and earlier; the Open Society Foundation targets regime change in countries by pursuing segregation and social division through accentuating differences in social and demographic structures in the Republic of Turkey state just as in Arab countries; the suspect Mehmet Osman KAVALA, by conducting research into the cultural and social situation of our country’s people through both Anadolu Kültür S.A. and the other CSOs, companies and entities of which he is the founder and director, has both obtained detailed and important information and engaged in segregationist activities...and the actual aim of the activities consisting of the actions and processes he engages in with talk of developing so called democratic freedoms and spreading them to the grassroots of society is to incapacitate the legitimate democratic government, incite segregation within society and cause harm by weakening the unity and togetherness of our citizens with the state and nation to the detriment of national interests and the benefit of foreign states and intelligence organisations.”

24. Within such a profoundly ideological framework, the work of civil society activists such as Osman Kavala in encouraging democratic freedoms and human rights is presented as a means of inciting segregation within society. The theme that civil society groups are actively seeking to weaken the unity of Turkish society, segregationism, runs unchecked throughout this indictment and is the opposite of an objective legal presentation of evidence. Osman Kavala’s work in providing funding for documentary projects such as a film on citizens of Kurdish and Armenian origin are, therefore, presented as aimed at dividing different groups within society in order to weaken it in preparation for armed insurrection.

25. Further, the reference above to Osman Kavala obtaining “detailed and important information” appears to portray obtaining ordinary information in the course of civil society work as part of his alleged espionage. It is difficult to see how a court of law can evaluate such theses nor how lawyers for the defence would be able to challenge them. Moreover, these passages beg the question who this indictment is being written for? There must, indeed, be a suspicion here that it is drafted for a political readership rather than for the parties in the proceedings.

26. Moreover, such passages have an effect on the fairness of any subsequent proceedings. When the political ideology of a ruling party runs unchecked through an indictment, for any lawyer or judge to challenge or deny such a thesis is capable of being viewed as tantamount to a repudiation of the ruling party. Of course, that is not to say that lawyers are not able to make submissions about the paucity of tangible evidence or that judges cannot consider them, but such a strong political slant makes objective impartial assessment of the evidence more difficult. Such a concern is by no means hypothetical; following the acquittals in the Gezi Park trial in February 2020, the trial judges were placed under investigation by the Association of Judges and Prosecutors and the verdicts of acquittal were described as 'maneuvers' by Turkey's President Erdoğan.
27. At a more basic level, a considerable amount of the material presented in the indictment is incapable of legal assessment; how is a court supposed to assess or rule on an accusation that promoting the rights of different groups within society has the effect of creating division within society and a feeling of otherness within it?

Lack of clarity and coherence

28. Commensurate with the predominantly political tone of the indictment, is a lack of clarity and coherence.
29. In particular, there are a number of rambling and unexplained comments. The following passage from the introductory section concerning the 2013 Gezi uprising (page 9/71) is typical:

"The uprising was coordinated on behalf of the Open Society Foundation by the foundation's founding member, the suspect Mehmet Osman Kavala; that Mehmet Osman Kavala exerted great influence particularly over Taksim Platform, Taksim Solidarity and the Forum Coordination, which was rolled out widely in the advanced stages of the uprising, and, even if he did not officially have membership in these, the decisions taken were not taken without consulting the suspect Mehmet Osman Kavala; that all international endeavors relating to the Gezi Uprising were set up through the suspect Mehmet Osman Kavala; that the suspect Mehmet Osman Kavala was informed of the needs of the activists participating in the Gezi Uprising, and these were met and that work involving the use of all manner of visual broadcasting methods such as documentaries, films and exhibitions with a view to increasing interest in the uprising both in Turkey and abroad and putting pressure on the State of the Republic of Turkey and the setting up of new media structures took place under the suspect Mehmet Osman Kavala's organisation."

30. Prima facie lawful activity such as attending film festivals and meeting with members of human rights organisations is, therefore, said to be in furtherance of armed insurrection, but without explanation as to how. In the same way, participation in a photographic exhibition at the European Parliament is presented as being part of preparing the way for the attempted coup.
31. The indictment also presents evidence of the travel of the two defendants, but without ever setting out the significance of the travel in the context of the charges alleged. For instance, at 41/70, the indictment states:

When the records for entry from abroad and exit for the suspect Mehmet Osman Kavala were examined, it was identified that the suspect went abroad more frequently prior to the 15 July attempted coup than in previous years.

32. How such travel is related to the crimes alleged is simply not explained. Likewise, dates when the defendants did not travel together or meet is presented, without explanation, as evidence that they jointly prepared an attempt to overthrow the state. Consider, for instance the following (37/71):

It was established that the suspect Henri J. Barkey was in Istanbul from 26-29 June; on 30 June 2016, he went to Diyarbakır province, and had various meetings in the Yenişehir, Bağlar, Sur and Kayapınar districts, returning to Istanbul on the evening of the same day, and remained in Istanbul province until 3 July 2016.

It was identified that the suspect Mehmet Osman Kavala meanwhile, on 27 June 2016, one day after the arrival of the suspect Henri Jak Barkey in Istanbul, went to Diyarbakır province, and after having various meetings there, returned the same day to Istanbul.

33. What either was doing in Diyarbakır province, at different times, or how it might have supported a coup attempt, is nowhere explained. A sequence of, ostensibly, unrelated travel is presented in the lead up to the following conclusion (37/71):

“Taking account of the chain of events elaborated on above, it has been ascertained that the activities prior to the 15 July coup attempt of the suspects Mehmet Osman Kavala and Henri Jak Barkey intersected with the coup attempt preparations; that both suspects had prior knowledge of the coup attempt and set up a host of connections domestically and abroad to create the infrastructure of the coup attempt”.

34. The evidence as to how either defendant had foreknowledge of the coup attempt is not presented. The indictment presents a series of meetings and seminars that Henri Jak Barkey attended, but without setting out how they are connected either to espionage or in support of the attempted coup.
35. The indictment, understandably, focusses on the events surrounding the attempted coup on 16 July 2016. It closely analyses Henri Jak Barkey’s movements at a conference event on Büyükada island near Istanbul at that time, but without setting out how participation at the conference or his activities at the time boosted, supported or helped organise the attempted coup. The evidence establishes that Henri Jak Barkey monitored the events on television and made international calls that night, but it must be highly likely that most people in Turkey at that time also monitored the dramatic and important events that were broadcast on a number of television channels.
36. How such activity was in furtherance of a crime, however, is not explained in the indictment, nor is evidence presented of anything said or done by him at that time, or previously, to organise or direct the attempt.
37. Following a lengthy section setting out the legal framework for a charge of espionage under Article 328 TPC, the indictment then sets out the case for the defendants with that charge. This sets out a thesis but does not set out any evidence to substantiate them. In the following passage, highlighted in bold are matters for which no evidence is presented:

“Considering the actions of the suspects in light of these explanations, it was determined that the suspects established parallel contacts with insider officers playing a covert role in the organisation that conducted and directed this attempt on behalf of the FETÖ/PDY armed terrorist organisation prior to the coup attempt, and thus made preparations for the coup attempt; that they were in contact and direct relations and that they took initiatives with the aim of coordination with the persons and groups who were likely to take on legal or illegal duties within the new administration to be formed after the coup attempt’s success; that in this context, they travelled extensively domestically and abroad; that they travelled and held meetings successively, including with the insider officers of the organisation; [and] that their contacts in the form explained, which took place with an unusual intensity, were within the scope of preparations for the coup attempt. It is also understood that one of the suspects, Henri Jak Barkey, came to our country the day the coup attempt was attempted; that in this context, he organised a meeting in order to hide his activity; as also explained in the previous sections of the indictment, that he postponed the date of this meeting with unreasonable excuses until the day of the coup attempt; [and] that on the day of the coup attempt, he directed the process by following the attempt from a relatively safe distance considering the attacks that could be experienced and were experienced due to the coup attempt in our province Adalar.

As also stated by those whose statements were taken as witnesses within the scope of the file, it was determined that Henri Jak Barkey, unlike the other delegates who stayed with him, closely followed the developments regarding the coup attempt during the night and made contacts, in a tense mood, that could be regarded as directing the process; [and] that in this context, foreign persons and institutions that were in contact with him shared the travel information of the President of the Republic of Turkey on social media. Within the scope of these activities, it is quite obvious that the suspects took active roles in the coordination and maintenance of the coup attempt attempted by members of the FETÖ/PDY armed terrorist organisation in favour of foreign states, followed the actions in situ, and intervened in the process with the coordination and contacts they established, when necessary.”

38. In terms of the offence of espionage under Article 328, the indictment states that the state secret information that the defendants procured was (page 61) “obtaining information that has sociological, economic and political content, which should be kept confidential in terms of the security of the state or foreign political benefits of the state.” The indictment, however, does not provide any explanation as to why working on the sociological, economic, political context of the country through work in civil society organisations in producing analysis can in any meaningful sense be collecting “confidential information.” Not only is this definition meaningless, but it would also *prima facie* criminalise the work of all such civil society and rights organisations. Indeed, finding out information about the society in which citizens live would become evidence of a crime. Such a definition is not only legally meaningless, it also presents a full-frontal attack on basic rights of association and expression.
39. It is noticeable that, notwithstanding the seriousness of the allegations, no serious attempt has been made in the indictment to link Osman Kavala to any activity or role in either espionage or the attempted coup. Consequently, given the lack of coherent evidence, it is hard to resist the conclusion that the indictment is a piece of political theatre rather than a legal instrument and one designed to perpetuate the detention of Osman Kavala.

Article 170(5) – Does the indictment properly balance evidence both favourable to and unfavourable to the defendants?

40. This Article requires the indictment to have balance and to weigh points both favourable and unfavourable to the suspects. This is no more than to reflect the general norms as set out in Principles 13(a) and 13(b) of the Basic Principles on the Role of Prosecutors and Article 3 of the Standards of the International Association of Prosecutors. Article 3 states that:

“Impartiality: Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

3.1 carry out their functions impartially;

3.2 remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

3.3 act with objectivity;

3.4 have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.”

41. Unfortunately, there is little sense of balance to be found in this indictment. Although the indictment does acknowledge that there was little ‘direct evidence’ of communication between the two defendants, there are a number of other basic aspects to the evidence that would require comment and evaluation in the indictment in order for there to be due balance, which are absent here. They include:
1. Neither of the defendants are presented as expressing any comments in favour of armed insurrection and/or support for any coup or overthrow of the state;
 2. Neither of the defendants are presented as taking any actions that, objectively viewed, aided or advanced an attempted military coup;
 3. No evidence of either defendant having contact with any of the organisers of the attempted coup;
 4. The lack of any evidence to suggest that either defendant was in possession of information that could be considered state sensitive espionage material;
 5. The lack of any acknowledgement that Osman Kavala and others were acquitted of the charges that they directed the Gezi Park protests. Likewise, the lack of causal connection between these protests in 2013 and the attempted coup in 2016.
 6. The activity of both defendants comes within the ambit of prima facie legal activity in exercise of rights of freedom of association and expression.
42. More generally, the indictment consistently presents the activities of the defendants in civic society within an extreme and hostile ideological perspective that is the very opposite of a fair objective balanced evaluation of the evidence such as is mandated by TPC.

3: Evaluation of the indictment in terms of international standards

43. In addition to failing to comply with TPC, the indictment is also at odds with rights enshrined within the ECHR and the International Covenant on Civil and Political Rights (“ICCPR”) to which Turkey is a signatory.

Right to a fair trial

44. The right to a fair trial is protected in both Articles 5 and 6 of the ECHR and Articles 9 and 14 of the International Covenant of Civil and Political Rights (“ICCPR”) to which both Turkey is a signatory.
45. A fundamental component of the right to a fair trial is the right of a defendant to know the case against him/her and to challenge it. International human rights law is clear that if a defendant does not know the nature of the case against him/her, he/she is unlikely to be able to properly instruct his/her lawyer, obtain relevant evidence to support his/her defence or properly prepare for his/her defence. He/She is therefore highly unlikely to be able to have a fair trial. He/She is also unable to challenge his/her detention.
46. General Comment 32 of the United Nations Human Rights Committee, dated 23 August 2017 (CCPR/C/GC/32) provides clearly at paragraph 31 that this right includes being provided with “both the law and the alleged general facts on which the charge is based.”
47. Furthermore, established case law of the ECtHR affirms that it is a fundamental aspect of a fair trial that proceedings be adversarial with equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations

filed and the evidence adduced by the other party.

48. In this case, the lack of clarity and coherence, and the failure of the indictment to disclose any real evidence, unnecessary repetition and unexplained theory and comments in the indictment is such as to render it incapable of proper objective analysis or response and accordingly is an indictment which, in every respect, violates articles 6 and 14 of the ECHR and ICCPR, respectively.
49. Likewise, the right to a fair trial protects the cardinal principle of the “presumption of innocence.” In this case, a considerable amount of material in the indictment describes activity which is on the face of it lawful activity (making trips abroad, meeting with individuals from both Turkey and abroad, private telephone communications, work within ordinary lawful civil society groups, etc.), but which in the indictment is presumed, without any or any concrete evidence to the contrary, to be criminal activity. Further, the indictment presents the collection of ordinary information about society through social activism work as collecting confidential espionage material.
50. As such, the whole premise of the Indictment runs contrary to the presumption of innocence enshrined within the right to a fair trial in Articles 6 and 14, as above. It further fails to meet the minimum guarantees within those provisions as to the information to which a defendant is entitled in responding to a criminal charge against him/her to such an extent that a fair trial on this indictment is impossible.

Freedom of expression and association

51. Of further concern in the context of this indictment is that it appears to fundamentally undermine the rights of freedom of expression and freedom of association as enshrined in Articles 10 and 11 of the ECHR, and as enshrined in 19 and 21 of the ICCPR. The indictment fails to consider, balance or evaluate any of these rights in the context of the evidence and allegations.
52. All of the activity of the defendants as described in the indictment was *prima facie* lawful activity protected by these rights (human rights activism, commenting on government policy, meeting with parliamentarians from the European parliament, going on trips abroad, working in and running open society groups, attending seminars and conferences, etc.). Where such activity is detailed in the indictment, it is done without reference to any concrete evidence that such activity was in pursuit of criminal purposes.
53. On the contrary, in the indictment, the exercise by these defendants in these basic rights was wholly criminalised and presumed to be criminal. Within such a framework, all criticism of the government is cast as being part of some overall plot to overtake Turkey by force. The total lack of appreciation or evaluation of the rights under Article 10 and 11 ECHR and 19 and 21 ICCPR, respectively, is a further indication that this indictment falls far below proper and ordinary prosecutorial standards. It is an indictment drafted in profound contradiction to fundamental standards of international human rights to which Turkey has agreed to be bound.

The effectiveness, impartiality and fairness of prosecutors in criminal proceedings

54. Finally, reference should be made to the UN Guidelines on the Role of Prosecutors (“Guidelines”) which outline the role of prosecutors in upholding the rule of law. Principle 12 require prosecutors to perform their duties “fairly, consistently and expeditiously” in a way that upholds human rights and protects human dignity. Principle 13(a) requires prosecutors to carry out their functions impartially and without discrimination, and 13(b) requires prosecutors to “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 Guidelines are complemented and expanded on by the International Association of Prosecutors Standards of Professional Responsibility and Statement on the Essential Duties and Rights of Prosecutors. The Guidelines add specificity to fundamental principles of international human rights law including the right to equality before the law, the presumption of innocence and the right to a fair and public hearing before an independent and impartial tribunal.
55. As outlined above, there is a profound lack of balance that runs through the indictment such

that the indictment as a whole can only be said to constitute a profound breach of international prosecutorial standards.

4: Conclusion

- 56. Politically sensitive investigations demand balanced evaluation by prosecutors. In this particular indictment, however, ideological fervor has clearly overtaken sound prosecutorial judgement and analysis of evidence. The indictment lacks due balance and has, within a highly politicised and hostile perspective, substituted ideology for evidence. The indictment is also in serious breach of domestic law and international human rights standards.
- 57. The indictment is so problematic that it is hard to meaningfully set out how it could be improved, particularly where there is a strong inference that it has been presented for ulterior motives, in violation of Article 18 ECHR. It is hugely concerning that Osman Kavala remains in detention on the basis of a flawed indictment that has replaced an equally flawed indictment. ECtHR's damning ruling on the earlier indictment has not resulted in an improved approach in this successor indictment.
- 58. The strong political slant of the indictment, its reversal of the presumption of innocence and lack of coherence strongly suggest a violation of the Article 6, right to a fair trial. Osman Kavala's acquittal from the Gezi Park trial gives rise to a concern that he is now being prosecuted for essentially the same matters that he has already been acquitted of, in breach of Article 4 of the 7th Protocol of ECHR. The indictment also seeks to criminalise ordinary civil society activism and human rights work in a way that is in violation of Articles 10 and 11 ECHR.
- 59. Indeed, the logical consequence of the indictment is that all work to enhance the rights of those within Turkey can be viewed as *prima facie* criminal and seeking information about Turkish society can be viewed as a means of gathering confidential material for the purposes of espionage. That just demonstrates how dangerous this indictment is and how far from reality and legal requisites it has strayed.

Endnotes

- 1 Kavala v. Turkey (Application no. 28749/18) at Paragraph 4.
- 2 Kavala v. Turkey (Application no. 28749/18) at Paragraphs 23-27, 38
- 3 Kavala v. Turkey (Application no. 28749/18) at Paragraphs 108
- 4 Kavala v. Turkey (Application no. 28749/18) at Paragraphs 139-155
- 5 Kavala v. Turkey (Application no. 28749/18) at Paragraphs 240.

12

Legal report on indictment

Turkey v Ahmet Altan & others

PEN Norway's Turkey Indictment Project

Şerife Ceren Uysal
Published: 21 January 2021



About the author:

Şerife Ceren Uysal is a human rights lawyer from Istanbul. During her practice in Turkey, she was working on many cases related to systemic human rights violations. She has been an executive board member of the Progressive Lawyers Association since 2012. She is also an active member of the international relations committee of the association and represents the association in several international organisations. As part of her activities at the committee, she has organized numerous fact-finding and trial observation missions together with her colleagues. Based in Vienna since December 2016, she took up the position of guest researcher at the Ludwig Boltzmann Institute for a year. She has participated in several conferences and seminars in different countries, to draw attention to the situation in Turkey, particularly in relation to lawyers and human rights defenders. She was awarded the Dr. Georg Lebiszcak-Prize for Freedom of Speech in Austria. She is currently studying at the Gender Studies Master Program of the University of Vienna during which she has been focusing on gender issues within the context of human rights law.

1: Introduction

The scope of this report consists of the evaluation of the 247-page indictment, with the investigation number 2016/100447 and the indictment number 2017/1545, against 17 suspects, including Ahmet Altan, prepared by İstanbul Public Prosecutor Can Tuncay on 11.04.2017. Regarding his pre-trial detention status continuing for more than 4 years, this report focuses solely on Ahmet Altan.

In addition to this limitation with the preference of focusing on one person, it was necessary to limit the parts of the indictment subject to examination, since from page 7 to 155 of the total 247 pages of the indictment were cited entirely from another indictment, and there is no direct or indirect connection between this section and the suspects. For this reason, the report does not focus on the said page range of the indictment.

However, a few words should be said regarding the consequences of the indicting prosecutor's preference of "citing." The first thing that strikes one here is that until the page 155 of the indictment, no suspect has the opportunity to catch the slightest hint of the scope of the charge brought against him/her. The method adopted by the indicting prosecutor and the writing technique that does not rely on cause-and-effect relationship lead to serious confusion. Accepting an incoherent text of 247 pages as an indictment is in itself difficult on the basis of legal criteria.

A paragraph of the other indictment quoted entirely in this indictment (page 56) refers to a procedure carried out in the investigation file of the indictment examined. It is paradoxical that the two indictments quote each other. These indictments are pending and differ from each other in terms of essential elements such as suspects and allegations. Yet, the broad and farfetched interpretation creates an impression that the only evidence about these allegations is the other indictment; that is to say the prosecutor's method cannot be explained in the context of presumption of innocence.

Subheadings such as "perception management," "mental manipulation" and "brain control" in the indictment quoted also make it difficult to make a legal assessment of this part. It is not possible to concretise within the bounds of the world as we know today and take the reader to a fantastic sphere with their character. Nor is it possible to link these subheadings with a concrete act, at least not in the context of the Penal Code still in force in Turkey today. If the first arrest and detention decision taken against Ahmet Altan within the scope of this investigation had not been based on the ground of "conveying a subliminal message," a kind of justification that cannot be defined by any norm within

a legal system, then these subheadings could have been ignored. However, when the said grounds and the relevant subheadings of the indictment are taken together as a whole, it is seen that at least two prosecutors within the Turkish judicial system have allowed such a legal characterisation. Even discussing the legal uncertainty created by this approach is absurd. Its consequences can also be clearly observed in the indictment examined. Since the charge pressed by the prosecution is linked to an abstract act that is impossible to prove—at least so merely with the verbal and written evidence put forward in this indictment—the evidence could also be evaluated not in a legal context, but in an unlimited field of interpretation within this abstract universe that the prosecutor constructs. One can argue that a legal system serves to construct a reality through norms under any circumstances. However, when a prosecutor begins to interpret the relevant reality in a parallel universe that goes beyond the norm, the line between legal truth and fiction becomes completely invisible. This point indicates a stage where the principle of legal certainty, which is indispensable in terms of criminal law, can no longer be mentioned.

Finally, it is worth remembering that the study focuses only on the indictment phase. The trial process of Ahmet Altan, which has lasted more than 4 years, will be summarised under the subheading “background” to make it easier to follow, and also some observations will be inevitably made in this section. However, the legal evaluation of the judicial process, which should be a subject of examination in itself, will not be included in this report.

2: Background

Ahmet Altan was taken into custody on 10.09.2016 and held in custody for 13 days on the basis of his statements in the program on which he was a guest, and which was broadcast on Can Erzinan TV on 14.07.2016. In the content of the warrant issued by the indicting prosecutor, it was stated that Ahmet Altan and his brother Prof. Dr. Mehmet Altan “made statements containing subliminal messages in connection with the coup” in the program.¹

Following 13 days of police custody, Ahmet Altan was released by the investigating judge. Within 24 hours of the release of Ahmet Altan, an objection was made by the prosecutor in charge of the indictment against the court order. The appeal was accepted by the Istanbul 1st Criminal Court of Peace and Altan was transferred to Silivri Prison on 23.09.2016.

While he was in prison and the indictment was not yet ready, Altan filed an individual application with the Constitutional Court of the Republic of Turkey on 08.11.2016. Again, this time on 12.01.2017, he applied to the European Court of Human Rights. This application of Ahmet Altan before the ECtHR is still pending.

The indictment against Ahmet Altan and the 16 people he was tried together with was prepared eventually on 11.04.2017. Within the scope of the indictment, the allegations against Ahmet Altan, Mehmet Altan and Nazlı Ilıcak were expressed as follows:

“[...] As it is understood, from the suspects’ social status, background and the nature of their acts [they] acted in cooperation with the terror organisation in line with the objectives of the organisation in a continuous manner beyond the existence of organic bonds and participated in the coup attempt on behalf of an armed terrorist organisation, it is accepted that they committed the alleged crimes of attempting to abolish the Grand National Assembly of Turkey or to prevent it from fulfilling its duties, of attempting to abolish the government of the Republic of Turkey or to prevent it from fulfilling its duties, of attempting to abolish the constitutional order of the Republic of Turkey, of committing a crime on behalf of an armed terrorist organisation, and thus it is necessary to punish them through the application of Articles 309/1, 311/1, 312/2 (and of 314/2 in line with 220/6) of the Turkish Penal Code Numbered 5237 in line with Articles 3 and 5 of Anti-Terror Law Numbered 5237, which befit their acts (...)”

It is seen that the evidence is scattered throughout the narrative in a disorganised way. Basically, it is understood that Altan’s statements during the program he appeared on 14.07.2016 were accepted as evidence against him. In addition, Altan’s telephone records, some commercial records, statements belonging to some anonymous witnesses or witnesses benefiting from repentance provisions of the Turkish Penal Code, and documents forming the basis of the case known as the Sledgehammer case

that were published in the newspaper Daily Taraf² at the time when Altan was the founding editor-in-chief have been included as evidence.

Following the acceptance of the indictment by the court, the first hearing was held on 19.06.2017. On 12.02.2018, the verdict was announced after the 5th hearing block. At the end of the trial Ahmet Altan was found guilty of the charge of attempting to abolish the Constitutional Order of the Republic of Turkey and was sentenced to a penalty of aggravated life imprisonment.

A few weeks before the hearing, an important development took place in that the Constitutional Court found that the right to liberty and security of the person and freedom of expression and press were violated within the context of the individual application of Mehmet Altan, who had been detained on the same charge. Although the İstanbul 26th Assize Court was expected to order the release of Mehmet Altan in line with the Constitutional Court decision at the decision hearing on 11.02.2018, it refrained from giving a release order on the grounds that the Constitutional Court decision had not been notified to them. Mehmet Altan was released many months after the Constitutional Court decision, by the „preliminary proceedings report“ of the İstanbul Regional Court of Appeals, 2nd Criminal Chamber. It is striking that the reasoning for the release was based on the original Constitutional Court decision, which was not implemented for many months.

Later, at the hearing on 02.10.2018, İstanbul Regional Court of Appeals, 2nd Criminal Chamber rejected all the requests of defense lawyers and upheld the verdict of the local court. This time, the parties appealed.

The 16th Criminal Chamber of the Court of Cassation reversed the local court's decision with its verdict dated 05.07.2019 numbered 521/4769 on the grounds that the nature of the crime was determined incorrectly in terms of Ahmet Altan. In summary, in its verdict, the Court of Cassation established that Ahmet Altan and Nazlı Ilıcak should be tried not for the crime of “attempting to overthrow the constitutional order,” but for the allegation of “knowingly and willingly aiding an armed terrorist organization whilst not being a member as part of its hierarchical structure.” With regard to Mehmet Altan, it was determined that he should be acquitted.

Following the decision of the Court of Cassation, a hearing was held by the İstanbul 26th Assize Court on 08.10.2019. Although Ahmet Altan was expected to be released because of the change in the classification of the crime and therefore the prescribed punishment being lower, the court made the interim decision to comply with the Court of Cassation's decision but decided to continue Altan's detention.

The prosecutor's dictum was submitted to the file on 31.10.2019, a few days before the second and final hearing to be held on 04.11.2019 and following the reversal decision of the Court of Cassation. In sum, the prosecutor in his dictum demanded that Altan be punished for charges of knowingly and willingly aiding an armed terrorist organisation although not being a member of the organisation; sentenced to a period longer than the minimum one.

At the hearing on 04.11.2019 by the local court, Altan was sentenced to 7 years in prison based on the conviction that Altan did not belong to the hierarchical structure within the organisation, but knowingly and willingly committed the crime of aiding an armed terrorist organisation, and the sentence was increased by half, and he was sentenced to 10 years and 6 months in prison. Along with the verdict, the court decided for Altan's release on 04.11.2019.

As for Mehmet Altan, the trial ended with acquittal following a long detention period and despite the former verdict of aggravated life sentence. In fact, these two diametrically opposed verdicts per se regarding Mehmet Altan tell a lot about the legal nature of the indictment as well as investigation phase that was approved by relevant authorities.

It also needs to be borne in mind that the first instance court, following the decision of the Court of Cassation, was able to deliver a new verdict at the end of two hearings, the first of which was purely procedural. When this second verdict is examined, the impression is reinforced that the first instance court merely adapted the previous verdict to the Court of Cassation decision, without going to the effort of holding a new trial, although the legal characterisation of the charge changed.

The trial prosecutor objected to Altan's release following the verdict. When it was refused by the original court, the objection was taken to Istanbul 27th Assize Court, which sustained the objection and ordered that Altan should be detained again. This objection and decision caused serious controversy. While the prosecutors did not have the right to object to release orders according to the Criminal Procedure Code before the State of Emergency, the amendments made to the Criminal Procedure Code opened a path for prosecutors to object to release orders. This amendment in itself is highly controversial in terms of both the legal interest, which says pre-trial detention should be the exception not the rule, and adopting a provision, that has a quality of an ordinary law, under the State of Emergency circumstances. However, in the present case, the question whether this objection remedy includes a verdict of release or not, points to another important question. The dominant view in the legal community is that such a broad interpretation would contradict the fundamental principle of protecting personal liberty and security. Indeed, at a stage where the verdict is under the supervision of the Court of Cassation, a court's auditing another equal status court's verdict is in clear contradiction with the regulations regarding the duties of the courts. The duties and powers of the courts are determined by law. In the present case, contrary to the aforementioned basic principle, a legal act through interpretation was taken regarding the jurisdiction of the courts.

As a result, Altan was rearrested on 13.11.2019 after having been free for 8 days and was sent to prison. An application was also made to the Constitutional Court against this detention decision, and this appeal by Altan was also rejected on 02.12.2020. Altan is still in prison today.

As of the date of this report, the file has been under appeal before the 16th Criminal Chamber of the Court of Cassation, and Altan's application to the ECtHR is still pending. In terms of Mehmet Altan's application of the same date, the ECtHR declared its verdict of violation on 20.03.2018.

The trial process has been publicly criticised many times by many human rights organisations, press organisations and the defence. Ahmet Altan had not been physically present at the hearings even once during this ongoing trial for more than 4 years, and he could only participate in the entire judicial process from prison through Turkey's judicial conferencing system, known as SEGBİS. The Defence was reported to have been removed from the courtroom by the presiding judge on several occasions. During the session on 23.06.2017, some lawyers from the defence were heard without waiting for the Public Prosecutor to be present in the courtroom. During the Regional Court of Appeal stage, the first hearing was moved to an earlier date and the witness was heard in the absence of the defendant's attorneys. The Defence often faced the situation of finding out the legal developments regarding their clients from the press. Considering the constraint on communicating with the lawyers, which lasted for months on account of the State of Emergency conditions and continued for a while even during the trial phase, and all the other practices mentioned so far, it is seen that Altan and others are prevented from using their defence rights effectively.

3: Evaluation of the Indictment

Regarding how an indictment should be drafted within the context of both the Turkish Criminal Procedure Code's Article 170 and the European Convention on Human Rights, detailed evaluations have been made in all of the reports written within the scope of this project. Some of the highlights will not be repeated in this report. Instead, the focus will be on the fact of sufficient suspicion, the legal consistency and appropriateness of the alleged crime and the foreseen provisions of the law to be implemented, and the relationship established between the acts alleged to constitute the crime and the existing evidence, all of which are of fundamental importance in terms of all indictments. While these three main points are being evaluated, the basic principles of criminal law and the ECtHR case law and especially the ECtHR judgement dated 22.12.2020 on *Demirtaş v. Turkey*³ will inevitably serve as a compass. For, despite all the unique aspects resulting from Demirtaş's identity as a Member of Parliament, the decision should be considered a holistic assessment of the espoused judicial practice in Turkey for some time now. Specifically, it should be noted that the following section in the aforementioned decision is of particular importance in terms of both this indictment and other indictments examined within the scope of the project:

... the Court attaches considerable weight to the observations of the intervening third parties, and in particular the Commissioner for Human Rights, who stated that national laws were increasingly being used to silence dissenting voices. The Court therefore considers that the decisions on the applicant's

initial and continued pre-trial detention are not an isolated example. On the contrary, they seem to follow a certain pattern.⁴

When a pattern instead of an individual example is detected, and moreover, when this evaluation is expressed not by a reporter but directly by the most important organ of the ECtHR, then it is clear that a discussion of a systematic and continuous line of violations will come up. For this reason, it is clear that in order for effective indictments to be drafted in an integrated manner with an effective investigation process, primarily this pattern, which the ECtHR judgement refers to, and the subsequent interpretation and practices-that amount to systematic violations of rights and freedoms-need to be transformed.

As summarised under the subheading “Background” the crimes attributed to Ahmet Altan in the indictment were TPC Art. 309, 311 and 312 and TPC Art. 314/2 with the instrumentality of TPC 220/6. Following the decision of the Court of Cassation, the case continued under TPC Art. 314/2 in line with 220/7. Therefore, within the scope of the report, it is necessary to discuss the appropriateness of the legal characterisation in the indictment along with the framework evaluations regarding these types of crimes.

3.1. Can the Violation of the Constitution, or a Crime Against the Government and the Legislative Body be committed through expression?

In the fourth section of the indictment, the prosecution justifies the treating of the acts of the suspects within the scope of Articles 309, 311 and 312 of the TPC. This point is particularly important. Ahmet Altan was investigated, tried and even convicted under the Articles of 309, 311 and 312 of the TPC from the stage of the indicting to the verdict of the Court of Cassation, although the legal characterisation of the act was changed by the Court of Cassation afterwards. As registered by the decision of the Court of Cassation, the indictment examined is based on a false legal characterisation from the beginning to the end. In other words, the text examined makes a gross error in terms of the most fundamental element that an indictment must contain in order to be legally valuable.

The crux of the matter is how these types of crimes, whose elements are coercion and violence, could have been committed by a journalist, who is not alleged to have resorted to force and violence. In fact, the indictment has stated more than once that the alleged crimes can only be committed by using coercion and violence. However, the definition of the notion of coercion was later expanded atypically by the prosecutor to include expression and interpreted so broadly that it went beyond the essence of the norm to result in constraint and ignored the requirements of the ECHR regulation, Art. 18.⁵

The main claim of the prosecutor is that, “media outlets, which have the power to influence the society, achieve a joint control with its armed units over coup attempts.” Considering this allegation together with the referral items, one expects that the later stages of the indictment will reveal that the suspects went to the streets by taking arms or tried to force some people to participate in the coup process by using physical force on them. However, the prosecutor did not once make such an allegation, nor did he mention in the indictment any acts of the suspects that fell within the scope of coercion or violence. Again, aside from sufficient suspicion, he did not submit any evidence that could lead, even in the smallest degree, to a suspicion in this direction. While the element of the crime is clearly “coercion and violence,” it is indisputable that a crime cannot be committed under the articles related to an act that does not contain these two elements.⁶

When the indictment is examined, it is seen that the prosecutor makes an effort to overcome the “legal impossibility” here through interpretation. The relevant comment is as follows:

“For the reasons explained, it is understood that the suspects, who are the media wing of the terrorist organisation and who participated in actions in line with the perpetrators’ objectives, who took part in the coup attempt by using physical coercion, by producing discourses and propaganda, which are a precursor to the term “coercion” that is the sub-element of the riot crimes and which cannot be considered separately, towards creating the political and social chaos environment that allegedly caused the act of the perpetrators; so that they are the main actors and along with committing the crime of membership to the armed terrorist organisation, they also committed the riot crimes.”

However, both the text of the article and the rationale of the article that formulates the crime of coercion

under the scope of Article 108 of TPC have a clarity that never allows such an interpretation. By saying that “coercion is the creation of a compelling effect on the will and behavior of a person or a third party by using physical force on a person,” the related article’s preamble establishes that it is not possible to commit a crime of coercion by writing or speaking. Again the formulation and the preamble of the Art. 108 of TPC not only excludes “discourse,” it even forecloses an interpretation so broadly as to include the act of threatening.

In this context, it is established in a way that leaves no doubt that the acts taken as basis for the accusations against the suspects within the scope of the indictment are not fitting types of acts in terms of these crimes and that the indicting prosecutor’s interpretation does not match up with the typical element of the crime.

The prosecutor’s allegation that, by means of their acts made up of only words and writing, the journalist suspects have committed a crime whose elements are clearly defined as coercion - that is, a crime that is impossible to commit through these acts. Similarly, the prosecutor’s grounds for the allegation, which is “expression and propaganda are the predecessor of the term [that is, of the act] of coercion.” In fact, the prosecutor’s allegation and reasoning should be assessed in conjunction with the act of “conveying subliminal message” that the prosecutor’s warrant of arrest refers to. Because there is a dangerous parallelism between the legal interpretation made over the concept of coercion and the interpretation of subliminal messages that paves the path for an arbitrary intervention in rights and freedoms. The potential consequence of such an interpretation in judicial practice will be that any statement that harshly criticises government practices and/or demands structural change can be treated within the scope of the offence in question. And of course, in such a judicial practice, one can no longer speak of individual violations of freedom of expression and press freedom, but of the absence of freedom of expression and the press as a whole.

At this point, it is useful to recall Article 12 of the United Nations Guidelines on the Role of Prosecutors:

“Prosecutors shall, 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.”

In the case under investigation, it is observed that Ahmet Altan has been subjected to a process that has resulted in his conviction for a crime impossible to commit through the acts described in the indictment, with regard to the principle of legality. In other words, the prosecutor carried out an investigation process that had to be carried out in line with a manner that would conversely lead to a successive and continuous violation of all fundamental rights and freedoms.

Going back to the indicting prosecutor’s proposal, summarised as a question under the subheading within the scope of this report, it is necessary to underline that the existence of discourses that precede the act of coercion and the criminalisation of these discourses indicate two different phenomena. The existence of the latter depends only on the existence of a clear regulation in the law, and a counter interpretation would mean the elimination of all principles that have so far dominated the criminal law.

3.2: Evaluation Regarding the Attribution of Art. 220/6 (or Art. 220/7) of TPC in the Context of Sufficient Suspicion and Predictability

As quoted exactly from the indictment in the Background section, it was demanded that Art. 314/2 of the TPC be applied to Ahmet Altan through the instrumentality of the Art. 220/6 of the TPC. With the decision of the Court of Cassation, the intermediary verdict was determined to be Art. 220/7 instead of 220/6 of the TPC.

Art. 220/6 of the TPC is as follows:

Any person who commits an offence on behalf of an organisation, although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organization. [...]

According to Art. 220/7 of the TPC:

Any person who aids and abets an organisation knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation. [...]

According to the legislation in force in Turkey, a basic condition of membership to an organisation is that the person is part of the organisational hierarchy. In this sense, both articles [although different explanatory clauses are used, such as not being a member of the organisation and being included in the hierarchical structure within the organisation] undoubtedly regulate the penalty provisions for the individuals, who are not members of the organization, as if they were members of the organisation. In the first situation, the person acts on behalf of an organisation of which s/he is not a member, while in the second s/he knowingly and willingly aids the organisation. Unfortunately, it is not clearly understood from the regulation itself which acts are within the scope of knowingly and willingly aiding the organisation, and which are within the scope of acting on behalf of the organisation. In this sense, both types of crime are separately drawn up in an extremely ambiguous way. However, in addition to this, it is not possible to tell from the norm what elements distinguish the two types of crime from each other.

The ECtHR has delivered a large number of violation judgements since the regulations in question are not foreseeable. For example, the ECtHR's judgement in the case of *Işıkırık v. Turkey*⁷ in 2017 can be considered a verdict determining essential criteria about the structural problems inherent in, and the violations caused by the Art. 220/6 of the TPC, as well as being directly related to the examined indictment. In this judgement, the European Court of Human Rights carried out a thorough examination of the regulation of Art. 220/6 of the TPC reached a judgement of violation since the intervention arising from the relevant regulation was not foreseeable. The following observation in paragraph 63 of the decision should be read by accepting it as intrinsic to the indictment, which is also the subject of this report:

As to the foreseeability requirement, the Court notes at the outset that the text of Article 220 § 6 of the Criminal Code tied the status of membership of an illegal organisation to the mere fact of a person having acted "on behalf" of that organisation, without the prosecution having to prove the material elements of actual membership. Furthermore, the wording of Article 220 § 6 of the Criminal Code did not itself define the meaning of the expression "on behalf of an illegal organisation."

Again, the statements in paragraph 66 of the same decision point to the depth of the structural problem:

The Court observes that the domestic courts have interpreted the notion of "membership" of an illegal organisation under Article 220 § 6 of the Criminal Code in extensive terms. The mere fact of being present at a demonstration, called for by an illegal organisation, and openly acting in a manner expressing a positive opinion towards the organisation in question, is sufficient to be considered acting "on behalf of" the organisation authorising the punishing of the person in question as an actual member. The Court notes in contrast that when Article 314 of the Criminal Code is applied alone, the domestic courts must have regard to the "continuity, diversity and intensity" of the acts of the accused (see paragraph 100 of the Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey of the Venice Commission, in paragraph 34 above), whereas when the same Article was applied in connection with Article 220 § 6, in the applicant's case, he was convicted of membership of an armed organisation merely on account of his attendance at two public meetings, which, according to the first-instance court, were held in line with the instructions by the PKK, and his acts therein, that is to say, walking close to coffins and making a "V" sign during the funeral and applauding during the demonstration. Hence, the Court finds that when applied in connection with Article 220 § 6, the criteria for a conviction under Article 314 § 2 of the Criminal Code were extensively applied to the detriment of the applicant.

In its judgement in the case of *Imret v. Turkey*⁸ in 2018, ECtHR this time conducted the discussion on unpredictability in the context of the regulation of Art. 220/7 of the TPC. Again the 250th paragraph of the ECtHR's *Demirtaş v. Turkey* is important as a recent example to understand the scope of the predictability debate:

One of the requirements flowing from the expression "prescribed by law" is foreseeability. In the Court's view, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 of the Convention unless

it is formulated with sufficient precision to enable people to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

The fact can clearly be accepted that, in their present form, Art. 220/6 and Art. 220/7 of the TPC contain an ambiguity that paves the way for arbitrary interference on rights and freedoms. In many cases these articles result in disproportionate sanctions - which directly concern the present indictment. The investigated indictment has preferred to fill the gap arising from the ambiguity in the norm with the widest possible interpretation against the rights.

Despite the prosecutor's clear preference and immense effort, there is still a gap in establishing the connection between the Art. 220/6 of the TPC and the concrete acts in the indictment. As can be understood from the text of the relevant article, the minimum requirement for the prosecutor to press such a charge was to compile and submit the evidence that would reveal sufficient suspicion that the alleged criminal acts had been committed "on behalf of the organisation." When the indictment is examined in this context, it is understood that the statements by Ahmet Altan on the program he appeared on the day before the coup attempt are made the basis for the application of Art. 220/6 of the TPC. It is necessary to briefly touch upon the comments in the indictment that focus on the program. In the indictment, a section of said program is transcribed. In this section, Ahmet Altan, Nazlı Ilıcak and Mehmet Altan are seen to be speaking on Turkey's current political situation and Ahmet Altan is stating that the current political situation in Turkey is such as to prepare the ground for a military coup. Following a long quotation from the relevant program, the prosecutor has summarised his assessment of these statements in a paragraph as follows:

It is seen that during a large section of the program they have made threatening and derogatory remarks about Recep Tayyip Erdoğan, the President of the Republic of Turkey and the authorities of the Government of the Republic of Turkey; and have said that the dealings and the practices these authorities are involved are unlawful, that they are committing a crime and paving the way for a military coup; and that the President is making the same decisions and re-opening the paths for whatever developments that enabled the past coups; and they have repeatedly stated that the President and the government will be overthrown and they will stand trial; and within this context they have stated that there will be a coup; and it is impossible for them to know about the coup attempt without thinking and acting in unison with the terrorist organization or to declare it one day before the coup in a way to shape the public perception; and that their objective is to justify the coup attempt . . .

In the next part of the evaluation made by the prosecutor, it was concluded that Altan's statements regarding administrative plans during the curfews in Cizre and other cities and districts were an operation of disinformation in favour of the PKK and Gülen movement, referred to as FETÖ / PDY. Since the claim regarding the PKK is not repeated in the rest of the text and does not occupy a place in the gist of the accusation, it will not be evaluated.

The salient point in this section quoted is the following: The prosecutor actually summarises Altan's statements by adding his own interpretation [such as insults, threats] from the beginning of the paragraph up to the phrase repeatedly stated that. When not only the transcribed form of the statements but also this summary containing commentary is read, it is seen that Altan expresses a political opinion about the possibility that the political climate in Turkey and the government's practices can lead to a coup, and that he harshly criticises the government's policies and says that in case of a coup, people responsible in the decision-making mechanism of the government can face trial. However, the prosecutor claims that the relevant discourse contains threats and insults. If the accusation in the indictment had proceeded along these two crimes, it would have made sense to examine the statements in this direction. Yet, it is seen that the prosecutor preferred to focus on the date of the speech rather than the content of the speeches in the indictment. In short, the prosecutor claims that it would not be possible for Altan to make these statements one day before the coup attempt, without knowing that there would be a coup. He also claims that the purpose of these sentences can only be to legitimise the coup. This claim is a weighty claim. The natural expectation of an "objective observer" in the face of such a weighty allegation will be that the indictment should reveal some evidence arousing the suspicion that Altan was aware of it on the day previous to the coup attempt.

It is possible to make a few more quick observations based on the prosecutor's quoted comment:

- First of all, nowhere in his assessment did the prosecutor claim that Altan had committed his acts "on behalf of the organisation." The indictment refers to the existence of meetings with the organisation or certain units of the organisation on certain dates, or to issues such as Sledgehammer documents. However, the indictment is missing the answer to the question of what evidence there is, if only minimally sufficient to prepare an indictment, to set forth that Altan carried out his actions not in his own name but on behalf of the organisation. It is clear that there is no specificity in Turkey as to how to determine whether an act is committed on behalf of an organisation or not. However, when discussing a situation in which an act is committed on behalf of an organisation, it is clear by a simple reasoning that a specific (which is not a continuous and non-intense, non-hierarchical relationship) connection must be established between the organisation and the person performing the act. Otherwise, anyone who voices an opinion that is in line with the discourse of any organisation at any time may be accused of committing a crime on behalf of the organisation. Such a broad practice will obviously lead to serious violations of rights. It is known that preventing such violations of rights is among the obligations of prosecutors. In essence, what the indicting prosecutor must do is to reflect the sufficient suspicion of the crime in the indictment that Altan had committed his act on behalf of the organisation. However, the basis for such a suspicion cannot be understood from the indictment.
- When the details of the evaluation are examined, it is understood that the prosecutor tried to establish this link (act and organisation link) by way of the date of the statement. It is clear to the prosecutor that Altan had committed his act on behalf of the organisation, since Altan uttered these sentences the day before the coup attempt. In this case, the first element that makes Ahmet Altan suspicious in the eyes of the prosecutor is "coincidence." The fact that such temporal coincidences may prompt prosecutors to conduct an investigation will not be objected to in most cases. However, the gap still remains in place. In this case, the duty of the prosecutor, who has a slight suspicion nourished by coincidence, is to investigate whether there are additional facts to support this coincidence that arouses his suspicion. For coincidence may be enough to have suspicion, but it is a fundamental principle that this suspicion must be a sufficient suspicion backed up by evidence in order to demand punishment on behalf of the public.
- Another point to dwell on is the prosecutor's tacit allegation that Ahmet Altan knew about the coup. According to the prosecutor, it is not possible for Altan to commit this act "without knowing that there would be a coup." In this case, it is necessary for the Prosecution to reveal how Altan was informed about this situation, or at least how it was believed that he had foreknowledge. Otherwise, anything ranging from an analysis of a political or academic nature to a simple prediction may be under suspicion simply because of a temporal overlap. At this point, it is important to recall paragraph 314 of the ECtHR's *Demirtaş v. Turkey* judgement:

Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will, however, depend on all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; *Çiçek v. Turkey* (dec.), no. 72774/10, § 62, 3 March 2015; *Mehmet Hasan Altan*, cited above, § 124; and *Şahin Alpay*, cited above, § 103).

In short, uttering a sentence on a certain date alone does not make a suspicion sufficient. The meaning attributed to coincidence by the prosecutor in the investigated indictment is so broad that it cannot possibly overlap with the principles of criminal law, and it confines all judgement to the field of interpretation.

4: Conclusion

In the third subheading, it is established that the legal characterisation of the crime was clearly erroneous, and the principle of typicality was ignored, and there was a significant gap in establishing the relationship between the act and the allegation. In addition to these findings, the "absence" of sufficient

suspicion, which we must accept as the basis of an indictment, has been emphasised.

It is believed that citing some of the evidence submitted against Ahmet Altan in the file will make contributions to the intelligibility of the indictment. In addition to the television program that Altan attended the day before the coup, his writing an article on the haber.com.tr news website was also cited as evidence against him. Similarly, 3 separate articles written by Altan were accepted as evidence of criminal activity. Further evidence submitted were the fact of another trial pending against Altan, telephone conversation records from 2010 to 2012-2013, the contents of which are not included in the indictment, and trade registry information, which could not be linked either to the context of the story or the allegation. In conclusion, it is seen that the majority of the evidence submitted are activities within the scope of journalistic activities, and those outside these categories are not temporally related to the crimes subject to the indictment. The fact that the ongoing proceedings against Altan regarding the Sledgehammer documents are predominantly presented as evidence against him also points to a problem. The fact that a person's trial for another act is proceeding does not constitute sufficient suspicion that he has committed a concrete act. Cited as a guide, paragraph 330 of the ECtHR's *Demirtaş v. Turkey* judgement is important in this sense:

The Diyarbakır 2nd Magistrate's Court found that the number of ongoing criminal investigations in respect of the applicant for terrorism-related offences made it possible to conclude that there was a strong suspicion that he had committed the offence of membership of an armed terrorist organisation. In the Court's view, a vague and general reference to other investigations being carried out by public prosecutors can on no account be deemed sufficient justification of the reasonableness of the suspicion on which the applicant's pre-trial detention was supposed to have been based.

Again, while evaluating the whole indictment in terms of evidence, the following observation in paragraph 280 of the *Demirtaş v. Turkey* judgement must be taken into consideration:

In the Court's view, such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.

In conclusion, this indictment has accepted evidence (such as newspaper articles, speeches) that cannot be based on the committing the crime defined in law, and has accepted additional evidence that is not related, either temporally or to the subject of the allegation, as the basic basis of sufficient suspicion. It is crucial to underline repeatedly that 1) Based on these pieces of evidence, it is impossible to commit the crimes found under Art. 309, Art. 311 and Art. 312 of the TPC 2) and again, while it had to be presented in such a way as to form sufficient suspicion that the crime was committed on behalf of the organisation in order to get to Art. 314/2 of the TPC in line with Art. 220/6 of the TPC, there isn't any explanation about this in the indictment. It is known that the application of Art. 314/2 of the TPC in such a broad sense result in violation of Art. 10 of ECHR in many cases. While there is no mention of sufficient suspicion in the indictment, the fact that the entire investigation process was under pre-trial detention demonstrates that there are multiple violations under Article 5 of ECHR.

The sentence demanded for Ahmet Altan in the indictment was not mentioned throughout the report; the public prosecutor demanded that Ahmet Altan should receive 3 times life sentences and 2 times 7.5 years of imprisonment. A prosecutor is expected to act with extraordinary care - regardless of his political opinion - when demanding a punishment that a human life will not be long enough to complete. However, the indictment we have examined gives the impression that it was written with a conviction that every individual uttering of a sentence against the government within the borders of the Republic of Turkey must face trial. In this sense, it is possible to follow the concrete projections of the observation about a "pattern" made in the *Demirtaş v. Turkey* judgement in this indictment. Unless a practice aiming to eliminate this pattern is followed, it will not be possible to talk about a judicial practice in Turkey that focuses on human rights or a democratic society.

Endnotes

- 1 For the said statement, see: <http://www.diken.com.tr/ahmet-altan-ve-mehmet-altanin-gozalti-gerekcesi-darbeyi-bir-gun-duyurmaları/>
- 2 Ahmet Altan resigned from Taraf newspaper on 14.12.2012, and the newspaper was closed down via a state of emergency decree law passed shortly after the coup attempt.
- 3 ECtHR Grand Chamber, Demirtas v. Türkiye (no.2); Dated 22.12.2020 and application number 14305/17.
- 4 ECtHR Grand Chamber, Demirtas v. Türkiye (no.2), parag. 428; Dated 22.12.2020 and application number 14305/17.
- 5 Bearing the heading "Limitation on use of restrictions on rights," Article 18 of ECHR is as follows: "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."
- 6 In the first version of the TPC draft, the statements of "coercion and threat" are included in the article text. During the negotiations on the draft, the text of the article has become in force today with the adoption of the motion to use the term "coercion and violence" instead of "coercion or threat." Although there are still debates on this subject in the doctrine, it is observed that in the relevant formulation and the discussions that preceded it, even the act of "threat," which can be accepted as the moral aspect of the act of coercion, is not accepted by the lawmaker among the elements of this crime. For more detailed information on this subject; Kenan Evren Yasar, CHKD, Vol: 2, Issue 1-2, 2014, <https://dergipark.org.tr/en/download/article-file/14664>
- 7 ECtHR, Işıkırık v. Türkiye, Application No: 41226/09, 14.10.2017
- 8 ECtHR, Imret v. Türkiye, Application No: 57326/10, 10.07.2018

13

Legal report on indictment

**Reyhan Çapan, Hüseyin
Aykol, Emire Eren Keskin**

PEN Norway's Turkey Indictment Project

Hannah Beck & Clarissa Fondi
Published: 4 February 2021



Legal report on indictment

Reyhan Çapan, Hüseyin Aykol, Emire Eren Keskin

About the authors:

Mag.a iur. Hannah Beck is a young human rights lawyer from Vienna, Austria. She studied law with specialisation in human rights law and law of international relations at University of Vienna, Austria and University of Pretoria, South Africa and is representing the Vienna-based Ludwig Boltzmann Institute of Human Rights as one of two Austrian legal experts in PEN Norway's Turkey Indictment Project.

Mag.a iur. Clarissa Fondi is a Sociocultural Anthropologist and dedicated human rights lawyer from Vienna, Austria. She is one of the two Legal Experts representing the Austrian Ludwig Boltzmann Institute of Human Rights in PEN Norway's Turkey Indictment Project.

1. Introduction

In the June 2015 elections the AKP (Justice and Development Party) lost its parliamentary majority and the opponent party HDP (People's Democratic Party) passed the election threshold of 10% for the first time in years. Hence, without a two-third majority President Erdoğan's plans for a constitutional change could not be implemented.

As a result of unsuccessful attempts to form a coalition government, new elections were called for in November 2015. The period between June and November 2015 was a turbulent one, with a number of terrorist attacks carried out in various cities. Addressing these terrorist attacks in one of his speeches, President Erdoğan claimed that if AKP could get 400 chairs in the parliament – restoring its absolute majority – incidents like these would never happen. His statement was widely criticised and thematised in many newspapers including *Özgür Gündem*.

Özgür Gündem was a newspaper published between 1992 – 1994 and again between 2011 – 2016. Political difficulties increased and resulted in over 150 investigations against the newspaper under the Anti-Terror Law and Articles 301 and 299 of the Turkish Penal Code in 2016 alone. The majority of these investigations were followed by indictments accusing authors, editors and members of the consultant board of various offences.

Our analysis is centered around an indictment, which was issued in response to the article dated September 8, 2015 commenting on the above-mentioned statement of the president. At the time Reyhan Çapan was *Özgür Gündem*'s editor-in-chief, Hüseyin Aykol and Emire Eren Keskin were co-editors-in-chief and are therefore named as defendants. All of them were and still are subject to numerous other criminal cases and have been sentenced to multiple years in prison in the past.

Upon complaint of President Erdoğan, an investigation was launched and an indictment was issued. Because of the article's headline as well as some sections within the text, the three journalists were accused of "insulting the president" and "making propaganda for a terrorist organisation".

The indictment was accepted by the 13th High Criminal Court in Istanbul, the proceedings are still ongoing. The 19th hearing took place on February 24, 2021.

2. Analysis in terms of Turkish Law

2.1. Structure and Formalities, Art. 170 (3) Turkish Criminal Procedure Code

The indictment consists of four pages and is divided into two sections. The first part is a general one, providing information about the case such as details about the complainant and plaintiff, the three suspects, the alleged crimes, the applicable articles as well as the collected evidence. This section is followed by two pages of continuous text under the heading “The Investigation Report was Examined”. The layout of the indictment is kept simple, no more sections could be identified.

To comply with Turkish law an indictment has to contain a wide range of elements. These elements are clearly listed in Art. 170 (3) Turkish Criminal Procedure Code (CPC) and should be included in the document as exhaustively as possible.

The indictment mentions President Erdoğan as plaintiff with additional information about his lawyer. According to the document, the investigation was launched upon his complaint.

It also specifies the identity of the three suspects and correctly names their defence counsel on the first page. Right after the general section, however, the prosecutor mixed up the names of two of the suspects. It seems to be a small, only formal mistake, nevertheless, it allows the reader to draw conclusions on the prosecutor’s accuracy and diligence when drafting the indictment. This mistake is a result of carelessness within the drafting process and could easily be avoided.

In compliance with Art 170 (3) CPC the indictment states “making propaganda for a terrorist organisation” and “insulting the president” as the charged crimes, referring to Art. 299 (1) and (2) Turkish Penal Code, Art. 7 (2) Anti-Terror Law and Art. 53 (1) Turkish Penal Code. This information is essential for the defendants as it helps them to understand the allegations and prepare a suitable defence. It therefore should be laid out in as much detail as possible. In regards to the place and date of the alleged crime, however, the prosecutor decided to keep it imprecise on page one by only mentioning “2015, Istanbul”. This general information is only specified on the next page through the prosecutor’s explanations of his findings in regards to the issue of the newspaper Özgür Gündem from September 8, 2015. In light of the requirement of a fair and transparent judicial process, including exact details about the alleged crimes in the beginning of the indictment is essential.

As formally required, the indictment is addressed to the Assize Court in Istanbul and is signed by the Prosecutor for the Republic along with the date of issue November 26, 2015. Because of its position at the end of the text body, the date of issue is not immediately noticeable, even though it plays a crucial role to the timeline of the judicial proceedings and should therefore be clearly displayed.

Furthermore, according to Art. 170 (3) CPC the evidence should be clearly stated. On page two of the indictment as the last subcategory of the general section, evidence is listed as follows: “Accusation, defence, and the scope of the whole investigation document”. This “list of evidence” does not give any specifics on the pieces of evidence the indictment is based on. Up to this point we do know what the accusations are (“making propaganda for a terrorist organisation” and “insulting the president”) but we have not been given any information on the scope of the defence statements nor any other investigation documents. The indictment is clearly based on a newspaper article, which should be mentioned as a piece of evidence, citing its place and date of publication. Contrary to the formulation “the scope of the whole investigation document”, the reference to specific documents, photos, witnesses etc. would ensure fair-process in terms of Art. 6 European Convention of Human Rights (ECHR).

In conclusion, the incomplete presentation of the evidence was the only significant deficiency found in terms of Art. 170 (3) CPC. The prosecutor should have further elaborated on the evidence list, instead he fell short of explaining his abstract references in violation of Turkish law. Other than that, a majority of the necessary formal details were provided and quite a clear layout was chosen.

Even though the indictment is short, minor careless mistakes have slipped in, resulting in an impression of a hurried and careless working method. Producing a well-structured, detailed indictment without avoidable mistakes should be of high priority for a prosecutor. An indictment plays a crucial role for a

fair and transparent criminal process, as from the moment it is served the defendants are formally given notice about the allegations against them.

2.2. Evidence, Art. 170 (4) Turkish Criminal Procedure Code

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

Starting on page two, the prosecutor describes the circumstances which lead to the accusations. He is referring to the newspaper *Özgür Gündem* with its report about President Erdoğan's speech on September 8, 2015. The following parts are cited as evidence:

1. The Palace is going crazy (headline)
2. On the day that there are heavy casualties in Oremar, the palace – which put an end to the peace process for the sake of the presidency – admitted that it waged the war for 400 MPs.
3. The palace is dragging the country to a bloody cliff for its prosperity.
4. The report is appalling, the war that Erdoğan, who overthrew the peace table to be the President, waged against the people on 24 July and led the country to a circle of fire. More than 100 children, women and young people were executed, hundreds of special force officers and soldiers lost their lives in the Palace's war and more than 50 guerrillas lost their lives in the defensive war. The statements shock [the country]; Erdoğan makes statements, which shock the whole of Turkey, on the day there are heavy casualties on the soldiers in Oremar. He says: had there been 400 MPs, none of this would have happened. Erdoğan's statements, which underline there would be more bloodshed, appalled the whole society, there quick reactions to his statements.
5. Erdoğan: Dishonest!
6. HPG [Peoples' Defence Force] announces that TSK [Turkish Armed Forces] asked for a ceasefire through villagers by referring to photos of a crushed military vehicle – resulting from a terrorist attack – called 'Scorpion' that killed soldiers, who became martyrs. The TSK asked for a ceasefire to get the corpses of soldiers from areas under the control of HPG.

Unfortunately, the various parts are not separated from each other for example by use of paragraph, but instead make up one big section. This in fact makes it difficult to understand where one citation finishes and another one starts. Adding to the confusing presentation of the evidence is the fact that the exact same paragraph is repeated word for word a second time. Only after having read the indictment multiple times, it becomes apparent what the prosecutor tried to do: The first big paragraph comprises all the evidence (citations 1 – 6). Then, the prosecutor seemed to follow the pattern of firstly isolating the various citations, secondly commenting on them and lastly linking the citations to the alleged crimes, which in fact is a logical approach in theory. In practice, however, the reader has difficulties filtering the evidence and the prosecutor's lack of explanations is baffling. In our opinion, the text can be broken down as follows:

Citations 1-6: General paragraph with evidence

Citations 1-4: linked to the allegations of "insulting the president" and "making propaganda for a terrorist organisation"

Citation 5: linked to the allegation of "insulting the president"

Citation 6: linked to the allegation of "making propaganda for a terrorist organisation"

Each of the sections are commented by the prosecutor giving short details as to why he thinks the citations amount to sufficiently convincing evidence to support the accusations. However, his explanations are kept quite short and basic and do not constitute sufficient and justified legal arguments.

First of all, in the instance of citations 1-4, the prosecutor did not comment on specific sentences but

generally declared “the news” to be an insult to the president’s honour, dignity and respect. He did not further elaborate on the definition of an “insult”.

Moreover, the prosecutor argued that by describing the situation as “guerrillas lost their lives in the defensive war” (evidence), the journalists committed the offence of “making propaganda for a terrorist organisation” (accusation). This harsh allegation comes alongside following explanation: “it describes the members of an armed terrorist organisation or PKK as guerrillas and considers PKK’s terrorist attacks an action within the scope of legitimate defensive war” (explanation). No further arguments are given and it’s left to the reader to fill the gaps, that are left behind by the uncomplete depiction of the prosecutor’s thought process. For a legal argument and a clearly demonstrated link between evidence and accusation, a prosecutor should not miss out on elaborating on his interpretations of words like “guerrilla” or “member of a terrorist organisation”.

Secondly, the prosecutor claims that citation 5 – as a shorter version of a quote by the President himself – is used in an insulting way, suggesting that Erdoğan is dishonest. Even though the prosecutor is explaining the original quote by Erdoğan, he still is implying that the reduced depiction is deliberately used as an insult. Thereby, the presumption of innocence principle is ignored. In connection with the original quote the prosecutor, especially in case of doubt, should have come to the conclusion that the statement in fact is merely a shorter presentation of the longer statement by Erdoğan.

Last but not least, in regards to citation 6 the prosecutor claims that the report about an allegedly demanded ceasefire by TSK “presents the violent, coercive and threatening actions of the armed terrorist organisation as legitimate”. The line of argumentation is not comprehensible and seems to be far-fetched in regards to the mere information about an event. The citation in question does not present any evidence to demonstrate an act of propaganda, the prosecutor did not consider it necessary to further explain his accusations. Additionally, the prosecutor’s comment that the citation in question “describes the Turkish Armed Forces as weak” is irrelevant in regards to the accusations and seems to be used to appeal to negative emotions in respect to the three suspects.

In conclusion, the prosecutor tried to explain the evidence in relation to the alleged crimes. Even though the line of argumentation cannot be followed, the intent to meet the standards set by Turkish law is noticeable. We, however, strongly urge that a clearer layout is followed in the future to help the defendants understand the content of the allegations. It would be helpful to discuss the different accusations separately from each other, instead of dealing with all of it in the same paragraph. As to the prosecutor’s approach to linking the evidence to the charged crimes, we are particularly surprised about the lack of legal arguments and reasoning.

2.3. Sufficient suspicion, Art. 170 (2) Turkish Criminal Procedure Code

When analysing this indictment, the way of proceeding was a rather unusual one from an Austrian perspective. The Austrian Criminal Code does not recognise the offence of “Insulting the President”, rather only offers a general article in relation to “Insult”. This offence can only be investigated based on a complaint by the affected person. In relation to presidents or other officials the prosecutor can act without a preceding complaint but still needs permission from the official in question.

Even though the possibility of opening criminal proceedings in similar cases does exist in Austria, the majority of instances are dealt with through civil law suits with the aim of reparations for damages. A clear tendency to refrain from applying criminal law can be witnessed not only in Austria but also other European countries in response to various decisions of the European Court of Human Rights (ECtHR).

In that respect, the Venice Commission in March 2016 found: “The developments in Europe indicate that there is an emerging consensus that states should either decriminalise defamation of the Head of State, or limit this offence to the most serious forms of verbal attacks against heads of States while at the same time restricting the range of sanctions to those not involving imprisonment.”¹

This “European consensus” on limiting the offence to only the most serious forms of verbal attacks should have been taken into consideration by the prosecutor in the investigation phase. After a thorough (and correct) assessment of the freedom of press against the personal right of the president (see below), the prosecutor should have come to the conclusion that the evidence is not sufficient to prepare

an indictment in accordance with Art. 170 (2) CPC.

In this respect, the second accusation of “making propaganda for a terrorist organisation” proves to be baseless as well. In light of the fatal absence of legal arguments, we could not observe the necessary compliance with Turkish law.

3. Analysis in terms of International Law

3.1. Freedom of Expression and Freedom of the Press

This case and its indictment causes particular concern in regards the Right to Freedom of Expression and Freedom of the Press, as protected by Art 10 European Convention on Human Rights (ECHR) as well as Art 19 International Covenant on Civil and Political Rights (ICCPR). In our evaluation process on this indictment, we have positively noticed that the prosecutor showed initial awareness on the conflicting issue, as there is a clear section where he establishes his understanding of the limits of the Freedom of the Press. Since his line of argumentation presumably reflects the general position of prosecutors in Turkey regarding the Freedom of Expression and the Freedom of Press, we are going to discuss the arguments made in the indictment and assess them in terms of international standards.

To give some context, the prosecutor starts off by immediately clarifying that Freedom of the Press is not limitless, and pointing out a legal obligation to not attack personal rights. Personal rights are protected against attacks under Articles 24 and 25 of the Turkish Civil Code as well as under the Turkish Constitution. The prosecutor then goes on to argue that in cases where Freedom of the Press conflicts with personal rights, the least protected one shall be considered of superior value, while the main criterion for choosing the right one shall be the public interest.

When dealing with competing rights, international human rights standards refer to the margin of appreciation doctrine as an instrument to balance individual rights with national interests in order to resolve any potential conflicts. As the ECtHR clarified already in 1968, the margin of appreciation must be derived from “a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter”². This balance, of course, has to be based on the values of a democratic society, namely plurality, tolerance and freedom. Restrictions on the Freedom of Expression and the Freedom of the Press as stipulated in Art 10 (2) ECHR are only permissible if there is a compelling social need, otherwise any limitation would run the risk of appearing as censorship.

The prosecutor argues in the indictment, that in order for the right to freedom of speech to be acknowledged, a news outlet’s criticism or value judgment must meet the criteria of being real and newsworthy, it must lie within the scope of public interest and public attention, and provide an intellectual connection with its means of expression. He further states, that the press should objectively perform its function and denies that the Özgür Gündem is doing so.

In this context, there seems to be a distorted understanding of “objectivity”. A media outlet covering a political speech, even if it is held by President Erdoğan himself, is fulfilling its purpose as social watchdog by providing the public with information. While doing so, the value of the published information can not be measured depending on whether or not it condones or condemns the content of the speech nor can it lead to denying the news article’s status of objectivity. After all, the ECtHR has stated in 2004 that “the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of ‘public watchdog’”³.

Even more alarming are the prosecutor’s assumptions, that Özgür Gündem is acting against public interest by covering a widely criticised speech by President Erdoğan. On the contrary, Art 10 ECHR includes the “right to receive and impart information and ideas without interference by public authority and regardless of frontiers”. The ECtHR reconfirmed this in 2014 by stating: “The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press,

one of society's 'watchdogs', in the public debate on matters of legitimate public concern."⁴. Therefore a newspaper does not violate public interest by publicly criticising a politician.

The prosecutor states however, that if an article includes any unnecessary or non-beneficial statements, is written in a "provocative style" that causes the feeling of hostility or scepticism, if the reporter chose a wording that is insulting or offending, or if the article includes any unnecessary or non-beneficial statements, the content would not justify these forms of expression, and the newspaper article in question would therefore be against the law. Evaluating this statement on the basis of international human rights standards, can only lead to quoting the following passage of a 1976 ECtHR judgment: "Freedom of expression [...] 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"⁵. The prosecutor's conclusion that a "provocative" newspaper article justifies legal action against the newspaper's staff is therefore baseless. The function of any press includes the creation of forums for public debate⁶. Causing scepticism is a necessary element for fulfilling that purpose and can therefore not be an indicator of legal violation. Regarding the fact, that the prosecutor is denying the newspaper Özgür Gündem their rights in terms of Freedom of the Press on grounds of 'including any unnecessary or non-beneficial statements' in their article, it will be discussed separately in Chapter 3.2.

In the indictment's last sentence, the prosecutor announces that the news covered by the article in question, is "not real". Without taking position about the content of the article, it must be noted that it does certainly cover a real speech by President Erdoğan. It is also true, that in this speech he mentioned terror attacks that took place in 2015 and claimed that if he could get 400 chairs in the parliament, these incidents would never happen. He also did claim that families of some soldiers are dishonest. The prosecutor did not deny any of the content of Erdoğan's speech, as cited in the article. His objections were solely concerning the way it was contextualised. When the newspaper Özgür Gündem published its article about the speech, it used headlines like "the palace goes crazy" and included a picture of the president and the words "Erdoğan: Dishonest!". The article then referred to Erdoğan statement about soldier's families. It also criticised the palace's handling of the situation, which cost many people their lives on 24 July 2015 and stated in this context, that Erdoğan overthrew the peace table to be the president. These statements are certainly harsh value judgements, but nonetheless the article covers real events. To deconstruct this last part of the indictment, we will refer once more to the ECtHR: „In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof."⁷ Since it is impossible to prove the "realness" of value judgments, the prosecutor's requirement can not be fulfilled. Justifying a restriction of the Freedom of Expression and the Freedom of the Press on these grounds therefore infringes Article 10 ECHR.

Regarding the crime of insulting the president, as stipulated by Art. 299 (1) Turkish Penal Code, we want to point out that while prevailing law must be respected, it is once again necessary to balance individual rights with national interests in accordance with the margin of appreciation. President Erdoğan's personal rights need to be carefully weighed against the right for Freedom of Expression and Freedom of the Press.

To count as an insult, a statement expressing clear disregard or contempt is generally sufficient, but only if the insulted person did not cause such a judgement by his or her behaviour. Appropriate criticism of dishonouring behaviour is not insulting. In order to legitimately limit the Freedom of Expression, the protection of a person's honour must meet the standard requirement of being necessary for a democratic society. Additionally, certain public figures like politicians are required to tolerate a general restriction on their protection of honour, as they are subjects of increased public interest and must therefore also expose themselves to much harsher criticism by the public, than private individuals.

3.2. Guidelines on the Role of Prosecutors

Finally, we will discuss an issue that we briefly touched on above. The prosecutor argues that the newspaper Özgür Gündem is not legitimised to enjoy protection of their rights to Freedom of the Press as guaranteed within the Freedom of Expression in Art. 10 ECHR and Art. 19 ICCPR. His reasoning for this, is that they were including unnecessary and non-beneficial statements in their article.

The reader of this indictment is left to wonder, who exactly a newspaper article has to be beneficial for, in order to not be perceived as “unnecessary”. The answer to this lies once again in the media’s function as public watchdog. The legitimacy of a news article can therefore certainly not be undermined by arguing that there is no benefit in the article, just because it perhaps does not benefit a desired side. The fact that in this case one side is represented by this indictment’s plaintiff President Erdoğan himself, must not have an influence on what kind of newspaper article is viewed as “beneficial” or else “unnecessary”. A prosecutor of legal integrity needs to be able to separate any political sympathies or loyalties he might carry for the President from his understanding of justice and handling of a fair trial. In this case however, the prosecutor is refusing to acknowledge the newspaper’s legitimacy and deems it justified to restrict their rights in terms of Freedom of the Press under the claim that the news article included unnecessary and non-beneficial statements. For lack of additional argumentation by the prosecutor, his reasoning leads to the conclusion that he considers any newspaper article to be generally unnecessary if it does not benefit the president. In this context, we want to point towards the United Nation’s Guidelines on the Role of Prosecutors, which lay out a set of standards to ensure a fair, impartial and efficient prosecution of criminal offences in all justice systems. In this context we want to particularly point out principles 13 (a), 13 (b) and principle 14:

13. In the performance of their duties, prosecutors shall:

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

(b) 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;

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

As the prosecutor of this indictment stated initially, Freedom of the Press is not limitless. This, in its core is correct. But in order to restrict a media outlet’s protection under Freedom of the Press, the reasons for these restrictions need to be legitimate according to Art. 10 (2) ECHR and Art. 19 (3) ICCPR. It most certainly does not suffice for a newspaper article to not benefit a certain side. After all, it still benefits its purpose as public watchdog and the prosecutor is therefore required, under international law, to acknowledge the journalist’s rights protected by Art. 10 ECHR and Art. 19 ICCPR.

3.3. Fair Trial and Presumption of Innocence

Throughout the indictment we noticed a recurring issue with properly linking evidence to accusations. This becomes especially clear with the lack of explanation as to why the defendants are being charged with the crime of “making propaganda for a terrorist organisation”, Art 7(2) Anti-Terror Law. As discussed in more detail above, the indictment only touches on this accusation twice.

To briefly recap, firstly, the prosecutor quotes a section of the newspaper article that criticises the death of more than a hundred children and women, hundreds of special force officers and soldiers, and more than fifty guerrillas. He then constructs his accusations based on the word “guerrillas” by assuming that it is meant to describe members of an armed terrorist group, he then goes on to conclude that the article’s authors are therefore considering terrorist attacks an action within the scope of legitimate defensive war, which he then sets equal with making propaganda for a terrorist organisation. Secondly, the prosecutor refers to the allegedly demanded ceasefire by TSK. According to him, mentioning this in the article, “presents the violent, coercive and threatening actions of the armed terrorist organisation as legitimate”. He fails to offer any explanation as to how he made that connection or came to this conclusion, only adding that this “describes the Turkish Armed Forces as weak”, which further contributes to the reader’s confusion.

Both statements and his subsequent lines of argumentation for charging the defendants with “making propaganda for a terrorist organisation”, are inconclusive at best. Failing to properly link evidence to accusations and still insisting to continue the prosecution, does not only stand in clear conflict with principle 14 of the UN Guidelines on the Role of Prosecutors, it additionally heavily violates Art. 6 (2)

ECHR, presumption of innocence. Without this essential core function of a fair trial as guaranteed by Art. 6 ECHR, a judicial system can not appropriately protect and uphold the law within a democracy.

4. Conclusion and Recommendations

In conclusion, the present indictment does not entirely meet international nor national standards. As has been elaborated in detail above a number of deficiencies could be detected.

First of all, even though the indictment seems very well structured, the layout of the individual text bodies leads to difficulties in understanding the allegations. The prosecutor did not use a sufficient number of paragraphs and headlines, which made it harder to understand the allegations without misconceptions.

Secondly, the prosecutor included a majority of the formal necessities in accordance to Turkish law, however, the absence of a comprehensive list of evidence constitutes an obvious and significant failure. Abstract references do not provide the necessary detail and are therefore inadequate to present the evidence. Furthermore, the accusations were not presented with the required detail and legal reasoning. Therefore, the indictment should never have been issued.

Thirdly, the prosecutor's approach regarding Freedom of Expression and Freedom of the Press has strayed far from the international understanding of these rights, and their legitimate limitations. Any scope of possible interpretation regarding the margin of appreciation has been transgressed and the line of argumentation displayed in this indictment does not hold. In this context we would like to leave the last word to the ECtHR, who put it precisely to the point with the following statement:

"The Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person"⁸.

Therefore, we strongly urge the process of criminal prosecution in Turkey to be reviewed and improved. Following steps could be taken:

1. Drafting an indictment should always be in line with Art. 170 (3) CPC. We recommend that after finishing a first draft, the prosecutor should check if all the details prescribed by law were considered and can be found in the document. It might help to read the document from the point of view of the defendant to make sure that it is comprehensible and clear.
2. A clear format and headlines are absolutely essential and do not only help the defendants to understand the allegations, but could also be of importance to a prosecutor to develop a good and straightforward line of argumentation.
3. Regular awareness and legal training are of utmost importance. The prosecutors should always take into consideration the international standards and should be trained in applying the margin of appreciation doctrine when balancing individual rights with national interests.
4. Once again, we need to stress the importance of acknowledging the presumption of innocence as stipulated in Art. 6 ECHR. As an essential core function of a fair trial, it is also an irreplaceable element of any legitimate democracy. Unfortunately, this indictment has shown that the presentation of accusations based on correct legal arguments seems to pose the most difficulties when drafting the indictment.
5. Furthermore, we urge the authorities to reassess their understanding of national interests, especially in the context of the true purpose of free press and media for a democratic society.

Endnotes

- 1 Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, Venice Commission no. 831/2015 (15 March 2016) para. 57
- 2 Belgian Linguistic Case (No. 2), No. 1 EHRR 252 (23 July 1968) para 5
- 3 Cauvy and others v France, No. 64915/01 (29 September 2004) para 67
- 4 Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, No. 39534/07 (28 February 2014) para 33
- 5 Handyside v United Kingdom, No. 5493/72 (07 December 1976) para 49
- 6 Társaság a Szabadságjogokért v. Hungary, No. 37374/05 (14 July 2009) para 27
- 7 Lingens v Austria, No. 9815/82 (8 July 1986)
- 8 Társaság a Szabadságjogokért v. Hungary, No. 37374/05 (14 July 2009) para 37

14

Rule of Law in Turkey: **Judicial Administration**

Dr. Orhan Gazi Ertekin
Published: 4 February 2021



Dr. Orhan Gazi Ertekin:

Dr. Orhan Gazi Ertekin graduated from Ankara Faculty of Law in 1993. He received his Master's Degree in 1998 and Doctorate in 2006, both from Middle East Technical University. He is the author of five books and has written a variety of articles focussing on the judiciary in Turkey, as well as on international relations and politics.

He is the co-chair of the Democratic Judiciary Association and is a judge in İzmir, Turkey.

INTRODUCTION

Turkey's judicial administration model has been changed seven times throughout the history of the Republic, which is almost a century old, and twice in the last ten years. Since legal changes in 2014 brought a major change in terms of work and division of labour, another addition can be made to these figures. When we consider it from another angle, since 1961, judicial administration has been organised as a separate and independent organisation. The structure, method and division of labour in the organisation has been changed six times. Changes that have been made frequently and close together bring great risks in terms of judicial administration and foreseeable decisions; and they increase suspicions about the degree to which the demand for "institutional security" is being met at an alarming level. The fact that three judicial administration systems have been implemented in the last ten years, combined with the other factors mentioned above is not something that serves to inspire confidence.

The Laws and Institutions between Universality and Locality

The frequent changing of constitutional institutions such as judicial administration not only requires us to think inquisitively about social and political changes but can also trigger concerns that an all-out "unconstitutional period" has been commissioned. Justice and judicial administration boards comprise one of the fields in which authoritarian tendencies that create concern on a global scale are most felt. In this sense, Turkey purports to be a laboratory in which we can keep tabs on the legal order as it exists, and offers a looking glass.

It is worth remembering that just as much as the problem of justice and judicial administration in Turkey serves as a universal lesson, it also has very complex political, cultural and historical features that cannot easily be translated to another language.

Therefore, in terms of coming to the point of today's problems and understanding the integrity of our current subject, it pays to conduct some historical research into how justice and judicial administration was established in Turkey and how its customs and customary laws developed.

THE HISTORY OF JUDICIAL ADMINISTRATION OF TURKEY

In the Turkish-Ottoman state customary law emerged not as a result of local power's conditions for independence and demands for privilege against central power, but on the contrary, as a routine administrative activity taken by the central power. Therefore, independence and neutrality have not been values that are jealously defended against the central power in terms of the Turkish- Ottoman judicial customs. On the contrary, the Turkish judges gained their historical characteristics and identity from loyalty and servitude to a central hub. The Republic of Turkey's judicial administration has taken over a "tradition of bureaucracy" from the past as its distinctive term of identity.

It would be helpful to study the judicial administration of the Republic's history by dividing it into two periods. The first period is between 1924-1961, in which judicial administration was carried out by representatives of the Ministry of Justice and the appellate court as a dependent institution. The second period, from 1961 until the present, has been a period in which judicial administration has been built as a separate institution with an independent and constitutional characteristic.

THE FIRST PERIOD JUDICIAL ADMINISTRATION OF THE REPUBLIC (1924-61)

The judiciary has not been a political priority from the perspective of the Republican elites. For instance, just as a constitutional court was not considered in the first constitution of the Republic (1924), great discussions were not held on the subject of the judiciary. Judiciary was not seen as a career or missionary profession of the Republic in the same terms as the military, education or district governor (district administrator) roles in terms of the ruling elite; but as an ordinary professional position. This was the case all the way until the Republic's elites were divided into two and began practicing politics in two different parties in the 1940s. The judicial administration issue in Turkey became one of the main fields of tension and conflict between the two parties that emerged from the decision to move to a multiparty system in 1946. As a result of the 1954, 1956, 1958 and 1961 rivalries between the two parties, wherein both sides removed judicial staff in place of the other, judicial administration became a constitutional and independent institution with the launch of the 1961 constitution.

In this first period, one can frequently encounter prosecutors and courts being used like a "club" against the Kurds, Socialists and Islamists that were declared "enemies of the republic". Fair trial and freedom of expression were by no means fields to which the judicial system was sensitive in terms of citizens' rights. On the contrary, even when courts and judges conducted openly unlawful judicial practices, they were congratulated and even rewarded. The unlawful trials of the poet Nazım Hikmet and author Dr. Hikmet Kivilcimlı between 1930-40 can be presented as the foremost examples of these unlawful trials in this sense.

On the other hand, as of the mid-1940s, the authority of the Prime Minister and Minister of Justice in judicial administration became a serious political issue and especially in the 1950s, judges and trials became the fundamental field of conflict between the ruling Justice Party and the opposing CHP. The attempt of Prime Minister Adnan Menderes to openly interfere in the trial of opposition politician Kasım Gülek was quickly brought to the public agenda, and when the attempt to intervene could not produce results, the tactic of forcing judges into retirement was resorted to. The prime minister at the time who openly put pressure on judges and forced many into retirement, was put on trial after the coup of 1960, based on a number of false accusations was sentenced to death, and consequently executed. French revolutionist Danton also faced the judges about to sentence him to death and said: "I am the one who prepared the administration of your court." The prime minister of Turkey did not look at his judges as Danton did, but with fear. This was not just the personal tragedy of Adnan Menderes, who interfered with the judicial system for his own interests and was subsequently put on trial in an unlawful manner. The judicial history of Turkey has really been a "history of tragedies". We will see this more clearly in the coming periods.

THE PERIOD OF INDEPENDENT JUDICIAL BOARDS

The First Judicial Administration as an Independent Board (1961-1971):

1961 High Council of Judges

Total Principal Members: 18 (+5 Reserve)

6 Members: By the Court of Cassation

6 Members: By First Level Judges

3 Members: By the Parliament

3 Members: By the Senate

It can be said that with the 1961 constitution, the constitutional groundwork was prepared for a democratic judicial administration board. While a "High Council of Prosecutors" was established in this period, a High Council was also created for judges. One third of the council, which comprised 18 principal and three reserve members, was elected from among the members of the Supreme Court; one third was elected by senior judges in the first class from amongst themselves and the remaining one third was selected from among judges in the superior court, or that of equal status. It was also set forth that three be selected by the Grand National Assembly of the Republic of Turkey, and three by the Senate. The provision that the Minister of Justice could attend the meetings held by the High Council of Judges when deemed necessary but did not have voting rights was also accepted. Thus, the constitutional groundwork was established for a democratic judicial administration, entirely elected from among judges for which the election process was completely left to various judicial organs including legislative organs. Leaving the Minister of Justice and his staff completely out of the running was an expression of another important democratic approach.

The 1971-1980 Judicial Administration Process

1971 High Council of Judges

Total Principal Members: 11 (+3 Reserve)

14 Members: By the General Assembly of the Court of Cassation

The first attempt at democratic judicial administration began to be criticized with different complaints and concerns. Some claimed that the parliament and senate's authorization to select a member pushed some judges into using political means to be elected; and that this was not becoming to the qualities of a judge. Others defended that some lower level judges abused their right in order to elect members. But the most remarkable concern amongst the elites was the difficulty of having rulers in manipulating and managing a judicial administration that had a relatively high rate of divergence and diversity. Therefore, to avoid the democratic influence of the sociological and political diversity accompanying the 1971 coup, a broad scale representation of judges was abolished. This is why a smaller council which could be controlled more easily and which comprised smaller interest groups was created. The New High Council of Judges comprised ten members now– all elected from the Supreme Court and by Supreme Court members. Another change was made so that the Minister of Justice could act as the chairman of the High Council of Judges when deemed necessary.

The increased broadening of social and political preferences in this period and the state showing diversity exceeding the existing dual-party flanks made it difficult to govern in the traditional sense. The increasing broadening of new social relationships, migration from villages to cities, new work areas opening up, the industrialisation of agriculture and the growing workforce brought about an unquantifiable public life. The uneasiness felt in the face of these new social and political developments was behind the attempt to transform the judicial administration into a narrow and central structure. They didn't want law, judiciary and justice to come up against the new and competing claims that emerged in Turkey.

The 1971 coup set out to realize this anti-democratic expectation, but because expectations were not met sufficiently, it was going to be necessary to wait for the 1980 coup to pave the way for a harder "sledgehammer" effect.

The 1980 Coup and HSYK (High Council of Judges and Prosecutors)

1982 High Council of Judges and Prosecutors

Total Principal Members: 7 (+ 5 Reserve)

1 Natural Member: Minister of Justice (President)

1 Natural Member: Undersecretary of the Minister of Justice

3 Members: By the President of the Republic (Among candidates of the Court of Cassation)

2 Members: By the President of the Republic (Among candidates of the Council of State)

One of the first institutions created after the 1980 coup was the High Council of Judges and Prosecutors and this structure was later attached to the constitution of 1982. In other words, the council of judicial

administration was not established by a constitution, but by a law set forth by putschists and was regulated as a structure similar to the National Security Council that the military units responsible for the coup represented. Accordingly, the High Council of Judges and Prosecutors served as the new judicial administration and comprised seven principal and five reserve members.

The Minister of Justice was the chairman of the council and the undersecretary to the minister was a member of the council. The other five members were to be determined by the President from among Supreme Court and Council of State members. As will be immediately clear, the councils of judges and prosecutors would thereby be brought together. The change was not limited to this. The profession of Judges and Prosecutors would be subject to the same law; and strangely enough it would be transformed into a “new” and complex profession that could be expressed as “judge-prosecutor”.

It was thought that now the Minister of Justice and their undersecretariat would unwaveringly work with the HSYK made up of Supreme Court members. In fact, it can be said that this prediction was proven to have come true by 2002. But as of 2002, when the government switched to a more politically Islamic rooted party, a new phase of the conflicts experienced in the 1950s could be observed. The tension in the High Council between the Minister of Justice and his undersecretary from the ruling party and the members of the High Judiciary Board Superior Justice from the ideological and cultural world of traditional powers gradually rose. On the other hand, it appeared that some preventive measures were being taken inside the judicial system against the new ruling party, the AKP. Contrary to constitutional procedure and conventions, the new government was prevented from electing the President; bans were introduced against the wearing of headscarves in universities; and what’s more, cases with very weak material were filed in order to try to shut down the governing party and the Constitutional Court received appeals for the closure of the governing party.

Although there was an attempt made to ignore all constitutional procedures and prevent the Presidential election, the attempt failed; and in 2007, the government elected a partisan president. But again, the Supreme Court members could not be changed because all members elected by Supreme Court members were made up of individuals chosen outside of the government. The government pushed for a referendum to move to a new constitutional structure that would break the monopoly that had accumulated in the judicial system. Accordingly, four of the members of the new HSYK would be chosen by the president of the universities, one would be chosen from Justice Academics reporting to the Ministry of Justice, seven principal members would be chosen by judicial judges and prosecutors, three principal members by administrative justice judges, and the remaining five members would be chosen with three from the Supreme Court, and two from the Council of State. In the newly proposed 22-member HSYK, the Minister of Justice and his undersecretary would maintain their positions.

This proposal constituted a more democratic shift compared to the previous HSYK structure and made the member selection of first degree judges quite critical and definitive. In response to this, long and tense discussions ensued on the government’s attempt to increase its power of representation in judicial administration and the principle of the majority traditional powers not letting go of their advantageous position.

The HSYK of 2010: Reaching Authoritarianism while Striving for Democracy

The referendum was accepted with a 58% vote in favour of the AKP, which was under siege from the traditional judicial system. However, it was understood once again that establishing legal and institutional fields on the grounds of equality would not necessarily come to mean democracy. The constitutional referendum of 2010 and the new HSYK election held afterwards produced adverse results – since it was not supported on a social or political level – despite new constitutional steps toward democratisation. It was seen once again that in a country lacking a strong civil and social movement, liberal laws could also serve as a tool for anti-democratic political objectives. No doubt, this is not quite as tragic as the fate of the Weimar Constitution’s article 48 – which led to the 3rd Reich, but it was an important lesson since laws alone do not bring about democracy.

For one thing, the period set forth for an election was so short that it was almost impossible for the candidates to prepare an introduction of themselves. This made a group of candidates centred in the Ministry of Justice that followed and knew all the judicial members closely to get more advantages. What’s more, it was discovered that these judges working in the ministry headquarters had used their

positions systematically and in an organised way to achieve results in their own favour.

Thus, the HSYK member elections of first degree judges were seized upon by Gülen Organisation members, who were quite powerful in the judicial system and had a concealed alliance with the government for quite a long time. Those that were elected to the judicial administration board as members were either members of the Gülen Organisation or comprised people the organisation favoured. Finally, after the 2010 referendum, in the “first round” of judicial administration elections, the traditional powers were defeated; and in fact, started to be put on trial as defendants in cases managed by judges who had newly taken over. The victims of the justice system only a few years prior used the same methods as their political rivals and administering justice in front of the political proceedings they wanted. The senior level military members that were the most privileged group among the traditional powers were brought in front of courts for the first time and imprisoned for plotting a coup. The legal grounds for the accusations against them were quite weak and material evidence in the files was limited or almost non-existent. The judicial administration was taken over by new political powers, but the same methods of the past were now practised against those who had practised them. And so, everything had changed, yet nothing had changed.

As we know from Macbeth, there is no “dream of a pure and joyous rule” that does not end in a nightmare. There never was. It did not happen again. The concealed alliance between the AKP government and the Gülen Organisation began to shatter by the end of 2013 and, in fact, ended up in open enmity. Back to the drawing board.

The government became the minority within the HSYK with this crisis and tried to change all the procedures and methods of a constitutional institution with a simple law. The government placed itself in the 1st office of the HSYK, organised in three circles reporting this and ensuring that strategic decisions were made by this office. This was clearly unconstitutional. But the fight for power continued. The HSYK, which was the centre of command in judicial administration, was again at the centre of political conflict.

THE COLLAPSE OF JUDICIAL ADMINISTRATION IN TURKEY: TOWARDS AN ANCIENT ROMAN BASILICA

Up until the HSYK elections of 2014, in Turkey, the “judicial conflicts” were founded on taking over a “mechanism”. The question of “who the judicial system should belong to” was the main question guiding all conflicts.

The judiciary here portrayed features of a closed “device” with its own operating system, autonomous rules and its own staff. Whatever power took over the command of this device would be the one deciding against whom cases were to be filed and who would be eliminated.

The Coup Attempt of July 15, 2016 and the End of Justice

Up to the coup attempt on July 15, 2016, Turkey had witnessed countless conflicts and tensions based on taking over judicial administration and owning the power and authorisation over assigning and promoting judges and over their benefits, determining and guiding political cases, and seizing the privilege to decide on judicial discretion following economic policies and going along with them. What happened after the coup attempt of July 15th is not a “judicial crisis.” For one thing justice, judiciary and judicial administration had completely lost its legal and institutional autonomy as a whole. The traditional conflict based on the “struggle to take over justice as an instrument” experienced a qualitative change and became the “abolition of justice”. Since justice was no longer a legal and institutional field, the fight was based on “taking over justice” and was replaced by a process to use the function of justice in free style without institutional or legal limits.

The July 15th experience actually passed by two principal judicial administration models. Since the HSYK of 2014 and the new Council of Judges and Prosecutors (HSK) in 2017 determined the practices and rules of the justice and judicial administration we experience today, I am of the opinion that they should be handled together.

The HSYK Elections of 2014 and the End of the Justice Wars

The 2nd term of the HSYL elections in 2014 arrived on top of the crisis within the ruling alliance that was clarified with the Referendum of 2010. Friends and enemies needed to be changed once again in the election of new members. While the ruling AKP party attempted an alliance with the main body of “enemies” in the 2010 referendum, the Organisation chose to work with groups that remained and were decisive as the opposition. While the AKP government and its allies won by a small margin, it was clear that the war within the judicial administration would continue and the end result would be announced in the judicial system. Up until the coup attempt of July 15, 2016 the low-intensity conflict continued within the judicial system. After the coup attempt of July 15, we faced a “new element” in terms of justice and judicial administration.

The HSYK of 2014 reflected an administration that would remove justice entirely from being a legal and institutional field. Nearly 4,000 judges and prosecutors were expelled from their professions; and within the next four years, nearly 20,000 new judges and prosecutors were admitted into the profession. Thus, almost 80% of judicial members acquired a seniority equivalent to 0-4 years of work. This is a very striking rate represented in the judicial system. As a profession and as an organisation, it completely and institutionally collapsed because the rate in question means being deprived of all the knowledge that could pass on by the professional tradition that could create a judicial culture and a standard for legal information. As we can easily see in the indictments and verdicts of the past few years, a freestyle judicial practice began to emerge. It is possible to see all the consequences of the 2014 verdicts in the indictments and verdicts following July 15th. The verdict by the ECtHR about the businessman Osman Kavala’s imprisonment was not reasonably justified or enforced by courts. Also, in terms of some defendants – such as author Mehmet Altan, who was put on trial – the verdicts of the Turkish Constitutional Court were not even enforced in violation of the constitution.

On the other hand, four HSYK members, 79 Supreme Court members and nearly 4,000 judges and prosecutors were detained and put on trial after the July 15th coup attempt. When we look at a large majority of the files belonging to the people who were tried, we can see that almost the same questions as in the McCarthy era were used. It is clear that almost all of the points of interrogation –such as whether or not the defendants or their children went to Organisation schools, whether or not they deposited money into Organisation banks, whether or not they followed Organisation media or whether or not they were in contact with Organisation members are not actions that constitute a crime.

It is tragic that the government, which was the victim of unjust judicial practices in the past, didn’t take a political lesson from this and ended up being even harsher than the “judicial crisis”. Unfortunately, an understanding that justice is a “legitimate weapon” of political interest has settled in. In contrast to this, the government even found the structures and decisions of the 2014 HSYK that had generated functional results for them to be insufficient, and in 2017, it recommended and constitutionalised a new judicial model.

The HSKCJP of 2017: Moving on from Judicial Administration to “The Spiritual Leader of Justice”

When we look at the constitutional level, the new judicial administration structure now has 13 members. While the Minister of Justice is the board’s chairman, his assistant is a natural member of the board. Three members of the board are selected from among first class judicial court judges, and one member is selected from among administrative court judges by the President. Three of the remaining members are selected from the Supreme Court members, and one member is selected from the Council of State. The other three members are selected by the Grand National Assembly from among academicians in law and attorneys.

According to this, the latest element is that judges and prosecutors are completely removed from the “constituents” base of the new judicial administration. It appears that this is more of a desire for the government to be free of “weights” and “unwieldy” functions such as elections rather than insecurities against existing judges and prosecutors. Thus, the government has the power to choose virtually anyone they wish to be a member.

A President Centred Judicial Administration

The 2017 change to the judicial administration model was not just a change at the constitutional level. It also brought with it a new judicial operation in which the president was at the core. Since then, the President became justice itself in political reality. The new government system with the President in its centre has required the understanding of the President's "personal" will and to behave accordingly for all employees in the judicial administration as in all institutions. The new judicial administration style also appears to be specific in terms of authoritarian customs and covers two different political cycles.

A cycle that extends to the people from the leader and the cycle that extends to the leader from the people:

- In the first cycle, the direct command and governance of the President is the principal item. The arrest, trial and release of a person is immediately executed with the announcement of the President's command.
- The second cycle pertains to the reactions of the President's own constituent base to the decisions made by the President. These reactions are again considered by the President, and the judicial system and the judicial administration is made to amend their decision. Those who make decisions and acknowledge the expectations of their base are again up to the President. Decisions can be changed daily and even hourly. In fact, directly after the acquittal verdict in a case in which businessman Osman Kavala was put on trial, the reactions of the ruling party's base on social media were taken into consideration, and within a few hours, a new investigation was created; and he was arrested once more.

The new judicial administration "system" makes three different offices prominent. The first and principal power and authority is the President himself. The President is the solidified organic form of justice. The second is the official judicial organs and the HSK as the judicial administration board; and the third is the varying interests and expectations of the ruling power's base. The judicial system in Turkey now operates on this triple structure. For example, even though social media phenomenon Taylan Kulaçoğlu was acquitted by the courts, the reactions of the ruling party's base on social media were considered; and later it was decided he would be detained again. Many more examples can be provided. Another example is the opening of an official investigation against two judges (Orhan Gazi Ertekin, Ayşe Sarısu Pehlivan) who declared they were saddened by the death of one member of a music band that died as the result of a hunger strike, when the ruling party's base objected on social media.

The Judicial Administration as an Ancient Roman Basilica

The law has never been the carrying power of the state in any period of the republic's judicial system, but at least it has succeeded in creating modern institutions and was able to form the professional traditions of prosecutors and judges and legal information standards. Despite all the political judiciary, legal and judicial order of the republic was based on institutional maturity at a mid-range level that gained experience by way of its autonomy. It managed to create a "sense of legal security" among the middle class despite harsh and excessive tendencies regarding political opposition.

Now, we appear to be in an ancient Roman Basilica. The distinctions between holy-secular, institutional-behavioural, punishment-execution and increasingly legal-illegal are becoming blurred and are re-established in "organic union" with the spiritual and physical existence of the President. Now, the judicial administration in Turkey is just like an ancient Roman Basilica; it has entered a new era in which the place where decisions are made and executed and the place where worshipping is conducted are connected to one another in the same structure; and spatial and institutional diversity is replaced by union.

CONCLUSION

Tiresome judicial conflicts comprising long, tense and mostly revengeful confrontations have left a hopeless impression on the Turkish people. Trust and credibility in justice is questioned more and more every day. Conflicts and inconclusive struggles that have no creativity and arguments that keep going back to square one show that the main and most important problem in the Turkish judicial system is related to “solution culture” in reality. Since “taking over” the judicial system means it can be taken over by others as well, the establishment of a new and real judicial system and judicial administration is constantly postponed by repetitive political games. Whoever takes over the judicial system does not consider that they actually prepare it for the use of the “enemy” later on. Turkish justice and its administration has experienced the last century as the principal field for such a war; and it appears that there is no souvenir left from this in the ruins other than the memories of the war.

The judicial culture of Turkey, its mechanism and its administrative structures have frequently faced legal and constitutional changes. If it is possible to pinpoint an institutional problem here, the problem actually goes far beyond this. Legal- constitutional changes are, at the same time, part of an “administrative strategy”. It is not just the administrative mechanism and structure of justice that changed. The culture, tradition, knowledge and experience are also changed, thereby making it more easily manageable.

Moreover, saying that the judicial administration in Turkey just experiences an “institutional problem” would not be considered correct. In fact, it would mean a completely incorrect conclusion is drawn from this despite all the periods we have been through because the laws and institutions in the legal field in Turkey hold a broad sense of “freedoms” and “arbitrariness”. When we consider the history of judicial administration, there are routine “oddities” that immediately surface surpassing the issue of institutionalisation. For example, the fact that the HSYK was established as a judicial institution directly after the military coup of 1980 and then attached to the 1982 constitution is one of the items of historical fact that foremost need to be remembered. Thus, the institution of judicial administration somehow came into existence before the constitution; and this is one of the features that will go down in constitutional history. This is an “oddity” that places the HSYK in a “founding will” position as a “special” structure, even somewhat “superior to the constitution.” Just like the National Security Council that had coup attempter generals in it, the HSYK was also transformed into a constitutional institution. Being established through a military coup and not with a constitution is a striking feature of the HSYK that implies an antidemocratic political character structure that we will encounter frequently in the later periods.

The “extraordinary-ordinary” history of judicial administration in Turkey is not limited to this event, and as we can see, judicial administration has been at the heart of political conflicts in Turkey since 2006. The government, which became a minority when the alliance within the HSYK broke down after 2013, placed its own members in the 1st office of the institution. That institution was in three cycles with a legal change in 2014 to achieve majority in this office. They ensured that all strategic decisions were made by this office. Thus, the nongovernment majority in the HSYK was made ineffective and dysfunctional; and it became possible for the minority to govern a majority. This change can be considered another type of the “gerrymandering” as lodged in accusations of electoral corruption in the U.S. and remembered as a “joke” of politics regarding the judicial system more than an “oddity”.

Finally, last but not least, it is worthwhile pointing out two important pieces of information in the history of “oddities in judicial administration.” The first is before the July 15, 2016 coup attempt, when four members of the HSYK were accused of being “members of a terrorist organisation”, arrested and put on trial. The claim that a “member of the judicial administration was a member of a terrorist organisation” could seem strange to a reader not familiar with Turkish history, but just like the lack of institutional tradition, “perplexing” nature is another main feature of the judicial administration in Turkey. Let us remind you: after the coup attempt of July 15, 2016 about 4,000 judges and prosecutors comprising nearly 30% of the HSYK’s Turkish judicial system were removed from their professions.

The oddities here are no doubt tragic for a judicial administration. Tragedy turning into history like this generally blurs the lines between literature and social sciences.

In the meantime, as will be apparent from a short historical tour, the history of Turkish justice and judicial administration is really the history of the struggle between “political powers”. An autonomous and

independent justice and judicial administration culture could not be created. An autonomous association of lawyers and legal thought could not be built. Power wars keep happening without creating any “common public” field; and legal proceedings and cases cannot be made into the field of “res publica” with judiciary, judges and judicial administration.

It will not be possible to reverse Turkey’s fortunes and change a hopeless future into a hopeful one unless Turkey bases its laws on a ‘balance of powers’, on a class of lawyers that produce their own profession and culture in resilient forms, and on an idea of rights and law independent from the social and political rulers. But then again, we can’t overcome tragedies by giving up all hope.

Dr. Orhan Gazi Ertekin

15

Is this justice in your world?

PEN Norway's Turkey Indictment Project

Berna Akkızal
Published: 5 November 2020



Is this justice in your world?

About the author:

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 for 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.

Is this justice in your world?

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 the 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 highest 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 2 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 imprisonment, but adding that "If this crime is committed through a media publication, the 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 to five thousand days". 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 up to seven 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 the Turkish Criminal Code 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 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 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 a 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. If one of the defendants was a relative, you had the most gut-wrenching and but highest possibility of getting in. It was possible to watch the trial of a colleague who was arrested for reporting news like yourself, only if there was any room left after the international committees took their seats. After the yellow card-holders among the press got in, employees of non-governmental organizations and friends of the defendants were generally unable to enter the courtroom or were able to enter alternately and convey their observations in reports and tweets.

International committees from various different countries waited in the corridors with all 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, in which there was no possibility to find seating, for the previous hearing to end and the committee to take their seats.

This crowd could sometimes build up considerably depending on the profile of the defendants put on trial. Sometimes, in lesser reported 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. People from any profession who criticize the government, show solidarity with others suffering from oppression and unrelated to any act of violence are put on trial one by one, receiving the punishments standard for killings and abuse.

Attorneys, academics, doctors, civil 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 be 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 by the requirements of a democratic society, it must fulfill a social need and be a 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 was 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 the Southeastern and Eastern Anatolia, saying: "We can't let the children die." During the 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 say.

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 Büyükdada 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 civil rights advocates. Everyone more or less suffered the same treatment. Our friends who were called to the courthouse to give a statement and went in of their own accord were cuffed and detained there and then. Our professors, who despite being deans in their university with a permanent address and a specific 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 for it is conducted 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 referred to takes the form of a newspaper article, a news report or a tweet. Therefore, the question of how a screenshot, a newspaper clipping or even personal computers or telephones could be tampered with while they are kept in custody still remains unanswered. Sometimes, even a photograph displayed in a government-sponsored project can be regarded with suspicion based on the assumption that 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 in your name, 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 the pro-government media.

Once the indictment is prepared, the first session is held fairly quickly. Sometimes the first hearing do not take place in the months between being taken into custody and being put on trial without remand; 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 calls, which formed another violation. Defendants were forced to give their defense from a room in their prison and were unable to hear what was discussed in the courtroom, unaccompanied by their attorney. Sometimes, when the 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 to 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 the judicial order if an investigation or case was opened against the attorneys themselves, who could sometimes be banned 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 in cases that the government considered to involve the question of anti-terrorism were always the same. If the lawyers could be proven to have been pro-freedom of expression advocates in their personal lives, they could also be charged with terrorism; they could not take on such cases in the future; and thus, they were persuaded to censor their own activities.

In addition to all of this, a person against whom an investigation or case has been filed is innocent until proven guilty. 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 like-minded people advocating for the same causes.

Even if you have a lawyer not being investigated on grounds of terrorism, and you are tried fairly swiftly, whether the chief justice speaks to you with the informal or formal “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 leave 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 it is not often criticised.

Okay, so what happens to the rights advocacy instruments that are the components of civil society, at 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 also be protected to the fullest. This must be given the utmost priority.

If domestic law is completely powerless against a government that merges legislation, execution and justice in one body by changing 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 on 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 initially aimed to lighten the workload not of the judiciary alone, but that of the supreme court and the 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 to be 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 were re-issued. For defendants and their families, it was extremely distressing to be arrested again under different charges as early as ten minutes after their release.

Even if years have gone by and your trial is finished, and 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 outlined in Article 267 of the Turkish Criminal Law and states: "Court decisions may be appealed in cases specified by 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 the defendants but also restrict the mobility of all civil society. We will remember Osman Kavala's detention exceeding 1,000 days, with the 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 non-governmental 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 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 only in the long term; and we 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.

Endnotes

- 1 All defendants in the file were exonerated.
- 2 Bia Medya Observation Report - 2016

16

**The Rule of Law in Turkey:
Legal Practice and Bar
Associations –
Where to now?**

PEN Norway's Turkey Indictment Project

Dr. Kasım Akbaş
Published: 22 October 2020



The Rule of Law in Turkey: Legal Practice and Bar Associations – Where to now?

About the author:

Kasım Akbaş graduated from Ankara University's Faculty of Law in 2001. He pursued his Masters and Doctoral studies at Anadolu University. He is the author of two books as well as various articles and book chapters in the fields of Sociology and Philosophy of Law, Theory of State and the Law and Human Rights. He continues to work in the areas of research and publication. As he was one of the Academics for Peace signatories calling for peace in Turkey in 2016, he was ousted from his university post under the State of Emergency Decree number 686. Kasım Akbaş is the recipient of prizes from organisations both within Turkey and internationally.

1: The Starting Point

As of the end of 2019, there had been a total of 127,691 lawyers in Turkey, all of whom witnessed fundamental changes in their profession made by the government. Turkey has the third highest number of lawyers in Europe, after Spain and Germany. France, which ranks fourth, lags far behind with almost half this figure.

Up until the recent political “antagonism”, this excessive number of lawyers was one of the most common complaints of those in the profession. The situation was exacerbated by the proliferation of legal faculties opened by various ruling parties for populist reasons, as well as the ease of entry into the legal profession, in many cases only a formality that could be attained after just a one-year internship. Consequently, it was criticised for lowering the standards and also earnings.¹

While Turkey is third in Europe for the number of lawyers, it ranks eighth in terms of the number of lawyers per capita (at a ratio of 1:642). In fact, when this is compared to the number of lawyers in countries with relatively smaller populations, like Estonia, Norway and Luxembourg, this seems to be fairly acceptable.² Thus, when considered comparatively, the complaints of Turkish lawyers in this regard seem overstated.

However, looked at from a historical perspective, it should be noted that the legal profession and bar associations have functions that surpass those of other countries due to the socio-political realities of Turkey.

2: The Legal Status of Lawyers in Turkey

In the Turkish legal system, the status of lawyers and bar associations has some unique characteristics compared to other countries. In Turkey, the profession is described in law as a “public service and a freelance profession”, a fact that has, from time to time, given rise to various claims and disputes.

On one side of the argument, some claim that to be a lawyer is to have a “freelance profession”, that no “public power” is used during the execution of the job and that the relationship between the representative and the represented is a proxy one by nature.

The flip side of the argument considers lawyers to be “public officials,” and is based on the premise of Article 128 of the Constitution, which describes public service as carried out by “public servants and other public officials”. In fact, there are other regulations that reinforce these arguments. For example, according to Article 6 of the Turkish Criminal Law: “In the practice of criminal law, “judiciary” refers to the high courts, judicial, administrative and military courts with their members and judges, Public

Prosecutors and lawyers”. Article 57 of the Legal Practitioners Act, titled “Crimes committed against Lawyers”, contains the ruling that “Crimes committed against lawyers in the course of their duty or due to a duty they carry out shall be punishable according to the same provisions on such crimes committed against judges.”

Looking at these provisions, we can see that lawmakers have wanted to fortify the legal status of lawyers by rendering it close to public officers, but on the other hand – when we consider that a public officer cannot be independent and objective in the face of the government – they have also taken into account concerns over professional independence and thus determined it to be a “freelance” activity. It is not difficult to guess that there are certain social and historical developments behind the accommodation of these two, seemingly contradictory, approaches.

As it emerged along with the modernisation of Turkey, the legal profession also became part of the secular yet state-centred modernisation process. The secularisation, modernisation and westernisation of legal and judicial institutions can be seen as the hallmark of the Turkish Revolution, because the weakness of any social strata that might have formed its platforms or agendas meant that the Turkish Revolution principally emerged as a renewal of institutions within a legal framework. The founder of the republic, Mustafa Kemal Atatürk, expressed this at the opening of the Ankara Law School (today’s Ankara University Faculty of Law): “The Turkish revolution, which has been in progress for many years, has harnessed its existence and ideas to the expedience of determining and validating new legal provisions that are the source of public life”. His speech at the inauguration was concluded with the words: “I am extremely pleased to say that I have never before felt the joy I feel now in opening this institution, which will become a force behind the Republic”.

3: The Legal Profession in Turkey: A Short Framework of Socio-Historical Developments

While 1938 marks a shift from the first to the second major period of developments in the legal profession in Turkey, the post-1938 period can also be divided up into periods, which are no doubt closely related to the political, social and economic developments in the country. The period after 1938 was one in which wars on the global stage were accompanied by the beginnings of international institutions, with developments towards both fascism and democracy. From Turkey’s perspective, this period was marked by moving to a multi-party electoral political system and also the introduction of a new constitution following the military coup of 27th May 1960. The characterisation of the legal profession as a “freelance profession in the nature of public service”, as it is referred to so often today, emerged in this period. In an elective but non-internalised, democratic setting, the concept of the legal profession as an extension of the central government – itself greatly influenced by the authoritarian, fascist and corporatist trends of the time – sat comfortably next to the idea of an “independent profession”.

In this framework, lawyers and their organisations constituted a highly-educated segment of society that had been given the duty of representing, not only republican values, but also defending the idea of non-individualistic (or classless) economic and political development. Therefore, the legal profession in Turkey developed along a freelance trajectory that frequently intersected with the statist ideology, rather than the lawyer typology otherwise seen following liberal bourgeois revolutions.

Leaving aside the controversial status of the 1961 Constitution in Turkey’s political and legal history, we can say that it marks a shift to a political order in which the founding ideology of the state blended with a limited social state that partially adhered to liberal, individualistic values. The new constitution’s liberal elements concerning rights and freedoms, and its more social approach towards trade unions, and strikes showed, not a departure from the corporatism explained above, but on the contrary, a step closer to a substrata of social solidarity. Thus, the legal profession entered a period that saw it undertake the task of defending basic rights, freedoms and social rights. It became increasingly “politicized”, yet did not stray from loyalty to the state’s founding ideology. As the organisations upon which the profession was founded, Bar Associations as a whole were the defenders of this constitutional structure and even had public authority within it.³

As part of the regime created by the 1961 Constitution, a supreme central bar association, the Union of Turkish Bar Associations (UTBA), was established through the new Legal Practitioners Act in 1969

(which is still in force despite many changes). The establishment of the UTBA and the transfer of certain authorities that used to belong to the Ministry of Justice (while maintaining tutelage) to the supreme professional body meant two things: firstly, the expansion of the profession's independence and its ability to respond to political and social issues; secondly, it meant an attempt to erode the impact of local bar associations⁴ because powerful bar associations with a large membership—such as the Istanbul Bar—started defending rights and freedoms, the social state and democracy more fiercely under the relatively more “libertarian” atmosphere created by the 1961 Constitution. Furthermore, an opportunity arose to combine larger platforms with other rights and labour organisations that emerged in the period. However, the establishment of the UTBA meant “centralisation” for the bars, which brought a host of difficulties in its wake.

It's not surprising that lawyers later increased their independence in terms of economic status and social conscience. While they had no particular conflict with the basic values of the state, lawyers and bar associations had attained a position where they could oppose certain choices by the Ministry of Justice and other government bodies. However, they also lost a degree of uniformity amongst their ranks.

As part of the process that emerged with the 1982 Constitution, it can be seen that the central government abruptly abandoned the concept of separation of powers that had made relative progress in the previous period. The most well-known examples are the erosion of judicial and legislative powers, while increasing the enforcement authority given to the president as head of the executive. When legislation was reduced to the agency of a parliament with reduced functions and powers, elected by an anti-democratic election and political parties law, those working in the judicial system lost their independence and became government officials.

The 1982 Constitution also meant a loss or erosion of autonomy in many institutions. The autonomy of universities and institutions like the public broadcaster TRT was either completely lost or eroded to the point of becoming irrelevant. The same is true for the bars and the UTBA. The tutelage of the Ministry of Justice, or in other words the executive, has increased. Professional associations were placed under state administrative and financial supervision, prohibited from cooperating with other unions and associations, and UTBA administrators even had to seek permission from the Ministry of Justice to leave the country.⁵ In other words, the separation of powers was eroded both horizontally and vertically (decentralised establishments). The UTBA only regained many of its old powers and relative independence after the amendment of the Legal Practitioners Act in 2001.

The situation facing us today can only be understood against this historical background: in other words, the bar as an institution of the “republic” and its use of authority in the public sphere became the subject of debate in terms of both its general values and its position as a decentralized institution. When considered from this perspective, it is apparent that the discussion about bar associations and/or ensuring democratic representation, which was started by the ruling party in the name of democracy, is not actually a move towards “democratisation” but, on the contrary, an anti-democratic move. Aside from a few different historical developments, the history of Turkey's political and constitutional shifts is the history of the centralized state and the consolidation of the power of the executive within it. What we are faced with today is not the issue of bars “practicing politics” or the “democratic definition of governance”, but a political ruler that does not want to share public power with any constitutional force, including the legislative and executive organs of the state, or any autonomous establishment.

4: Bar Associations in Turkey: Professional Associations Serving as Public Bodies with Public Legal Entity

Lawyers in Turkey are required to register with bar associations. According to Article 66 of the Legal Practitioners Act No.1136: “Every lawyer is required to be registered with the bar association within the jurisdiction in which they will be practicing law”. Since the regulation that is the subject of so many current discussions is related to a sentence added to this article, we will return to it below in the section headed “Recent Developments”; but for now, let it suffice to say that lawyers that are substantively and continually assigned to public bodies, public organisations or state economic enterprises (referred to hereafter as “public lawyers”) are not obligated to register with a bar association, and registering with a bar is left entirely to their own discretion (as per Supplementary Article 1 of the Legal Practitioners Act No.1136).⁶

According to Article 76 of the Legal Practitioners Act, “Bar Associations are professional organisations of a public nature, which operate as legal entities and in line with democratic principles in order to nurture the profession, ensure honesty and reliability among the members and practice owners of the profession, defend and preserve professional order, morals, reputability, the rule of law and human rights and to meet the needs of lawyers. Also, according to Article 77: “Bar Associations are established in all provincial centres that have at least thirty lawyers in them”. Since the current disputed regulation also made an addition to this article, we will come back to this topic.

The Law regulates the Union of Turkish Bar Associations as follows:

The establishment and characteristics of the Union:

Article 109 –

- The Union of Turkish Bar Associations is an organisation that is formed with the participation of all bar associations.
- The association is a professional organisation with the nature of a public body and with a legal entity.
- The headquarters of the union are in Ankara.

Up until the latest changes, the UTBA General Assembly, which has the duty and authority to choose members of its executive, disciplinary and supervisory boards and also elect the Union president, was established by secret ballots in which each bar selected two delegates from among members with at least 10 years of experience in the profession. Furthermore, bar association presidents currently in post and lawyers that have served or are serving as presidents of the UTBA are automatic members of the General Assembly; they also have the right to participate in the vote, as well as to be elected. Up until the latest changes, bar associations with over one hundred lawyers would each select one extra delegate for every three hundred members over the first hundred.

Delegates for bar association president, the executive, disciplinary and supervisory boards and the UTBA General Assembly are chosen in ballots held every two years. The UTBA president, executive, discipline and supervisory boards are elected for a four-year term. Consequently, each UTBA president goes through a general assembly called a “financial general assembly without elections” during their presidency. The UTBA General Assembly holds a general meeting every two years at the time and place assigned by the previous general assembly meeting. However, General Assembly meetings that include elections are held in Ankara. Also, an extraordinary meeting of the General Assembly can be called by the UTBA executive board or – up until the latest changes – by the written request of the executive boards of at least 10 bars.

The most important feature of the legal status of bar associations in Turkey is that they are set up as “professional organisations with a public nature”. This issue is outlined in article 76 of the Legal Practitioners Act quoted above, which states: “Bar Associations are professional organisations of a public nature, which operate as legal entities and in line with democratic principles”. Article 135 of the Constitution states that: “Professional organisations and supreme bodies of a public nature; are public legal entities”. In other words, the bar associations and their supreme body, the UTBA, are not powerful yet ordinary non-governmental organisations, but rather an integral part of the state public legal entity; bar associations are among the establishments that use state sovereignty on behalf of the people.

If we were to express this in legal terms, the three functions of the state are legislative, executive and judicial. Upon the execution of these functions, the state sovereignty helps to shape these powers of legislation, execution and judiciary.

These authorities and powers are used by the legislative organ (parliament), the judicial organ (courts) and the executive organ (government and administration). The administration, which is an element of state sovereignty, is organized into central management and decentralized powers. In terms of decentralisation, the first thing that comes to mind is the location aspect of decentralisation, in other words, local governance. There are three types of local administration in Turkish law: provincial, district

and village administrations. Service decentralisation bodies are another form of decentralisation. These have been created based on the idea that leaving management of matters that require technical knowledge and expertise up to the centralized governance could be problematic. Examples of these locally-assigned authorities include the Directorate General of Foundations, the PTT (Turkish Post Service) Directorate General, the Machinery and Chemical Industry Agency, the Turkish Employment Agency, TÜBİTAK (Scientific and Technological Research Council of Turkey), universities, TRT (Turkish Radio and Television), the Atatürk High Council of Culture, Language and History, etc.

Agencies with governance within delineated local areas have the status of a public legal entity; they are autonomous, have their own budgets and are subject to the tutelage of the central administration. Professional organisations with public agency, including bar associations, are decentralized too, in this sense. Thus, the bar associations use a portion of state sovereignty on behalf of the people—or, to clarify, use the authority to perform public service given to them by the constitution and the law.⁷

There are 80 bar associations in Turkey that are within this legal framework today. This means that today there is a bar association in every province (excluding Bayburt). The bar associations of the three largest cities in the country (Istanbul- Ankara-Izmir) are also the most heavily populated ones in terms of the number of lawyers. With its number of members approaching 50,000, the Istanbul Bar Association is not only Turkey's most populous bar association, but among the most populous bar associations in the world.⁸ The Ankara Bar Association has 20,000 members, and the Izmir Bar Association has 10,000. The number of lawyers in these three bar associations makes up about 75% of the lawyers registered in bar associations across the country.

The general assembly elections for the more populous bar associations are conducted using a type of open list system. This means that the presidential candidates comprise one list; and the candidates for other boards are on a separate list. In the general assembly, the lawyers mark these lists to determine their candidates for president, the boards and the supreme body. But of course, there are “groups”⁹ working inside the bar that guide their followers by preparing “key lists”. In this manner, the most preferred candidate for president is elected; and the bar administration is formed from among those that receive the most votes. According to this method, when two groups participate in the election, theoretically a group with 51% support could persuade its supporters to vote for their entire “key list,” and thus take over the management entirely. In reality, as there are more groups than this, a group with around 30% of support is usually in a position to determine the president and administration. Also, since not all lawyers vote in the elections, it can even be claimed that the support for the bar management comes to no more than around 25%.

So, bar associations are, on the one hand, an extension of public power; on the other hand, they are able to take an oppositional stance contrary to the general political trend in Turkey due to both the power of the profession's tradition and the circumstances of the bar elections up to now. At a time when politics saw clashes on sensitive issues concerning secularism, the conflicts between the bar associations and the ruling party intensified, particularly after the AKP came to power, making their oppositional position ever clearer.

Likewise, later groups like the Avukat Hakları and Avukat Hareketi (Lawyers' Rights and Lawyers' Movement) were made up of former members of ÇAG, who later formed ÖİÇAG. For a detailed analysis of the Istanbul Bar groups specific to the 2018 elections, see Seda Kalem and İdil Elveriş, “Siyaset Yapmak ya da Yapmamak: 2018 İstanbul Barosu Seçimlerine Bir Bakış”, Ankara Barosu Dergisi, 2018/4: 161-208. In the Ankara Bar, a group called Demokratik Sol Avukatlar (DSA) (Democratic Leftist Lawyers) formed after splitting from ÇAG in the political atmosphere of the 90s. The DLL determines the candidate for the president with a pre-ballot among its own members. Support for the DLL in the Ankara bar is so strong that the candidate chosen in this pre-ballot will no doubt become the new president of the bar. At this point, let's remember that the existing UTBA president, Metin Feyzioğlu, began in the DLL, became the Ankara Bar president, and later the UTBA president.

This is why the AKP government sees the bars as a threat. For one, they cannot tolerate a structure within the existing state apparatus that has the capacity to use state power but is not aligned with them. Secondly, they can see that the bar associations are one of the rare organized structures capable of raising their voice against the authoritarian practices that have visibly eroded rights in recent times. In fact, the government knows that it is highly unlikely that a circle close to their own socio-political base

will ever be dominant in the UTBA. Consequently, it is a known fact that from its first years in office, the government has had strategies ready for use in curbing the influence of the bars. Every time an argument arises that intensifies the oppositional stance of the bars, a new change to the Legal Practitioners Act comes into play.

5: Recent Developments

It has never been a secret that the AKP government wanted to make an amendment to the Legal Practitioners Act that would change the composition of bar associations. But the agreement the government appeared to reach with current UTBA President Metin Feyzioğlu—the substance of which no-one can be completely sure about—enabled the new legislation to be postponed a little longer. Metin Feyzioğlu's line, which gradually got closer to that of the AKP government and finally even matched it, made the bar associations very uncomfortable.

Subsequently, for over a year, there were a variety of attempts made to end Feyzioğlu's presidency before his term was completed. As a result of these attempts, the executive boards of twelve bar associations, including those of Istanbul, Ankara and Izmir, applied to the UTBA executive in writing, as per Article 115 of the Legal Practitioners Act, and demanded an extraordinary general assembly meeting be held for a new election to take place. The UTBA administration claimed on Nov. 08, 2019—before the change—that despite there being no stipulation and/or impediment in the law on this subject, an election could not be held in an extraordinary general assembly meeting, and rejected the request.¹⁰ One delegate applied to the administrative court to stop the vote and cancel the UTBA Executive Board decision.

The Ankara 5th Administrative Court ruled to halt the UTBA decision on March 10, 2020; thus forging the way for an extraordinary general assembly meeting with an election.¹¹ The UTBA appealed the stay of execution ruling at the Regional Administrative Court. In response to this, the Ankara Regional Administrative Court, 12th Administrative Judicial Chamber removed the stay of execution on April 23, 2020, stopping the election once again.¹²

The holding of an extraordinary general assembly had been decisively subverted, meaning that the continued presidency of Metin Feyzioğlu was only rendered possible by a compulsory court order. The UTBA administration was taken to court by the country's leading bar associations—most likely representing over 80% of lawyers in the country. It was all but certain that the delegates elected to the bar association in 2020 would not be supporting Metin Feyzioğlu and his administration at the end of year UTBA General Assembly meeting. Therefore, from the perspective of Metin Feyzioğlu and the AKP government he had been acting in unison with, it was only a matter of time before he would lose the UTBA presidency; and the other bar associations would find a candidate they could all agree on. If no intervention was made, by the end of 2020, a new UTBA president would be elected by the "opposition" bar associations.

The day after the Regional Administrative Court gave its ruling, the following statement was issued before Friday prayers in a sermon by the Director of Religious Affairs, Ali Erbaş (whose sphere of influence and share of the budget keeps increasing—a sensitive issue for secularists): "Islam considers adultery the greatest of sins. It condemns "Sodomy",¹³ homosexuality. What is the wisdom of this? The wisdom is that it brings disease and rots a generation. Every year, thousands of people are exposed to the HIV virus caused by the biggest sin, adultery. In Islamic literature, this means people living in sin. Come let's fight to protect people from this evil together". In response to this, the Ankara Bar released a written statement saying, "We watched with astonishment and concern the speech of Ali Erbaş, the Director of Religious Affairs, in which he used a speech aimed at the masses to scorn a group of human beings with intense hatred. Our astonishment is down to this individual who, as though emerging from an ancient time that pre-dates civilisation, sits at the head of a government agency, basing his discourse on values that are considered holy with the bloodthirsty audacity to incite hatred and animosity among the people". Immediately after this, those government circles launched a campaign targeting the Ankara Bar Association administration.¹⁴ This was followed by public prosecutors launching an investigation into the Ankara Bar Association administration. Thinking it would find support for its own cause in this "sensitive" discussion, the government then brought the Legal Practitioners Act, long waiting in the wings, back onto the agenda.

In fact, the changes expressed by the government did not refer directly to the statement made by the Ankara Bar Association. But with one of the most powerful bar associations opposing the existing UTBA falling out of public favour, the case was made for an urgent amendment to the law before the approaching UTBA election, using a series of arguments that appeared relatively legitimate, such as the idea that the bar administrations did not represent the values of the nation; that their administration was not democratically elected; that the delegate structure was wrong; the open list method was anti-democratic; and that “small” bar associations were not represented in the UTBA General Assembly.

The government’s main concern was to achieve changes to the delegate composition that would make it possible for Metin Feyzioğlu’s presidency to continue in the 2020 UTBA General Assembly. Also, in a direct shot at the bars of Istanbul, Ankara and İzmir, they aimed to instigate a crisis of legitimacy for the existing bar administrations by making it possible to establish more than one bar association in the same city.

In this framework, there were two areas of regulation that stood out: the first was clearing the way for cities with more than 5,000 lawyers to be able to establish a new bar by gathering together a minimum of 2,000 lawyers. The second was to reduce the number of delegates from Istanbul, Ankara and İzmir, which had a large majority in the UTBA General Assembly, thereby increasing the representation of relatively small bar associations. Both legislative matters were presented by the government and its circles as moves toward “democratisation” and “increasing/fortifying democratic representation”.

The bar associations were against both regulations. In fact, while the number of bar associations backing the call for an extraordinary meeting of the UTBA General Assembly remained at twelve, the presidents of over sixty bar associations expressed their opposition to the legislation. Furthermore, they started a march from their own cities to Ankara, where the proposed discussions were due to take place at the Turkish Grand National Assembly (TGNA). Large numbers of bar association presidents marched to the capital, where they met with a harsh response from the government. Firstly, the bar association presidents were stopped at the entrance to Ankara, and barred from going any further. Next, they were prohibited from entering the TGNA. Only representations to the Commission and discussions at the general assembly were allowed, but the bar presidents would not agree to this. Large numbers of bar presidents spent days and nights in the streets wearing their official robes, keeping vigil at a location close to the TGNA. From time to time, there were even police interventions. Despite this, the law, which also had the support of Metin Feyzioğlu, was swiftly accepted by the Parliament, and ratified by the President. It soon came into effect after publication in the Official Gazette.

Now let’s take a closer look at which changes have taken place through this law and whether or not it strengthened democratic representation as originally claimed. First of all, with regard to allowing more than one bar association to be established in a city, the following addition was made to Article 77: “In provinces where there are more than 5,000 lawyers, a bar association can be established by a minimum of 2,000 lawyers. These calculations will be based on the number of lawyers registered to the bar, lawyers serving in government agencies and institutions and lawyers in state economic enterprises”. There are currently three bar associations with more than 5,000 members; these are the Istanbul, Ankara and İzmir bar associations. The Antalya Bar Association has almost 5,000 members. However, by adding the stipulation that public lawyers who are not required to register with the bar will also be counted, Antalya and very soon Bursa will also be considered to have more than 5,000 lawyers. Of course the issue is not just having over 5,000 lawyers, there must also be 2,000 lawyers willing to establish a new bar. It appears that public lawyers will be pressurised to register with the new bars to meet the 2,000 figure. In fact, at the time of writing, there are still no newly-established bars, despite mentions of attempts to establish second bars in Istanbul and Ankara.

Looked at in this way, the legislation, which the government presented as giving the right to “choose” a bar association, can be seen as a tool to encourage discourses that question the legitimacy of the existing bars by compelling public lawyers, over whom the government has authority, to join as members. Therefore, it is not democratic freedom that is on the agenda, but rather an attempt to create an anti-democratic obligation.

It can be foreseen that another type of obligation to join the newly established bars may arise within the Turkish judicial system, whose objectivity and independence is already in question. The rumour that courts will make their decisions based on which bar association the lawyers belong to poses a threat

that could completely eliminate the principle of judicial independence and impartiality that has already been seriously undermined. This is the biggest risk both in terms of the profession and the right to a fair trial.

We already mentioned that the second area of regulation concerns the composition of delegates that elect the administration of the UTBA. The amendment on this subject was made to Article 114 of the Legal Practitioners Act. According to this, the UTBA General Assembly is to be established by secret ballot, with each bar association electing three delegates from members with at least ten years' seniority. This marks a shift from the system mentioned previously, in which each bar association directly elected two delegates. In effect, this increases the delegates of relatively small bars by one. Also, one delegate for each 5,000 members is chosen by the Bar general assemblies. Just to recall, in the past, there had been one delegate elected for every three hundred members over one hundred. This effectively reduces the number of delegates for relatively large bar associations. For example, if we are talking about a bar of 4,900 members, in the old system they would have at least three delegates, as two delegates and the chairman were granted automatically. Since one delegate would be appointed for each 300 members past the initial 100, this hypothetical bar would gain sixteen more delegates. Thus, a bar association of 4,900 members would send 19 delegates to the UTBA General Assembly. Under the new regulation, this same bar would have a total of four direct delegates made up of three delegates and a president. There is no question of additional delegates as they can only be granted for each 5,000 members. Simply put, a bar with 4,900 members would be represented by just four delegates under the new regulations. How the change in the delegate system will affect the bar associations is presented as an additional table, but it would be pertinent to provide some examples here.¹⁵

According to the old regulation, the following bars would have been represented by the following number of delegates (including the president) in the UTBA General Assembly;

- The 42-member Tunceli Bar, 3 members,
- The 48-member Ardahan Bar, 3 members,
- The 89-member Gümüşhane Bar, 3 members,
- The 91-member Kilis Bar, 3 members,
- The 46,052-member Istanbul Bar, 156 members,
- The 17,598-member Ankara Bar, 61 members,
- The 9,612-member Izmir Bar, 34 members,
- The 4,757-member Antalya Bar, 18 members.

Under the new regulations, the same bars will be represented by the following number of delegates in the TBB General Assembly (including the president);

- The 42-member Tunceli Bar, 4 members,
- The 48-member Ardahan Bar, 4 members,
- The 89-member Gümüşhane Bar, 4 members,
- The 91-member Kilis Bar, 4 members,
- The 46,052-member Istanbul Bar, (4+9) 13 members,
- The 17,598-member Ankara Bar, (4+3) 7 members,
- The 9612-member Izmir Bar, (4+1) 5 members,
- The 4757-member Antalya Bar, 4 members.

According to the old regulations, the Tunceli Bar would have a representation ratio of 1:14. In other words, the Tunceli Bar Association members have one UTBA General Assembly member per 14 lawyers. The representation ratio of the Ardahan Bar is 1:16; the Gümüşhane Bar is 1:29.66; and the Kilis Bar 1:30.33. Similarly, the representation ratio for the Istanbul Bar is 1:295.2; so the Istanbul Bar members have one UTBA General Assembly member per 295.2 lawyers. The representation ratio for the Ankara Bar is 1:288.4; for the Izmir Bar it is 1:282.7; and for the Antalya Bar, it is 1:264.2.

Under the new regulations, the representation ratio for Tunceli increases to 1:10.5. The Ardahan Bar is represented at a ratio of 1:12, the Gümüşhane Bar at 1:22.25 and the Kilis Bar at 1:22.75. The Istanbul Bar's representation ratio falls to 1:3,542. This ratio becomes 1:2,514 for the Ankara Bar, 1:1,922 for the Izmir Bar, and 1:1,189 for the Antalya Bar. So, under the new regulation, the chances of a lawyer in Istanbul or Ankara having an impact on the UTBA are reduced 10-fold in comparison to the former system, which was also unjust to begin with.

To summarize, the amendment the government has made in the name of democratic representation actually further downgrades representative justice. Besides this, to eliminate any danger of an "elective general assembly" taking place, the same legislation states that "an extraordinary meeting of the General Assembly can be called directly by the Union Executive Board or upon the written request of the executive boards of at least twenty-five bars, on the condition the meeting is limited to the range of duties specified in Article 117. However, no election shall be held in the meeting". In other words, the government does not want the bars, which represent 80% or possibly even more of the country's lawyers, to congregate and possibly change the UTBA administration at an "inopportune time". It not only imposes the condition of 25 bars in place of 10, and reiterates the limitation on the range of duties, but also states that an election cannot be held in an extraordinary meeting.

Furthermore, the procedure with which the new regulations were established also needs to be examined. Discussions about the new proposed regulations began at the end of April 2020. The proposal was presented to the TGNA Directorate on 30th June. On 6th July, the Justice Commission meetings were completed; and on July 11, it was accepted at the TGNA General Assembly. On 15th July 2020, the proposal was published in the Official Gazette, thereby coming into force as legislation. This change to the law, about which no information was provided until it was presented to the TGNA Directorate, was implemented within 15 days.

Another procedural concern is the manner used to bring in this legislation. A legislative technique called an "omnibus bill" has been used in Turkey for a long time. Many regulations concerning different fields are legislated on the same bill, and with a confusing style of phrasing, without a clear understanding of the regulation it would replace. Here's an example: the regulation that created a significant change in delegation structure was executed as follows:

ARTICLE 18 – The "two each" phrase in clause two of Article 114 under Law 1136 has been changed to "three each" and clause three has been changed as below.

In order to keep track of what this regulation means, one must first find the phrase "two each" in article 114 of Law 1136, change it to "three each" and then assess what the repercussions might be. This makes it very difficult for the public to follow changes in the law.

Consequently, we are faced with an amendment that falls very far from democratic representation in terms of both procedure and content.

6: The Finish Line

With this amendment, another temporary article was added to the Legal Practitioners Act No.1136: "Regardless of terms in office, all bar associations must hold elections for their presidency and members of the executive, disciplinary and supervisory boards and for delegates to the UTBA in the first week of October 2020; elections for president of the UTBA and for members of the executive, disciplinary and supervisory boards are to be held in December 2020." In other words, the administrators of all bars in Turkey will change in October 2020. These administrators and delegates will elect the UTBA administration two months later in December.

We began with some observations about a country that has one of the highest numbers of lawyers and most powerful bar traditions in Europe. It is obvious that there are many problems in both the judiciary itself and in the profession in general. It is unthinkable that regulations, couched in the language of due process and democratisation, that might lead to partisanship and injustice in representation and which, in fact, make justice even more unlikely, can be passed as a *fait accompli* within merely 15 days, without even a hint of consultation with the public. Yet, this is exactly what is happening in Turkey.

Endnotes

- 1 There are hundreds of complaints expressing this sentiment, but a good representative example can be found in an article by the former Ankara Bar Association President, the lawyer Atilâ Sav, called "The Profession of Defence is a Public Service", Ankara Bar Association Journal, 2010/1:
- 2 For European countries' statistics, see https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statistics/EN_STAT_-2018_Number-of-lawyers-in-European-countries.pdf, Date of Viewing: 07/08/2020. For Turkish statistics, see <https://www.barobirlik.org.tr/Haberler/2019-avukat-sayilari-31122019-81078> Date of Viewing: 07/08/2020. Unless otherwise specified, the other statistics have been produced by the author based on the data included here.
- 3 See İdil Elveriş Bar Associations and Politics from Özman: The Bar Associations and Government Agencies of Turkey, 2014, İstanbul: İstanbul Bilgi Üniversitesi Yayınları, p. 50
- 4 Elveriş, op.cit., p 54.
- 5 Elveriş, op.cit., p 54.
- 6 As there is no separate registry system for public lawyers, all the figures quoted in this article refer to lawyers registered with bar associations.
- 7 See Tora Pekin and Kasım Akbaş, "Autonomous bar associations as public power", <https://birartibir.org/siyaset/739-kamusal-guc-olarak-ozerk-barolar>, View date: 07/08/2020.
- 8 In 2010, the İstanbul Bar shared an article declaring it was "the world's biggest bar": <https://www.istanbulbarosu.org.tr/HaberDetay.aspx?ID=5190>, View date: 07/08/2020.
- 9 These groups can be classified as socio-political, ideological and/or groupings with common professional concerns. In İstanbul, Ankara and İzmir, a group of lawyers called Çağdaş (Modern) (although the name has changed a few times) have been in control for a long time. Within the historical framework explained above, this group arose in the political atmosphere of the 60s and 70s on a platform of secularism, social justice and rights-freedoms, but disintegrated under the impact of the political agendas of the 80s, 90s and 2000s and/or continued its existence under different names. For example, the Çağdaş Avukatlar Grubu (ÇAG) (Modern Lawyers Group) in the İstanbul Bar, which is considered to be fairly representative of the point in question, has been in continuous control since lawyers first began to form groupings. However, the political atmosphere of the 90s led to divisions based on different agendas. In the end, a group called the Önce İlke Çağdaş Avukatlar Group (ÖİÇAG) (Principles First Modern Lawyers Group), which emerged from the Çağdaş group, remained in control. In the 2018 elections, this later group gave birth to another group from within its own ranks, called Önce İlke-ÇAG Yükseliş Hareketi (Principles First Modern Lawyers Group Advancement Movement).
- 10 For the relevant UTBA Board of Directors ruling, see <https://www.barobirlik.org.tr/Haberler/turkiye-barolar-birligi-nin-olaganustu-genel-kurula-davet-edilmesine-dair-taleplere-iliskin-yonetim--80939>, View date: Aug. 07, 2020.
- 11 For the relevant news report, see <https://www.cumhuriyet.com.tr/haber/mahkeme-karar-verdi-tbb-olaganustu-genel-kurula-gidecek-1729846>, View date: Aug. 07, 2020.
- 12 <https://www.gazeteduvar.com.tr/gundem/2020/04/23/tbbde-genel-kurul-yapilmasina-dair-mahkeme-karari-bozuldu/>, View date: Aug. 07, 2020.
- 13 In the religion of Islam, the concept of sodomy goes back 4,000 years; it is believed that the tribe of Lot normalised behaviour forbidden in the Qur'an, such as homosexual relations, incest, rape and prostitution, and therefore suffered the wrath of Allah. The myth is the same as that of Sodom in the Torah. In daily life, behaviour regarded as unacceptable to Islamic morals about sexuality, especially homosexuality, is often discussed with references to the tribe of Lot.
- 14 The UTBA President Metin Feyzioğlu also took the side of the Department of Religious Affairs against the statement by the Ankara Bar. Feyzioğlu stated that he considered the Ankara Bar's statement to be "irresponsible", and "it is not possible to approve of this". See <https://www.cumhuriyet.com.tr/haber/tbb-baskani-metin-feyzioglundan-diyanet-aciklamasi-1735645>, View Date: 07/08/2020.
- 15 See Kemal Göktaş, "The AKP-MHP's proposal for changes in bar associations: Coup-like and insidious", <http://www.diken.com.tr/akp-mhpnin-barolarda-degisiklik-teklifi-darbeci-ve-sinsi/>, View date: Aug. 07, 2020. The reason why the figures here differ from Göktaş's figures is that the statistics in this article are based on the number of lawyers as of Dec. 31, 2019



What is the Council of Judges and Prosecutors in Turkey (HSK)

- It was first established with the 1961 constitution as The Supreme Council of Judges (YHK).
- It deals with tasks such as appointing and supervising Judges, removing them from office, abolition of courts
- Its structure, member distribution and powers have been changed 4 times since 1961

SUPREME COUNCIL OF JUDGES (YHK)

When it was first established

As Established Under Turkey's 1961 Constitution



Authorities

- Investigating judges, personnel affairs, removing judges from office, assigning those who supervise judges, disciplinary penalties
- Abolition of a court or an office of judge



Supervision

- Judges are supervised by judges assigned by the Council



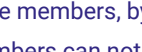
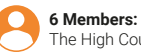
Authorities of the Minister of Justice

- Can join the meetings, but cannot vote
- Can appeal to initiate a disciplinary trial of a judge

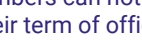
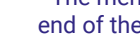
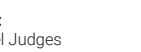
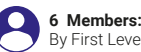


Member Distribution

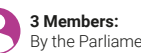
Total Principle Members: 18 (+5 Reserve)



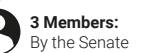
6 Members:
The High Court of Appeal



6 Members:
By First Level Judges



3 Members:
By the Parliament



3 Members:
By the Senate



Structure

- The President of the Council is elected among the members, by secret ballot
- The members can not be re-elected at the end of their term of office
- The members can not carry out other assignments or duties during their membership
- The council's authority covers judges of courts of justice, and does not cover administrative judges
- The decisions of the council can be appealed to the Council of State

1971 SUPREME COUNCIL OF JUDGES (YHK)

Member Distribution

Member Distribution: 11 (+3 Reserve)



14 Members:
By the General Assembly of
The High Court of Appeal

Major Changes

- The members can be re-elected at the end of their term of office
- The Minister of Justice can act as the President of the Council when necessary

1982 SUPREME COUNCIL OF JUDGES AND PROSECUTORS (HSYK)

Member Distribution

Total Principle Members: 7 (+5 Reserve)



1 Member (President):
Minister of Justice



1 Ex-officio Member:
Undersecretary of the Minister of Justice



3 Members: By the President of the Republic
(Among candidates by the Court of Cassation)



2 Members: By the President of the Republic
(Among candidates by the Council of State)

Major Changes

- The Council's authorities have expanded to cover judges of administrative courts and public prosecutors
- The name is changed to Supreme Council of Judges and Prosecutors (HSYK)
- There shall be no appeal to any judicial instance against the decisions of the Council

The increased power of the Ministry and Minister of Justice

- The President of the Council is the Minister of Justice
- The Undersecretary to the Minister of Justice shall be an ex-officio member of the Council.
- Investigation and supervisions are made by judiciary inspectors with the permission of the President of the Council. The President of the Council may now also request the investigation or inquiry to be conducted.
- The council has started to work in the Ministry of Justice building
- Abolition of a court or an office of a judge or public prosecutor, changes in the jurisdiction of a court are proposed by the Ministry of Justice and decided by the Council.



The powers of the Minister of Justice have increased with the 1982 constitution. Questions about judicial independence were raised as a result.

2010 SUPREME COUNCIL OF JUDGES AND PROSECUTORS (HSYK)

Member Distribution

Member Distribution: 22 (+12 Reserve)



1 Member (President):
Minister of Justice



1 Ex-officio Member:
Undersecretary of the Minister of Justice



4 Members:
By the President of the Republic



3 Members:
By the Court of Cassation



2 Members:
By the Council of State



1 Member:
By the Justice Academy



7 Members:
By First Level Ordinary Courts
Judges and Prosecutors



3 Members:
By First Level Administrative
Court Judges and Prosecutors

Major Changes

- The council no longer works in the Ministry of Justice building
- The "dismissal from the profession" decisions of the Council, can now be subject to judicial review
- A General Secretariat shall be established under the Council and the Council has its own budget
- Investigation and supervisions are made by judiciary inspectors with the proposal of the Council and permission of the President of the Council.

2017 COUNCIL OF JUDGES AND PROSECUTORS (HSK)

Member Distribution

Total Principle Members: 13



1 Member (President):
Minister of Justice



1 Ex-officio Member:
Undersecretary of the Minister of Justice



4 Members:
By the President of the Republic



7 Members:
By the Parliament of Turkey

Major Changes

- The word "supreme" has been removed from the Council's name



As a result of the 2017 constitutional change, all members of the Council were appointed by political authorities, increasing the powers of the executive branch.

This infographic is prepared by PEN Norway, as a part of the Turkey Indictment Project. The infographic aims to display basic information concerning the legal system in Turkey.

**PEN
NORWAY**

BARS ASSOCIATIONS OF TURKEY

"The lawyer freely represents the independent defence which is one of the constituents of the judiciary." - Article 1 of the Lawyer Law No. 1136

OVERVIEW

- 81** provinces exist in Turkey.
- 80** Bar associations used to exist
Bar associations opposed the multi-bar bill.
- 614** delegates used to represent all bar associations in The Union of Turkish Bar Associations.
- 251** delegates used to represent Istanbul, Ankara and Izmir bars in The Union of Turkish Bar Associations (TTB).

* The information on this page is based on the former system and statistics from 2019. In September 2020, a new bar was established in Bayburt (the last remaining city), raising the total count to 81.

Members of 3 Largest Bar Associations in Turkey

Istanbul 46,052
Ankara 17,598
Izmir 9,612

%57

3 largest cities have %57 of registered members in Turkey

There are a total of
127,691
registered lawyers in
Bar associations in Turkey.

The downgraded judicial representation justice in The Union of Turkish Bar Associations

Amount of
automatic delegates
For each bar association

Extra delegate amount
according to the total
member count

Former System

- 1 President
- 2 Delegates

+1 delegates for every
300 members
**For Bar associations with more than
100 members

Current System

- 1 President
- 3 Delegates

+1 delegates for every
5,000 members

* Amendments to the original
Lawyer Law no.1136 were
adopted by the Turkish
Parliament on 11 July 2020,

Requirements To Establish a New Bar

Former System

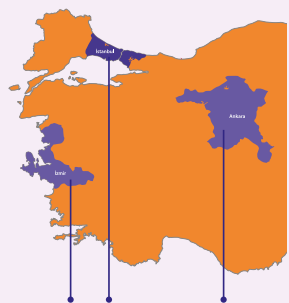
Only **1** Bar Association could be established in all provincial centres that have at least **30** lawyers in them

**PEN
NORWAY**

Current System

In cities with more than **5,000** lawyers, a minimum of **2,000** lawyers can gather to establish a new bar.

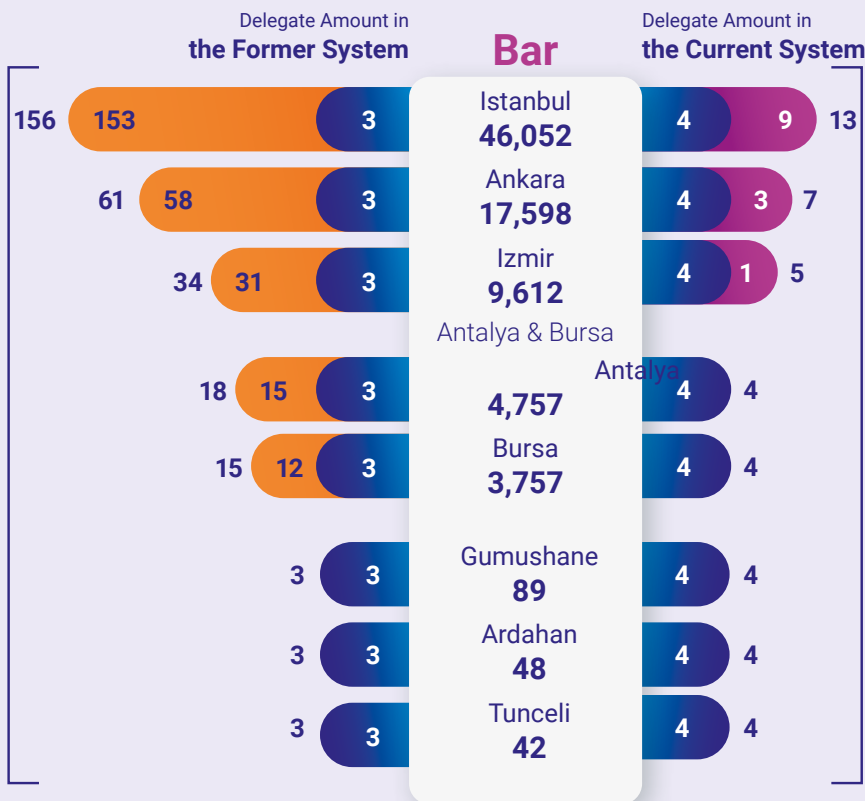
Provinces with
over **5,000**
registered
lawyers



A new bar can be established in Istanbul, Ankara and Izmir

This infographic is prepared by PEN Norway, as a part of the Turkey Indictment Project.
The infographic aims to display basic information concerning the legal system in Turkey.

Changes In Representation of the Bars With the Highest and Lowest Member Counts



Representative Justice?

The new system decreased the representation rates of Istanbul, Ankara and Izmir.

While the Istanbul, Ankara and Izmir bars have 57% of the registered lawyers in Turkey, they will only have 7,5% of the delegates in The Union of Turkish Bar Associations

Representative Justice?

The Antalya bar with 4,757 members is now represented by the same amount of delegates with the Tunceli Bar with 42 members.

* "Entry in the bar association directory is optional for those employed regularly and permanently as attorneys with public agencies and organizations and state economic enterprises." Considering this option, it is possible that the amount of registered members to increase above 5,000 in Antalya and Bursa as well.

"... the new model of multiple bars based on voluntary membership has many downsides. Most importantly, it may lead to politicisation of BAs, which would likely endanger the independence of attorneys and the political neutrality of the legal profession. It may also result in administrative instability."

- § 57 From The Joint Opinion Of The Venice Commission and The Directorate General of Human Rights And Rule Of Law (DGI) of the Council. (adopted by the Venice Commission at its 124th online Plenary Session)

Criminal Justice in Turkish Judiciary System

Judicial courts



Supreme Court:
Court of Cassation

Constitutional Jurisdiction



Supreme Court:
Constitutional Court

Administrative Justice



Supreme Court:
Council of State

Litigation



Supreme Court:
Court Of Jurisdictional Disputes

Judgement of Accounts



Supreme Institution:
The Court of Accounts

Criminal Courts

Civil Courts

1

First Instance Criminal Courts

First instance courts are basic judicial authorities to settle disputes.

Assize Court

- The Assize Courts have jurisdiction on crimes that bring "imprisonment of more than ten years" as well as other crimes defined by article 12 of law 5235, such as theft by force, forgery of official documents...

Criminal Peace Judgeship

- Established in 2014. Their responsibilities include making court decisions that concern the investigation phase such as: ordering pre-trial detention; decide on the continuation of detention; accept or reject requests on release...

Criminal Courts of First Instance

- Criminal Courts of First Instance have jurisdiction on crimes that do not fall under the jurisdiction of Assize Courts and Criminal Peace Judgeships

2

Second Instance Court

Regional Courts of Appeal

- Regional Courts of Appeals review and examine decisions held by first-instance local courts and may examine the facts of the case, conduct hearings, and render a new decision.

3

Supreme Court

Court of Cassation

- Decisions by Regional Courts of Appeal can be appealed if the decision is formally subject to examination by the Court of Cassation.
- Conduct legal examination of the decisions made by Regional Courts of Appeal. It does not examine facts and evidence leading to the decision. (There might be some exceptional cases with different procedures)

* Freedom of expression cases mostly appear as criminal cases. While there are exceptions, we have focused on the criminal judiciary for the sake of comprehensibility.

**PEN
NORWAY**

This infographic is prepared by PEN Norway, as a part of the Turkey Indictment Project. The infographic aims to display basic information concerning the legal system in Turkey.

INVESTIGATION

- Public Prosecutors conduct investigation as judicial authorities.
- In case there is reasonable suspicion of a crime, the prosecutor prepares an indictment, leading to the prosecution phase if accepted by the court.
- A Prosecutor can give a decision of non-prosecution if there isn't reasonable suspicion of the crime
- During the investigation, if there are facts that tend to show the existence of a strong suspicion of a crime and an existing "ground for arrest", an arrest warrant against the suspect may be rendered by a Criminal Peace Judgeship.

REGIONAL COURT OF APPEAL

- The Regional Court of Appeal might give the decision of a retrial at the original first instance court.
- The Regional Court of Appeal might give the decision of a retrial at the The Regional Court of Appeal.
- The Regional Court of Appeal may reject the appeal, confirming the decision of the first instance court.
- Decisions by Regional Courts of Appeal can be appealed to the Court of Cassation by all parties if the decision is formally subject to examination.*

First Instance Court or Regional Court of Appeal The Court That Has Made The Decision

- In case the first instance court or the Regional Court of Appeal abides by the decision of the Court of Cassation, a new trial will be held. The new decision might be corrective or same with the original decision.
- The first instance court or the Regional Court of Appeal might insist on its former decision against the reversal decision, the case will then return to the Court of Cassation. The new review will be conducted by the General Assembly of Criminal Chambers of the Court of Cassation.

CONSTITUTIONAL COURT

- The Constitutional Jurisdiction, is a different jurisdiction branch as displayed above
- The Constitutional Court, in the context of Criminal justice, reviews individual applications of those claiming violation of their protected rights and freedoms.
- The rights claimed to be violated should be under the protection of the Constitution, ECHR and International Agreements.*

1

PEN NORWAY

This infographic is prepared by PEN Norway, as a part of the Turkey Indictment Project. The infographic aims to display basic information concerning the legal system in Turkey.

2

PROSECUTION

First Instance Court

- Prosecution begins when the court accepts an indictment
- The First instance court can decline an indictment that does not meet the criteria defined by law.
- Prosecution ends with one of the following decisions: acquittal, conviction, dismissal, decision of nonsuit or imposition of security measures.
- During the prosecution, if there are facts that tend to show the existence of a strong suspicion of a crime and an existing "ground for arrest", an arrest warrant against the accused may be rendered.
- The decision of the First Instance Court can be appealed to the higher court by all parties.*

3

4

COURT OF CASSATION

Criminal Chamber

- In case of a reversal decision the case file is returned to the court that has made the decision. So if the Regional Court of Appeal has approved first instance court's decision without changing it, the case will be returned to the first instance court.*
- Approval or Corrective Approval decisions by the Court of Cassation are final and do not require a re-trial.

5

6

COURT OF CASSATION

Criminal Chamber

- If the first instance court or the Regional Court of Appeal insist on its former decision, the Criminal Chamber[bold] of the Court of Cassation can also insist on its reversal decision. In this case the final decision will be made by the Court of Cassation General Assembly of Criminal Chambers.

7

COURT OF CASSATION

General Assembly of Criminal Chambers

- Approval or Reversal decisions at this stage are final.

European Court to Human Rights (ECtHR)

- ECtHR may only deal with the matter after all domestic remedies have been exhausted
- If the requirements are fulfilled for a Constitutional Court application, it is considered the final domestic remedy before applying to ECtHR
- All applications to ECtHR must be completed within 6 months of the final decision given by domestic courts.

* This chart aims to explain the steps of a standard criminal case in a simplified manner. The steps might differ in some exceptional cases. An appeal to the Court of Cassation or an application to the Constitutional Court, is only possible if the conditions meet the requirements defined by law.

17

Point Zero of a Trial: The Indictment

PEN Norway's Turkey Indictment Project

Dr. Kasım Akbaş
Published: 14 January 2021



About the author:

Kasim Akbaş graduated from Ankara University's Faculty of Law in 2001. He pursued his Masters and Doctoral studies at Anadolu University. He is the author of two books as well as various articles and book chapters in the fields of Sociology and Philosophy of Law, Theory of State and the Law and Human Rights. He continues to work in the arenas of research and publication. Due to the fact that he was one of the Academics for Peace who signed the letter calling for peace in Turkey in 2016 he was ousted from his university post under State of Emergency Decree No. 686. Kasim Akbaş is the recipient of prizes from organisations both within Turkey and internationally.

Point Zero of a Trial: The Indictment

The judicial process in Turkey is in greater difficulty than at any point in history. At a time when even the European Convention on Human Rights and the Constitution are wholly disregarded, the survival of individuals and institutions is seen as an achievement in itself: there are politicians, representatives of civil society, and journalists who are still in jail despite the decisions of the ECtHR and the Constitutional Court of the Republic of Turkey. It appears that freedom of expression and freedom of assembly have been almost suspended.

The powers of the judiciary, which are supposed to protect us against all kinds of unjust coercion and arbitrariness, especially those exercised by the executive holding the monopoly of power, has itself become the locus of injustice and arbitrariness. Political detentions, case files lacking evidence, and trials not abiding by even the most basic procedural provisions have now become common place. Let us put one of these tools – the “indictment” or “birth certificate” of unjust cases – under scrutiny and see whether the results will make any positive impact on the public debate. Certainly, any effort made to rectify injustice and arbitrariness will not be in vain. If having extensive knowledge of the matter before us is crucial in the search for rights and justice, it is indeed necessary for us to discuss the “indictment”.

Introduction: The Importance of Indictments

An indictment is a document containing allegations; it is prepared within the “investigation” process that is carried out by the prosecution. It alleges a criminal act, and the prosecution phase of a trial begins with the admission of this document by the court. Hence, the indictment is also the legal document that separates the two stages of the trial, that are: the investigation and prosecution. A person charged with a crime is referred to as a “suspect” until this document is prepared, then, with the admission of the indictment, s/he becomes a “defendant.”

In the criminal trial, an investigation is the series of actions taken by the public prosecutor being “informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way ... [to] immediately investigate the factual truth in order to make a decision on whether to file public charges or not.” (Criminal Procedure Code, hereinafter CPC, Article 160/1). Let us examine the provision carefully: a) An investigation is not the action taken when s/he (the defendant) is “informed of that a crime has been committed” but when s/he is “informed of a fact that creates an impression that a crime has been committed”; b) The investigation aims to search for the “truth”, not the “crime.”

At this stage, the public prosecutor is in charge. The prosecutor, on behalf of the public, “considers” whether a crime has actually been committed. “S/He is in charge”, because “s/he is obliged, via the

judicial security forces, who are under her/his command, to collect and secure evidence in favor and in disfavor of the suspect, and to protect the rights of the suspect” (CPC, 160/2). The public prosecutor is impartial to the suspect as s/he is charged with the task of finding out whether the crime was actually committed. Let’s take careful note of that point; s/he is impartial to the “suspect”, not to the “criminal allegation.” S/he should be uncompromising concerning the possibility that the crime may not have been committed, and shall ensure that the person protected by the presumption of innocence is not deprived of her/his rights and freedoms considering the possibility that the suspect may not have committed the crime. Therefore, s/he is given a wide range of powers and great responsibilities, too.

If the prosecutor reaches “a sufficient suspicion that the crime has been committed” as a result of the investigation that s/he carried out by way of a wide range of research and examinations, s/he shall prepare an indictment (CPC, 170). “In cases where, at the end of the investigation phase, there is no evidence with sufficient gravity to justify the suspicion which is required to open a public claim, or there is no legal possibility of prosecution, then the public prosecutor shall render a ‘decision of no grounds for prosecution.’” (CPC, 172). With the finalisation of the decision of no grounds for prosecution (i.e. with the expiration of the objection period or the rejection of the objections), the case will be closed until new evidence or a new suspicion arises. However, in a case where the investigation ends in the first form, i.e. the indictment is prepared, a new stage will commence. An indictment finalises the investigation phase and initiates the prosecution phase. It marks the route followed by the prosecutor up until that time, and the map to be followed during the prosecution thereafter. Once the allegations are clear, the defendant has to try to prove that the alleged act was never committed, or that s/he did not commit it, or even if it is committed - that it cannot be considered a crime. Therefore, an indictment constitutes point zero in a criminal trial that in itself consists of investigation and prosecution.

Content of the Indictment

From the simple explanation above, the necessary content of an indictment can be easily inferred. That being: The suspected act that amounts to a crime, the evidence showing that this act has been committed, the details (identity, residential address, etc.) of the person who is “suspected” of having committed the crime, information about the victim(s), if any, of the act, and the evidence that create the impression that the crime has been committed.

In the Turkish law, the elements that should be included in an indictment are listed in Article 170/3 of the Criminal Procedure Code:

- a. The identity of the suspect,
- b. Her/his defense counsel,
- c. Identity of the murdered person, victim or the injured party,
- d. The representative or legal representative of the victim or the injured party,
- e. In cases where there is no danger of disclosure, the identity of the informant,
- f. The identity of the claimant,
- g. The date the claim had been put forward,
- h. The crime charged and the related Articles of the applicable Criminal Code,
- i. Place, date, and time period of the charged crime,
- j. Evidence of the crime,
- k. Explanation of whether the suspect is in detention or not, and if s/he is arrested with a warrant, the date s/he was taken into custody and the date of her/his arrest with a warrant, and their duration.

Furthermore, in the fourth paragraph, the article includes the provision that “the events that comprise the charged crime shall be explained in the indictment in accordance with their relationship to the present evidence”; likewise, the fifth paragraph clearly states that not only the issues that are unfavourable to but also those that are in favour of the suspect should be included.

According to Article 174 of the Law, the indictments produced in violation of the provisions of Article 170, or those produced without collecting evidence that would have a bearing on to prove the crime with certainty, or without applying the procedures falling under the provisions of “the settlement of the case on the payment of the fine”, or “mediation” are to be returned to the public prosecutor’s office within the scope of the “return of the indictment” provisions.

As can be seen, the foregoing are all regulations related to the constituents of an indictment.

Quality of an Indictment

It may have been seen that the content provided in the Criminal Procedure Code does not pursue the aim of ensuring the quality of indictments. Here, indictments are regulated according to their technical components but, in relation to enhancing the quality, the prosecutor is charged with the obligation to explain only “the events that comprise the charged crime in accordance to their relationship to the present evidence.” As a matter of fact, the justification of Article 170 states that the law “adopts the principle of legality in terms of initiating a public prosecution, i.e., it obligates the public prosecutor to file a public action in case of sufficiently reasonable doubt.” In other words, “if the collected evidence, leads, exhibits, and indicators, in the opinion of the aforementioned, are relevant and sufficient to require the initiation of a public prosecution, that is, if the bases in question are such that the suspicion is at the level of ‘sufficiently strong doubt’, a public action will be filed.”

Under Article 172 of the CPC, “In cases where at the end of the investigation phase there is no evidence with sufficient gravity to justify the suspicion which is required to open a public claim, or there is no legal possibility of prosecution, then the public prosecutor shall render a “decision of no grounds for prosecution.” In other words, there is a very small margin in which the prosecutor can choose not to initiate a public action. However, although this does not directly constitute the subject of this paper, there are many examples where the prosecutor’s offices have “covered up” the cases without starting an investigation or proceeding with the prosecution process, especially in terms of crimes allegedly committed by public officials. This situation, which is conceptualised as “impunity” in legal literature, essentially means a violation of the “state’s obligation to investigate effectively” as provided by both the Constitution and the European Convention on Human Rights. In other words, if the initiation of unjust prosecutions with an incomplete, inadequate and, so to speak, “low quality” indictment is a violation of rights. The failure to prepare an indictment as a result of incomplete and/or inadequate investigations is also a violation of rights in cases of criminal charges against the state and public officials. (For a review on the matter according to the decisions of Constitutional Court, see. Şirin, 2019). Şirin draws attention to six criteria used by the Constitutional Court and the European Court of Human Rights in checking whether an investigation is effective or not:

“First, the investigation should be initiated ‘ex officio and promptly’.

Second, the investigation should be conducted in an ‘impartial and independent’ manner.

Third; ‘effective evidence’ must be collected in the investigation.

Fourth, the investigation should be completed ‘with due diligence and promptness’.

Fifth, the investigation must be ‘transparent and open to public scrutiny’.

Sixth, if the investigation leads to the conclusion that a person is guilty, the perpetrator should be recommended a ‘deterrent punishment’” (Şirin, 2019: 1582).

Resources referring to the quality of the indictments and the actions of prosecution include the opinions, recommendations, and reports of Council of Europe Commission for the Efficiency of Justice of Europe (CEPEJ) and the Consultative Council of European Prosecutors (CCPE).

In the document “Measuring the quality of justice” (CEPEJ (2016) 12) adopted at the CEPEJ meeting in 2016, the criteria related to judges and prosecutors fall under the following headings: competence, impartiality, ability to communicate with the parties, time available and clarity of decisions. In other words, prosecutors’ being sufficiently knowledgeable, being impartial in their actions, developing good communication with their interlocutors, finalising their actions within a reasonable time, and making a decision comprehensible by everyone will demonstrate the quality and effectiveness of their actions. Hence, we can expect a similar level of quality from indictment processes.

The CCPE’s opinions 9 (2014), 10 (2015), 11 (2016) and 12 (2017) are concerned with prosecution activities. The main idea that dominates all of these opinions is the notion that the activities based on prosecution actions and decisions should be carried out in a qualified, impartial, and ethical manner to protect the fundamental rights and freedoms including and prioritizing the rule of law, effective and efficient judicial process, personal security, and the right to a fair trial.

For example, in accordance with the opinion no. 9 (2014) submitted to the Council of Europe Committee of Ministers, “prosecutors should ... [behave] impartially and with objectivity. They should thus strive to be, and be seen as, independent and impartial, should abstain from political activities incompatible with the principle of impartiality ... their work is based on the principle of transparency. In fulfilling their duties, prosecutors must respect the presumption of innocence, the right to a fair trial, equality of arms, separation of powers, independence of the courts, and binding final court decisions.” Prosecutors should only make a prosecution order based on solid evidence reasonably believed to be reliable and acceptable. Prosecutors should act strictly but fairly. Likewise, according to the opinion no. 10 (2015), “Prosecutors, regardless of their role in the investigations, should ensure that their actions are in accordance with the law and in particular, respect the following principles: equality before the law; impartiality and independence of prosecutors; the right of access to a lawyer; the right of the defense to full disclosure of all relevant material; the presumption of innocence; equality of arms; the independence of courts; the right of an accused to a fair trial.”

The CCPE’s opinion no. 11 (2016) is exclusively concerned with the evaluation of the work of prosecutors. In relation to this point, the work of prosecutors during the trial of a case is expected to be objective and impartial, comprehensive and detailed, based on reasoning and be reasoned, and clear and, open to exchange of information and cooperation in accordance with paragraphs 48 to 57.

We can say that the CCPE’s regulations, recommendations, and evaluation criteria regarding prosecution activities apply also to indictments. In fact, the merits of a “high quality” indictment depend on the quality of the evidence. Therefore, whether there is sufficient evidence showing that the alleged act has been committed and there is sufficient evidence relating it to the perpetrator, and whether these pieces of evidence are obtained by respecting the rights under the right to defense is a fundamental issue while the indictments are being evaluated.

Recent History of Turkey as an “Indictment”

Simply charging a person or a group with a criminal act can have irreversible consequences. If it is done via an official document such as an indictment or by an official authority such as the prosecutor’s office, it may result in the person in question being a party in the proceedings and, in some cases, facing violations of rights even if he is eventually acquitted. In this sense, the ECtHR’s *Akçam v. Turkey* decision is an important jurisprudence indicating that solely the existence of the threat of prosecutorial investigation may lead to a violation of rights. The applicant Altuğ Taner Akçam, a writer, historian, and researcher, was investigated on the basis of a complaint in 2006 due to the articles he had written in a newspaper, and the prosecutor’s office decided for non-prosecution in 2007. There was another complaint about the same articles in 2007 and the prosecutor’s office made yet another decision of non-prosecution. Upon Akçam’s application to the ECtHR, the Court considered the investigation, conducted twice, was a violation of the right to freedom of expression under Article 10 of the Convention, even though the investigations resulted in non-prosecution decisions.

Although there are various criteria by which we can measure the quality of investigations and indictments, such as academic assessments and human rights advocacy activities related to the work of the judiciary and courts, studies often focus on the final outcome, that is, the court process and ensuing decisions. Despite numerous observation and monitoring activities carried out in Turkey, due to the

confidentiality of the investigation phase, it is extremely difficult to conduct researches on actions taken prior to the prosecution phase. In addition, there is a very limited number of analyses on the indictments (See Gire, 2015 for an academic study analyzing indictments).

However, as has been mentioned, indictments are the starting points of the prosecution process. Moreover, in a political atmosphere where the legal system can be manipulated as a political tool (as with Turkey), and bearing in mind the fact that prosecutors do not have the same guarantees in particular as judges, there appears to be confusion between this office's prosecutorial role and its responsibility to act on behalf of the public with its function as the legal representative of the government. In this way, indictments may become a tool for a fundamental intervention into political and social life.

Indeed, Turkey's recent history has seen "operations", carried out under the name of prosecutorial investigations, a portion of which went on to result in indictments. Even though some of these ended with acquittal decisions, they radically changed the political and social structure of the country. For example, a series of lawsuits known publicly as "Ergenekon" beginning in 2007. These comprised the 1st, 2nd, and 3rd Ergenekon indictments, the Poyrazköy indictment, and the indictment for the attempted assassination to Admirals, Kafes [The Cage] indictment, as well as the Islak İmza [wet-ink signature] indictment, Erzincan indictment, ÇYDD (the Association for Supporting Contemporary Life) indictment, Şile excavations indictment, Gölcük indictment, the Oda TV indictment and others. This was a process headed by Prosecutor for the Republic of Turkey, Zekeriya Öz.

In 2012, the indictment of the KCK Istanbul Main Case was prepared. Among the indictments examined within the scope of this project are the Büyükkada indictment of 2017, the Deniz Yücel indictment of 2017, the Gezi Park (Osman Kavala) indictment of 2019, and the 2020 indictment against news coverage on members of the MİT (National Intelligence Organization). In addition were the indictment against the Progressive Lawyers' Association, prepared in 2013, and the Özgür Gündem Newspaper indictment in 2016, the Cumhuriyet Newspaper indictment in 2017, and the Academics for Peace indictment in 2018. Furthermore, starting around 2015, there were more than ten indictments served against Selahattin Demirtaş, with yet another indictment issued against him in 2020.

From 2014 onwards, when President of the Republic Recep Tayyip Erdoğan took office, until the end of 2019, 63,041 citizens faced charges of insulting the President of the Republic. 9,554 of these cases resulted in convictions. For the sake of a simple comparison with the presidents before Erdoğan, 248 citizens faced charges during Abdullah Gül's term of office, 168 citizens during Ahmet Necdet Sezer's office, 158 citizens during people Süleyman Demirel's office, 207 citizens during Turgut Özal's office, and 340 citizens during the post-military-coup office of Kenan Evren.

The fact that, in the last fifteen years, so many dissenting voices and critics of the government were made into defendants, shows how prosecutorial investigations can be used as part of a political agenda. This is especially true of indictments regarding political and social issues. Criticism of impunity in crimes allegedly committed by public officials are a 'types of crime' that is especially preferred by prosecutors. The same is true of the targeting of specific individuals. These investigations are often turned into indictments. It is doubtful whether these indictments meet universal standards or even the domestic as stipulated in the Criminal Procedures Code. Furthermore, the basic criterion of a reasoning to connect the crime to the individual can also be lacking. Such reasoning is laid out in the CPC as follows: "events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence".

When indictments become a tool of political intervention, the rewards of those who write them become "political" rather than "legal". In this context, we observe that the Istanbul Chief Public Prosecutor İrfan Fidan and his deputy Hasan Yılmaz played an important role in the preparation of recent indictments, although they did not individually put their signatures under each of them.

İrfan Fidan was elected member of the Supreme Court by the General Assembly of Council of Judges and Prosecutors on 27 October 2020. He participated in the election for the Supreme Court quota membership of the Constitutional Court without participating in a single file interview, and in the voting held on 17 December 2020, he received the highest number of votes because the others withdrew their candidacy, thus he was at the top of the list submitted to the President of the Republic. Just before this operation, his deputy Hasan Yılmaz was appointed as Deputy Minister of Justice.

However, even if we look at the recent violation decisions of the Constitutional Court and the ECtHR regarding lawsuits filed by them or under their supervision in the Istanbul courts, we see how unsuccessful these two prosecutors were in terms of securing justice: the Constitutional Court found violation/s in its judgements on Can Dündar-Erdem Gül, Mehmet Altan, Şahin Alpay, Enis Berberoğlu, Atilla Taş, and Füsün Üstel and others (Academics for Peace) cases; the ECtHR, on the other hand, found violations in its judgements on Mehmet Altan, Osman Kavala, Cumhuriyet Newspaper and Ahmet Şık cases. Apparently, the criterion of success can be different for law and for the political power. The promotion of Fidan and Yılmaz, who were seen as absolute failures in terms of the law but very successful by the political power are two examples of this. Perhaps more importantly, it is necessary to see how inconsistent these promotions are with the government's Judicial Reform claims. Could İrfan Fidan be appointed to the Constitutional Court to stop the detection of the violations that he himself caused? Can the quality of indictments be improved by rewarding and promoting the authors of low-quality indictments?

PEN Norway Turkey Indictment Project

PEN Norway's Turkey Indictment Project is a team of Turkish and international lawyers, judges and human rights experts who, in 2020, examined 12 recent indictments in cases relating to freedom of expression, freedom of the press, and freedom of assembly in Turkey. The team of lawyers and judges analyse the compliance of these indictments with national legislation as well as with international standards. From September 2020 onwards, reports on the indictments of Nedim Türfent, Berzan Güneş, Gezi Park (Osman Kavala), Pelin Ünker, Deniz Yücel, MİT members news coverage, Büyükkada, and Cumhuriyet Newspaper cases were published.

The primary concern of the cases discussed is the right to freedom of expression and freedom of the press. One of the indictments studied was that of Nedim Türfent, a Kurdish journalist charged because of a news report he made (See Uysal, 2020a). Berzan Güneş is also a Kurdish journalist and the indictment against him is related also specifically to his journalistic activities (See Fondi and Beck, 2020a). An indictment was prepared against Pelin Ünker for her news report on the son of the then Prime Minister (See Heggdal, 2020). During the investigation into his alleged crime, Deniz Yücel was only asked about the articles he published on Die Welt. He was detained for a year, ten months of which time he was kept in solitary confinement (Uysal, 2020b). Likewise, indictments were issued against journalists Aydın Keser, Barış Pehlivan, Barış Terkoğlu, E.E., Erk Acarer, Hülya Kılınç, Mehmet Ferhat Çelik, and Murat Ağirel in the case related to news coverage relating to members of the MİT (National Intelligence) (See Uysal, 2020c). The case against the journalists of the Cumhuriyet Newspaper was filed with an indictment that features the word "news" 662 times and that criminalises the activity of news reporting and journalism itself (see Fujita, 2020).

In addition to this, among the cases regarding the rights to organise, and rights of assembly and demonstration, the Büyükkada case (see. Fondi and Beck, 2020b) and the Gezi Park (Osman Kavala) case (see Dent, 2020) stand out.

In all but one of the files, there were people taken into custody and arrested. Some defendants were detained for more than 1000 days (see Dent, 2020 and Uysal, 2020a). The only evidence in almost all of the proceedings is related to news coverage, tweets, or the act of joining a demonstration or meeting - all of which are entirely legal undertakings. However, almost all of the indictments include criminal charges of "propaganda of a terrorist organisation", "membership in a terrorist organisation", "aiding a terrorist organisation" or even "attempting to overthrow the government." All the reports highlight that, in the face of such grave criminal charges, the indictments lack concrete evidence corresponding to these accusations.

The length of the indictments varies from 3 to 657 pages. However, the indictments, be they three-page or longer than five hundred pages, instead of showing the relation between the acts of the defendants with the elements of the alleged crime, instead list the acts of the organisation for whom aid or propaganda acts were allegedly performed. Therefore, in almost all cases, the prosecution strives to emphasise how "evil" the organization is, instead of showing the "fact" that the person on trial has committed the crime. Naturally, this does not constitute a good example of legal reasoning.

Although the indictments are apparently prepared in a relatively short time considering the general practice in Turkey, some attributed acts date back five or six years. For example, a file involves tweets posted in 2014 (see Fondi and Beck, 2020a). This shows that the indictments are prepared for the purpose of creating an opinion about the person on trial based on retrospective searches.

None of the indictments were found adequate by the authors of said reports. The following expressions used in the evaluations are striking:

- "In general, the form of the indictment and the presentation of important facts and details are not satisfactory... It is not clear why Taner Kılıç was included in the indictment" (Fondi and Beck, 2020b: 10-11).
- "It is seen that [the document] details many themes that are not directly related to the investigation file and includes numerous bulky quotations. This makes it significantly difficult to read and understand the indictment" (Uysal, 2020c:7).
- "It is seen that the first page of the indictment fails to show a link between the written content and the suspect and the accusations against him (Uysal, 2020b:7).
- "It does not contain a succinct statement of facts. It also does not clearly state the applicant's criminal responsibility for the facts at the center of the Gezi events or criminal acts committed there. It is basically a compilation of evidence some of which have only limited influence on the crime in question "(Dent, 2020: 8).
- "The indictment is poorly written does not meet the main purpose that should be in any indictment, that is, it does not allow the defendant to understand the criminal charges, the legal justification of the charge in question, and the relevant evidence supporting the charge" (Heggdal, 2020: 6).
- "This document is lacking in details regarding the most important points of the indictments. One of the major flaws of the present indictment in terms of Turkish Law is that it cannot provide information on the exact date and time of the crime committed, which leads to uncertainty about exactly what the defendant was accused of" (Fondi and Beck 2020a: 5).
- "The section starting from page 2 of the indictment to the middle of page 18 contains summary information about the organisation of which the suspect is alleged to be a member or to make propaganda. There is no reference to the name of the suspect in any part of this first 18-page" (Uysal, 2020a: 4).
- "There is a risk that the political colour of the indictment will adversely affect the fairness of the trial" ... "In the case in question, the indictment does not even provide, let alone in a satisfactory manner, a reasonable justification for suspecting that any of the defendants have committed a crime" (Fujita, 2020: 6, 28).

The findings are generally concluded stating that the text evaluated does not count as an indictment at all. Some reviewers stated that had the indictment been issued in their country, it would have been absolutely rejected.

As has been already stated, there is actually no regulation within the scope of Article 170 of the Criminal Procedure Code to ensure the "quality" of an indictment. Apart from this finding, most of the reports show that even the requirements of Article 170 have not been met. A few of the reports contain recommendations that prosecutors should comply with the requirements of Article 170. "The fulfillment of the requirements of CPC Article 170 by the prosecutors should be defined as an obligation and in this sense, the indictments should be associated with a mandatory format just like the Constitutional Court's individual application form" (Uysal, 2020b: 27). "CPC Article 170 should be completely abided by. If this is achieved, the indictment will provide the defendant with sufficient information" (Heggdal, 2020:17).

Almost all of the reports point out that the indictments make political references falling outside the scope of the trial. This, in turn, reinforces the suspicion that the indictments are being used as a tool of political intervention, as we have argued earlier. The statements of government representatives about the persons on trial appear in newspapers, some of which are echoed back to the indictments. In some cases Ministers, Prime Ministers, or other members of the government as a whole appear as plaintiffs.

What is more, statements are made by government representatives regarding some of the files while the trial still continues.

The reports are generally concluded with the recommendation that the indictments should be prepared to be briefer, more to the point, or even in the format of a mere form, and that prosecutors should show more clearly how they carry out legal argumentation, that is, how they establish the relationship between the perpetrator and the act in the concrete case, and which elements of the crime correspond to this.

Conclusion: “J’Accuse!”

Based on the results of the PEN Norway Indictment Project, we have to reach the conclusion from this study, which defines the indictment as the point zero of the proceeding, that the proceedings in Turkey “end before starting.” As in the saying “a bad beginning makes a bad ending,” the judicial process in Turkey does not begin and resume as a “judging/reasoning process” and unfortunately the decisions eventually made are not “judgments” but “edicts.”

Though a trial process should consist of arguments that will “convince” the parties of the trial and the public, and a decision should be reached through them. What makes the trial fair is not that the sentence passed “punishes a criminal”, but that it establishes a comprehensible relationship between the act, suspect, and the elements of the crime as stipulated by law. An indictment is a text that brings this before the court. When the indictments are not of this nature, it is not possible to call the performance taking place in courtrooms an actual trial.

Another important point, which is not possible to demonstrate in this study, is that the indictments in fact consist of police enquiry reports. In most cases, if not all, indictments are but copied and pasted police reports from the time of the defendants’ initial arrest. This results in typos, mistaken locations and dates, mixed up facts, logical errors and so forth being transferred directly from the police reports to indictments and then to the final decision of the court. There are thousands of files flooded with misspelled or skipped names and inconsistencies because the indictments are prepared just by changing the names that appear on previous indictments of completely different defendants.

Turkey has a strong tradition and experience of human rights movements. However, we can consider it a shortcoming that indictments have not been exclusively analysed in this way before. It is understandable that the indictment process is seen as a missing link from the very beginning. Because it is accepted by some human rights defenders and those in civil society that prosecutorial indictments are used as a form of judicial harassment, particularly in relation to acts contrary to the interests of the current government rather than the law, it could then be regarded that the approach of studying these indictments is a naive objective. However, when showing that a biased, incomplete, and inconsistent indictment can be appealed with a counter-claim, Emile Zola called it out very clearly when he declared: “J’Accuse! [I accuse!] ”

Altuğ Taner Akçam v. Turkey , Application no. 27520/07, Accessed: <https://hudoc.echr.coe.int/tur#takip%26quot;fulltext%26quot;%26quot;%26quot;\"CASE%20OF%20ALTUĞ%20TANER%20PINE%20v%20TURKEY\"%26quot;>, "documentcollectionid2";: ["GRANDCHAMBER";, "CHAMBER"], "itemid";: ["001-107206"]]} .

Dent, K. (2020). Indictment Investigation Report: Osman Kavala and Others . PEN Norway, Accessed: https://norskpen.no/wp-content/uploads/2020/10/TIP_Gezi-park_TR.pdf .

Fondi, C., & H. Beck (2020a). Indictment Investigation Report: Turkey v. Berzan Güneş . PEN Norway, Accessed: <https://norskpen.no/wp-content/uploads/2020/09/PEN-Norway-Berzan-Gunes-Report-TR-1.pdf> .

Fondi, C., & H. Beck (2020b). Indictment Investigation Report: Büyükada Case. PEN Norway, Accessed: <https://norskpen.no/wp-content/uploads/2021/01/Kasim-Akbas-Point-Zero-EN.pdf>.

Gire, A. (2015). Hukuki ve Siyasal Süreçlerin İlişkisel Analizi (Relational Analysis of Legal and Political Processes) Yıldız Technical University, Institute of Social Sciences, Political Science and International Relations Master's Program, Unpublished master's thesis.

Heggdal, H. (2020). Indictment Investigation Report: Turkey v. Pelin Ünker. PEN Norway, Accessed: https://norskpen.no/wp-content/uploads/2020/10/Turkey-Indictment-Project_Pelin-Unker_TR.pdf .

Şirin, T. (2019). "Türkiye'de Cezasızlık Sorunu ve Anayasa Mahkemesi", D.E.Ü. Hukuk Fakültesi Dergisi, Prof. Dr. Durmuş Tezcan'a Armağan, v. 21, Special Issue, pp. 1577-1607.

Uysal, C. (2020a). Indictment Investigation Report: Turkey v. Nadim Türfent. PEN Norway, Accessed: <https://norskpen.no/wp-content/uploads/2020/09/PEN-Norway-Nedim-Turfent-Report-TR-2.pdf> .

Uysal, C. (2020b). Indictment Investigation Report: Turkey v. Deniz Yücel. PEN Norway, Accessed: https://norskpen.no/wp-content/uploads/2020/10/Deniz-Yucel_TR.pdf.

Uysal, C. (2020c). Indictment Investigation Report: MIT Members News Coverage Case. PEN Norway, Accessed: https://norskpen.no/wp-content/uploads/2020/11/MIT-News-Case_EN-1.pdf.

Fujita, Aska (2020). Indictment Investigation Report: Cumhuriyet Newspaper Case, PEN Norway, Accessed: https://norskpen.no/wp-content/uploads/2020/12/Cumhuriyet-trial_TR.pdf

18

Turkey Indictment Project 2020

Conclusion and Recommendations

Published: February, 2021



February, 2021

The protection and improvement of the rights and freedoms accepted by the international community is the responsibility of the whole of civil society. This includes the rights to freedom of thought and expression, freedom of the press, the right to a fair trial, the presumption of innocence and the exceptional use of pretrial detention. Since its inception in 1922, PEN Norway has defended the right to freedom of expression and has carried out a wide range of activities to promote the right to read and write freely, always in the belief that rights and freedoms are universal common requisites and independent from nation state borders.

For many years, but increasingly so more recently, Turkey has been the focus of a large number of non-governmental organisations working to monitor and defend rights and freedoms. This necessity to focus on Turkey has come about due to an increasing disregard of, and even what could be described as a systematic attack upon, the fundamental rights and freedoms enshrined in both Turkey's own constitution and in the contracts and conventions of which it is a long-standing signatory.

New indictments and prosecutions come to the fore on an almost daily basis. There is a pervading sense of legal insecurity within the country which is palpable not only to civil society at large but to the many monitors and observers of the lengthy judicial processes to which so many of our journalist and civil society colleagues have been subjected, especially during the past six years. The focus of this project is to translate the indictments of cases in which we at PEN Norway and our international NGO colleagues have been directly involved in monitoring and to hold them up to scrutiny using both domestic and international standards and contracts.

The aims of the project are neatly summarised by Kasım Akbaş in his article titled *The Point Zero of a Trial: The Indictment*:

The powers of the judiciary, which are supposed to protect us against all kinds of unjust coercion and arbitrariness, especially those exercised by the executive holding the monopoly of power, have themselves become the locus of injustice and arbitrariness. Political detentions, case files lacking evidence, and trials not abiding by even the most basic procedural provisions have now become common place. Let us put one of these tools – the “indictment” or “birth certificate” of unjust cases – under scrutiny and see whether the results will make any positive impact on the public debate. Certainly, any effort made to rectify injustice and arbitrariness will not be in vain. If having extensive knowledge of the matter before us is crucial in the search for rights and justice, it is indeed necessary for us to discuss the “indictment”.

These words are the assessment of an expert legal academician who has personally been impacted by the legal insecurity ongoing in Turkey and ring true with the observations obtained during the systematic work carried out by PEN Norway in Turkey up until this date.

The purpose of PEN Norway's Turkey Indictment Project 2020 is to record and report upon the poor standards to indictment writing and the inconsistencies in their production. As pointed out in another section of Dr Akbaş's report, above, the indictments studied range from 3 to 667 pages in length. PEN Norway is extremely concerned at the length of time it takes for Turkey's prosecutors to produce an indictment. The blanket-approach seen in recent years of arresting journalists and civil society actors and holding them in pre-trial detention for months or years before an indictment is produced is a clear example of unjust judicial harassment. The civil society actor Osman Kavala was held in prison for 16 months before he and his legal team were finally informed of the basis for his arrest and case against

him. This is a clear violation of the right of a fair trial, the right to be clearly informed of the crime being alleged, and the right to be brought speedily before a judge. Furthermore, the practice of lengthy pretrial detention of journalists in cases where absconson and tampering with evidence appear impossible (especially as in the case of Deniz Yücel, where the 'evidence' was historic, published newspaper articles) is inextricably linked, we feel, with the lack of evidence at hand and the apparent need to search social media feeds and other records for sufficient evidence to build an indictment around.

The Turkey-focussed NGO community within and outside the country have so far been focussing on initial arrests, detentions and the monitoring of the trial process, all of which have been recognised as a violation of rights by the ECtHR in their many decisions. However, it is the very indictments themselves and the pre-trial detention, both of which take place prior to these prosecutions, that represent the preliminary point where rights violation begins. While it is inarguable that there are problems in this very area leading to major concerns, our primary purpose of initiating this project was to define them accordingly.

In line with this purpose, and due to the fact that PEN Norway is an organisation that works to support freedom of expression, linguistic rights and the right to read and write freely, we first decided to evaluate the indictment of various major trials that primarily target journalists, the media and civil society.

This evaluation should be regarded as a legal compliance audit. All indictment reports centred around the requisites of Article 170 of the current Criminal Procedural Code, defining the criteria of indictments in Turkey. The reports also compared the content of indictments to the requisites of the European Convention on Human Rights and the United Nations' Guidelines on the Role of Prosecutors¹. The reports focussed on whether these indictments in question were in compliance with these binding legal documents.

The rapporteurs and staff members involved in the project cooperated very closely to produce a sound and scientific methodology and to ensure the technical accuracy of the reports.

Issues highlighted in these reports do pose some distinctive common characteristics. All the rapporteurs have observed that a great deal of progress can be achieved by merely implementing Article 170 of the Criminal Procedural Code qualitatively. This is before even considering the pertinent international laws. However, in almost all of the indictments evaluated, there have been recurrent, common findings, such as sections of the indictments having been copied and pasted from police inquiry reports, and the fact that the language and narration of the indictment is so complicated in narrative and weak in terms of syntax and clarity as to actually impede the defendants' right of defence. The reports also found that the issue of reasonable doubt was not being supported by any forms of evidence that are essential in order to formulate such an indictment. They also found a lack of a logical association and reasoning between the accusations against the suspect, their actions, and the evidence presented. Moreover, many indictments disproportionately interfere with freedom of speech, and most fail to present any elements in the case that are in favour of the suspects. Some indictments are criticized as having been written with a political instead of a legal approach in mind.

We here present both an overview of the common issues that cropped up in the indictments studied and a list of recommendations for the improvement of style, content and legal veracity of indictments.

A LEGALLY SOUND INDICTMENT IS THE FIRST STEP TO ENSURING A FAIR TRIAL

Probably the most challenging topic for all the legal experts producing these reports was having to formalise their recommendations at the end of each report. This common challenge was due to the controversial nature of the legal qualities of the indictment, particularly pertaining to proceedings regarded as sensitive for certain reasons.

RECOMMENDATIONS

1. The language and narration of the indictments must be simplified and the indictments must be built upon a standard format.

The fundamental common principle indicated in these reports is the usage of a simple language in an attempt to make the indictments comprehensible for the defendants, thus securing their right of defence. Multiple reports recommend the usage of sub headers. Such use of sub-headers in indictments would enable prosecutors to assert their claims in a more systematic manner. This would enable suspects to comprehend the accusations against them more easily and allow them to base their defence upon the indictments in question. Unfortunately, many indictments lack this systematic, facilitating element.

Another item which is as equally important as the provision of sub headers is the language and narration used in the indictments. They are comprised of endless sentences that are joined to each other by commas and apparently unrelated, hanging phrases. Sometimes a single sentence flows for 8 to 10 lines and at times even exceeds this length. Paragraph-long sentences puts a strain upon one's comprehension of the allegations stated therein. In addition, because the paragraphs do not unfold systematically at times it becomes impossible to follow the actual thought process. The finding in Pelin Ünker's indictment can be regarded as the summary of the common concerns and recommendations shared by all the rapporteurs:

Our first recommendation is that great pains should be taken in writing the indictments in a more simple and comprehensible language. Prosecutors in many countries, including Norway, prepare their indictments in a complicated language which people are not familiar with. However, the indictment regarding Ünker is an extraordinary example in this respect².

Our first and foremost recommendation in this respect, is to define the language, narration qualifications and literary technique of the indictments, which is the starting text of the whole legal process, systematize these features and transform it into a norm that would bind all the prosecutors.

Reports on the Nedim Türfent[1] and Büyükada[2] indictments include a practical recommendation based on expert advice. The recommendation which was summarised as "Preparing a standard template for prosecutors to use when preparing the indictments" in the Büyükada evaluation report. This was further elaborated upon in Türfent's indictment evaluation report by recommending the preparation of a singular template format for indictments, similar to the one used for applying to the Constitutional Court in Turkey. This would enable one to inspect whether the requirements indicated in Article 170 of the Criminal Procedural Code have been fulfilled. This practice is seen also in the application forms used across Europe and when applying to the European Court of Human Rights.

In order to fulfil the defendant's right to clearly understand the case being brought against him/her, these elements of presentation and clarity of language are vital and should not be dismissed as mere stylistic recommendations.

In terms of the content of indictments, our legal experts had serious issues and we have the following recommendations regarding evidence and legal reasoning.

2. All evidence must be provided in order within the indictment:

Another topic which is mentioned frequently in the reports is the incomprehensibility of the evidence against, and in general, the lack of any in favour of the suspect. The report [3] concerning Berzan Güneş's indictment is noticeably clear on this point. In the report on Güneş's indictment, experts firmly underlined the importance of listing the evidence in chronological order. Moreover, recommendations such as inclusion of a list of dates to accompany each piece of evidence and a listing of evidence at the beginning of the text were seen as being important elements to create a clear history of investigation.

The report further recommended refraining from mentioning additional topics which are not affiliated to the actual accusation in order to prevent any confusion regarding the evidence.

A similar necessity has been defined in the Gezi indictment report^[4] in which civil society leader and human rights defender Osman Kavala appeared as a defendant. In this report, firstly the requirement for a clear, evidence-based foundation for the indictment was highlighted by the legal expert. This came about after the author had stressed the necessity for the prosecutor to provide a listing of evidence in favour of the defendants, and how and why the indictment might refute those pieces of evidence, if the prosecution puts forth an accusation despite the existence of the said evidence in question.

The importance of these recommendations is evident, as is further highlighted in the indictment report of Pelin Ünker³, that also stresses the importance of a proven link between the alleged crime and evidence.

3. The application of fundamental elements the Criminal Procedural Code

Many times in the reports, reference has been made to the basic provisions that are in place in the current Criminal Procedural Code of Turkey. They adequately provide a convenient basis on which to write qualified and satisfactory indictments. Heggdal, who is a judge herself, has explained this in her report⁴ below:

Essentially, Article 170 of the Criminal Procedural Code serves as an efficient tool in order to write an indictment in line with the established international standards. Adhering to this relevant article would serve as a control list that includes all the necessary aspects required to ensure an objective, impartial, readable and functional indictment.

In Türfent's⁵ report, yet again, a reference has been made to the Criminal Procedural Code pointing out to the requirement of encouraging the judges of first instance courts to refuse any such indictments that do not meet the Law. It has been underlined that such a practice would indeed relieve the burden of the judiciary system and serve as an audit mechanism urging prosecutors to prepare indictments in a more qualified and meticulous manner.

4. Vocational training of prosecutors

Another point emphasized frequently in reports is the importance of vocational training for Turkey's prosecutors. In the report on the Gezi Park⁶ indictment and the MIT Haberleri (National Intelligence Organisation News)⁷ indictment mention was made that such training should start from university level and should also involve the evaluation of negative examples. In Berzan Güneş's⁸ report, vocational training has been defined as a fundamental tool in developing the judicial system and securing a fair prosecution for all defendants. An area of training that is crucial to the improvement of indictments is that of improving evidence-based justification and how evidence can be connected by way of concrete and legally substantial reasoning to the alleged crime.

Not one of the indictments studied in 2020/21 met with Turkish or international standards. It is crucial that a review of indictment-writing is undertaken by the relevant body in Turkey, be it the Council of Judges and Prosecutors or the Ministry of Justice itself. A clear training program is recommended to be set out and implemented, that would cover issues detected during our studies, ranging from basic layout issues to the more concerning and complex issue of the apparent complete lack of substantial and logical legal reasoning to prove the point of reasonable suspicion that a crime has in fact been carried out at all, and whether the defendant(s) are connected with sufficient suspicion to the alleged crime.

The Büyükada report⁹ also underlines the importance of organising regular training in an attempt to ensure that prosecutors, in particular, fulfil their responsibilities in a fair, consistent and swift manner, including complying with the United Nations Guidelines on the Role of Prosecutors with a focus on defending both human dignity and human rights, thus improving the overall judicial system.

5. Politicians should refrain from making statements related to cases which have been submitted to the court

In a number of our reports, it was indicated that leading political figures had made public statements condemning the suspects who were the subjects of the indictments.

In the report evaluating the MIT News indictment, this topic has been explained as follows:

The encountering of a similar phenomenon in virtually all the scrutinised indictments begs investigation as to whether this behaviour of the executive branch has been deliberately turned into a vehicle for bringing pressure to bear on prosecutors, as a component of the judiciary, in determining the content of the aforementioned indictments.

As even raising such a question would make the independence of the judiciary controversial in the eyes of the public, the executive power should act sensitively and refrain from giving partisan statements concerning cases under current prosecution.

CONCLUDING REMARKS

We find that the ECHR's decision dated 22 December 2020 on *Demirtaş v. Turkey*¹⁰ is also instructive in pointing to the criteria to be followed to prepare better-quality indictments whilst not losing focus on protecting rights and freedoms. In this decision, an overarching pattern of political rather than judicial intent was identified in the prosecutions. As indicated in the report¹¹ evaluating the indictment against Ahmet Altan within the scope of this project, it would be impossible to ensure a judicial practice which places human rights in its focus and naturally a democratic society as long as a practice is not followed in order to eliminate this pattern of political intent behind prosecutions.

Since 1954, Turkey has been signatory to the ECHR. We believe that prosecutions against journalists and civil society figures should be brought carefully and only after absolute consideration of their rights enshrined in the above-mentioned protocols and conventions. This includes their right to liberty and security which can be violated by long pre-trial detention periods whilst awaiting an indictment, their right to freedom of expression and the right to disseminate the news, bearing in mind all ECtHR decisions that explain and allow the press to express stronger and more graphic opinions and reports than the public at large.

Endnotes

- 1 https://www.unodc.org/documents/justice-and-prison-reform/HB_role_and_status_prosecutors_14-05222_Ebook.pdf
- 2 Heggdal, H. (2020a). Indictment Evaluation Report: Turkey-Pelin Ünker. PEN Norway, Access: https://norskpen.no/wp-content/uploads/2020/10/Turkey-Indictment-Report-Pelin-Unker_EN.pdf
- 3 Heggdal, H. (2020a). Indictment Evaluation Report: Turkey -Pelin Ünker. PEN Norway, Access: https://norskpen.no/wp-content/uploads/2020/10/Turkey-Indictment-Report-Pelin-Unker_EN.pdf
- 4 Heggdal, H. (2020b). Indictment Evaluation Report: Turkey - Şebnem Korur Fincancı, Erol Önderoğlu, Ahmet Nesin. PEN Norway, Access: <https://norskpen.no/wp-content/uploads/2020/12/Fincanci-Nesin-and-Önderoğlu-EN-2.pdf>
- 5 Uysal, C. (2020a). Indictment Evaluation Report: Turkey -Nedim Türfent. PEN Norway, Access: <https://norskpen.no/wp-content/uploads/2020/09/PEN-Norway-Nedim-Turfent-Report-EN-1.pdf>.
- 6 Dent, K. (2020a). Indictment Evaluation Report: Osman Kavala ve Diğerleri. PEN Norway, Erişim: https://norskpen.no/wp-content/uploads/2020/10/TIP-Gezi-Park_EN-1.pdf.
- 7 Uysal, C. (2020c). Indictment Evaluation Report: National Intelligence Organisation's Member News Trial. PEN Norway, Access: https://norskpen.no/wp-content/uploads/2020/11/MIT-News-Case_EN.pdf.
- 8 Fondi, C. ve H. Beck (2020a). Indictment Evaluation Report: Turkey -Berzan Güneş. PEN Norway, Access: <https://norskpen.no/wp-content/uploads/2020/09/PEN-Norway-Berzan-Gunes-Report-EN-1.pdf>.
- 9 Fondi, C. ve H. Beck (2020b). Indictment Evaluation Report: Büyükada Trial PEN Norway, Access: https://norskpen.no/wp-content/uploads/2020/11/B%C3%BCy%C3%BCkada-trial_EN-2.pdf.
- 10 AİHM Büyük Daire, 22.12.2020 tarihli 14305/17 başvuru no'lu *Demirtaş v. Türkiye* (no.2)
- 11 Uysal, C. (2021a). Indictment Evaluation Report: Turkey -Ahmet Altan and Others. PEN Norway, Access: <https://norskpen.no/wp-content/uploads/2021/01/Ahmet-Altan-EN.pdf>

Links to laws referred to within the report: (HEADER)

Turkish Penal Code (TPC): https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf

Turkish Criminal Procedure Code: https://www.legislationline.org/download/id/4257/file/Turkey_CPC_2009_en.pdf

Press Law, Turkey: <https://www.judiciaryofturkey.gov.tr/Sayfalar/press-law>

Constitution of the Republic of Turkey: https://global.tbmm.gov.tr/docs/constitution_en.pdf

European Convention on Human Rights: https://www.echr.coe.int/Documents/Convention_ENG.pdf

Guidelines on the Role of Prosecutors: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>