PEN NORWAY

Turkey Indictment Project

The Study of 10 Indictments in Freedom of Expression Cases in Turkey with Articles on the crisis in Media Freedom and the Rule of Law

2021

PEN Norway Turkey Indictment Project Final Report, 2021
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List of Abbreviations

AKP - Justice and Development Party
BHRC - Bar Human Rights Committee (of England and Wales)
CCPE - Consultative Council of European Prosecutors
CEPEJ - 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

"These reports allowed us to better explain to our young colleagues the real nature of the indictments, the reasons why we have been following those cases and why we have been more interested in taking a pro-rule of law stance rather than expressing dissent. Moreover, we can now do this through the words of other competent lawyers and legal institutions."

Semih Gökayaz, President,
Adana Bar Association

"The fact that these reports are written by experts from different jurisdictions across Europe and the findings being in line with each other warrants an extra weight to the importance, objectivity, and impact of the work."

Ayşe Bingöl, Human Rights Lawyer

"My opportunity to work with my training group on the indictment reports prepared within the scope of the PEN Norway Turkey Indictment 2020 Report, came during a CCP (Code of Criminal Procedure) training for lawyers who were new to the profession. In terms of creating awareness about points that need attention in an indictment, I think it has been a very successful work, especially for us young lawyers who are not yet familiar with all aspects of professional practice."

Firdevs Avşar, Lawyer

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Introduction

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Turkey Indictment Project

Introduction

For more than 30 years, PEN Norway has consistently carried out activities to strengthen the right to freedom of expression and linguistic rights and to support writers and journalists at risk or imprisoned in Turkey.

An important pillar of this systematic effort has been the monitoring of the trials of Kurdish and Turkish writers and journalists. Following this in-person trial monitoring by members of PEN Norway it became apparent that many of the indictments forming the bases of the cases were insubstantial or, in some cases, obfuscated by excessive, unrelated evidence. As a result, the Turkey Indictment Project was designed and implemented in order to examine the indictments more closely.

The Turkey Indictment Project 2020

In 2020, we worked with legal experts from Austria, the United Kingdom, Norway and Turkey to examine 12 indictments targeting prominent journalists and civil society actors in Turkey. These reports were compiled by evaluating whether the indictments conformed to domestic and international law, in particular to Article 170 of Turkey's Procedural Code, governing indictment writing, Article 6 of the European Convention on Human Rights and the UN's Guidance for Prosecutors.

These reports were complemented with a series of articles by well-respected academics, journalists and lawyers in Turkey covering aspects of the judicial system. The results of the 2020 Turkey Indictment Project were a cause for concern, when it was demonstrated that all twelve indictments failed to comply with either domestic or international basic standards. The main failings of the indictments were either a dearth of concrete evidence, or excess of irrelevant information concerning other cases, and a failure to make a legal argument connecting the evidence, defendant and crime. In many cases, basic information was incorrect and pointed to the practice of copying and pasting information from other indictments or from original police reports. Prepared at the end of 2020, our 220-page final report was sent as hard copy to all bar associations in Turkey, all parliamentarians with a legal background and a number of legal academics and non-governmental organizations working in the field of human rights.

Methodology of the Turkey Indictment Project 2021

In the project's second year, the indictments were chosen in a way to highlight the different and interconnected issues within the judiciary in Turkey. Firstly, we wanted to reveal the diversity of legal regulations that are prone to be interpreted in such a way to as violate freedom of expression in the country.

For this reason, a special effort was made to identify indictments that levelled allegations against court reporters, journalists reporting on social media, or lawyers who undertake the defence of journalists. These included the accusations based on the articles of the Anti-Terrorism Law in relation to making propaganda for a terrorist organization, or the accusations of insulting the President, which are very well-known by the international community. Moreover, as gender inequality has become a serious problem in Turkey, our selection of indictments introduced a particular focus on cases in which women journalists had become the targets of prosecutions.

Likewise, while we selected the indictments of journalists from different media outlets to reveal the broad scope of violations of freedom of expression, this year we also focused on lawyers, academics and documentary-makers who were prosecuted for exercising their right to freedom of expression. We believe that the results of our investigations have succeeded in revealing the bleak picture of freedom of expression in Turkey at present.

Turkey Indictment Project Final Report 2021

In the final report of 2021, we are presenting you 10 reports into the indictments issued against Can Dündar and Erdem Gül, Hikmet Tunç Kumli, Bülent Şık, Necla Demir, Canan Coşkun, Ertuğrul Mavioğlu and Çayan Demirel, Veysel Ok, Adana Bar Association lawyers, Seyhan Avşar and employees of the shuttered Kurdish daily Özgür Gündem. The methodology for the study of the reports, written by legal experts from Italy, the Netherlands, Norway, Austria, Turkey and the United Kingdom is a scientific approach evaluating their compliance with domestic and international laws. The reports are produced bilingually and were the subject of detailed background study. We hope that these reports will serve as an important resource for everyone working in the field of the law in Turkey, especially in cases where there may be violations to the right to a fair trial and to freedom of expression. The feedback received in relation to our 2020 report shows that these examinations are already used both in the training of young lawyers and in the ongoing trials on the same charges. We hope, too, that our reports will become important archival resources in the future.

In addition to our reports this year, we also present articles on the field of media and journalism in Turkey that we hope will be of interest to you. For example, Gökçer Tahincioğlu's article focuses on the history of oppression on journalism in Turkey and the diverse set of oppression mechanisms, and it serves as a guide to understand what is happening in Turkey.

In 2021, we succeeded in establishing relations with important professional organizations in Turkey such as the National Bar Council of Turkey, Adana Bar Association and İzmir Bar Association. We received excellent and encouraging feedback from bar association and young lawyers working in Turkey. Our reports were used as supporting evidence and as expert opinions in cases in the High Criminal Courts in Turkey and formed a part of applications on behalf of defendants in freedom of expression cases at Turkey's Constitutional Court and the European Court of Human Rights.

In 2021, the Ministry of Justice's 4th Legal Reform Package included an addition to Article 170 of Turkey's Procedural Code to the effect that it prohibited the inclusion of evidence that is unrelated to the case at hand. We are sure that our Turkey Indictment Project 2020 contributed to this reform. When studying indictments such as the 600+ page Gezi Trial indictment, the report's author, Kevin Dent QC, clearly pointed out the unwarranted presence of a large amount of irrelevant information pertaining to unrelated legal cases.

As well as recommending that irrelevant evidence not be included in indictments, our recommendations in the 2020 report also addressed such issues as presentation of data, the suggested use of a template to ensure that all criteria of Procedural Law 170 are met and the crucial importance of the Prosecutor's providing a convincing and concrete legal argument linking evidence to the alleged crime and to the accused persons. We further proposed that judges should be supported in dismissing cases where the indictment lacks concrete evidence or does not conform to established domestic or international standards. We have identified a need for a thorough traning programme of prosecutors to be implemented across Turkey.

We sincerely thank everyone who contributed to the realization of this project: those who authored the indictment reports and legal articles, the, young women journalists who contributed significantly to our ongoing trial observation missions in Turkey, our interpreters, and all our team members who worked very hard to present our reports and articles effectively.

In 2022, we will continue to promote and evaluate the findings of our reports. We hope that this effort will make a meaningful contribution to the struggle for freedom of expression, the right to a fair trial and the rule of law in general in Turkey.

Caroline Stockford, Turkey Adviser, PEN Norway
Şerife Ceren Uysal, Indictment Project Reports Supervisor, PEN Norway

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PEN NORWAY

Legal Report on Indictment

Özgür Gündem Raid

Hannah Beck & Clarissa Fondi
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Legal Report on Indictment:
Özgür Gündem Raid

1. Summary of Case Background Information

Özgür Gündem was a newspaper published between 1992 and 1994, which then started being published again in 2011. In its pages it criticised state policies and was known for publishing news about the Kurdish issue in Turkey.

On 16 August 2016, the 8th Istanbul Criminal Court of Peace ordered that Özgür Gündem newspaper should temporarily be closed for "spreading propaganda for a terrorist organisation". The same day, the announcement of closure was followed by a police raid of the newspaper's office in İstanbul's Beyoğlu district, during which 22 people allegedly insulted and threatened the police officers after the newspaper's editor-in-chief and the managing editor were arrested. Subsequently, 16 employees of Özgür Gündem alongside 6 journalists and cameramen from outside organisations IMC TV and DIHA, who were present at the scene to report on the raid, were detained as well.

After 48 hours of detention the 22 suspects were finally released. Some of them made complaints against the police officers in charge, accusing them of "insult" and "excessive use of force". The public prosecutor's office however, issued a decision of non-prosecution and announced this decision together with an indictment against all 22 journalists. Three police officers had filed counter-complaints, accusing the 22 journalists of "insult" and "prevention of public duty". Based on these allegations, the present indictment was issued on 27 September 2017, more than a year after the raid had been carried out.

The first hearing took place on 9 February 2018 with further hearings following on 29 June 2018, 20 January 2019, 19 June 2019, 05 November 2019, 25 February 2020, 02 June 2020, 22 October 2020, 16 February 2021, 22 April 2021 and 01 July 2021. The countless requests of the defence lawyers to close the case and return the confiscated phones and digital materials which were seized during the raid were rejected by the court. Due to the fact that 4 defendants did not appear for any of the hearings, the court issued arrest warrants to force their participation and postponed the trial numerous times in order to execute this decision. On 22 April 2021, the court ruled for the separation of the files of the 4 journalists in question and declared that all necessary evidence had been collected in the main case. Observing this brief hearing, PEN Norway reported that the file is now being submitted to the prosecutor for an opinion and that the next hearing is scheduled for 01 July 2021. On 01 July 01 2021, the court gave the defence lawyers time to submit their statements against the prosecutor's opinion and adjourned the hearing to 23 November 2021.

2. Analysis of the Indictment

In this chapter we will assess whether the indictment meets legal requirements in terms of Turkish law as well as international standards. We will look at the structure and formalities, dissect the evidence, analyse the charges in terms of the connection between the crime and the act, and finally address some procedural concerns.

2.1 Structure and Formalities

The indictment consists of three pages. The first two pages provide general information about the indictment, the complainant, the plaintiffs, the suspects and their defence lawyer. Furthermore, a short overview about the offences in question, date and place of the crime, the applicable articles as well as collected evidence is given.

This general section is followed by one page of continuous text with the heading "The investigation

report is examined" and concludes with the prosecutor's request to sentence the 22 suspects in accordance with stated articles. Furthermore, a note in regards to the decision of non-prosecution of the police officers, who were accused of "excessive use of force" is included at the very end of the indictment.

The structure of the main section is particularly striking, for it is formulated as a single sentence and is not formatted in a clear and comprehensible manner. Throughout the prosecutor's description of events and accusations, punctuation rules are ignored and paragraphs are only used twice in the conclusion section. Thus, the main section is hard to read and hinders a structured approach to a quick analysis of the whole document. Even though the indictment itself is rather short, it takes some effort to read and comprehend it after picking apart the various sections to grasp their meaning.

Assessment in terms of Turkish law

In accordance with Turkish law an indictment has to contain a wide range of elements. These elements are clearly listed in Art 170/3 TCPC and should be included in the document as exhaustively as possible.

In compliance with Turkish law the indictment mentions the identity of the 22 suspects as well as the name of their defence counsel, the complainant and the plaintiffs on page one and two.

Already on page two it is made clear what offences the journalists are accused of, namely "prevention of public duty" and "insult". In this respect, the prosecutor refers to Art 125/1, 125/3-a, 265/1, 265/3, 265/4 and 53/1 Turkish Penal Code (TPC). Furthermore, "16/08/2016 İstanbul's Beyoğlu" is mentioned as the date and place of the alleged crime. These circumstances are specified in the main section including the exact time the raid took place and the address of the newspaper's office.

As formally required, the indictment is addressed to the Criminal Court of First Instance in Istanbul and is signed by the Istanbul Public Prosecutor along with the date of issue: 27 September 2017. Because of its position at the end of the text body, this date is not immediately noticeable, even though it plays a crucial role in the timeline of the judicial proceedings and should therefore be clearly displayed.

As stated in Chapter 2, the date of the alleged crimes (16 August 2016) and the date of issue of the indictment (27 September 2017) lie more than a year apart. At first glance, the indictment does not seem overly complicated nor does it seem of extensive length. Therefore, the question arose why the investigation phase and drafting of the indictment extended over a period of more than 13 months.

According to Art 160 TCPC, public prosecutors should immediately start an investigation as soon as they are informed of circumstances that give sufficient reason to assume that a crime has been committed. The indictment's investigation number 2016/101793 suggests that the prosecutor started the proceedings already in 2016. Even though three police officers are indicated as plaintiffs, it is not mentioned when they brought forward their accusations nor are other details given on this issue.

Moreover, as soon as prosecutors are notified of a possible crime, it is their duty to "investigate the factual truth, in order to make a decision on whether to file public charges or not". They have to collect all necessary evidence in relation to the events and have to decide whether there is sufficient suspicion to indict. An extremely diligent method of conducting the investigation might explain the delay in issuing the indictment, but this should have subsequently led to an equally diligent drafting.
In the present case the list of evidence could, for example, comprise the statements of the plaintiffs and suspects as well as written police reports about the raid. However, as will be shown below, the prosecutor fell short of providing specifics in a lot of these instances especially in relation to the list of evidence itself and the attribution of its pieces to the actions of individual suspects. It seems like there was not a lot of time and effort put into the collection of evidence and the draft of a well-prepared document based on legal argumentation and reasoning.

In conclusion, we cannot know for sure why the prosecutor took so long to draft the indictment. Naturally, an excessive caseload or difficulties in regards to the production of evidence can always lead to a procedural hold-up. However, the structure and format of the indictment suggest that the document has rather carelessly been put together and most allegations are not presented with the necessary diligence.

Assessment in terms of International law

"An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him [or her]". The European Court of Human Rights has stressed in multiple decisions the importance of a well-drafted indictment in a criminal process, and has particularly pointed out the possible negative impacts of a defective indictment for a defendant's defence preparation and the further course of the proceedings.

Therefore, a clear format and structure is essential. Formulating the main part of an indictment without using punctuation and paragraphs is not in line with international standards and unnecessarily complicates the readability of an indictment. It severely affects the right to a fair trial and should be avoided.

Furthermore, according to Art 6/3-a ECHR, everyone has the minimum rights "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]". The underlying purpose of this article is to enable the defendants to prepare their defence accordingly and in good time before the first day of their trial.

As long as the defendants have not received a formal notice, for example in the form of a written indictment, they do not know the exact crimes of which they are being accused. Therefore, it should be a number one priority for a prosecutor to conduct the investigation as fast as possible and conclude the findings in a reasonable and well-argued indictment. The longer the investigation period lasts, the harder it gets for the defendants to collect exonerating evidence to defend themselves against the allegations brought forward at a later time.

The chaotic structure of the indictment, the missing details and specifics as well as the slow progress of the proceedings are not in line with the international standards of a fair trial. The suspects have to put in extra effort to understand what they are accused of and start the trial already with a clear disadvantage.

2.2 Evidence

According to Art 170/3 TCPC, the prosecutor should add all evidence of the offence to the indictment. In the present case, a list of evidence is included in the general section on page two: "accusation, statements by the suspects, police reports and the whole investigation document".

Assessment in terms of Turkish law

The list of evidence, despite being more specific than other lists of evidence we have encountered in our previous reports, still does not fulfil the requirements of Turkish national law, which requires the evidence to be clearly stated. The prosecutor does not elaborate on the content of his abstract references neither in this part nor later in the document. Only in the conclusion section of the indictment does he once again mention that the alleged crimes are based on "the investigation document". Other than that, no further explanations are given as to which "police reports" he is referring to and what the "whole investigation document" is comprised of.

However, the most significant deficiency of the presented list lies within the missing explanation in regards to the "statements by the suspects". Only when searching for these ominous statements in other parts of the indictment, it becomes apparent that the prosecutor is referring to two quotes, which contain what the journalists allegedly said during the raid. These citations carry the prosecutor's narrative on what crimes the suspects have committed and obviously are of utmost importance for his reasoning.

Therefore, the prosecutor should have mentioned meticulously where he derived this information from, for example from a specific police report or witness testimony. Instead, he fell short of explaining his abstract references in violation of Turkish law. The purpose of Art 170/3 TCPC is to guarantee that all necessary facts are included, in order for the suspects to be able to defend themselves. The list of evidence constitutes a major element of an indictment and should be handled with necessary care and diligence to ensure that it is in accordance with the domestic law.

Furthermore, Art 170/4 TCPC stipulates that all events that comprise the charged crime must

be explained in the indictment in accordance to their relationship to the present evidence. These clarifications should constitute the main section of the document and should clearly display the prosecutor's thoughts and findings that lead to the issue of the indictment.

In Chapters 3.3 and 3.4, which are dedicated to the two offences in question, we will further analyse whether the prosecutor managed to precisely link the evidence to the charged crime. We will look at the pieces of evidence in detail and examine their position within the line of argumentation.

Assessment in terms of International law

Art 6/2 ECHR embodies the principle of the presumption of innocence as an important guarantee in the context of a criminal trial. All defendants must be presumed innocent until proven guilty. Furthermore, the principle determines that the burden of proof lies with the prosecutor and that any doubt should benefit the suspect. To meet this obligation, the prosecutor is required to adduce evidence sufficient to convict the defendants.

Even though the prosecutor includes a list of evidence in the indictment, he does not specify in detail the particular documents and statements on which his account of facts and accusations are based. Instead, he presents his assumptions of the events without any further explanations and solely reproduces a seemingly subjective narrative which he justifies neither through precise evidence nor legal arguments. The suspects are therefore not provided with the necessary knowledge to prepare their defence accordingly and are stripped of a fair and transparent judicial process.

Furthermore, the prosecutor does not elaborate on the fact that the suspects denied the accusations. This rejection of allegations constitutes reason for doubt and should therefore be addressed in more detail. Instead, the prosecutor does not only fall short of presenting the reasoning of the suspects, but also does not include any facts in favour of the journalists as is required by domestic and international law.

In conclusion, the indictment's presentation of evidence severely compromises the fair trial principle, especially the right to presumption of innocence as guaranteed in Art 6 ECHR. The prosecutor failed to present the incriminating evidence in a clear manner and did not give any information on where his account of facts had been derived from.

2.3 Prevention of Public Duty

The first charge against the 22 suspects concerns the "prevention of public duty". The indictment accuses them of having offered resistance with the presumed aim of preventing officers of the İstanbul Police Headquarters from conducting the search on the premises of the Özgür Gündem newspaper and arresting editor-in-chief İnan Kızılkaya and managing editor Bilir Kaya.

Assessment in terms of Turkish law

"Prevention of public duty" under Turkish law is stipulated in Art 265 of the Turkish Penal Code (TPC). The specific charge in this case is focused on subparagraphs 1, 3 and 4 of Art 265.
The core of this charge lies in subparagraph 1, which defines the crime as "using force or threats against a public officer in order to prevent him from performing his duty".

Subparagraph 3 imposes increased penalty for committing the offence jointly with more than one person or by a person concealing their identity.

Subparagraph 4 addresses two further aggravating factors of committing the crime either with a weapon, or by taking advantage of the power to invoke fear derived from a criminal organisation.

The prosecutor explicitly includes subparagraphs 3 and 4 of Art 265 TPC, but throughout the indictment he neglects to specify the particular allegations derived from them, and fails to bring forward arguments to substantiate these charges. From the case's context, it can be speculated that the suspects are being accused of committing the offence jointly with more than one person and that the prosecutor insinuates a connection to an assumed terrorist organisation. It is unclear, whether he also accuses the suspects of concealing their identity or using weapons. In any case, mere speculation derived from a case's context,

has no place in a fair trial and is inadmissible within any lawfully composed indictment. Art 170/4 TCPC stipulates that all events that comprise the charged crime must be explained in the indictment in accordance to their relationship to the present evidence. When it comes to these subparagraphs, the indictment does not meet the requirements of Art 170/4 TCPC.

Regarding subparagraph 1 of Art 265 TPC, one of two objective elements is required to fall within the scope of the offence - the use of either force or threats. Additionally, a subjective element needs to connect those actions with an intent to prevent a public officer from performing his or her duty. While the indictment narrates the general occurrences during the raid, it fails to draw a precise connection between the alleged misconduct of the journalists and the particular legal elements required to be charged with Art 265 TPC and its subparagraphs.

The prosecutor sums up two statements the suspects are accused of having made. The first one allegedly occurred as a reaction to when the police officers attempted to arrest the newspaper's editor-in-chief and managing editor:

"You can't get anyone out of here, who are you, we don't know you, you low-life losers".

This statement is then classified by the prosecutor as "insulting and threatening" and in his opinion constitutes "verbal resistance" against the police officers.

While the use of the words "low-life losers" and its possible classification as an insult will be discussed in more detail below, we are unable to recognize the threatening nature of this statement. Furthermore, saying that the police officers cannot get anyone out of there, asking who they are and stating that they don't know them, certainly does not constitute a threat of any kind either. For reference, we looked up the legal definition of "threat" under Turkish law.

Art 106/1 TPC defines it as threatening "another individual by stating that he will attack the individual's or his relative's life or physical or sexual immunity" or threats related "to causing extensive loss of economic assets or other related harms". It is evident that neither of the phrases lie anywhere within the scope of this legal definition. There was undeniably no announcement made by the defendants regarding any sort of attack on life, physical or sexual immunity, nor repercussions on economic assets to be feared whatsoever. None of the phrases can be interpreted as threatening in a legally relevant context. To claim the opposite defies any logic, as the prosecutor's thought process lacks the necessary transparency to clarify how the wording could possibly be interpreted to constitute a crime under Art 265/1 TPC.

The second statement is quoted as follows:

"You scumbags, even the Gülenists were better than you, you are the policemen of AKP, we do not recognize the rulings of the court, we won't let you search, we will rather die than surrender, you cannot get any of us out of here, everyone shall see your unlawfulness streamed on live stream".

Dissecting this statement in terms of revealing possible threats is even more perplexing: "Scumbag" is not a threatening word, its insulting qualities are not relevant for Art 265 TPC but will be analysed in the next chapter.

The phrasing that "even the Gülenists were better", only insinuates that the suspects do not identify as Gülenists themselves. At this point we would like to once again point out, that according to Art 170/5 TCPC, an indictment is supposed to include not only the issues that are unfavourable to the suspects, but also issues in their favour. Had this indictment been crafted with more legal precision, this particular sentence would certainly have been used in favour of the suspects. To instead use it as grounds to imply a threatening nature to their statement, is deemed absurd.

The next sentence "you are the policemen of AKP" could only be interpreted as an insult, if being associated with AKP is seen in a negative light, otherwise it states a mere factual circumstance. Neither does "we do not recognize the rulings of the court" nor "we won't let you search" constitute a threat, as it once again lacks any announcement of imminent attacks with consequences as defined in Art 106/1 TPC.

"We would rather die than surrender, you cannot get any of us out of here"

only shows the suspects' own fear to lose their lives through the İstanbul Police Headquarters, certainly not the other way around.

And finally, the phrase "everyone shall see your unlawfulness streamed on live stream" not only lacks any elements of threat in terms of Art 106/1 TPC, it is furthermore an entirely inconsequential announcement, if assumed, that the İstanbul Police Headquarters' behaviour was lawful.

At this point we must come to the conclusion that the element of "threat" is not sufficiently given to constitute the crime of "prevention of public duty" according to Art 265/1 TPC.

The alternative requirement to be charged with Art 265/1 TPC is the element of "using force against a public officer in order to prevent him from performing his duty". Examining the indictment to find sufficient argumentation for assuming that the suspects used "force", did not take long, as the prosecutor mentions their physical actions only twice. First in the context of the police detaining the two editors, the other suspects "offered physical resistance". And secondly, when the officers demanded the live broadcasting to be stopped, it was "met with physical attacks". The prosecutor does not substantiate this accusation with a single example of what those physical actions looked like. He therefore fails to bring any evidence whatsoever to support this claim. Without precise reference, the incriminating factor of these physical actions cannot be determined and is therefore not sufficient to support a charge under 265/1 TPC.

When it comes to the subjective element stipulated within Art 265/1 TPC, the suspects' actions need to be carried out with the intent to prevent a public officer from performing his or her duty. Since the prosecutor was not able to link the journalists' actions during the raid to the requirements of the charged crime of Art 265/1 TPC, the subjective element is void. Nonetheless, the prosecutor's final remarks need to be addressed, as they raise further concerns. At the end of the indictment, he writes that "it is understood that the suspects offered resistance with the aim of preventing the officers" from conducting the search in the premises and detaining the editor-in-chief and the managing editor. Even though the prosecutor failed to provide precise examples of evidence, he claims that "it is understood" they offered resistance.

Additionally, he does not only suggest the suspects' possible subjective intentions, he factually claims their actions had the "aim of preventing public duties", even though the objective actions were not classifiable as threatening nor forceful, as analysed in detail above. There are several decisions by the Turkish Supreme Court, in which the Supreme Court asks whether the actions underlying an accusation of violating Art 265 posed a realistic risk in terms of preventing officers from carrying out their public duty. Passive acts like talking, as long as there are no severe verbal threats being made, are not defined as criminal acts under Art 265 TPC, according to the Supreme Court. Since the prosecutor merely mentions that there were physical actions, but neglects to define any active acts, his claims in terms of Art 265 cannot be legally verified.

Assessment in terms of International law

In light of these shortcomings, we want to once again point out that charging the suspects with a crime, even though the evidence is not sufficient, severely violates the presumption of innocence within the right to a fair trial as protected under Art 6/2 ECHR. The purpose of the guarantee that anybody accused of a crime shall have the benefit of doubt, is the protection of defendants from unsubstantiated accusations. This fundamental right is ensured by imposing the burden of proof on the prosecution, making it an essential duty of any prosecutor to present an unambiguous and substantial causal relationship between evidence and crime. While analysing the charges in terms of Art 265 TCP, we found not only a clear failure to properly link evidence to accusations concerning the element of "threat", but even a sheer lack of argumentation regarding the element of "force", as there were not even enough relevant details given on the suspects' alleged physical actions to be used as evidence for the charged crime.

Additionally, we feel the need to reiterate the existence of the UN Guidelines on the Role of Prosecutors, which set out standards to ensure a fair, impartial and efficient prosecution of criminal offences. In this context we want to particularly point towards Principle 14, which determines that "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."

2.4 Insult against Public Officers

All 22 journalists are furthermore accused of "insulting public officers" during the search at the premises of Özgür Gündem newspaper. As has been stated above, the prosecutor lists two statements as evidence:

"You can't get anyone out of here, who are you, we don't know you, you low-life losers"

"You scumbags, even the Gülenists were better than you, you are the policemen of AKP, we do not recognize the rulings of the court, we won't let you search, we will rather die than surrender, you cannot get any of us out of here, and everyone shall see your unlawfulness on live stream"

No additional evidence or reasoning in relation to the allegation of "insult" is brought forward by the prosecutor in this indictment.

Before assessing the stated evidence in terms of domestic law as well as international law, one of the biggest flaws of this indictment has to be stressed. The prosecutor does not attribute the quotes to a specific person. All 22 journalists are accused of insulting the police officers, however, it is not clear who has made the remarks in question. For an objective reader it is truly unthinkable that all 22 journalists said the words as suggested in the indictment in unison. Scenarios in which only individuals spoke, seem more likely. Moreover, the situation at the time of the raid had surely been a stressful one for all parties involved and therefore the exact recollection of who said what might have been particularly difficult. Without presenting the necessary details to prove who spoke up, the prosecutor cannot use the quotes as sole argument against all 22 suspects. Consequently, he severely violated the principle of individual criminal responsibility as a fundamental concept of criminal law.

Assessment in terms of Turkish law

Leaving aside the problem of attribution, the above-mentioned statements should amount to a violation of Art 125 TPC, which stipulates the offence of "insult" as one of two possible scenarios. Either "a person attributes an act or fact to a person in a manner that may impugn that person's honour, dignity or prestige" or "a person attacks someone's honour, dignity or prestige by swearing". If the insult is committed "against a public officer due to the performance of his public duty" the possible penalty of imprisonment shall not be less than one year.

In terms of assessing the statements, the sections should be looked at individually again. For instance, following sentences can be excluded as evidence right away, as they do not constitute anything even remotely resembling an insult: "who are you", "we don't know you", "you are the policemen of AKP" and "everyone shall see your unlawfulness on live stream". These quotes are mere statements without any form of value judgement, disregard or contempt towards the police officers. Therefore, they cannot serve as evidence for the offence of "insult".

Furthermore, the statements "you can't get anyone out of here", "we do not recognize the rulings of the court", "we won't let you search" and "we will rather die than surrender" could perhaps be examined under the aspects of Art 265 TPC "prevention of duty" and have already been analysed above, however they certainly entail no insulting components.

The fact that the prosecutor does not distinguish between evidence amounting to the one crime and evidence amounting to the other, but instead mixes it up without any explanation on the connection of evidence to specific events and alleged crimes, clearly violates Art 170/4 TCPC, which determines that "the events that comprise the charged crime should be explained in accordance to their relationship to the present evidence". The prosecutor does not make any effort to keep the two allegations apart and does not further elaborate on them individually. Therefore, it is left to the reader's own logical approach to analyse the statements and draw the correct conclusions as to which evidence is presented in regards to what offence. This of course constitutes a huge defect of the indictment and is not in accordance with Turkish law.

Consequently, only following statements remain to be assessed in terms of Art 125 TPC: "you low-life losers", "you scumbags" and "even the Gülenists were better than you". Particularly the first two statements might fall within the scope of an "insult" and could be seen as incriminating evidence for

attacking someone's honour by swearing. However, when evaluating the events, the overall stressful and chaotic atmosphere should be kept in mind and included into considerations. Prosecutors should at all times remain impartial in their investigation and evaluate the events fairly and well-balanced. They should present the evidence clearly. In the end, it will be up to the court to decide whether the offence of "insult" was committed.

In conclusion, the prosecutor did not act in conformity with Turkish law. He failed to attribute the various pieces of evidence to specific suspects and withheld legal arguments and interpretations all together. Every indictment should clearly list who is accused of what offence based on which evidence. The prosecutor did not only fail to give comprehensible clarification on which individual made above-mentioned statements but also deemed it unnecessary to explain where he found the evidence (namely the statements) he presented in the indictment. Furthermore, he did not explain the two offences of "insult" and "prevention of public duty" separate from each other in accordance to their relationship to the evidence in violation of Art 170/4 TCPC.

Assessment in terms of International law

The missing diligence in terms of correct attribution of pieces of evidence to a specific person is alarming and severely compromises the lawfulness of the whole process. The right to a fair trial as set out in Art 6 ECHR is tremendously affected by the prosecutor's general approach to the present investigation, especially the seemingly careless way he attributed the statements to all 22 suspects. Without plausible explanation he accused all of them of the serious offence of "insult against public officers", thus opening up room for doubt in regards to his own impartiality and fairness.

According to Principle 13/b UN Guidelines on the Role of Prosecutors, a prosecutor "should 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". Furthermore, the already mentioned Principle 14 stays relevant in this context as well.

The indictment lacks a fair and detailed evaluation of the different positions of the police officers on the one hand and the journalists on the other. The prosecutor did not elaborate on why the journalists denied the accusations and did not pay enough attention to the fact that an "insult" is not an offence that can be committed collectively. Each and every individual has to set a behaviour that amounts to the alleged crime. In the eyes of an objective reader, it seems obscure that all 22 suspects are accused of saying the exact same words. Even if some of the suspects did, it still lies within the prosecutor's responsibility to filter the information and only indict the individuals responsible. For all others, the proceedings should not have been continued, especially in case of doubt.

2.5 Procedural Concerns

Finally, we would like to address some severe procedural concerns that came up while we were analysing the indictment.

Our first concern is regarding the lack of information about the arrest of the editor-in-chief and the managing editor during the raid. In the beginning, the indictment gives broad background information about the investigation phase against the Özgür Gündem newspaper leading up to the raid. It goes into detail about accusations that the newspaper has allegedly been acting "like the media outlet of the terrorist organization", which lead to the decision to shut down the newspaper and to carry out a search on its premises to seize any materials and documents substantiating the pending allegations against them. Details are also given about how the riot police department entered the property, read aloud the order of the Istanbul 8th Magistrates Court in the presence of a lawyer of the Istanbul Bar Association and informed the Özgür Gündem employees and the other journalists who were present, about the search that would be carried out, explaining the procedures to editor-in-chief İnan Kızılkaya and managing editor Bilir Kaya.

This is where the detailed account of events stops, and the indictment's narration quickly jumps to when the police were attempting to detain both İnan Kızılkaya and Bilir Kaya, without giving any context or previously mentioning any arrest warrants pending against them. Since the indictment refers to these arrests as the moment the 22 suspects started offering verbal and physical resistance, it

seems fundamental to give some information as to why the two were being detained in the first place. Additionally, neither the editor-in-chief, nor the managing editor are listed as suspects in the present indictment.

Upon some background research, we are now assuming that arrest warrants against both individuals were in fact issued around the time the search warrant was issued. But reading the indictment without this background knowledge, it seems like the arrests were made without any arrest warrants and even before anything incriminating during the raid had happened, leaving the reader confused about the chronological order of arrest and crime and therefore questioning the legal reasoning and legitimacy of the arrests.

Assessment in terms of Turkish law

As a recurring topic in our report, our main procedural concern was that throughout the entire document, there are no separate claims made against the individual suspects. All charges and accusations are held against all 22 suspects. Due to the nature of the particular crimes, they are being charged with, generalised allegations can never constitute sufficient evidence against all individuals. Art 125 TPC for example, requires a person to attack someone through swearing. Regardless of whether the evidence constitutes an actual violation of Art 125 TPC, it cannot possibly be argued that every single person was shouting the exact sentences as quoted by the prosecutor as evidence at the exact same time. The same holds true for Art 265 TPC, as there are no specifics given about the journalists' alleged "use of force or threats" to link the crime, they are all being charged with, to individual actions.

Once again pointing towards Art 170/2 and 4 TCPC, all events that comprise the charged crime must be based on sufficient suspicion and must be linked to the presented evidence. Since the connection of the crime to the act in this indictment is particularly weak, we can't help but wonder whether the prosecutor's goal was to charge the suspects with any crime that seemed applicable, regardless of factual evidence.

Assessment in terms of International law

In this context, we would like to address a report from March 2016, submitted by the Human Rights Foundation of Turkey (HRFT) to the UN Committee against Torture as an alternative to the replies of the Government of Turkey to the list of issues prior to the submission of the fourth periodic report (LoIPR) from January 2014. In it, the HRFT voices concern about a significant increase in reported cases of torture and other forms of ill-treatment by police officers, occurring in police vehicles, confined areas, streets, homes, areas of demonstration or other unofficial places of detention in Turkey. The HRFT then presents statistics and graphics that reveal a connection between cases where victims reported their allegations against officers, and an observable increase in counter-charges against these victims. According to this report, particularly Art 125 and 265 TPC are being used to file charges against people who reported police officers for use of excessive force. These two articles of the TPC are therefore said to be "commonly hanging over the population's head like the sword of Damocles", which is why the HRFT calls this practice a "counter-charge phenomenon" and sees in it a method of intimidation.

We cannot say for certain if these allegations can be connected to the present case. Nevertheless, the HRFT's findings had to be mentioned, as we cannot ignore their potential repercussions for our analysis and need to express our concern about these statistics. In light of this counter-charge phenomenon, the fact that all 22 suspects were arrested during the raid for allegedly violating Art 125 and Art 265 TPC, becomes additionally problematic in terms of Art 5 ECHR. This Article protects the right to liberty and security by stipulating that no one shall be deprived of their liberty unless in accordance with a procedure prescribed by law.

Since this case centres around a police raid on the premises of a newspaper critical of the government, the issued indictment additionally causes a particular uneasiness in regards to the Right to Freedom of Expression and Freedom of the Press, as protected under Art 10 ECHR. By now it is internationally known that there are multiple trials against many journalists connected to the Özgür Gündem newspaper.

Conclusion

To conclude, we would like to summarise our main concerns and address what can be done to improve the quality of indictments like this in order to return to the core values of a fair trial and ensure commitment to the principles of the rule of law.

What is outlined in the indictment, is barely more than a narration of a rather chaotic raid. Given the characteristic concept of any raid though, chaos seems to be an inevitable element. It is therefore all the more crucial for a prosecutor to dissect the event into clearly structured sections in order to then connect each presumed illicit conduct to a particular charge. What we see instead in this indictment, is a general recount of events during the raid. It lacks a comprehensible and transparent line of argumentation to link each incident to the applicable articles and subparagraphs, which ultimately deprives the charges of their plausibility.

To improve the quality of this indictment and subsequently ensure a fair trial for all defendants in terms of Art 6 ECHR, it is crucial to follow a clearly structured format, using paragraphs and punctuation.

While it is certainly useful to give some background information to create context, there should also be a comprehensive list of evidence in more detail at the beginning of each section for every single offence.

Most importantly, every evidence in the indictment needs to be clearly linked to the charged crime. It does not suffice to assign general evidence to a charge. The reasoning needs to be precise and each argument needs to refer to the specific subparagraphs. If a piece of evidence cannot be properly linked to a particular crime, it cannot be included in an indictment, as prosecution on grounds of speculations must not be continued.

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Legal Report on Indictment

Demirel & Mavioğlu

Ezio Menzione
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03

Legal Report on Indictment:
Demirel and Mavioğlu

Summary of Case Background Information

Journalist Ertuğrul Mavioğlu and film-maker Çayan Demirel co-directed the documentary Bakur, picking up moments from the life of the Kurdistan Workers' Party (PKK/KCK) brigades operating in South-East Turkey, that is, in the Kurdish territory of Turkey. Following the subjects over a period covering the different seasons, the documentary was shot live in 2013. It was scheduled to premiere on 12.04.2015 at the Istanbul Film Festival, but authorities blocked it because no application had been made for the necessary entry in the dedicated public registry, resulting in failure to obtain the relevant licence. The document was then aired at several foreign festivals, earning success and recognition. Still lacking the necessary licence, on the following month (namely on 06.05.2015) the documentary was shown in the hall of a cultural centre in the city of Batman, close to the Syrian border.

This is the start of the judicial issue we focus on. In relation to the documentary, the Public Prosecutor's office in Batman brought an indictment against the two directors for disseminating propaganda in favour of terrorism, invoking the 1st and 2nd subparagraphs of Article 7/2 of Anti-terror law No. 3713, aggravated by the use of an audio visual medium (cinema) for such purpose.

The Court holding territorial jurisdiction rejected the charge twice for procedural reasons before holding the trial against the two directors after admitting the charge.

Mavioğlu was heard during the investigation stage and pleaded not guilty, invoking the right of assertion of thought and expression.

Demirel issued a very short statement to the Court, pleading not guilty because he had acted in the exercise of a constitutionally guaranteed right, and he didn't even understand why he had been brought to trial. Although he had been severely ill and suffering from serious mobility problems since March 2015, essentially unable to move, he still appeared twice before the judges.

The trial of first instance ended on 18.07.2019, with the two defendants sentenced to 4 years 6 months (minimum sentence 3 years, brought to the above period because an aggravating circumstance had been found and applied).

Currently, an appeal against the ruling of the Court of Batman is pending before the Gaziantep Regional Court of Appeal.

The PKK is classified as a terror organisation by the Turkish judicial system, by Europe and by the USA, but not by the UN. Between 2013 and 2015, talks were held between the Turkish Government and the organisation, which had chosen to lay down arms and start a process which was supposed to result in the administrative autonomy of the Kurds and, therefore, peace between the Turkish and the Kurdish people. Such process - the Dolmabahçe Agreements - was abruptly interrupted in early 2015 following a unilateral decision by the Government of Turkey, which resumed the "hunt" against PKK members with extremely serious repercussions on the civilians in the Kurdish territory of Turkey.
We will examine the indictment against Mavioğlu and Demirel, which has led to their conviction in terms of their right to freedom of expression in general, but firstly by examining the indictment in the light of

internal Turkish legislation, in the context of a series of judgements of the Turkish Constitutional Court, and finally in the context of International legislation - more specifically, the principles expressed by the ECtHR, which has repeatedly examined Article 7/2 of Law No. 3713.

3. Analysis of the Indictment

3.1. The indictment as compared to Turkish internal law

The rule referred to in the 1st and 2nd subparagraph of Article 7/2 of Anti-terror law No. 3713 reads as follows:

> *"Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or inciting the use of methods constituting coercion, violence or threats shall be liable to a term of imprisonment of one to five years."*

Such phrasing comes from the amendment to the Anti-terror Law introduced by Law No. 6459 of 30.04.2013, which has limited the offence to those "justifying, praising or inciting" to methods involving "coercion, violence or threats", Said amendment was due to the numerous interventions by the ECtHR, condemning Turkey because the previous phrasing of the law contravened the right of expression.

The text of the article in question was then further amended by means of Law No. 7188 of 17.10.2019, establishing that both Article 7/2 of Law No. 3717 3713 and Article 215 of the TPC should provide for an offence only in case of actions causing a clear and imminent threat to public order. Further specifying that any expression of thought not exceeding the limits of reporting or simply criticising do not constitute the crime in question.

Such legislative change was obviously inapplicable at the time of the indictment and the relevant judgement of first instance were issued (both before the amendment), but it will certainly apply to the appeal, which is still pending, given that the latest law is more favourable to the defendant. We simply notice that the principles inspiring the novelty of 2019 should have inspired the decision of first instance as well, these being in line with the general principles on this matter.

Note also how the wording "any person" refers to anyone - including those who do not belong to the organisation in favour of which the propaganda is being disseminated - while other offences, as those provided for by Article 7/1 of Law No. 37173713, are specific to those who "establish, lead, or are a member of a terrorist organisation".

Over the last years, very many cases of incitement for violations of Article 7/2 of Law No. 3713 were reported in Turkey:

10.547 in 2013
15.815 in 2014
13.608 in 2015
15.913 in 2016
24.585 in 2017
17.077 in 2018

Please note that data from 2017 and 2018 refer to violations of the whole of Law No. 3173[1].

Such data include cases, like the one in question, involving journalists, politicians, artists, teachers, opinion makers, bloggers, advocates for human and civil rights, etc[2].

The indictment is relatively short (less than two pages) and not dozens or even hundreds of pages long, as is often the case with system in Turkey, resulting in the facts underpinning the charge getting lost and in the failure to understand what the accused must defend themselves from. And yet, regardless of the brevity, it is not clear what such "propaganda" consists of and, most of all, which parts of the movie contain such "propaganda".

Article 170 of the Turkish Criminal Procedure Code specifies what the content of the indictment should be - aside from formal and identification elements, paragraph 2 3 lists:

p.h) the crime charged and the related articles of applicable Criminal Code;
p.i) Place, date and the time period of the charged crime;
p.j) Evidence of the offence."

then, and this is what we intend to underline, paragraph 4) provides that:

> *"the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence"*

and finally, in paragraph 5:

"the conclusion section of the indictment shall include not only the issues that are disfavorable to the suspect, but also issues in his favour" (the underlining is ours).

Therefore, paragraph 5 reads that the facts representing the alleged offence must be fully detailed.

The crime of "disseminating propaganda" (Article 7/2 of Anti-terror Law No. 3713, as amended) in favour of a terror organisation consists in legitimising and condoning the methods used by such organisation constituting coercion, violence or threats or incitement to the use of such methods to perpetrate the crime of terrorism.

As it can easily be seen, the definition of propaganda is quite vague because "legitimising" and "condoning" violence can also simply be intended as the expression of an opinion on the legitimacy of such methods.

"Propaganda" actually consists of an attempt to convince others of the legitimacy of an organisation, with the main purpose (whether achieved or not) of making others adhere to said organisation. In the absence of such purpose, we are in the presence of an expression of a conviction or a free thought[3]. The point is that, in criminal law, uncertainty about the incriminating rule is not admitted or should at least be kept to a minimum. This is not the case for the rule invoked by the indictment in question (Article 7/2 of Law No. 3713).

More specifically, the content of the incriminating object (a documentary) is examined in a paragraph at the end of page 2 of the indictment:

> *"The documentary demonstrated that (it) featured the lives of the members of the PKK/KCK terrorist organisation, the rural activities carried out by the members of the organisation and the dialogues that would reflect the military and political ideology of the PKK/KCK terrorist organisation; that (it) recorded the opinions of Murat Karayilan - one of the top leaders of the PKK/KCK terrorist organisation on the ideology and the aim of the PKK/KCK terrorist organisation - and that almost all of the footage featured the members of the organisation with weapons in their hands."*

Therefore, the documentary is a representation of:

the lives of the members of the terrorist organisation;
more specifically, the rural activities of such members;
the dialogues that reflect their military and political ideology;
the opinions of one of its top leaders;
the fact that the footage shows the members of the organisation almost always with weapons in their hands.

Such a list shows how the documentary is an accurate picture of the way the members of PKK/KCK live and organise themselves, no more and no less.

Just as if, instead of a documentary, the two directors had used an instrument such as a journalistic reportage - which, after all, is a documentary.

The indictment seems to focus mostly on the fact that the terror organisation had turned into an

organisation made up mostly of women and, therefore, a female movement.

And this is a fact, maybe a political one, but in itself, it is definitely not even a clue of a terrorist organisation. If anything, it is an element underlining the level of consideration for the civil rights of each member (be it a man or a woman) within an organisation.

The directors have reported what was before them, and it is hard to imagine that anyone watching the documentary may be induced to adhere to the terror organisation: and yet, this is exactly the dividing line between reportage/documentary (a free expression of thought) and propaganda.

The indictment should have indicated which parts, statements, comments, images of the documentary were intended to incite those watching it to adhere to the terrorist organisation.

Article 7/2 of Law No. 3713 itself provides for the following to be constituent elements of terrorism propaganda:

a) covering the face, in whole or in part, during demonstrations;
b) bearing insignia and standards of the terrorist organisation, shouting slogans or making announcements using audio systems, or wearing uniforms of the terror organisation.

These are specific hypotheses of propaganda.

It is true that the documentary often shows militants wearing uniforms or shouting slogans - nonetheless, the norm aims at punishing those committing these actions in the way provided therein, and not those who film people wearing uniforms or shouting slogans.

And indeed, in the indictment these elements are not deemed as evidence supporting the claim of dissemination of propaganda in favour of a terrorist organisation. Therefore, it is to be assumed that the person drafting the indictment had it clear that filming such behaviour does not represent an act of propaganda.

The point, however, is that there is no indication of any part of the documentary, albeit short, where an incitement to join an organisation or a propaganda element can be detected or understood.

And yet, this is what should have been listed in the indictment in order to put the co-directors in a position to defend themselves - this is precisely what the indictment consists of: making the defendants aware of every single element they are called to give reasons for and defend themselves from.

We have already seen how Article 170 of the Turkish Criminal Procedure Code provides that the Prosecutor's attention does not have to be limited to the facts against the suspect but also to those in his or her favour.

Within the Bakur case, it seems important to recall at least 3 facts in favour of the defendants which should have been considered by the Prosecutor while drafting his indictment:

a) Not all of the International community agrees on considering PKK as a terror organisation. It was declared as such by Turkey, obviously, Europe and the United States, but not by the United Nations;

b) The documentary was shot in the summer and fall of 2013, a time when serious reconciliation talks between the Government of Turkey and the ethnopolitical Kurdish community (which PKK is obviously a part of) were in place, so much so that, following a request from their acknowledged leader Ocalan, the Kurds had laid down their arms.

c) Most of the documentary - and here lies the novelty compared to what other media had already told - is dedicated to the role achieved within PKK by women, including highest ranks and leadership level. In the indictment, this should have been considered as the acknowledgement of a civil right and not as an accusation.

Each of these three elements, and all of them as a whole, make it possible to question the presence

of the crime of propaganda and, therefore, should have been taken into account within the indictment which, on the contrary, does not deal with them.

The indictment does not take into account any of these three elements (13 a-b-c). Indeed, one of the sentences ("PKK turned to become a women's movement") seems to point at the ever-increasing role of women within the organisation as an element of the crime or maybe as an aggravating factor.

More specifically, as underlined by journalist Mavioğlu at his hearing, in relation to point 13-b, the indictment reads: "the documentary was filmed in 2013 when the decision and the peace process were still ongoing, and they shot the documentary to support such peace process."

The statement is quoted but is not taken into due consideration or accorded any at all, while it should have been to comply with Article 170/5 of the Turkish Criminal Procedure Code.

3.2. The indictment and the The Constitution of the Republic of Turkey in matters of freedom of thought and right of expression.

The Turkey's Constitution acknowledges the right to freedom of thought and opinion. Article 25 reads as follows:

> *"Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose, nor shall anyone be blamed or accused because of his/her thoughts and opinions."*

However, we know well how freedom of thought or opinion is nothing without freedom of expression. In fact, Article 26 provides that:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities";*

However, this same article provides for a system of licensing and, finally, for the possibility to restrict such freedoms on grounds of national security, public order, public security or integrity of the nation.

However, in the case in question, in addition to freedom of thought, what is at stake is the freedom of science and the arts, as provided for by Article 27 - and there is no doubt that we are dealing with art (film art, specifically) and science (journalism)[4].

This framework of reference should have been taken into account in the indictment and be considered as the context within which to assess the alleged unlawfulness of Bakur.

It is understood that the Prosecutor, albeit not explicitly, intends to regard the documentary as an exercise of freedom that can be restricted on grounds of "national security, public order, public security, and safeguarding of the fundamental characteristics of the Republic."

In order to assess the relationship between the indictment and the provisions of Turkey's Constitution, we benchmark it against a recent judgement by the Constitutional Court in relation to the Academics for Peace (AfP) case[5].

There are many cases in which the Constitutional Court of the Republic of Turkey has taken into account the balance between freedom of speech and expression (as granted by Article 26 of the Constitution), and the need for the State to safeguard itself from political attacks, especially for facts and events happening where groups it deems as terror groups are active.

But the AfP case actually bears many similarities to the Bakur case. The count of indictment (Article 7/2 of Law No. 3173) is the same, and the terrorist group around which it is built (PKK) is the same.

The main differences lie in the fact at the centre of the accusation: on the one side, for Bakur, a documentary showing the life of a brigade of the PKK; on the other side, an openly political declaration asking the Government to cease the "massacres", "murders" and "tortures" perpetrated by Turkish forces

against the Kurdish people (and not only) during the winter of 2015/2016 in the cities and towns of East and North-East Turkey.

It is to be acknowledged that the political impact - and, therefore, the danger (from the point of view of the Government of Turkey) - is certainly more considerable in the AfP declaration than in the documentary, which does not intend to incite to anything but rather, only to represent an aspect of the life of PKK.

And yet, on the basis of the declaration signed by 2,212 researchers and professors (both in Turkey and abroad), the Court has established that the freedom of expression provided for by Article 26 of the Constitution should prevail, despite underlining that the content of the declaration is not shared by the majority of the country. Such internal division seems to be mirrored by the division of the Constitutional Court at the time of the decision: 8 were in favour and 8 were against, with the former prevailing because of the vote of the President of the Court, who believes the limitation of the freedom of expression is "unacceptable", just as the Court does by means of its decision. The declarations on the AfP manifesto remain within the limits of freedom of expression: although they heavily criticise authorities with a harsh, accusatory and unilateral language, they are not such as to incite violence or to represent a threat to the society, the State and the democratic political order, so as to encourage people to perform illegal actions. Yet, it is indeed in these cases that "considerable caution must be exercised when showing a legal reaction to such expressions", keeping in mind that "a similar reaction sets a strict limit to the right of the public to be informed on particularly significant facts from a perspective other than that of the majority." A "higher degree of tolerance" is mandatory, as required by democratic pluralism[6]. The Court adds that this necessary caution is mandatory because the norm provides for the deprivation of liberty whenever a violation occurs, and therefore such norm cannot be interpreted in a restrictive way.

Having said this in relation to the declaration signed by AfP, it is easy to see how the Bakur documentary is framed within a context that is even broader and more innocuous for State security, for at least two main reasons:

a) it does indeed contain elements that are critical towards the Government of Turkey, but there is no incitement;

b) the declaration signed by AfP was set amid a political-military crisis (and this is what justified it), whereas Bakur was conceived and filmed at a time when peace talks between the Government and the PKK allowed to lay down the arms and suggested that a peace agreement was soon to be found.

Another case sharing similarities with the Bakur one and which came under scrutiny by the Constitutional Court was the Ayşe Çelik v Turkey[7] one - a very typical case of freedom of expression. It revolves around a declaration made on 08.01.16 during a TV show, when Ayşe asked viewers "not to keep silent" about what was going on in the South-East of the country, whilst the target of government military measures, and about the conditions of minors and mothers under the curfew imposed by the Government.

A critical and heartfelt political declaration, which was certainly more immediately incisive than the Bakur documentary. Sentenced to 1 year and 3 months for the violation of Article 7/2 of Law No. 3713, the defendant resorted to the Regional Court of Appeal and to the Court of Cassation invoking, among others, Art. 10 of the ECHR on freedom of expression. But it was the Constitutional Court only, to which Ayşe Çelik then appealed, who acknowledge her right with the judgement of 09.05.19.

3.3. The Bakur case in the light of International legislation

a) The indictment must be first and foremost examined in the light of UN Guidelines on the Role of Prosecutors (Principles 10-20). It can be said that such norms foresee an active role for prosecutors in ensuring the legality of the indictment.

More specifically, Principle 12 of the Guidelines provides that:

> *"Prosecutors shall, in accordance with the law, perform their duty 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."*

That is to say that we expect the prosecutors in the investigation stage as being meticulous in the legality of evidence, observing reasonable doubt and taking into account the evidence in favour of the defendant as well.

Finally, Principle 18 of the Guidelines highlights the need for Prosecutors to put an end to the investigation if the accusations are unsubstantiated.

b) While this is the context within which the Prosecutor must act to assess whether to issue or not an indictment, it is in relation to the criteria of legitimacy that one must look at the single case. On this regard, ECtHR spoke out about Turkey several times over a very long period of time, almost always and continuously censoring the country for its anti-terror rules and, more specifically, for the propaganda law (so much so that, as we have seen, Turkey had to repeatedly and significantly intervene on article 7/2 of Law No. 3173)[8].

Article 6 of the European Convention underlines the need for the defendant "to be informed promptly […] and in detail, of the nature and cause of the accusation against him/her". Instead, as we have already seen, the indictment is generic. Not only because the crime of "propaganda" is, in itself, generic and does not meet the criterion of legal certainty - which is at the base of a (supposed) criminal liability (nullum crimen sine lege, as the Latins said) - but also because, in this specific case, generic reference is made to the Bakur documentary, but never is it specified which parts of the documentary (images, sentences, or combination of the two) can be deemed as elements of propaganda - that is, such as to incite to adhere to the terror organisation.

c) Attention is also drawn to the fact that the International Association of Prosecutors itself, founded at the UN headquarters in 1995 (and, therefore, shared by Turkey too), calls for the guarantee 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 a criminal proceeding 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".

3.4. Article 7/2 of Law No. 3713 and international rules.

At the time the indictment was issued, Article 7/2 of Law No. 3713 read:

> *"Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or encouraging the use of methods constituting coercion, violence or threats shall be liable to a term of imprisonment of 1 to 5 years." The words from "justifying" to "intimidation" were introduced by way of an amendment on 30.04.2013, as concrete elements to identify the crime of "propaganda" in accordance with the principles of freedom of expression as outlined in the case-law of ECtHR and, in particular, with regard to Turkey. Therefore, Article 7/2 will have to be applied in line with the principles of freedom of expression, as formulated by ECtHR.*

These include the principle that the term "propaganda" lacks that specificity and concreteness that must characterise criminal provisions;

In doubtful cases, it is not possible to resort to Article 7/2 through the analogical application in malam partem, that is, against the defendant

There is then the issue of the psychological element of the crime: did the person intend to express an opinion on political or social issues (which is legitimate) or to incite violence (which is not)?

What is the degree of connection between the action (words or images) and its legitimate intended purpose (incitement)? ECtHR is clear on this, stating that there must be a "clear and direct connection between words and violence in order for the restrictions to the freedom of speech to be justified." ECtHR, Çamyar and Berktaş v. Turkey (appl. No. 41959/02, dec. 15/2/11). Gül and others v. Turkey

In the case in question, the issue of malice refers to the intent to damage the integrity of the country: this is not the case with Bakur, because just when the documentary was being shot, Turkey and the PKK

were holding talks to reach an agreement and establish peace. Therefore, the documentary is simply a realistic representation of the interlocutor of the Government of Turkey.

The crime referred to in Article 7/2 of Law No. 3173 can also be clarified by Article 220 of the TPC, especially by paragraphs 6, 7 and 8, which unsurprisingly, in providing for the crime of propaganda in favour of a criminal organisation, explicitly state that the action must be specific and, most of all, that it has to be put in place "knowingly and willingly" (c. 6).

Furthermore, it provides for a penalty ranging from 1 to 3 years, whereas in the anti-terror law, such penalty ranges from 1 to 5 years (to which, as in the case in question, the aggravating circumstance of the use of a medium other than the press applies). This makes a great difference because, even when there is no full clarity in determining it, sacrificing the right to freedom of expression can be justified if it leads to lower sanctions but not to higher ones (even 7 years and 6 months).

The reasons for restricting the freedom of thought must be "relevant and sufficient": when assessing such characteristics, the criteria and limits set forth from 1 to 5 will have to be taken into account. As stated very well in the "Expert Opinion" by Helen Duffy et al. for the Turkish Constitutional Court in the Ayse Çelik v. Turkey case (appl. No. 2017/36722), this will be a "holistic" assessment that does not disregard the certainty of the indictment, the subjective element (malice or intent, generic or specific), the circumstances under which the actions representing a crime were performed, and the amount of the penalty: all these elements and several others will allow to establish whether the indictment drafted by the Prosecutor was vitiated by illegality and, therefore, whether it could have been issued or not.

4. Conclusions and Recommendations

All the pleas of illegality of the indictment we indicated (in relation to substantial Turkish law; in relation to procedural Turkish law; in relation to the indications by the Turkey's Constitutional Court; in relation to International legislation) can be summarised by two main reasons:

the indictment is generic and vague; there is no indication of specific facts (declarations, comments, scenes from the documentary) that can be deemed as "disseminating propaganda" and about which the defendant must or is able to defend himself from;

the presence of a conflict with the freedom of expression recognised by Article 26 of the Turkey's Constitution, by Articles 10 and 11 of ECHR, and Art. 19 and 21 of the ICCPR.

It must be reiterated that a documentary is a representation of a reality (in this case, some PKK formations) but that it does not identify with what it represents. The documentary can represent such aspects with a variable degree of sympathy or aversion. Still, in order for there to be "disseminating propaganda," there must be a clear intent to praise what is being represented and the purpose to cause a political or even factual adhesion to the represented organisation: objective element and subjective element or malice of the crime. Both these elements must be asserted in a precise and clear manner in order for the suspect, which is intended to become a defendant, to be able to defend himself or herself.

The fact that the indictment is generic is a symptom of how it derives from and limits itself to a political declaration. Just as it cannot support a technical defence, a mere political declaration is not enough to represent a technical accusation.

Unlike many other cases where the indictment was several pages long and it was not clear which of these contained the facts the suspect was held to account, in this specific case it is quite short - as it should be - but still lacks a clear reference to the facts constituting the violation of a criminal law.

This is all the more serious because the norm (the concept of propaganda) has very blurred boundaries and too often it represents a violation of the right of expression or even of freedom of thought.

We feel like putting forward two recommendations:

a) When drafting an indictment, prosecutors must adhere strictly to the facts behind the accusation, without leaving out those that go towards the affirmation of non-liability, and should never limit themselves to political stances.

b) The Turkey's political authority should re-assess Article 7/2 of Law No. 3713 as far as the expression "disseminating propaganda" is concerned: despite the changes introduced in 2013 and 2019, this term is still not as precise and concrete as international legislation demands it to be.

About the author

Ezio Menzione specialises as a criminal lawyer, has been President of the Criminal Chamber of Pisa several times, has been a member of the Council of the Criminal Chambers and has worked in the role of defence lawyer in numerous trials of national importance.

He has always been interested in minority rights, especially in terms of sexual orientation. On the subject he has published numerous articles and essays and in 1996 the book "Rights of homosexuals".
He regularly participates in conferences and seminars on the subject of minorities.

Endnotes

1. Cfr. Judicial Statistics of the Ministry of Justice, 2018, page 24.

2. Some of the cases that have made the headlines, besides those we will be examining in detail, are: Main Özgür Gündem case (journalists); Eren Keskin case (journalist); Selahattin Demirtaş case (HDP member); Figen Yüksekdağ case (HDP member); Idris Baluken (HDP member, sentenced to 16 years); many other cases involving HDP administrators and MPs, especially in the South-East of Turkey; 225 cases against Human Rights Association (IHD); Avesta Publishing House cases (publisher, for books published between 2001 and 2015).

3. In relation to the blurred boundary between propaganda and free expression of thought, see - among others - DUFFY et al., Expert Opinion for the Turkish Constitutional Court in the case Ayse Celik v Turkey - appl.n.2017/36722, p.22.

4. Not many documentaries have actually been sent to trial after the one we are dealing with. We found:

   Veysi Altay – Dicle Anter for the Nuju documentary (because of its poster showing a YPG flag);

   Kurbettin Cebe for the Roza – Iki Şehrin Ülkesi documentary, for which he was sentenced to 2 years and 4 months in 2020;

   Yunus Ozan Korkut, together with 4 actors for Benim Varoş Hikayem (which is more of a film than a documentary), all acquitted in 2019.

5. Zubeyde Fusun Ustel and Others vs Turkey, appl. No. 2018/17635 decision 26/7/19.

6. The words in quotes are by DUFFY et al. cit.

7. Ayşe Celik v Turkey , appl.2017/36722 dec.9/5/19

8. In addition to the AfP and Çelik cases mentioned above, we recall, among others:

   Halis Doğan v Turkey – appl. No. 71984/01 – dec.25/7/06
   Özgür Gündem v Turkey – appl. No. 23144/93 – dec.16/3/2000
   Surek v Turkey – appl.No. 24735/94 – dec.8/7/99
   Surek v Turkey – appl. No. 26682/95 – dec.8/7/99
   Gerger v Turkey – appl.No. 24919/94 - dec.8/7/99 (grand Chambre)
   Karataş v Turkey – appl. No. 23168/94 – dec.8/7/99
   Ceylan v Turkey appl. No. 23556/94 – dec.8/7/99
   Belek v Turkey – appl.s No. 36827/06, 36828/06, 36829/06 – dec.20/11/12
   Gündüz v Turkey – appl. No. 35071/97 – dec.4/12/03
   Öztürk v Turkey – appl. No. 22479/93 - dec. 28/9/99 (Grand Chambre)
   Imret v Turkey – appl. No. 57316/10 – dec.10/7/18
   Zana v Turkey – appl. No. 18954/91 - dec.25/11/97
   Yalcınkaya and others v Turkey – appl. No. 5497 – dec.24/6/14
   Güzel and Özer v Turkey – appl. No. 4870/02 – dec.8//6/10
   Yılmaz and Kılıç v Turkey – appl. No. 68514/01 – dec.17/7/08

04

PEN NORWAY

Legal Report on Indictment

Bülent Şık

Vidar Strømme
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04

Legal Report on Indictment:
Bülent Şık

1. Introduction

The case against Bülent Şık was based on his publication of important information on dangerous environmental pollution. After losing his position as a researcher, he found out that the Ministry of Health did not inform the public about the research results that he was working on. He was of the opinion that the public should be aware of the dangers, so he published parts of the information himself in his articles.

Thus, the core of the case is his exercise of freedom of expression and academic freedom. The essence of the indictment is also a description of these acts.

2. Summary of case background information

Bülent Şık was an academic and Technical Assistant Director of the Food Safety and Agricultural Research Center at Akdeniz University. The research centre is a centre established to work with toxic chemical substances in foods, water and the environment and to support scientific studies on this subject. Bülent Şık worked at the center from 2010 onwards. From 2011 to 2016 the center worked on a project titled "The Evaluation of Environmental Factors and Their Impacts on Health in Kocaeli, Antalya, Tekirdağ, Edirne and Kırklareli Provinces", led by the Ministry of Health. An aim of the project was to determine whether there had been conditions posing a threat to public health. The project consisted of 16 sub-projects, such as preliminary diagnosis of cancer, exposure to heavy metals and trace elements, environmental pollutants, pollutants in certain waterways, soil, food and air, and preventive healthcare. Bülent Şık took part in the project from the beginning. Throughout 2015, he worked on the assessment of data and project results, and also participated in a general evaluation meeting in December 2015.

Bülent Şık was also a signatory of the 2016 Academics for Peace petition "We will not be party to this crime". His assignment at the center was not extended in January 2016, and soon after he was dismissed from all the research projects in which he participated as an executive and as a researcher, including the project mentioned above. His employment as an academic was terminated pursuant to an emergency decree on November 22, 2016.

The results from the project were not published by the Ministry of Health after the evaluation at the end of 2015. As he had participated in the project and also the evaluation, Bülent Şık had knowledge about the information. He had also made a copy of the analysis reports from his office computer, just to have as a backup.

One month after he had been fired, his younger brother, investigative journalist Ahmet Şık, was taken into custody, along with 17 other colleagues and executives of the newspaper Cumhuriyet.

After Bülent Şık understood that the results of the research were not going to be shared with the public, he started to analyse the material he had downloaded from his office computer. He shared the research results in a series of articles in the daily newspaper Cumhuriyet and on Bianet (an online media platform with a focus on human rights). The articles were published in Cumhuriyet newspaper from 16 to 19 April 2018.

Already on 17 April 2018, the Ministry of Health made a criminal complaint, and on 16 July 2018 the indictment against Bülent Şık was issued.

The first hearing was held on 7 February 2018. For this hearing, he had prepared a written defence statement, focusing on the reasons why he as an academic and researcher had an obligation to publish the important information that the Ministry did not publish[1].

After the first hearing, the Court asked the Ministry of Health to clarify any legal basis for a ban on publishing the information. The files of the case were also handed to an expert, to inspect whether the report was published by anyone other than Bülent Şık.

The second hearing was held on 30 May 2019. In this hearing the Ministry of Health answered the question from the first hearing, and stated that there was no specific legislation on keeping the information secret. His duties were in line with his contract as a researcher. Bülent Şık was given time to prepare his final statements.

The third hearing was held on 26 September 2019. Bülent Şık was acquitted of securing prohibited information (TPC 334) and of disclosing prohibited information (TPC 336). He was however sentenced for violation of the disclosure of confidential information in respect of a duty (TPC 258), and was sentenced to one year and three months in prison. The execution of the prison sentence was not suspended, as he had not shown any remorse about the crime he had allegedly committed.

He appealed this sentence to Istanbul Regional Court of Appeal, and on 29 April 2021 Bülent Şık was acquitted also for this remaining part of the case. The Court stated that his research could not be classified a confidential document or secret. And according to the Court, the Ministry of Health should have revealed the information for the benefit of the public themselves[2]. The prosecutor of the Istanbul Regional Court of Appeal objected to the verdict of the Istanbul Regional Court of Appeal and applied to the Supreme Court. The prosecutor's claimed that the allegation that the acquittal was unlawful. Additionally the Ministry of Health objected to the decision too. The case file will be examined by the Supreme Court and it is still open.

3. Analysis of the indictment

The alleged crimes and legal basis.

The indictment issued on 16 July 2018 specified three alleged crimes, all related to the obtaining and dissemination of the information in the published articles, and based on the following three Articles;

Disclosure of Confidential Information in Respect of a Duty, according to Turkish Penal Code Article 258:

> (1) Any public officer who publishes or discloses any confidential document, decision, order or other official notification under his control, or within his knowledge, by virtue of his office, or who facilitates, by any means, the access to such information by another shall be sentenced to a penalty of imprisonment for a term of one to four years.
>
> (2) The same penalty shall be applicable where a public officer commits such an offence after the expiry of his status as a public officer.

Securing Prohibited Information, according to Turkish Penal Code 334;

> (1) Any person who secures information that, due to its nature, must be kept confidential and the disclosure of such has been prohibited by a regulatory act of a competent authority in accordance with the law shall be sentenced to a penalty of imprisonment for a term of one to three years.
>
> (2) Where this act jeopardizes the State's preparations for war, its effectiveness in war or its military movements, the offender shall be sentenced to a penalty of imprisonment for a term of five to ten years.

Disclosure of Prohibited Information according to Turkish Penal Code 336;

> (1) Any person who discloses information which, due to its nature, must be kept confidential and the disclosure of which is also prohibited by a regulatory act of a competent authority in accordance with the law shall be sentenced to a penalty of imprisonment for a term of three to five years.
>
> (2) Where the act has been committed during wartime or has jeopardized the State's preparations for war, its effectiveness in war or its military movements, the offender shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.
>
> (3) Where the act has been the result of recklessness on the part of the offender, the offender shall be sentenced to a penalty of imprisonment for a term of six months to two years in circumstances described in paragraph one and for a term of three to eight years in the circumstances described in paragraph two.

Deprivation of rights

> The indictment also invoked Article 53 of the TPC. According to Article 53, a person sentenced to a penalty of imprisonment for an intentional offence shall also be prohibited from becoming a member of the Turkish Grand National Assembly and is deprived of rights such as being employed in administrative positions.

The indictment – factual description and application of law.

The part of the indictment describing the factual basis of the alleged crimes is quite short.

Evidence

The indictment refers to the "Investigation report", but the only specified documents are the complaint from the Ministry, a copy of the Cumhuriyet Newspaper dated 16/04/2018, a statement by Bülent Şık, and his criminal record.

It is hard to see that any investigation was carried out, other than reading the mentioned documents. In particular, there is no examination of the importance or significance of the published information, or Bülent Şık's role, duties or rights. Thus, after the first hearing, the Court asked for clarification of the legal basis for the alleged secrecy.

Factual description

The indictment simply refers to the Ministry's complaint, to the articles and Bülent Şık's statement, and then concludes that the above-mentioned articles have been violated;

> *"…an article published in Cumhuriyet Newspaper on 16/04/2018 under the headline "The Hidden Report - Here's How Turkey Is Being Poisoned" and with subtitles "Here's How We Are Being Poisoned - The Study the Ministry Kept Secret - Poison in the Food - Chemicals Everywhere". [The article] published confidential information in a manner so as to lead to public indignation,*
>
> *Although the suspect, in his written statement presented to the Chief Public Prosecutor's Office, declared that he was the author of articles published in Cumhuriyet Newspaper on 16/04/2018 and aimed to share the public health project with the public, inform the public about this issue, to mobilise public institutions that are obliged to solve such issues, and shared information only related to the obligations to protect public health, and published the article within the scope of freedom of expression and the media.*
>
> *The suspect, Bülent ŞIK, whose ID information is written above, has disclosed or publicized the confidential documents, decisions and orders and other notifications delivered to him by virtue of office or facilitated access to such information and documents by third parties. [Bülent ŞIK] secured information that, due to its nature, must be kept confidential and that the disclosure of*

such has been prohibited by a regulatory act of a competent authority in accordance with the law and [the suspect] published this information in Cumhuriyet newspaper and therefore, in line with the explanations above and based on the scope of the file, it is understood that the suspect committed the alleged offence.

It is requested on behalf of public that the suspect be tried by the court and be sentenced under the articles written above that are applicable to the act."

Initial observations – omission of crucial considerations

From a general legal point of view, there are some striking omissions in the description of the alleged crimes.

The basis for any duty of confidentiality is not established specifically.

While Bülent Şık's statement mentioning freedom of expression is referred to, there is no reasoning as to why the indictment is not an interference in or breach of freedom of expression, beyond stating that the information could lead to "public indignation".

Bülent Şık's role as a researcher and an academic is not mentioned.

These omissions are even more striking, because the referred titles of the articles clearly indicate that the public interest of the information should be considered. Faced with an article titled "Here's How We Are Being Poisoned - The Study the Ministry Kept Secret - Poison in the Food - Chemicals Everywhere", it is not sufficient to state that publication could lead to public indignation. It should also be considered whether the publication is protected by freedom of expression and thus not punishable at all.

The indictment in light of domestic law

Article 170 of the Turkish Criminal Procedure Code (TCPC) outlines basic regulations concerning the issuing and content of indictments.

Most of these regulations serve to identify the actions that are considered to be unlawful, and the rules applied, in order for the accused to build a defence against the indictment. The actions and the applied national law are clearly identified, and as such most of the criteria in Article 170 are met.

The indictment is also relatively short, and written in a clear language.

According to TCPC Article 170/6, the conclusion of the indictment shall clearly state which punishment and measure of security is requested to be inflicted. The indictment does however not specify the requested punishment, only that he should be "tried by the court and be sentenced under the Articles".

The major problem with the indictment, is that the actual facts do not seem to constitute a crime at all, when the Articles of the Turkish Penal Code are understood in conjunction with the principles of freedom of expression.

Article 170/2 states that an indictment can only be issued if it is likely that a "crime has been committed", and according to 170/3-h the "applicable" rules shall be specified. If the rules are not applicable, there is no crime. The Prosecutor must obviously have a duty to consider whether the actions fall outside the scope of penal code.

According to Article 10 of the European Convention on Human Rights, any interference in Freedom of Expression must be "necessary in a democratic society", for the specific reasons mentioned in the article. If the state cannot justify an interference according to the strict proportionality test, the interference will also be a violation of the freedom. If the prosecutor finds that an interference in freedom of expression actually is "necessary in a democratic society", the reasons for this should be mentioned in the indictment. In a case involving freedom of expression, the validity of any such reasons will be the crucial points for the outcome of the case. If the reasons for interference in freedom of expression are not given, the accused is not given a fair opportunity of defence.

According to TCPC Article 170/4, the crime shall be explained in relation to the facts at hand, and according to Article 170/5 the indictment shall include issues in favour of the accused. In a case such as this, the aim of these criteria can hardly be met if the indictment does not clarify the reasons for an obvious interference in freedom of expression.

International law; Freedom of Expression and Academic Freedom

The indictment is clearly an interference in the freedom of expression, protected by Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Academic freedom is a part of this protection.

According to the case law of the European Court of Human Rights (ECtHR), the right to publish the results of academic research is at the core of this protection. One example is the case Hertel v. Switzerland[3]. Mr. Hertel had published reports on the effects of microwave ovens, concluding that the ovens were very dangerous to human health. Even if the research seemed to lack merit, and led to a drop in the sales of such ovens, the ECtHR stated that it was his right to publish, regardless of this;

> *"The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas."*

The protection of academic freedom was also underlined in ECtHR case Sorguç v. Turkey[4]. Mr. Sorguç, a professor of construction management at Istanbul Technical University, had been sentenced to pay 3,455,215,000-TL for remarks made in a speech and a paper at a conference. ECtHR held this to be a breach of ECHR Article 10, and the reasoning is valid also in the case of Bülent Şık:.

> *"In its Recommendation 1762 (2006), the Parliamentary Assembly of the Council of Europe adopted the following declaration for the protection of academic freedom of expression:*
>
> *"...*
>
> *4. In accordance with the Magna Charta Universitatum, the Assembly reaffirms the right to academic freedom and university autonomy which comprises the following principles:*
>
> *4.1. academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction;...*
>
> *4.3. history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation;..."*

Article 10 of ECHR seems to be the basis of Article 3 of The Turkish Press Law, Law Number 5187. Thus, the same principles follow from both domestic and international law.

Any sanctions against Bülent Şık for writing the articles of major public concern would quite clearly undermine the very core of academic freedom. As stated by ECtHR; An academic should have the freedom to "distribute knowledge and truth without restriction".

The role of the Prosecutor

Bülent Şık was finally acquitted. Not only did the National Court find that no crime was committed. The Court also stated that the Ministry should have revealed the information themselves. However, following an appeal by the Prosecutor of the decision of the Regional Appeal court, the case now continues and it is going on before Turkey's Supreme Court of Cassation.

The fact that an indictment does not lead to a conviction, does not in itself imply a failure on part of

the prosecutor. In this case, however, the issuing of the indictment seems to be based on a lack of adherence to fundamental principles.

The basis for this assertion, is the fact that the indictment is an obvious and prima facie interference in freedom of expression and academic freedom.

When this is the case, the prosecutor must consider whether there are any valid reasons for the interference, so that the interference is "necessary in a democratic society". It is for the state to come up with convincing arguments for such overriding arguments. If not, the interference will also imply a breach of human rights. There are, however, no signs that this has been considered in a prudent way, which is also evidenced by the fact that the national regional appeal court did not find any convincing arguments for convicting him.

These duties follow from both domestic law and international principles.

It follows from Article 1 of ECHR that the Contracting Parties shall "secure" to everyone the rights and freedoms defined in the Convention. The main elements in the indictment is a description of exercising freedom of expression. In Kavala v. Turkey[5], the ECtHR stated that;

> *"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."*

According to the UN Guidelines on the Role of Prosecutors[6] Principle 12;

> *"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."*

Issuing indictments for exercising human rights, without sufficient explanation, is clearly not fulfilling these obligations.

According to the TCPC Article 170/2, an indictment shall only be issued where;

> *…at the end of the investigation phase, collected evidence constitute sufficient suspicion that a crime has been committed…".*

In this case, the description in the indictment itself indicates that there is no crime, and the evidence part of the indictment shows no sign of investigation into or consideration of reasons for interference in Bülent Şık's Academic Freedom or Freedom of Expression.

4. Conclusion and recommendations

It is evident from the facts mentioned in the indictment, that the alleged crime is based on Bülent Şık's exercise of freedom of expression and academic freedom.

Despite this, the indictment does not contain any facts that could justify an interference in these rights, based on the "necessary in a democratic society" test in ECHR Article 10 and the Turkish Press Law Article 3.

The information given in the indictment gives a strong indication that any sanctions based on the articles would be a breach of these fundamental rights. This is confirmed by further information about the facts, and also the actual outcome of the case.

While the indictment fulfils most of the criteria in TCPC Article 170, related to clarifying the alleged crime and its time and place, the Prosecutor has failed in the duty to prudently consider if a crime has been committed at all.

As a representative of the State, a prosecutor is obliged to "secure" the exercise of human rights. The duty to protect human rights also follows from the UN Guidelines on the Role of Prosecutors.

Both the guidelines and the TCPC Article 170/2 contain the basic principle that both law and facts should be considered in a prudent way before issuing an indictment. An indictment should only be issued when "sufficient suspicion" exists.

The case gives a basis for at least three recommendations;

First, if the alleged crime involves a reference to an underlying duty (here a duty of confidentiality), the source of this duty should be identified in the indictment.

Second, it should always be considered if the indictment represents an interference in a human right. In cases directed against authors and academics, there will often be an interference with Freedom of Expression (ECHR Article 10.1).

Third, if the indictment represents an interference, the Prosecutor must consider if there are any reasons that can justify the interference according to the criteria in Article 10.2 (prescribed by law, specific reasons and proportionality). The indictment should mention the alleged reasons. Without such reasons, the interference will be a breach of the freedom in question.

About the author

With a varied background, Vidar Strømme was believed to be one of the few successful generalists in the big law firms. Admitted to the Supreme Court since almost 30 years, Strømme is currently the Director of the Norwegian National Institution for Human Rights. Former lawyer for Norway's General Counsel, Civil Affairs and former District Attorney. He has represented Edward Snowden in a case on extradition against the Norwegian state, and litigated the "Rolfsen" case that was awarded Columbia's prize for the best ruling on Freedom of Speech in 2016.

Endnotes

1 http://www.dunyamizzehirlenmesin.org/bulent-sik-mahkeme-savunmasi

2 https://www.duvarenglish.com/istanbul-appeals-court-acquits-academic-bulent-sik-over-article-series-on-cancer-study-news-57300

3 Judgement 25 August 1998, application 59/1997/843/1049

4 Judgement 23 June 2009, application 17089/09

5 Judgement 10 December 2019, application 11/05/2020

6 https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx

Legal Report on Indictment

Seyhan Avşar Oğuz

Heidi Heggdal
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05

Legal Report on Indictment:
Seyhan Avşar Oğuz

Introduction

This evaluation report represents the legal analysis of the indictment issued against journalist and author Seyhan Avşar Oğuz (Avşar) by the Office of the Chief Public Prosecutor's Investigation Bureau on Press Offences in Istanbul on 19 September 2019. The indictment, with the investigation number 2019/56129 and indictment number 2019/26597, consists of two pages and charges Avşar with violating Article 125/1-3 a of the Turkish Penal Code (TPC), namely insult against a public officer due to the performance of his/her public duty.

This report assesses the indictment's compliance with the Criminal Procedure Code of the Republic of Turkey and International standards for fair trials.

Summary of the Case Background Information

Avşar was a reporter for Sözcü Newspaper. Currently, she works as a crime and court reporter at Cumhuriyet Newspaper. In 2020 she was awarded the Metin Göktepe Written News Award for her article "Cleaning in return for a mansion" in Cumhuriyet newspaper and the Uğur Mumcu Investigative Journalism Award for her article "FETÖ exchange". The article "FETÖ exchange" is the subject of this indictment. Avşar is also the subject of several criminal investigations and prosecutions because of her other articles.

The injured parties of the indictment are Lütfı Karabacak (Karabacak) and Ismet Bozkurt (Bozkurt). Both were public prosecutors in Istanbul (Çağlayan) Courthouse and dealt with a number of significant well-known cases. They were suspended in March 2019 as a result of an investigation conducted by the Istanbul Chief Public Prosecutor`s Office. At the time of the suspension, Karabacak was working as public prosecutor at the Terror and Organized Crimes Bureau. Bozkurt was public prosecutor at the Unidentified Crimes Bureau. The decision of suspension was issued by the 2nd Chamber of the Council of Judges and Prosecutors and was based on the allegations that the prosecutors took bribes from members the Gülen Organization. On 16 January 2020, both were dismissed from public duty as a result of the disciplinary investigation.

At the same time, Bakırköy Public Prosecution Office conducted a criminal investigation against both former prosecutors. The prosecutors were charged with "bribery", "corruption", "trade of influence", "disclosure of the secret regarding the duty" and "violation of confidentiality"[1] and are facing prison time from 7 years 10 months to 28 years 6 months if they are convicted. The trials are still pending.
Avşar wrote two separate news articles on 17 March 2019 and 22 March 2019 and they were published by Cumhuriyet newspaper. In her first article, she referred to the indictments against the two prosecutors where the alleged crime was that they took money to decide on non-prosecution in the investigations related to members of the Gülen organisation. She also wrote that the prosecutors were suspended because of this issue.

In her second article, she included details about the disciplinary investigations against the two prosecutors.

A criminal investigation was initiated against Avşar after she published her articles. On 8 May 2019 she gave her testimony before the public prosecutor in her case. On 19 September 2019 she was indicted with insulting public officers. Avşar's defense lawyer noticed that there were two other indictments with the same accusations against Avşar. In the end, only one trial was initiated.

On 16 January 2020 the first hearing of the Avşar case was held at Istanbul 2nd Criminal Court of First Instance. Avşar did not participate in the hearing. Her lawyer requested the court not to proceed to the merits of the trial, since the indictment was not issued within the due date according to the Press Law. The lawyer also mentioned that there were three different indictments against the defendant with the same accusation. She requested Avşar's acquittal. In the same hearing, the court decided to drop the case related to the Press Law Article 26, as the indictment was not accepted by the court within four months after the publications of the articles.

Avşar's casefile is still pending before the Regional Appeal Court of Istanbul.

Analysis of the Indictment

3.1 Evaluation of the indictment in terms of Domestic Law

The indictment itself is only two pages long and thus quite short compared to several of the indictments we have examined in this project. The first impression is still that it is hard to read, as the descriptive part consist of one single sentence.

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

3.1.1 TCPC Article 170/3 - Formalities

TCPC article 170/3-a-k describes mandatory formalities of an indictment. The indictment against Avşar conforms to most of these formalities. In the introductory section, it is clearly set out the identity of the suspect, the defense lawyer's name, the identities of the injured party, the name of the plaintiff, and their legal representation. The identity of the claimant is also mentioned, but the date of the claim is not, as it should according to TCPC Article 170/3-g. In this case, this is just a minor flaw, but it still makes the indictment appear rather sloppy.

The place and date of the crime is placed in the introductory part. This part is not complete as it contains only one date: 22/03/2019. Later, in the descriptive part of the indictment, both dates of the articles are put in, hence the indictment also conforms with TCPC Article 170/3-i. The indictment would appear more professional if both dates were put in the introductory part, but again this is just a minor issue.
The crime is described as "Insulting a Public Officer" with the applicable articles 125/1-3 a and 4, 43/2-1 and 53 of the Turkish Penal Code (TPC). The short description of the crime in the introductory part of the indictment complies with the applicable articles. The evidence of the crime is listed according to TCPC Article 170/3-j.

Avşar was not at any time in pre-trial custody. According to TCPC Article 170/3-k the indictment shall contain an explanation of whether the suspect is in detention or not. The information is mandatory for a reason and should be offered in the introductory part.

All in all the flaws detected in the introductory part of the indictment are minor and have no other effect than making the indictment look less professional.

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

TCPC Article 170/4 states that the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence. The charged crime in this indictment is "Insulting a public officer".

According to TPC Article 125/1 "any person who attributes an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige, or attacks someone's honour, dignity or prestige

by swearing shall be sentenced to a penalty of imprisonment for a term of three months to two years or a judicial fine». If the insult is committed against a public officer due to the performance of his duty, the penalty shall be not less than one year (TPC 125/3-a). The indictment also mentions TPC Article 125/4 which regulates the penalty when the insult is committed in public. According to this, the evidence must establish that Avşar by writing these articles impugned or attacked these prosecutors' honour, dignity or prestige.

In the descriptive part, the indictment first refers to the two separate articles published on 17 and 22 March 2019. Thereafter is information about the dates the article were published, the name of the newspaper and where in the newspaper the articles were placed. This information is followed by the text from the articles that allegedly constitutes the crime. This structure would actually be good, if the whole descriptive part of the indictment did not consist of one long sentence.

The conclusion is that Avşar, by writing these articles:

- constituted a breach of personal rights of the two prosecutors

- amounted to an insult to a public officer in the sense that they depicted the injured parties as public officers who took action in return for a bribe

- violated the right presumption of innocence by publishing the names of the prosecutors and created the impression as if the public prosecutors are issuing decisions of non-prosecution in return for a bribe

- reported false news:

- when Avşar claimed that Lütfi Karabacak demanded Turhan Turunç be allowed to benefit from the provisions of effective remorse [law] whereas he never took part in the first hearing session of the said case in Istanbul 14th Assize Court

- as she stated that the plaintiff incurred a relocation penalty whereas he did not.

A crucial part of any indictment is to connect the alleged criminal actions to the elements of the applicable article in TPC. In this indictment, this part is totally missing. There is no explanation why the articles represent a breach of personal rights or amounted to an insult of the prosecutors. Furthermore, there is no definition of an "insult". That the content of articles are considered to be insulting is not sufficient to justify a criminal investigation against Avşar.

The alleged criminal act described as "violated the right presumption of innocence" is quite interesting. Nowhere in TPC Article 125 is violation of the right of presumption of innocence described as a criminal act. Needless to say, ECHR article 6 § 2 enshrine everyone's right to be presumed innocent until proven guilty according to law. However, it is the obligation of the Republic of Turkey (not the journalist or the newspaper) to protect the right to a fair trial and hereunder the right to be presumed innocence. There is no obligation for the journalist to wait to report on the criminal cases against the prosecutors until their cases has been decided by the court.[2]

There is no doubt that Avşar named the two prosecutors in her articles. It is understandable that the prosecutors disliked Avşar's articles. They might even have felt insulted. However, I'm quite convinced that this is not enough to establish a violation of TPC Article 125. The indictment states that presumption of innocence was violated by publishing the names of the prosecutors and created the impression as if the public prosecutors are issuing decisions of non-prosecution in return for a bribe. To create an impression of public prosecutors being corrupt, can definitely be regarded as an insult. However, a closer look at the evidence (the quoted text of the articles) shows that this is not a case of insulting public officers. It is obvious from the text that the articles merely report facts from the criminal cases against the two prosecutors. In the articles, it is written that:

Lütfi Karabacak (…)was claimed to have given multiple decisions of non-prosecution on FETÖ files in return for money…

It was claimed that the prosecutors, who are now suspended, issued decisions of non-prosecution for the suspects at the inquiry stage of the FETÖ cases they handled

It was claimed that the prosecutors' conversations with the members of FETÖ, who have been under the surveillance of the police were wiretapped, that a lawyer filed a complaint against them and that they have been bargaining for the decision of non-prosecution and for the amount of money

Claims of a bargain between prosecutors and suspects facilitated by estate agents, policemen and attorneys

The difference between attributing an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige, which is the criminal action according to TPC Article 125, and referring the facts of a criminal investigation against public officers should be addressed in the indictment. From the text quoted in the indictment, one cannot draw the conclusion that Avşar was offering her opinion on the ongoing investigation or that she concludes that the prosecutors are guilty of the allegations. She has carefully written that it was claimed that the prosecutors took bribes. It is not explained why this is an insult according to TPC Article 125. The indictment again fails to connect the elements of the crime to the articles.

Avşar is finally accused of reporting false news. This action is not mentioned in TPC Article 125. Even if it was, no evidence is offered to prove what Avşar's article contained false news.

The conclusion is that it is obvious that the indictment does not fulfill the requirements in TCPC Article 170/4.

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

The indictment states Avşar's defense:

The suspect stated that she acted in her capacity as a journalist and reported an incident that was being closely followed by the public and that had a public interest dimension and added that the reportage she wrote was within the limits of press freedom and she denied the accusations.

The indictment fails to address this defence. There is no reference to Turkish Press Law Article 3 and the freedom of the press to acquire and report information. There is no reference to the right to freedom of speech, which is enshrined both in The Constitution of Republic of Turkey and in ECHR Article 10.
It is actually a serious flaw that there is no mention of the right to freedom of speech or more specific the freedom of the press in the indictment. This approach is lacking in several analyzed indictments within this project. Turkey has a bad record when it comes to cases brought before ECtHR regarding freedom of speech and free press. A more conscious approach to this part of the indictment by the prosecutor should therefore be expected.

Finally, there is the defense of truth. Avşar has reported on ongoing investigation against two prosecutors. Even if the cases against the prosecutors are still pending, it is an undisputable fact that they were indicted for taking bribes. The ECtHR has held that truth should be a defence to a charge of defamation, see for instance McVicar v. United Kingdom.[3] TPC Article 127 provides that "Where an accusation, the subject matter of which constitutes a criminal offence, is proven, the person shall receive no penalty." The prosecutor should be aware of this regulation and related defense and address it in the indictment.

In this sense, the indictment is definitely not in line with TCPC Article 170/5.

3.1.4 TCPC Article 170/2 – Should the prosecutor prosecute?

The answer is simple. The prosecutor should not prosecute these claims against Avşar. According to TCPC Article 170/2 the prosecutor should only prosecute in cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed.

Clearly, the analyses above show that there was no sufficient suspicion against Avşar for any criminal offense. The indictment is not based on the facts and evidence of the case and is not in line with the

requirements in TCPC Article 170. The prosecutor did not fulfill his duty to closely examine the evidence and did not mention the defense that obviously was in Avşar's favour.

In addition, there is no explanation on why the articles violates TPC Article 125.

The conclusion is that the indictment does not meet the requirements set out in the Republic of Turkey's domestic law.

3.2 Evaluation of the indictment in terms of international standards

The domestic law on how to write an indictment is actually very good. If the indictment were in line with TCPC Article 170, it would meet international standards.

Turkey has ratified the European Convention on Human Rights (ECHR) and, according to the Constitution of Turkey article 90, ratified international law takes precedence over domestic law. This means that if the articles of the ECHR are violated, so is the Constitution of Turkey.

The relevant international standards for this indictment is ECHR Article 6 "Right to fair trial" and Article 10 "Freedom of Speech", United Nations Guidelines on the Principles Concerning the Role of the Prosecutors and ECtHR caselaw.

3.2.1 ECHR Article 6: Right to a Fair Trial

ECHR Article 6 obligates all states of the convention to establish a judicial system in accordance with the article's requirements.

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

According to ECHR's Guide on Article 6[4] an indictment plays a crucial role in the criminal process because it is from the moment of its service that the suspect is formally put on written notice of the factual and legal basis of the charges against him or her. In paragraph 388 of the Guidelines it is stated that:

> *Article 6 § 3 (a) affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts.*

Even if the indictment is in Turkish, the descriptive part is written in one whole sentence, which makes it very hard to find the exact actions that the prosecutor has found is criminal and what parts of the applicable article in TPC are connected to these actions. In addition, the indictment does not connect the alleged criminal actions to the elements of the applicable article in TPC. In combination, this makes it almost impossible for Avşar to build her defense. It is clear that the indictment does not meet the requirements in ECHR Article 6 § 3 (a).

Failing to properly link evidence to accusations and still insisting to continue the prosecution is in addition a violation of ECHR Article 6 § 2, presumption of innocence.

3.2.2 ECHR Article 10: Freedom of Expression

Article 10 of the European Convention on Human Rights guarantees freedom of expression. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.5

The right to freedom of expression is subject to exceptions. Such exceptions have to meet the requirements foreseen in ECHR Article 10 § 2. The exception must be prescribed by law and be necessary in a democratic society. The protection of the reputation or rights of others may be such an exception. In balancing competing rights, the ECtHR has clarified that there must be "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"[6]

The States are also required to establish an effective mechanism for the protection of journalists in order to create a favourable environment for participation in public debate. To enable journalists to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter.[7] Freedom of the press is enshrined in the Constitution of Republic of Turkey Article 28, which clearly states that the press is free and shall not be censored.

Article 10 of the ECHR states that right to freedom of expression includes freedom to receive and impart information and ideas (...).Avşar is a journalist and the articles were published in a newspaper, still the indictment does not mention if ECHR Article 10 was an applicable defense. In the Lingens judgement[8] ECtHR ruled that

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.

The indictments against the two prosecutors are clearly of public interest and Avşar had the right and the duty to report on the ongoing investigation against them. The ECtHR has emphasized 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[9]. To indict a journalist for defamation/insult when s/he reports on misconduct by public officers, surely has a chilling effect.

Finally, it must be stressed again that it is not an insult to report on criminal charges against public officers, even if the facts of the case are unpleasant. It is a fact that the prosecutors were indicted and it was in the public interest to report these facts. The conclusion is that the indictment against Avşar for insulting a public officer violates her right to freedom of expression enshrined in Article 10 of the ECHR. The indictment also violates the Constitution of Republic of Turkey.

3.2.3. UN Guidelines on the Role of Prosecutors

Principles 10 to 20 in the Guidelines outline the role of the prosecutors in criminal procedures. According to Principle 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.*

The analysis above shows that the prosecutor did not act in accordance with TCPC Article 170 or in accordance with international human rights standards when Avşar was indicted.
Furthermore, according to UN Guidelines Principle 13 (b) the prosecutors 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 Avşar is a violation of the public interest in being informed about possible misconduct of public officers. The indictment is not objective, as it pays no attention to circumstances that were favourable to Avşar.

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. 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 conclusion of this analysis is that

the indictment does comply with the rules set out in TCPC Article 170, thus it is clear that the prosecutor should not initiate criminal proceedings against Avşar.

Conclusion and Recommendation

The indictment against Avşar is not in line with neither domestic law nor international standards.

Again, as in the other reviewed indictments in this project, it must be stressed that the language of the indictments must be better. The descriptive part of Avşar's indictment is one long sentence. That is unnecessary and gives the indictment an unprofessional appearance.

As this is the third indictment I have evaluated, it seems to me that there is no consistency in how the indictments are written. I would suggest the development of templates, where the different part of the indictments can be filled in. The introductory part of the indictments will then look more or less the same with name, dates, numbers, if the defendant is in pre-trial detention etc. In the descriptive part of the indictment, I will suggest that first the applicable article in the TPC is cited, then the alleged criminal action and its connection to the applicable article and finally the evidence and its connection to the alleged crime. In this way, the prosecutors will be forced to do the evaluation that TCPC Article 170 requires.

It could also be helpful to the prosecutors to develop a checklist on international human rights standards. For instance, there could be questions like:

Is the indictment written in an understandable language?
Is the defendant's right to be presumed innocent violated?
Is the evidence properly cited and dated and connected to the alleged crime?
Are the articles of public interest?
Is it true what is written?

In my opinion, templates could make the indictments look more professional and ensure that all the elements of the indictments are according to the law. Checklists would help the prosecutors to evaluate if the indictment complies with international standards.

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 many years.

Endnotes

1. https://www.cumhuriyet.com.tr/haber/feto-borsasindaki-savcilar-icin-meslekten-cikarma-karari-1714792

2. Flux v. Moldova (no.6), par. 31

3. ECtHR: McVicar v. United Kingdom, Par 84 and 87

4. ECHR's Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), Updated in April 2021

5. ECtHR: Handyside v. the United Kingdom, par. 49

6. ECtHR: Belgium Linguistic Case, par. 5

7. ECtHR: Dink v. Turkey, par. 137 and Khadija Ismayilova v. Azerbaijan, par. 158

8. ECtHR: Lingens v. Austria, par. 41

9. ECtHR: Österreichische vereinigung zur erhaltung, stärkung und schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen grundbesitzes v. Austria, par 33

Legal Report on Indictment

Veysel Ok

Jaantje Kramer & Stella Pizzato
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06

Legal Report on Indictment:
Veysel Ok

1. Introduction

This evaluation report is part of the Turkey Indictment Project established by PEN Norway. The scope of this legal report is to examine the indictment issued against the lawyer Veysel Ok by the Istanbul Chief Public Prosecutor's Office on 11 August 2016 with investigation no. 2016/47844 and indictment no. 2016/25212 in light of Turkey's domestic laws and international human rights laws in order to ascertain whether the indictment complies with these standards. Section 2 of the report includes a brief summary of the case background information. Section 3 presents the legal analysis of the indictment. Section 3.2 evaluates the indictment against Turkey's domestic law focusing on Article 170 of the Turkish Criminal Procedure Code (TCPC) and on Article 301 of the Turkish Penal Code (TPC). Section 3.3 assesses the indictment in light of international standards, specifically Articles 6, 7, 10 and 18 of the European Convention on Human Rights (ECHR), the United Nations (UN) Guidelines on the Role of the Prosecutors and the UN Basic Principles on the Role of Lawyers. The report concludes, in section 4, with recommendations on what can be done to improve the quality of the indictment.

2. Summary of Case Background Information

Veysel Ok is a well-known lawyer from Turkey who focuses on freedom of speech and press freedom. He started his career as a lawyer for Taraf newspaper. In 2017, he co-founded the Media and Law Studies Association (MLSA), a non-profit organisation based in Turkey which provides pro-bono legal support to journalists. The main goals of MLSA are to offer legal protection to journalists who are punished for expressing their thoughts, to promote the right to information and to promote rights of minority groups[1]. MLSA aims to represent journalists from different backgrounds, from the investigation phase to the trial before the European Court of Human Rights (ECtHR)[2].

As a lawyer, Veysel Ok has been working on various cases that are or were politically sensitive in Turkey's current political climate. Among others, he represented Deniz Yücel, Ahmet Altan, Mehmet Altan, Şahin Alpay, Nedim Türfent and Erol Önderoğlu.

Veysel Ok was awarded the Thomas Dehler medal for his work in advocating for the right to freedom of speech and the rule of law in Turkey in 2019. The same year, he also received the Bulut Öncü Courage Award. Additionally, in 2020, he was given the Index for Censorship Freedom Speech Award.

On 11 August 2016, Veysel Ok was indicted and accused of insulting the judiciary of Turkey, as criminalized under Article 301 of the TPC. The indictment is based on a statement that Veysel Ok gave in an interview conducted by the journalist Cihan Acar who worked for the Özgür Düşünce Newspaper. Cihan Acar was indicted as well.

In the interview, that was published on 25 December 2015, Veysel Ok expressed his views about the judiciary in Turkey. He criticized the situation and underlined the importance of free speech and the independence of the judiciary. He mainly focused on the role of the Criminal Judgeships of Peace and criticized their way of functioning. Among other things, he stated:

> *"Previously, judges could hold varying opinions. There was a possibility of being tried by judges who valued freedoms. But now all members of the judiciary come in a single colour. We see judges serving at the Criminal Judgeships of Peace. They are deaf to defence statements or*

objections. Where the loyalties of these judges lie is clear. Nothing changes the result, because the decisions are pre-ordered. Either those in power give orders to the judicial authorities before the investigation, or attack the defendant via the government press"[3].

Following this interview, President Recep Tayyip Erdoğan's legal representatives filed a complaint against Veysel Ok on 29 December 2015. To initiate an investigation into violation of Article 301 TPC the special permission of the Ministry of Justice is required. This permission was given on 29 July 2016[4].

The first court that was involved with the Veysel Ok case was the İstanbul 37th Criminal Court of First Instance. The first hearing was held on 19 September 2017. Between this first hearing and 22 November 2018, Veysel Ok needed to appear in court several times for hearings related to jurisdictional disputes. There were changes in the presiding judge, due to recusals, and requests to intervene by President Erdogan's Office. The case shuffled between the İstanbul 37th High Criminal Court and the İstanbul 2nd Criminal Court of First Instance. On 22 November 2018, the 10th hearing was held. In this hearing, the İstanbul 37th Criminal Court of First Instance ruled that the case fell outside its jurisdiction and referred it to the İstanbul 2nd Criminal Court of First Instance. On 21 March 2019, the İstanbul 2nd Criminal Court of First Instance held a hearing on the merits of the case[5].

In his defence statement, Veysel Ok said:

"I still think the same way on the Criminal Courts of Peace. I do not think these judgeships are lawful. This is not an idea I hold alone, many lawyers, jurists think the same way. The Venice Commission's report on this issue is in the case file. I made this criticism as a lawyer and am a part of the justice system myself. The criticism cannot be treated as an insult"[6].

On 12 September 2019, the İstanbul 2nd Criminal Court of First Instance delivered its ruling. The court convicted Veysel Ok and imposed a suspended sentence of six months' imprisonment, which was reduced to a suspended sentence of five months due to his behaviour during the hearings[7].

3. Analysis of the indictment

3.1 Introductory Remarks & Formalities

The indictment accuses lawyer Veysel Ok of "Publicly insulting the State's Judicial Organs"[8]. Article 301 TPC is referred to as the relevant penal provision. The indictment is rather short and takes up a little over one page. The indictment starts with formalities, such as the place, the date and time period of the alleged crime, the date when claims were put forward, the description of the crime and the evidence of the offence. It makes sense to commence with these formalities, as this is an effective way to clarify the most essential elements of the accusations made against the defendant.

Unlike many other indictments in freedom of speech cases in Turkey, this indictment is rather short. Nevertheless, the indictment is difficult to comprehend. The indictment is poorly written and does not fulfil the basic purpose of an indictment, namely to give the defendant an understanding of the accusation, the legal basis and the relevant evidence that supports it.

Firstly, the issue date of the indictment is mentioned at the end. It would be preferable to mention this date at the beginning together with the formalities. Secondly, it is preferred that the statement of Veysel Ok included in the indictment is clearly marked. The indictment now includes one quotation mark at the beginning of the quote, but it is not entirely clear where the quote ends. Presumably, the indictment refers to the following quote:

"in the past, there were judges who had different opinions and there was a higher possibility of being tried by Judges who pay attention to freedoms, yet members of the judiciary are now uniform; there was a higher possibility of being tried by Public Prosecutors and Judges who pay attention to freedom of expression. Yet, the key difference of this period is that members of the judiciary are uniform now. Almost all members of the judiciary, whom I met in the last 2 years, are uniform and have the same view. We see the Criminal Peace Judgeships. Neither defence nor appeal work in cases before these judgeships. Currently, journalists are continuously appearing before 12 Criminal Courts of Peace. These judges' social media posts and sympathies are clear. In this respect, one's defence never influences decisions no matter how efficient and

up-to-date they are. … Because there are pre-determined and the decisions are pre-ordained in these cases, … the Executive either orders the judicial authorities in advance or targets [them] in the press. Then, the judiciary enforces the order".[9]

Additionally, we note that the procedural aspects of the case are included in the actual indictment, such as the information that "there is still time to launch a court case considering the time passed while the file was exchanged with the Ministry of Justice"[10]. It is recommended to separate the procedural aspects from the substantive aspects of the accusation.

3.2 Evaluation of the Indictment under Turkey's Domestic Law

3.2.1 The Requirements of Article 170 TCPC

Article 170 TCPC prescribes the duty of the prosecutor and the content of the indictment. Section 3 of this Article prescribes that an indictment shall include the following aspects:

> "**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".[11]

The indictment conforms to the requirements in Article 170/3 TCPC in respect of most of the formalities. It clearly sets out the identity of the suspect, the date and the place of the crime. There is no mention in the indictment as to whether the suspect has been in detention or not. As Veysel Ok 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 "Publicly insulting the State's Judicial Organs", and the related articles applicable (Article 301 and 53 TPC) are set out in the introductory section.

Article 301 TPC reads as follows:

> "1. A person who publicly degrades Turkish Nation, State of the Turkish Republic, Grand National Assembly of Turkey, the Government of the Republic of Turkey and the judicial bodies of the State shall be sentenced to a penalty of imprisonment for a term of six months to two years.
> 2. A person who publicly degrades the military or security organisations shall be sentenced according to the provision set out in paragraph one.
> 3. The expression of an opinion for the purpose of criticism does not constitute an offence.
> 4. The conduct of an investigation into such an offence shall be subject to the permission of the Minister of Justice".[12]

Elements of this offence seem to be, in this case, "publicly", "degrades" and "judicial bodies of the State". The indictment refers to the newspaper that "has statements that amount to insulting the President, the State's institutions and organs"[13]. Therefore, there is no clear link between the elements of the offence and the wording in the indictment, which could be seen as a violation of Article 170/3-h TCPC. The prosecutor has drafted the indictment as a story and not in accordance with the legal rules of procedure that should have been followed.

An important requirement of Article 170 TCPC is the "evidence of the offence"[14]. The list of evidence in

the indictment is presented as follows:

> *"Copy of Özgür Düşünce [Free Thought] newspaper, Mr Cihan Acar's statement, the Ministry of Justice's Directorate-General for Criminal Affairs' letter that grants interrogation permission, registers of persons and criminal records, and the scope of the whole investigation document".*[15]

It is the duty of the prosecutor to connect the evidence to the alleged crime, as mentioned in Article 170/4 TCPC, which prescribes that "the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence"[16]. The list of evidence does not fulfill its purpose entirely. Firstly, it would be clearer if the date of the newspaper and the letter of the Minister was included. Secondly, the evidence refers to "Mr Cihan Acar's statement", which does not directly link Veysel Ok to the crime. The lack of this link leaves the defendant in ignorance of the crime he has committed and of the evidence that supports the allegation.

Furthermore, the conclusion of the indictment does not include the issues that are both favourable and unfavourable to the suspect, as prescribed by Article 170/5 TCPC. The indictment explicitly states that "there was no chance to take the suspect's defence"[17]. In the defence statement, Veysel Ok refers to other individuals (e.g. journalists) who share his opinion. From that point of view, he regards this comment solely as criticism and not as an insult. It could be a mitigating factor if other individuals or bodies share his ideas.

The indictment does not include any reference to intent. However, it can be argued that such a reference should have been included due to the exception in Article 301/3 TPC. Article 301/3 TPC explicitly states that the expression of an opinion for the "purpose of criticism" does not constitute an offence[18]. The prosecutor should have at least explained in the indictment why the statement of Veysel Ok was not made for the purpose of criticism but for the purpose of degrading/insulting. This inherently touches upon the intent of Veysel Ok. Moreover, the concluding section does not refer to a punishment or measure that is foreseen. This is in violation with Article 170/6 TCPC[19].

Lastly, the indictment refers to the periods or prescribed terms in which cases of crimes related to the press should be opened. Article 26 of the Press Law prescribes that:

> *"1. It is essential that cases of crimes entailing the use of printed matter or other crimes mentioned in this law should be opened within a period of four months for daily periodicals and six months for other printed matter. This period begins with the delivery of the printed matter to the Office of the State Chief Prosecutor.*
>
> *2. If the material is not submitted, the beginning date of the above-mentioned periods is the date when the Office of the State Chief Prosecutor ascertains the action which constitutes the crime. However, these periods cannot exceed the periods stipulated by Article 102 of the Turkish Penal Code.*
>
> *3. The period for the case to be opened against individuals who had material published despite the objection of the responsible editor and the editor working beneath him/her begins when the decision acquitting the responsible editor and the editor working beneath him/her becomes final.*
>
> *4. If the responsible editor discloses the identity of the owner of the publication, the period for the case to be opened against the owner of the publication begins with the date when the disclosure is made.*
>
> *5. The period to open a case concerning crimes the legal proceedings of which are based on complaints begins when the date the crime is committed is ascertained, provided that the prescription envisaged by the law is not exceeded. Regarding crimes for which permission or a decision to open a public case is needed, the period to open a case ends when the application is made. This process cannot exceed four months"*[20].

According to this Article, the case against Veysel Ok should have been opened within 4 months after the 'application', as mentioned in Article 26/5 of the Press Law, was made. It is not clear on which date this application was made. The indictment mentions that the 'permission' to open the case was granted on 29 July 2016. However, given the lack of information on the application date, it is impossible to

verify whether the process for this permission did not exceed four months. This is a serious defect in the indictment. It is also not clear why the indictment indicates that the date of a possible court case began on 11 April 2016 with reference to Article 26/4 of the Press Law. In this case, Veysel Ok's identity was known from the very beginning. Therefore, the defence that the government used for the delay in handling this case is not applicable.

3.2.2 Criticism on Article 301 TPC from a National and International Point of View

Article 301 TPC has been subject to significant discussions in Turkey and in the international human rights community since it was regulated[21]. The "Venice Commission`s Opinion on articles 216, 299, 301 and 314 of The Penal Code of Turkey" dated 11-12 March 2016, includes the following interesting information:

> *"Article 301 has been repeatedly criticised internationally and domestically. During the 2010 Universal Periodic Review of Turkey, five States (Armenia, Cyprus, France, Spain, and the United States of America) explicitly recommended that Turkey remove or revise Article 301. The OSCE Representative on Freedom of Media noted that Article 301 (in its original wording) was open to various interpretations and could be used to chill public debate. Amnesty International in its recent report, wrote that even after the 2008 amendment, "Article 301 continues to constitute a direct and impermissible limitation to the right to freedom of expression despite some cosmetic reform. (...) The only conclusion compatible with Turkey's international obligations is (...) its repeal". Freedom House, in its 2015 Report on Freedom of Press in Turkey, added that "very few of those prosecuted under Article 301 receive convictions, but the trials are time-consuming and expensive, and the law exerts a chilling effect on speech".*[22]

Amnesty International launched a campaign against this article in 2013, called "[e]nd it, don`t amend it". In the announcement of their campaign, they referred to one of their own reports and stated that: "Article 301 of the Turkish Penal Code has long been one of the most problematic articles as far as freedom of expression is concerned. Up until 2008, the article criminalized "denigrating Turkishness". Reforms replaced "denigrating Turkishness" with "denigration of "the Turkish nation, the state of the Republic of Turkey, the Turkish Parliament (TBMM), the government of the Republic of Turkey and the legal institutions of the state" and added the additional requirement of the authorisation of the Minister of Justice before prosecutors could initiate proceedings. Neither of these ostensible safeguards has been sufficient for the ECtHR to find the article compatible with the right to freedom of expression as protected in the European Convention on Human Rights".[23]

In 2007, 21 members of the International Freedom of Expression Exchange (IFEX) demanded the abolishment of Article 301 TPC. [24]

In a report dated 12 July 2011, the former Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, expressed his concerns over Article 301 TPC:

> *"Following his visit to Turkey in 2009, the Commissioner expressed his concern regarding Article 301, notwithstanding an amendment adopted in 2008 which led to a decrease in the number of proceedings brought under this article. On 14 September 2010 the Court delivered its judgment in the case of Dink v. Turkey in which it found a violation of Article 10 of the ECHR on account of Hrant Dink's conviction based on Article 301. The Court held that Hrant Dink's conviction for denigrating Turkish identity prior to his murder did not correspond to any "pressing social need" which is one of the major conditions on which interference with one's freedom of expression may be warranted in a democratic society. The Commissioner considers that the amendment adopted in 2008, which subjects prosecution to a prior authorization by the Ministry of Justice in each individual case, is not a lasting solution which can replace the integration of the relevant ECHR standards into the Turkish legal system and practice, in order to prevent similar violations of the Convention".*[25]

As can be inferred from the statement above, Article 301 TPC has been amended in 2008. The amendments were implemented in order to bring the article in line with the standards designated by the ECtHR[26]. The amendment focused on three major issues: first, the concept of "Turkishness" and "Republic" have been replaced by "Turkish Nation" and the "Republic of Turkey"; second, the maximum limit of imprisonment that could be imposed in the case of conviction was reduced and the aggravating

circumstances were removed from the article; and third, the permission of the Ministry of Justice to initiate prosecution for acts deemed to be criminal under Article 301 was introduced[27].

Nevertheless, human rights organisations and the ECtHR underlined that these amendments did not make any difference in terms of the interference of Article 301 on freedom of speech. In 2011, the Court in the Altuğ Taner Akçam v. Turkey judgment underlined that replacing the term "Turkishness" by the "Turkish nation" did not make any difference in the interpretation of these concepts. According to the Court, Article 301 is so vague that it does not meet the "quality of law". Its unacceptably broad terms do not allow for foreseeability of its effects and violate the freedom of expression[28].

The case of Altuğ Taner Akçam v. Turkey recognised the chilling effect that Article 301 TPC, as an overbroad criminal provision, creates on the right to freedom of expression on matters of public interest. Furhermore, it established that an interference with Article 10 ECHR can be found even when the applicant is no longer subject to criminal prosecution[29].

Subsequently, the Court, in Dilipak v. Turkey, laid down the principle that an applicant, in this case a journalist, may claim to be a victim of a violation of Article 10 ECHR where considerably lengthy criminal proceedings have a chilling effect on the applicant's desire to express his opinion on matters of public interest, even when proceedings are eventually discontinued. Altuğ Taner Akçam and Dilipak are both built upon the acknowledgement of the "vulnerable nature" of expression on matters of public interest[30].

Already in Dilipak, in 2015, Judge Pinto de Albuquerque, in his concurring opinion, stated that

"the Court made it crystal-clear in paragraph 95 of the Altuğ Taner Akçam judgment that the notorious Article 301 had to be reformed, no changes were made. This time the Turkish legislature cannot ignore the fact that the Court has found the mere existence of such a criminal-law threat intolerable, even in the absence of a subsequent conviction. In the light of the systemic effect of the present judgment within the Turkish legal system and the large number of legal suits brought against journalists, the Turkish legislature must instigate a reform of the Criminal Code and the Military Criminal Code with a view to removing from these texts all obstacles to freedom of expression. In particular, it must abolish Article 301 of the Criminal Code or replace it with a criminal provision criminalising assaults on the reputation of State bodies created strictly as a bulwark against a clear and imminent threat to national security".[31]

To this purpose, Judge Pinto de Albuquerque advocated that the time had come for the Court to take a clearer position and to "issue an injunction to the respondent State under Article 46."[32]

In 2018, in the case of Fatih Taş v. Turkey (No.5), the Court adopted Judge Pinto de Albuquerque's concurring opinion from Dilipak and held that amending Article 301 TPC by bringing it in conformity with the Court's case law would "constitute an appropriate form of execution" of the Court's judgment and a mean to end the violations found; thus, it applied Article 46 ECHR.[33]

By applying Article 46 ECHR the Court explicitly indicated the individual measure, subject to supervision of the Committee of Ministers, that Turkey should adopt to end the violation of Article 10 ECHR. The application of Article 46 ECHR shows the Court's concern on the creation of a climate of censorship through Article 301 TPC; and therefore, demands Turkey to amend the Article in compliance with ECtHR standards.[34]

3.3 Evaluation of the Indictment under International Standards

According to Article 90 of the Constitution of the Republic of Turkey, international law takes precedence over national law.[35] Turkey has ratified the European Convention of Human Rights (ECHR) in 1954. Citizens of Turkey are therefore directly protected, through the Constitution, by the fair trial standards enshrined in Article 6 ECHR and the freedom of speech under Article 10 ECHR.

Other relevant international standards can be found in the United Nations (UN) "Guidelines on the Role of Prosecutors"[36], and the standards set out by the International Association of Prosecutors on the principle of fair trial regulated under the ECHR[37]. Additionally, and specifically applicable to this case are the UN Basic Principles on the Role of Lawyers[38].

3.3.1 Article 6 ECHR

The ECtHR guide on Article 6 ECHR includes several relevant starting points to assess whether the indictment is in accordance with the right to fair trial[39]. First of all, Article 6/3-a prescribes that 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[40].

The Guide on Article 6 ECHR includes the following information:

> *"Article 6/3-a points to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (Pélissier and Sassi v. France [GC], § 51; Kamasinski v. Austria, §*
>
> *79). Article 6 § 3 (a) affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts (Mattoccia v. Italy, § 59; Penev v. Bulgaria, § § 33 and 42). The information need not necessarily mention the evidence on which the charge is based (X. v. Belgium, Commission decision; Collozza and Rubinat v. Italy, Commission report).*
>
> *Article 6/3-a does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him/her (Pélissier and Sassi v. France[GC],§53; Drassich v. Italy,§34; Giosakis v. Greece (no.3),§29). In this connection, an indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him or her (Kamasinski v. Austria,§79).The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence (Mattoccia v. Italy,§65; Chichlian and Ekindjian v. France, Commission report,§71)."*[41]

Although the indictment is written in Turkish, which is a language that Veysel Ok understands, the indictment is difficult to comprehend. This is due to the long and complicated sentences which are separated by a comma. The format makes it hard to unravel the actual content. The incomprehensible language and the failure to connect the alleged crime to the evidence leave the defendant in ignorance about the crime he is accused of. It is not clear which part of the statement made by Veysel Ok amounts to a violation of Article 301 TPC. This makes the preparation for the defence difficult.

Article 6/2 ECHR reflects the presumption of innocence[42]. The way in which the indictment is set up seems to violate this principle. The indictment includes the information that "due to the limited time, namely not to miss the statute of limitations, there was no chance to take the suspect's defence".[43] This seems to indicate that the indictment violates the presumption of innocence. In addition, the indictment ends with the statement that "it is concluded that he committed the crime", which violates of the presumption of innocence.[44]

3.3.2 Article 7 ECHR

From Article 7 ECHR it can be inferred that offences and penalties must be accessible and foreseeable. Given the presence of vague terms in Article 301 TPC, such as "degrade" or "denigrate", it can be argued that this indictment violates Article 7 ECHR, because the elements of the crime are not clearly mentioned or linked to evidence. Additionally, critics argue that the terms tahkir (to insult) and tezyif (to deride), which are reflected in Article 159 former TPC (law no: 765), are not synonyms of the word aşağılamak (to denigrate/degrade)[45]. Moreover, the scope of the terms such as "the Republic of Turkey" is unclear. If a statement is made against the Kurdish identity, this would probably not be covered by Article 301 TPC, even though the Kurds are legally part of the Republic of Turkey. It can therefore even be argued that Article 301 TPC in itself violates Article 7 ECHR. Due to the vagenuess of the terms it is difficult to foresee when Article 301 TPC is violated.

3.3.3 Article 10 ECHR

The right to freedom of expression is enshrined in Article 10 ECHR. This article reads as follows:

> *"1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".*[46]
>
> *The press is seen as a fundamental watchdog in a democratic society, which the ECtHR highly values and protects.*[47]
>
> *"[…] the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy (see among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no. 103, p. 26, § 41, and the above-mentioned Sürek (No. 1) judgment, § 59). While the press must not overstep the bounds set, inter alia, for the protection of vital State interests, such as national security or territorial integrity, against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas, the public has a right to receive them. 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 (see the above-mentioned Lingens judgment, p. 26 §§, 41-42)".*[48]

This is relevant for the analysis of the indictment, as the statement at hand was published in a newspaper.

Furthermore, in the ECtHR Guide on Article 10 ECHR[49], specific mention is made of the status of actors in the justice system and their freedom of expression in the context of judicial proceedings. In particular:

> *"Where the Court points out the importance, in a State governed by the rule of law and in a democratic society, of maintaining the authority of the judiciary, it also emphasises that the proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the various protagonists in the justice system, at the forefront of which are judges and lawyers (Morice v.France[GC],§170)".*[50]
>
> "*The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (Morice v.France[GC], §§ 132-139; Schöpfer v. Switzerland, §§29-30; Nikula v. Finland,§45; Amihalachioaie v. Moldova,§27; Kyprianou v. Cyprus[GC], §173; André and Another v. France,§42; Mor v. France,§42; and Bagirov v. Azerbaijan, §§ 78 and 99). For members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation (Morice v.France[GC],§132; Kyprianou v. Cyprus[GC],§175)."*[51]
>
> *"Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another –among them, usually, a certain latitude regarding arguments used in court (Morice v.France[GC],§133; Steur v. the Netherlands,§38)".*[52]

It is, however, clear that lawyers cannot be equated with journalists:

> *"Their respective positions and roles in judicial proceedings are intrinsically different. Journalists*

have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party (Morice v.France[GC], §§148 and 168)".[53]

An interesting and relevant precedent is the case of Morice v. France[54]. This case shows that the freedom of expression of lawyers should be kept broad. In this case, a lawyer named Morice was convicted for criminal defamation. He criticized judges who presided a case he was litigating in a newspaper interview. Specifically, Morice had mentioned that the investigating judges in the case engaged in "conduct which [was] completely at odds with the principles of impartiality and fairness"[55]. The decision of the ECtHR refers to Opinion no. (2013) 6 on the relations between judges and lawyers, adopted by the Consultative Council of European Judges (CCJE), dated 13-15 November 2013, which reads – in so far as relevant in this respect:

"Judges and lawyers must be independent in the exercise of their duties, and must also be, and be seen to be, independent from each other. This independence is affirmed by the statute and ethical principles adopted by each profession. The CCJE considers such independence vital for the proper functioning of justice.

The CCJE refers to Recommendation CM/Rec (2010)12, paragraph 7, which states that the independence of judges should be guaranteed at the highest possible legal level. The independence of lawyers should be guaranteed in the same way".[56]

"The CCJE accordingly considers it necessary to develop dialogues and exchanges between judges and lawyers at a national and European institutional level on the issue of their mutual relations. The ethical principles of both judges and lawyers should be taken into account. In this regard, the CCJE encourages the identification of common ethical principles, such as the duty of independence, the duty to sustain the rule of law at all times, co-operation to ensure a fair and swift conduct of the proceedings and permanent professional training. Professional associations and independent governing bodies of both judges and lawyers should be responsible for this process.
...

Relations between judges and lawyers should always preserve the court's impartiality and image of impartiality. Judges and lawyers should be fully conscious of this, and adequate procedural and ethical rules should safeguard this impartiality.

Both judges and lawyers enjoy freedom of expression under Article 10 of the Convention. Judges are, however, required to preserve the confidentiality of the court's deliberations and their impartiality, which implies, inter alia, that they must refrain from commenting on proceedings and on the work of lawyers.

The freedom of expression of lawyers also has its limits, in order to maintain, as is provided for in Article 10, paragraph 2 of the Convention, the authority and impartiality of the judiciary. Respect towards professional colleagues, respect for the rule of law and the fair administration of justice – the principles (h) and (i) of the Charter of Core Principles of the European Legal Profession of the CCBE – require abstention from abusive criticism of colleagues, of individual judges and of court procedures and decisions".[57]

With regards to the level of protection accorded to authorities when the matter in question concerns public interest, the Court clarified the following:

"Moreover, as regards the level of protection, there is little scope under Article 10/2 of the Convention for restrictions on political speech or on debate on matters of public interest (see Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV; Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and Axel Springer AG v. Germany [GC], no. 39954/08, § 90, 7 February 2012). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context

> *of proceedings that are still pending in respect of the other defendants (see Roland Dumas v. France, no. 34875/07, § 43, 15 July 2010, and Gouveia Gomes Fernandes and Freitas e Costa v. Portugal, no. 1529/08, § 47, 29 March 2011). A degree of hostility (see E.K. v. Turkey, no. 28496/95, §§ 79-80, 7 February 2002) and the potential seriousness of certain remarks (see Thoma v. Luxembourg, no. 38432/97, § 57, ECHR 2001-III) do not obviate the right to a high level of protection, given the existence of a matter of public interest (see Paturel v. France, no. 54968/00, § 42, 22 December 2005)".*[58]

With respect to the aim of maintaining the authority and impartiality of the judiciary, the Court emphasized that restrictions of freedom of expression on this basis were reserved for "gravely damaging attacks that [were] essentially unfounded," not comments like those made by the defendant".[59]

In the Court's words, the objective of supporting the judiciary could not have:

> *"the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter. In the present case, Judges M. and L.L. were members of the judiciary and were thus both part of a fundamental institution of the State: they were therefore subject to wider limits of acceptable criticism than ordinary citizens and the impugned comments could therefore be directed against them in that capacity".*[60]

The ECtHR held that France had violated Article 10 ECHR[61].

In the Mustafa Erdoğan and others v. Turkey case the Court provided further guidance regarding the extent to which criticism of the judiciary can be accepted. The Court noted that "issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10" and "[t]he press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them"[62]. Nevertheless, the protection of Article 10 does not include speech delivered with the intent to insult[63].

> *"In this connection, the Court reaffirms that the courts, as with all other public institutions, are not immune from criticism and scrutiny. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (see Skałka v. Poland, no. 43425/98, § 34, 27 May 2003)".*[64]

In Sviridov v. Kazakhstan, the Human Rights Committee found a violation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The defendant, a human rights defender, was fined for showing a sign that read: "[i] demand a fair trial for Mr. Zhovtis!"[65] The defendant, after attending Mr. Zhovtis' trial, documented many violations of the right to fair trial and wrote them on the website of his organisation. According to the Human Rights Committee, Article 19 ICCPR protects an individual's right to share "opinions on matters of human rights such as the right to a fair trial"[66]; and that the State had therefore "interfered with the author's right to freedom of expression and to impart information and ideas of all kinds"[67]. Hence, Article 19 ICCPR protects opinions that relate to the right to fair trial. The present indictment presents Veysel Ok's concern regarding judicial impartiality and independence in Turkey which closely relate, if not match, with the fundamental requirements of the right to fair trial. Therefore, his criticism should be protected by his right to freedom of expression, both under Article 10 ECHR and under 19 ICCPR.

In the specific case of Veysel Ok, various aspects of the freedom of press and expression are combined. First of all, as a lawyer, he should enjoy a high level of protection while expressing himself at trial or in the context of his activities as a defence lawyer. Although the statement that he made can be seen outside of this context, Veysel Ok still acted from the central position in the administration of justice as an intermediary between the public and the courts. In line with the case law of the ECtHR, his statement is important for the public in order to have confidence in the ability of the legal profession to provide effective representation. By being critical of the judicial system, Veysel Ok is trying to gain confidence and fulfilling his duty in this respect. The indictment at face value therefore can be seen to violate the freedom of expression as laid down in Article 10 ECHR.

3.3.4 Article 18 ECHR

Article 18 ECHR reads as follows: "The 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"[68]. This article limits the use of restriction on rights and empowers the Court to investigate whether criminal prosecutions have been perverted into instruments of suppression going beyond the surface of measures that could apparently seem legitimate.[69] Article 18 has an auxiliary function, meaning that it is a non-autonomous provision, that can only be invoked in conjunction with another Convention right, which has to be a qualified right subject to restrictions. However, a violation of Article 18 can still be found regardless of whether the right that was invoked in connection with it was not violated.

As it emerged from two recent cases from the ECtHR, Demirtaş v. Turkey (no. 2) [GC] and Kavala v. Turkey, the Court observed an ongoing pattern of oppression of political dissent, human rights defenders, journalists and lawyers in Turkey. In both cases the Court found a violation of Article 18 ECHR.

In Demirtaş, the Court stated that

> *"it has been established beyond reasonable doubt that the applicant's detention, especially during two crucial campaigns relating to the referendum and the presidential election, pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society".*[70]

This judgment highlights the ulterior purpose behind Demirtaş's deprivation of liberty and the Court ordered his immediate release providing "an unequivocal solution to the protracted political crisis in Turkey concerning the fate of Selahattin Demirtaş and other opposition politicians and dissidents in general"[71]. The significance of the Grand Chamber judgment cannot be understated, it sends a powerful and clear message to the Government of Turkey that has the duty to recognise and protect the freedoms that political dissidents enjoy in a democratic society governed by rule of law.

Similarly, in Kavala, the Court concluded that the "restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority" and that

> *"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 is such activities and to paralyse civil society in the country".*[72]

As it has been observed by many, the targeted harassment of human rights defenders in Turkey is part of

> *"a wider practice of arbitrary detentions and abusive prosecutions of journalists, elected politicians, lawyers, and other perceived government critics. This practice has been well-documented in many reports by the Council of Europe, the European Union, and human rights organizations".*[73]

Considering the broader context in which the indictment against Veysel Ok was issued, we can see a pattern of oppression of dissent in Turkey that provokes a chilling effect on the right to freedom of expression and causes the deterioration of the rule of law. Therefore, it could be argued that the indictment against him was issued with the purpose of silencing him as a prominent figure advocating for the right to freedom of speech and freedom of press in Turkey.

3.3.5 UN Guidelines on the Role of Prosecutors

Principles 10 to 20 in the UN Guidelines on the Role of Prosecutors (UN Guidelines) outline the role of the prosecutors in criminal procedures.[74]

According to Principle 12 UN Guidelines:

> *"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".*[75]

Due to the potential violation of the terms and time periods set in the Press Law, and the jurisdictional disputes, it can be stated that the process was not in line with the basic standards for prosecutors set out in these Guidelines. In particular, it cannot be inferred from the indictment that due process was ensured, as the indictment clearly states that "there was no chance to take the suspect's defence". This statement could be included as an excuse with reference to the statute of limitations. However, such a statute should not be a legitimate reason to draft an indictment that violates national and international law.

Principle 13/a of the UN Guidelines states 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".*[76]

It seems apparent that the reason for the criminal prosecution of Veysel Ok is that the subject of his statement was the judicial body, an organ of the State. Furthermore, the criminal investigation was initiated by a letter from the President's Office. This indicates that the indictment is lacking impartiality and could be the result of political discrimination.

According to Principle 13/b of the UN Guidelines 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".*[77]

The prosecution of Veysel Ok can be seen as a violation of the protection of the public interest, namely that the public is informed about judicial issues. Furthermore, the indictment lacks objectivity and does not pay attention to circumstances that were favourable to Veysel Ok.

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[78]. 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."[79] The fact that there is no evidence whatsoever on mitigating factors and that the indictment includes that there was no chance to take the suspect's defence, could indicate that these standards were violated.

3.3.6 UN Basic Principles on Role of Lawyers

In analysing the indictment, attention must finally be paid to the UN Basic Principles on the Role of Lawyers.[80] Firstly, principle 16 includes that:

> *"Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".*[81]

Additionally, principle 23, "Freedom of expression and association", merits close consideration:

> *"Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in*

accordance with the law and the recognized standards and ethics of the legal profession."[82]

In light of these Articles and given the above analysis, the statement of Veysel Ok included in the indictment would merit protection instead of prosecution.

4. Conclusions and Recommendations

In the Netherlands, the defence would argue an indictment with similar flaws to be void. The prosecutor has the possibility to file a motion to amend the indictment at any time during the proceedings to restore any defects. The prosecutor is usually granted considerable leeway to file these motions, which are easily granted by the court. However, if such a motion is not filed or denied and the court rules that the indictment is void, this would imply that the indictment is invalid (either in whole or in part). This is a final decision, which ends the prosecution and means that no ruling on the merits of the case will be provided. The prosecutor cannot initiate a new proceeding for the same crime, due to the ne bis in idem principle (which prohibits being prosecuted twice for the same offence).

To improve the quality of the indictment, the following steps can be taken:

Keep the wording of the indictment simple and brief, so that the content of the indictment is easier to understand. Although it is common (and inevitable) for indictments to include complicated, legal language, the wording in the indictment against Veysel Ok is particularly vague;

Mention the issue date of the indictment at the beginning together with the formalities;

Include paragraphs in the indictment as to make its content logical and comprehensible. Avoid long sentences that are solely separated by commas;

Clearly mark the evidence in the indictment, i.e., the statement of Veysel Ok, and include the date of the pieces of evidence;

Include each element of the alleged crime in the indictment and connect each piece of evidence to one or more elements of the alleged crime;

Include evidence that is in favour of the suspect;

Avoid any conclusions about the criminal liability of the suspect in the indictment (i.e "it is concluded that he committed the crime");

Include which punishment and measure of security are foreseen;

In cases in which the Press Law is involved, clearly indicate the dates that are relevant for the prescribed periods in which a case must be opened;

Evaluate whether the indictment is in line with ECHR rights, such as the right to a fair trial, among which the right to be presumed innocent, and the right to freedom of press;

Evaluate whether Article 301 TPC is in line with ECHR rights, such as the right to freedom of expression and the right to only be punished for an offence when this is foreseeable.

In conclusion, the flaws in the indictment of Veysel Ok cause serious concern for the guarantees of fairness and transparency of judicial proceedings in Turkey, as protected by the European Convention on Human Rights. We therefore urge the Ministry of Justice of the Republic of Turkey to take our recommendations into consideration, not only by abolishing or reviewing the wording of Article 301 TPC, which is to be targeted strictly against clear and imminent threats to national security, but also by training public prosecutors about the conditions set out in Article 170 TCPC.

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Lawyers for Lawyers ("L4L") is an independent and non-political Dutch foundation that seeks to promote the proper functioning of the rule of law by pursuing freedom and independence of the legal profession. Lawyers for Lawyers was granted Special Consultative status with the UN Economic and Social Council in July 2013.

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07

PEN NORWAY

Legal Report on Indictment

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07

Legal Report on Indictment:
Hikmet Kumli Tunç

1. Introduction

The scope of this study covers the assessment of the 3-page indictment with the investigation no. 2019/421 and indictment no. 2020/156 issued by Fatma Yıldız, the Public Prosecutor of Muradiye on 02.04.2020 against the journalist Hikmet Tunç Kumli and Leyla Balkan.

To be fair, the indictment in question contains many legal problems similar to the indictments previously examined within the scope of the project. It is once again observed that the basic principles of press freedom are not considered in a criminal investigation where the suspect was a journalist and that the basic provisions in the Code of Criminal Procedure of Turkey are not taken into account in the indictment. In this sense, many legal problems identified in the indictment inevitably contain some common characteristics that the previous indictment assessment reports had already pointed out. However, there are certain unique elements to this indictment and the proceedings that followed it. First of all, the news agency (Jin News) where Hikmet Tunç Kumli, the suspect in the indictment, works is an exceptional news agency unmatched in Turkey and around the world. Jin News is a women-only news agency, founded and managed by women at every level, including its technical staff, its reporters, and editors. In this sense, the inclusion within the scope of the project of such an indictment issued against a female journalist from this news agency could be taken as the sign of agency's importance for us. In addition, considering the proceedings following the indictment, it can be argued that the trial of Hikmet Tunç Kumli points to a new form of an already incessant and systematic legal repression targeting the journalists in Turkey. Because Tunç was the first journalist in Turkey to be tried under the so-called simplified proceedings method.

The Law on Amendments to the Criminal Procedure Law and to Certain Laws no. 7331 came into force in October 2019, and there it was prescribed that the method of simplified proceedings could not be applied in cases that were prosecuted, ruled or finalized as of 01.01.2020. However, the Constitutional Court annulled the phrase "where the criminal lawsuit was initiated" with its judgement no. 2020/16 E.2020/33 and dated 25.06.2020[1]. Referring to the aforementioned judgement of the Constitutional Court, the Court in charge of the proceedings of the case against Hikmet Tunç Kumli decided that in her case the method of simplified proceedings shall be applied.

This is extremely worrying. Because, as has been underlined by many lawyers, the method of simplified proceedings amounts to the open violation of the "habeas corpus" principle of the criminal law, of the right of defence to which this principle is strongly connected and therefore of the right to a fair trial.

2. Summary of Case Background Information:

One of the suspects in the indictment, Hikmet Tunç Kumli, is the provincial affairs correspondent of Van province for Jin News Agency. On 13.05.2019 Tunç wrote a story titled "Muradiye Waterfall was abandoned to its fate by the contractor company which was paid 4,5 million" and this story was published on the website of Jin News News Agency[2]. The next day, the same story was republished by the Yeni Yaşam newspaper.

This story in question featured some sections of a certain report prepared by the People's Democratic Party on the restoration process of Muradiye Waterfall and the opinions of Leyla Balkan, then the Co-Mayor of the municipality. Following the publication of the story, Harun Yücel issued a complaint against

both the journalist who wrote the story and the Co-Mayor of the municipality, Leyla Balkan, whose opinions were featured in the story. The indictment indicated that Yücel was then the District Governor of Muradiye and had also been acting as the appointed trustee who superseded the elected co-mayors during the period when the construction operations at Muradiye Waterfall mentioned in the report had been taking place.

The indictment does not provide any information as to the exact date of the letter of complaint. The prosecutor provides only a summary of the contents of it. Accordingly, Leyla Balkan was claimed to allege that Harun Yücel was involved in corruption and Harun Yücel stated in turn that he was insulted by this account.

In accordance with the Articles 125/1, 125/3-a and 125/4 of the Turkish Penal Code, the indictment in question has been issued against Leyla Balkan and journalist Hikmet Tunç Kumli on 02.04.2020, with the allegation that they have committed the crime of publicly insulting a public officer. Muradiye Criminal Court of First Instance approved the indictment, and the proceedings began. On 20.10.2020, however, the court issued a preliminary proceedings report and notified the parties that the case would be handled using the method of simplified proceedings.

The preliminary proceedings report provided a different date of crime than the indictment itself. Although this issue is not directly related to the theme of this report, the fact that the court gave an incorrect date of crime by about 2 months must be noted here as a small sample of numerous judicial mistakes caused by the "copy-paste" working style that seem to have been dominating the judicial system in Turkey. The previous assessments carried out within the scope of this project revealed some further examples where the names of the suspects were incorrect. Even at this stage of the project, it can be comfortably said that the "factual mistakes" of similar nature are not singular examples regardless of whether they have a concrete impact on the bases of the criminal investigation/ prosecution processes. It is well known that the criminal proceedings are directly related to public order, and in many cases they affect the lives -and to a certain extent, the freedoms- of individuals involved. Therefore, these recurrent factual mistakes cannot be dismissed as insignificant, considering at stake are the rights of the suspects and the legal interests that must be protected. This and similar cases of negligence could be taken as an indication of the arbitrary conduct a field can engage in especially when it is granted an exemption from all kinds of legal control mechanisms.

The mechanism of simplified proceedings starkly contradicts the principles of criminal proceeding and infringes especially the principle of habeas corpus and in that sense the right of defence to a great extent. The following statements in the relevant preliminary proceedings report reveal the extent of the violations this method could generate:

> *[It is decided that] this preliminary proceedings report, in accordance with the CCP Article 251/2, be served to the addresses of the suspects together with the indictment by way of a warning; [that] the suspects be asked to submit their defence, if any, in WRITTEN form within 15 days starting from the issue date of the notification and [that] it be noted in the notification that a judgement could still be handed down without a hearing even if a written defence is not submitted in due time.*

The method of simplified proceedings is debatable, but the criterion and the focus of all debates should be the relationship between the method in question and the right to a fair trial. Since this report aims to assess the indictment itself, we do not intend to provide a comprehensive criticism of the simplified proceedings method. It is essential, however, to briefly mention the violations that already occurred or that are highly likely to occur following the adoption of the simplified proceedings method, as this report deals with the very first example of such a method employed within the framework of a series of proceedings that has been targeting the journalists[3].

The existence of a significant incongruity becomes even more obvious when the method of simplified proceedings is contrasted with the ECHR Article 6. It can be concluded that a structural contradiction exists between the ECHR Article 6 and a method where the judge alone can decide whether to hold a hearing, and where the suspect has only a single written statement to discuss the evidence and allegations levelled against her.

As a result, following the day Tunç received the court's notification that the method of simplified

proceedings were to be instituted, she did not appear before a judge, listen the complainant who issued the complaint nor did she experience a process where she can debate in-person the evidence and her defence with the court. Following this process, on 12 August 2021 and without even her defence being heard, Tunç was sentenced to prison sentence of 8 months and 22 days the pronouncement of which was suspended.

3. Analysis of the Indictment

3.1. Evaluation of the Indictment under the Code of Criminal Procedure:

The indictment in question consists of 3 pages in total. The brevity of the indictment cannot be a subject of criticism as the suspects of the file are facing an inquiry and evidence that are simple enough to be assessed within a couple of pages. There is a story written by journalist Hikmet Tunç Kumli. There is a report cited in the story and a person whose opinion was obtained. The report that constituted the basis of the news story and Leyla Balkan, then the Co-Mayor of Muradiye Municipality who offered her opinions both level criticisms against the nature of the project itself and against the individuals who were in charge of the tendering and implementation of the Muradiye Waterfall project. The person -the complainant- who was then the acting mayor of the municipality as a government trustee, issued a complaint claiming that the statements regarding his alleged corruption constituted the 'crime of insult'. The whole background of the case could of course be explained concisely in a couple of paragraphs. However, even if such a concise narrative is preferred, it should be ensured that all the requirements of Code of Criminal Procedure Article 170, with the subtitle The Duty of Filing a Public Prosecution are completely met. An indictment is not only expected to summarize an incident. On the contrary, indictments must include details about the alleged crime that could be linked with the incident in question, a definition of that crime together with its elements, the specific actions of the suspects that constituted the crime, the relationship between the evidence and the crime and finally, the exculpatory evidence. A text without such elements cannot be regarded as an indictment in the legal sense of the term, even if it contains an allegation.

In accordance with the CCP Article 170/3, an indictment should contain information about the identity of the suspect, the defendant, and the charged crime, as well as about the applicable articles of the law. The indictment contains those elements. Due to the unsystematic way the indictment summarizes the incident, however, without a background study, it becomes impossible to understand the exact nature of the relationship between the subjects of the indictment and the Muradiye Waterfall restoration project mentioned in the news story. One has to research and figure out the facts such as the complainant and Balkan had consecutively served in the same municipality, that the complainant had then been the officer in charge of the authority that invited the tenders for project in question, that the suspect assumed the position in the same institution while the tender contract was still in force, and that Tunç has been working as a journalist and wrote a news story based on a quoted report and on the statements of an open news resource.

According to the CCP Article 170/3, all the indictments should also contain information about the date, place, and the time period of the charged crime. The indictment in question specifies those elements as 14.05.2019, Van/Muradiye. The indictment is clear in this respect.

Another fundamental element an indictment is expected to have according to the CCP Article 170/3 is the evidence of the offence to be clearly stated. In the evidence section of the indictment, it is seen that the following documents are listed: "The defences of suspects, letter of complaint by the complainant, criminal record and population registration copies of the suspects and the scope of the entire file". This could be regarded as a formal breakdown of all the evidence; but clearly, one cannot claim that this way of composing fulfils the requirements in CCP Article 170/3. This is because the fundamentally important evidence that should be included in the file are omitted from the list. The most important omission is Hikmet Tunç Kumli's news story which the prosecutor presumed to be the instrument of the crime. The story in question is not mentioned in the evidence section. The main body of the indictment maintains the same omission. In the indictment, the prosecutor did not quote even a single passage from the story. The indictment indicates that in his letter, the complainant has complained about the term "corruption" which led the public prosecutor to the conclusion that a crime of insult has been committed, as his remark refers to "the charges of corruption that have factual imputations".

However, apart from stating that the suspects used the term 'corruption', the indictment does not use the

'citation' method, which is the only way to present to the suspects or to the other readers the context in which the relevant statement took place.

The news story as the alleged instrument of crime is not the only omitted item in the evidence list. Another evidence as important as Tunç's story is the report prepared by the Peoples' Democratic Party on the restoration of Muradiye Waterfall, which is also mentioned in Tunç's defence and constitutes the main body and the source of the news story. This report is important in the sense that it clarifies the issue of 'factual imputations', which is the main argument used by the prosecutor when explaining the crime of insult, as well as an important exculpatory evidence in that it was prepared by a political party and it formed the basis of the news report by the suspect, who is a journalist. It is obvious that that the prosecutor completely omitted the report in the indictment. The aim of the CCP Article 170/3 is not only to have an item-by-item list of all the evidence, but to ensure that their contents are explained in a way to allow the suspect to understand them and defend herself. In that sense, it is impossible to claim that the indictment in question presented the evidence in accordance with the CCP Article 170/3.

An evaluation of the CCP Article 170/4 suggests that the prosecutors are expected to explain the events that constituted the alleged offence in relation with the existing evidence. As mentioned earlier, the subject matter of the indictment in question is hardly complicated. Therefore, it shouldn't have been very challenging to fulfil the CCP Article 170/4 requirements. Since, however, the indictment is found to contain a huge gap in terms of the proper listing and citing of the evidence, it would not be realistic to expect that it would fulfil the requirements of the CCP Article 170/4 either.

As the alleged offence is insulting the public officer due to the performance of his/her duty, it is relevant to examine within the context of this offence if the requirements of the CCP Article 170/4 were fulfilled or not.

TPC Article 125/1 is as follows:

Any person who attributes an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige, or attacks someone's honour, dignity, or prestige by swearing shall be sentenced to a penalty of imprisonment for a term of three months to two years or a judicial fine. To be culpable for an insult made in the absence of the victim, the act should be committed in the presence of at least three further people.

Article 125/3-a provides for the crime committed against a public officer and Article 125/4 for the crime committed publicly.

It is understood from the whole indictment that the prosecutor concluded a crime of insult was committed by way of a 'factual imputation'. The following passage from the final section of the indictment shows that the prosecutor presumed that the crime was committed when a factual imputation about "getting involved in corruption" was cast:

... Considering all the points in question together with the entire scope of the file, it is understood that the suspects' statements about [his] involvement in corruption lacks evidence and as such constituted a factual imputation where no firm evidence against the complainant that seems reliable at face value was presented, considerably exceeding the limits of freedom of expression...

In this quote, there are two questions that should be addressed. The first question is about the research that a prosecutor is supposed to carry out before issuing an indictment on a case of 'factual imputation'. This question must absolutely be treated in relation to the prosecutor's claim that the suspects presented 'no firm evidence that seems reliable at face value'. The second question is about why the prosecutor chose to avoid making any points about the freedom of press and the relevant legislation whereas she rather preferred to discuss the freedom of expression and its limits throughout the indictment.

Firstly, it is imperative to understand the source of the factual imputation. The news story in question mentions the word 'corruption' once:

Sharing her views on the matter, Leyla Balkan, the Co-Mayor of Muradiye from HDP, pointed out that

they took over a debt-ridden municipality from the trustee. Adding that what the trustee brought was not only corruption and debt, Balkan said that "he had also destroyed the natural look of Muradiye Waterfall which was an important waterfall of Van province and our district as it was a natural beauty."[4]

As it can be seen, the imputed fact is that an alleged corruption took place and debt incurred during the period when the complainant had been in charge as the trustee. Moreover, the news story features an extensively quoted report which was prepared by the elected co-mayors of the municipality and was stated to have documented the corruption in question. Apparently, the prosecutor deemed this report to be "worthless at face value", since it was not mentioned among the list of evidence. It was, however, a main duty of the public prosecutor to examine a document on which both the factual imputation and the news story were based, especially if on trial was a news story that was based on the report in question. This is not only a requirement of the CCP Article 170/4 but also of the CCP Article 170/5 which regulates the collection of exculpatory evidence. This requirement can also be considered as a requirement of TPC Article 127. TPC Article 127 is a special provision that provides for instances where crime of insult is committed through a factual imputation which is then proved to be true. According to the article in question, "where an accusation, the subject matter of which constitutes a criminal offence, is proven, the person shall receive no penalty." The article continues as follows:

The accusation shall be assumed to be proven upon the finalisation of a guilty verdict against the insulted person concerning such accusation. Otherwise, where there is an application to prove the accusation is true the acceptance of such will depend upon whether there is a public interest to determine whether the accusation is true or whether the complainant consents to the process of proving the accusation.

Since, according to the indictment, the factual imputation is an alleged corruption in a municipality, it is clear that there is a matter of public interest which must be investigated further to prove the imputation. The indictment, however, does not provide any data that would allow the reader to make her own evaluations.

After all the evaluations, it can easily be concluded that an evaluation of the indictment in accordance with the CCP Article 170/2 demonstrates that the prosecutor did not make any effort to support the reasonable doubt with evidence.

3.2. Remarks about the Supreme Court Judgement that was Referred to in the Indictment

In the indictment, prosecutor extensively explained why the news story in question could not be treated within the scope of freedom of expression. In that section of the indictment, the prosecutor directly refers to the court decision no. 2018/6590 E, 2020/430 K dated 14.01.2020 by the 18th Chamber of the Supreme Court. The prosecutor's choice is quite interesting. Because the court decision that is referred as an inculpatory decision could in fact be interpreted in an exculpatory way.

Before demanding a punishment for the suspects, the prosecutor quoted heavily from the decision and then wrote "considering all the points in question together with the entire scope of the file", and concluded that the suspects committed the crime of insult on the grounds that they cast factual imputations without presenting any evidence that seems reliable at face value.

At this point, it is necessary to take a closer look at Supreme Court decision in question which constitutes the main body of the indictment. The Supreme Court summarized the relevant case as follows:

In the concrete case that was subject to the review; as regards to the news reports published in Taraf newspaper on 25/08/2014 with the title "The Mole in the Presidential Palace" which read "it has been revealed that information about the then-President Abdullah Gül and his family had been passed by M.K., an employee of the Palace, to the counsellors of the Prime Minister's Office that was in charge of the internet trolls", the defendant was sentenced on the grounds that the article he/she wrote has been a solid case of the violation of the honour, dignity and the reputation of the party.[5]

As it can be seen, the case in question was also related to a journalist and a news report, and in that case the local court ruled that the journalist committed the crime of insult through a factual imputation. Following the summary of the case, the Supreme Court underlined that a statement, albeit a disturbing

one, must be examined to see whether it exceeded the limits of freedom of expression as defined under the Constitution and the ECHR. In the indictment, the prosecutor quoted heavily from this decision and especially bolded the paragraph that began as "however".

However, freedom of expression is not absolute and unlimited either. Both the national and international legislations state that, in the exercise of these rights, any attitude and behaviour that will violate the rights and freedoms of individuals should be avoided.

As a matter of fact, the freedom of expression protected in Article 26 of the Constitution may be limited for the reasons specified in the second paragraph of the same article. Therefore, according to the article in question and Article 13 of the Constitution, restrictions on freedom of expression can only be imposed by law and cannot be contrary to the requirements of a democratic social order and the principle of proportionality, nor can it interfere with the essence of rights and freedoms.

The prosecutor, however, skipped the next part and then carried on with the quotations. Unfortunately, the prosecutor's choice calls in question whether she acted in accordance with her responsibility to carry out her duties without any bias. This is because while the prosecutor bolded the part about the possible restrictions that could be imposed on the freedom of expression, she still left out the part which discussed the limitations to such a restriction. Some of the omitted paragraphs of the Supreme Court decision are as follows:

Paragraph 2 of Article 10 of the Convention stipulates the regime of restrictions that public authorities can impose on the exercise of this freedom. In view of its importance, interventions against freedom of expression are only admissible in very exceptional circumstances and the conditions of such a restriction as stipulated by paragraph 2 of Article 10 of the Convention are narrowly interpreted. Therefore, the "necessity" of a public authority's interference with freedom of expression must absolutely be explained in a convincing manner. The condition of "necessity" as framed by the aforementioned article of the Convention means that an intervention must correspond to a pressure exerted by a social need and be especially proportionate to the legitimate purpose it intends. That an intervention meets the criteria in question and therefore is justified could be inferred from the fact that the justifications offered by the national authorities are "relevant and adequate".

Any failure to comply with both the provisions of the Constitution and the Convention may mean that the state acts in violation of its positive and negative obligations. Because the competent authorities, in line with their negative obligations, shall not prohibit and sanction the freedom and dissemination of expression; and in line with their positive obligations, shall take the necessary measures and maintain the balance for the real and effective protection of the freedom of expression. Otherwise, the ECHR may rule a violation of Article 8 of the Convention on the grounds of insufficient protection by the national courts for the dignity and reputation of the person in the face of unfair attacks targeting them. Because from the point of view of the ECHR, right to respect for private life and freedom of expression of the applicants are of equal importance. According to the case law of the Court, the basic principles to be considered in the maintenance of the balance are the contribution of the statements to the discussion regarding the public interest, the reputation and the previous attitude of the speaker, the content, form and effects of the statement.

In many of its decisions, the ECHR stated that Article 10 of the Convention guarantees not only the essence of the opinions or information expressed, but also the way they are conveyed. In this sense, in the case law of the ECHR, the press is recognized as one of the spokespersons of the society and a particular importance is attached the freedom of the press, which allows information and opinion exchange on issues of public interest, with the underlying idea that everyone has the right to obtain information of public interest.

As it is immediately obvious, the relevant case law, which we had to quote as heavily because of the prosecutor's omission, underlines the role of the press in a democratic society and the right of the public to obtain information. Therefore, it is not unreasonable to expect the prosecutor to pay a special attention to the relevant parts of the Supreme Court's decision in an indictment where one of the subjects is a journalist. Unfortunately, the prosecutor picked and chose only certain parts of the decision that fit into the narrative of the indictment and omitted the rest. For these reasons, we get the growing impression that the prosecutor opted for a selective method of inculpatory citation. In a nutshell, it can be said that all the paragraphs of the decision the indictment referred to, except for the part quoted by

the prosecutor, was essentially about why the indictment under review should not have been issued at all.[6]

Unfortunately, the Supreme Court's decision leaves us with two possibilities. Either the prosecutor did not completely read the decision of the Supreme Court, or as mentioned above, the fact that the indictment referred only to parts of the Supreme Court decision that supported the restriction of freedom of expression was because the prosecutor was "motivated" to issue an indictment under any circumstances. Regardless of which of these possibilities is true, unfortunately they render the structure and motives of the indictment in question controversial as a result.

3.3. The issue of whether the terms in the Press Law are observed:

In addition to all the legal findings presented so far, the indictment has another flaw. As is known, Article 26 of the Press Law is titled 'trial periods'. According to the legislation, it is essential that cases of crimes entailing the use of printed matter should be opened within a period of four months for daily periodicals and six months for other printed matter. It is provided that these periods begin with the delivery of the printed matter to the Office of the State Chief Prosecutor. It is obvious that if the material is not submitted to the Prosecutor's Office at all, then the date when the act was ascertained would be the basis of the trial. Similarly, for the offences linked with complaints the date of the offence would be the date of ascertainment, which could be taken as the beginning of the period. The accusation in the case in question, however, is of insulting the public officer which is a qualified offence, and it should be kept in mind that such an offence does not warrant a complaint.

In the case in question, it is clear that the news story was published in Yeni Yaşam newspaper, a daily publication. Even the indictment itself recorded that the story was published in the newspaper on 14.05.2019. The date of the indictment is 02.04.2020.

This is where the problem begins. Unfortunately, the defence is forced to make assumptions since the indictment presented no other information that would clarify the procedural issue in question. Furthermore, in the indictment there is no information that is vital for a criminal proceeding, such as whether the prosecutor's office was informed about the publication, if so when, if not, then the date of the complainant's complaint which would constitute the date of the ascertainment.

3.4. Evaluation of the Indictment under the International Law:

An indictment that failed to fulfil the requirements of the CCP Article 170 cannot possibly comply with the right to a fair trial under Article 6 of the ECHR. Even some simple examples would confirm this premise. The Article 6/3-a of the ECHR prescribes that people have 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. Considering that this analysis dwelled less upon the details that are included in the indictment and more upon the ones that are omitted from it, it can be said that the indictment failed to fulfil its duty to inform "in detail", which was prescribed the Article 6/3-a of the ECHR.

The prosecutor's scepticism towards the freedom of expression is demonstrated by her purposeful effort to put a journalist on trial because of a news story that was clearly in the public interest and with an identifiable source, and, as her choice of quotations suggested, by her biased willingness to find justifications for a trial rather than impartially searching for the element of reasonable doubt.
At this point, the UN Guidelines on the Role of the Prosecutors Principle 12, which we have been frequently citing within the scope of the project should be kept in mind. According to that principle, 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.

It can comfortably be claimed that the prosecutor completely ignored the Principle 12, given that the indictment has an attitude that specifically seeks to restrict the freedom of expression. The Principle 13/b of the same Guidelines should absolutely be kept in mind. According to this principle, the prosecutors shall protect the public interest, act with objectivity, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect. Her choice to ignore the exculpatory evidence and her omissions of the parts of the Supreme Court decision that were favourable to the suspect mean that the prosecutor deliberately chose to act against the

principle in question. It must also be noted that this indictment acts against the Principle 14 of the Guidelines as well. Accordingly, prosecutors shall not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded. In fact, the principle underlines that they must make every effort to stay proceedings. Unfortunately, the legal findings above reinforce the impression that the prosecutor of the indictment made a deliberate effort in the opposite direction.

4. Conclusion and Recommendations

This conclusion section will not repeat the critical remarks that were already specified under the previous sections. It is of particular importance, however, to remind the reader of the simple structure of the subject matter that the indictment is dealing with. The failure to write a successful indictment even for such an uncomplicated case with straightforward evidence in hand, and the existence of a biased motivation in the indictment to restrict the freedom of expression rather than to present the facts, charges and the evidence are matters of serious concern. This indictment alone reveals the prevalent motivation behind the 'subliminal message' allegations in Ahmet Altan indictment, or the fabrication of crimes based on the travel logs of the person in Osman Kavala-Espionage indictment, or the criminalization of a meeting that was held in a glass-covered transparent room in Büyükada indictment. Because the common feature of all those indictments are their clear willingness and motivation to charge rather than investigating the criminal suspicion.

Even the fact itself that this indictment was issued heavily impaired the freedom of expression and curtailed the right to a fair trial, which makes the question how this indictment could be improved more crucial. In fact, this question has been answered many times. As we have underlined over and over before, the prosecutors may work with a template, which would not solve all the problems but at least could prevent them from 'forgetting' or 'omitting' the fundamental information as it was the case with the indictment in question. The use of such a template can help overcome the shortcomings such as the lack of a complaint date, inadequate summarization of the evidence and failure to provide verbatim citation of the quotes. Introducing a legal obligation to use subtitles in the indictment could be useful as it would make it easier to comprehend the indictment and therefore contribute to the effective exercise of the right of defence. Because even with this very short indictment, the reader has to make a serious effort to follow the train of thought.

However, as we all know, these recommendations will not be enough to solve the structural problem. At this point, a reference could be made to the Recommendation Rec (200)19 presented to the Member States by the Committee of Ministers of the Council of Europe under the title The Role of Public Prosecution in the Criminal Justice System. Article 7 of the relevant Recommendation lays out a basic framework for what needs to be done. That article says that training is both a duty and a right for the public prosecutors before their appointment as well as on a permanent basis and then goes on to list the topics of such a training.[7]

Considering both the indictments analysed within the scope of the project and the daily rising numbers of investigations in Turkey, it is obvious that there is an urgent need to address this need for such a training that the relevant Recommendation of the year 2000 stated as a duty and a right for all public prosecutors and as an obligation for the states to undertake. As to the indictment against Hikmet Tunç Kumli, it would be unthinkable for a prosecutor to issue such an indictment if he/she had enough knowledge about the right to freedom of expression and the necessary awareness to protect the constitutional rights of the suspect.

Many articles of the Recommendation referred to here can be discussed in relation with the indictment in question. For example, the Article 26 highlights the public prosecutors' duty to ensure equality before the law and notes that this duty includes making themselves aware of favourable circumstances including those affecting the suspect. Article 27 stipulates that the prosecutors should not continue prosecution when an impartial investigation shows the charge to be unfounded.

Finally it is worth referring to the Venice Commission Report on the Independence of the Judicial System (494/2008), Part II titled as The Prosecution Service[8]. Subtitled "Qualities of Prosecutors", the 15th paragraph of the report states that the prosecutors must act fairly and impartially, and goes on to emphasize that it is not the prosecutor's function to secure a conviction at all costs but that she must put all the credible evidence available before a court. The following phrase in the relevant paragraph is especially striking: "The prosecutor (...) cannot pick and choose what suits.

The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case."

In conclusion, as stated by the United Nations guide on The Status and Role of Prosecutors, the rule of law cannot be upheld, nor can human rights be protected, without effective prosecution services that act with independence, integrity and impartiality in the administration of justice.[9]

About the author

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Endnotes

1. Constitutional Court judgement no. 2020/16 E.2020/33 and dated 25.06.2020: https://www.resmigazete.gov.tr/eskiler/2020/08/20200819-6.pdf [Turkish].

2. To access the related story: https://yeniyasamgazetesi.com/yikimi-yapip-kaybolmuslar/ [Turkish].

3. To convey the gist of the matter, it would be enough to highlight the following points. The method of simplified proceedings is based on the CCP Article 251/1. According to the relevant provision, "Upon the approval of the indictment, the Criminal Court of First Instance may decide to employ the method of simplified proceedings in crimes that require a judicial fine and/or a maximum imprisonment of two years or less."
Turkey's judicial regime has been the subject of multiple criticisms for many years. Especially recently, it has been observed that a legislative technique of enacting "omnibus bills" has become common. As the inevitable consequences of the technique in question, eclecticism and its ramifications haunt the method of simplified proceedings. For example, CCP Article 217 provides that the judges shall only rely upon evidence that is presented at the main hearing and has been discussed in his presence while forming his judgment. The same article also provides that the evidence shall be the main element that would guide the conscious opinion of the judge. A natural corollary of this article is that the judges as the decision makers should get into direct contact with the evidence, the witness, and the defendant. The assumption that the conscious decision of the judge should be the result of an immediate encounter could be taken as an element of the principle in question. In this sense, it is understood that the method of simplified proceedings does not comply with CCP Article 217. Because this procedure deprives the parties of all the tools but the written statement that would allow them to influence the conscious opinion of the judge. It could well be claimed that as it is, what this provision provides cannot be accepted as a proper proceeding in the real sense of the word. A proceeding indicates a process where the three elements of allegation, defence and judgement should exist as a whole. A proper proceeding is less about presenting those three elements successively in isolation than creating an interactive setting where they could debate and refute and sometimes mutually reinforce each other. The principle of collective evidence is also related to the way the proceedings are structured. Evidence is a means of proving the allegation. Evidence is a means of proving the allegation. An evidence can only fulfil its function if it is scrutinized collectively. As the natural corollary of the CCP Article 216, the principle of letting both parties know and debate the sources and the contents of the evidence, together with the CCP Article 217, makes it very clear that the method of simplified proceedings contradicts both provisions. At the risk of invoking a cliché, it can be concisely stated that the mechanisms that are only shortly mentioned here such as being able to present one's case orally, in-person and publicly with the opportunity to discuss the evidence are among the basic principles of a criminal proceeding.

4. To access the related story: https://yeniyasamgazetesi.com/yikimi-yapip-kaybolmuslar/ [Turkish].

5. 18th Chamber of the Supreme Court decision no. 2018/6590 E, 2020/430 K, dated 14.01.2020.

6. The relevant decision of the 18th Chamber of the Supreme Court, which constituted the basis of the indictment, referred to the relatively dated ECHR decision (1992) on Thorgeir Thorgeirson v. Iceland and underlined that it is unnecessary to establish the accuracy of all aspects of the information published in the press. In doing so, the Supreme Court -in connection with the indictment in question- underlined the fact that the ECHR, in its Thorgeir Thorgeirson v. Iceland decision, exempted the applicant from the burden of substantiating the accuracy of some of the claims he raised, that he reported on the statements of other individuals, therefore cannot be held responsible for the content and that his purpose was not to defame but to express the claims and therefore the ECHR, in discussing the culpability of the journalists in cases of factual imputations, continued to uphold the primacy of the responsibility to report in matters of public interest. Following all these evaluations, in the aforementioned case the Supreme Court quashed the verdict on the journalist who had been convicted of insult.

7. The training topics in the Recommendation are as follows:
a. the principles and ethical duties of their office;
b. the constitutional and legal protection of suspects, victims and witnesses;
c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;
d. principles and practices of organisation of work, management and human resources in a judicial context;
e. mechanisms and materials which contribute to consistency in their activities.

8. https://www.hsk.gov.tr/Eklentiler/Dosyalar/e0a67151-fb8b-4c6c-a095-af118c918072.pdf

9. https://www.unodc.org/documents/justice-and-prison-reform/HB_role_and_status_prosecutors_14-05222_Ebook.pdf

Legal Report on Indictment

Necla Demir

Hannah Beck & Clarissa Fondi
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08

Legal Report on Indictment:
Necla Demir

1. Introduction

The subject of this report is the indictment issued against Necla Demir, former editor-in-chief of the Gazete Karınca Newspaper news website, on 3 February 2020 with investigation number 2020/10389 and indictment number 2020/2683. It consists of one page, which is assessed in terms of Art 170 Criminal Procedure Code of Turkey (TCPC), Art 6 and Art 10 European Convention on Human Rights (ECHR), Art 14 and Art 19 International Covenant on Civil and Political Rights (ICCPR) as well as the United Nation's Guidelines on the Role of Prosecutors.

2. Summary of Case Background Information

Necla Demir is a journalist from Turkey, who started her career as a reporter for Dicle News Agency until it was shut down by an Emergency Decree-Law during the State of Emergency in 2016. She became editor-in-chief of Gazete Karınca Newspaper and was responsible for the publication of the articles on the newspaper's website.

An investigation was launched against her in 2020, following anonymous complaints via the Communication Service of the Prime Ministry (BİMER), which in 2018 was renamed and is now better known as Communication Service of the President (CİMER). The platform is usually used by the citizens of Turkey to ask for information, voice concerns or submit complaints.

These anonymous complaints insinuated that some of the articles and shared items on the newspaper's website potentially fall within the scope of "insulting the President" as stated in Art 299 Turkish Penal Code (TPC).

In order to open a lawsuit against an individual for the crime of "insulting the President" it is required to obtain permission from the Republic of Turkey's Ministry of Justice. In this respect the obligatory permission was granted on 2 January 2020, which was followed by the issuance of the indictment on 3 February 2020.

The first hearing was supposed to take place on 13 May 2020, but had to be postponed to October due to the COVID-19 pandemic.

On 8 and 28 October 2020, the second and third hearing took place. The President's lawyer did not participate in any of the proceedings. In the third hearing, not only Necla Demir herself but also the trial's prosecutor asked the judge for an acquittal because according to them the cited articles did not contain any insulting statements and were merely constituting permissible criticism. Bearing in mind that the prosecutor who represents the public prosecutor's office at court, is generally a different person than the prosecutor who issued the indictment. Following this prosecutor's opinion, the court ruled to acquit Necla Demir.

3. Summary of Case Background Information

In this chapter we will assess whether the indictment meets legal requirements in terms of Turkey's domestic law as well as international standards. We will look at the structure and formalities of the

indictment, analyse the evidence, closely examine the charge of "insulting the President" and finally address some procedural concerns.

3.1. Structure and Formalities

In accordance with Turkey's domestic law an indictment has to contain a wide range of elements. These elements are clearly listed in Art 170/3 TCPC and should be included in the document as exhaustively as possible to help the suspects understand the claims made against them.

The reviewed document consists of only one page with a structured first part, indicating the most important information about the complainant, the injured party and its legal counsel, the suspect, place and date of the offence, applicable law and evidence. This introductory section to the case is followed by only half a page of continuous text under the headline "the investigation documents were examined and it was found that", which is supposed to offer a transparent and comprehensible explanation as to why the indictment had been issued and how the found evidence can be linked to the alleged crime. Unfortunately, this section is missing a clear format and rather creates the impression that the prosecutor did not invest a lot of time and effort into the drafting process.

The paragraphs are kept short and simple, which of course does not automatically indicate an inadequate working method. Even quite the opposite, short and clear sentences could help suspects without a legal background to better understand the charges. However, this requires a prosecutor to know how to properly summarise legal arguments and be able to use it for comprehensible formulation. In this case, we found that the short paragraphs are mere narrations of past events and lack legal argumentation all together as will be discussed in the next chapter. Therefore, the first impression of a hurried and careless working method proves to be true and the brevity of the whole document does not do justice to the seriousness of the accusations.

One of the biggest flaws of the indictment is linked to the information about the date and place of the offence. Naturally, specific details about the criminal act in question are indispensable and have to be correctly included in the indictment according to Art 170/3 TCPC. The date and place of an alleged crime, above all, play an immensely important role in a criminal process as statutory periods and the choice of place for further proceedings depend on it. It lies within the role of a prosecutor to collect this information before drafting the indictment and sending it to the authority in charge. Getting the date or place of the offence wrong could highly influence the outcome of a process. Consequently, a prosecutor is expected to carry out his job with diligence.

In the present indictment, date and place are stated as "11/01/2019 ISTANBUL/CENTRAL".
The unspecified nature of the information is immediately noticeable. No further details are given as to what event the prosecutor is referring to. On second glance, an even bigger deficiency becomes apparent. The date "11 January 2019" can neither be matched with the date of one of the two articles presented as evidence (6 and 10 October 2016) nor any other date mentioned in the document. No further explanations are made in this respect and the suspect is left to wonder what had happened on 11 January 2019 and what it has to do with the allegations made against her. Such a scenario must never happen in a criminal process and strongly indicates the defectiveness of the indictment.

As cannot be stressed enough, a well-structured indictment which contains all necessary details lies at the heart of a criminal process. Oftentimes, it is through this document that the suspects are confronted with the allegations against them for the first time. They should therefore be able to get a full picture of the situation by only reading the indictment. A clear structure and format as well as a correct depiction of the circumstances, including all necessary details, are essential for a fair criminal process.
In this respect, we want to bring attention towards the international standard of the "right to a fair trial" as stipulated in Art 6 ECHR and Art 14 ICCPR. Every person has the right to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them. The European Court of Human Rights (ECtHR) observes that this provision "points to the need for special attention to be paid to the notification of the 'accusation' to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him [or them]".[1]
As has been shown above, the indictment does not only lack relevant details but also leads to confusion as to some of the most important facts of the case. This document is indisputably neither in line with Turkey's domestic law nor international law.

3.2. Evidence

There is no crime without evidence. There is no indictment without a crime.

According to Art 170/3 TCPC all evidence must be included in the indictment. Art 170/4 TCPC stipulates that all events that comprise the charged crime must be explained in accordance with their relationship to the present evidence. Subsequently, a prosecutor does not only need to list all the incriminating evidence but has to link the collected evidence to the alleged crime through legal argumentation. This process should occupy the main focus of a prosecutor's work and surely represents the most important part of an indictment. It should clearly display the prosecutor's thoughts and findings to understand the circumstances that ultimately lead to the issuance of the indictment.

In the introductory section of this indictment, the following is cited as evidence: "full contents of case file". No more details are given as to what the case file contains. From the continuous text of the indictment, it becomes clear that the prosecutor is basing his allegations on two newspaper articles, which were published online in 2016. The articles were cited alongside their publication dates, headlines and short excerpts, which allegedly are insulting to the President.

Turkey's domestic law requires the evidence to be clearly stated. General statements like the above-mentioned "full contents of case file" do not provide enough information about the events that lead to the indictment. The prosecutor did not elaborate on the content of his abstract reference neither in this part nor later in the indictment.

Despite the fact that the pieces of evidence are mentioned later in the indictment, the introductory section with its simple structure would be the ideal place to introduce the newspaper articles with additional information about the publication date and place.

Nevertheless, the most striking aspect about this indictment is the sheer lack of legal arguments. Following newspaper articles are mentioned as evidence with an excerpt of one sentence each:

1) On 10.10.2016, in the article titled

'RedHack members speak out: Why did they hack Albayrak?'

If only the present administration was a competent and solid organisation, they don't even have the capacity to hand over responsibility of switching off the lights to anyone, even the President, so much so that they leave the lights on all night…

2) On 06.10.2016, in the article titled

'From Wikileaks documents: Erdoğan is dragging the country towards civil war'

After Erdoğan came out of the last elections with a victory, he put an end to talks with the PKK and is taking the country to the brink of civil war.

The introduction of the evidence is followed by one paragraph about the defence statement of the suspect, one paragraph about the confirmation obtained by the Ministry of Justice and finally the concluding paragraph with the simple note that the crime of "insulting the President" had been committed "by way of damaging the character, honour and respectability of the President via the internet in an overt manner".

This in fact is a very weak example of drafting an indictment because no link was made between the evidence and the claim. The prosecutor did not further elaborate on how and why he came to the conclusion that cited sentences constituted the crime of "insulting the President" for example by consulting the definition of "insulting the President" and in a next step subsuming the wording of the newspaper articles under this definition. By doing so, the connection between evidence and claim would be strengthened and would provide support for the line of argumentation. Instead, the prosecutor fell short of providing any argumentation and rather half-heartedly supported his claim with a trivial standard wording.

As mentioned in the background information, Necla Demir had been acquitted of all charges. In fact, even the prosecutor present at the third hearing had been of the legal opinion that the elements of the alleged crime were not fulfilled and that the articles had merely been voicing criticism. According to Art 170/2 TCPC an indictment shall only be prepared in cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that the crime has been committed. In light of the fact, that even a fellow colleague of the prosecutor had requested the acquittal of the suspect, it seems arguable that the indictment should not have been issued in the first place due to lack of evidence. Additionally, it seems odd that two articles dating back as far as 2016 were brought forward in an investigation that started in 2020. Therefore, the whole document gives the impression that the allegations against the defendant might possibly be the outcome of a constructed case.

3.3. Insulting the President

The crime of "insulting the President" has been defined in Turkey's penal codes since 1961 (formerly under Art 158 of the previous Penal Code of Turkey), but a significant increase in trials and convictions for this crime can be observed in recent years. In 2018, Human Rights Watch published statistical results, confirming a sharp rise in prosecutions for Art 299 TPC from 132 cases in 2014 to more than 6,000 in 2017:

> *"According to the Ministry of Justice's General Directorate of Judicial Records and Statistics, the number of people prosecuted for article 299 has rapidly increased since 2014. The records reveal that 132 people (including 1 minor) were prosecuted in 2014, that there was a sharp increase to 1,953 (including 76 minors) in 2015, and that in 2016, the number of cases more than doubled, with 4,187 persons (including 148 minors) prosecuted. In 2016, 54 of the minors prosecuted were aged between 12 and 15. A further huge leap occurred in 2017, when prosecutions rose to 6,033, with 340 cases concerning minors (42 aged between 12 and 15). According to the ministry's statistics, the number of convictions also rose over the same period. While 40 persons were convicted for insulting the president in 2014, 238 were convicted in 2015, the number almost quadrupled to 884 in 2016, and jumped to a staggering 2,099 convictions in 2017."*[2]

Comparing this situation to other European countries, many penal codes do not recognise the criminal offence of "insulting the President" and exclusively prosecute incidents in relation to general "insult", whereby investigations usually only take place on grounds of an individual complaint by the insulted person. In fact, the offence of "insult" is often not even disputed in criminal trials but rather settled through civil procedures. Additionally, public figures like politicians are subject to increased public interest and must therefore be able to receive harsher criticism than private individuals and are generally expected to tolerate lower protection against insults to their character.

Whereas under Turkey's domestic law, "insulting the President" does not only exist as a criminal offence but is also actively and regularly indicted. Additionally, the prosecution is able to initiate the investigation phase without a preceding complaint, merely with permission of the Ministry of Justice.

In its "Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey", the Venice Commission stated in March 2016: "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."[3]

In light of these international analyses on Art 299 TPC as well as the alarming lack of evidence found in this particular investigation, the indictment raises overarching concerns with regard to international human rights standards, particularly touching the "right to freedom of expression" and "freedom of the press", as protected by Art 10 ECHR as well as Art 19 ICCPR.

Turkey is party to the European Convention on Human Rights as well as the International Covenant on Civil and Political Rights, both legally binding Instruments of international law. Nonetheless, these recent statistics raise legal and ethical concerns with regard to free speech and potential censorship. In its observations, Human Rights Watch furthermore confirmed that Art 299 TPC was being predominantly used "to prosecute journalists, academics, juveniles, and ordinary people for social media postings".[4]

The prosecutor who prepared this indictment exhibits no awareness of the conflicting legally protected rights of this investigation. International human rights standards refer to the "margin of appreciation doctrine" as a tool to weigh competing legal goods. As defined by the ECtHR 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."[5] The foundation for this balance must be rooted in plurality, tolerance and freedom as core values of a democratic society while any restriction of the "right to freedom of expression" and the "right to freedom of the press" can only be based on a compelling social need within the public interest. Our analysis of this indictment however, reveals a sheer lack of assessment between the accused violation of the President's personal rights and the "right to freedom of expression".

Furthermore, the ECtHR clarified in 2004 "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'"[6] and has reconfirmed that statement in 2014:

> *"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."*[7]

A media outlet criticizing the actions of leading political figures is therefore merely serving its purpose as 'social watchdog'. An assessment of the published article under criminal law must not depend on whether those political actions are being portrayed positively or negatively, since the ECtHR established already in 1976, that the "right to 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"[8] and reconfirmed in 2009 that the function of any press includes the creation of forums for public debate.[9]

As mentioned above, the Court ruled to acquit Necla Demir after the trial's prosecutor announced his judicial opinion about the case in which he voiced concerns regarding the elements of the crime and consequently requested the acquittal of the defendant. Looking at the context and circumstances of this particular investigation as well as the previously analysed evidence, it is irritating that charges were brought forward against Necla Demir in the first place. Moreover, the Court declared that the newspaper articles in question were in fact not insulting under Art 299 TPC but amounted merely to political criticism. In its verdict the Court goes on to confirm that the scope of criticisms towards politicians is wider than for private citizens. Referencing rulings of the Constitutional Court of the Republic of Turkey as well as the ECtHR, the Court clarifies that individuals engaged in politics may indeed have to endure harsh, strong and even offensive criticism, and that this is an indispensable element of life in a democratic society. The Court further elaborates on the reason behind this principle being that politicians willingly choose to assume public positions that are open to scrutiny by journalists and the public. Unlike private citizens, politicians can therefore be expected to tolerate a greater degree of criticism. By using this line of argumentation, the ruling Court of this case once more confirms a shared point of view with the ECtHR.

3.4. Procedural Concerns

As has been mentioned in the background information, the investigation is based on anonymous complaints via the communication service BİMER. No details on the quantity nor the contents of these allegations were included in the indictment.

Even though the complaints do not constitute evidence they are still essential for the progression of the case as they lay the ground for the initiation of the investigation. Therefore, it is astonishing how little information about the nature of the complaints has been disclosed in the indictment.

The prosecutor mentions that the complaints were submitted via BİMER, which since July 2018 is better known as CİMER. Since the old version of the communication service is mentioned in the indictment, we can conclude that the complaints must have been made before July 2018. Following the natural course of proceedings, it could be assumed that the investigation phase was initiated shortly after the

complaints became known. However, the number of the investigation "2020/10389" suggests otherwise and leaves us puzzled as to why it took presumably more than 1,5 years to commence the investigation. Furthermore, according to the indictment the prosecutor got the permission to "initiate the proceedings against the suspect" on 2 January 2020. Even though the domestic law of Turkey speaks of a "permission to initiate the investigation", in practice the permission is rather given with regards to the "issuance of the indictment". This means that in most instances investigations are already ongoing when the permission of the Ministry of Justice is obtained. Therefore, to be able to get a permission on the second day of 2020, an investigation must have been ongoing at least since 2019 - maybe even before that.

When taking a closer look at the following chronology, a mysterious scenario presents itself: the start of the investigation, the application for permission to issue the indictment as well as the confirmation by the Ministry of Justice presumably all took place within the first two days of 2020 (nota bene 1 January 2020 is a public holiday). This scenario seems almost impossible and leaves doubts regarding the correct and lawful implementation of the proceedings.

While we positively recognise the Court's verdict as well as the trial prosecutor's request to acquit the defendant, we need to emphasise our concerns with the prosecutor who initially submitted the indictment for this case, since these observations suggest that he neglected to respect the "right to a fair trial" and "presumption of innocence".

In this context we want to refer to the United Nation's Guidelines on the Role of Prosecutors, particularly to principle 13 (a) and (b) as well as principle 14 as they lay out a set of standards to ensure a fair, impartial and efficient prosecution of criminal offences in all justice systems:
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.

Both Principles were disregarded within this indictment, as the prosecutor failed to discontinue his prosecution even after it became evident that a clear link between evidence and accused crime could not be established.

This in turn heavily violates Art 6/2 ECHR, the presumption of innocence, an essential core function of the "right to a fair trial" as guaranteed by Art 6 ECHR. Without this principle, a judicial system cannot be expected to appropriately protect and uphold national law nor international human rights standards within a democracy, as its citizens would lose all trust into the country's institutions and the rule of law could not be upheld. Therefore, it is of utmost importance that prosecutors, when conducting the investigation as well as drafting the indictment, meet the requirements of the fair trial principle with appropriate care and respect.

4. Conclusion

In conclusion, this indictment does not only fail to meet international standards but additionally violates domestic standards as has correctly been recognised by the trial's prosecutor as well as the ruling Court of Turkey.

Firstly, the implementation of an effective criminal justice system begins with a duly conducted investigation phase and the successive issuance of a well-argued indictment. In this case, however, our main concern is precisely the fact that the indictment had been drafted in the first place. Looking at the evidence as analysed in detail above, this case should have been dismissed at the end of the investigation phase. By failing to do so, the prosecutor demonstrates not only grave disregard for international human rights standards like the Guidelines on the Role of Prosecutors, but additionally

violates Art 170/2 TCPC which clearly states that an indictment shall only be prepared in cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that the crime has been committed.

This leads directly to the second flaw of this indictment. Not only did the prosecutor fail to provide sufficient evidence to lawfully continue with the proceedings, but he subsequently neglected to link the supposed evidence to his accusations entirely. Failing to properly connect evidence to the criminal charges constitutes yet another infringement of Art 6/2 ECHR, the presumption of innocence.
Lastly, the entire indictment has not been sufficiently well structured, the most severe flaw being the incoherent date of offence as filed by the prosecutor. This choice of date cannot be explained and does not trace back to any piece of evidence, as discussed in detail above.

These deficiencies leave us with severe doubts regarding the proper implementation of international guarantees of fairness and transparency in Turkish judicial proceedings.

We therefore recommend to follow a structured format throughout the indictment, to be diligent with elements like the exact date of the crime and most importantly, to be mindful of the necessity of a full list of evidence in the introductory section. These elements can be structurally implemented by using a common template across the prosecutor's office.

Beyond that, it is the fundamental core of any indictment that the evidence is properly linked to the accused crime, otherwise there is no legitimacy in the criminal charge and therefore in the indictment itself. In this context it is absolutely crucial for any prosecutor to acknowledge the elements of a fair trial, in particular the presumption of innocence as stipulated in Art 6 ECHR. We cannot emphasize enough how vital these principles are for any democracy's judicial system and hope to see a more diligent approach by Turkey's law enforcement to issue indictments in line with the requirements of legally binding international human rights standards.

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Endnotes

1. Pélissier and Sassi v. Austria, European Court of Human Rights, no. 25444/94 (25 March 1999) para. 51

2. Human Rights Watch, Turkey: End Prosecutions For 'Insulting the President' https://www.hrw.org/news/2018/10/17/turkey-end-prosecutions-insulting-president (17 October 2018)

3. Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, Venice Commission, no. 831/2015 (15 March 2016) para. 57

4. Human Rights Watch, Turkey: End Prosecutions For 'Insulting the President' https://www.hrw.org/news/2018/10/17/turkey-end-prosecutions-insulting-president (17 October 2018)

5. Belgian Linguistic Case (No. 2), European Court of Human Rights, no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968) para. 5

6. Cauvy and others v. France, European Court of Human Rights, no. 64915/01 (29 September 2004) para. 67

7. Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, European Court of Human Righs, no. 39534/07 (28 February 2014) para. 33

8. Handyside v. United Kingdom, European Court of Human Rights, no. 5493/72 (07 December 1976) para. 49

9. Társaság a Szabadságjogokért v. Hungary, European Court of Human Rights, no. 37374/05 (14 July 2009) para. 27

Legal Report on Indictment

Adana Bar Association

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Legal Report on Indictment:
Adana Bar Association

1. Introduction

This evaluation report is part of the Turkey Indictment Project established by PEN Norway. The scope of this legal report is to examine the indictment issued against seven lawyers of the Adana Bar Association (Adana BA) by the Adana Chief Public Prosecutor's Office on 5 April 2018 with investigation no. 2017/40802 and indictment no. 2018/5925 in light of domestic laws and international human rights laws in order to ascertain whether the indictment complies with these standards. Section 2 of the report includes a brief summary of the case. Section 3 presents the legal analysis of the indictment. Section 3.1 introduces the relevant provisions, being the first sentence of Article 25/b.1 of the State of Emergency Law (SoE or Law No. 2935) and Article 53 of the Turkish Penal Code (TPC). Section 3.2 evaluates the indictment against domestic law focusing on Article 170 of the Turkish Criminal Procedure Code (TCPC). Section 3.3 assesses the indictment in light of international standards, specifically Articles 6, 7, 10 and 11 of the European Convention on Human Rights (ECHR), the United Nations (UN) Guidelines on the Role of the Prosecutors and the UN Basic Principles on the Role of Lawyers. The report concludes, in section 4, with recommendations.

2. Summary of Case Background Information

The indictment targets seven suspects. The suspects are lawyers and are all registered with the Adana BA. Most of these lawyers are well-known as a result of their prominent human rights work and are members of the Progressive Lawyers Association (ÇHD). The suspects are: Ali Akıncı, Sebahattin Demir, Sevil Aracı Bek, Şiar Rişvanoğlu, Tugay Bek, Ümit Büyükdağ and Veli Küçük (the former president of the Adana BA). The lawyers were indicted for "acting in a contrary way to the Governorship's measures".[1] The background of the case is as follows.

In November 2016, three lawyers[2] that represent the Cumhuriyet Newspaper were arrested together with the journalists from the Cumhuriyet newspaper.[3] In April 2017, several lawyers launched an action against the unlawful arrest of their colleagues. This initiative is called "Justice Watch". Between April 2017 and December 2018, Justice Watch was held weekly without any interruptions. Justice Watch ended in its 85th week with the slogan "Justice Watch is coming to an end, the struggle for justice will continue". Every week, a local BA became the host of the Justice Watch. In May 2019, Justice Watch was re-launched, because the lawyers and the journalists were rearrested after they had been released.

On 18 May 2017, the seventh Justice Watch was organised all over Turkey to support the imprisoned lawyers that were defending the journalists from the Cumhuriyet newspaper. In Adana, the Justice Watch was organised by the Adana BA, the Progressive Lawyers Association and other legal groups. The action included a sit-in and a press release that was read out loud, to support and ask for the release of the imprisoned lawyers.

The Governor of Adana issued an order and announced that any kind of assembly including press releases in front of the Courthouse or close to the building was forbidden. The order included specific locations such as the courthouse and the İnönü Park. At the same time, the order of the governor was saying "etc" after defining specific activities. The activities listed as forbidden were also expended by "etc." including press releases, camping, demonstrations and "all the other activities". This order had been issued many times during the state of emergency. The order affected not only the Justice Watch, but also student protests, peace actions and any kind of movement in Adana no matter what the content

was.

The Adana police officers told the participants of the Justice Watch that they were committing a crime, as organising and reading a press release out loud was prohibited. The police informed the lawyers that they would initiate a criminal investigation against every individual who joined the Justice Watch. The lawyers that organised and joined the Justice Watch underlined that fundamental rights should not be interfered with by arbitrary practices and that the public needs to be informed. The lawyers read the press release publicly and sat in front of the courthouse to protest against the attacks on lawyers by the administrative powers. The police officers recorded the demonstration. On 13 June 2017, the police provided an investigative report with respect to every lawyer that had joined the Justice Watch. The report concluded that the lawyers acted against the order of the Governor. Following this report, the prosecution office initiated a criminal investigation against twelve lawyers.

According to Article 32 of the Law of Misdemeanour, violation of an order given by the competent authorities due to judicial proceedings or for the purpose of protecting public security, public order or general health, is treated as a misdemeanour. According to this regulation, the suspect is offered to make a prepayment and if the suspect accepted to pay, the prosecutor makes a non-prosecution decision. If the suspect accepts to pay the required amount of money within a set time period, the prosecution office has to close the investigation and must issue a decision of non-prosecution. If the suspect declines to fulfil the payment, an indictment will be issued.

Of the twelve suspects, six of them paid the penalty (of less than 1000-Turkish Lira), including the former president of the Adana BA (Veli Küçük). However, the prosecutor made a mistake and issued an indictment against the president of the Bar nevertheless. The other six lawyers decided not to pay the prepayment amount and claimed that the prepayment decision was unlawful. An indictment was issued against them as well.

On 5 April 2018, the indictment against the seven lawyers was submitted to the court. The indictment was accepted by the Adana Second Criminal Court of First Instance. The accusation in the indictment was "acting in a contrary way to the Governorship's measures" (the first sentence of the Article 25/b.1 SoE) and included the possibility to impose heavier sanctions for committing the crime deliberately (Article 53 TPC).[4]

On 15 January 2019, a hearing on the merits of the case was held. In their defence, the lawyers admitted that they had participated in the demonstration, but underlined that their actions did not qualify as a crime referring to their right to demonstrate. In their view, their actions were fully legal. Later on, in the third hearing, the Court of First Instance ruled that the demonstration fell under the protection of the right to free speech and that the defendants did not have any intent to commit a crime. The Court of First Instance issued the acquittal of six lawyers and dismissed the case against the president of the Adana BA, who had already paid the penalty.

The lawyers appealed the decision because they wanted to challenge its justification. Even though the Court of First Instance had acquitted them, in the justification for its decision, the Court only focused on the lack of intent as a reason for the acquittal. The decision could be interpreted as if a crime was committed without intent, though the lawyers were of the opinion that no crime was committed at all. In the appeal, the lawyers underlined that the justification of the acquittal should reflect this point. The Adana Regional Court of Appeal examined the casefile and accepted the lawyers' application. The Court of Appeal stated that the part of the verdict justifying the acquittal by the lack of intent should be removed and that the following sentence should be included instead: "[s]ince the legal elements of the crime charged against the accused are not formed". The acquittal of the lawyers was therefore final (after the judgment of the Regional Court of Appeal) on 7 December 2020.

3. Analysis of the Indictment

3.1 Introductory Remarks and Formalities

The indictment accuses seven lawyers all registered with the Adana BA. The first sentence of Article 25/b.1 SoE and Article 53 TPC are referred to as the relevant penal provisions. The indictment takes up a little over one page. The indictment starts with formalities, such as the description of the crime, the place and the date of the alleged crime, the applicable laws and the evidence. It makes sense to

commence with these formalities, as this is an effective way to clarify the most essential elements of the accusations against the defendant.

The indictment is rather short. Nevertheless, it is difficult to comprehend. The indictment is poorly written and does not entirely fulfil the basic purpose of an indictment. Namely, to give the suspects an understanding of the accusation, the legal basis and the relevant evidence that supports it.[5] The issue date of the indictment (05 April 2018) is marked at the end but it is not clear what this date refers to. It would be preferable to mention the issue date at the beginning together with the formalities.

3.2 Evaluation of the Indictment under Domestic Law

3.2.1 The Requirements of Article 170 TCPC

Article 170/3 TCPC prescribes the elements that an indictment should include.[6] The indictment conforms with most of the formal requirements in Article 170/3 TCPC. It clearly sets out the identity of the suspects, the date and the place of the crime.

There is no mention in the indictment of the defence counsel (170/3/b TCPC). Neither is mentioned whether any of the suspects have been in detention or not. As none of the suspects were, the lack of information on this matter is not important to the overall evaluation of the indictment. The crime charged, described as "acting in a contrary way to the Governorship's measures", and the related articles applicable (Article 25/b.1 SoE and 53 TPC) are set out in the introductory section. The elements of the crime, laid down in the first sentence of Article 25/b.1 SoE, seem to be the following:

> *"anyone whose actions constitute a breach of the measures taken by a regional governor or the governor of a province in accordance with the authority provided in this Law or in other laws, or who disobeys orders or does not carry out the requirements of such orders".*[7]

The elements of the crime seem to be "actions", "breach of the measures taken (…)" and "disobeys orders (…)". From the wording of the indictment, it is unclear whether the allegation concerns a breach of a measure or a disobedience of an order. It does reflect that the suspects organised a sit-in action and a press release on a banned location, and that the suspects continued joining the action after they were notified of the unlawful characteristics thereof. However, it does not mention that the suspects were given an explicit order to leave the premises or discontinue their actions, which they would have then disobeyed.

Additionally, given the elements in the penal provision, it is important that the indictment includes the respective measure or order that the actions were allegedly contrary to. The indictment only refers to an "APPROVED" circular issued by the Governorship of Adana banning locations for meetings, demonstrations, marches and press conferences. It does not mention the number of the order or the date in which the circular was issued.

Therefore, there is no clear link between the elements of the offence and the wording in the indictment, which could be seen as a violation of Article 170/3/h TCPC. The prosecutor has drafted the indictment as a story and not in accordance with the legal rules of procedure that should have been followed. As a result, the indictment does not inform the suspect which measure is breached or which order is disobeyed.

An important requirement of Article 170 TCPC is the "evidence of the offence".[8] The list of evidence in the indictment is presented as follows: "Allegations, defence, reports issued on the day of the incident, criminal records, registers of persons, the scope of the whole investigation document".[9]

It is the duty of the prosecutor to connect the evidence to the alleged crime, as mentioned in Article 170/4 TCPC, which prescribes that "the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence".[10] The list of evidence does not fulfill its purpose entirely. Firstly, in respect of the "reports issued on the day of the incident", the type of reports and the entity that issued them is left unspecified. If the reports mentioned here are the reports issued by the Adana Provincial Security Directorate, it is unclear why only the report issued on the day of the incident is mentioned, and not the report issued on 9 June 2017, that is mentioned in the indictment

itself. Secondly, the evidence refers to generic "registers of persons", which does not link the individual suspects to the crime.

Furthermore, the conclusion of the indictment does not include the issues that are both favourable and unfavourable to the suspect, as prescribed under Article 170/5 TCPC. In this respect, mention should have been made to the right of freedom of speech and assembly, and the reasons why these rights would or would not be applicable to this case.

Additionally, the indictment does not include any reference to intent. It does refer to Article 53 TPC, which prescribes heavier sanctions for committing the crime deliberately. The indictment also concludes that the suspects should be deprived of certain rights for committing the crime deliberately with reference to this article. For this reason alone, the indictment should have included the basis for the intent or the lack thereof. Secondly, a lack of intent would mean that the crime is qualified as a misdemeanor, for which a prepayment should have been offered under the condition of non-prosecution. The mere fact that an indictment is issued for the alleged crime either implies that the prosecution means that the crime was committed intentionally, or that the suspects denied the offer of the prepayment. This should also be included in the indictment, albeit in a separate paragraph. Moreover, it can be argued that a reference to intent should have also been included due to the wording of the first sentence of Article 25/b.1, as "disobeying orders" or "not carrying out the requirements of such orders" rarely happens unintentionally. Lastly, the concluding section of the indictment does not refer to a punishment or measure that is foreseen. This violated Article 170/6 TCPC.[11]

3.3 Evaluation of the Indictment under International Standards

International law has precedence over national law, according to Article 90 of the Republic of Turkey's Constitution.[12] Turkey has ratified the European Convention of Human Rights (ECHR) in 1954. Citizens of Turkey are therefore directly protected, via the Constitution, by the fair trial standards established in Article 6 ECHR, the freedom of expression embodied in Article 10 ECHR, and the right to freedom of assembly and association enshrined in Article 11 ECHR.

Other relevant international standards can be found in the United Nations (UN) "Guidelines on the Role of Prosecutors",[13] and the standards set out by the International Association of Prosecutors on the principle of fair trial regulated under the ECHR.[14] Furthermore, and especially relevant to this case, the UN Basic Principles on the Role of Lawyers.[15]

3.3.1 Article 6 ECHR

The ECtHR guide on Article 6 ECHR includes several relevant starting points to assess whether the indictment is in accordance with the right to fair trial.[16] First of all, Article 6/3-a prescribes that 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.[17]

The Guide on Article 6 ECHR includes the following information:

> *"Article 6/3-a points to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (Pélissier and Sassi v. France [GC], § 51; Kamasinski v. Austria, § 79). Article 6 § 3 (a) affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts (Mattoccia v. Italy, § 59; Penev v. Bulgaria, § § 33 and 42). […]*
>
> *Article 6/3-a does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him/her (Pélissier and Sassi v. France[GC],§53; Drassich v. Italy,§34; Giosakis v. Greece (no.3),§29). In this connection, an indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him or her (Kamasinski v. Austria,§79).The duty to inform the*

accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence (Mattoccia v. Italy,§65; Chichlian and Ekindjian v. France, Commission report,§71).”[18]

Although the indictment is written in Turkish, which is a language that the suspects understand, the indictment is difficult to comprehend. This is due to the long and complicated sentences which are separated by a semicolon. The format makes it hard to unravel the actual content. The failure to connect the alleged crime to the evidence leave the suspects in ignorance about the crime they are accused of. It is not clear which specific measure or order was breached or disobeyed. This makes the preparation for the defence difficult.

3.3.2 Article 7 ECHR

From Article 7 ECHR it can be inferred that offences and penalties must be accessible and foreseeable. This principle of legality requires offences and corresponding penalties to be clearly defined by law. As the order or a reference thereto is not included in the indictment, it is difficult to examine whether the legal basis for the criminal investigation is in line with the criteria of Article 7 ECHR. It has been understood that the order included specific locations, but that the governor also referred to “all the other activities” that are forbidden. If the scope of the governor’s order was that broad, it is not foreseeable which specific acts are criminalized. In this respect, it should be noted that criminal investigations in relation to the Justice Watch only took place in Adana, and not in the other cities in which the Justice Watch was organized.

3.3.3 Article 10 ECHR

3.3.3.1 Press Freedom and Attorney’s Freedom of Expression

The right to freedom of expression is enshrined in Article 10 ECHR The group of seven lawyers from the Adana BA was indicted for acting contrary to the Governorship’s measures. It can be inferred from the indictment that the alleged behaviour includes the organization of a sit-in action and the reading out loud of a press release. This was done at the initiative of the Justice Watch, by which the lawyers wanted to take action and raise awareness for the unlawful detention of their colleagues. The governor’s measure that allegedly prohibits this behaviour therefore interferes with the right to freedom of expression and press.

The press is seen as a critical watchdog in a democratic society, which the ECtHR cherishes and defends under the right to freedom of expression.[19]

“[…] the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy (see among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no. 103, p. 26, § 41, and the abovementioned Sürek (No. 1) judgment, § 59). While the press must not overstep the bounds set, inter alia, for the protection of vital State interests, such as national security or territorial integrity, against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas, the public has a right to receive them. 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 (see the abovementioned Lingens judgment, p. 26 §§, 41-42)”.[20]

The Adana Police Headquarters told the participants of the (Adana) Justice Watch that organizing a press release was forbidden, that the lawyers were committing a crime and that a criminal investigation would be initiated against every individual who joined the Watch. From the indictment, it is not clear what the press release entailed and what the lawyers said. Considering the broader context of the Justice Watch, the group of lawyers must have expressed their dissenting opinions regarding the arrest of their colleagues. The right to freedom of expression which encompasses press freedom was infringed for no apparent reason or at least not for the lawful restrictions laid down under paragraph 2 of Article 10 ECHR.

Furthermore, the position of participants in the justice system and their freedom of expression in the

context of judicial proceedings is specifically mentioned in the ECtHR Guide on Article 10 ECHR.[21] The lawyers from the Adana BA play a fundamental role in the justice system in their positions as lawyers (Morice v. France[GC],§170).[22] Hence, their views regarding the unlawful detention of other lawyers merits even more protection.

> *"The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (Morice v. France[GC], §§ 132-139; Schöpfer v. Switzerland, §§29-30; Nikula v. Finland,§45; Amihalachioaie v. Moldova,§27; Kyprianou v. Cyprus[GC], §173; André and Another v. France,§42; Mor v. France,§42; and Bagirov v. Azerbaijan, §§ 78 and 99)."*[23]

Moreover, the contribution of the lawyers from the Adana BA to the Justice Watch clearly concerns a matter of public interest. In the Mustafa Erdoğan and others v. Turkey case the ECtHR noted that "issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10" and "[t]he press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them".[24] Additionally

> *"the Court reaffirms that the courts, as with all other public institutions, are not immune from criticism and scrutiny. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (see Skałka v. Poland, no. 43425/98, § 34, 27 May 2003)".*[25]

Furthermore, the case of Morice v. France is a significant precedent. This case demonstrates the importance of preserving the attorneys' freedom of expression. Permitting attorneys to engage in a constructive dialogue with judges and about the justice system in general, is preserving the rule of law.[26] However, it is also true that "[t]he freedom of expression of lawyers also has its limits, in order to maintain, as is provided for in Article 10, paragraph 2 of the Convention, the authority and impartiality of the judiciary".[27] In this case there is no evidence that the lawyers engaged in abusive criticism or insult of the justice system.

Furthermore, concerning the amount of protection afforded to authorities when the subject at hand is of public interest, the Court clarified the following:

> *"Moreover, as regards the level of protection, there is little scope under Article 10/2 of the Convention for restrictions on political speech or on debate on matters of public interest (see Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV; Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and Axel Springer AG v. Germany [GC], no. 39954/08, § 90, 7 February 2012). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending in respect of the other defendants (see Roland Dumas v. France, no. 34875/07, § 43, 15 July 2010, and Gouveia Gomes Fernandes and Freitas e Costa v. Portugal, no. 1529/08, § 47, 29 March 2011). A degree of hostility (see E.K. v. Turkey, no. 28496/95, §§ 79-80, 7 February 2002) and the potential seriousness of certain remarks (see Thoma v. Luxembourg, no. 38432/97, § 57, ECHR 2001-III) do not obviate the right to a high level of protection, given the existence of a matter of public interest (see Paturel v. France, no. 54968/00, § 42, 22 December 2005)".*[28]

The Human Rights Committee found a breach of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) in Sviridov v. Kazakhstan. The defendant, a human rights activist, was fined for displaying a placard that stated: "[i] demand a fair trial for Mr. Zhovtis!"[29] After witnessing Mr. Zhovtis' trial, the defendant recorded many violations of the right to a fair trial and posted them on his organization's website. According to the Human Rights Committee, Article 19 ICCPR protects an individual's right to share "opinions on matters of human rights such as the right to a fair trial";[30] and that the State had therefore "interfered with the author's right to freedom of expression and to impart information and ideas of all kinds".[31]Thus, Article 19 ICCPR protects opinions that relate to the right to

fair trial. The present indictment indirectly presents the concerns of the group of lawyers from the Adana BA about their colleagues who have been unlawfully arrested. An unlawful arrest directly touches upon the fundamental requirements of the right to fair trial. Therefore, the opinions of the lawyers should be protected both under Article 10 ECHR and under 19 ICCPR.

All lawyers should be afforded a high level of security whether expressing themselves in court or in the context related to their work as lawyers. Even if the press release and the sit-in can be considered outside of this context, the group of lawyers from the Adana Bar acted from a central position in the administration of justice. According to the case law of the ECtHR, lawyers' activities are critical for the public in order to have faith in the legal profession's capacity to offer effective representation. By expressing their dissent regarding the unlawful arrest of their colleagues through a sit-in and a press release, the lawyers were critical of the system. The present indictment therefore violates the freedom of expression as laid down in Article 10 ECHR.

3.3.3.2 Freedom of Expression and State of Emergency (SoE)

The right to freedom of expression has been severely curtailed by SoE decrees in Turkey.[32] In this case, the Governor of Adana issued the order reflected in the indictment many times during the SoE. In 2017, the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey concluded that

> *"the situation of the right to freedom of expression in Turkey is in grave crisis and requires immediate steps for Turkey to be compliant with its obligations under international human rights law. In particular, focus is paid to the state of emergency decrees and their effect on the 23 arrest, detention and harassment of journalists, media closures, Internet restrictions, academic freedom, the dismissal of public officials and the suppression of civil society".[33]*

In 2018, the Commission of the European Union found in the "Turkey 2018 Report Communication on EU Enlargement Policy" that

> *"these emergency decrees have notably curtailed certain civil and political rights, including freedom of expression, freedom of assembly and procedural rights. They have also amended key pieces of legislation which will continue to have an effect when the state of emergency is lifted".[34]*

In addition, the 'Intervention of United National Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression before the European Court of Human Rights' on 20 October 2017 concerned ten applications to the Court regarding journalists that have been arrested and/or detained under counter-terrorism laws and state-of-emergency decrees in Turkey. The brief presents a pattern of abuses of the applicable international norms pertaining to freedom of speech to demonstrate that Turkey's limits on freedom of expression, as guaranteed by Article 10, are not "prescribed by law".[35]

Amnesty International also carried out a study which details a variety of human rights violations perpetrated in Turkey during the state of emergency, with a focus on the capacity of human rights defenders and non-governmental organizations (NGOs) to carry out their work. Increased arbitrary imprisonment, abusive anti-terrorism prosecutions, the use of emergency rule to close NGOs, rising cases of intimidation to silent opposition, and unjust limitations on the right to freedom of assembly are all highlighted in the report. Amnesty stated that "[a] chilling climate of fear is sweeping across Turkish society as the Turkish government continues to use the state of emergency to shrink the space for dissenting or alternative views."[36]

Therefore, since the Governorship's measures infringed by the group of lawyers had already been issued many times during the state of emergency, it can be inferred that these measures might not be in line with the requirement of "prescribed by law" under paragraph 2 of Article 10 ECHR. There is no evidence that indicates that the measures were necessary in a democratic society or that were enacted in the interest of national security at that time. For this reason, the interference with the right to freedom of expression of the seven lawyers could amount to a violation of Article 10 ECHR. In fact, it seems more likely that the right to freedom of expression of the lawyers was restricted with the purpose of shrinking the political space for dissenting opinions. This could lead to a violation of Article 18 ECHR as this provision forbids the use of rights restrictions and allows the Court to examine whether criminal

proceedings have been twisted into instruments of suppression that appear to be lawful.[37]

3.3.4 Article 11 ECHR

The right to freedom of assembly and association is prescribed by Article 11 ECHR.[38] In this case, the right to freedom of assembly and association is closely linked to the right to freedom of expression.[39] The significance of the right to peaceful assembly and its relationship to the right to free speech has often been highlighted in the ECtHR case law:

> *"The link between Article 10 and Article 11 is particularly relevant where the authorities have interfered with the right to freedom of peaceful assembly in reaction to the views held or statements made by participants in a demonstration or members of an association (Primov and Others v. Russia, 2014, § 92; Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, 2001, § 85)."*[40]

Assembly is a form of expression. Many instances in which opinions were expressed during an assembly, including sit-in actions, have been examined under Article 11 ECHR:

> *"Installation of a banner on a wall during a demonstration was examined under Article 11 alone (Akarsubaşı and Alçiçek v. Turkey, 2018, §§ 31-33; cf. Olga Kudrina v. Russia, 2021, § 49, where similar actions were examined under Article 10 when they were combined with throwing political leaflets out of the window), as was the making of public statements to the press near judicial buildings in defiance of the legislative ban on doing so (Öğrü v. Turkey, 2017, § 13). Likewise, a series of protest actions including a press conference, a procession and a sit-in, all linked to a single campaign, was examined under Article 11 (Hakim Aydin v. Turkey, 2020, § 50). A penalty for shouting slogans and holding banners during a demonstration on account of their content is considered an interference with the right to freedom of peaceful assembly under Article 11 (Kemal Çetin v. Turkey, 2020, § 26)."*[41]

According to the indictment, the protestors acted against the measures of the Governor and disobeyed the orders. In principle:

> *"[a] prohibition on holding public events at certain locations is not incompatible with Article 11, when it is imposed for security reasons (Rai and Evans v. the United Kingdom (dec.), 2009) or, as the case may be in respect of locations in the immediate vicinity of court buildings, for protecting the judicial process in a specific case from outside influence, and thereby protecting the rights of others, namely the parties to judicial proceedings".*[42]

However, "[t]he latter ban should be tailored narrowly to achieve that interest (Lashmankin and Others v. Russia, 2017, § 440; Öğrü v. Turkey, 2017, § 26)".[43] Therefore, restrictions placed on peaceful assemblies, even when there is a risk that the assembly might result in disorder, must be in conformity with paragraph 2 of Article 11 ECHR. States have a positive obligation to secure the effective enjoyment of these rights and must refrain from applying unreasonable restrictions on the right to peaceful assembly.[44]

In this case, the right to freedom of assembly of the lawyers is interfered with twice, during the Justice Watch by the Governorship's measures and after the Justice Watch by the sanctions imposed and the criminal indictment. In fact:

> *"the term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards (Ezelin v. France, 1991, § 39). For instance, a prior ban can have a chilling effect on the persons who intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities (Bączkowski and Others v. Poland, 2007, § 66-68)".*[45]

> *"There are two types of restrictions, each giving rise to a range of legal issues. The first type comprises conditions on the exercise of the right to freedom of assembly, in particular rules on the planning and conduct of an assembly imposed through mandatory notification and authorisation procedures. Restrictions of this type are mainly addressed to the assembly*

organisers. The second type of restrictions comprises enforcement measures such as crowd-control, dispersal of an assembly, arrest of participants and/or subsequent penalties".[46]

Interference of any kind with the right to peaceful assembly is a violation of Article 11 unless it is "prescribed by law," pursues one or more legitimate goals under paragraph 2, and is "necessary in a democratic society" for the attainment of the goals at issue.[47] Furthermore, the proportionality of the measures must be considered taking into account the chilling effect:

"[i]n particular, a prior ban of an assembly may discourage the participants from taking part in it (Christian Democratic People's Party v. Moldova, 2006, § 77)."[48]

"A chilling effect may remain present after the acquittal or dropping of charges against the protestors, since the prosecution itself could have discouraged them from taking part in similar meetings (Nurettin Aldemir and Others v. Turkey, 2007, § 34)."[49]

"The subsequent enforcement measures, such as the use of force to disperse the assembly, the participants' arrests, detention and/or ensuing administrative convictions may have the effect of discouraging them and others from participating in similar assemblies in future (Balçık and Others v. Turkey, 2007, § 41). The chilling effect is not automatically removed even if the enforcement measure is reversed […] (The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria, 2005, § 135)."[50]

As to the first interference, the Governorship's measures might have a chilling effect on the right to freedom of assembly and could be disproportionate to the aim they want to achieve. Furthermore, the fact that they were issued many times during the state of emergency can be an argument as to whether or not these measures are prescribed by law or necessary in a democratic society as envisaged under paragraph 2 of Article 11 ECHR.

As to the second interference, which includes the sanctions, the criminal investigation and the following indictment, the nature and the severity of the measures need to be considered when assessing the proportionality of an interference:

"[w]here the sanctions imposed on the demonstrators are criminal in nature, they require particular justification (Rai and Evans v. the United Kingdom (dec.), 2009). A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (Akgöl and Göl v. Turkey, 2011, § 43), and notably to deprivation of liberty (Gün and Others v. Turkey, 2013, § 83). Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence (Taranenko v. Russia, 2014, § 87)".[51]

In the Ogru and others v. Turkey case the ECtHR decided that the Turkish government breached freedom to demonstrate by imposing fines on demonstrators without proper judicial scrutiny.[52] The Ogru case presents a similar scenario to the one at hand. The applicants had taken part in peaceful demonstrations in Adana province between December 2009 and April 2010, some of which were preceded or accompanied by sit-ins. Under a Gubernatorial Decree of November 2009, the three applicants were ordered to pay administrative fines of 143 Turkish Lira on several occasions. Considering Articles 10 and 11, the applicants claimed that their fines violated their rights to freedom of expression and peaceful assembly guaranteed by the Convention. The ECtHR reasoned that the national courts failed to perform the required balancing act between the right to freedom of assembly and the necessity and proportionality of the interference. Instead, they only checked the factual accuracy of the charges, namely that the applicants took part in the demonstrations and acted against the decree.[53] The ECtHR concluded that the fines were not subjected to adequate judicial review and that there had been a violation of Article 11 ECHR. The Turkish government violated the right to freedom of assembly by imposing fines on demonstrators.[54]

Similarly, in the Yılmaz Yıldız and Others v. Turkey case a fine was imposed on the applicants for attending meetings and reading out press statements, contrary to police officer's orders. They complained that this constituted an interference with their rights to freedom of assembly and freedom of expression.[55] The Court observed that the applicant's intention was to debate on matters of public interest and they held a peaceful demonstration in one of the areas prohibited by the authorities. The

police informed them that the gathering was illegal but the applicants continued to read out the press statements. The three applicants were prosecuted and subsequently sentenced to pay administrative fines. The Court stated that the proportionality principle requires that a balance be struck between the requirements listed in Article 11 § 2. Hence, a peaceful demonstration should not be made subject to the threat of a penal sanction (see Akgöl and Göl v. Turkey, nos. 28495/06 and 28516/06, § 43, 17 May 2011). The Court concluded that Turkey violated Article 11 of the Convention.[56]

> *"the prosecution of the applicants and the imposition of administrative fines for their participation in a peaceful demonstration were disproportionate and not necessary for maintaining public order within the meaning of the second paragraph of Article 11 of the Convention (see Gün and Others v. Turkey, no. 8029/07, §§ 77-85, 18 June 2013)."*

It can be concluded that the right to freedom of assembly was interfered with when the Justice Watch was restricted by the Governorship's measures and subsequently, by the imposition of fines and the criminal investigations. Following the reasoning of the Court in similar cases, these interferences, especially the imposition of fines, violates Article 11 ECHR as the fines are disproportionate, not necessary in a democratic society and create a chilling effect on the right to assembly. Furthermore, the Governorship's measures might also not comply with the requirement "prescribed by law" as the same measures were issued many times during the SoE.

Article 34 of the Turkish Constitution protects the right to hold peaceful meetings and demonstrations without prior permission. This and the available restrictions provided for in the Constitution are in line with Article 11 ECHR.[57] However, it is reported that:

> *"Secondary legislations are mostly in breach of the Constitution and international standards, because they establish arbitrary limitations like execution of the notification obligation in the form of permission or granting police forces with excessive use of power or delegating governors' the authority to decide whether the protest is lawful or not before the free exercise of the freedom of assembly. Besides, the conditions foreseen for banning, postponing or terminating a meeting or demonstration are drafted in a very vague manner in these secondary legislations, causing forth arbitrariness in restriction of the exercise of freedom of assembly".*[58]

The Governorship's measures at hand seem to be part of secondary legislations that violate the Constitution and international standards. As a result, the fines should be lifted and the measures revised. That way, the seven lawyers from the Adana BA, and also all the other citizens, can fully appreciate the right to freedom of assembly.

3.3.5 UN Guidelines on the Role of Prosecutors

Principles 10 to 20 in the UN Guidelines on the Role of Prosecutors (UN Guidelines) outline the role of the prosecutors in criminal procedures.[59]

According to Principle 12 UN Guidelines: "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".[60] The prosecution of the suspects is an act contrary to the respect and protection of human dignity, as the freedom of assembly and the freedom to demonstrate have not been taken into account at all.

Principle 13/a of the UN Guidelines states 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".[61] The prosecution of the suspects seems to be a decision taken in extent to the Governorship's orders, which implies that the function of the prosecutor is not carried out impartially.

According to Principle 13/b of the UN Guidelines 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".[62] The prosecution of the suspects can be seen as a violation of the protection of the public

interest, namely that fundamental rights of journalists and their lawyers are respected.

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.[63] 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."[64] The fact that there is no evidence on mitigating factors and that the indictment includes no information on the freedom of speech and the freedom of assembly, could indicate that these standards were violated.

3.3.6 UN Basic Principles on Role of Lawyers

In analysing the indictment, attention must finally be paid to the UN Basic Principles on the Role of Lawyers.[65] Firstly, principle 16 includes that:

> *"Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".*[66]

Additionally, principle 23, "Freedom of expression and association", merits close consideration:

> *"Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession."*[67]

In light of these Articles and given the above analysis, the lawyers' sit-in action and the press release referred to in the indictment would merit protection instead of prosecution, especially since the actions related to the potential unlawful arrest of their colleagues.

4.) Conclusions and Recommendations

In the Netherlands, the defence could argue an indictment with similar flaws as the one issued against the seven lawyers to be void, in particular because it is not clear which specific measure was breached or which specific order was disobeyed. The prosecutor has the possibility to file a motion to amend the indictment at any time during the proceedings to restore any defects. The prosecutor is usually granted considerable leeway to file this motion, which is easily granted by the court. However, if such a motion is not filed or denied and the court rules that the indictment is void, this would imply that the indictment is invalid (either in whole or in part). This is a final decision, which ends the prosecution and means that no ruling on the merits of the case will be provided. The prosecutor must then file a new and improved indictment.

In addition, the defence could also claim that the allegation in the indictment cannot be proven and/or does not amount to a criminal offence, requesting the court for an acquittal or discharge of further prosecution. Arguments for this position are the lack of elements of the crime in the indictment and the lack of the specification of the respective measure or order at hand, which would force a Dutch court to rule that that the allegation does not qualify as a crime. After a ruling of acquittal or discharge, the prosecutor cannot initiate a new proceeding for the same crime, due to the ne bis in idem principle (which prohibits being prosecuted twice for the same offence).

To improve the quality of the indictment, the following steps can be taken:

- Keep the wording of the indictment simple and brief, so that the content of the indictment is easier to understand;

- Mention the issue date of the indictment at the beginning together with the formalities;

- Include paragraphs in the indictment as to make its content logical and comprehensible. Avoid long sentences that are solely separated by a semicolon;

- Clearly mark the evidence in the indictment, i.e., by whom certain documents were drafted, and include the date of the pieces of evidence;

- Include each element in the indictment and connect each piece of evidence to one or more elements of the alleged crime;

- Include evidence that is in favour of the defendant;

- Clearly indicate the penalties and/or measures that can be foreseen;

- Clearly refer to the governor's order on which the criminal investigation and the indictment were based;

- Evaluate whether the indictment is in line with ECHR rights, such as the right to a fair trial and the right to freedom of speech and assembly.

In conclusion, the flaws in the indictment of the suspects cause serious concern for the guarantees of fairness and transparency of judicial proceedings in Turkey, as protected by the European Convention on Human Rights. We therefore urge the Turkish Ministry of Justice to take our recommendations into consideration, by training public prosecutors about the conditions set out in Article 170 TCPC. Additionally, we note that the ultimate outcome of these cases (i.e., acquittals) should be communicated throughout the Turkey Ministry of Justice, so that prosecutors are made aware of these precedents and the low success rate of the indictments issued. The criminal investigations impacted the everyday life of the lawyers for several years. They were designated as suspects since 2017 and definitely acquitted on 7 December 2020. During that time, they faced multiple problems with the administration solely because their name popped up the system in relation to a criminal case. Given these consequences, the decisions to initiate the criminal investigations against the lawyers should have been made more carefully.

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Lawyers for Lawyers ("L4L") is an independent and non-political Dutch foundation that seeks to promote the proper functioning of the rule of law by pursuing freedom and independence of the legal profession. Lawyers for Lawyers was granted Special Consultative status with the UN Economic and Social Council in July 2013.

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PEN NORWAY

Legal Report on Indictment

Canan Coşkun

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Legal Report on Indictment:
Canan Coşkun

1. Introduction

This report assesses the 2-page indictment with the investigation no. 2017/134371 and indictment no. 2018/2814 issued by Edip Şahiner, the Public Prosecutor of Istanbul on 05.04.2018 against the journalist named Canan Coşkun.

2. Summary of Case Background Information

On September 12, 2017, several lawyers who were members of the Progressive Lawyers' Association and undertaking their professional activities under the People's Law Office were detained after a police raid on their offices and homes. Taken to the courthouse on 20 September 2017, fourteen of the lawyers were arrested and transferred to various prisons. The arrest of the lawyers was met with a public reaction both in Turkey and in the international legal circles and the problems encountered by the legal profession in 2017 and beyond were widely discussed.[1]

The police operation against the lawyers has generated considerable interest among the public in Turkey. This was because the arrested lawyers were defending the victims in socially important cases such as the Soma Mine Disaster Case, Berkin Elvan Case, Hasan Ferit Gedik Case, which were closely followed by the democratic public. Moreover, almost all of them were lawyers of Nuriye Gülmen and Semih Özakça[2]. Gülmen and Özakça were two of the hundreds of thousands of individuals who were dismissed from their public office. As individuals who initiated and maintained for hundreds of days the protest known as Yüksel Resistance, Gülmen and Özakça were well-known by the local and global public[3]. It provoked another reaction when Gülmen and Özakça were detained just days before the trial against fourteen of their lawyers began.

Canan Coşkun was a court reporter working for the Cumhuriyet newspaper on 20.09.2017 and she had been following the ongoing legal proceedings regarding the arrest of the aforementioned lawyers in Istanbul Caglayan Courthouse. On the same day, her report titled "14 Lawyers of Nuriye and Semih were arrested"[4] was published in the Cumhuriyet newspaper. The news report in question generally provided information about the questions asked during the statement taken by the prosecutor, mentioned the presence of a witness with an explicit name who formed the basis of the questions and accusations raised by the prosecutor and finally included information that 2 lawyers were released while 14 were arrested as a result of the proceedings.

Upon the publication of the news report, Public Prosecutor's Office of Istanbul launched an investigation against Coşkun and issued the indictment in question on 05.04.2018. The indictment, in accordance with the Counter-Terrorism Law (CTL) Article 6/1, charged Coşkun with marking the state officials that were assigned in fight against terrorism as targets.

The proceedings began when the 26th Assize Court of Istanbul approved the indictment. She mounted her defence during the first hearing held on 06.06.2018. In her defence, she said that she was a court reporter for Cumhuriyet newspaper and that the news report in question was related to an investigation of public interest. Stating that the report was based on the statement records obtained from the lawyers in the courthouse, Coşkun said that the detained lawyers were asked questions regarding the lawsuits of Dilek Doğan, Hasan Ferit Gedik and Berkin Elvan, which she then reported as news. She also said that the name of the witness who had been allegedly marked as a target was explicitly written in the statement

records and that if he were an anonymous witness, the records would have used his nickname instead which she would have used in her news report. She demanded that she be acquitted and said that she did not accept the allegation that the investigation had been compromised by her report and that no reporters were prosecuted for such a common practice of writing the prosecutor's name in the news report.[5]

The prosecutor of the court presented his opinion as to the merits of the case during the second hearing which took place on 10.07.2018. In his opinion, the prosecutor demanded that Coşkun be punished on the grounds that a restriction order had been in place regarding the investigation reported by Coşkun and thus her report compromised the objective of the investigation, that the witness and his family had been exposed and marked as a potential target for the terrorist organizations and that Coşkun committed the alleged offence by exposing the name of a person who benefited from the effective remorse and contributed to the uncovering of the activities of the terrorist organization. Coşkun and her lawyers submitted their statements against the opinion of the prosecutor during the hearing held on 19.07.2018. Following the defences, the Court sentenced Coşkun to a prison sentence of 2 years and 3 months and no abatements were granted on the grounds that she had no remorse for the offence she committed. An appeal was filed by Coşkun's lawyers against her conviction. The 2nd Chamber of the Regional Criminal Court of Appeal of Istanbul ruled to acquit Coşkun after its appellate review with merits no. 2018/2220 and order no. 2020/81. The reasoning of the Court contained the following statement:

> *As set out by the Article 6/1 of Law no. 3717, the offence of marking somebody as a target could only take place if certain individuals are marked as a target for terrorist organizations. An evaluation of the content of the article and the website where it was published as a whole reveals that the text cannot be considered to fall within the scope of marking somebody as a target. The defendant was convicted with a written justification without regard for the fact that the article should have been viewed within the scope of the press as an indispensable element of a democratic society and of its functions of providing information, criticism and interpretation, and within the scope of the freedom of expression set out by the Article 26 of the Constitution and the Article 10 of European Convention on Human Rights...*

To conclude, Coşkun was acquitted by the order of the Court of Appeal. But the majority of the lawyers mentioned in Coşkun's news report were convicted and are still in prison as a result of the criminal investigation launched against them. One of them, Att. Ebru Timtik died on 27.08.2020 as a result of the hunger strike she began with the demand for "the recognition of the right to a fair trial for all." The witness Berk Ercan who was allegedly marked as a target by Coşkun, acted as a "witness" against 344 individuals more than 200 of whom were prosecuted and arrested.

There is another detail about Coşkun's trial process. Akın Gürlek, the presiding judge of the Court who sentenced Coşkun to 2 years and 3 months imprisonment, acted as one of the judges of the Criminal Court of Peace during the investigation phase when the witness Berk Ercan, who was allegedly marked as a target by Coşkun, made a statement to benefit effective remorse. Again, Akın Gürlek undertook the prosecution against Berk Ercan in his capacity as the presiding judge of the 26th Assize Court of Istanbul as well. As another interesting detail, Akın Gürlek was the presiding judge of the 37th Assize Court that heard the trial against the lawyers in question, which resulted in a severe conviction ruled against them. Another journalist, Buse Söğütlü, is still on trial under the same allegations with Canan Coşkun, namely marking Akın Gürlek as a target for terrorist organizations, based on her posts on Twitter criticizing Akın Gürlek[6].

3. Analysis of the Indictment

3.1. Evaluation of the Indictment under the Code of Criminal Procedure:

The indictment in question consists of 2 pages in total. As previous reports have noted, the brevity of an indictment alone cannot be a subject of criticism. Since the essence of the indictment in question is only a news report written by Canan Coşkun, it is only natural that the indictment is short. The simplicity of an event and the fact that it can be summarized and explained in a few paragraphs, however, does not exempt an indictment from the requirements of the Code of Criminal Procedure Article 170 which is subtitled "The Duty of Filing a Public Prosecution". The legal function of the indictment involves much more than summarizing an event. As legal texts, the indictments must include details about the

alleged crime that could be linked with the incident in question, a definition of that crime together with its elements, the specific actions of the suspects that constituted the crime, the relationship between the evidence and the crime and finally, the exculpatory evidence. A text without such elements cannot be regarded as an indictment in the legal sense of the term, even if it contains an allegation.[7]

3.1.1 The Indictment's Battle with the Evidence

In accordance with the CCP Article 170/3, an indictment should contain information about the identity of the suspect, the defendant and the charged crime, as well as the applicable articles of the law. The indictment contains all those elements. The date and the location of the crime are clearly stated in the indictment as well. Indictment's biased and sloppy take on the evidence is what impairs it in the context of CCP Article 170/3.

According to CCP Article 170/3, the evidence of the charged crime must be clearly written in the indictment. The following documents are listed under the evidence section on the first page of the indictment: "The allegation, the suspect's defence, the incident and investigation report, the suspect's register and criminal record, and the scope of whole investigation document." This could be regarded as a formal breakdown of all the evidence; but clearly, one cannot claim that this way of composing an indictment fulfilled the requirements in CCP Article 170/3.

First of all, among all the evidence, there is no mention of the news report by Coşkun. Furthermore, the restriction order (the one for the investigation reported by Coşkun) mentioned in the indictment and the order of the Magistrate's Court on Duty of Istanbul to block access to the website, which is also claimed to have been taken on the basis of this restriction order, were not listed among the evidence. The indictment's language used when dealing with the restriction order and the order to block access to the website is so superficial that it raises suspicions about whether it was written by a member of legal profession or not. For example, the indictment mentions an order by the Magistrate's Court on Duty of Istanbul only in passing. Which Magistrate's Court was on duty at the time? What was the date and merits number of the order? It is clear that a decision cannot be referred to without this information. As can be seen, the only problem with the evidence section is not whether all the "items" were properly listed or not. What is striking at this point is the prosecutor's attitude against the news report written by Canan Coşkun. The prosecutor quoted only one paragraph from the report whereas it contains 12 paragraphs. The prosecutor claims that the content of the report constituted a crime and that Coşkun marked as targets the prosecutor of the lawyers' case and the person who testified against the lawyers. For that very reason, it does not make any sense why the indictment did not include the full content of the report or did not discuss exactly which sentences of it constituted the crime of marking people as targets.

The paragraph of the report in question quoted by the indictment is as follows:

> *It is determined that a news reports published on the weblink http://cumhuriyet.com.tr/haber/turkiye/827875/Avukatlar_savilik_sorgusunda_Neden_Nuriye_ve_Semih_in_avukatligini_yaptiniz.html reads "The prosecution added into the lawyers's case file the witness statement of a prisoner named Berk Ercan. In his testimony, Ercan said 'they have been involved in publicly prominent cases such as Berkin Elvan, Dilek Doğan, Hasan Ferit Gedik, Sabancı Assassination and the cases about Nuriye Gülmen and Semih Özakça who are on a hunger strike', which were then used in prosecution's charges against the lawyers...*

It can be seen that in this paragraph Coşkun did not provide any descriptions of Berk Ercan except for the sentence "the witness statement of a prisoner named Berk Ercan", she did not point to Ercan's family, neither did she make any guiding comments that mark Ercan as a target.

Following the quote, however, the prosecutor somehow came to the following conclusion:

> *It is understood that a news report was published in a way to compromise the objectives of the prosecution, despite the existence of a "Restriction Order" within the scope of the file no. 2017/10567 under the Public Prosecutor's Office and that Berk Ercan who was referred to as a witness in the file and Ercan's family were exposed and marked as targets for terrorist organizations.*

The completely objective tone of the paragraph quoted by the indictment and that it contained no

comments raised the question of how the prosecutor came to the inference above. This makes it essential to analyse the piece by Coşkun in its entirety through the lens of this inference (the claim that the report exposed Berk Ercan and his family and marked them as targets for terrorist organizations).

- A review of the report shows that the first 4 paragraphs of this 12-paragraph report did not include Berk Ercan's name.

- Paragraph 5 is the paragraph quoted in the indictment.

- Paragraph 6 contained Berk Ercan's name once again in the following sentence: "In his allegations, the Prosecutor Tuncay referred to Ercan's testimony who said "[the lawyers] were trying to be present as defenders during the prosecution and court stages" of the investigations against the terrorist organization."

- Ercan's name is mentioned again in paragraph 7. The phrasing is as follows: "When the lawyers pointed out that the individuals, once they were detained due to the emergency laws, were forced to spend time in custody during the period between the collection of their statements and their transfer to the courthouse, which was an arbitrarily determined and illegal practice, the Prosecutor Tuncay, again based on Ercan's testimony, included these statements in the file as if they constituted an offence."

- Finally, Ercan's name is mentioned in paragraph 8 for the last time. And here, the phrasing is as follows: "That the lawyers formed delegations on events that have become topical matters for the country such as natural disasters, workplace accidents, incidents of terrorism that took place in Sur, Cizre, Silvan, Rehanlı, Soma and Ermenek was assumed, by the prosecutor, to constitute an offence, again based on the testimony of witness Ercan."

- It is clear that the report contained no other sentences about the witness Ercan.

As such, it is clear that none of these sections, including paragraph 5 quoted by the prosecutor, contained a single statement that could lead to the conclusion that Berk Ercan was marked as a target. The prosecutor claims that Coşkun exposed not only Berkan Ercan himself but also his family and marked them as targets for terrorist organizations. However, Ercan's family has not been mentioned even once in the news report. The report did not include a photo of Ercan or his family either. We believe this was the reason why the prosecutor preferred to not to quote the report in its entirety. Because as it is, the content of the news report favours Canan Coşkun who fulfilled the requirements of her profession as a court reporter. As such, the prosecutor either assumed an ill motive or was completely carried away by his intention to punish Coşkun without seeking a proper basis to do so.

As such, it is impossible to claim that an indictment is written in accordance with CCP Article 170/3 when the evidence is only superficially listed, no exculpatory evidence is considered and no access to evidence is provided.

Once the relationship between the indictment and the evidence is described as a battle, it would even make less sense to expect this indictment to have been written in accordance with CCP Article 170/4. As is known, CCP Article 170/4 tasks the prosecutors with explaining the events that constituted the alleged offence in relation with the existing evidence. As the report did not contain any remarks that marked as targets Berk Ercan, nor his family nor the prosecutor who was in charge of the investigation, it is effectively impossible for it to fulfil the requirements in CCP Article 170/4.

After all the evaluations, it can easily be concluded that an evaluation of the indictment in accordance with the CCP Article 170/2 demonstrates that the prosecutor did not make any effort to support the reasonable doubt with evidence. It doesn't hurt to make even a clearer remark. In fact, Coşkun's report is clear enough to dispel any doubts the prosecutor may have entertained. And if there is no evidence, there is not a reasonable doubt. Therefore, there should not have been an indictment issued. Unfortunately, it was issued and approved by the court and Canan Coşkun was sentenced to a severe sentence of 2 years and 3 months of imprisonment even though she was acquitted by the court of appeal.

3.1.2: The Indictment's Battle with the Counter-Terrorism Law Article 6/1:

Article 6/1 of the Counter-Terrorism Law is so ambiguous and eclectic that it deserves a separate study. The wording of the article makes it almost impossible to understand the quality of the criminal act or acts and the elements of the offences set out by it; meanwhile the broken Turkish used in the text does not make it easier. Therefore, it can be argued that the article as it is, paves the way for the incompetent and ambagious indictments to be issued, such as the one in question.

CTL Article 6/1 is as follows:

> *Those who announce or publish that a crime will be committed by terrorist organisations against persons, in a way that makes possible that these persons can be identified, whether or not by specifying their names and identities, or those who disclose or publish the identities of state officials that were assigned in fight against terrorism, or those who mark persons as targets in the same manner shall be punished with imprisonment from one to three years.*

The actual practice aside, an analysis of the text of the article in question reveals that it sets out a number of offences. These offences can be listed as follows:

- Those who announce or publish that a crime will be committed by terrorist organisations against persons, in a way that makes possible that these persons can be identified, whether or not by specifying their names and identities.

- Those who disclose or publish the identities of state officials that were assigned in fight against terrorism in a way that makes possible that these persons can be identified, whether or not by specifying their names and identities.

- Those who mark persons as targets in the same manner

These three separate offences, defined under the same article, raises many questions in terms of criminal law technique. The definition of the first offence makes it impossible to understand what kind of a legal interest it provides a protection for. Will it be considered a crime if a journalist writes a news report based on the information that somebody could be potentially targeted by terrorist organizations? What's the justification for that? If the intention is to work up to the offence set out by the Article 6/1 of CTL through the allegation that the actual intention of the journalist was to praise an offender or to disseminate propaganda of a terrorist organization, then what is the difference between this offence and the laws already in force on the same issues?

The second offence set out by the Article raises another question. To whom does the definition of "state officials that were assigned in fight against terrorism" refer? Neither the CTL nor the other legislations include a clear definition in this regard. Article 15 of CTL is the only one that offers something helpful. This article which sets out the appointment of a lawyer mentions "Turkish Armed Forces staff, persons in charge of the local authorities, intelligence and law enforcement officers and other personnel that are in charge of fight against terror." A prosecutor who is defined as an official who prosecutes the defendants and brings them before the judge in order to defend the rights of the public and to enforce the law on behalf of and in favour of the public, and a witness who has been on a trial (and even convicted) and benefiting from the provisions on effective remorse: Can they be both classified as "other personnel that are in charge of fight against terror"?

Only the third of the offences set out in the Article has a relative clarity: Marking persons as targets... In terms of the language used here, it should be noted that there is an ambiguity that contradicts the basic principles of the criminal law. Because the wording of the article makes it impossible to determine for sure whether the term "persons" refers to the "state officials in charge of fight against terror" or not. However, among the offences set out by the Article 6/1 of the CTL, the wording of this last offence can be said to be relatively more lucid. At least it is clear that the element of this offence is "marking somebody as a target".

But what are the offences that Coşkun is charged with? A review of the 2-page indictment reveals the following respective charges:

- Marking as targets the people who are in charge of fight against terrorism,

- Compromising the objectives of the investigation against the lawyers,

- Exposing Berk Ercan and his family and marking them as targets for terrorist organizations,

- Explicitly mentioning the names of the prosecutor of the investigation and the suspect of the case who benefited from effective remorse and contributed to the uncovering of the activities of the organization,

An analysis of the offences that Coşkun is charged with reveals that indictment is alarmingly unfounded and lacks any internal consistency. A review of the prosecutor's first charge reveals that he somehow merged the second and third offences of the Article 6/1 of CTL and preferred to use the phrase "the person who is in charge of fight against terror." In other words, according to the prosecutor, "the person" described in the third offence of the Article 6/1 of CTL has a descriptive adjective. This means, for the prosecutor, it would be enough if the person is in charge of fight against terror even if he/she is not a state official. A point of concern is the prosecutor's understanding of "being in charge of fight against terror". According to the prosecutor who issued the indictment, the prosecutors are automatically classified as persons who are in charge of fight against terror as individuals who have to act on behalf, and in favour, of the public. The prosecutor even assumes that a person can acquire the status of a person who is in charge of fight against terror if he/she is on a trial or convicted on a similar charge and testifies in order to benefit from effective remorse. The prosecutor's reasoning is absurd. Neither domestic law nor international law imposes such a responsibility on prosecutors. In a functioning legal order, the prosecutor is obliged to investigate whether even the acts carried out by the state with the aim of fighting terrorism violate basic rights and freedoms of the citizens. The prosecutor's responsibility is not to fight terrorism but to protect fundamental rights and freedoms along with the public interest. The prosecutor displays his scant understanding of the relevant legal mechanism when he assumes a person to be in charge of fighting terror if he/she is benefiting from the effective remorse.

It is unquestionably clear that the second and third charges brought by the prosecutor against Coşkun are entirely unfounded. It is clear that the investigation against the lawyers has not been compromised. Because the lawyers are still under arrest since the publication of the news report. This way of interpreting the news about an ongoing investigation that is of public interest is nothing but a violation of the freedom of press and people's right to receive information. The claim that Berk Ercan and his family were exposed and marked as targets is particularly ridiculous. How was Ercan's family marked as a target while the report did not even mention anything about the family? In what sentence did the offence of marking them as targets took place specifically? The prosecutor did not even attempt to elucidate these allegations properly, probably because he assumes that his only obligation is "to fight terrorism." The fourth criminal charge is merely a combination of the first three charges into one single amalgam. Unfortunately, it lacks reason and consideration too. Hundreds of stories about Can Tuncay, the prosecutor who is leading the investigation against the lawyers, have already been published, including in the mainstream media, before Canan Coşkun's report was published. Tuncay was the prosecutor of the Ahmet-Mehmet Altan investigation, Büyükada investigation and many mass investigation unfolded in the aftermath of the military coup attempt. Naturally Coşkun was not the first reporter who explicitly mentioned the name of the prosecutor. Moreover, the mainstream media had published and broadcasted many news stories that exalted Tuncay, or opposition media that criticised his practices whereas Coşkun's report treated him neutrally.

As a result, since even a simple research could reveal that none of the prosecutor's accusations against Coşkun were properly substantiated, what the prosecutor had to do was not issue this indictment in accordance with the Article 170 of the CCP. However, the fact that this indictment was issued despite its logical inconsistencies is the manifestation of the prosecutor's assumption that issuing this indictment was part of his duty to fight terrorism as a prosecutor.

3.2. Evaluation of the Indictment under the International Law:

An indictment that failed to fulfil the requirements of the CCP Article 170 cannot possibly comply with the right to a fair trial under Article 6 of the ECHR. Moreover, existence of such an indictment that lacks sufficient evidence to support a reasonable doubt leads to a violation of the presumption of innocence by itself.

The prosecutor's scepticism towards the freedom of expression itself is indicated in his purposeful

effort to put a journalist on trial because of a news story that was clearly in the public interest and with an identifiable source, and in his biased willingness to find justifications for such a trial.
As underlined throughout this evaluation report, one of the main problems in this indictment is the prosecutor's incongruous approach towards the alleged mission of "being in charge of fight against terror." To better understand whether the prosecutors have such a duty, it is essential to refer to the United Nations Guidelines on the Role of the Prosecutors. This guideline clearly defines the role of prosecutors in criminal procedures.

According to Section 11 of the UN 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, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.*

Section 12 contains the following statement:

> *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.*

It is clear that neither those principles nor the guideline in general impose such a duty of fighting terrorism on the prosecutors. On the contrary, Section 12 reminds prosecutors of their obligation to safeguard the human rights and Section 13/b underlines the obligation of prosecutors to protect the public interest, act objectively and pay attention to any relevant situation, regardless of whether it is to the benefit or detriment of the accused.

The most important section of the guideline in terms of the indictment in question is the Section 14. Accordingly, prosecutors shall not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded. In fact, the principle underlines that they must make every effort to stay proceedings. Unfortunately, the legal findings above reinforce the impression that the prosecutor of the indictment made a deliberate effort in the opposite direction.

The problem is not just the prosecutor's self-determined duty to fight terrorism. It is his sense of entitlement to ignore the fundamental rights and freedoms during the performance of his duty, which is as problematic as his attempt to assume such a duty that does not exist in any legal order and contradicts the essence of the prosecution as a profession.

The prosecutor's assumptive view of his own powers to eliminate the freedom of press and accordingly, the freedom of expression is indicated in his determination to fabricate a crime out of a court reporter's report which was prepared in accordance with the universally accepted principles of journalism on a matter of public interest and did not contain almost a single subjective remark.
Accusing a journalist of a crime the element of which is "marking a person as a target" without the need to show a single evidence is a violation of the freedom of expression under both domestic law and the Article 10 of ECHR. But this also reveals that the relevant regulations are undervalued, unimplemented and willingly ignored.

4. Conclusions and Recommendations

This indictment should not have been issued in any way. Many other reports of this project wrote similar sentences before. But the indictment in question makes it an imperative to repeat the sentence once again. No legal reasoning could be employed to provide an explanation why this indictment came to be issued, especially considering the offence of marking somebody as a target did not take place, no evidence was offered and thus no tangible and comprehensible charges could even be laid.

It has once again become essential to refer to the Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System. Article 7 of the relevant Recommendation lays out a basic framework for what needs to be done. That article says that training is both a duty and a right for the public prosecutors before their appointment as well as on a permanent basis and then goes on to list the topics of such a training.[8]

The prosecutors who fail to distinguish between their duty as prosecutors and the duties of the counterterrorism personnel should closely study the following articles of the Recommendation:

> **24.** In the performance of their duties, public prosecutors should in particular;
>
> a. carry out their functions fairly, impartially and objectively;
> b. respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms;
> c. seek to ensure that the criminal justice system operates as expeditiously as possible.
>
> **25.** Public prosecutors should abstain from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health, handicaps or other status.
>
> **26.** Public prosecutors should ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting the suspect, irrespective of whether they are to the latter's advantage or disadvantage.
>
> **27.** Public prosecutors should not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.

The fact that such an indictment could be issued can be considered to be the clear evidence of the fact that none of the above-mentioned principles have been applied.

As referred previously, the Venice Commission Report on the Independence of the Judicial System (494/2008), Part II titled as The Prosecution Service is of utmost importance.[9] Subtitled "Qualities of Prosecutors", the 15th paragraph of the report states that the prosecutors must act fairly and impartially, and goes on to emphasize that it is not the prosecutor's function to secure a conviction at all costs but that she must put all the credible evidence available before a court.

The indictment in question establishes that it is essential to foster an environment of judicial independence in Turkey where prosecutors would recollect the distinction between the duty of prosecutors and the duty of counterterrorism personnel.

About the author

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Endnotes

1. For more information on this topic, please see: Uysal, Şerife Ceren, "State of Emergency, Every Numbers that goes into the Records is a Human Life", Liga Befund 2017, Austria http://www.liga.or.at/site/assets/files/1889/2017.pdf, Council of Bars and Law Societies of Europe's statement dated 05.04.2018: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statements/2018/EN_HR_20180405_PR_0618.pdf, Lawyers on Trial Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey report published by Human Rights Watch on 10.04.2019: https://www.hrw.org/report/2019/04/10/lawyers-trial/abusive-prosecutions-and-erosion-fair-trial-rights-turkey

2. Gülmen was an academic and Özakça a teacher. Together with other public workers who had been dismissed like them, Gülmen and Özakça had initiated a protest in Yüksel Street in Ankara, demanding that the unlawful dismissals be cancelled and they be reinstated. Their all attempts to make press statements were intervened by the police, they were subjected to repeated detentions and the mistreatment and torture they have experienced made it to the news dozens of times. When it became impossible even to exercise their democratic right to make a press statement, Gülmen and Özakça began a hunger strike.

3. For detailed information on the subject: https://pen-international.org/news/turkey-academics-on-hunger-strike-detained, https://bianet.org/english/human-rights/192937-gulmen-ozakca-on-300th-day-of-hunger-strike

4. To access the full story on the indictment: https://www.cumhuriyet.com.tr/haber/nuriye-ve-semihin-14-avukati-tutuklandi-827875

5. https://www.amnesty.org.tr/icerik/canan-coskun-dava

6. For more information: https://bianet.org/english/law/232698-journalist-on-trial-with-the-lights-on

7. Uysal, Şerife Ceren, Hikmet Tunç Kumli indictment evaluation report, PEN Norway Indictment Project 2021, pp. 5-6, https://norskpen.no/eng/wp-content/uploads/2021/10/PEN-Norway-Turkey-Indictment-Project_Hikmet-Kumli-Tunc_14-October-2021_ENG.pdf

8. The training topics in the Recommendation are as follows:
a. the principles and ethical duties of their office;
b. the constitutional and legal protection of suspects, victims and witnesses;
c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;
d. principles and practices of organisation of work, management and human resources in a judicial context;
e. mechanisms and materials which contribute to consistency in their activities.

9. https://www.hsk.gov.tr/Eklentiler/Dosyalar/e0a67151-fb8b-4c6c-a095-af118c918072.pdf

PEN NORWAY

Legal Report on Indictment

Can Dündar & Erdem Gül

Tony Fisher
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Legal Report on Indictment:
Can Dündar & Erdem Gül

1.) Introduction and Summary of the Case and the Indictment

1. This legal report is drafted by Tony Fisher as part of the PEN Norway Turkey Indictment Project, established by PEN Norway, and represents an analysis of the indictment in the case of defendants Can Dündar and Erdem Gül. The focus of this report will be on the indictment as it relates to Can Dündar but most of the commentary will apply equally to fellow journalist Erdem Gül.

2. Can Dündar is a renowned journalist from Turkey who has been a respected political and journalistic commentator for the last 40 years, working for several newspapers and magazines in Turkey. He has produced many TV documentaries focusing particularly on modern history of the Republic of Turkey and cultural anthropology. He worked as an anchorman for several news channels. He has worked in the Yankı, Hürriyet, Nokta, Haftaya Bakış, Söz and Tempo media outlets since 1979. He was in the program crew of 32. Gün (32nd Day) from 1989 to 1995. 32. Gün was a national and international television news show launched in 1985 and was Turkey's longest-running programmes as well as being one of the most influential news programmes. Most recently Mr Dündar was the editor in chief of the daily Cumhuriyet newspaper in Turkey. Dündar has been the recipient of a number of awards and honours including:

- 2016 CPJ International Press Freedom Awards
- 2016 Oxfam Novib/PEN Award
- 2017 Best European Journalist of the Year, Prix Europa

3. He is also an honorary member of PEN Norway.

4. On 29 May, 2015 Dündar published an article in Cumhuriyet entitled "Here are the weapons Erdoğan claims do not exist", alleging that Turkey's National Intelligence Organization (MİT - Millî İstihbarat Teşkilâtı) had been delivering arms to rebels in Syria. Cumhuriyet also published a video and photos supporting the claim. On 12th June 2015 Gül wrote another article concerning the same issue and supporting the same claim.

5. Following this, the president of Turkey President Erdoğan publicly stated that they would 'not get away with it' and on November 26, 2015, they were arrested and held in pre-trial detention on charges of willingly aiding an armed terrorist organisation without being a member of it.

6. The suspects Gül and Dündar applied to the Constitutional Court of the Republic of Turkey demanding to be released on the grounds that their pre-trial arrest was unconstitutional and that their lawyers had been unable to examine their files. They cited the 2014 European Court of Human Rights decision of Ahmet Şık and Nedim Şener v. Turkey[1], in which the Court found that Turkey had violated the right to freedom of expression and the right to a fair trial.

7. Dündar and Gül were held in Turkey's Silivri prison for 92 days until the Constitutional Court ruled in their favour on the 25 February 2016 (the "CC Judgement"), recognizing that their rights to personal liberty and security together with their rights to freedom of expression were infringed under Articles No. 19 (the right to personal liberty and security), 26 (the right to express and disseminate one's thoughts and opinions) and 28 (freedom of the press) of the Constitution of the Republic of Turkey. As a result, they were released on February 26, 2016, despite the fact that the President of the Republic of Turkey stated that he would neither recognize nor obey the Constitutional Court's ruling. He further noted that

Turkey is ready to pay compensation if an upper court's decision – detaining the two journalists again – was appealed before the European Court of Human Rights. "The State can object to the European Court of Human Rights if it gives a decision supporting the Constitutional Court or it can pay the compensation", he said.[2]

8. The findings of the Constitutional Court are relevant for the purposes of the analysis of the indictment (which was not available at the time the Constitutional Court delivered its judgement since it had not at that time been drafted). At paragraph 76 of the CC Judgement the court concluded that the main facts on the basis of which the decision to arrest the applicants was made was the publication of the two news reports in Cumhuriyet newspaper in relation to the immobilization and searching of the MİT trucks referred to in paragraph 3 above. The judgement went on to confirm that the facts which were contained in the two articles in question were already in the public domain since they had previously been published by another publication on 21 January 2014, some 15 months earlier. It is worth quoting the reasoning of the Constitutional Court at this stage on the basis of which they ruled that the suspects' right to personal liberty and security enshrined by Article 19/3 of the Constitution had been violated:

> **76.** … Although the arrest warrant stated that the current state of evidence regarding the alleged crimes was sufficient for the arrest, it mentioned no concrete evidence other than the aforementioned news reports. The applicants were accused of and arrested for publishing the photographs and information presented in the reports with the aim of "aiding an armed terrorist organisation knowingly and willingly, without becoming a member of it" and for obtaining and disclosing them "with the aim of political and military espionage". The reasoning of the arrest warrant, however, did not provide any explanations as to which concrete facts about the applicants led to the assumption of such a strong criminal suspicion that the news reports in question were published "with the aim of political and military espionage". Regarding the strong criminal suspicion of "aiding an armed terrorist organization knowingly and willingly without becoming a member of it", which was mentioned in the warrant as the reason of arrest, no concrete facts were presented to support the allegation that they were aiding [the terrorist organization] other than the opinion that the applicants, "by their profession, were supposed to know that" the reports they published "were about a terrorist organization that was under investigation".
>
> **77.** On the other hand, a newspaper report published on 21/1/2014, two days after the incident when the trucks were immobilized and searched, included a photo and some information regarding the materials allegedly carried by the trucks …... Aside from the abstract public debate about the quality of the cargo that the trucks hauled, the fact that a similar photograph and information were already published approximately sixteen months before the reports in question and that they were easily accessible as of the date of the review of the application file, must be taken into account while determining the existence of a strong criminal suspicion required for the arrest.
>
> **78.** Therefore, when presenting the measures against a news report, it is important to provide a reasoning as to whether such a threat to the national security still persists if the news reports are published by another newspaper later on with similar elements and photographs that the previous reports already featured.(For the ECHR decision on the republication of previously published confidential information about the national security, see: Observer and Guardian/The United Kingdom, App. no: 13585/88, 26/11/1991, §§ 66-74).

9. The Constitutional Court also noted that during the six month period between the date when the investigation against the defendants had started and the date on which they were summoned to give their statements in November 2015:

> **80.**…… the Office of the Chief Public Prosecutor's Office of İstanbul did not collect the statements of the applicants nor did it take measures such as detention or arrest. Neither the questions asked during the statement collection nor the reasoning of the arrest warrant make it clear what evidence -other than the news reports that were published- was obtained during that time period that linked the applicants to the charged crime.

10. The reasoning of the Constitutional Court is very relevant to any analysis of the indictment. It seems clear that the Constitutional Court did not feel that the facts made out by the prosecutor justified

any prosecution on the grounds it was made and the prosecutor who participated in the hearings should have withdrawn the charges when its decision was announced.

11. It is also relevant because even if the prosecutor had been justified in continuing the prosecution after the decision had been handed down by the Constitutional Court the prosecutor who participated in the hearings was clearly under a duty to balance the allegations made in the indictment with these comments which had been made by the Constitutional Court.

12. Dündar stepped down from his post as the editor in chief of the daily Cumhuriyet newspaper in August 2016, after he was sentenced to 5 years and 10 months of imprisonment for the crime of "disclosing documents of the state, that due to their nature, must be kept confidential" under Article 329(1) of the Turkish Criminal Code. This is not one of the charges listed in the indictment. The Court of Cassation subsequently decided that these charges under Article 329/1 should be dismissed due to Article 26 of the Press Law. The first instance court was ordered to focus on the charge under Article 328 of the Turkish Criminal Code. After this decision the first instance court merged the cases (which had been separated in May 2016) and eventually, in December 2020 Mr Dündar was convicted under Articles 220/7 and 328. That decision has now been appealed to the Court of Cassation.

13. On the day Dündar received his first sentence (May 2016), he was assaulted by a gunman at the courthouse. He was unhurt but subsequently left Turkey for Germany. He is currently a columnist for German daily Die Zeit and commentator for German WDR's Cosmo. He founded the news website called Özgürüz (We are Free).

14. At the time of their arrest on 26th November 2015 Dündar and Gül were charged (according with the wording of the indictment) with

> *Obtaining state secrets for the purposes of political and military espionage, revealing information relating to the state security for the purposes of espionage, seeking to overthrow the government by force and violence or seeking to partially or completely obstruct the conduct of its operations, willingly aiding an armed terrorist organization without being a member of it.*

15. The charges were expressed to be under Articles 314/2, 328/1, 330/1, 312/1, 53, 63/1 and 58/9 of the Turkish Penal Code by the implication of the Article 220/7 of the Turkish Penal Code and the Article 5 of the Law No. 3713. The conviction was secured in May 2016 under article 329, not listed in the indictment. As stated this charge was overturned by the Court of Cassation. The trial continued however in relation to the charges under Article 328 and 220/7 "willingly aiding an armed terrorist organisation without being a member of it" which reads as follows:

> *(Amended on 2/7/2012 - By Article 85 of the Law no. 6352) 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. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.*

16. I will comment on the legality of proceeding with this separate case on the basis of the same facts later.

17. The evidence on the basis of which these charges were made is summarised in the indictment in the following (entirely vague) terms:

> *Letters of criminal complaint, examination and statement records, review, investigation and evaluation records, the report prepared by Terrorism Department and the whole investigation document.*

18. The indictment is 437 pages long. I have not seen a translation of the whole of the document. Large sections of the indictment relate to other cases against other suspects or defendants in relation to different or similar alleged offences and clearly have no relevance to the guilt or innocence of these suspects. The first substantive reference to the suspects appears on page 72 where it is stated that:

- "This Indictment against the suspects Can Dündar and Erdem Gül is organised under the following chapters;

- the coup attempt of 17th 25th of December and the task given to the suspects by the FETÖ/PDY terrorist organisation in this process;

- immobilisation of the aid trucks of the National intelligence organisation and the task given to the suspects by the FETÖ/PDY terrorist organisation in this process;

- terrorist attacks in Reyhanli and Cilvegözü and the task given to the suspects by FETÖ/PDY terrorist organisation in connection with these attacks; and

- the review and assessment of the actions of suspects through the lens of criminal law."

19. The emphasis has been added in the above summary. In essence, the allegations against each of the suspects are that they had been instructed by a terrorist organisation (FETÖ/PDY) to carry out three different tasks for them. The evidence which is adduced in support of these allegations consists almost entirely of quotations from articles written by Dündar and Gül about each of the three incidents described in the indictment. No factual evidence is adduced with regard to the way in which these alleged tasks had been allocated to the suspects, or the individuals who are alleged to have allocated these tasks. Nor is there is any documentation or other evidence adduced to indicate that such tasks had in fact been allocated. There are extensive quotations from journalistic reports written by Dündar, but no evidence to demonstrate that those reports were written on the instruction of any third party. I will deal with each of these incidents in turn:

20. The Alleged Coup Attempt 2013:

a. Between December 17 and December 25, 2013, a criminal investigation was undertaken in Turkey which involved several key people in the Government of Turkey. It was reported that 52 people were detained on 17 December and it was alleged that they were connected in various ways with the ruling Justice and Development Party. Allegations were made against a number of family members of Cabinet ministers of bribery and corruption and fraud, money laundering, and gold smuggling. Subsequently, then Prime Minister Recep Tayyip Erdoğan announced the reshuffle of 10 members of his cabinet and his government dismissed or reassigned thousands of police officers and hundreds of judges and prosecutors, including those leading the investigation, and passed a law increasing government control of the judiciary. The case against the defendants was subsequently dismissed.[3]

b. After the dismissal of the principal prosecutor, Celal Kara, Dündar interviewed him. Extensive quotations are contained within the reviewed indictment of the answers given by Mr Kara to the questions posed by Mr Dündar during his interview. None of these quotations evidence any motive on the part of Mr Dündar other than to provide journalistic reports of the facts and events related by Mr Kara.

21. Immobilisation of the aid trucks of the National intelligence organisation National Intelligence Organisation (MİT):

a. On 29 May, 2015 Cumhuriyet published an article and video evidence indicating that security forces had been discovered emptying weapons parts being sent to Syria on trucks belonging to the MİT state intelligence agency. The footage showed gendarmerie and police officers opening crates on the back of the trucks which contain what the article described as weapons and ammunition. The article stated that the video was from Jan. 19, 2014 but did not say how it had obtained the footage.

b. A further article was subsequently published on 12 June 2015.

c. There had been previous reports that witnesses and prosecutors had alleged that MİT helped deliver arms to parts of Syria under Islamist rebel control during late 2013 and early 2014, quoting a prosecutor and court testimony from gendarmerie officers.

d. Other reports of the interception of the vehicles in the press had appeared internationally at the time of the incident and the facts and evidence concerned were in the public domain.

e. In a report published by international press agency Reuters they indicated that they could not verify the authenticity of the video footage, but the license plates on several of the vehicles matched those given in witness testimony seen by Reuters relating to the Jan. 19 search in the southern province of Adana.

f. President Tayyip Erdoğan was reported as having said the trucks stopped that day belonged to MİT and were carrying aid to Turkmens in Syria. He allegedly said prosecutors had no authority to search MİT vehicles and were part of what he calls a "parallel state" run by his political enemies and bent on discrediting the government.

g. The state-run Anadolu News Agency said the Istanbul chief prosecutor's office had launched an investigation into Dündar under counter-terrorism laws after the footage was published on its website.

h. Syria and some of Turkey's Western allies were reported to have said that Turkey, in its haste to see President Bashar al-Assad toppled, let fighters and arms go over the border to hard-line Islamist rebel groups in Syria.

i. Ankara denied arming Syria's rebels or assisting hard-line Islamists. Diplomats and officials from Turkey stated it had in recent months imposed tighter controls on its borders.[4]

j. In the indictment there are very detailed descriptions of the investigations carried out at the time the vehicles were intercepted and various allegations are made against the members of the security forces who intercepted the vehicles that they were acting in concert to embarrass the state in front of visiting ambassadors. The report in Cumhuriyet was published some 16 months later. Allegations are made in the indictment that the reports made "were in line with the FETÖ/PDY Armed Terrorist Organization's ultimate aim of ensuring, based on the false denunciations and evidence, that the State of the Republic of Turkey is put on a trial in the International Penal Tribunal, through an effort to misrepresent it as a country that aided terrorism." This allegation is repeated in various different parts of the indictment but no evidence is identified to establish the truth of the allegation.

k. There are also extensive quotations from articles written by Dündar prior to the publication of the May and June 2015 articles. These are articles which relate to entirely unrelated aspects of society in Turkey. There is no cogent or credible explanation as to why these articles have any relevance whatsoever to the charges put under the terms of the indictment.

22. Terrorist attacks in Reyhanlı and Cilvegözü:

a. on 11 May 2013 twin car bombs killed over 50 people in the Turkish town of Reyhanlı, near the Syrian border[5]. In another attack in Cilvegözü at a border gate a further 17 people were killed.

b. The indictment contains a detailed examination of the investigation in relation to these attacks and refers to the witness statements which were taken at the time. It does not however relate these in any way to any activities undertaken by either of the suspects. Extracts from unrelated articles are included and in the middle of the text relating to the investigation Mr Dündar's name is mentioned. However, it is not related to any facts which involve him in any way with the activities leading to the bombings or with the bombings themselves, or with any publications arising out of the bombings. There is much description of a theory that members of the MİT were aware of the attacks prior to them taking place and reference to an article where Mr Dündar makes reference to this.

c. After these extracts the indictment goes on to present the following analysis:

"THE REVIEW AND ASSESSMENT OF THE ACTIONS OF THE SUSPECTS THROUGH THE LENS OF PENAL CODE

This section is organized under the following main titles:

1.) AIDING AND ABETTING THE FETÖ/PDY ARMED TERRORIST ORGANIZATION KNOWINGLY AND WILLINGLY WITHOUT BECOMING A MEMBER OF IT,

2.) A. POLITICAL AND MILITARY ESPIONAGE, DISCLOSURE OF INFORMATION (STATE SECRET) THAT SHOULD REMAIN CONFIDENTIAL,

B. SEEKING TO OVERTHROW THE GOVERNMENT OF TURKISH REPUBLIC BY FORCE AND VIOLENCE OR SEEKING TO PARTIALLY OR COMPLETELY OBSTRUCT THE CONDUCT OF ITS OPERATIONS (the capitalisation of this summary is in the original indictment).

d. This summary is followed by an extensive academic analysis of the subject of terrorism which appears to have been copied and pasted from various publications. In some cases these sections end abruptly mid-sentence suggesting that the full passage has not been copied. The summary is followed by a variety of allegations against Fetullah Gülen with references to various television programmes and a description of various offences under the Turkish criminal code many of which are articles relating to offences which the suspects had not been charged with. I quote one passage below to illustrate the irrelevant nature of much of the content of the indictment:

It is understood that all the speeches by Fetullah Gulen, the leader of the organization, were made for a specific purpose and aim, that he sent some messages to the members of the organization and instructed them to take the necessary actions to achieve the ultimate purpose of the organization.

The TV series titled "Sefkat Tepe" [Kindness Hill], whose plots are written on the orders and approval of the suspect Fethullah Gulen, featured the scenes referred as "Dark Council" or "Council of Decisionmakers" where the phrase "Muta" ["Fornication"] was constantly mentioned. In his speeches, Fetullah Gulen highlighted the issue of "Muta" and the columns of Gultekin Avcı, a columnist in a newspaper called Bugün, systematically discussed the issue of "Muta Marriages" [a sham marriage that is believed to make non-marital sexual intercourse permissible]. One of the charges attributed to the suspects in the investigation no. 2011/762 was "Muta" ("act of compelling prostitution" according to the suspects' statements). When the personal identification report written for one of the victims in the file and the points made above are taken as a whole, it can be seen that the phrase "Muta" was featured by the series titled "Sefkat Tepe" and the columnists only after the suspect Fetullah Gulen used it for the first time. In parallel to that, it is understood that among the charges attributed to the suspects in the investigation no. 2011/762 was the phrase "Muta ("act of compelling prostitution" according to the suspects' statements)", which they tried to link with the victims.

2.) Analysis of the Indictment

23. The indictment, despite its considerable length, does not contain a succinct statement of the facts. It is essentially a compilation of apparently random references to publications authored by Mr Dündar and Mr Gül over a number of years and contains substantial volumes of information and evidence which either:

a.) has no connection with the allegations made against them (because it relates to other investigations or prosecutions);
b.) has no relevance to the particular case but is simply an academic analysis of the concept of terrorism;
c.) relates to the investigation of other crimes which the defendants are not alleged to have committed; or
d.) analyses offences which the defendants have not been charged with.

24. At the heart of the indictment is the allegation that both suspects were allocated "tasks" by the Gülen organisation to bring the state into disrepute and the publication of journalistic articles disclosing possible wrongdoing on the part of politicians and government officials amounted to a performance

of these tasks. These allegations are repeated throughout the indictment (often in shouting CAPITAL LETTERS). However, no evidence is advanced that the publication of these articles was influenced or encouraged by any third party.

25. In their own statements to the prosecutor the indictment confirms that they denied any such allegations. Mr Dündar confirmed to the prosecutor (and I quote from the indictment) that:

he was reporting without any other purpose," and that "the images were previously published by another newspaper". When asked orally about "if the previously published images were newsworthy", he stated that "the images he published were different and newsworthy". When asked about "if he has any information and documents that indicated that the aid trucks were sent to any organization", he stated that he has no such information or documents but that was what he heard". Likewise, the suspect Erdem Gül stated that "he had no purpose other than journalism." As can be understood from the statements, despite the fact that the suspects didn't have any concrete information or documents, they still attempted to link the state and the government of the Republic of Turkey with terrorism, using the images handed over to them by the FETÖ/PDY Terrorist Organization, through some middlemen. And in line with their purpose, they have written unreal/fictitious articles knowingly and systematically.

26. The allegation therefore appears to be that the information which the suspects received and which was published in the newspaper had been secured from a terrorist organisation "through some middlemen." No evidence is found anywhere in the indictment to identify who these middlemen were, or to demonstrate how any instructions had been given.

27. As with so many indictments analysed by others who have produced reports for the PEN Norway project there is endless repetition, idealistic and academic theorising, and the expounding of conspiracy theories about Turkey and its reputation with the wider world but there is no cohesive and structured narrative linking the suspects with any factual basis on which they could reasonably be regarded as having committed the crimes they are charged with. This has made it almost impossible for the suspects to properly respond to the allegations against them. Their right to defend themselves adequately against facts which might indicate their guilt has been completely undermined by the introduction of hundreds of pages of irrelevant narrative.

3.) The Relevant Domestic Law

28. The formal requirements in relation to the filing of a prosecution are set out in Article 170 of the Turkish Criminal Procedure Code. These include such things as identifying the suspect, defence counsel, the victim and the complainant. The complainants in this case are the President of Turkey (himself possibly impugned by the evidence published in Cumhuriyet) and the Undersecretariat of the National Intelligence Organisation (the organisation alleged to be responsible for shipping arms to terrorists in Syria). In most respects the indictment would seem to be compliant with Article 170. However, under article 170 (5) there is a requirement that "the conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour." There is no mention of any favourable aspect of the case, and the lack of any direct evidence of either suspects' association with any terrorist organisation is clearly a relevant factor which should from a procedural perspective have been included in the conclusion.

29. Paragraph 2 of article 170 requires that the evidence collected at the end of an investigation should constitute sufficient suspicion that a crime has been committed before an indictment is prepared. The decision of the Constitutional Court, which clearly found that the facts which were available were insufficient to find the Defendants guilty of any terrorist offence was handed down in February 2016 and the indictment was prepared before this decision was available. However, any prosecutor is expected to be able to evaluate the same legal arguments. This is clearly relevant to the question of whether or not the prosecution should have proceeded and it seems the prosecutor failed in his duty under Paragraph 2 of article 170.

30. Finally article 170 (4) requires that "the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence." The confused narrative of the indictment clearly does not comply with this requirement. Interestingly Article 170(4) has very recently been amended (on 8 July 2021) and a new sentence has been added which mandates that ""an indictment ... shall not give information that is not related to the events that constitute the alleged

offence or to the evidence thereof." The vast bulk of the indictment in this case relates to information which "is not related to the events that constitute the alleged offence or the evidence thereof."

31. There is passing reference in the indictment to a ban on publication concerning the MİT trucks which was issued under Press law 5187 Article 3(2) by the Adana 5th Court of Peace Judgeship, on 14th January 2015, case file no. 2015/197. This ban prohibited the re-publication of the photographs and other information published in May 2016 in Cumhuriyet and publication could have amounted to an offence under the Press Law 5187 published on 26th June 2004. Under Article 11 of the Press Law the owner of the periodical in which the material is published is primarily liable for any breach although the editor can be punished in circumstances where the owner cannot be. Under Article 26 of the Press Law any prosecution is required to be commenced within four months of the publication of the offending materials. The indictment was issued just over six months from the publication of the MİT article and would appear to be out of time for any prosecution under the Press Law. Any such ban (especially in relation to the publication of facts which were already in the public domain) would in any event violate international standards concerning the freedom of the press which are referred to in the next section.

4.) Relevant International Standards

4.1) Freedom of Speech

32. The case clearly raises fundamental issues regarding the right to journalistic freedom protected under Article 10 of the European Convention of Human Rights ("ECHR"). Whether or not there was a ban on publication of the relevant materials, in establishing whether or not there has been interference with the right to freedom of expression, there is no need to dwell on the characterisation given by domestic courts. Article 10 of the Convention applies to statements which seek to draw attention to unlawful or morally reprehensible conduct, and specific protection is provided for such statements in the case law of the European Court of Human Rights ("ECtHR").

33. As a matter of general principle, the "necessity" of any restriction on the exercise of freedom of expression must be convincingly established (Sürek and Özdemir v. Turkey [GC], para. 57[6]; Dilipak v. Turkey, para. 63[7]). The Court must determine whether the reasons adduced by the national authorities to justify the restriction are "relevant and sufficient" (Barthold v. Germany, para. 55[8]; Lingens v. Austria, para. 40[9]).

34. With particular regard to the disclosure of information received in confidence, the Court has emphasised that the concepts of "national security" and "public safety" need to be applied with restraint and to be interpreted restrictively and should be brought into play only where it has been shown to be necessary to suppress release of the information for the purposes of protecting national security and public safety (Stoll v. Switzerland [GC], para. 54[10]; Görmüş and Others v. Turkey, para. 37[11]).

35. The Court has consistently held that there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or debate (Brasilier v. France, para. 41[12]) or on debate on matters of public interest (Sürek v. Turkey (no. 1) [GC], para. 61; Lindon, Otchakovsky-Laurens and July v. France [GC], para. 46[13]; Wingrove v. the United Kingdom, para. 58[14]). The information in the articles published by the suspects in this case was in any event already in the public domain.

36. The Court considers that the difficulties raised by the fight against terrorism do not in themselves suffice to absolve the national authorities from their obligations under Article 10 of the Convention (Döner and Others v. Turkey, para. 102[15]). In other words, the principles which emerge from the Court's case-law relating to Article 10 also apply to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism (Faruk Temel v. Turkey, para. 58[16]).

37. With due regard to the circumstances of each case and a State's margin of appreciation, the Court must ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations (Zana v. Turkey, para. 55[17]; Karataş v. Turkey, para. 51[18]; Yalçın Küçük v. Turkey, para. 39[19]; İbrahim Aksoy v. Turkey, para. 60[20]).

38. Applying the courts approach to the facts of the present case it seems clear that the Court would not support attempts by the state to prevent dissemination of information and images tending to show the participation of state security forces and senior political figures in an operation to supply terrorists with weapons in a third country. Especially where that information was already in the public domain and had already been the subject of public debate.

39. During the investigations the indictment discloses that Mr Dündar and Mr Gül refused to disclose the source of the information which they had been supplied with and which was published in May 2016. The Court has on numerous occasions protected the right of journalists who have refused to disclose their sources. It appears that no order was obtained in this case from any domestic court to secure the release of this information but had any such order been made it is likely that this would have been found to be a violation of article 10 of the Convention. See for instance Voskuil v. the Netherlands[21] where the Dutch government's interest in knowing the identity of the applicant's source had not been sufficient to override the applicant's interest in concealing it. The journalist had written for a newspaper concerning a criminal investigation into arms trafficking and was detained for more than two weeks in an attempt to compel him to disclose his sources.

4.2) Right to a Fair Trial

40. The right to a fair trial is protected by both articles 5 and article 6 of the ECHR and articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"). Turkey is a signatory to both instruments.

41. A fundamental component of the right to a fair trial is the right of any defendant to know the case against him and to challenge it. Without this knowledge he is unlikely to be able to effectively defend himself or give appropriate instructions to any lawyer instructed. Indeed, it is not possible to obtain evidence to support his defence if the defendant does not know the case against him.

42. This report is not an appropriate place to provide a full analysis of the deficiencies of the criminal justice system in Turkey both in relation to institutional requirements under Article 6 of ECHR and the procedural requirements under Article 6. Criticisms with regard to both have been made by academics, bar associations, NGOs and international institutions for a number of years.

43. The indictment presents a confusing and inchoate collection of facts, none of which point to the guilt of the suspects but which often relate to investigations undertaken by the state in secret, making it virtually impossible for the suspects to prepare effectively for their trial.

44. In this particular case there were also constant changes of judges throughout the very lengthy trial. One member of the judicial panel was arrested for alleged membership of the Gülen Organisation on 2 December 2016. The presiding judge was removed at a further hearing on 19th of December 2016. There were a multiplicity of hearings when various other cases were joined or removed. All of these factual issues are clearly of great concern when considering whether the court in these circumstances was capable of complying with the requirements of Article 6. These concerns are exacerbated by the closed hearings within which the presiding judge granted the request of the prosecutor of the court to admit president Erdoğan and the intelligence agency of Turkey as official complainants in the case despite protests by the defence that the move would jeopardise the independence and fairness of the trial. They were both potentially implicated in the wrongdoing which the defendants had reported. These are just some of the concerns which suggest that the institutional and procedural protections provided for by the ECHR were not respected.

45. There is one distinct facet of the trial which promotes even greater concern in relation to the treatment of Mr Dündar.

46. After his conviction in May 2016 under article 329 of the Turkish Penal Code the case in relation to the allegation that he had "aided an organisation without being a member of it" was separated and a further hearing took place on the 21 September, 2016 again at the Istanbul 14th assize Court to continue with this charge.

47. 21 further hearings took place between September 2016 and December 2020 when Mr Dündar was sentenced to 27 years and six months imprisonment on the charge of providing assistance to a terrorist organisation without being a member of it. Throughout this period Mr Dündar was in Germany.

48. It does not appear that any further factual evidence of any relevance to the charge was presented after Mr Dündar 's initial conviction in May 2016. Protocol number 7 to the ECHR entered into force in Turkey from first of August 2016[22]. From that date any Turkish indictment had to comply with article 4 (I):

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 appeal procedure of that State.

49. This provision prohibits successive prosecutions of defendants based on the same set of facts. However, the continued prosecution after the original conviction in May 2016 was exactly that. No new facts were presented. On this basis it appears that the continued prosecution of Mr Dündar after August 2016 was in breach of Turkey's international obligations under Protocol 7. His conviction did not take place until December 2020.

4.3) The Impartiality and Fairness of the Prosecutor in the Proceedings UN Guidelines on the Role of Prosecutors

50. When discussing the question of whether or not the indictment and the conduct of the trial respects fair trial principles and procedures reference needs to be made to the UN Guidelines on the Role of Prosecutors ("UN Guidelines") which outline the role of prosecutors in upholding the rule of law.

51. Principle 2 (b) requires that prosecutors "have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law".

52. Principle 12 goes on to 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".

53. As identified above the indictment contains no reference to matters (the clear lack of cogent evidence that the suspects had been allocated any "tasks" by a terrorist organisation) which clearly were to the advantage of the suspects. It is clear from this and from other cases that prosecutors (being under heavy political pressure themselves) seem unable to uphold the "ideals and ethical duties of their office" or discharge many of the other duties imposed on them by the UN Guidelines.

54. The Constitutional Court had in February 2016 made it clear that it did not consider it appropriate to pursue a prosecution against the suspects for merely reporting facts in the public domain which had been the subject of public debate for over 15 months before the offending articles were published. In paragraph 98 of the CC Judgement that view was articulated in the following form:

> **97.** Considering the above findings regarding the legality of the arrest (see §§ 76-80) and taking into account that the only fact cited as the basis for the charges is the publication of the news reports in question, a strong measure such as an arrest that does not meet the legality requirements cannot be considered as a necessary and proportional intervention in a democratic society in terms of freedom of expression and press.
>
> **98.** Furthermore, the characteristics of the incident in question and the reasoning provided by the arrest warrant do not make it clear which "urgent social need" necessitated such an intervention against the freedoms of expression and press as arresting the applicants and why it was necessary to do so in a democratic society in order to protect the national security without regard to the fact that a similar news report was published in another newspaper

sixteen months ago and an investigation was launched against the news report in question six months before.

99. On the other hand, when evaluating the necessity and proportionality of an intervention in a democratic society, it is necessary to take into consideration the potential "chilling effect" of the interventions against the freedoms of expression and press upon the applicants and the press in general.(Ergün Poyraz (2), § 79, for ECHR decisions in a similar vein, see Nedim Şener/ Turkey, § 122; Şık/Türkiye, § 111). It is also clear that the fact that applicants were arrested without any concrete facts and reasoning regarding the necessity of an arrest apart from the news reports, might make a chilling effect on their freedoms of expression and press."

It is clear that during the prosecution these words in the judgment were not taken into consideration.

5.) Conclusions and Recommendations

55. The shortcomings and defects in the indictment in this case which have been highlighted in this report reflect defects and shortcomings which have been present in many, many cases in Turkey over the last ten years. These defects and shortcomings have become exacerbated over the period since the attempted coup in July 2016 when numerous mass trials have taken place.

56. The level of apparent incompetence and lack of compliance with both domestic and international rules and principles governing the drafting of indictments on the part of the prosecutor in this and other cases is clearly astounding to lawyers who have trained and practiced in other European jurisdictions. No conviction based on the evidence adduced by this indictment can be regarded as safe or satisfactory.

57. The facts disclosed by the indictment do not appear to justify either the prosecution itself nor the conviction of the defendants for the offences with which they were charged.

58. The changes made to Article 170(4) of the Turkish Criminal Procedure Code in July 2021 instructing prosecutors not to include irrelevant materials in indictments do show some awareness that this practice is unacceptable. Let us hope that they will take heed of these changes in future cases.

59. First and foremost it is clear that the convictions of Mr Dündar and Mr Gül should be quashed. They are manifestly unsafe and unsatisfactory and resulted from a prosecution and trial which failed to comply with both domestic and international rules and obligations concerning the role of the prosecutor and the delivery of a fair trial to each of the defendants. The prosecutions were also clearly in breach of Turkey's obligations under Article 10 of ECHR.

60. Mr Dündar 's second conviction in December 2020 was in breach of Turkey's international duties under Protocol 7 of the ECHR and is doubly open to challenge.

61. On 14th June 2021 the first International Fair Trial Day took place drawing together lawyers, bar associations and human rights organisations from across the world to focus on the increasingly challenged situation concerning fair trial rights in Turkey (and in other countries where the rule of law and fair trial rights are challenged). On the occasion of the International Fair Trial Day a joint statement was made by over 90 bar associations, associations of judges, NGO's and other human rights organisations calling on Turkey to implement a range of measures to address failings in the judicial system[23]. These included calls to guarantee and respect the principle of presumption of innocence in all criminal investigations and prosecutions, and a demand to ensure that the rights to fair trial embodied in Article 6 of the ECHR and Article 14 of the ICCPR are respected in all criminal prosecutions in Turkey's criminal courts at all levels. Turkey should take up this challenge and start the process of complying with these demands to move the country to a situation where the rule of law and fundamental rights and freedoms, including fair trial rights, are fully respected.

About the author

Tony Fisher is CEO of the law firm Fisher Jones Greenwood LLP in Essex, England. Tony has undertaken a wide range of international and domestic human rights work and has appeared as an advocate in the European Court of Human Rights on many occasions. He is a Fellow of the Human Rights Centre at the University of Essex and is a member and former chair of the Human Rights Committee of the Law Society of England and Wales. He sits on the Council of the Law Society of England and Wales as the representative for the Essex constituency and on the International Committee, which oversees the international work of the Law Society.

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12

PEN NORWAY

A Test for Associations in Turkey

Seyhan Avşar
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A Test for Associations in Turkey

On 21 July 2016, a state of emergency was declared across Turkey, following the attempted coup a few days earlier on 15 July 2016. However, while the coup threat subsided, the state of emergency was extended seven times, on every occasion for a period of three months. The state of emergency lasted for two years, finally ending on 17 July 2018.

Repercussions for democracy and human rights

For those engaged in the struggle for democracy and human rights in Turkey, the state of emergency came at a high price. Over the two-year period, the cabinet issued thirty-six statutory decrees, tens of thousands of people were subject to judicial and administrative proceedings and thousands of civil servants were sacked.

Opposition groups tarred with the Fetullah Gülen brush

Numerous organisations and institutions were closed by statutory decree during the state of emergency period, including five news agencies, 17 TV channels, 22 radio stations, 46 newspapers, and 1,748 associations and charitable foundations. Proclaiming that they were in a "Fight against the Fethullah Gülen Terrorist Organization (FETÖ)," the government tarred opposition groups whose stance they disliked with the same brush, branding associations and foundations defending democracy, human rights and LGBTI+ equality with the same iron.

Organisations accused of "being in contact and affiliated with terror groups …" were closed down, their assets were confiscated and their doors were sealed off in police raids.

First women's news agency also closed

Among the organisations closed in this period were: JINHA, the world's first pro-active women's news agency; the Tigris News Agency (DİHA), which had long been targetted by the government, Zarok TV, a children's channel broadcasting in Kurdish, and Özgür Radyo (Freedom Radio), an alternative radio station.

Equipment belonging to the organisations was confiscated by police, including vital journalistic apparatus like cameras and recording devices. None of the organisations were able to broadcast under the same name again. The women at JINHA later regrouped to establish another news site, Jin News, and continued to published their work.

"Intimidation won't stop us reporting"

Ayşe Güney, the editor of Jin News, emphasised that the government's fear of the women's struggle was the main reason for the closure of organisations that covered women's news, saying, "The women's struggle is growing and JINHA was part of that struggle. Jin News is another part of the struggle. It is an organisation that gives visibility to the women's fight.

The state doesn't want people to know about the harassment, violence and rape endured against women, especially in the region (east and southeast Anatolia). But, despite all their policies of repression and intimidation, we will carry on reporting the news. We will be here for as long as women continue to resist. We are growing with them. Stopping or going backwards is absolutely not an option."

Legal bodies also in the firing line

The government didn't miss the opportunity to harness the state of emergency as a means of shutting down legal associations pursuing justice. As a result, the Progressive Lawyers Association (ÇHD), founded in 1974 to prevent attacks on fundamental rights and human dignity, especially the right to life, was closed down, along with the Lawyers for Freedom Association, founded in the 2000s to fight against violations of the rights of Kurdish people.

While the closure proceedings were in progress, the Lawyers for Freedom Association continued its work under the name of the Lawyers for Freedom Platform.

When the state of emergency ended, the group was re-established under another name, the Lawyers Towards Freedom Association. However, events unfolded somewhat differently for the Progressive Lawyers Association. Following the decision to shut them down, the Progressive Lawyers Association issued a statement declaring that associations could only be closed by a judicial decree and that, therefore, they did not recognise the closure ruling. Furthermore, they announced that an office was not necessary for them to continue with their work, vowing to carry on their struggle for justice and law in every corner of life.

"A de facto embargo"

Following the end of the state of emergency, the Progressive Lawyers Association re-registered with the Central Bureau of Associations under the same name. The Ankara Chief Public Prosecutor's Office objected that they were prohibited from doing so and filed for legal action. In the words of Nergiz Tuba Aslan, General Secretary of the Progressive Lawyers Association: "We registered at the Central Bureau of Associations. We even held our general assembly. But the Ankara Chief Public Prosecutor filed an annulment action, claiming that we could not re-establish our association with the same name. The court that heard the case decided in our favour, arguing that the Progressive Lawyers Association had been closed, not by a court decision, but by a government one. This time the prosecution appealed the decision. We are subject to a de facto embargo. But we won't surrender the name we have had since the times of Halit Çelenk (the lawyer who represented the Turkish revolutionary leader Deniz Gezmiş and his friends, Yusuf Aslan and Hüseyin İnan) and his associates."

The gains accrued over many years can't be erased by one official seal

Women's and LGBTI+ associations were also among those closed by the statutory decrees, including, Adıyaman Women's Life Association, Anka Women's Research Association, Bursa Panayır Women's Solidarity Association, Ceren Women's Association, the Rainbow Women's Association, the Kurdish Women's Congress, Muş Women's Framework, Muş Women's Association, Selis Women's Association and Van Women's Association. The doors to their premises were closed off with an official seal and none of the groups were re-established under the same name. In reaction to these closures, women declared that the gains, experience and dreams that had been accumulated over so many years could not be erased by one official seal.

Fatma Aslan, who has been involved in the struggle for women's and LGBTI+ rights for many years, said that women and the LGBTI+ community entered a long, difficult period after their associations were closed, "Using the excuse of the state of emergency, the government took aim at associations who were opposed to violence against women and LGBTI+ individuals, who offered legal, economic, psychological and social solidarity to women, delivered literacy courses, organised educational seminars for girls and women, published scores of materials on women's' rights, held panels and symposiums and gave educational bursaries to girls. Their entire assets were also seized in an attempt to undermine the women's struggle. But we came out of this fight even stronger. It might be true that we can't operate under the names of our closed associations, but we don't need a name or premises for our work. Our women are continuing their work and are stronger than ever."

Associations still under fire as the state of emergency ends

The declaration of a state of emergency in 2016 was accompanied by a systematic dismantling of the right to organise and to freedom of expression. Changes to the Law of Associations made it compulsory to handover membership identity details to the Ministry of the Interior. Then, in December 2020,

organisations were faced with a new danger.

The 'Bill on the Prevention of Financing the Proliferation of Weapons of Mass Destruction', presented by the Justice and Development Party with the support of the Nationalist Movement Party, contained controversial provisions relating to civil society. It was claimed that the bill's purpose was to set out procedures and principles for implementation of the United Nations Security Council (UNSC) decision to impose sanctions in support of their resolution, 'Prevention of the Financing of Weapons of Mass Destruction'; but the opposition objected to provisions in the proposed law that authorised the Ministry of the Interior to impose sanctions on associations without any judicial ruling.

On 27 December 2020, the law was ratified by the Turkish Grand National Assembly, with 254 votes in favour and 113 votes against.

Associations threatened with regulatory supervision

According to this law, those convicted of collecting funds to directly or indirectly fund terrorism, of manufacturing and trading in drugs or stimulants, or of money laundering, will not be able to take up positions in the bodies of associations other than in the general assembly.

Additionally, if persons serving in bodies of the association other than the general assembly, or any other relevant staff, are investigated in connection to these three crimes, the bodies may be suspended by the Minister of the Interior as a temporary measure. In cases where this measure is insufficient and delays are considered to be problematic, the Minister of Interior may temporarily suspend the entire association from its activities and apply immediately for a court order.

The court will rule on the temporary suspension from activity within 48 hours. The district governor will apply to the magistrates' court in the location of the headquarters of the association, requesting the appointment of a state administrator to take over from the suspended bodies and their members. The administrator will continue with this duty until the verdict of the legal action has been finalised.

Freedom to organise under threat

Opposition parties have pointed out that the accusation of "directly or indirectly serving terrorism" in Turkey is open to interpretation and used to repress civil society organisations, also highlighting the large numbers of lawsuits filed on unfounded accusations, especially against those opposed to the government. They have also objected that every year 300,000 people, including journalists, NGO workers and members of professional bodies are investigated for membership of an illegal organisation alone, and that the appropriation of an entire organisation due to an investigation into one person poses an out-and-out threat to the organisation.

Opposition parties have also complained that the law envisages large numbers of administrative fines for contravening the fundraising terms, which will severely hamper the ability of associations to provide support funded by charitable donations. As the work of women's and LGBTI+ organisations is largely funded by charity, they will be particularly affected by the severe restrictions.

"Unconstitutional"

The main opposition party and numerous NGOs have applied to the Constitutional Court on the grounds that the law's provisions on associations are unconstitutional. MP Zeynel Emre, the Republican People's Party spokesperson on the Parliamentary Justice Commission, declared that it is not possible to say that civil organisations can operate freely in Turkey all the while the clauses relating to associations are enshrined in law.

Emre said, "According to this ruling, if a lawsuit in relation to certain crimes is filed against any person in the management of an association, the Ministry of the Interior will appoint an administrator to take over the association. There are currently 850,000 criminal cases in progress across Turkey. Many people are already on trial. Most of the lawsuits that are filed result in acquittals. There are 16 board members in an association. It's unacceptable to force an administrator on them just because one of them is subject to legal action. There is no rhyme or reason for it. The ultimate aim is to control the associations. We have taken the articles on associations in this law to the Constitutional Court. Our Constitution guarantees

freedom of association."

Also, 620 NGOs published a declaration, entitled, "The Bill is Contrary to the Constitution and the Freedom to Organise", which was part of a social media campaign against the proposals, using the hashtag #CivilSocietyCannotBeSilenced. The declaration stated that the law would affect almost 120,000 associations in Turkey, at least 1.5 million adults who are members of these associations, which if you add their families to the equation makes a total of at least 10 million people. The declaration warned, "If this bill in its current state becomes law, one signature will be all it takes to close down any charitable foundation or association, especially those working for human rights, but also those engaged in work for the rights of women, refugees, LGBTI+'s, disabled persons, children and young people, various legal associations, associations fighting for social change, groups that rely on fundraising to deliver social support, citizens' groups, sports clubs and the associations and charitable arms of different faith groups. As such administrative procedures would normally last many years, in practice a 'rapid closure' process will have been created." Unfortunately, these warnings have not been heeded.

About the author

Seyhan Avşar is a journalist working for Turkey's Cumhuriyet newspaper. To date, her articles have won awards from the Journalists' Association of Turkey, Istanbul Journalists' Association, and the Association of Progressive Journalists. She has also won the Metin Göktepe prize for journalism.

Jin News Agency: “On the path to truth with a woman’s pen”

Şerife Ceren Uysal
Published: 25 November 2021

Jin News Agency: "On the path to truth with a woman's pen"

Jin News Agency is a Kurdish women's news agency based in Turkey. The unique ethos of its working practices has undoubtedly contributed to feminist media theory since the day it was founded. In fact, Kurdish women's journalism in Turkey has accumulated considerable experience over its long history, making it particularly worthy of examination. It provides a means of understanding the intersecting dimensions of state oppression and violence in Turkey and the ways in which women have continually resisted these forms of persecution.

Jin News is the first news agency founded and operated exclusively by women in Turkey, and there are still no other similar examples. Comparable organisations from around the world are limited and do not fully correspond to the Jin News model in terms of organisational structure and focus. There are several important organisational points that distinguish Jin News from the other examples. First of all, Jin News is not a women's magazine, newspaper or any other form of print media product. On the contrary, since it is organised as a news agency, its primary aim is to distribute news. This operational preference goes beyond just writing and recording news stories, because the act of distributing the news to other publications inherently means taking control of the source of news. Another important distinguishing feature is that all employees of the agency have been women since its establishment, including technical staff, reporters, drivers and accountants.

Jin News does not just focus on news about gender inequality. On the contrary, the agency provides news on all areas of life, but presents everything from an intersectional feminist perspective. Just like other mainstream or hybrid news agencies, Jin News covers a wide range of subjects, such as sports, health, and politics. However, the huge gap between Jin News and mainstream, masculine journalism becomes evident on reading their reports. For example, the agency rejects the repeated use of surnames for people mentioned in its news or articles, seeing the use of surnames as a powerful tool for maintaining the patriarchal order. Also, as part of its stance against hierarchical power relations, the agency avoids headlines that will strengthen and reinforce these hierarchical relations bolstered by different aspects of society. It is absolutely clear that the principles of intersectional feminism are strictly adhered to when interpreting any events. In this sense, it is not just the problems of women and LGBTQI+ people arising from gender inequality that make up the news coverage, but there is also meticulous attention to the Kurdish issue, ecological issues, inequalities stemming from class discrimination and children's rights. The decision to publish its news in five different languages shows that linguistic rights have a special importance for the agency.

The "Media Critique" section on the agency's website can be considered as a reflection of the agency's social preferences, as well as a guide to the introduction of the fundamental principles of intersectional feminist journalism. Articles in this section are updated frequently and cover numerous topics, such as how murders of women should be reported and the function of the press.

A Brief Summary of the Jin News Story

The repression and censorship meted out by the government in Turkey, particularly targeted at freedom of expression, touch every aspect of life. In the years after the founding of Jin Ha (Jin Haber Ajansı– the predecessor of Jin News), these measures notably increased, taking on new dimensions and leaving serious traumas in the collective memory of society. Jin News was first established in 2012 as Jin Haber Ajansı (Jin Ha). In 2015, curfews with no legal basis were declared in major Kurdish centres such as Sur, Cizre and Nusaybin, marking a momentous period in terms of both the history of the country and the practices of the agency. Female reporters and journalists within the agency challenged the generally

accepted gender division of labour in journalism, by reporting for months from pretty much the centre of the conflict. The attempted coup and subsequent declaration of a state of emergency in July 2016 also triggered another important process for the agency. Following allegations of involvement in terrorist activities, the agency [Jin Ha] was shut down by a state of emergency decreed on October 29, 2016. October 29 is the day the Republic of Turkey was declared, and the closure of a Kurdish women's news agency on this date carries a symbolic meaning that cannot be overlooked.

After the closure, the women at the agency decided to start an online newspaper, and Sujin Newspaper was founded as a successor, or sister, to Jin Ha in 2017. However, this newspaper was also closed on 25 August 2017 by another state of emergency decree. This time, journalists re-established the agency under the name Jin News in September 2017. Jin News is still active today, although journalists working there inevitably face a multitude of repressive measures.

Memory, Journalism and Jin News

Barbie Zelizer describes journalism and memory as "two distant cousins":

> *Memory and journalism resemble two distant cousins. They know of each other's existence, acknowledge their shared environment from time to time and proceed apace as autonomous phenomena without seeming to depend on the other. And yet neither reaches optimum functioning without the other occupying a backdrop, just as journalism needs memory work to position its recounting of public events in context, so too does memory need journalism to provide one of the most public drafts of the past.*[1]

Clearly there are important references to collective memory throughout the work of Jin News. In fact, contrary to Zelizer's characterisation of "two distant cousins", the relationship between Kurdish women's journalism and memory can be interpreted as something much closer, perhaps as a relationship of sisterhood. Even the date and place where Jin News [as Jin Ha] was originally established exemplifies this. The agency was established on 8 March 2012 in Diyarbakır. Of course, there could be many other practical reasons why Diyarbakır was chosen to launch the venture, but the influence of the city's historical and socio-political meaning for all Kurdish people cannot be underestimated. The date of 8 March is a symbolic reference, directly relating to the collective memory of all women across the world. These two choices alone (the date and place of the agency's establishment) indicate that the founding women journalists saw their actions as connected with the histories of both the Kurdish national struggle and the feminist struggle. References to memory are certainly not limited to this one example. Another illustration can be found in a number of the agency's news reports and articles that describe Jin News as the realization of the dream of female journalist Ayfer Serçe, who was killed by the Iranian army between the Turkish-Iranian border in 2006. The insistence on this reference over the years from Jin Ha to Jin News should not be seen as only honouring a murdered female journalist: it is also a form of resistance to the imposed amnesia or the compulsion to forget, which should be seen as a form of oppression.

The "About Us" section, which was published when Jin Ha was re-established as Jin News, is particularly striking in terms of the relationship with memory:

> *We are the subject of every piece of news we write in opposition to the male state and masculine domination, which attack women, children, LGBTI people, nature, living things, memory, identity and peoples.*
>
> *With the same legacy, the same accumulated experience… and the belief we inherited from women like Rosa Luxembourg, Zabel Yaseyan, Gurbetelli Ersöz, Emma Goldman, Virginia Woolf, Ayfer Serçe, Ulrike Meinhof, Zeynep Erdem, Deniz Fırat and Nûjiyan Erhan, who wanted to ensure that women's writings, their spoken words and journalism endure permanently, we repeat the words of the women before us, "We will continue to write regardless of the judgements of men." We existed, we exist, we will exist!*[2]

It's clear that women journalists at Jin News see themselves as representatives of a historical continuum. As can be seen from the names cited in the About Us section, this is more than a simple claim to carry the historical legacy of journalism; the focus is on carrying the historical legacy of the struggle to ensure that women's words endure, whether in the field of literature, art or political activism.

This turns collective memory into a tool of resistance and existence. When such a position is combined with journalistic activity, the result is the rewriting of all the narratives produced under male domination, and in a sense, a rewriting of history itself. It is also an unequivocal intervention in the very process of creating narratives.

Under the banner of “On the path to truth with a woman’s pen”, this bond established between the past, present and future will not only contribute to women’s freedom of expression, but also contribute to the rewriting of histories that exclude women. It won’t be out of place to say that these efforts will strengthen the voice of all women, not just those who are journalists.

About the Author

Şerife Ceren Uysal is a human rights lawyer from Istanbul. An executive board member of the Progressive Lawyers Association since 2015, Ceren Uysal was awarded the Dr.Georg Lebiszczak Prize for Freedom of Speech in Austria in 2016 December. She is researching at the Gender Studies Master Program of the University of Vienna, focusing on gender issues within the context of human rights law, and is currently the co-Secretary General of The European Lawyers for Democracy and World Human Rights (ELDH). In 2021, Ceren is working as Indictment Reports Supervisor for PEN Norway.

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PEN NORWAY

Media Under Seige

Gökçer Tahincioğlu
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PEN NORWAY

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Article:
Media Under Seige

Media Under Seige

Media Structure From the 1990's and Onwards

Only one word could be used for media outlets described as mainstream in the 1990s: cartel. The mainstream media bodies that made up the cartel began by de-unionising the workforce. This new attitude came hand in glove with the arrival of neoliberal policies in Turkey, ushering in a new era of de-unionisation in the media.

The owners of mainstream media outlets had impeccable relations with the General Staff, who decided what would and wouldn't be published with regard to the Kurdish issue - frequently discussed under the banner of "the fight against terror". When the conservative Welfare Party became part of the ruling coalition in the latter half of the 1990s, these precautionary arrangements were supplemented by reactionary briefings from the General Staff. The mainstream media realised their limitations, but perhaps because their business was going well, they didn't object. Sales were good and they were able to engage in a number of industries, including banking.

In the same period, Metin Göktepe, a journalist at Evrensel Newspaper, was tortured to death, while other journalists like Uğur Mumcu and Çetin Emeç were assassinated. Numerous people working for Özgür Gündem newspaper, which focused on the Kurdish issue, were kidnapped and killed. It's offices in Diyarbakır were bombed. Human rights advocates became the victims of unsolved murders. Lists of journalists, known as "memorandums", were given to the media by the General Staff, and those named there were forced to work under constant threat.[1] Journalistic accreditation also began to fall under the remit of the General Staff. In comparison to the present day, the mainstream media had more freedom to report issues outside the restricted areas. However, these areas included the very subjects that needed to be reported on, subjects that would determine Turkey's future and shape its history.

Following the rise to power of the Justice and Development Party (JDP) in 2002, a wind of EU harmonisation blew over Turkey and continued until 2007. In this comparatively democratic climate, the media experienced relative comfort compared to previous years. The picture was changed by legal challenges aimed at closing down the JDP, rumours of a coup in Ankara and the ruling party's alliances with Gülenists and other religious sects. The first seeds of the current situation were sown immediately after the 2007 election.

With the launch of a number of operations carried out under the umbrella term of Ergenekon, Turkey entered a new era of special operations. The JDP, and its then leader Recep Tayyip Erdoğan, were angry at the media, and this was clearly reflected in nearly every one of their political commentaries. This period of tension was followed by the first steps to purge Turkey's biggest media group, Doğan Group, from the media pool, when the group were landed with historical tax fines. Firstly, in 2007 the Doğan Group were hit by a fine of TRY 1 billion 174 million lira (USD 630 million at the then exchange rate), and two years later they received a second fine of TRY 5 billion 630 million (USD 3 billion 630 million at the then exchange rate). Eventually, most of these fines were revoked by judicial rulings, but Doğan Group had heard the warning.

The justification given for the operations was that a secret Gladio organisation, called Ergenekon, was mobilising for a coup.[2] However, as time passed, it appeared that the main aim of the Ergenekon operations was to eradicate people or groups that were an obstacle to the Gülenists. Nevertheless, the government itself was fully behind the operations. Under pressure from the government and the Gülenists, the media were forced to show support for the operations. Anyone who behaved contrary to

this would find themselves splashed across the Gülenist newspapers and other news outlets close to the government in stories accusing them of being part of the Ergenekon plot. There was a proliferation of stories outlining who would be arrested or detained. Journalists were on tenterhooks. Every journalist knew they could be arrested at any moment while simply doing their job in the normal way.
The JDP's two overtures towards resolving the Kurdish issue from 2009 onwards meant that at least on that subject, the media could be relatively relaxed. Unfortunately, this climate also did not last long. The media had initially been asked to show their support, but after both processes ended in failure, their reporting on certain matters was unwanted, just like in the 1990s. Throughout the subsequent so-called "Trench Operations" carried out by the police and army in numerous provinces and districts of the south east, the silence of the media was palpable as heavy weapons and armoured vehicles were deployed and people were ordered under curfew.[3] The same media that, during the resolution process, had broadcast live from Kurdish Newroz celebrations and once headlined with the letters of PKK leader Abdullah Öcalan, now even refrained from sentences or statements including the word "peace".

Before coming to the years running up to the attempted coup on 15 July 2016, it will be worth recollecting some dates.

- 12 September 2010 referendum: The structure of the judiciary, which was said to be under military tutelage in Turkey, was completely transformed by this referendum. However, the new structure was even less independent than before. The judiciary, which could make relatively autonomous rulings, was now the strongest arm of the JDP-Gülenist alliance.

- 2013 Gezi resistance: Resistance that began in opposition to the felling of trees in Istanbul's Gezi Park turned into a protest against the governments authoritarian policies. Throughout the protests, the government applied great pressure on media bodies not to cover the events. In fact, the media earned the moniker "penguin media" after publishing a penguin documentary while the most severe interventions were being made at Gezi Park.

- 17-25 December 2013 operations: The JDP-Gülenist alliance collapsed due to power struggles and corruption investigations targeting the JDP; the latter were driven by special authorised courts at the behest of the Gülenist. This triggered the purging of the Gülenists, with operations mounted against Gülenist companies and the seizure of their media outlets.

- 7 June 2015 election: When the People's Democracy Party (PDD) passed the 10% vote threshold in the general elections for the first time, the JDP were left with insufficient votes to form a government on their own. Two days before the election, a bomb exploded in the PDD party headquarters in Diyarbakır. After the election, an ISIS suicide bombing took place in Suruç. When two police were subsequently killed in Ceylanpınar, the JDP ended the resolution process. As a new government could not be formed, a re-election was held on 2 November. Shortly before the election, there was another ISIS suicide bombing, this time at a peace meeting in Ankara. The JDP gained enough votes in the re-election to form a government on their own.

- 15 July 2016: An attempted military coup connected with the Fetullah Gülen movement took place. Shortly after suppressing the coup, a state of emergency was declared.

What Was It? What Happened?

From 2002 onwards, the government put a great deal of effort into establishing its own media. Existing pro-government newspapers and TV channels were supplemented by others that had been transferred to government supporters after being taken over by the state. However, as the influence of Doğan Group media was still unrivalled, pressure on them increased. This firstly resulted in the sale of Milliyet Newspaper to the Demirören group in 2011.[4]

The departure of Doğan Group from the media was finally complete in 2018, when all its TV channels and newspapers, including Hürriyet, Kanal D, CNN Türk and Posta, were sold to Demirören.[5] The government now controlled pretty much all the mainstream media. There were just a few newspapers left, like Cumhuriyet and Sözcü, and some TV channels, like Halk TV and Fox TV. This was met by an explosion in online publications.

Ownership was not the only method of media control pursued by the government. In the view of the state, journalists could not be left to their own devices!

The Press Advertising Authority (PAA), one of the most important organisations facilitating the viability of local media, introduced a raft of rules forcing local newspapers to merge in 2013. Consequently, the number of local newspapers throughout Turkey fell from 292 to 112 by 2019. The Authority's policy of distributing public advertisements according to a newspaper's circulation and predefined standards left local anti-government press particularly starved of oxygen. Numerous media outlets closed down.[6]

The PAA's approach, which could be broadly summarised as strengthening media close to the government while weakening any opposition media, was not just implemented at a local level. Advertising should have been allocated objectively, but instead the PAA found ways to use them for the benefit of government-friendly media.

In 2020, pro-government newspapers received just under 142 million Turkish Lira of public funds from the PAA, almost 78% of all its funding. The nine opposition newspapers, including Cumhuriyet and Sözcü, only got 22% of all official bulletins. By contrast, fines issued in the form of withholding advertising from newspapers increased by 150% in 2020. Ninety-seven percent of all fines on national newspapers were served on BirGün, Cumhuriyet, Evrensel, Korkusuz and Sözcü - all titles which had a critical stance towards the government. Since January 2021, Evrensel newspaper alone has received 103 of such fines.[7]

In the 1990s, there had been particular criticism of the cartel media's hold on Turkey's distribution monopoly. In response, various distribution companies owned by different groups gave alternative media the opportunity to join one distribution network if rejected by another. However, these companies were closed in the JDP period, and a monopoly was created by the transfer of Doğan Group's Yaysat network to Demirören. Numerous publications with alternative outlooks were either rejected by Yaysat or excluded by exorbitant prices.[8]

The debate about yellow press passes, which had been ongoing in Turkey for many years, took a completely different turn after the attempted coup in July 2016. Since the 12th July 1980, in accordance with Law No. 212, the Directorate of Press and Information has issued yellow press passes to journalists registered with the national insurance scheme, regardless of their political views, as long as they have been working a certain amount of time. This was followed by the implementation of an accreditation system, particularly in the second half of JDP rule. The Prime Minister's Office and other ministries only permitted accredited journalists to observe their journalist briefings, excluding others even if they had yellow passes. The General Staff had already been implementing this system since the 1990s. These accreditation practices became more stringent after Erdoğan was elected president. The State of Emergency decree following the attempted coup tied the General Directorate of Press and Information to a newly established Presidential Ministry of Communications. New Press Pass Regulations were issued, and the new decrees were later established in law. The Ministry of Communications established a Press Pass Commission, as in the past, but did not send all applications to the commission. The Presidency kept press pass applications "under review", citing the regulations. To sidestep potential judicial challenges, the applications were kept under review without being turned down. Journalists who did not have a press pass, still referred to as a yellow pass although the colour had changed to turquoise, were now restricted and prevented from doing their job even on the streets. As people working in online media are not entitled to join the national insurance scheme under Law No. 212, they too were excluded from the press pass system. Consequently, those blacklisted by the government as opposition media workers could not track public press briefings. The police also made things difficult for journalists on the streets, for example, by banning or detaining those without a turquoise card at protests.[9]

When professional associations launched a legal challenge, the Council of State suspended the Press Pass Regulations, but the Ministry of Communications came back with a new, even more severe and abstract regulations, which continued to be implemented.

The press pass crackdown didn't stop there. When four journalists broke the story of two villagers being tortured and thrown from a helicopter in Van, the indictment against them contended that their activities could not be considered as journalism because they did not have turquoise cards.[10]

Journalists Adnan Bilen, Cemil Uğur, Şehriban Abi and Nazan Sala were detained pending trial, but later

released. Another, Zeynep Durgut, was charged but not detained pending trial. The indictment cited the fact that "they did not engage in tabloid or sports journalism" as proof that they were not real journalists. After 15 July, the internet became the salvation of journalists unable to find any amenable medium to work in. Many took their work online, either publishing through collective online news platforms they had set up or on an individual basis. But further regulations were introduced through the magistrate's court so that internet news sites could be blocked with little oversight. According to reports by Free Web Turkey, at least 1910 URLs were blocked between November 2019 and October 2020. It was found that 42% of the blocked news was about President Erdoğan, his family and close associates. The Information and Communication Technologies Authority also blocked access to numerous news sources on its own authority.[11]

There was also a glut of investigations by cyber police, who especially combed Twitter for messages about the government. According to 2020 data, over a three-year period, 29,089 people were investigated on charges of insulting the president alone. Of these cases, 34.4% resulted in conviction, 35.1% ended with adjournment of the verdict and just 14.3% were acquitted.[12]

Looking at the tally of 15 July is a good benchmark for the conditions in which journalists are operating. Under the State of Emergency (OHAL) declared on 20 July 2016, a total of 32 statutory decrees were issued. On 19 July 2018, the government ended the state of emergency. It had lasted two years and was extended seven times. In its first two months, a total of 620 press passes and 34 parliamentary press passes were cancelled, and some journalists had their passports confiscated. A total of 204 media organisations were closed by statutory decree: 6 news agencies, 70 newspapers, 20 magazines, 41 radio stations, 38 TV channels and 29 publication distribution companies. Decisions were overturned for 25 media organisations closed within the scope of these decree laws: 17 newspapers, 4 radio stations and 4 TV channels. During the state of emergency, 179 media outlets (53 newspapers, 34 TV stations, 37 radio stations, 20 magazines, 6 news agencies and 29 publishing houses) were closed.[13]

After the attempted coup in 2016, lawsuits were filed against numerous journalists working in Gülenist media outlets, especially during the state of emergency. Some of them were accused of actively participating in the coup and hiding others who were involved in it. Others were prosecuted simply because of news reports they had published. But these operations were not restricted to the Gülenists. Various news reports were the justification for an operation against Cumhuriyet Newspaper, especially a story they had broken about National Intelligence Service (MIT) trucks. As a result of the operation in 2016, journalists, including Akın Atalay, Murat Sabuncu, Kadri Gürsel and Ahmet Şık were arrested and lawsuits were filed against 19 people. The decision, announced in April 2018, sentenced 15 people to a total of 81 years and 45 days in prison, while three people were acquitted. The files of Can Dündar and İlhan Tanır were separated. Journalists Akın Atalay, Orhan Erinç, Kadri Gürsel, Güray Öz, Musa Kart, Aydın Engin, Hikmet Çetinkaya, Ahmet Şık, Kemal Güngör, Hakan Kara, Önder Çelik, Ahmet Kemal Aydoğdu, Emre İper and Bülent Utku were convicted, and a judicial review was ordered. On 19 February 2019, the 3rd Penal Chamber of the Istanbul Regional Court of Justice (Appeals) upheld the decision of the Cumhuriyet case. The decision finalised sentences of up to five years for Kadri Gürsel, Güray Öz, Musa Kart, Mustafa Kemal Güngör, Emre İper, Önder Çelik, Bülent Utku and Hakan Kara. Journalists Musa Kart, Emre İper, Önder Çelik, Mustafa Kemal Güngör, Hakan Kara and Güray Öz, who had been sentenced to under five years in prison, were sent back to prison again on April 25, 2019. These journalists could have remained free if the Supreme Court had revoked the decision. The Supreme Court was only aiming for Ahmet Şık to be punished.

Özgür Gündem newspaper was closed by statutory decree and 22 of its journalists were arrested in 2016. Özgür Gündem's co-editor and acting editor-in-chief were arrested. When the newspaper began a solidarity campaign called "Rotating Editor-in-Chief", investigations were opened into 49 of the 56 participating journalists. Eleven of these cases were dismissed due to lack of legal grounds. The other 38 cases resulted in a total sentence of 118 months and 15 days and a total fine of TRY 67,000. One of those on trial, Murat Çelikkan, was sentenced to one year and six months and spent 68 days in prison. Another journalist, Ayşe Düzkan, served her whole sentence of 18 months.

The imprisonment of journalists has been a constant theme of JDP rule. The Council of Europe's 2018 figures stated that 110 journalists were being held in Turkish prisons. Despite the number of detained or convicted journalists not dropping below 100 for many years, the JDP rejected the criticism, claiming, "no-one has been detained because of journalism," and citing the fact that many of those imprisoned did not have a yellow press pass as proof that they were not real journalists.

Journalists are working under the constant threat of arrest, while also battling with the increasing numbers of cases and investigations into them since 15 July. The fate of Ahmet Altan and Mehmet Altan, who were arrested and prosecuted after 15 July, is one case in point. Although the Constitutional Court and the European Court of Human Rights ruled that Mehmet Altan's case was a violation of rights, the local courts refused to implement the decision. Altan was only released through an appeal court decision based on written explanations sent by the Constitutional Court and after serving an extra four months in prison. The Supreme Court later ruled that Altan, who had been sentenced to aggravated life imprisonment, should be acquitted. Despite being in almost the same situation as Mehmet Altan, Ahmet Altan was not released. The Constitutional Court withheld his case for years before eventually rejecting it. Ahmet Altan was sentenced to aggravated life imprisonment, and his sentence was set at 10 years and 6 months by the Supreme Court. Altan was released considering the length of his pre-trial detention, but arrested again after the prosecutor objected to his release. This detention period lasted about one and a half years.[14]

Nedim Türfent has been in prison for five years because of his news reports. Despite the fact that 19 of the 20 witnesses that testified against him, claiming he was the member of an illegal organisation, stated during the proceedings that they had given statements under torture, he was charged and sentenced to eight years and nine months.[15]

From time to time, the crackdown changes its character and form. Çiğdem Toker, a well-known economic commentator, was faced with legal proceedings amounting to a TRY 1.5 million fine for articles she wrote about illegal tenders. The cases are still going through the court of appeals.
The Paradise Papers story was picked up by journalists across the globe, but after penning a series of related articles, Pelin Ülker became one of only two journalists in the world subjected to legal proceedings as a result. There are also numerous investigations and indictments concerning several other of Ülker's news reports.

Journalist Deniz Yücel was detained in 2017 due to the publication of an interview he conducted with the leader of the PKK. He waited for nearly two years for an indictment to be written, despite an existing precedent in the form of a different decision previously made by the Constitutional Court, which stated that the act "does not constitute a crime". The lawsuit filed against him requested a prison sentence of between four and 18 years, but Yücel was released after intense negotiations between Germany and Turkey. After Yücel left Turkey for Germany, he was sentenced to prison and more cases were opened against him.[16]

After a member of the National Intelligence Services (MIT) died in an operation abroad, a number of journalists were arrested for exposing his funeral and full identity, despite the fact that his name had already been clearly stated at a parliamentary press briefing. Those arrested were: journalist Mehmet Ferhat Çelik and editor-in-chief Aydın Keser from Yeni Yaşam Newspaper; news editor Barış Terkoğlu, general editor-in-chief Barış Pehlivan and reporter Hülya Kılınç from Odatv; and writer Murat Ağırel from Yeniçağ newspaper. The journalists were released at the first hearing.

Press passes, accreditation, the Press Advertising Authority, online news blocks, social media monitoring, investigations, criminal charges and compensation cases. The many and varied instruments used in the attempt to achieve complete domination over the media, which started from well before 15 July. Sometimes the tactic is to control journalists who won't be silent, despite the consequences, sometimes it is to cripple media outlets that will not be silent, sometimes it is to reduce the number of people able to access the news and sometimes it is simply for the purposes of political animosity.

A new draft of regulations is being prepared to regulate social media and websites. Bringing online news platforms under Radio and Television Supreme Council licensing laws was seen as insufficient, so further measures are in the pipeline. But journalists have always found a way. Even in the darkest of times, they have continued to report. The disintegration that started with the military coup on 12 September 1980 is now in its final stages. Anything we might class as old media is now almost completely obsolete. The greatest hope is that journalists have now learnt how to work independently and come together to create new mediums. If this can be formally entrenched, the intentions of the JDP or any other ruling party to control the media will implode, and journalists will be able to continue just being journalists.

About the Author

Gökçer Tahincioğlu began his career as an author and journalist in 1997. He worked as reporter and news chief for Milliyet newspaper. He continues his journalistic work at the internet news platform T24. He is the author of such books as 'White Taurus', 'Lessons of State', 'Is This What they Taught these Students?' and the novels 'The Seal', and 'The Cherry Tree'. He has also edited the collected works 'Lost Justice' and 'Wounded Memory'.

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PEN NORWAY

Social Media as Criminalizing Tool

Kemal Göktaş
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Article:
Social Media as criminalizing tool

Social Media as Criminalizing Tool

Advent of the 'new' Public Arena

The first prison sentence for posting insults and threats on Twitter was delivered in Istanbul on 15 February 2013.[1] Eight years later, on 15 May 2021, the Economist magazine cautioned tourists heading for Turkey to refrain from tweeting about Recep Tayyip Erdoğan.[2]

In the intervening six years, social media has become a medium where criticism of the government is punished severely. According to a 2018 report from Oxford University's Reuters Institute for the Study of Journalism, 65% of participants expressed, "Concern that openly expressing their political views online could get them into trouble with the authorities". Turkey had the highest percentage of 37 countries in this respect.[3]

Following their success in the Constitution Referendum of 2010, the AKP (together with the Gulenists) were able to institutionalise their power over the judiciary, hence seizing control of a crucial means of repression. The "rise" of the internet and social media in Turkey corresponded with the "rise" in the AKP's authoritarianism in the early 2010s.

The Gezi Resistance, more than anything else, showed the government that subduing the media would not be enough. As other media outlets floundered, social media became the "main medium" of resistance, through which people exercised their right to access news, while also using it to organise and build the opposition.[4]

The advent of this new public arena, where everyone could "freely" have their say, left the government faced with the inadequacy of legislation and a lack of preparation among security services. Consequently, banning social media platforms was the first measure it turned to. Social media had become a danger to the then prime minister, Recep Tayyip Erdoğan, who expressed this in his own words by saying, "Twitter and whatever else, we'll root them all out. The international community can say what they like, I don't care."[5]

The Constitutional Court revoked the complete ban on social media platforms, such as Twitter and YouTube, finding it contrary to the Constitution and the European Convention on Human Rights.[6] Temporary restrictions on platforms like WhatsApp, Twitter and Facebook were blocked by the judiciary, and more importantly, the government realised they were not sustainable. Nevertheless, the government did not change tack when considering the measures essential for its own "survival". Wikipedia was blocked in April 2017 after it refused to remove pages claiming that Turkey had provided support for jihadists in Syria. It remained out of bounds until three years later when the ban was revoked by the Constitutional Court as a violation of rights.[7]

'Big brother' surveillance on social media: virtual patrols

The practice of "virtual patrols" was a main arm of the state's strategy to prevent the spread of potentially damaging criticism and news on social media.

Following a cabinet ruling in 2011, the "Department for Combating IT Crime" was set up within the police force. The organisation, whose name was changed to the "Department for Combating Cybercrime" in 2013, not only kept close surveillance on social media, but also waged a "psychological war". The IT Systems Section, which was established as part of the Office of Public Order, aimed to "... combat websites that adversely affect the general morality and order of society, even if they are not breaking

the law."[8]

In 2017, the police force announced that social media accounts were being monitored by the Department for Combating Cybercrime, simultaneously calling on citizens to become informants, by emailing the police if they came across any shared material they thought to be criminal.

The "virtual patrols" were unconstitutional and illegal, but their de facto implementation was placed on a legal footing in 2018. Firstly, Statutory Decree No.680, part of the state of emergency legislation issued after the attempted coup, gave the police **"...the authority to investigate in the virtual environment."** When the state of emergency came to an end, this regulation was subsumed into the Law on Police Duties and Powers.[9]

In 2018, 2,700 police were involved in the virtual patrols. While the email addresses for those wishing to report their suspicions to the police receive an average 3,000 messages a day, at times of "terror attacks, bombs and protests" the number can rise to 30,000.[10]

The Ministry of the Interior began publishing the weekly outcomes of these virtual patrols in 2018, changing to monthly in 2019. Clearly, the aim of regularly sharing this data with the public was more to do with sending a "message" about the scope of social media surveillance and oversight than any commitment to "transparency", "communication" and "accountability".

According to data from the Ministry of the Interior, between 2018 and 2020, 146,712 social media accounts were scrutinised by the police and 68,672 were subjected to further investigation.[11]

The Constitutional Court revoked the regulations that formed the legal basis for the virtual patrols on the grounds that they contravened, both Article 20 of the Constitution, stating that personal data can be processed only in cases stipulated by the law, and Article 13, stating that fundamental rights and freedoms can only be subject to restriction for the reasons specified in the relevant articles of the Constitution and by means of statute.[12]

The Minister of the Interior, Süleyman Soylu, bluntly denounced the Constitutional Court, describing how he had called the Chair of the Constitutional Court about the matter despite such interference being contrary to the constitution. But this annulment decision was not actually implemented; virtual police patrols continue to this day and the Ministry of the Interior regularly announces the outcomes.[13]

Access denied

The state's prohibitive approach to the internet, especially social media, does not stop there. Statistics show that Turkey is among the top countries in the world when it comes to blocking access to both news sites and social media accounts. Between 29 May and the end of 2020, 54 separate criminal prosecutions resulted in access being blocked to over 3,150 Twitter accounts, over 3,400 tweets, over 600 pieces of Facebook content and over 1,850 YouTube videos.[14]

According to Twitter Transparency Reports, 7,070 (57%) of all 12,499 court rulings they received worldwide between 2012 and 2020 came from Turkey.

In terms of removal requests received from all over the world, 42,455 of a total 169,190 requests came from Turkey, the second highest after Japan. Turkey also sent the second highest number of "account closure" requests, after Indonesia, making up 107,221 of the total 500,325 requests received worldwide. Turkey ranked top for the number of accounts closed or rendered invisible, accounting for 2,527 (75%) of all such actions.[15]

Social Media as a tool of enemy criminal law

It could be said that social media became one of the most crucial tools of public opposition and independent journalism at a time when mainstream media was in free fall and opposition media was on its knees; but equally, social media provided tremendous opportunities for the government's aim of suppressing dissent.

Social media functions as a data bank where actions serviceable for charges and prosecutions

sought by the government and the associated judiciary can be effortlessly found. In fact, thanks to the comparatively less demanding technique of trawling social media for "serviceable" evidence, these days there is little need for the former methods of obtaining it through torture, as was the case until the end of the 1990s, or through the more hands-on solutions used with great proficiency by the Gulenist judicial and security bureaucracy, such as electronic surveillance, phone tapping, secret witnesses and evidence planting.

Potentially incriminating posts are "hunted down" among the social media accounts of people earmarked for punishment, before being sent to the prosecutors. The prosecutors have neither the power nor the inclination to reject these requests, and police investigation reports turn into legal proceedings. From then on, the decisions of the courts, and appellate mechanisms will depend on the status of the person concerned and the gravity of the "incident" in relation to current government strategy and tactics. Due to the changing balances of power and incidental positionings that come about, even in an authoritarian system (especially in Constitutional Court decisions), the government does not win every law suit, but this fact has not discouraged the use of social media as a tool of enemy criminal law, nor lessened the effects of its social and political outcomes.

Trolls as a tool for manipulating public space

The minimal "legitimacy" of implementing this enemy criminal law can be asserted in public debate when targeting the person who is being punished, rather than the crime. This legitimacy is provided by pro-government Twitter accounts and campaigns in the government press.

The government's use of troll accounts to manipulate public debate is a well-known phenomenon in Turkey. It came as no surprise when Twitter announced, in June 2020, that it had closed 7,340 accounts linked to the AKP for violation of Twitter policies to prevent manipulation.

Twitter's decision was based on a report by Stanford University Internet Observatory, which stated that the closed accounts had been set up between 2008 and 2020. These state-sponsored accounts ran campaigns in favour of the AKP and against the Republican People's Party (CHP) and the People's Democracy Party (HDP), frequently accusing the latter of terrorism. During the 2017 Constitution Referendum, these accounts organised posts in favour of transition to a presidential system. According to the report, many of these closed accounts were part of an extremely centralised and organised retweet network of AKP supporters. It also stated that they shared the same content, used audience-building tactics and tried to make their hashtags look popular.[16]

Applying enemy criminal law on social media

It should be remembered that the judicial processes of the AKP government, which are triggered by the investigations, detentions and arrests of those who post on social media, are in themselves a significant means of pressure. Almost all the judiciary bodies act as part of this oppressive apparatus, mostly meeting the demands of the security bureaucracy regarding social media.

The Constitutional Court's occasional decisions in favour of freedom of expression are no deterrent to the government and ignored by the local courts.

The application of this enemy criminal law by the AKP government, along with the compliant security bureaucracy and judiciary, is so blundering that even their own words can constitute a "crime" when repeated by someone belonging to the "enemy" category.

The depths to which this goes are exemplified by the indictment against former CHP deputy leader, Zeynep Altıok, who was accused of insulting President Erdoğan on social media. One of the posts in the charges against her quoted the President's own words: "I will absolutely not allow anyone to take advantage of my office, not even my family. This authority is not for the use of liars and fraudsters."[17]

In another example before the constitutional referendum on introducing a presidential system to Turkey in 2017, a social media user was arrested on an indictment from Erdoğan's lawyers for sharing a video on social media, saying. "If this 'no' (to the presidential system) video is a hit, they will arrest me." The video had gone viral.[18]

Enemy criminal law is not only applied in the political playing field, it is also used against people the government is targetting for their culture or lifestyle. Selen Pınar Işık, one of Turkey's first social media phenomenons, who used her account with the username of "Pucca" to make posts that challenged the usual stereotypes about her private life as a woman, was prosecuted for "promoting the use of drugs". The resulting prison sentence of 5 years and 10 months is one example of enemy criminal law being applied simply because of "lifestyle".[19]

The wording of the court's reasoned decision summarises the state's social media phobia: "In consideration of the impact of social media: its potential has been used in different countries all over the world to organise around particular ideologies, and the consequences have gone as far as overthrowing governments.[20]

Pucca's tweet, "I've watched so many gay films, one after the other. No, no, no! I still fancy the miserable, characterless gender referred to as male," prompted a lawsuit on the grounds that she had defamed men. Her sentence of 5 months on the grounds of "... flagrantly defaming a group of people based on gender difference." showed that the judiciary had been systematically following this social media phenomenon.[21]

Genco Erkal, a famous 83-year-old actor, who shared dissenting posts, is a typical example of how enemy criminal law works. It was not until 2012 that an informant report made in 2016 about Erkal was processed. However, it was not just the reported posts that were scrutinised, but all his past social media posts. A lawsuit was filed against Erkal, accusing him of insulting the president, based on two posts he made in 2017 and one in 2021.

These three tweets contained criticisms of President Erdoğan, but no insults, and in fact one of them was a criticism of the presidential system rather than the president himself.[22]

Social media posts have turned into more than a means of punishment under criminal law, becoming a vehicle for sanctions against those snared by the outreach of "enemy criminal law" into private law. The Supreme Court ruled in favour of terminating the employment contract, without compensation, of a worker who had liked and retweeted Twitter posts criticizing the killing of unarmed soldiers who surrendered during the attempted coup on 15 July. Despite the fact that the local court had ruled, "The contents of tweets are shared within the scope of freedom of thought", the Supreme Court overruled them, saying: "The liked and shared words clearly criticize the resistance to the attempted coup on 15 July. Considering that the defendant's workplace is also part of the public sector, the plaintiff's behaviour has clearly had a negative effect on the workplace."[23]

Not just posting, but also liking and retweeting on social media have become a crime under enemy criminal law. After being reported for retweeting a film recommendation posted by a famous journalist, the CEO of HSBC Turkey was brought to trial charged with insulting Erdoğan, six years after sharing the post, only evading the accusation after an acquittal decision.[24]

Journalist Hakan Aygün was detained for a month pending trial after retweeting a post saying, "Oh thou IBAN givers...", poking fun at the aid campaign started by President Erdoğan announcing an IBAN for public donations during the pandemic. Aygün's retweet earned him a sentenced of 7 months and 15 days in prison, but a year later, the Constitutional Court ruled that the prison sentence was a violation of his human rights.[25]

In their decision on Selma Melike v. Turkey, the ECHR ruled: "The dismissal of public employees due to liking a Facebook post is a violation of their freedom of expression."[26]

It wasn't just retweeting or liking that could land social media users in trouble, even simply following "particular" accounts was counted as evidence of guilt. Five students at Amasya University stood trial accused of terror crimes partly on the basis that they were following the account of Selahattin Demirtaş, the HDP's presidential candidate.[27]

Social media as a means of purging political opponents

Social media also presents the state with ideal material for criminalising political opponents for the purposes of purging or rendering them effective. In a lawsuit launched after Turkey's failure to implement

an ECHR ruling that the former co-leader of the HDP, Selahattin Demirtaş, should be released, a tweet was the most important piece of evidence against Demirtaş, who is still imprisoned, and other HDP politicians. Claimed to have been sent from HDP Headquarters, the tweet called on people to organise protests against the siege of Kobanê by ISIS.[28]

The CHP Istanbul area chair, Canan Kaftancıoğlu, who played a huge role in the CHP victory in the Istanbul Municipal Council elections, was targetted by government media and trolls in the run up to her trial for a tweet she had posted 7 years ago. The appeal court approved her sentence of 9 years 8 months for, "... defaming the state, insulting a public official and the President, inciting hatred and hostility and spreading terrorist propaganda."[29]

Social media as a means of suppressing journalists

The crackdown on press freedom continued with numerous investigations and court cases against journalists due to social media posts.

Journalists, whose profession tends towards more use of social media, were convicted on the grounds of their social media posts, even in the absence of any other evidence.

Cumhuriyet newspaper writers and executives received heavy sentences after being accused of "aiding terrorist groups", in a case that presented their social media posts as part of the evidence of guilt.[30]

T24 writer Hasan Cemal was accused of "insulting President Recep Tayyip Erdoğan" and investigated on the grounds of two retweets he had sent from other accounts and one made from his own account, saying, "Opposing an attempted military coup is not the only criterion for being a democrat, another is saying no to the intensifying 'Erdoğan coup'!"[31]

Meltem Oktay and Uğur Akgül were arrested while reporting from Nusaybin during the 'curfew' period. Based on social media posts, they were accused of "being a member of an illegal organisation" and "spreading terrorist propaganda", resulting in a 4-year prison sentence.[32]

Five years after sharing a photograph from the Newroz celebrations in Diyarbakır in 2015, journalist Melis Alphan was accused of "sharing terrorist propaganda" due to a "terrorist flag" appearing in the picture. The prosecutor's demand for a sentence of up to 7.5 years in prison is a good example of the potential for social media to be used as evidence of guilt by the ruling powers. Alphan was acquitted by a local court, but the Istanbul Chief Prosecutor objected to the decision, sending it to the appeals court.[33]

Investigations as a means of hindering public debate at times of crisis

Under AKP rule, mass investigations into social media, arrests and detentions have become a routine practice aimed at silencing public debate at times of economic, political and social turmoil. This goes beyond the government's known taboo subjects, like cross-border military operations and 'terror' attacks, for which any critical voices are labelled as enemies. Mass investigations and arrests are also employed at times of governmental crisis, such as the pandemic, rises in the exchange rate, refugee incidents and forest fires.

According to the Ministry of the Interior's 2019 report, 452 people were arrested and 78 detained in relation to 1,297 accounts claimed to be "spreading terrorist propaganda" by opposing the military operations against Syria in October of that year.

Similarly, there was no hesitation about launching mass investigations and detentions for those who shared critical posts in connection to the forest fires in the summer months of 2021[34]. Social media users who criticised the government's pandemic response also received their share of investigations and arrests. [35]
Thousands of archives testify to the fact that social media is one of the vehicles through which criminal enemy law is implemented. And lastly, aside from the small proportion of examples given above, legal proceedings following social media trawls intended to curb secularism and place religion above criticism are also significant.

About the Author

Kemal Göktaş graduated from the Ankara Law Faculty in 1999 and gained his MA in journalism from Ankara University's Social Sciences Institute, where he continues to read for his PhD. Göktaş has worked as a journalist at Radikal, Sabah, Vatan, Milliyet and Cumhuriyet newspapers and for the news platform Diken. He is the receipient of numerous grants and a total of nine prizes, including those of the Journalists' Association of Turkey, and the Metin Göktepe and Abdi İpekçi memorial prizes for journalism. Göktaş has authored two books and many magazine articles. He continues to run his internet media business 'Kısa Dalga', 'Short Wave'.

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PEN NORWAY

Analysis of Turkey's 4th Judicial Reform Package: 'Relative'

Kasım Akbaş
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Article:
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Analysis of Turkey's 4th Judicial Reform Package: 'Relative'

'Packaging' rights and freedoms

Turkey has developed a tradition of introducing "legal packages" containing changes and/or additions to various statutes, which are sometimes completely unrelated to each other. Instead of enacting a new law or changing the old law on a particular matter, and in the process discussing in detail this individual new legal measure or change, packages known as "statutes on amending certain laws" are presented to the public. Turkey has "been managed" with "packages" for a long time.

Problems inherent in the nature of a package

Before looking at the changes presented in the "Fourth Judicial Package", we should firstly address the problematic aspects of delivering strategic and structural programs that affect the country in the form of a "package".

A package is by its very nature closed, and consequently it gives no opportunity for public debate. The word "closed" has two meanings: one is not knowing what is inside. In this sense, "package" is the opposite of "transparency". The other meaning is that we cannot tell what the intention of the packager was at first glance. If the outside appearance of the package is somewhat "alluring", there is no doubt that it has indeed been prepared to be attractive to us. Otherwise, why would it have been presented in "package" form at all...? But could it be that this allure is hiding something? Aren't there dozens of historical examples of packages being used to facilitate assassinations? By activating the reward centres of the brain, the "package" format may also hinder our ability to think rationally, thus blinding us to the potentially serious threat it may contain.

A package is unilateral. The person who makes it knows what it contains. It is prepared, sealed and "presented" unilaterally. The recipient can but "guess" what's inside. The only way to do anything with the contents of the package is to open it up. For example, it's not possible to object to some of the package contents, without accepting it as a whole from the outset. Thinking along similar lines, Austrian physicist Erwin Schrödinger carried out an experiment on the matter of "packages". In this experiment, which represents one of the best-known paradoxes in quantum physics, a cat is left in a sealed box with a vial of poison and a radioactive source. The probability that the radioactive source will radiate within one hour is equal to the probability that it will not. If the sensor inside detects radioactivity, the mechanism that breaks the vial is triggered and the poison kills the cat. According to one interpretation of this experiment, the cat is equally dead and alive all the while the box remains unopened. But if the box is opened and observed, one of these scenarios becomes reality. Contrary to popular belief, Schrodinger did not carry out the experiment to advocate this viewpoint, but rather to show the absurdity of the interpretation that a cat can be both alive and dead at the same time. Therefore, the "reality" can be found by opening up the package.

A package is circumscribed. Once it is sealed, the person who packed it cannot make any modifications. It has now become an independent whole, whose meaning is invested in its existence as an entity embodying both the unilateralism and inaccessibility of the package. What becomes important is the existence of a package, not that it contains this or that. The package symbolises whatever name it is given: democracy package, judicial package, justice package, education package, health package, human rights package, EU harmonisation package… Human rights can be packaged by calling a package containing no human rights "a human rights package".

So, in the light of this brief outline, let me repeat the assertion that Turkey has been "managed" with "packages" for a long time.

Turkey's fourth judicial package

As stated in the Human Rights Action Plan Schedule, a number of laws had to be amended in order to "strengthen the independence of the judiciary and the right to a fair trial, improve legal certainty and transparency, and take essential steps to protect material and moral integrity, and the freedom and security of the individual, and private life". In this context, the legislative proposal "Changes to the Criminal Procedure Code and Other Laws", submitted to the Presidency of the Turkish Grand National Assembly on June 18, 2021, was presented to the public as the "Fourth Judicial Package". The proposal was adopted with Law No. 7331, 8 July 2021, published in Official Gazette No. 31541, dated 14 July 2021. The reason why the package is referred to as the "judicial package" is mainly because it contains "changes" in the field of judicial law. Considering the five statutes and judicial branches related to the provision of justice (Administrative Judicial Procedures Act No. 2577, Turkish penal Code No. 5237, Criminal Procedures Law No. 5271, the Sentencing and Security Measures Law No. 5275, and the Establishment of the Constitutional Court and its Judicial Procedures Law No. 6216. The changes affected three areas of jurisdiction (judicial, administrative and constitutional).

As the package is aimed at "strengthening the independence of the judiciary and the right to a fair trial, improving legal certainty and transparency, taking urgent steps to protect material and moral integrity, and the freedom and security of the individual, and the protection of their private life", the amendments should be evaluated in terms of their fitness for these purposes.

Internship opportunities in constitutional jurisdiction

Considering that the sole regulation concerning constitutional jurisdiction is to allow potential judges and trainee lawyers to do internships in court, it should be said from the outset that the changes in this area are negligible for the context of this analysis.

'Thrifty' changes to timing in administrative jurisdiction: from 60 to 30 days

In the field of administrative jurisdiction, there were changes to four clauses of the Administrative Judicial Procedure Act. All relate to reducing the usual time period stipulated for various matters from 60 to 30 days. These time frames are associated with the responses given by administrative officials to members of the public. Before the amendment, a response time of 60 days was stipulated for people applying to administrative officials for a procedure or action that might affect an administrative lawsuit concerning them. If they did not receive a response within 60 days, it was considered as "implied refusal", triggering the start of the litigation period. Now, the litigation period begins if the administration does not respond within 30 days. Therefore, the administration promises to respond to people in a shorter time, and if this does not take place within the period, it is accepted that a lawsuit can be filed. Certainly, taken at surface value, it's quite possible to read this regulation, which seems to be a relative improvement on the past, as follows: The administration can remain indifferent to people's requests for 29 days. In fact, in the past, when the administration had to give a positive answer, but was "playing hard to get" on the issue, they exploited the response period until the last day. For example: You have won an action for an administrative procedure to be revoked, so there is no question that administrative officials can choose "non-implementation" of the court decision. However, in Turkey, this response time tends to be interpreted as a discretionary period in which it can choose "non-implementation" as it pleases. This amendment means that the previous discretionary period of 59 days has now been reduced to 29 days. Considering that we live in a time when almost any document can be accessed with the click of a button and even the most complicated administrative procedures can be carried out in seconds through the e-government interface, REM (registered email address) system and any organisation's internal email correspondence, this is hardly a "revolution". The reduction from 60 to 30 days should be seen as a relative rather than an absolute improvement.

Judicial judgments: The lesser of two evils

The Fourth Judicial Package is essentially a judicial package. The amendments made to the Turkish penal Code No. 5237, the Criminal Procedures Law No. 5271 and the Sentencing and Security Measures

Law No. 5275 all concern the field of judicial procedures.

The changes to the Turkish penal Code consist of adding "perpetrated against a divorced spouse" to arrangements qualifying the status of various crimes. According to the changes introduced with the package, when the crimes of murder, injury, maltreatment and deprivation of liberty are "perpetrated against a divorced spouse", they will merit a heavier sentence. It should be emphasized that this relative improvement has limited implications. As of 1 July 2021, in perfect synchronicity with the time of this change, Turkey is no longer a party to the Istanbul Convention, an agreement which is of vital importance for women. Having announced its departure from an international convention of rights that provides much more comprehensive and gender-based protection for all women, the government cannot possibly fill the "gap" in the penal code by aggravating sentences for some crimes committed by the perpetrator against his divorced spouse. The amendment in question requires heavier punishments for crimes committed against a divorced spouse, which was in any case, a significant omission. All the while women are the victims of male violence in Turkey, it is blatantly obvious that such aggression is directed towards divorced spouses. Therefore, this is not a dramatic change, but rather the correction of an omission.

Even though the omission has been corrected it should be emphasized that the change does not foresee one step beyond this. In other words, the reality is that violence against women, even if it was to come to an end, has been correlated with the institution of the family. The amendment is not about protecting women, but "former spouses".

The main body of the judicial package consists of amendments to the Criminal Procedures Law No. 5271 (CMK). Changes are stipulated in 14 clauses of the CMK, and a new clause has been added. Before we continue, let's set aside any regulations about using new technologies. For example, it allows for witnesses subject to sub subpoena orders to be notified digitally, if contact information such as telephone, telegram, fax, email is included in their file. Likewise, it allows for the indictment to be reported to the accused, and (this is a new one) to the victim and complainant by making use of these technologies, provided that the relevant contact information is included in the file.

Then, let's set aside the regulation including an addition about legal remit: this states that "Courts where the victim resides are also authorised to deal with crimes committed by means of IT systems, banks or credit institutions, and bank or credit cards". It's hard to make a firm connection between this amendment and the aim of "strengthening the independence of the judiciary and the right to a fair trial, improving legal certainty and transparency, taking urgent steps to protect material and moral integrity, and the freedom and security of the individual, and the protection of their private life".

Likewise, we can set aside the regulations regarding serial and simple proceedings, which are judicial procedures. For example, the regulation states that, "simple proceedings cannot be applied after the hearing date has been decided" or when it is found that a material mistake was made in sanctions determined in a summary process; the case must be returned to the Chief Public Prosecutor's Office by the court in order to complete the deficiencies, and the petition letter can be rewritten and sent to the court after the mistakes have been corrected by the public prosecutor. This addition does not constitute an important breaking point in criminal proceedings. Moreover, the summary proceeding is a special procedure that only entered the law in 2019. The need for a "reorganisation" of this arrangement, which has not even been operational for two years, indicates the haphazard nature of the previous regulation, rather than the success of the new package. Moreover, the notion of bringing special types of judicial processes into criminal proceedings under various names should be discussed separately in its own right. Therefore, it would have been more appropriate if serial and simple proceedings could have simply been removed from complex and special proceedings with the aim of "strengthening the right to a fair trial and providing legal certainty."

We now come to matters associated with liberty and the right to security, where we find measures related to arrest, detention and judicial control.

The following provision has been added to the CMK, clause 94, paragraph 3: "The public prosecutor may order the release of any person arrested outside working hours for the purposes of giving a statement, as long as the person guarantees to be present in front of the judicial authority on the specified date. This provision can only be applied once for each arrest warrant. The public prosecutor of the place where the arrest warrant was issued will issue a fine of 1000 Turkish lira to any person who does not meet their

obligation." This regulation is clearly related to personal freedom. The facility to release a suspect who has been arrested in order to give a statement, and whose freedom is restricted until working hours, is a positive development.

Likewise, in CMK clause 109, another positive arrangement in terms of personal freedom, permits judicial control in the form of home confinement to be offset from any potential punishment. Other important steps in terms of personal freedom and legal certainty are: reviewing decisions concerning judicial control in four-month periods, limiting the periods to be spent in judicial control to two or in some cases three years, and halving the lengths of such periods applicable to children. Furthermore, a provision that in the event of an acquittal, the evidence or audio recordings will be destroyed can be associated with the package's aim of the inviolability of private life.

Finally, the package includes amendments made regarding detention, which is one of the long-lasting problems of the criminal justice system in Turkey. However, it should be stated that although these changes bring relative improvements - or appear to do so - they have attracted criticism for being constituted in such a way that they could be used to protect the perpetrator, especially in cases of sexual violence against women and children.

The grounds for arrest are regulated by CMK Clause 100. The formula can be summarized as follows: concrete evidence showing the existence of strong suspicion of crime + reason for arrest Arrest (not "=", " "). The article also lists what can be counted as grounds for arrest, such as the possibility of the accused fleeing, the possibility that they might hide the evidence, or that they might try to influence witnesses. It also states that these grounds for arrest can be assumed for the crimes specifically listed in the clause. In its old version, this situation was formulated as follows: presence of strong grounds for suspicion that crimes were committed + listed crime type Arrest. In its new version, the formula is as follows: presence of strong grounds for suspicion based on concrete evidence that crimes have been committed + listed crime type Arrest.

The only change in this amendment appears to be the emphasis on "concrete evidence", which was mentioned earlier in the clause, also being added to "catalogue crimes". Due to judicial practice in Turkey, the condition of "based on concrete evidence" should not be considered otherwise than as a major change. Equally, it should be noted that the weight of "strong suspicion based on concrete evidence" in criminal allegations with a political content and of "strong suspicion based on concrete evidence" in other criminal allegations is not the same. For example, in the trials of Osman Kavala and Selahattin Demirtaş, where the ECtHR ruled there was a violation of rights, in fact a violation of Article 18, judicial organs continued their detention on the grounds of "strong suspicion based on concrete evidence". Yet these same judicial bodies failed to see the charge of sexual abuse of a five-year-old boy, accompanied by concrete evidence in the form of a forensic medicine reports, as reason for arrest.[1] It should be reiterated that the detention of Osman Kavala and Selahattin Demirtaş has continued since these amendments have been in force, including the package's requirement of "based on concrete evidence". Therefore, although the requirement for concrete evidence has come into force, the place where it finds a footing in our legal world might be in cases of sexual violence and abuse against women and children.

When the package was made public, many sections of society, especially women's organisations, insisted that the "strong suspicion based on concrete evidence" provision, would be particularly detrimental to the victim in sexual assault and abuse files. In response, Ministry of Justice spokespersons stated that a child's statement should also be seen as "concrete evidence"[2]. However, if a "statement" is to be seen as concrete evidence, it is accepted from the outset that the regulation cannot achieve the protection expected from it. In terms of both the positive obligations of the state for the protection of the right to life and international and national regulations that require taking into account the best interests of the child, it is not difficult to envisage that the regulations introduced by the package may bring inadequate or even counterproductive results, especially in allegations of sexual violence and abuse against women and children. This subject, which would be unlikely to cause so much controversy in any other country, is unfortunately an important issue considering the realities of Turkey. For, example, according to the 2020 report of the We Will Stop Femicide Platform, "In 2020, 300 women were murdered and 171 women were found dead in suspicious circumstances. The reasons behind 182 of the 300 murders could not be identified, 22 of them were killed for economic reasons and 96 were killed when they wanted to make their own life decisions, such as wanting a divorce, rejecting reconciliation, refusing marriage or refusing to have a relationship. The inability to determine the excuses claimed for killing 182 women is down to the fact that violence against women and femicides

are rendered invisible. Unless the murderers and reasons behind femicide are determined, unless a fair trial is conducted, and unless deterrent punishments and preventive measures are implemented against suspects, the accused and murderers, the violence rains on with changing dimensions". Against this dire background, and combined with the government's decision to withdraw from the Istanbul Convention, it is no surprise that the package's emphasis on "concrete evidence" is viewed with suspicion by women's organisations, while appearing to be an improvement on personal freedom.

The regulation of "arrest warrants" is also in the CMK, this time in clause 101, which states that the decisions surrounding arrest, the continuation of detention or the rejection of a bail request must be backed up by clear concrete facts showing that there is a strong suspicion of crime, there are reasons for the arrest and that the proportionality of the detention measure is justified. After the changes, these conditions have been supplemented by the requirement to show that "the application of judicial control will be insufficient". As there was already an obligation to evidence that the detention measure was proportional, it should be assumed within the principle of proportionality that the application of judicial control will be insufficient. However, in the current judicial practice of Turkey, "progress" is made by making further regulations out of something that should already be implied by the very nature of an existing regulation.

CMK clause 268 sets out the process of objecting to decisions made by judges and courts. As known, arrest and judicial control decisions made by Criminal Judgeships of Peace in Turkey have attracted major criticism with respect to personal freedom and security. Worse still was the procedure for filing objections to these decisions, which had to be made to another magistrates court. This horizontal objection procedure created a "closed circuit" oversight system among the magistrates courts. With the amendment made with the package objections to decisions made by magistrates courts regarding arrest and judicial control are passed to the judge of the Criminal Court of First Instance in the same legal jurisdiction, thereby introducing a vertical objection procedure system, as it should be in any ordinary legal framework. As the practice of horizontal objection has garnered much criticism from human rights defenders, the ECtHR and various national and international civil and public organisations, this should undoubtedly be seen as a win in terms of rights and freedoms. However, this is also a "relative" gain, because the casual observer does not need to be a prophet to predict that the same "state attitude" that, under pressure, turned the previously existing vertical objection procedure into a horizontal objection procedure as a result of pressure, can resort to other means to hinder the emergence of any actual positive outcomes for personal freedom and security.

In 2020, PEN Norway implemented the Indictment Project on the premise that indictments at point zero of trials in Turkey are highly problematic texts. Numerous indictments were examined in their entirety and the report was made public. In her introduction letter for the PEN Norway Turkey Indictment Project Report 2020, Sarah Mehta referred to the indictments as follows:

> *"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."*

The indictments covered in the report were analysed by national and international experts. Among their conclusions, which are included in the report, the following statements stand out: "some of the unnecessarily included evidence" (Berzan Güneş Indictment Report p13), including legally irrelevant social media posts that lack any reasoning for linking them to the charged crime" (Berzan Güneş Indictment Report p14), "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" (Gezi Park Indictment Report), "explanations for the inclusion of all this irrelevant material" (Gezi Park Indictment Report), "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" (Nedim Türfent Indictment Report), "there is no attempt in the indictment to connect the allegations to the wording in the articles" (Pelin Ünker Indictment Report), "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." (Deniz Yücel Indictment Report), "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. (MİT News Trial Indictment Report), after having spent 113 days in prison. Taner Kılıç, who was arrested by the police one month prior to the Büyükada workshop on 6 June 2017, was released on 15 August 2018 after 432 days in prison. "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" (Büyükada Indictment Report), "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." (Büyükada Indictment Report), "The most severe flaw of the indictments appears in the attempt to connect the referred texts to the elements of the alleged crime". (Fincancı, Önderoğlu, Nesin Indictment Report), "there are a number of rambling and unexplained comments" (Kavala-Berkey Indictment Report), "A sequence of, ostensibly, unrelated travel is presented in the lead up to the following conclusion" (Kavala-Berkey Indictment Report), "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." (Ahmet Altan and others Indictment Report).The reason for such a long reference to the PEN Norway project and its reports is the judicial package's addition to Clause 170 of the CMK. This inserts the following sentence, "there should be no details that are unrelated to the events that constitute the suspected crime and evidence of the crime", into CMK, clause 170, paragraph 4, after the sentence, "The indictment outlines the events that constitute the suspected crime, relating them to the available evidence." The fact that this simple practicality has to be expressed in law and served up as an important change is more of a confession to the past than a hope to the future.

'Your package could not be delivered'

Be it the sender or the recipient, one of the messages that most annoys people today is, "Your package could not be delivered." It brings with it connotations of not being able to do a job that needs to be done and the sent item being in a void or maybe even lost.

Law No. 7331, dated 8 July 2021, otherwise known as the "Fourth Judicial Package", is far from offering a comprehensive solution to Turkey's chronic lack of judicial independence, its problems with fair trials, and its issues with personal freedom and security. The judiciary in Turkey has urgent problems. Clearly, any talk of independent judiciary is null and void as long as the Council of Judges and Prosecutors continues to remain in the hegemony of the executive. Judicial guarantee can only be a principle that remains on paper in a climate where approximately 4,000 judges and prosecutors were dismissed after the attempted coup of 15th July, and committees that ruled to release detained defendants in files of critical social importance were dismissed and appointed to other lower ranking courts. It is not possible to ensure fair trial and legal certainty in a legal regime where the decisions of the ECtHR are not applied and the decisions of the Constitutional Court are ignored. There is no possibility of freedom, security and material and moral integrity being protected by a legal regime in which judges and prosecutors do not act on the basis of rights and freedoms, but according to the political agenda and the protection of their own interests, which are embedded in political sovereignty relations. While it is blatantly obvious that concrete events should underpin legal practice with regards to clauses 216, 220, 299, 301, 314 of the Turkish penal Code and various regulations of the Anti-Terror Law, which have been the subject of dozens of reports, the fact that a judicial package aiming to improve human rights and freedoms chooses not to address these fundamental problems means that the relative improvements it contains are in a void.

In summary, it can be said that the Fourth Judicial Package is a relative package that could not be delivered. Its contents are caught in a void and will most certainly soon be lost, hence rendering it incapable of doing what needs to be done.

About the Author

Kasım Akbaş graduated from Ankara University's Faculty of Law in 2001 and completed his post-graduate MA and PhD at Anadolu University. He has written book chapters, article and translations in the fields of the sociology and philosophy of law, the theory of the state and the law and on human rights. He continues to work as a freelance lawyer, independent researcher and publisher. He was expelled from his teaching role at university in relation to Emergency Decree number 686, over the Academics for Peace document of which he was one of many signatories and which was drawn up to call for peace in the country in 2016. Akbaş is the recipient of national and international prizes in the fields of human rights and the law.

Endnotes

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How to Get Away with Enforcing the ECtHR Decisions:

Nine Procedural Recommendations for Governments Intent on Authoritarianism

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Article:
How to Get Away with Enforcing the ECtHR Decisions

How to Get Away with Enforcing the ECtHR Decisions: Nine Procedural Recommendations for Governments Intent on Authoritarianism

The European Convention on Human Rights (The Convention or ECHR) enjoys a special status among all the international human rights regulations: The Convention benefits from a strong and effective judicial review mechanism. Such a judicial review is administered through the European Court of Human Rights (The Court or ECtHR). Established and regulated by the Section II of the Convention, the ECtHR is a standing court.

As it is known, the Convention has been signed by the Member countries of the Council of Europe to which The Court belongs as a body. In accordance with Article 46 of the Convention "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." In other words, the states that are party to the Convention acknowledge the jurisdiction of the Court as well as the binding nature of its judgments.

Moreover, according to Article 90 of the Constitution of the Republic of Turkey, "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail." The Constitution groups the international agreements duly put into effect into two categories. The first category includes all kinds of international agreements, which are given the force of law and cannot be appealed on the grounds that they are unconstitutional. Second category includes the international agreements on fundamental rights and freedoms, which, as for those in the first category, are given the force of law and cannot be appealed on the grounds that they are unconstitutional. However, in cases where those international agreements contain provisions that are incompatible with those in the domestic law, the provisions of international agreements shall prevail, which gives such kinds of agreements the force of law as well as raising them above the law by a degree.
As an international agreement, duly put into effect, concerning fundamental rights and freedoms, the ECHR is a binding agreement. So much so that it is given the same status as the law, but in a way to underline its supremacy over the domestic law the ECHR cannot be appealed on the grounds that it is unconstitutional, and its provisions shall prevail in cases where its provisions are incompatible with those in the domestic law. As mentioned above, it is an absolute obligation for Turkey to comply with the ECtHR judgments, since article 46 of the Convention stipulates that the states undertake to abide by the ECtHR judgments.

The implementation of ECtHR judgments by the state parties is overseen by the Committee of Delegates on behalf of the The Committee of Ministers of the Council of Europe. The Committee of Ministers and the Committee of Delegates that is formed by it are both structures set up by a group of politicians. The technical review is carried out by The Department for the Execution of Judgments of the European Court of Human Rights formed under the mandate of the Directorate General Human Rights and Rule of Law of the European Commission[1]. The main function of the Department is to advise and assist the Committee of Ministers. The rules of the Committee for the supervision of the execution of judgments are adopted on 10 May 2006 and named as The Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements[2]. According to the Rule 11 of that document, if the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee,

refer to the Court the question whether that Party has failed to fulfil its obligation.

The domestic responsibility for the implementation of the ECtHR judgments in Turkey rests with the Department of Human Rights of the Ministry of Justice (DHR). In accordance with Article 1/c of the Decree Law No. 650, DHR is assigned responsibility to supervise the execution of ECtHR judgments. As per the law, DHR is tasked with taking general measures regarding the execution of ECtHR judgements against Turkey regarding the violations, communicating such judgements to the relevant authorities and supervising the processes to ensure the correction of the violation.

Any ECtHR judgement regarding a certain violation is significant in two respects, one individual and one general. Individually, such a judgement establishes the fact that a certain right of the applicant or applicants is violated. Based on this fact, the ECtHR determines a corrective action, if possible, to correct the violation and/or its consequences. In some cases where such an action is not possible, the Court awards compensation. Generally, the Court may rule for certain measures that would stop the violation in question for everyone and that would prevent the continuation of it. For example, domestic law may need to be changed.

Would a legal mechanism that is ideally expected to operate in this way be abused? Can certain procedures to obstruct the actual execution of ECtHR judgments be invented despite the presence of strong international and national regulations? The ECtHR judgements regarding a certain violation establish that a state party violated human rights. This means that a certain state party, which is expected to comply with the ECtHR judgments, is known to have previously violated human rights. The same state may also cause another violation by not complying with the ECtHR's judgments. Even if the states are willing to refuse to comply with the ECtHR judgments, however, they need to contrive a more nuanced attitude, as the explicit display of such a willingness may have unwanted consequences. Based on the example of Turkey, this study will provide a practical guide for the governments intent on getting away with enforcing the ECtHR judgments or rendering it ineffectual. It is important to point out that the procedures that will be outlined here have been tried and proven to be highly successful! Moreover, a successful implementation of those procedures allowed Turkey to avoid any onerous sanctions. The procedures outlined here can be implemented with guaranteed results and without any prejudice to the country's membership to the European Commission, its status as a state party to the ECHR and its undertaking to abide by the ECtHR jurisdiction. Here are our practical recommendations for the government's intent on authoritarianism.

1) Delay it by exploiting all available time limits

Certain time limits of the ECtHR proceedings are not explicitly prescribed in the Convention. Neither do Additional Protocols include such prescriptions. Such procedural matters can be found in the Rules of Court. As a matter of fact, the states' periods of reply and reply to the reply are determined by ad hoc decisions. Rule 38 provides a broad definition as to the time-limits: "No written observations or other documents may be filed after the time-limit set by the President of the Chamber or the Judge Rapporteur, as the case may be, in accordance with these Rules. No written observations or other documents filed outside that time-limit or contrary to any practice direction issued under Rule 32 shall be included in the case file unless the President of the Chamber decides otherwise."

And parallel to that broad prescription, Rule 49, in prescribing the way a single judge shall examine the individual application, provides that the Judge Rapporteur "may request the parties to submit, within a specified time, any factual information, documents or other material which they consider to be relevant." Likewise, Rule 59 on the procedures for the examination of individual applications by the Chamber, prescribes that "unless decided otherwise, the parties shall be allowed the same time for submission of their observations." Thus, it can be concluded that such time-limits can be determined by the judge or the Chamber examining the case file.

Exploiting all the available time limits until the last minute would primarily work to detain a probable judgment regarding a violation. Besides, it is perfectly legitimate to do so. There are a multitude of time-limits in the proceedings that could be deferred until the last minute: Period of first reply, period of second reply, time-limits for the filing of the documents, application period to the Grand Chamber, various periods of communication, etc. etc. Holding it up until the end of each time-limit may buy time that could add up to months in total. When you hold it up until the end of every time-limit, this would practically mean the deferral of the implementation terms of a possible judgment regarding a violation.

For example, there will be certain time-limits set by the Court for the compensation payments or for the removal of the consequences of the violation as well as time-limits originating from the functioning of domestic law and the nature of the incident. Two institutions will have to exchange correspondence with each other for example. Such time-limits could be exploited until the last day and even the last minute of the last day. Which could in turn buy days or weeks.

2) Request extensions of time-limits or additional time

This is a right that parties can enjoy. Then why shouldn't you enjoy it? According to Article 19 of the Practice Directions titled "Written pleadings", "a time-limit set under Rule 38 may be extended on request from a party." The next article states, "A party seeking an extension of the time allowed for submission of a pleading must make a request as soon as it has become aware of the circumstances justifying such an extension and, in any event, before the expiry of the time-limit. It should state the reason for the delay."

Turkey effectively exercises her right to seek an extension of time and reaps considerable benefits from this practice. For example, in the case of Cumhuriyet / Sabuncu and Others v Turkey (No: 23199/17) the Court first gave Turkey a time limit for the statement of defence until October 2nd, 2017. And at the end of that date, Turkey, instead of filing a statement of defence, sought an extension of time, which the Court agreed and extended until October 24th. However, instead of filing the statement of defence, the government once again held it up until the last day and sought another extension. The High Court which was too meticulous to ignore the slightest procedural error by the applicant party gave another extension to Turkey until the November 7th, stating that it was the last time.[3] Yet Turkey did not file its statement of defence and requested another extension on the very last day[4]. Although the court did not grant another extension, Turkey managed to file a sixty-page defence statement a few days later[5]. Therefore, in terms of the statement of defence alone, a period of almost a month and a half was bought.

Seeking an extension stands as one of the most favoured procedures in terms of the government of Turkey's ECtHR practice. In the case of Ahmet Şık v. Turkey (No: 36493/17), Turkey did not file a statement of defence until the last day of the time-limit (October 25th, 2017) and sought an extension. Likewise, in the case of Deniz Yücel v. Turkey (No: 27684/17), Turkey's time-limit for the statement of defence expired on October 24th, 2017, after which the government sought an extension. The government, however, did not file a statement of defence on November 14th either and the Court granted another extension until November 28th[6]. We should also keep in mind that Şık and Yücel were under arrest throughout these extensions. In the case of Wikipedia v. Turkey, during the hearing on July 2, 2019, the Court addressed seven questions to the government of Turkey to be answered by October 24. Having left the questions unanswered by that date, the government of Turkey sought a six-week extension on the very last day, which was granted by the Court[7]. Merging the applications of several signatories of the Academics for Peace declaration, the ECtHR demanded Turkey to file its statement of defence by October 2021 by the end of which Turkey sought an extension which the Court granted until January 10, 2022. In a nutshell, signatories of the Academics for Peace declaration had been dismissed from public office about 5 to 6 years ago by a decree law and some of their applications had been rejected by the Court on the grounds that the domestic remedies had not been exhausted. The rest of the applications were detained before the court for a considerable amount of time after which the government of Turkey was notified and granted a generous time-limit for the filing of the first statement of defence. By the time the government's request for extension was granted, The State of Emergency Inquiry Commission, which the ECtHR held as an effective domestic remedy, had not yet issued a single decision regarding a signatory of the Academics for Peace declaration.

3) Invent a domestic remedy from scratch

Let's pick it up from where we left in the previous paragraph. The Court had declared inadmissible the first applications of the signatories of the Academics for Peace declaration on the grounds that the domestic remedies had not yet been exhausted. For example, the application (no. 54668/17) of the author of this article to the ECtHR regarding his dismissal from the public office by a decree law was declared inadmissible by the Court which referred to the State of Emergency Commission that was established a year after the Academics for Peace declaration in question was signed and publicized. Moreover, some signatories (and in fact tens of thousands of other public officials) had been dismissed from public office by the decree laws issued before the Commission in question was established. In other words, from the perspective of many applicants both their act and the legal proceedings against

them materialized long before the establishment of the Commission. The Commission in question was established with this particular objective of assessing the acts and proceedings that took place before its establishment.

The State of Emergency Inquiry Commission was established by the Decree Law on the Establishment of the State of Emergency Procedures Review Commission published in the Official Gazette on January 23, 2017. The Commission consists of seven members. Three of its members are appointed by the Prime Minister (later on, the President) from among the public officials, a member by the Minister of Justice from among the judges and prosecutors serving in the central organization and affiliated bodies of the Ministry of Justice, a member by the Minister of Interior from among the chief local administrators, and two members by the Council of Judges and Public Prosecutors from among the rapporteur judges serving in the Council of State and the Supreme Court.

Even this concise paragraph reveals the true nature of the Commission as a non-judicial body formed one year after the Academics for Peace declaration that resulted in the dismissal of the signatories and established by the public officials that are appointed by the executive branch who had themselves issued the dismissive decree laws. It was also clear that the act of signing a peace declaration had no connection with the state of emergency whatsoever, but the Court kept referring to the Commission as an effective domestic remedy anyway. It is worth keeping in mind that signatories filed applications to the administrative courts and then to the regional administrative courts before the Commission was established, which had been rejected on the grounds that the State of Emergency measures could not be reviewed by the courts in question. Likewise, their application to the Constitutional Court was declared inadmissible for lack of jurisdiction. Therefore, by the years 2016-2017, the domestic remedies had already been exhausted for tens of thousands of public officials, including the signatories of the Academics for Peace declaration.

However, the government of Turkey managed to promote an administrative commission found only recently as an effective domestic "legal" remedy, which supposedly relieved the ECtHR from receiving numerous applications and saved the government of Turkey from the convictions it would otherwise be facing. The ECtHR's take in the case of Köksal v. Turkey (No. 70478/16) has been encouraging for the government in this regard. Because, the Commission had not yet been operative and started processing applications when the Court had handed down its judgment in the case of Köksal. The Court, however, declared the case as inadmissible on the grounds that the domestic remedies had not been exhausted.

It soon became clear that the Commission was not an effective remedy. Established for two years in January 2017, the Commission only became operative in December, meaning that it had not processed even one of the tens of thousands of pending cases one year after its establishment. Nobody was surprised when those cases had not been handled within two years. As we are heading towards the end of 2021, that is, five years after its establishment, the Commission is still operative. As of 28/10/2021, 7% of the applications are still waiting to be processed[8]. Moreover, the Commission's admissibility rate, which is 8%, is too low to be seen as an effective remedy. In other words, eight out of a hundred individuals could expect to get a positive decision, with the rest 92 individuals are waiting to be able to file an application to the ECtHR for more than five years now. Furthermore, the decisions granted by the commission are not final but subject to judicial review. The decisions of the Commission must be taken to the administrative courts which five or six years ago dismissed the initial applications for lack of jurisdiction. Therefore, the only function of the State of Emergency Inquiry Commission in this whole process has been to defer the judicial review by the administrative courts of the dismissals. There is much more to it than that. Once issued, the decision of the Commission can only be appealed to a handful of administrative courts in Ankara specially assigned to this task. Rejected by the Commission, the cases of nearly 100,000 people are piling up before these courts with a waiting period of probably a few more years. Then the hierarchy of appeal courts would be traversed first through the regional administrative courts, and then maybe through the Council of State and the Constitutional Court, and only those who succeeded in exhausting the domestic remedies would be able to file an application to the ECtHR. One need not be an oracle to imagine that this pre-ECtHR process, which had taken more than six years already, would probably limp along for another 15 years. And with the ECtHR process, one can assume that it would take another three to five years should the government implement the practical recommendations of this manual[9].

4) Take advantage of any possible means of appeal and pleading against an ECtHR judgement of any level

Again, this is a right the parties can enjoy, and it is completely legal... The Rules of Court grants the parties the right to make pleadings on various issues. An important plea the state party could use is the first plea which includes the pleas of inadmissibility of the Rule 55. But the Rule 73 on the "Request by a party for referral of a case to the Grand Chamber" is unmistakably the most important tool that could significantly delay the execution of ECtHR judgments. Accordingly, "In accordance with Article 43 of the Convention, any party to a case may exceptionally, within a period of three months from the date of delivery of the judgment of a Chamber, file in writing at the Registry a request that the case be referred to the Grand Chamber. The party shall specify in its request the serious question affecting the interpretation or application of the Convention or the Protocols thereto, or the serious issue of general importance, which in its view warrants consideration by the Grand Chamber."

Obviously, this rule works like an appeal against the judgment of the Chamber. Furthermore, a period of three months is granted, which I assume by now the reader could immediately see that this is just another deadline that could be exploited to the last day.

Let's take a closer look at the case of Selahattin Demirtaş v. Turkey (No. 2) (No: 14305/17)[10]. Demirtaş filed an application to the Court for an alleged breach of Articles 5, 10 and 18 of the Convention and Article 3 of Protocol No. 1 to the Convention, and the government of Turkey was given notice of the application. Chamber of Second Section of the Court found, unanimously, that there had been no violation of Article 5 § 1 and of Article 5 § 4 of the Convention and that there had been a violation of Article 5 § 3 of the Convention and of Article 3 of Protocol No. 1. The Chamber also found that there had been a violation of Article 18 of the Convention in conjunction with Article 5 § 3. The Chamber held that the Turkish state was to take all necessary measures to put an end to the applicant's pre-trial detention. However, on 19 February 2019, the Government (and the applicant too, on the grounds that his immunity was revoked unconstitutionally) requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention. The panel of the Grand Chamber accepted the requests on 18 March 2019[11]. Grand Chamber of the ECtHR "ruled on December 22, 2020, that by holding Demirtaş in pretrial detention since November 2016 and prosecuting him for his activities and speeches protected under the European Convention on Human Rights (ECHR), the Turkish authorities had pursued an ulterior purpose of preventing him from carrying out his political activities, depriving voters of their elected representative, and 'stifling pluralism and limiting freedom of political debate: the very core of the concept of a democratic society"[12]. Likewise in the case concerning the exemption of the children of Alevi citizens from religious culture and ethics classes (Mansur Yalçın and others v. Turkey, No: 21163/11), in a judgment on September 16, 2014 the Chamber held unanimously that the government, without delay, needed to introduce a new system where the students would be exempted from attending to the religious culture and ethics classes. However, the government of Turkey referred this judgment to the Grand Chamber on the very last day of the time-limit granted by the Court.[13]

It is unlikely that the government of Turkey will have the Chamber judgment quashed by the Grand Chamber. However, this allows the government to impede for a significant amount of time the implementation of the judgment on the grounds that there is no "final decision" even when it is about in the cases where the Chamber found severe violations of human rights.

5) Wait for the official translation of the ECtHR judgment and claim that you never received it

Following the Chamber judgment on Demirtaş case, his lawyers demanded his release, which the Ankara 19th Assize Court refused to grant on the grounds that it would wait for the official translation, even though lawyers of Demirtaş had a translation available. While the official translation was prepared, the government of Turkey referred the case to the Grand Chamber and refused the grant a release on the grounds that there was not an official judgment yet.

On December 22, 2020, the ECtHR Grand Chamber found a violation and held that the government was to release Selahattin Demirtaş immediately. Naturally, the lawyers of Demirtaş demanded him to be released immediately. The Ankara 7th Criminal Court of Peace, however, rejected the demand and ordered the continuation of his detention on the grounds that "the Chief Public Prosecutor's Office of Ankara requested the translation of the judgment in question from the Ministry of Justice via a letter which has not been replied yet. The lawyers of the suspect submitted a judgment that is not translated

and as it could not be known which application the ECtHR ruling is referring to, which offenses it concerns and the scope of the ruling, it has been understood that the ruling in question is not suitable for a legal review." And until the translation of the judgment could be delivered, his conviction from another case before the Assize Court was mobilized to keep him under continued detention.

6) Make the case as intricate as possible, so that neither the judges of the ECtHR nor the national/international public can fully grasp its scope

There is only a tiny group of lawyers who could follow the legal journey of the case of Osman Kavala. Let's have a look at the case:

> *"How many detention and release orders have been issued for Osman Kavala so far? Here is the chronology of this legal horror movie: On November 1 2017, two separate detention orders were issued for him on the grounds of attempted overthrow of the government (which later became the Gezi Case) and attempted coup. As to the latter allegation, he was released on October 11 2019. On February 18 2020, the court acquitted and released him of the Gezi Case. Before he was actually released, however, he was once again detained in the prisoner transport vehicle and arrested for the third time on February 19, again on the charges of attempted coup. On the evening of March 9 2020, he was taken out of his prison cell and was arrested of the same case for the fourth time by the judge he saw on a computer screen in a prison room. This time the allegation was espionage, because the maximum legal detention period of two-years prescribed for the previous allegation was no longer applicable. Thus, on March 20th, his detention concerning the attempted coup was revoked as the maximum legal detention period of two-years expired and a third release order was issued. As a result, Osman Kavala has been under continuous detention since November 1 2017. And this is despite the European Court of Human Rights found the most severe violation possible and held that he was arrested for politically-motivated reasons".*[14]

His case is registered in the ECtHR as Kavala v. Turkey, No: 28749/18. A chronological summary of the case could be found on The Department for the Execution of Judgments of the European Court of Human Rights website.[15] As even the summary of the case in question is very difficult to comprehend, let's try to summarize the summary: Kavala was detained on October 18, 2017, He was persecuted under the Article 309 (violation of the constitution, attempted coup) and Article 312 (offences against the government) of the Turkish Penal Code. On October 11, 2019, he was released on charges of attempted coup, but he remained in pre-trial detention on charges of the latter offence. On February 18, 2020, he was acquitted of the second charge as well. He was ordered to be released but before he was able to spend a night at home, another warrant has been issued to place him in a pre-trial detention on the very same day. Meanwhile, an inquiry was launched against the judges who acquitted him. On March 9, 2020, the court decided he was to remain under pre-trial detention on charges of espionage under Article 328 of the Turkish Penal Code. In between those events, there had been many Constitutional Court applications, judgments quashed by the Court of Appeal, appeals to the Supreme Court, ECtHR applications, various pre-trial detention orders on charges of three different offences and some other judicial processes. And as I was writing this article the Committee of Ministers of the Council of Europe decided to initiate the infringement procedure.

It's dizzying, isn't it? It must be... Is it even possible that, without the full knowledge of the perplexing intricacies of the judicial system in Turkey, the national and international public could make sense of this complicated process? Of course not. Having turned the whole process into something inscrutable, the choir of government officials now chant the following exclusive tune: "The Turkish judiciary is independent and making its own judgments which you should respect."

7) If the implementation of a decision has become inevitable, launch another investigation/ prosecution against the same person and treat it as the new basis of the old process

Very much like a Russian doll, the nested charges based on Articles 309, 312 and 328 of the Turkish Penal Code come out within the scope of different files, eventually forming a whole. Let's have a brief look: The Article 309 of the Turkish Penal Code prescribes the offence of violation of the constitution. This is the offence of attempting to abolish, replace or prevent the implementation of, through force and violence, the constitutional order of the republic of Turkey. Article 312 prescribes the offences against the government, and it punishes the offence of attempting, by the use of force and violence, to abolish

the government of the Republic of Turkey or to prevent it, in part or in full, from fulfilling its duties. Article 328 prescribes the political or military espionage. This is the offence of securing 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.

It is clear that each of the charges is extremely serious. Those Articles include very serious, concrete elements, the details of which will not be laid out here. Which means that, by their quality, the charges in question cannot just be brought through some cursory indictments. Since these are types of offences that require a serious investigation before even a suspicion could be entertained, one might find it quite inexplicable that the same person, and in different time periods, could by coincidence became the object of suspicions regarding all those offences. But who cares? After all, an individual may have committed one of the crimes in the Penal Code, and isn't it completely legal to give them a shot no matter how strange it may seem?

Similarly, the Demirtaş case could be followed from the chronological summary on the website of the Department for the Execution of Judgments of the European Court of Human Rights.
In relation to the speeches Demirtaş gave on incidents of the October 6-8, 2014, he has investigations and prosecutions launched against him on charges of "setting up or leading an armed terrorist organization", "disseminating propaganda for a terrorist organization", "condoning crime and criminals", "insulting the public officers", "insulting the president", "holding illegal meetings and demonstrations", "provoking people to hold illegal meetings and demonstrations", "defaming the public officials", "publicly degrading the Government of the Turkish Republic", "publicly degrading the Turkish nation, the State of the Turkish Republic, institutions and bodies of the state", "publicly degrading the judicial bodies, military and security organization"[16]. The charges include provoking somebody to kill another. The Office of the Public Prosecutor must have realized in 2020 that the offence of "disrespecting the national flag" was committed during the incidents in question, because the last indictment raised this charge as well.

8) Ensure that the authorities the domestic law holds responsible for the implementation of the ECtHR judgments evade such a responsibility and claim that it would be unlawful to issue such instructions to the domestic courts

As clarified in the first section above, the Committee of Ministers is responsible for the implementation of ECtHR judgments on the Council of Europe side, whereas on the Turkish side this responsibility is held by the Department of Human Rights of the Ministry of Justice.

In a session between 14th and 16th September, The Committee of Ministers of the Council of Europe requested that Demirtaş "be released, his conviction by the Istanbul Assize Court be quashed and the criminal proceedings pending before the 22nd Ankara Assize Court be terminated, together with the removal of all other negative consequences of the constitutional amendment." A newspaper reported that on September 27 2021 the Department of Human Rights of the Ministry of Justice sent an official letter and provided an "unofficial" translation of the Committee of Ministers' request to the General Directorate of Penal Affairs, General Directorate of Penitentiary, General Directorate of the Legislation of the Ministry of Justice and to the Chief Public Prosecutor's Office of Ankara and Istanbul[17]. According to the same news report the letter said, "as is known, the execution of ECtHR judgments regarding a violation is monitored by the Committee of Ministers of the Council of Europe and the responsibility to follow up the processes regarding the execution of judgments (excluding matters related with the foreign policy) rests in our Ministry. As to the supervision of the execution of judgments, a series of decisions has been made in the 1411th DH Committee of Ministers meeting on 14-16 September 2021. Please find attached the unofficial translation by our Department of the decisions. Kindly submitted for your information." In other words, the Ministry, rather than ensuring "the necessary action is taken in accordance with the decision", merely "submits (it) for your information." But if someone asked why the Ministry merely submitted the decision for information rather than ensuring the necessary action is taken in accordance with it, they would customarily repeat the following: According to the Article 138 of the Constitution, "No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

9) Send public messages from time to time implying that the ECtHR judgments are not legal

This is the most common and easiest thing to do. Turkey is a founding member of the Council of Europe.

The ECtHR is the judicial body of the Council. In other words, Turkey is one of the founders of the Court. The Council or the Court is not some sinister, obscure, or shady entity whose identity is a secret. Despite this, the government's rhetoric about "external and internal foes" fuels prejudices against every individual and institution that is not seen to be "national and domestic". Therefore, the citizens are not able to question whether the Court is actually a judicial body established by Turkey itself. It does not take much to misrepresent a judiciary body whose main task is to decide on the human rights violations by the State Parties as an anti-Turkey entity once it hands down judgments regarding the violations. Moreover, human rights defenders themselves have also criticized the ECtHR. Such criticisms that demand better treatment of human rights could easily be manipulated to foster the image of the Court as an undeniably politically motivated judicial entity.

Presidential statements such as "the judgments of ECtHR cannot replace the judgments of our own courts. That the Court requested his release is a double standard and even hypocrisy. ECtHR has to be aware that right now it is defending such a terrorist"[18]; and statements by the Chair of the Parliament such as "The ECtHR should stop defending the rights of terrorists and immediately hand down democratic and legal judgments"[19] could help to render the ECtHR judgments ineffectual for the citizens. This would also provide a strong political backing for the judges who refrain from implementing the ECtHR judgments domestically.

The procedures to render ECtHR judgments ineffectual presented in this Guide are designed for the governments intent on authoritarianism and could be used individually or in combination. There is no fixed sequence for the procedures in question. Most importantly, a government must have a determined and consistent political will to implement them. The presence of a favourable international conjuncture and political relations such as a refugee crisis can offer some extra advantages which could keep the Council of Europe and ECtHR from taking strong measures in the face of non-implementation and thus the issue would linger merely as a protracted political crisis. The only factor that would pose risks for Europe, the ECtHR and the relevant State Party would be the strong solidarity, determination and will of human rights defenders.

About the Author

Kasım Akbaş graduated from Ankara University's Faculty of Law in 2001 and completed his post-graduate MA and PhD at Anadolu University. He has written book chapters, article and translations in the fields of the sociology and philosophy of law, the theory of the state and the law and on human rights. He continues to work as a freelance lawyer, independent researcher and publisher. He was expelled from his teaching role at university in relation to Emergency Decree number 686, over the Academics for Peace document of which he was one of many signatories and which was drawn up to call for peace in the country in 2016. Akbaş is the recipient of national and international prizes in the fields of human rights and the law.

Endnotes

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6. https://www.dw.com/tr/aihmden-t%C3%BCrkiyeye-son-m%C3%BChlet/a-41268322

7. https://www.dw.com/tr/t%C3%BCrkiyeye-wikipedia-savunmas%C4%B1-i%C3%A7in-ek-s%C3%BCre/a-51028323

8. https://ohalkomisyonu.tccb.gov.tr/

9. n.b. I had written that “By the time the government’s request for extension was granted, The State of Emergency Inquiry Commission, which the ECtHR held as an effective domestic remedy, had not yet issued a single decision regarding a signatory of the Academics for Peace declaration.” The Commission began firing “rejections” one after another once the extension was granted. But it is most likely that by the time the reply period is over on January 10, 2022, the Commission will have issued the rejections for all signatories of the Academics for Peace declaration. By experience we know the tired statement the government would issue on January 10th -unless it seeks an extension of course: “The domestic remedies have not yet been exhausted as the Commission issued its decision and the administrative procedures are performed.

10. https://hudoc.echr.coe.int/eng?i=001-207173

11. https://anayasagundemi.files.wordpress.com/2020/12/demirtas-bd-ceviri-1.pdf

12. https://www.hrw.org/tr/news/2021/06/08/378883

13. https://odatv4.com/makale/alevileri-ilgilendiren-bu-mahkeme-kararlarinda-kafalar-karisik-1902151200-71838

14. https://birartibir.org/yeniden-tutuklandi/

15. https://hudoc.exec.coe.int/eng?i=HEXEC(2021)10-TUR-Kavala-ENG

16. https://www.aa.com.tr/tr/turkiye/demirtas-12-davada-yargilaniyor/1319453

17. https://www.gazeteduvar.com.tr/aihmin-demirtas-karari-mahkemeye-gizli-yaziyla-gayri-resmi-tercume-haber-1537410

18. https://www.dha.com.tr/yurt/erdogan-aihm-bizim-mahkemelerimizin-yerine-gececek-sekilde-karar-veremez/haber-1804336

19. https://www.yenisafak.com/dunya/mustafa-sentoptan-aihm-elestirisi-teroristleri-savunmayi-birakmali-3723321

Conclusions & Recommendations

Conclusion and recommendations

At PEN Norway, we continued our Turkey work in 2021 on schedule, despite the adverse conditions arising as a result of the global pandemic. During this time we continued to monitor the ongoing crisis in freedom of expression in Turkey and worked to support such defendants and prisoners as Osman Kavala, Nedim Türfent and İlhan Sami Çomak, as well as a host of other writers and journalists detained in Turkey's prisons simply for doing their job or for expressing their opinions. We were grateful to work with a highly skilled and respected team of legal experts and journalists from Turkey and around the world, always with the support of our highly valued translators.

Our findings in 2021 did not differ greatly from those of 2020, when we found not one of the indictments we studied met either domestic or international standards. We hope our recommendations will assist in establishing a new framework for indictment writing and that they will be adopted in order to assist in reforming the indictment-writing process, raising standards and thereby supporting the rule of law and the right to a fair trial for all in Turkey.

Interventions against freedom of expression in Turkey are disproportionate

As we stated at the very beginning of our 2021 final report, we established a wide-ranging methodology by which to assist the selection of indictments to be analysed this year. We would like to underline our main two focuses. First of all, when choosing the indictments to be examined this year, we did not only focus on journalists, but on academics, lawyers and documentary-makers as well. The result were as striking as in 2020. The examination by our legal experts of the indictments chosen revealed that even shooting a documentary, publishing the data of an academic research, or giving an interview about the problems in the judicial system as a lawyer could be the subject of an indictment. We were, of course, aware of this broad nature of violations of freedom of expression at the beginning of our work. The results of this scientific study, however, revealed a level of disproportionateness that was shocking.

Our second point of focus was on analysing different legal regulations that could give rise to disproportionate interference with freedom of expression. Many non-governmental organizations working to support rights and freedoms in Turkey, and many international bodies, including the Venice Commission,[1] have repeatedly drawn attention to the aspects of legal regulations in Turkey that negatively affect freedom of expression. Some of the most often criticised parts of the law that lead to violations of freedom of expression are in relation to crimes such as propaganda for a terrorist organization, especially regulated under the Anti-Terror Law (Anti Teror Law Art. 7/2), Inciting the Public to Hatred and Enmity (TPC Art. 216) Insulting the President (TPC Art. 299), Insulting the Turkish Nation, the State of the Republic of Turkey, the Institutions and Organs of the State (TPC Art. 301) and the crime of membership of a Terrorist Organization (TPC Art. 314) 314).

One of our first findings this year was that the regulations that stood out as a means of disproportionate interference with freedom of expression in Turkey were not limited to those listed here. For example, the examination of the indictment report against Canan Coşkun revealed that the crime of targeting a public official, regulated in the Anti Terror Law Art. 6/1, has a feature that directly affects freedom of expression and the professional activities of journalists working as court reporters. Likewise, the indictment against Can Dündar and Erdem Gül strikingly shows that the TPC Art. 328 and TPC Art. 329, together with the TCK 220/6 and 220/7 regulations, which were repeatedly criticized by ECtHR, have been functioning as the Sword of Damocles hanging over freedom of expression. Also, examination of the indictment against Hikmet Tunç Kumli illustrates how the accusation of defamation in TPC Art.125 can violate freedom of expression and freedom of accessing public information.[2] The examination of the

indictment, which led to the prosecution of academic Bülent Şık on charges of 334 (Providing Prohibited Information), 336 (Disclosure of Prohibited Information) and 258 (Disclosure of Confidential Information in Respect of a Duty), for reporting on a research he carried out, revealed that interferences against the right to freedom of expression in Turkey have become unbridled.[3]

334 (providing prohibited information), 336 (Disclosure of Prohibited Information)

This grim picture painted by our reports should worry everyone working in the field of freedom of expression. Because it demonstrates that Turkey is not working to solve the problem of freedom of expression, but on the contrary, the problem is getting deeper day by day.

As we mentioned in 2020, the focus of our work within the scope of the Turkey Indictment Project should be seen as a legal compliance test specific to indictments. In this context, all our reports examine whether the relevant international regulations, particularly the European Convention on Human Rights and the United Nations (UN) Principles Directive on the Role of Prosecutors, are applied in the indictments, together with Article 170 of the Criminal Procedure Code, which regulates the domestic criteria for an indictment.

Unfortunately, likewise the last year, the common observation of the reports this year is that the indictments were not drafted in accordance with domestic law and the international law.
The common criticisms against the indictments examined are striking. For example, it will be seen in many reports that there are statements such as “this indictment should never have been written” or “even writing this indictment is a disproportionate interference with the freedom of expression”. Additionally, our legal experts underline that the legal language and the characteristic jargon adopted by the indictments are so complex that they hinder the right of defense. The other common criticisms can be summarized as the exclusion of the evidence in favor of the suspects in the indictments, writing the indictments without considering the cause-effect relationship, the reflection of the political motives of the prosecutors on the indictments, failure to discuss the issue of sufficient suspicion, including the events unrelated to the indictment and the construction of incoherent plots marred with unnecessary repetitions.

In this concluding section, we aim to summarize the common problems in the indictments, with an overview, as well as to express a series of recommendations for improvement in terms of the presentation, content and legal validity of the indictments.

As a result of the bleak picture painted above, we would like to make remedial recommendations in relation to the problems identified during our two-year study. Unfortunately, we have observed that the problem in Turkey has a structural aspect. For this reason, it appears that improvements in indictment-writing and a stricter adherence to legal process and the rule of law will only be made possible by committed political will on the part of the Ministry of Justice and the executive at large.

Recommendations

1) A clear and objective indictment writing method should be developed.

The determination of our legal experts in almost all the indictments, from the shortest to the longest, examined in 2021, was that the indictments were not intelligible. This is less about giving a highbrow literary quality to the texts than merely making them clear and comprehensible in terms of the facts, the evidence supporting the facts, the alleged crime, the relationship of the alleged crime with the evidence, the existence of suspicion. An indictment in which these elements are not understood may lead to a prosecution process that may result in a violation of the right to a fair trial.

In this context, we must repeat some of our recommendations in 2020.

- The indictments must be written in a systematic way that the suspects can understand. In this sense, the wording of the indictments should be kept simple and short, as clearly stated in our report on the indictment against the Adana Bar Association lawyers.[4] Thus, its content can be understood by suspects who are not mostly legal professionals. For example, paragraphs can be used in indictments, long sentences separated only by commas can be avoided, and subheadings can be added.

- In addition to observing the essential elements of this indictment form, the method of collecting evidence should definitely be discussed in the indictments. Each piece of evidence must be linked to the elements of the alleged crime.

- Evidence in favor of the suspect must be absolutely mentioned in the indictment. Again, as a natural consequence of the fact that the duties of prosecutors involve a judgement regarding whether the indictment is compatible with fundamental rights and freedoms, these issues should also be discussed in the indictments. The finding in the report regarding the Hikmet Tunç Kumli indictment is important in this sense:

"As we have underlined over and over before, the prosecutors may work with a template, which would not solve all the problems but at least could prevent them from 'forgetting' or 'omitting' the fundamental information as it was the case with the indictment in question. The use of such a template can help overcome the shortcomings such as the lack of a complaint date, inadequate summarization of the evidence and failure to provide verbatim citation of the quotes. Introducing a legal obligation to use subtitles in the indictment could be useful as it would make it easier to comprehend the indictment and therefore contribute to the effective exercise of the right of defence. Because even with this very short indictment, the reader has to make a serious effort to follow the train of thought."[5]

The recommendation included in our Seyhan Avşar indictment review report for a clear and objective indictment is, in our opinion, a guideline for resolving this serious problem to some extent.

As we stated in our related report, a checklist or template should be prepared for standardizing the writing of an indictment. Such a method will not only contribute to the right of defense of the suspects, but also contribute to the ability of prosecutors to carry out their duties in a more qualified manner. The following recommendations are included in the Avşar examination report on this subject:[6]

"For instance, there could be questions like:

- *Is the indictment written in a language/register that can be understood?*
- *Is the defendant's right to be presumed innocent violated?*
- *Is the evidence properly cited and dated and connected to the alleged crime?*
- *Are the articles of public interest?*
- *Is what is written actually true?"*

While not necessarily limited to the questions here, we believe such a guiding and self-control checklist is important.

2) The relationship between the evidence and the crime charged must be established:

Another issue that is frequently mentioned in the reports is that the evidence against the suspect cannot be understood in the text of the indictments, and the evidence in favor is not written frequently. For instance, in the report on the Necla Demir's indictment,[7] legal experts stated that the failure to establish a proper connection between the evidence and the alleged crime, is another violation of ECHR Article 6/2 that regulates the presumption of innocence.

The report on the indictment against Veysel Ok[8] contains many findings in this regard. Experts drew attention to the fact that the evidence did not even include a date, and they identified the absence of any factor in favor of the suspect in the indictment as an important shortcoming.

Again, the report of the Özgür Gündem Raid indictment[9] contains determinations and recommendations that, in our opinion, should not be ignored:

"Most importantly, every evidence in the indictment needs to be clearly linked to the charged crime. It does not suffice to assign general evidence to a charge. The reasoning needs to be precise and each argument needs to refer to the specific subparagraphs. If a piece of evidence cannot be properly linked to a particular crime, it cannot be included in an indictment, as prosecution on grounds of speculations must not be continued.

Finally it is worth referring to the Venice Commission Report on the Independence of the Judicial System (494/2008),[10] Part II titled as The Prosecution Service. Subtitled "Qualities of Prosecutors", the 15th paragraph of the report states that the prosecutors must act fairly and impartially, and goes on to emphasize that it is not the prosecutor's function to secure a conviction at all costs but that she must put all the credible evidence available before a court.

> *"The prosecutor (...) cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case."*

3) Professional training of prosecutors

Almost all of the indictments examined in 2021 emphasized that the professional training of prosecutors in Turkey should be put on the agenda as soon as possible by taking into account the international standards.

At this point, a reference could be made to the Recommendation (Rec) 2000/19 presented to the Member States by the Committee of Ministers of the Council of Europe under the title The Role of Public Prosection in the Criminal Justice System.[11] Article 7 of this Recommendation sets an important framework for the continued professional development of prosecutors. According to this article, pre-vocational and in-service training of prosecutors is both a right and a duty for prosecutors.

The training topics in the Recommendation are as follows:

> *a. the principles and ethical duties of their office;*
> *b. the constitutional and legal protection of suspects, victims and witnesses;*
> *c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;*
> *d. principles and practices of organisation of work, management and human resources in a judicial context;*
> *e. mechanisms and materials which contribute to consistency in their activities.*

A careful examination of the reports we published in 2021 shows the undoubted necessity of such training. Indeed, in almost all reports, it has been determined that prosecutors systematically ignored the suspects' fundamental rights and freedoms, which are also guaranteed under the ECHR.

For example, the following finding in the report on the Mavioğlu-Demirel indictment[12] reveals the importance of the training of prosecutors on fundamental rights and freedoms:

> *"When drafting an indictment, prosecutors must adhere strictly to the facts behind the accusation, without leaving out those that go towards the affirmation of nonliability, and should never limit themselves to political stances."*

Likewise, the findings in the Bülent Şık indictment[13] report reveal the inevitability of such a training:

> *"It should always be considered if the indictment represents an interference in a human right. In cases directed against authors and academics, there will often be an interference with Freedom of Expression (ECHR Article 10.1).*

If the indictment represents an interference, the Prosecutor must consider if there are any reasons that can justify the interference according to the criteria in Article 10.2 (prescribed by law, specific reasons and proportionality) Without such reasons, the interference will be a breach of the freedom in question. The indictment should mention the alleged reasons."

Conclusion:

The last months of 2021 have revealed that the disproportionate interventions in fundamental rights and freedoms, including freedom of expression, and the ongoing judicial crisis in Turkey are now causing irreparable damage to the entire society. Turkey's politically motivated attitude in not releasing

human rights defender and businessperson Osman Kavala, despite the ECtHR judgment about him, led the Committee of Ministers to initiate infringement proceedings against Turkey on 2 December 2021. Unfortunately, it is known that the consequences of this process for Turkey can be very serious. [14]

Again, the statistics for 2021, announced by the European Court of Human Rights,[15] reveal the disproportionateness of Turkey's interference with the right to freedom of expression. With 15,251 applications, Turkey became the second country with the highest number of applications after Russia in 2021. Again in 2021, Turkey is the country with the highest number of violation judgments in the field of freedom of expression with 31 violation judgments. The statistics announced by the ECtHR unfortunately confirm the conclusions reached by our legal experts in the indictment examination reports.

With the ever-deepening crisis in freedom of expression, the right to a fair trial, rights to freedom of assembly and demonstration in Turkey, now is the time to implement lasting reform in the judiciary. Whilst we accept that a great number of judges and prosecutors were lost to the system by way of their incarceration after the attempted-coup of 2016, we would urge the Ministry of Justice to invest in deep and lasting commitment to training and monitoring of standards, adherence to the decisions of the European Court of Human Rights, a full return to a wholly independent judiciary and a cessation of the practice of arbitrary journalist arrests and detentions.

PEN Norway support the right to a fair trial of all citizens in Turkey, their right to express their thoughts and opinions freely, without inciting hatred or violence and their right to receive balanced and critical journalism and information from diverse, quality sources.

Following publication of this report, we look forward to a stimulating and helpful dialogue with the Ministry of Justice in Turkey and to providing further guidelines for the training of prosecutors in indictment writing in 2022.

Endnotes

1. See: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)002-e

2. See: https://norskpen.no/eng/wp-content/uploads/2021/09/PEN-Norway-Turkey-Indictment-Project_Hikmet-Kumli-Tunc_14-Ekim-2021_TUR-1.pdf

3. See: https://norskpen.no/eng/wp-content/uploads/2021/09/PEN-Norway-Turkey-Indictment-Project_Bulent-Sik_23-sept-2021_TUR.pdf

4. See: https://norskpen.no/eng/wp-content/uploads/2021/09/Turkiye-Iddianame-Projesi_Adana-Barosu_28-Ekim-2021_TUR.pdf

5. See: https://norskpen.no/eng/wp-content/uploads/2021/09/PEN-Norway-Turkey-Indictment-Project_Hikmet-Kumli-Tunc_14-Ekim-2021_TUR-1.pdf

6. See: https://norskpen.no/eng/wp-content/uploads/2021/09/PEN-Norway-Turkey-Indictment-Project_Avsar_30-sept-2021_TR.pdf

7. See: https://norskpen.no/eng/wp-content/uploads/2021/09/Turkey-Indictment-Project_NeclaDemir_TUR.pdf

8. See: https://norskpen.no/eng/wp-content/uploads/2021/10/PEN-Norway-Turkey-Indictment-Project_VeyselOk_07-oct-2021_TR.pdf

9. See: https://norskpen.no/eng/wp-content/uploads/2021/09/Ozgur-Gundem-raid_TUR.pdf

10. See: https://rm.coe.int/1680700a63

11. See: https://www.refworld.org/docid/43f5c8694.html

12. See: https://norskpen.no/eng/wp-content/uploads/2021/09/Demirel-Mavioglu_16.09.21_Tur.pdf

13. See: https://norskpen.no/eng/wp-content/uploads/2021/09/PEN-Norway-Turkey-Indictment-Project_Bulent-Sik_23-sept-2021_TUR.pdf

14. See: PEN Norveç'in bu konuya ilişkin açıklaması: https://norskpen.no/eng/nyheter/committee-of-ministers-rule-on-infringement-proceedings-for-turkey/

15. See: https://www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf

Links to laws referred to within the report:

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.asp

"PEN Norway's indictment reports showed us how a proper reporting should be. Regardless of the content of the study, the diligence, objectivity, and illustrative nature of the reports was impressive."

Songül Yıldız, Lawyer

"We are at the Constitutional Court stage in the case in which I am currently standing trial. We submitted PEN Norway's indictment report to the Constitutional Court, as we greatly value the findings it contains."

Veysel Ok, Human Rights Lawyer

"I provide internship training and Criminal Justice training to young colleagues at the bar association I am affiliated with. Now, in each of these trainings, I make sure that the participants read at least one of the indictment evaluations in the report."

Ümit Büyükdağ, Lawyer, Vice President,
Progressive Lawyers' Association

PEN NORWAY

Indictments studied in PEN Norway's 2020 report:

Berzan Güneş
Osman Kavala & Others
Nedim Türfent
Pelin Ünker
Deniz Yücel
MİT News Trial
The Büyükada Trial
Cumhuriyet Indictment
Şebnem Korur Fincancı, Erol Önderoğlu, Ahmet Nesin
Osman Kavala & Henri Jak Barkey
Ahmet Altan & Others
Reyhan Çapan, Hüseyin Aykol, Emire Eren Keskin

Articles commissioned in PEN Norway's 2020 report:

Judicial administration
Is this justice in your world?
Legal practice and bar associations – Where to now?
What is the Council of Judges and Prosecutors (HSK) in Turkey?
Point zero of a trial: The Indictment