PEN NORWAY

Legal Report on Indictment

Dicle Müftüoğlu

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Published: 24 October 2024

PEN Norway Turkey Indictment Project:

PEN Norway's Turkey Indictment Project has been running since January 2020.

During that time, with an international team of judges, lawyers and academics we studied 29 indictments in cases involving freedom of expression. These include the prominent Cumhuriyet newspaper trial, the Büyükada human rights defenders' trial and the five-year Gezi Park trial.

Each report takes a single indictment and compares it to Turkey's domestic law and to international law. The deepening crisis in the rule of law in Turkey since 2016 has meant that not one indictment has yet met domestic procedural standards or the tenets set out in Article 6 of the European Convention on Human Rights, concerning the right to a fair trial.

With this in mind, we continue to work with leading human rights lawyers globally to study indictments in the cases of journalists, civil society actors and lawyers and will continue to make recommendations for training of judges and prosecutors and for the continuing improvement of the indictment writing process in Turkey.

The importance of this work was demonstrated in 2022 when the defendants in the Gezi Park trial were all convicted and jailed for long sentences based upon facts in an alarmingly inadequate and flawed indictment. The project continues in 2023.

All reports can be accessed via our website: www.norskpen.no

And the two final reports of 2020 and 2021 are available at:

2020: https://norskpen.no/wp-content/uploads/2021/06/PEN-Norway_Turkey-Indictment-Project-Report-2020.pdf

2021: https://norskpen.no/wp-content/uploads/2022/03/PEN-Norway-Turkey-Indictment-Project-Report-2021_Eng.pdf

Additionally, as part of the project, guidelines on indictment writing for prosecutors in Turkey has also been published, and the guidelines can be accessed here: Guidelines-on-Indictment-Writing-for-Prosecutors-in-Turkey.pdf (norskpen.no)

The project is conceived and led by PEN Norway's Turkey Adviser, Caroline Stockford and the indictment reports are supervised by PEN Norway's Legal Adviser on Turkey, human rights lawyer Şerife Ceren Uysal.

Legal Report on Indictment

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1- Introduction

This study focuses on the indictment with the investigation no. 2023/182342 and indictment no. 2023/5664 issued by Nuri Şahan, the Public Prosecutor of Ankara on 06.09.2023 against the journalist named Dicle Müftüoğlu.

2- Summary of the case background information

Dicle Müftüoğlu (whom we will refer to as DM, for the sake of brevity) was born in 1984 in Doğubayazıt, Ağrı. She has been working as journalist, editor and reporter since 2008, collaborating with different institutions and agencies, some of which were closed via Government decrees. She is currently working for the Kurdish-Turkish news agency Mezopotamya, and in 2023 she was honoured as Most Resilient Journalist by Free Press Unlimited.

DM had been tried for her journalistic activities even before the indictment in question. She was particularly tried in the Diyarbakır 5th High Criminal Court during 2017-2018, and it is understood that she was fined 20,820 TL for committing the act of publishing in a way that legitimizes the coercive, violent, or threatening methods of a terrorist organization, as per Article 6/4 of the Anti-Terror Law. A decision was made to defer the announcement of the verdict for this penalty. This case is directly related to DM's current trial, as the first charge against her in the related indictment was also membership in a terrorist organization. In other words, the entire trial was conducted over the membership charge. Subsequently, DM was asked for additional defense, and a verdict was made against her based on

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TMK Article 6/4. That is, there had already been a trial for membership in a terrorist organization for the period covered by the indictment being reviewed in 2018.

Dicle's ongoing trial today also has a rather confusing history. because it follows two previous indictments of the same content filed before the Ankara Court: after the court refused to take up the case, it was filed before the Diyarbakır Court. The case also overlaps with another, concerning nineteen people, five of whom were journalists and were arrested in Ankara by court order. DM was one of them, she was arrested on 3 May 2023. The case was finally brought before the Diyarbakir High Court and at the third hearing, in February 2024, she was released with a travel ban whilst the trial continues. The case - or rather, the cases, because their origin is disputed - came to light in June 2022 on one side, and in April 2023 on the other. Throughout this complicated pre-trial history and for the trial she is currently facing, the charges have always been "establishing and managing a terrorist organisation", "membership in a terrorist organisation" and "knowingly and willingly assisting a terrorist organisation" (art. 314/1, 314/2 TPC, as well as art. 58, 63, 54 TPC and art. 3 and 5 of the Turkish Anti-Terrorism Law).

She has always maintained a very calm judicial demeanour, answering all questions posed to her by the police, clarifying all aspects relating to the accusation and linking them exclusively to her profession as a journalist. She broke down only once in front of the court, stating loud and clear that "Journalism is not a crime!." The trial is ongoing, and the next hearing is scheduled for October 2024.[1]

3- Analysis of the Indictment:

The indictment (no. 2023/5664) is an exceptionally long document of 43 pages, signed by the Chief Public Prosecutor's Office of Ankara. The document is almost entirely devoted to describing the internal bodies of the PKK organisation, mainly its cultural and media bodies. This description is repeated three times, for there are three witnesses who were heard during the investigation - one whose identity remains secret and two whose names appear. Always with the same story structure and very often with the same sentences and words. We find DM's name only on the last three pages, mentioned by two of the three witnesses (the secret one and a second one), while the third makes no reference to her.

DM is accused of participating in a training given to the 'cadres'[2] of the PKK for one month in 2014 One of the two witnesses who names her specifies: "*I have no information about her subsequent fields of activity nor heard any news about her.*" DM worked for news agency Mezopotamya in the central office of the Diyarbakır press committee, authoring articles distributed to agencies on a weekly basis, mainly about female figures. The prosecution then looks at the HTS data of GSM numbers, specifying that she exchanged a total of 1068 incoming and outgoing calls with suspicious persons. It is not stated in which period this happened and, of course, there is no reference to the content of these calls. The prosecution points out that she exchanged a total of 335 incoming and outgoing calls with members of the organisation. The investigation states that the suspect has two consecutive records of leaving and entering northern Iraq, where Qandil is located, in 2017: this is the town where the cadre school is supposed to be located.

Furthermore, the investigation claims that DM exchanged money with several people who were facing prosecution for being members of an armed terrorist organisation.

The indictment goes on to conclude:

> "When the evidence against the suspect - named Dicle Müftüoğlu - is considered as a whole, it is understood that the suspect actively carried out activities within the Ideological Field Headquarters of the PKK/KCK armed terrorist organization, in line with the terrorist organization's ideology and instructions, using her social life as a cover and observing secrecy and her organizational activities have been clearly and unequivocally established with the evidence in the file, in a way that leaves no room for doubt, and as it is, it is understood that the suspect took initiative and responsibility within the organization and is a leader of the terrorist organization, since her activities exceeded the scope of the activities of a member of a terrorist organization"

Let us recall that:

- the only dates emerging from the investigation are 2014 (when she is supposed to participate in the mentioned training at the camp) and 2017 (when she is supposed to have left for Northern Iraq);
- we do not know the content and period of the numerous phone calls;
- we do not know how much money was exchanged and with whom.

3-1- Grounds to Criticise the Indictment in the light of Turkish law

In assessing the indictment filed by the prosecutor against DM, we must start from a careful reading of article 170 of the Turkish Criminal Procedure Code (TCPC), whose purpose is to set out the elements that the indictment must contain in order to be considered valid and not fall into formal or substantive nullity.

What interests us here is point 5 of that rule: "*The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour*". What is it that we mean by the term '*issues*'?

And before that, what is meant by the Turkish term '*hususlar*'?

Our reference is the Venice Commission, which edited the English translation of the two Turkish penal codes - the substantive one and the ritual one - and chose to translate '*hususlar*' as 'issues'. It could also have translated it as 'matters' (an easier translation, suggested by Google Translate) and the meaning of the sentence would not have changed. It could have also made use of other synonyms for 'issues' and worded it as 'conclusions', 'results', 'points under discussion', 'questions' or 'problems'. These are all synonyms that refer to the matrix of the word 'issues' that stands for the result, the outcome of a search on a given problem.

The word '*hususlar*' is intended to emphasise that there is an issue behind the research and that such research may also present results that are opposite to those that prompted it in the first place. In this case, the results differed from those sought by the prosecution because, instead, they favoured the position (assertion of innocence) of the suspect.

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The term 'elements' would also have been fine, intended as elements in favour of someone, but the reference to the research completed and to its ambiguity would not have been as clear (every research ontologically moves around more than one possible solution).

It is no coincidence that the rule in art. 170 par. 5 of TCPC places a duty to set forth and consider the elements in favour of the suspect in the concluding section of the indictment. Let us bear in mind that an indictment is the summation (and also the summary) of what the prosecutor intends to make known to the court, which will then have to decide on whether to open a trial against the suspect. Therefore,

such a document cannot but also contain the elements favourable to the suspect - otherwise it would guide the court towards an obligatory solution, therefore violating two cardinal points of legal culture: the necessary dialectic between prosecution and defence, and the procedural economy, which requires the court to order the trial only in the absence of (at least) one element that already decisively testifies to the absence of criminal liability. One thing is certain, the term 'issues' does not only mean the material facts (*e.g.* an alibi, a technical analysis, an expert opinion, etc.) that the prosecutor certainly has a duty to include, even if they are contrary to the accusatory hypothesis: it also means the legal facts, the logical arguments, the reasoned conclusions.

What is of interest here are, above all, the legal facts, where by legal facts we mean the previous events, either simple or complex, or the judicial decisions that have already been taken: in short, every legal and judicial element that has affected the current suspect in the past and that has, of course, some reverberation on the accusation.

There is no doubt that the prosecutor's conclusions cannot but include the occurrence of a double indictment or, more precisely, a repeated indictment - what is called *ne bis in idem* in Latin (but also in legal parlance today). Such is the case when a person is on trial (or has even been convicted by a final judgement) for certain facts and these same facts are also the basis for a new and different, or not so different, indictment. It is an institution borrowed from Roman Law and perpetuated over the centuries, always recognised by every legal system.

If the two indictments – that is, the old one for which the person has already been brought to trial and the new one for which they are to be brought to trial again – fall under the same offence, then one can intuitively see how this is a prohibited hypothesis. But the hypothesis in which the facts are the same but their legal qualification (the offence charged) is different is just as prohibited: in fact, in criminal court defendants are held accountable for the facts, not for their position in the penal code, and the State's punitive power in relation to such facts is exhausted once they have been tried for them.

It may be that the facts for which the person has been held accountable in the past have been compounded by others that may be qualified in the same way or in an even more serious manner, for a far more serious offence. However, it is necessary for those facts to be indeed new and different from those on which the first trial was based, and for them to be stated as such (new and different) in the new indictment with absolute certainty.

Let us try to substantiate this argument by analysing the case of DM.

DM had already been tried before for membership in a terrorist organization. This previous trial also focused on the same time period that this indictment concentrates on. Let's also add that the judges overseeing this case assessed the hypothesis that DM's actions could be integrated with the crime of 'membership in a terrorist organization,' but later set this aside to render a verdict based on Article 6/4 of the Anti-Terror Law (TMK)

Once confronted with new statements (either oral or written) concerning DM and pointing to the offence of propaganda, the prosecutor could undoubtedly have requested a trial, as new individual facts might emerge. Even if the facts had been new or different but of the same type or nature, it would have been more difficult to request trial for "membership in a terrorist group" rather than for "propaganda"; and it would have been even more difficult to justify a request for trial for "being the head of a terrorist organisation", since facts of the same nature had already been recognised by the previous judgement as typical of the crime of "propaganda" and nothing more.

In the face of the previous trial against DM, the question must be asked whether or not the indictment relates to post-2018, and nonetheless different, facts; or whether it is merely a different and unlawful reassessment of the same facts.

There is no doubt that the witnesses' statements relate to events going back a long way. When emphasising the role played by DM in the PKK cadres' school, both witnesses naming her (*i.e.* Gokalp and the anonymous witness) refer to a specific month in 2014 - hence a time covered by the two previous trials and therefore already considered by the first trial DM underwent, which excluded her

membership in a terrorist organisation.

We can say with a reasonable amount of confidence that we are in a case of *ne bis in idem* or *double jeopardy*: no one can be tried (let alone convicted) twice for the same facts.

One could say, however, that such a conclusion is part of what is to be judged: we do not deem this correct, but in any case it was the prosecutor's duty to set out in the indictment the legal situation determined by the fact that at least a large part of the subject matter brought to the court's attention had already been taken into account in previous trials, so as to allow to decide whether or not to order the trial if there was sufficient evidence to do so.

The prosecutor, though, did not do so, and we believe this was a deliberate choice: to keep silent about a circumstance as important as a possible *ne bis in idem* is to mislead, to cheat the court.

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Silence on this point is certainly a violation of the duties imposed on the prosecutor in drafting the indictment, in that it means to keep silent on an element that could be very favourable to the defendant. Such a violation would make the indictment null and void.

Section 170 TCPC, par. 3-i also states that the indictment must contain the "*place, date and time period of the alleged offence*".

The indictment we are examining only contains a temporal reference to the summer of 2014, when DM allegedly participated in a training for PKK 'cadres'.

All other contested facts and evidence do not contain a temporal reference:

a) no indication is given, other than in generic terms ("*in 2017*"), as to when DM would have travelled across the Iraqi border to work for the PKK;

b) no indication is given as to when DM would have transported money to help the PKK;

c) no indication is given as to when DM allegedly made calls to or exchanged messages ("hundreds and hundreds" of them) with persons suspected of belonging to the PKK.

Let us leave out the fact that the calls and messages, but also the trips abroad, could be justified by DM's work as a journalist. What is of interest here is the fact that the elements of accusation are not placed in any temporal dimension, therefore making it extremely difficult for DM to defend herself:as we have examined in the previous section, certain facts and evidence may have already been considered in the previous judgments concerning her position, which judgments have excluded her membership in a terrorist association. As already mentioned, this would be a *ne bis in idem*, forbidden by Turkish Law just as by any criminal law system.

If the dates of the alleged trips across the border are not precisely stated, it is impossible for DM to defend herself, as the prosecutor

cannot require her to prove that she has not left the country for several months. In fact, the prosecution suggests that DM left the country illegally, which is why her documents do not show any border crossing.

Finally, no telephone call or message (either sent or received) was intercepted, and therefore we do not know their content - however, collocating them in time could at least hint at the continuity or the sporadic nature of those relations, thereby placing DM's supposed membership in the PKK in time and allowing us to understand whether such conduct has already been taken into account by previous sentences and whether, as a consequence, we are faced with a *ne bis in idem*.

In short, placing the accusation against suspects in time is crucial for them to be able to defend themselves and to understand the consistency of the accusations - especially if the offence is not an instant offence but rather, a protracted one, as is the case in question.

Not for nothing does the cited rule (art. 170(3)(i)) provide that indicating the time of the disputed facts is a prerequisite for the validity of the indictment, without which the document is null and void[3].

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It is worth recalling here that the Venice Commission has censured Turkey because it allows charges to be brought and sentences to be imposed for terrorism based on very vague accusations unsupported by concrete and verifiable elements, within the framework of a legislation that does not clearly define what is meant by 'terrorism' and therefore lacks the binding nature that is always necessary in criminal law[4].

In the present case of DM, by contrast, the vagueness of the alleged offence is compounded by the lack of a temporal collocation of the evidence (the expatriation, and the telephone and personal contacts) and finally by the fact that one of the two witnesses referring to DM is a secret witness. Vagueness and non-verifiability are the characteristic elements of this indictment.

It is true that the TCPC does allow for the use of secret witnesses (art. 170 par. 3-e TCPC), but only in cases in which disclosing the identity of the witness could pose a danger. So, the rule of the procedural code itself already places clear limits on the use of secret witnesses. A rule that goes against all principles of modern Law and is not found in any other legal system: a rule, therefore, that should have no place, as it is unconstitutional and should only be resorted to in extreme cases. We are well aware, instead, of how often secret witnesses are used in Turkey.

This is all the more serious in the case of DM, and not just for the reasons already stated (vagueness adds to vagueness) or because the other witness, whose name we do know, uses a construction of the narrative absolutely identical to the one used by the secret witness, including the same sentences and words - so much so as to suggest that the two witnesses modelled themselves on each other, or even that they might be the same person.

These two witnesses were originally heard in a 2020 investigation (2020/5580) in which another anonymous witness was also heard, with no reference being made to DM.

3-2- Analysis of the indictment in light of the ECtHR and the Venice Commission

In a report dated 15 March 2016 (Opinion No.831/2015), the Venice Commission (European Commission for Democracy through Law) focused on art. 314 of the TPC and on other controversial articles of the TPC. This article was examined together with art. 220 TPC because it addresses contiguous cases of association - not necessarily of terrorist nature but nevertheless illegal. These two articles were sometimes charged and applied together[5].

The main accusation levelled by the Venice Commission at art. 314 (becoming even more serious when applied together with art. 220) is its "vagueness". There is no definition of 'terrorism' in the TPC, not even after the new wording introduced in 2013 with the Anti-Terrorism Law. Nor we find any definition or at least the definition of a framework in which the actual cases may fall - as Human Rights Watch states: "*This legal framework makes no distinction between an armed PKK combatant and a civilian demonstrator".* Since 2016, prosecutors no longer together charge the two provisions: in fact, DM was not charged with article 220. The indictment, however, does use the wording of art. 220 ("knowingly and willingly aiding or abetting") for indicting based on art. 314. The VC recommends that nobody be convicted as a member of a terrorist organisation if they are not such, as provided for by paragraphs 6 and 7 of art. 220 TPC.

But this confusion is still possible, and we should ask ourselves why. The reason is that, as the VC states, the Turkish legislator has never wanted to accept the definition of "member of a terrorist organisation" used by both the ECtHR[6] and (at times) the Turkish Court of Cassation for many years: in order to define a person as 'member', it is not enough for them to share an ideology, but proof of acts attributable to the accused is required that demonstrate, "*in their continuity, diversity and intensity*", their "*organic relationship*" with an armed organisation, or that their acts can be considered to have been consciously and intentionally committed within the "*hierarchical structure of the organisation*". This rule, the VC states, should be applied strictly.

None of these rules have been applied in DM's indictment, which - as we have already seen - is the vaguest of the many indictments for terrorism. It demonstrates how prosecutors are wont to deal with art. 314 without any solid and specific evidence; moreover, it may happen that they indict vaguely based on art. 314 and are ready to downgrade paragraphs 6 and 7 of art. 220 if the indictment under art. 314 does not hold up.

4- Conclusion and Recommendations:

We have set out in detail the reasons why DM's indictment is objectionable and even, in some respects, null and void. We summarise them below:

- DM's indictment is **null and void** because it constitutes a *ne bis in idem*. She has already been tried in two other proceedings and convicted for the same facts alleged here, but the relevant judgments excluded her membership in a terrorist organisation;

- DM's indictment is **null and void** because it does not contain any temporal reference to the time when the offences were committed - the only reference is to the summer of 2014, but DM has already been tried for these facts (*ne bis in idem*);

- DM's indictment is largely based on the statements of a **secret witness**, but the prosecutor's deed does not explain why this witness should remain secret. Moreover, basing such an important deed on a non-verified and non-verifiable witness denotes a marked weakness on part of the prosecution.

The recommendations we feel compelled to put forward are as follows.

1) We propose that the Turkish legislator abolishes the figure of the secret witness because it is completely unconstitutional and incongruous with the system outlined in the European Treaty on Human Rights.

2) We propose that the representative of the prosecution formulates the indictments

a) placing in time (day, month, year, period of time) all the facts brought against the suspect;

b) expressly indicating, in order for the court to be aware of it, the trials and any convictions or acquittals to which the suspect has been subjected in the past, so that the court can immediately assess whether it is faced with a *ne bis in idem* - i.e. whether the offence has already been evaluated in court.

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 I met DM and her lawyer, Mr. RESUR TEMUR, on June 13 2024 at the latest hearing of the trial. She was very calm and willingly answered my many questions. Their line of defence is mainly centred on ne bis in idem, but they do not shy away from giving explanations for their behaviour other than those hypothesised by the prosecutor, and from denying what is not true and did not happen at all.

2 Cadres' are people in the organisation who received a certain period of training and were then sent to different camps/cities to carry out activities as leaders.

3 https://bianet.org/haber/eight-kurdish-journalists-sentenced-in-terror-case-297089 on 03/07/24
On 2 July 2024, eight Kurdish journalists from Mezopotamya agency were sentenced to 6 years and 3 months' imprisonment for being members of a terrorist organisation. Three others were acquitted. The charges, which date back to 2022, are very vague and, according to the defenders, are not based on documentary evidence, but only on the interpretation of testimonies devoid of adequate support.

4 https://bianet.org/haber/kurdish-journalists-sadik-topaloghu-arrested-on-chrge-he-already-received-sentence-for-297625 on 19/07/2024
Very similar to DM's case is the one of Kurdish journalist Sadik Topaloglu, of Mezopotamya agency (the same as DM): he was arrested a second time on 18/07/24 on the basis of statements by two witnesses for which he had already been arrested in 2019 and then sentenced in 2022 to 6 years and 3 months' imprisonment for the crimes of "membership" and "terrorist association" (PKK) with a judgment that has not yet been made final. In the Topaloglu case, the ne bis in idem is even clearer and more relevant than in the case of DM, as the indictment in the first trial is the same as in the second trial ("membership in a terrorist group").
We must consider that the trial referred to in the indictment is a terrorism trial and the Turkish Penal Code does not provide a definition of terrorism. So much so, that both the Venice Commission and the ECtHR have censured this legislative framework as it lacks the necessary binding nature (a mandatory prerequisite in any criminal system) and call for it to be applied very sparingly and with the necessary precautions.

5 For the use of both articles together, s. judgment of the European Court of Human Rights Gulcu v. Turkey, Application No. 17526/2019, decided on 19 January 2016.

6 Among many others along the same lines, s. the rather recent ECtHR decision: Parmak & Bakir v. Turkey (violation of art. 7 of the ECHR), which contains the following: "According to the wording of the amended section 1 of Law No.3713, the act of subscribing to a form of ideology, sharing ideas or combining with others to cultivate an interest in an ideology, is insufficient to qualify as terrorism". In the Parmak & Bakir case, the ECtHR states what the Venice Commission had already stated.