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Legal report on indictment

Turkey v Ahmet Altan & others

PEN Norway's Turkey Indictment Project

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About the author

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1: Introduction

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

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

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

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

Subheadings such as "perception management," "mental manipulation" and "brain control" in the indictment quoted also make it difficult to make a legal assessment of this part. It is not possible to concretise within the bounds of the world as we know today and take the reader to a fantastic sphere with their character. Nor is it possible to link these subheadings with a concrete act, at least not in the context of the Penal Code still in force in Turkey today. If the first arrest and detention decision taken against Ahmet Altan within the scope of this investigation had not been based on the ground of "conveying a subliminal message," a kind of justification that cannot be defined by any norm within a legal system, then these subheadings could have been ignored. However, when the said grounds and the relevant subheadings of the indictment are taken together as a whole, it is seen that at least two prosecutors within the Turkish judicial system have allowed such a legal characterisation. Even discussing the legal uncertainty created by this approach is absurd. Its consequences can also be clearly observed in the indictment examined. Since the charge pressed by the prosecution is linked to an abstract act that is impossible to prove—at least so merely with the verbal and written evidence put forward in this indictment—the evidence could also be evaluated not in a legal context, but in an unlimited field of interpretation within this abstract universe that the prosecutor constructs. One can argue that a legal system serves to construct a reality through norms under any circumstances. However, when a prosecutor begins to interpret the relevant reality in a parallel universe that goes beyond the norm, the line between legal truth and fiction becomes completely invisible. This point indicates a stage where the principle of legal certainty, which is indispensable in terms of criminal law, can no longer be mentioned.

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

2: Background

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

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

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

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

> "(...) As it is understood, from the suspects' social status, background and the nature of their acts [they] acted in cooperation with the terror organisation in line with the objectives of the organisation in a continuous manner beyond the

[1] For the said statement, see: http://www.diken.com.tr/ahmet-altan-ve-mehmet-altanin-gozalti-gerekcesi-darbeyi-bir-gun-duyurmalari/

> existence of organic bonds and participated in the coup attempt on behalf of an armed terrorist organisation, it is accepted that they committed the alleged crimes of attempting to abolish the Grand National Assembly of Turkey or to prevent it from fulling its duties, of attempting to abolish the government of the Republic of Turkey or to prevent it from fulfilling its duties, of attempting to abolish the constitutional order of the Republic of Turkey, of committing a crime on behalf of an armed terrorist organisation, and thus it is necessary to punish them through the application of Articles 309/1, 311/1, 312/2 (and of 314/2 in line with 220/6) of the Turkish Penal Code Numbered 5237 in line with Articles 3 and 5 of Anti-Terror Law Numbered 5237, which befit their acts (…)"

It is seen that the evidence is scattered throughout the narrative in a disorganised way. Basically, it is understood that Altan's statements during the program he appeared on 14.07.2016 were accepted as evidence against him. In addition, Altan's telephone records, some commercial records, statements belonging to some anonymous witnesses or witnesses benefiting from repentance provisions of the Turkish Penal Code, and documents forming the basis of the case known as the Sledgehammer case that were published in the newspaper Daily Taraf[2] at the time when Altan was the founding editor-in-chief have been included as evidence.

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

A few weeks before the hearing, an important development took place in that the Constitutional Court found that the right to liberty and security of the person and

[2] Ahmet Altan resigned from *Taraf* newspaper on 14.12.2012, and the newspaper was closed down via a state of emergency decree law passed shortly after the coup attempt.

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

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

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

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

The prosecutor's dictum was submitted to the file on 31.10.2019, a few days before the second and final hearing to be held on 04.11.2019 and following the reversal decision of the Court of Cassation. In sum, the prosecutor in his dictum demanded that Altan be punished for charges of knowingly and willingly aiding an armed terrorist organisation although not being a member of the organisation; sentenced to a period longer than the minimum one.

At the hearing on 04.11.2019 by the local court, Altan was sentenced to 7 years in prison based on the conviction that Altan did not belong to the hierarchical structure within the organisation, but knowingly and willingly committed the crime of aiding an armed terrorist organisation, and the sentence was increased by half, and he was sentenced to 10 years and 6 months in prison. Along with the verdict, the court decided for Altan’s release on 04.11.2019.

As for Mehmet Altan, the trial ended with acquittal following a long detention period and despite the former verdict of aggravated life sentence. In fact, these two diametrically opposed verdicts *per se* regarding Mehmet Altan tell a lot about the legal nature of the indictment as well as investigation phase that was approved by relevant authorities.

It also needs to be borne in mind that the first instance court, following the decision of the Court of Cassation, was able to deliver a new verdict at the end of two hearings, the first of which was purely procedural. When this second verdict is examined, the impression is reinforced that the first instance court merely adapted the previous verdict to the Court of Cassation decision, without going to the effort of holding a new trial, although the legal characterisation of the charge changed.

The trial prosecutor objected to Altan's release following the verdict. When it was refused by the original court, the objection was taken to Istanbul 27th Assize Court, which sustained the objection and ordered that Altan should be detained again. This objection and decision caused serious controversy. While the prosecutors did not have the right to object to release orders according to the Criminal Procedure Code

before the State of Emergency, the amendments made to the Criminal Procedure Code opened a path for prosecutors to object to release orders. This amendment in itself is highly controversial in terms of both the legal interest, which says pre-trial detention should the exception not the rule, and adopting a provision, that has a quality of an ordinary law, under the State of Emergency circumstances. However, in the present case, the question whether this objection remedy includes a verdict of release or not, points to another important question. The dominant view in the legal community is that such a broad interpretation would contradict the fundamental principle of protecting personal liberty and security. Indeed, at a stage where the verdict is under the supervision of the Court of Cassation, a court's auditing another equal status court's verdict is in clear contradiction with the regulations regarding the duties of the courts. The duties and powers of the courts are determined by law. In the present case, contrary to the aforementioned basic principle, a legal act through interpretation was taken regarding the jurisdiction of the courts.

As a result, Altan was rearrested on 13.11.2019 after having been free for 8 days and was sent to prison. An application was also made to the Constitutional Court against this detention decision, and this appeal by Altan was also rejected on 02.12.2020. Altan is still in prison today.

As of the date of this report, the file has been under appeal before the 16th Criminal Chamber of the Court of Cassation, and Altan's application to the ECtHR is still pending. In terms of Mehmet Altan's application of the same date, the ECtHR declared its verdict of violation on 20.03.2018.

The trial process has been publicly criticised many times by many human rights organisations, press organisations and the defence. Ahmet Altan had not been physically present at the hearings even once during this ongoing trial for more than 4 years, and he could only participate in the entire judicial process from prison through Turkey's judicial conferencing system, known as SEGBİS. The Defence was reported to have been removed from the courtroom by the presiding judge on several occasions. During the session on 23.06.2017, some lawyers from the defence were

heard without waiting for the Public Prosecutor to be present in the courtroom. During the Regional Court of Appeal stage, the first hearing was moved to an earlier date and the witness was heard in the absence of the defendant's attorneys. The Defence often faced the situation of finding out the legal developments regarding their clients from the press. Considering the constraint on communicating with the lawyers, which lasted for months on account of the State of Emergency conditions and continued for a while even during the trial phase, and all the other practices mentioned so far, it is seen that Altan and others are prevented from using their defence rights effectively.

3: Evaluation of the Indictment

Regarding how an indictment should be drafted within the context of both the Turkish Criminal Procedure Code's Article 170 and the European Convention on Human Rights, detailed evaluations have been made in all of the reports written within the scope of this project. Some of the highlights will not be repeated in this report. Instead, the focus will be on the fact of sufficient suspicion, the legal consistency and appropriateness of the alleged crime and the foreseen provisions of the law to be implemented, and the relationship established between the acts alleged to constitute the crime and the existing evidence, all of which are of fundamental importance in terms of all indictments. While these three main points are being evaluated, the basic principles of criminal law and the ECtHR case law and especially the ECtHR judgement dated 22.12.2020 on Demirtaş v. Turkey[3] will inevitably serve as a compass. For, despite all the unique aspects resulting from Demirtaş's identity as a Member of Parliament, the decision should be considered a holistic assessment of the espoused judicial practice in Turkey for some time now. Specifically, it should be noted that the following section in the aforementioned decision is of particular

[3] ECtHR Grand Chamber, Demirtas v. Türkiye (no.2); Dated 22.12.2020 and application number 14305/17.

importance in terms of both this indictment and other indictments examined within the scope of the project:

> . . .the Court attaches considerable weight to the observations of the intervening third parties, and in particular the Commissioner for Human Rights, who stated that national laws were increasingly being used to silence dissenting voices. The Court therefore considers that the decisions on the applicant's initial and continued pre-trial detention are not an isolated example. On the contrary, they seem to follow a certain pattern.[4]

When a pattern instead of an individual example is detected, and moreover, when this evaluation is expressed not by a reporter but directly by the most important organ of the ECtHR, then it is clear that a discussion of a systematic and continuous line of violations will come up. For this reason, it is clear that in order for effective indictments to be drafted in an integrated manner with an effective investigation process, primarily this pattern, which the ECtHR judgement refers to, and the subsequent interpretation and practices-that amount to systematic violations of rights and freedoms-need to be transformed.

As summarised under the subheading "Background" the crimes attributed to Ahmet Altan in the indictment were TPC Art. 309, 311 and 312 and TPC Art. 314/2 with the instrumentality of TPC 220/6. Following the decision of the Court of Cassation, the case continued under TPC Art. 314/2 in line with 220/7. Therefore, within the scope of the report, it is necessary to discuss the appropriateness of the legal characterisation in the indictment along with the framework evaluations regarding these types of crimes.

[4] ECtHR Grand Chamber, Demirtas v. Türkiye (no.2), parag. 428; Dated 22.12.2020 and application number 14305/17.

3.1. Can the Violation of the Constitution, or a Crime Against the Government and the Legislative Body be committed through expression?

In the fourth section of the indictment, the prosecution justifies the treating of the acts of the suspects within the scope of Articles 309, 311 and 312 of the TPC. This point is particularly important. Ahmet Altan was investigated, tried and even convicted under the Articles of 309, 311 and 312 of the TPC from the stage of the indicting to the verdict of the Court of Cassation, although the legal characterisation of the act was changed by the Court of Cassation afterwards. As registered by the decision of the Court of Cassation, the indictment examined is based on a false legal characterisation from the beginning to the end. In other words, the text examined makes a gross error in terms of the most fundamental element that an indictment must contain in order to be legally valuable.

The crux of the matter is how these types of crimes, whose elements are coercion and violence, could have been committed by a journalist, who is not alleged to have resorted to force and violence. In fact, the indictment has stated more than once that the alleged crimes can only be committed by using coercion and violence. However, the definition of the notion of coercion was later expanded atypically by the prosecutor to include expression and interpreted so broadly that it went beyond the essence of the norm to result in constraint and ignored the requirements of the ECHR regulation, Art. 18.[5]

The main claim of the prosecutor is that, “media outlets, which have the power to influence the society, achieve a joint control with its armed units over coup attempts.” Considering this allegation together with the referral items, one expects that the later stages of the indictment will reveal that the suspects went to the

[5] Bearing the heading “Limitation on use of restrictions on rights,” Article 18 of ECHR is as follows: “The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

streets by taking arms or tried to force some people to participate in the coup process by using physical force on them. However, the prosecutor did not once make such an allegation, nor did he mention in the indictment any acts of the suspects that fell within the scope of coercion or violence. Again, aside from sufficient suspicion, he did not submit any evidence that could lead, even in the smallest degree, to a suspicion in this direction. While the element of the crime is clearly "coercion and violence," it is indisputable that a crime cannot be committed under the articles related to an act that does not contain these two elements.[6]

When the indictment is examined, it is seen that the prosecutor makes an effort to overcome the "legal impossibility" here through interpretation. The relevant comment is as follows:

"For the reasons explained, it is understood that the suspects, who are the media wing of the terrorist organisation and who participated in actions in line with the perpetrators' objectives, who took part in the coup attempt by using physical coercion, by producing discourses and propaganda, which are a precursor to the term "coercion" that is the sub-element of the riot crimes and which cannot be considered separately, towards creating the political and social chaos environment that allegedly caused the act of the perpetrators; so that they are the main actors and along with committing the crime of membership to the armed terrorist organisation, they also committed the riot crimes.

However, both the text of the article and the rationale of the article that formulates the crime of coercion under the scope of Article 108 of TPC have a clarity that never

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[6] In the first version of the TPC draft, the statements of "coercion and threat" are included in the article text. During the negotiations on the draft, the text of the article has become in force today with the adoption of the motion to use the term "coercion and violence" instead of "coercion or threat." Although there are still debates on this subject in the doctrine, it is observed that in the relevant formulation and the discussions that preceded it, even the act of "threat," which can be accepted as the moral aspect of the act of coercion, is not accepted by the lawmaker among the elements of this crime. For more detailed information on this subject; Kenan Evren Yasar, CHKD, Vol: 2, Issue 1-2, 2014, https://dergipark.org.tr/en/download/article-file/14664

allows such an interpretation. By saying that "*coercion is the creation of a compelling effect on the will and behavior of a person or a third party by using physical force on a person,*" the related article's preamble establishes that it is not possible to commit a crime of coercion by writing or speaking. Again the formulation and the preamble of the Art. 108 of TPC not only excludes "discourse," it even forecloses an interpretation so broadly as to include the act of threatening.

In this context, it is established in a way that leaves no doubt that the acts taken as basis for the accusations against the suspects within the scope of the indictment are not fitting types of acts in terms of these crimes and that the indicting prosecutor's interpretation does not match up with the typical element of the crime.

The prosecutor's allegation that, by means of their acts made up of only words and writing, the journalist suspects have committed a crime whose elements are clearly defined as coercion - that is, a crime that is impossible to commit through these acts. Similarly, the prosecutor's grounds for the allegation, which is "expression and propaganda are the predecessor of the term [that is, of the act] of coercion." In fact, the prosecutor's allegation and reasoning should be assessed in conjunction with the act of "conveying subliminal message" that the prosecutor's warrant of arrest refers to. Because there is a dangerous parallelism between the legal interpretation made over the concept of coercion and the interpretation of subliminal messages that paves the path for an arbitrary intervention in rights and freedoms. The potential consequence of such an interpretation in judicial practice will be that any statement that harshly criticises government practices and/or demands structural change can be treated within the scope of the offence in question. And of course, in such a judicial practice, one can no longer speak of individual violations of freedom of expression and press freedom, but of the absence of freedom of expression and the press as a whole.

At this point, it is useful to recall Article 12 of the United Nations Guidelines on the Role of Prosecutors:

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

In the case under investigation, it is observed that Ahmet Altan has been subjected to a process that has resulted in his conviction for a crime impossible to commit through the acts described in the indictment, with regard to the principle of legality. In other words, the prosecutor carried out an investigation process that had to be carried out in line with a manner that would conversely lead to a successive and continuous violation of all fundamental rights and freedoms.

Going back to the indicting prosecutor's proposal, summarised as a question under the subheading within the scope of this report, it is necessary to underline that the existence of discourses that precede the act of coercion and the criminalisation of these discourses indicate two different phenomena. The existence of the latter depends only on the existence of a clear regulation in the law, and a counter interpretation would mean the elimination of all principles that have so far dominated the criminal law.

3.2: Evaluation Regarding the Attribution of Art. 220/6 (or Art. 220/7) of TPC in the Context of Sufficient Suspicion and Predictability

As quoted exactly from the indictment in the Background section, it was demanded that Art. 314/2 of the TPC be applied to Ahmet Altan through the instrumentality of the Art. 220/6 of the TPC. With the decision of the Court of Cassation, the intermediary verdict was determined to be Art. 220/7 instead of 220/6 of the TPC.

> Art. 220/6 of the TPC is as follows:
>
> Any person who commits an offence on behalf of an organisation, although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organization. (. . .)

According to Art. 220/7 of the TPC:

> Any person who aids and abets an organisation knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation. (…)

According to the legislation in force in Turkey, a basic condition of membership to an organisation is that the person is part of the organisational hierarchy. In this sense, both articles [although different explanatory clauses are used, such as not being a member of the organisation and being included in the hierarchical structure within the organisation] undoubtedly regulate the penalty provisions for the individuals, who are not members of the organization, as if they were members of the organisation. In the first situation, the person acts on behalf of an organisation of which s/he is not a member, while in the second s/he knowingly and willingly aids the organisation. Unfortunately, it is not clearly understood from the regulation itself which acts are within the scope of knowingly and willingly aiding the organisation, and which are within the scope of acting on behalf of the organisation. In this sense, both types of crime are separately drawn up in an extremely ambiguous way. However, in addition to this, it is not possible to tell from the norm what elements distinguish the two types of crime from each other.

The ECtHR has delivered a large number of violation judgements since the regulations in question are not foreseeable. For example, the ECtHR's judgement in the case of Işıkırık v. Turkey[7] in 2017 can be considered a verdict determining essential criteria about the structural problems inherent in, and the violations caused by the Art. 220/6 of the TPC, as well as being directly related to the examined indictment. In this judgement, the European Court of Human Rights carried out a thorough examination of the regulation of Art. 220/6 of the TPC reached a judgement of violation since the intervention arising from the relevant regulation was not

[7] ECtHR, Işıkırık v. Türkiye, Application No: 41226/09, 14.10.2017

foreseeable. The following observation in paragraph 63 of the decision should be read by accepting it as intrinsic to the indictment, which is also the subject of this report:

> As to the foreseeability requirement, the Court notes at the outset that the text of Article 220 § 6 of the Criminal Code tied the status of membership of an illegal organisation to the mere fact of a person having acted “on behalf” of that organisation, without the prosecution having to prove the material elements of actual membership. Furthermore, the wording of Article 220 § 6 of the Criminal Code did not itself define the meaning of the expression “on behalf of an illegal organisation.”

Again, the statements in paragraph 66 of the same decision point to the depth of the structural problem:

> The Court observes that the domestic courts have interpreted the notion of “membership” of an illegal organisation under Article 220 § 6 of the Criminal Code in extensive terms. The mere fact of being present at a demonstration, called for by an illegal organisation, and openly acting in a manner expressing a positive opinion towards the organisation in question, is sufficient to be considered acting “on behalf of” the organisation authorising the punishing of the person in question as an actual member. The Court notes in contrast that when Article 314 of the Criminal Code is applied alone, the domestic courts must have regard to the “continuity, diversity and intensity” of the acts of the accused (see paragraph 100 of the Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey of the Venice Commission, in paragraph 34 above), whereas when the same Article was applied in connection with Article 220 § 6, in the applicant’s case, he was convicted of membership of an armed organisation merely on account of his attendance at two public meetings, which, according to the first-instance court, were held in line with the instructions by the PKK, and his acts therein, that is to say, walking close to coffins and making a “V” sign during the funeral and applauding during the demonstration. Hence, the Court finds that when applied in connection with Article 220 § 6, the criteria for a conviction under Article 314 § 2 of the Criminal Code were extensively applied to the detriment of the applicant.

In its judgement in the case of Imret v. Turkey[8] in 2018, ECtHR this time conducted the discussion on unpredictability in the context of the regulation of Art. 220/7 of the TPC. Again the 250th paragraph of the ECtHR's Demirtaş v. Turkey is important as a recent example to understand the scope of the predictability debate:

> One of the requirements flowing from the expression "prescribed by law" is foreseeability. In the Court's view, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 of the Convention unless it is formulated with sufficient precision to enable people to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

The fact can clearly accepted that, in their present form, Art. 220/6 and Art. the 220/7 of the TPC contain an ambiguity that paves the way for arbitrary interference on rights and freedoms. In many cases these articles result in disproportionate sanctions - which directly concern the present indictment. The investigated indictment has preferred to fill the gap arising from the ambiguity in the norm with the widest possible interpretation against the rights.

Despite the prosecutor's clear preference and immense effort, there is still a gap in establishing the connection between the Art. 220/6 of the TPC and the concrete acts in the indictment. As can be understood from the text of the relevant article, the minimum requirement for the prosecutor to press such a charge was to compile and submit the evidence that would reveal sufficient suspicion that the alleged criminal acts had been committed "on behalf of the organisation." When the indictment is examined in this context, it is understood that the statements by Ahmet Altan on the program he appeared on the day before the coup attempt are made the basis for the application of Art. 220/6 of the TPC. It is necessary to briefly touch upon the comments in the indictment that focus on the program. In the indictment, a section

[8] ECtHR, Imret v. Türkiye, Application No: 57326/10, 10.07.2018

of said program is transcribed. In this section, Ahmet Altan, Nazlı Ilıcak and Mehmet Altan are seen to be speaking on Turkey's current political situation and Ahmet Altan is stating that the current political situation in Turkey is such as to prepare the ground for a military coup. Following a long quotation from the relevant program, the prosecutor has summarised his assessment of these statements in a paragraph as follows:

> It is seen that during a large section of the program they have made threatening and derogatory remarks about Recep Tayyip Erdoğan, the President of the Republic of Turkey and the authorities of the Government of the Republic of Turkey; and have said that the dealings and the practices these authorities are involved are unlawful, that they are committing a crime and paving the way for a military coup; and that the President is making the same decisions and re-opening the paths for whatever developments that enabled the past coups; and they have repeatedly stated that the President and the government will be overthrown and they will stand trial; and within this context they have stated that there will be a coup; and it is impossible for them to know about the coup attempt without thinking and acting in unison with the terrorist organization or to declare it one day before the coup in a way to shape the public perception; and that their objective is to justify the coup attempt . . .

In the next part of the evaluation made by the prosecutor, it was concluded that Altan's statements regarding administrative plans during the curfews in Cizre and other cities and districts were an operation of disinformation in favour of the PKK and FETÖ / PDY. Since the claim regarding the PKK is not repeated in the rest of the text and does not occupy a place in the gist of the accusation, it will not be evaluated.

The salient point in this section quoted is the following: The prosecutor actually summarises Altan's statements by adding his own interpretation [such as insults, threats] from the beginning of the paragraph up to the phrase *repeatedly stated that*. When not only the transcribed form of the statements but also this summary containing commentary is read, it is seen that Altan expresses a political opinion about the possibility that the political climate in Turkey and the government’s practices can lead to a coup, and that he harshly criticises the government’s policies

and says that in case of a coup, people responsible in the decision-making mechanism of the government can face trial. However, the prosecutor claims that the relevant discourse contains threats and insults. If the accusation in the indictment had proceeded along these two crimes, it would have made sense to examine the statements in this direction. Yet, it is seen that the prosecutor preferred to focus on the date of the speech rather than the content of the speeches in the indictment. In short, the prosecutor claims that it would not be possible for Altan to make these statements one day before the coup attempt, without knowing that there would be a coup. He also claims that the purpose of these sentences can only be to legitimise the coup. This claim is a weighty claim. The natural expectation of an "objective observer" in the face of such a weighty allegation will be that the indictment should reveal some evidence arousing the suspicion that Altan was aware of it on the day previous to the coup attempt.

It is possible to make a few more quick observations based on the prosecutor's quoted comment:

- First of all, nowhere in his assessment did the prosecutor claim that Altan had committed his acts “on behalf of the organisation.” The indictment refers to the existence of meetings with the organisation or certain units of the organisation on certain dates, or to issues such as Sledgehammer documents. However, the indictment is missing the answer to the question of what evidence there is, if only minimally sufficient to prepare an indictment, to set forth that Altan carried out his actions not in his own name but on behalf of the organisation. It is clear that there is no specificity in Turkey as to how to determine whether an act is committed on behalf of an organisation or not. However, when discussing a situation in which an act is committed on behalf of an organisation, it is clear by a simple reasoning that a specific (which is not a continuous and non-intense, non-hierarchical relationship) connection must be established between the organisation and the person performing the act. Otherwise, anyone who voices an opinion that is in line with the discourse of any organisation at any time may be accused of committing a crime on

behalf of the organisation. Such a broad practice will obviously lead to serious violations of rights. It is known that preventing such violations of rights is among the obligations of prosecutors. In essence, what the indicting prosecutor must do is to reflect the sufficient suspicion-of the crime in the indictment that Altan had committed his act on behalf of the organisation. However, the basis for such a suspicion cannot be understood from the indictment.

- When the details of the evaluation are examined, it is understood that the prosecutor tried to establish this link (act and organisation link) by way of the date of the statement. It is clear to the prosecutor that Altan had committed his act on behalf of the organisation, since Altan uttered these sentences the day before the coup attempt. In this case, the first element that makes Ahmet Altan suspicious in the eyes of the prosecutor is "coincidence." The fact that such temporal coincidences may prompt prosecutors to conduct an investigation will not be objected to in most cases. However, the gap still remains in place. In this case, the duty of the prosecutor, who has a slight suspicion nourished by coincidence, is to investigate whether there are additional facts to support this coincidence that arouses his suspicion. For coincidence may be enough to have suspicion, but it is a fundamental principle that this suspicion must be a sufficient suspicion backed up by evidence in order to demand punishment on behalf of the public.

- Another point to dwell on is the prosecutor's tacit allegation that Ahmet Altan knew about the coup. According to the prosecutor, it is not possible for Altan to commit this act "without knowing that there would be a coup." In this case, it is necessary for the Prosecution to reveal how Altan was informed about this situation, or at least how it was believed that he had foreknowledge. Otherwise, anything ranging from an analysis of a political or academic nature to a simple prediction may be under suspicion simply because of a temporal

overlap. At this point, it is important to recall paragraph 314 of the ECtHR's Demirtaş v. Turkey judgement:

> Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will, however, depend on all the circumstances (see Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, § 32, Series A no. 182; O'Hara v. the United Kingdom, no. 37555/97, § 34, ECHR 2001-X; Çiçek v. Turkey (dec.), no. 72774/10, § 62, 3 March 2015; Mehmet Hasan Altan, cited above, § 124; and Şahin Alpay, cited above, § 103).

In short, uttering a sentence on a certain date alone does not make a suspicion sufficient. The meaning attributed to coincidence by the prosecutor in the investigated indictment is so broad that it cannot possibly overlap with the principles of criminal law, and it confines all judgement to the field of interpretation.

4: Conclusion

In the third subheading, it is established that the legal characterisation of the crime was clearly erroneous, and the principle of typicality was ignored, and there was a significant gap in establishing the relationship between the act and the allegation. In addition to these findings, the "absence" of sufficient suspicion, which we must accept as the basis of an indictment, has been emphasised.

It is believed that citing some of the evidence submitted against Ahmet Altan in the file will make contributions to the intelligibility of the indictment. In addition to the television program that Altan attended the day before the coup, his writing an article on the haber.com.tr news website was also cited as evidence against him. Similarly, 3 separate articles written by Altan were accepted as evidence of criminal activity. Further evidence submitted were the fact of another trial pending against Altan, telephone conversation records from 2010 to 2012-2013, the contents of which are not included in the indictment, and trade registry information, which could not be

linked either to the context of the story or the allegation. In conclusion, it is seen that the majority of the evidence submitted are activities within the scope of journalistic activities, and those outside these categories are not temporally related to the crimes subject to the indictment. The fact that the ongoing proceedings against Altan regarding the Sledgehammer documents are predominantly presented as evidence against him also points to a problem. The fact that a person's trial for another act is proceeding does not constitute sufficient suspicion that he has committed a concrete act. Cited as a guide, paragraph 330 of the ECtHR's Demirtaş v. Turkey judgement is important in this sense:

> The Diyarbakır 2nd Magistrate's Court found that the number of ongoing criminal investigations in respect of the applicant for terrorism-related offences made it possible to conclude that there was a strong suspicion that he had committed the offence of membership of an armed terrorist organisation. In the Court's view, a vague and general reference to other investigations being carried out by public prosecutors can on no account be deemed sufficient justification of the reasonableness of the suspicion on which the applicant's pre-trial detention was supposed to have been based.

Again, while evaluating the whole indictment in terms of evidence, the following observation in paragraph 280 of the Demirtaş v. Turkey judgement must be taken into consideration:

> In the Court's view, such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.

In conclusion, this indictment has accepted evidence (such as newspaper articles, speeches) that cannot be based on the committing the crime defined in law, and has accepted additional evidence that is not related, either temporally or to the subject of the allegation, as the basic basis of sufficient suspicion. It is crucial to underline repeatedly that 1) Based on these pieces of evidence, it is impossible to commit the crimes found under Art. 309, Art. 311 and Art. 312 of the TPC 2) and again, while it had to be presented in such a way as to form sufficient suspicion that the crime was

committed on behalf of the organisation in order to get to Art. 314/2 of the TPC in line with Art. 220/6 of the TPC, there isn't any explanation about this in the indictment. It is known that the application of Art. 314/2 of the TPC in such a broad sense result in violation of Art. 10 of ECHR in many cases. While there is no mention of sufficient suspicion in the indictment, the fact that the entire investigation process was under pre-trial detention demonstrates that there are multiple violations under Article 5 of ECHR.

The sentence demanded for Ahmet Altan in the indictment was not mentioned throughout the report; the public prosecutor demanded that Ahmet Altan should receive 3 times life sentences and 2 times 7.5 years of imprisonment. A prosecutor is expected to act with extraordinary care - regardless of his political opinion - when demanding a punishment that a human life will not be long enough to complete. However, the indictment we have examined gives the impression that it was written with a conviction that every individual uttering of a sentence against the government within the borders of the Republic of Turkey must face trial. In this sense, it is possible to follow the concrete projections of the observation about a "pattern" made in the Demirtaş v. Turkey judgement in this indictment. Unless a practice aiming to eliminate this pattern is followed, it will not be possible to talk about a judicial practice in Turkey that focuses on human rights or a democratic society.