Interfering with Free Speech and the Fate of Turkey

The Criminal Defamation Case of Ekrem İmamoğlu

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On 21 April 1998, the then mayor of İstanbul, Recep Tayyip Erdoğan was sentenced to one year (subsequently reduced to ten months) in prison and a hefty fine by the State Security Court of Diyarbakır for "incitement to hatred and hostility on grounds of religious discrimination". His criminal act was that of reading two provocative verses from the poem "Divine Army" by Cevat Örnek ("*the minarets are bayonets, the domes are helmets / mosques are our barracks, the faithful our soldiers*") during a rally of the Islamist Welfare Party (of "Strasbourg fame") in 1997. After serving four months of his ten-month prison sentence and having his "political ban" lifted, Erdoğan emerged as the leader of the "pro-Western wing" of Turkey's Islamist movement and his new Justice and Development Party (hereinafter AKP) came to govern Turkey for two decades with an iron fist.

Twenty-five years after the aforementioned rally, Turkey experienced a free speech case involving another conservative-leaning political figure on the rise: on 14 December 2022, İstanbul's mayor Ekrem İmamoğlu was sentenced by İstanbul's 7th Criminal Court of First Instance to a term of imprisonment of two years, seven months and fifteen days for criminal defamation which, if finalised, will also consist of a "political ban". The timing of the verdict and the prospect of a "political ban" came as a surprise to the prominent figures of both the opposition and the ruling AKP since the opposition was on the verge of declaring its presidential candidate for the fateful elections in 2023 – not to mention the fact that İmamoğlu has been one of the favoured presidential candidates of the opposition's right-wing components. The İstanbul court's interpretation of the facts of the case also drew criticism in that İmamoğlu was sentenced for uttering the same word ("fool") that was directed against him by the Minister of the Interior, Süleyman Soylu, and the İstanbul court did not properly apply the "condition of clarity in attribution" (*matufiyet şartı*).

Due to the deeply political nature of the case, it is impossible to avoid the non-legal ramifications of this first-degree judgment. Nonetheless, the case of İmamoğlu is not an unprecedented interference with political speech in Turkey even though having a more profound impact on the future of Turkish politics. Thus, it is of primary importance to stress that the İstanbul court ignored reasonable grounds to acquit İmamoğlu while underlining that a potential conviction would result in an illegitimate interference with the right to freedom of expression within the framework of international human rights law.

The İstanbul Court's Judgment and Its Basis in Turkish Law

The series of events which led to the prosecution of İmamoğlu began when he travelled to Strasbourg to address the Council of Europe's Congress of Local and Regional Authorities. There, he argued that President Erdoğan had shown utter disregard for pre-election restrictions and stated that the AKP had sought to erase the electoral defeat in İstanbul via the Supreme Election Council (hereinafter YSK). His comments drew the ire of Turkey's "fiery" Minister of the Interior, Süleyman Soylu, who called İmamoğlu a "fool" for "ratting on Turkey before the European Parliament (*sic*)". İmamoğlu fired back during an interview on the same day and stated: "I hereby invite Soylu to act like a statesman. [...] The real fools are the ones who embarrassed us (as a nation), those who annulled the result of the (mayoral) election on 31 March", referring to the "first" mayoral election which he had won by a

small margin, only to score a landslide victory in the renewed election.

In short, İmamoğlu's remarks hinted at the perceived lack of independence of the YSK and constituted a reply to Soylu. However, the remark was deemed defamatory against the members of the YSK, which led to a consequent investigation on grounds of "defamation of public officials in the form of a commission."

A clarification needs to be made in this regard: even though the "defamation of public officials" is defined under the same article as general (criminal) defamation in the Turkish Criminal Code of 2004 and both offences have the common aggravating circumstance of "public commission", the former has distinct qualities. In that respect, three aspects ought to be mentioned:

- In order to determine whether a defamatory statement can be considered within the framework of "defamation of public officials", said statement must relate to the official duties of a public official. In other words, any defamatory statement concerning a public official's private life would fall under general defamation.
- Unlike general defamation, the "defamation of public officials" is an *ex officio* offence.
- When a "defamatory" statement is made against a group of public officials in the form of a commission, the statement is considered a "successive offence" (*zincirleme suç*, borrowed from the Italian *concorso di reati* – specifically *concorso formale omogeneo* in this case) and the lower limit of the envisaged penalty cannot be less than a one-year term of imprisonment. However, the İstanbul court could have assessed the case as "mutual defamation" since İmamoğlu was arguably replying to Soylu's remarks. Such an interpretation of the facts could have allowed the İstanbul court to refrain from punishing İmamoğlu, especially since the word "fool" does not relate to the official capacity of Soylu. Furthermore, given that İmamoğlu had not mentioned the YSK once in his speech, it is difficult to presume that İmamoğlu had clearly targeted the institution with the word "fool".

Evidently, the İstanbul court did not view the facts of the case accordingly: as one can gather from the detailed ruling (in remarkably poor Turkish) released on 28 December 2022, the prosecution's arguments as to the commission of an act of "public and successive defamation of a group of public officials in the form of a commission" were largely upheld by the İstanbul court. To "add salt to the wound", the public nature of the so-called "criminal act" and the İstanbul court's explicit insistence on "moving away from the lower limit" on the basis of the provisions related to "successive offences" have conceived a relatively lengthy prison sentence.

What may sound more surprising to the foreign reader is the so-called "political ban" attached to an eventual conviction. In Turkish law, "political bans" are implemented when an individual is convicted and sentenced to a term of imprisonment of at least a year for the intentional commission of an offence. The "ban" itself consists of a prohibition concerning the exercise of political rights such as voting, holding a public office or being nominated for one. In other words, if convicted, İmamoğlu would not be able to maintain his status as mayor of İstanbul let alone become the opposition's hope against Erdoğan. In essence, this measure does not differ much from those envisioned in (*inter alia*) the United Kingdom's Representation of the People Act 1981 (also known as the "Bobby Sands Act"), the Local Government Act 1972 or the Local Democracy, Economic Development and Construction Act 2009 – which is why it is unnecessary to "draw a line" between a "democratorship" and an "advanced democracy" in this respect.

Nevertheless, it must be stressed that the İstanbul court's judgment is not final as both İmamoğlu and the prosecution lodged an appeal. However, this does not impede us from dwelling on the human rights implications of a potential conviction.

Defamation and Political Speech under International Human Rights Law

Prima facie, one must consider that the majority view among human rights scholars is that defamation should not be a matter of criminal law. As a matter of fact, the UN Human Rights Committee (hereinafter HRC) and the Venice Commission have repeatedly advised states to consider the decriminalisation of defamation whereas the European Court of Human Rights (hereinafter ECtHR) has taken a somewhat nuanced approach despite the Council of Europe's alignment with the HRC. However, with regard to matters of public interest and individuals under public scrutiny, the ECtHR's approach has been much closer to the other bodies specialising in international human rights law.

The early case of *Oberschlick v Austria* (no. 2) is a fine example in that regard, as the applicant had been convicted for using a word similar to the one used by İmamoğlu (namely 'Trottel' which can be translated as "idiot" or "fool") against the then leader of the Austrian Freedom Party due to the latter's comments as to how Nazi soldiers had "fought for freedom". In ruling that there had been a violation of Article 10 of the European Convention on Human Rights (hereinafter ECHR), the ECtHR had stressed that the applicant's statement had "factual basis" as he referred to a previous statement by a politician and that the applicant had "sought to draw the public's attention in a provocative manner" to the politician's equally provocative statement.

It can be said, however, that the ECtHR's landmark judgment in *Lingens v Austria* had laid the foundations for cases like *Oberschlick*. Indeed, in *Lingens,* the ECtHR had notably held that "the limits of acceptable criticism are [...] wider as regards a politician as such than as regards a private individual" since a politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed". This ruling was later cited by the representatives of applicants from Turkey such as the Marxist student activist Ömür Çağdaş Ersoy who had been convicted for "defaming" the then PM Erdoğan, only to win the case in Strasbourg. Beyond the realm of criminal law, the same principle has also been applied in defamation cases arising from civil lawsuits: case in point, both the late socialist journalist Erbil Tuşalp and the leader of the Republican People's Party (hereinafter CHP), Kemal Kılıçdaroğlu, had lost civil lawsuits brought against them by Erdoğan before the ECtHR ruled that civil sanctions amounting to large sums could also result in illegitimate interferences with free speech.

Of course, the link between the case of İmamoğlu and the aforementioned judgments is rooted in the hypothesis that İmamoğlu had replied to Soylu. Nevertheless, even if one is to presume that the word "fool" had targeted the YSK, it is important to note that the ECtHR deems the harsh criticism of constitutional institutions under the protection of Article 10 ECHR. Moreover, in the case of *Belpietro v Italy*, the Strasbourg court ruled that the sanction of imprisonment constituted a disproportionate interference with an editor's right to freedom of expression in a case involving the criminal defamation of (*inter alia*) prosecutors, underscoring that "the limits of permissible criticism may in some cases be wider for public officials acting in the exercise of their powers than for private individuals."

Considering the circumstances of İmamoğlu's case, it is clear that a prison sentence for defamation may culminate in yet another Article 10 application against Turkey. This is not the whole picture, however, in that a conviction may also illegitimately interfere with İmamoğlu's rights under Article 3 of Protocol no. 1 to the ECHR – since interferences with opposition figures' right to free speech requires particularly stringent scrutiny and charges brought against them should not (in principle) be directly linked to their political activity.

Potential Political Outcomes and the Prospect of a "Beneficial SLAPP"

From a human rights standpoint, it may be possible to label "the İmamoğlu case" as the result of a strategic lawsuit against public participation (abbr. SLAPP). However, a brief look into Turkey's political history would show that SLAPPs usually "work" against

impoverished progressives whereas conservative figures like Erdoğan have been able to benefit from their "judicial martyrdom". Ironically, in an Erdoğan-like move, the pious contractor İmamoğlu had held a liturgy in the mayoral office following his "second" electoral victory and his presidential candidacy has reportedly been supported by the pan-Turkist/Turanist (Jobbik-like) Good Party led by Turkey's "iron lady" Meral Akşener. By contrast, İmamoğlu's own party, the CHP, openly supports the candidacy of Kılıçdaroğlu – a position shared by İmamoğlu himself.

Notwithstanding the fact that İmamoğlu may politically benefit from this "SLAPP", the legal risks are far too great for his candidacy: regardless of the outcome of the proceedings, İmamoğlu's candidacy would result in the AKP seizing the mayorship of İstanbul via its majority in the municipal assembly and a conviction might leave the opposition without a candidate in midst of an electoral campaign. This leaves Kılıçdaroğlu, an Alevi from Tunceli province, as the only viable candidate – especially since he can potentially win over the votes of the left and the "king-making" Kurdish voters.

The opposition may be far from signalling a return to the golden era of *laïcité de combat* under founding father Mustafa Kemal Atatürk; however, what is left of Turkish democracy cannot bear another heavy-handed attempt at silencing the opposition – hence the necessity to advance a consistent human rights argument in opposing the victimisation of İmamoğlu.

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