İFADE ÖZGÜRLÜĞÜ DERNEĞİ

Third Party Intervention

In the Case of Leyla Birlik v. Turkey (no. 54468/18)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

An independent non-governmental organization specialized in defending and promoting freedom of expression

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

Introduction

1. İfade Özgürlüğü Derneği (İFÖD) is of the opinion that the Leyla Birlik application cannot be evaluated and understood **without considering the general political context in Turkey**. Therefore, **lifting of immunities of the MPs** by an unprecedented provisional constitutional amendment and systematic persecution of HDP members and deputies can only be understood by considering this political context. The persecution of the HDP MPs started after HDP's election success on the general elections on 7 June 2015 and aimed to weaken the rapidly growing HDP. Therefore, in order to evaluate whether the applicant's arrest and detention was arbitrary, whether there was an effective remedy in the domestic law which should be exhausted by the applicant before lodging an individual application before the European Court of Human Rights and whether detention of the applicant pursued an ulterior purpose other than envisaged by the Convention, **the general political situation, the conditions surrounding the lifting of legislative immunities, the state of human rights and the general condition of the judiciary and relations between the judiciary and the executive and the oppression faced by dissidents in Turkey should be portrayed clearly**. In this intervention, **İFÖD will confine its comments predominantly on the fifth question**, namely, **whether the deprivation of liberty imposed on the applicant in this case was applied for any purpose other than that envisaged by Article 5 of the Convention, in breach of Article 18** (Rasul Jafarov c Azerbaijan, No. 69981/14, §§ 153-163, March 17, 2016).
2. İFÖD believes that the arrest and detention of Leyla Birlik who was an MP and member of the HDP **was not an isolated incident**, rather, it was part of a systematic political and judicial harassment policy against the rapidly growing opposition party following the June 2015 general elections in which the ruling Justice and Development Party (AKP) lost its parliamentary majority for the first time after 13 years single party government. In order to retain power and to regain majority in the parliament, the president prevented establishment of a coalition government and called for snap re-elections. In this process the democratisation or peace process was terminated, and armed clash was intensified between security forces and PKK. So, without portraying this political background, the environment surrounding the detention and prosecution of the applicant cannot be duly understood. In this intervention, firstly, an overview of political and legal developments in Turkey in recent years will be provided briefly to show how anti-terror legislation has been abused to criminalise and to silence any dissents including opposition MPs.

Background Information on the Political Atmosphere in Turkey

3. Before 2015, no pro-Kurdish political party could exceed 10% election threshold, the highest in Europe. Until 2015, the Kurdish parties did not compete in elections as a party, but by independent candidates. Indeed, in 2011 general elections, independent candidates all over Turkey got 6,57 of votes. However, after the establishment of HDP, the party changed the strategy of previous pro-Kurdish parties and achieved to reach different parts of society, including minorities, socialists etc.
4. In 7 June general elections, HDP exceeded 10% election threshold by receiving 13.6 per cent of the votes nationally and winning 80 seats in the Turkish Parliament. This was the first time that a political party with predominantly Kurdish leftist politicians achieved

representation as a mainstream political party in the Turkish Parliament in Turkey's history. Consequently, and significantly, the AKP lost its majority to establish a government in the Parliament for the first time since 2002 due to the success of HDP overcoming the 10 percent election threshold. Following this election, altering AKP's dominance in parliament for the first time since it came to power in 2002, President Erdoğan called for a snap re-election to take place in November 2015 on the grounds that it had not been possible to form a coalition government.

5. President Erdogan, continuously accused of the HDP for the incidents and escalation of violence in this period, framing them as terrorist collaborators. On 28 July 2015, President Erdoğan stated: "*I don't approve closing down political parties. However, deputies of the Peoples' Democratic Party (HDP) should pay the price one by one. The parliament should do what is needed and remove their parliamentary immunity shields. If people collaborate with a terrorist organization, they pay the price*". [1]
6. Yet, the HDP succeeded in passing the 10 percent threshold once again in the November 2015 elections and gained 59 seats at the Parliament. This was a radical change in the Turkish politics. The strong presence of the HDP in the Turkish politics directly affected the ruling party. As the main opposition party received less than 3% of votes in the region, AKP was receiving disproportional seats in predominantly Kurdish populated provinces due to the threshold. The role of HDP in big cities where large Kurdish population lives, such as İstanbul, cannot be underestimated. In İstanbul, HDP got %12,60 votes and 11 seats in the Parliament.
7. It was against this background the criminal investigations brought against HDP MPs was accelerated. Following the success of the HDP, President Erdoğan started publicly to accuse the HDP members. It can be observed that following the President Erdoğan's statements, the number of preliminary investigation files (fezleke) prepared by prosecutors and transmitted to Parliament against the members of HDP increased exponentially in 2015 and 2016. According to the Ministry of Justice records there were a total of 330 preliminary investigation files before the Parliament on 15 December 2015. 182 of these were related to HDP MPs covering the full period of eight years between 2007-2015. For the same period there were 110 files concerning the MPs of the second largest opposition party CHP, 36 files concerning the AKP MPs and 10 files concerning the MHP MPs.
8. On 2 January 2016, President Erdoğan said '*HDP MPs should go to prison*.'[2] Between 15 December 2015 and May 2016, the number of preliminary investigation files against HDP MPs before the Parliament almost tripled, reaching 510 files by May 2016. Between April and May 2016, 154 files were sent by prosecutors to Parliament against HDP members. The number of preliminary investigation files went up from 110 to 195 for the CHP (the largest opposition party) from 36 to 46 for AKP and from 10 to 20 for MHP in the same period. The number of preliminary investigations against HDP members increased from an average of 1.9 per month over the period 2007-2015 to an average of 73 files a month between January and May 2016. These preliminary investigation files all concerned political speeches by

[1] Statement by President Erdoğan, 28 July 2015, Ankara, available at http://www.cumhuriyet.com.tr/haber/turkiye/332325/Erdogan_cozum_surecini_bitirdi_HDP_lilerin_dokunulmazliginin_kaldirilmasini_istedi.html

[2] Statement by President Erdoğan, 2 January 2016, on plane returning from his official visit to Saudi Arabia to Ankara, available at https://www.bbc.com/turkce/haberler/2016/01/160102_erdogan_hdp

parliamentarians. The most common charge against HDP MPs is terrorist propaganda followed by violating the law on assemblies. Both of the laws that underpin these charges and their employment have been reviewed and found to be not fully compatible with the Convention by ECtHR on numerous occasions.[3] Considering that these investigation files have been prepared by different prosecution offices around the country, it seems that all operation was conducted by a central power.

9. Following the huge increase of preliminary investigation reports by prosecutors sent to the Parliament concerning HDP politicians in March 2016, President Erdoğan called on the Parliament to conclude the immunity issue saying that: "*We should immediately conclude the immunity issue. The Parliament should rapidly take a step for it. We cannot discuss whether we lift the immunity of one MP, or two. We should adopt a principle. What is this principle? The ones who cause the death of 50-52 people by getting my Kurdish brothers to pour into the streets will not be prosecuted and they will show up at the Parliament and my people will overlook the matter, is that so? If the Parliament does not take necessary action, this nation and history will hold it accountable.*"[4] In April 2016, referring to the number of preliminary investigations by the prosecutors, he said, "*There are 550 dossiers requesting prosecution. They should be addressed as soon as possible. Afterwards, those who are found guilty should serve their sentences. Politics shouldn't be a barrier to these prosecution dossiers. The judiciary takes the necessary action*".[5]
10. Afterwards, a constitutional amendment bill adding a provisional article to the constitution stipulating to lift parliamentary immunities was proposed. On 20 May 2016, the bill was adopted, and the parliamentary immunities were lifted as a one-off and retroactive measure, only relating to all the existing files against members of Parliament. During the debates on lifting of immunity, one argument put forward in favor of a one-off measure was the sheer number of preliminary investigation reports that come before the Parliament and the number of parliamentary hours it would take to review 561 reports one by one.
11. In its report, the Venice Commission stated that this amendment was not only an ad hoc regulation but also could be characterized as a piece of ad hominem legislation.[6] The Venice Commission also added that "As all ad hominem legislation, the Amendment is also problematic from the point of view of the principle of equality. The distinction between the 139 deputies on the one hand, and all earlier cases as well as the cases which arose since adoption of the Amendment on the other hand, cannot be justified with the workload of the Assembly. The Amendment violates therefore the principle of equality".[7]

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[3] Cf. Department for the Execution of the Judgments of the European Court of Human Rights Turkey Country Factsheet, available at https://rm.coe.int/tur-eng-fs4/1680709767

[4] Speech by President Erdoğan, 16 March 2016, Ankara available at https://t24.com.tr/haber/cumhurbaskani-erdogan-muhtarlar-toplantisinda-konusuyor,332319

[5] Speech by President Erdoğan, 11 April 2016, İstanbul, available at http://www.cumhuriyet.com.tr/haber/turkiye/513635/Erdogan__Yargilanacaksin_kardesim_ya_.html and https://www.yeniakit.com.tr/haber/erdogandan-dokunulmazliklarla-ilgili-sert-sozler-160925.html

[6] (European Commission for Democracy Through Law (Venice Commission), Opinion on the Suspension of the Second Paragraph of Article 83 of the Turkish Constitution (Parliamentary Inviolability), Adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016) Opinion No. 858 / 2016 CDL-AD(2016)027, para. 73 et seq.

[7] Ibid, para. 75.

12. Turkey witnessed a failed coup attempt on 15 July 2016 and a state of emergency were declared on 20 July 2016 and it lasted two years. Under the emergency rule, on 4 November 2016, the Prosecutors' offices in four different cities in Turkey - Şırnak, Hakkari, Bingöl and Diyarbakır - raided the houses of HDP MPs, including the applicant. Given that the all those investigations were independent investigations conducted by different prosecutors and there was no causal relation with one another, the only plausible explanation for multiple raids at the same time on the homes of members of parliament is that they were done under central instructions. Ms. Birlik was also arrested and detained on the same day on the charges of being member of a terrorist organization based on her speeches criticizing curfews and operations for violations of human rights and her participation of gatherings or funerals of civilian people died during the curfews.
13. While not a single member of ruling parties, namely AKP and MHP, has been detained following the Constitutional amendment, all but four MPs of HDP have been indicted, detained and convicted for serious prison terms. Mayors of the same party as well as many other leading figures have also been prosecuted and convicted. Although politicians were accused for terrorist crimes, none of them was indicted for violence. Almost all of their acts, which were the subject of the investigations, were essentially giving press briefings, attending funerals and marches of protest which fall within the scope of the right to freedom of expression and freedom of assembly.
14. The Constitutional Court has found inadmissible all cases of MPs challenging the lawfulness of their detention, with two exceptions, Ayhan Bilgen and Meral Danış Beştaş. However, the reason for those two exceptional decisions was that the courts had not taken the alibi defences of the applicants into consideration.[8]
15. It is considered that the rapid and continuing criminalisation of the HDP and its members, following the party's success in the 7 June 2015 election cannot be seen as an ordinary court work. These political and legal developments relating to HDP and its members are not independent of broader political and legal context in Turkey. So, broader political context and the state of fundamental rights and the rule of law should also be considered.

Deterioration of Fundamental Rights and the Rule of Law in Turkey in Recent Years

16. İFÖD observes that the state of human rights, the rule of law and independence of the judiciary deteriorated drastically within the last five years in Turkey. This has resulted with Turkey becoming one of the worst performers in the world in terms of freedom of assembly, freedom of expression and media freedom, as reflected in recent international reports. In 2016, Reporters Without Borders (RSF) ranked Turkey 151st of 180 countries in their World Press Freedom Index. In 2017, Turkey ranked 155th and 157th in 2018. Similarly, Freedom House classified Turkey as a 'partly free' country ranking it 156th in its 2016 media freedom index with a 20point decrease in score compared to 2010. In April 2017, it was announced that Turkey had fallen to 163rd in the global index. In January 2018, Turkey was ranked 154th and classified as 'not free' for the first time. Finally, in the most recent Freedom in The World 2019 Report, Turkey's total score was 31 out of 100 points and continued to be in the "not free" category. The country report indicated that "*the government has cracked down on NGOs since the coup attempt, summarily*

[8] Meral Danış Beştaş (2) app., no. 2017/5845, 4.7.2018, 1st Chamber; Ayhan Bilgen app., no. 2017/5974, 21.12.2017, Grand Chamber

shutting down at least 1,500 foundations and associations and seizing their assets. The targeted groups worked on issues including torture, domestic violence, and aid to refugees and internally displaced persons (IDPs). NGO leaders also face routine harassment, arrests, and prosecutions for carrying out their activities."[9]

17. The crisis of rule of law and human rights in Turkey was also portrayed by the Rule of Law Index prepared by World Justice Project. While Turkey's overall score was 0.46 and ranking was 80th in 102 countries in 2015 Index, in 2019 Index Turkey's overall score has fallen to 0.42 points and its ranking became 109th out of 126 countries. In the category of fundamental rights, Turkey's score was 0.32 and ranked 122nd out of 126 countries. The lowest score was 0.06 in the sub-category of no improper government influence in the category of criminal justice. This finding of World Justice Project clearly shows that there is a widespread perception among both lawyers and lay people that government has improper influence over the criminal processes.[10]
18. The problems relating to freedom of expression is evident not only in reports published by NGOs but also in reports issued by interstate oversight mechanisms. The UN Special Rapporteur on the right to freedom of opinion and expression noted his concerns in his preliminary observations after his visit to Turkey in November 2016.[11] The Council of Europe's platform to promote the protection of journalism has also noted that Turkey has the highest number of alerts and that a large part of these involve imprisonment of journalists.[12] The Council of Europe Commissioner for Human Rights' *Memorandum on Freedom of Expression and Media Freedom in Turkey* published in February 2017, states that 'journalists have been among the most affected by the various forms of judicial harassment' and also that 'detention is the most visible and chilling form that this harassment has taken.'[13] The Memorandum also noted that 'the exceptional nature of remands in custody, and the need to provide clear legal reasoning in cases where they are necessary are not embedded in the practice of the Turkish judiciary.' It goes on to say that **many Turkish judges still continue to use the list of catalogue crimes in the Code of Criminal Procedure as grounds for detention without a careful examination of the remaining conditions of detention**. The Venice Commission also noted that without individualized decisions, and without the possibility of timely judicial review, "membership" of terrorist organizations charges and arrests without relevant and sufficient reasons, instead of restoring democracy may further undermine it.[14]
19. **İFÖD** completely agrees with these observations and **would like to emphasize that under these conditions an isolated approach to the case at hand may cause losing sight about surrounding conditions of the applicant's accusation and detention by public authorities**. Therefore, İFÖD would like to make following submissions to the Court with this intervention, **drawing upon its expertise as an organization specialized in defending and promoting freedom of expression**:
    - The broader political context in which the applicant was arrested and detained should be taken into account when evaluating whether her detention was arbitrary, whether there exists

[9] https://freedomhouse.org/report/freedom-world/2019/turkey

[10] https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced.pdf

[11] Preliminary conclusions and observations by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891

[12] Of the 500 alerts, 109 involve Turkey and 59 are classified as Level 1 alerts. Platform to promote the protection of journalism and safety of journalists: http://www.coe.int/en/web/media-freedom/all-charts

[13] Comm DH (2017)5, para. 79.

[14] Venice Commission, CDL-AD(2017)007.

an affective remedy in domestic law and whether the deprivation of liberty imposed on the applicant in the present case has been applied for a purpose other than that envisaged by Article 5 of the Convention, in breach of Article 18.

- The most important factor in the deterioration of the rule of law and human rights is the lack of judicial independence in Turkey. Independence of the judiciary has been curtailed to a significant extent in recent years and judiciary has been brought under the control of the executive.
- Anti-terror laws are interpreted very widely and vaguely to silence dissidents and civil society including opposition MPs.

Independence of the Judiciary in Turkey

20. Following the 2010 constitutional amendments, which changed the structure of the former judicial council (High Council of Judges and Prosecutors -HSYK) and introduced a partly election system, twice the list of candidates supported by the Ministry of Justice won the elections in 2010 and 2014. This means that majority of the members of the HSYK had the support of the executive and were prone to the demands of the executive. Not surprisingly, after each election new laws were adopted by the parliament changing the structure and increasing the number of the members of both the Court of Cassation and the Council of State. In recent years, four times (In 2011[15], 2014[16], 2016[1718] and 2017[19]) the number of the members of the both high courts and structure of them were substantially changed by the ruling AKP in order to take control of high courts.[20] In 2017, structure and name of the judicial council has been changed by a constitutional amendment (Law no 6771). This time, following the appointment of the new members of HSK, structure and functioning of the high courts changed again and 100 new members were appointed to the Court of Cassation and 16 new members to the Council of State.
21. In each of the above-mentioned interventions, government produced some excuses for the changes, but **it can clearly be seen that no excuse can justify four structural reform in the form and functioning of the high courts within six years**. In each of these reforms, conditions of eligibility to membership of a high court or eligibility to be elected as president or chamber president were **also loosened in order to appoint those people who are close to the ruling party**. After each election in the HSYK almost half of the all judges were appointed to another court or to another city.
22. The political impact on the judiciary has increased following the failed coup attempt on 15 July 2016. One third of the existing judges and prosecutors (more than 4250) were dismissed from office without any individual investigation by the then HSYK without giving a chance to defend themselves. The Council of Europe's Commissioner for Human Rights found that this situation created "*an atmosphere of fear among the remaining judges and prosecutors*."[21] The European

[15] http://www.hurriyet.com.tr/gundem/yargitay-ve-danistayda-daire-sayilarini-attiran-tasari-yasalasti-16982030)
[16] http://www.aljazeera.com.tr/haber/yuksek-yargida-cemaate-fren)
[17] https://www.ntv.com.tr/turkiye/yargitay-ve-danistay-uyeleriyeni-yargi-paketini-protesto-etti,OQGgmDIUVEyiXe-AR39izQ?_ref=infinite
[18] https://www.bloomberght.com/haberler/haber/1899437-cumhurbaskani-erdogan-yargitay-ve-danistay-kanununu-onayladi
[19] Emergency Decree Law (Decree no 696)
[20] http://www.diken.com.tr/ne-yeni-yargi-ne-de-yargiya-son-darbe/
[21] Abdullah Zeydan others v. Turkey, ECtHR, Application no. 25453/17 and others, Third party intervention by the Council of Europe Commissioner for Human Rights, Doc. CommDH(2017)33, 2 November 2017, para. 35

Commission also stressed that *"[t]hese dismissals had a chilling effect on the judiciary as a whole and risk widespread self censorship among judges and prosecutors. No measures were taken to restore legal guarantees ensuring the independence of the judiciary."*[22]

23. Therefore, İFÖD kindly requests the Court to take into the account the above-mentioned political developments and the fact that HDP and its members were specifically targeted by the President and also the situation of the independence of judiciary while evaluating the application.

Article 18 of the Convention and Burden of Proof

24. The Court revised its case-law regarding Article 18 in the judgment of *Merabishvili v. Georgia* (GC), no. 72508/13, 28.11.2017§§ 287-317). Accordingly, the mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under Article 18 is only warranted if the claim that a restriction has been applied for an ulterior purpose not prescribed by the Convention appears to be a fundamental aspect of the case (*Merabishvili v. Georgia* [GC], cited above, § 291).
25. When considering an allegation under Article 18, the Court establishes whether restriction on the rights and freedoms of applications were applied for an ulterior purpose, whether the restriction pursued a purpose both prescribed by the Convention and an ulterior one and if the latter is the case which purpose was predominant. The Court has regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bears in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law (*Merabishvili v. Georgia* [GC], cited above, §§ 292-307).
26. In *Merabishvili v. Georgia* the Grand Chamber further clarified the principles of handling evidence to scrutinise Article 18 claims. The starting point of the principles laid out by the Grand Chamber is that, as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion (*Merabishvili v. Georgia* ([GC]§ 311). The Court further established that the standard of proof is that of is "beyond reasonable doubt" and that standard has an autonomous meaning and is not determined by how national legal systems employ it. According to the Grand Chamber, such proof follows from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Circumstantial evidence comprises information about primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts can be taken into account, in particular, to shed light on the facts, or to corroborate findings made by the Court (*Merabishvili v. Georgia* ([GC], § 317). The level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake (*Merabishvili v. Georgia* ([GC], § 314 and *Aliyev v. Azarbaijan* § 203). When provided with circumstantial evidence, it is the Court's task to assess the probative value of each item of evidence before it

[22] European Commission, Turkey 2018 Report, Doc. No. SWD(2018) 153 final, 17 April 2018, p.23.

27. The judgment also affirms the *well*-established case-law to the effect that there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (para. 288).
28. The Court in its *Selahattin Demirtaş v. Turkey* (2) (no. 14305/17, 20.11.2018) decision depended on the following observations when reaching the conclusion that Article 18 of the Convention was violated in conjunction with Article 5: Although there was reasonable suspicion leading to applicant's arrest, the courts ordering extension of his detention failed to provide grounds that can be regarded as "sufficient" to justify its duration. The Court also found that there was political motive behind continued detention of the applicant as a co-leader of the second biggest opposition party in the parliament. When reaching this conclusion, the Court resorted to contextual analysis and considered the general political and social background to the facts of the case and the sequence of events emerging from the case file. Within this context, the Court depended on observations of independent international observers like the Commissioner for Human Rights, the Venice Commission, Amnesty International and the intervening third parties, that in view of the applicant's position on the Turkish political scene, the tense political climate in Turkey since 2014 and the speeches by the applicant's political opponents, among them the President of Turkey, it is understandable that an objective observer might suspect that the extension of the pre-trial detention of the applicant was politically motivated. The Court also took into account the opinion of the Commissioner for Human Rights, who stated that national laws were increasingly being used to silence dissenting voices (para 263-67).
29. Furthermore, the Court determined that **political nature of the applicant's detention was the predominant purpose underlying the repeated decisions to extend the applicant's pre-trial detention**. When reaching this conclusion, the Court made reference to the observations by the Commissioner for Human Rights, that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency (para. 270). The Court also observed that although the investigation in respect of the applicant had not been initiated in response to the speeches by the President of Turkey, it had been at least accelerated after he had given those speeches and stated that "the deputies of that party [the HDP] must pay the price". The Court decided, having regard to in particular the fact that the national authorities have repeatedly ordered the applicant's continued detention on insufficient grounds consisting simply of a formulaic enumeration of the grounds for detention provided for by law, that it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society (para. 272).
30. In the Selahattin Demirtaş case, the main point that lead the Court to find a violation of Article 18 was the pressure imposed upon the judiciary by the execution. In the light of these, **İFÖD would like remind to the Court its above-mentioned observations about the independence of the judiciary in Turkey** as almost in all cases the Turkish Government argues that all proceedings were carried out by independent judicial bodies. The presupposition that all the decisions regarding arrest and detention of the opposition MPs, journalists, civil society activists, human rights defenders and dissident were delivered by independent and impartial authorities in good faith seems very optimistic, considering the recent developments in Turkey and leaves individual rights unprotected and democratic values and the rule of law forlorn.
31. According to the established case-law of the ECtHR a separate examination of a complaint under Article 18 is only warranted if the claim that a restriction has been applied for a purpose

not prescribed by the Convention appears to be a fundamental aspect of the case. In cases regarding with the arrest or punishment of the opposition MPs, journalists, civil society activists, human rights defenders, and dissidents, there is always the problem of ulterior aim of public authorities to silence and punish critical voices. In authoritarian regimes, in most of the cases, public authorities aim to punish critical voices just because of their legitimate activities, but they accuse them of terrorism related crimes.

32. In such cases, it is always difficult for the applicants to prove that their detention or punishment is directly ordered by the executive. In such cases, a contextualized approach is critical to protect individual human rights, namely freedom of expression and freedom of assembly and association as well as democratic values and the rule of law that are founding principles of the Council of Europe. Especially, in countries where judiciary is effectively controlled by the executive or political organs, criminal law and criminal procedures are used as tools to silence critical voices and crackdown opposition by rulers in order to maintain their power. Therefore, a contextualized approach is necessary not only to determine whether there were other purposes that is not prescribed by the Convention, but also to evaluate whether the arrest or punishment is arbitrary and whether there exist an effective remedy in domestic law to challenge the legality of detention or punishment.

33. IFÖD would like to submit to the attention of the Court that the sequence of incidents portrayed in this intervention points to the emergence of multiple ulterior purposes of punishing and silencing dissidents and opposition MPs with an aim to decrease HDP's share of the vote. This crystallized in 2015-16 which was the critical period in which the government pursued an intensive campaign of harassment against the HDP politicians. The ulterior political purposes to weaken the rise of HDP as a political party in Turkish politics led to the lifting of parliamentary immunities in Turkey retroactively.

34. It should also be noted that lifting of parliamentary immunities by a provisional constitutional amendment retrospectively deprived the MPs of procedural guarantees provided by the Constitution and house regulations against lifting of immunity. Considering the constitutional guarantees provided to MPs and the protection of political speech under the Turkish Constitution and the Convention, **it was not foreseeable that HDP MPs would be arrested for political speeches they made as active members of the parliament during their term as elected representatives**. When defending a political view, MPs were fully entitled to think that they would benefit from the constitutional legal framework in place which provides the protection of absolute immunity for political speech and procedural constitutional safeguards. In particular, the legitimate expectations of an opposition MP should not be any less than an MP from the ruling government.

35. It should also be taken into account that there is a worrying problem in terms of freedom of expression and freedom of assembly and association that anti-terror laws are resorted to silence dissent voices and to crackdown civil society. Journalists, civil society activists, human rights defenders and opposition politicians are generally accused of being member of a terrorist organization or aiding a terrorist organization or even attempting to overthrow government and they are arrested and detained on the basis of their legitimate activities or opinions.

36. The Turkish domestic law requires the involvement of violence to punish expression related to terrorism. However, any kind of criticism against government policies or operations of security forces have been interpreted as terrorist propaganda or even membership to a terrorist organisation without providing any evidence showing the suspect had resort to violence or incited to violence. Judicial authorities do **not distinguish between content involving**

legitimate criticism of the government and content serving for the aims of the alleged terrorist organization. In most of the cases a correlation is established between the aim of the alleged terrorist organization to overthrow elected government and the suspects' criticism of the government and suspects are accused of terrorism related crimes. **This approach equalizes criticism of government with terrorist activity and leaves no room for democratic and critical opposition.**

37. Recently, ECtHR, found unforeseeable the application of Article 220/6 and 220/7 of the Turkish Criminal Code in concrete cases and ruled for the violation of Article 11 of the Convention in *Işıkırık v. Turkey, Bakır and others v. Turkey* and *İmret v. Turkey* cases.

Conclusion

38. As set out above, İFÖD provided an overview of the legal principles to be applied in cases concerning the rights guaranteed under Articles 5, 10, 11 and 18 of the Convention. The proper application of these principles is critical in periods where essential components of a democratic society, such as a freedom of expression and freedom of assembly and association are under threat. **Cases such as the present one represent an important opportunity for the Court to apply the strictest of scrutiny in such a context to ensure that opposition politicians, civil society activists, journalists, and outspoken critics are not subject to charges that are politically-motivated, unjustified with reference to the exigencies of the situation and repugnant to the obligations set out under the Convention**.

22.08.2019

İfade Özgürlüğü Derneği – İFÖD (Turkey)

Web: https://ifade.org.tr Twitter: @ifadeorgtr

İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.