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Third Party Intervention

In the Case of Necati Gültekin v. Turkey (no. 34161/19)

by

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Introduction

1. İFÖD will address in its intervention in the case of Mustafa Necati Gültekin v. Turkey (**No. 34161/19**) the issue of freedom of expression on the social media platforms. In this case, the applicant was detained and prosecuted for being a member of a terrorist organisation and for disseminating terrorist propaganda on account of two publications he had published on the Facebook platform. He was convicted for making propaganda of a terrorist organisation and sentenced to imprisonment for one year, six months and 22 days but the court suspended pronouncement of the verdict. At the same time, the applicant was also dismissed from civil service by an Emergency Decree. As will be shown in this submission, any kind of political criticism by anyone is responded harshly by public authorities in Turkey to silence fair critiques against the government which as a result stifles democracy and pluralism. It should be noted that this case cannot be considered as an isolated single incident, rather it is an example of the deterioration of freedom of expression in Turkey. It is submitted that the current case should be reviewed against this background.
2. The applicant complained of violation of his freedom of expression as a result of criminal proceedings. The Court asked to the parties whether the applicant's freedom of expression had been interfered, within the meaning of Article 10 § 1 of the Convention. And if so, whether this interference was foreseen by law and necessary, within the meaning of Article 10 § 2 (see *Faruk Temel v. Turkey*, no 16853/05, §§ 53-57, 01.02.2011 and *Belge v. Turkey*, no 50171/09, §§ 31, 34 and 35, 06.12.2016)? In particular, having regard to the content of the applicant's publications on Facebook, the context in which these publications took place and their capacity to cause harm and whether the national courts carried out in their decisions sufficient examination and balancing between the interests at stake in the light of the criteria set out and implemented by it in cases relating to freedom of expression? (*Gözel and Özer v. Turkey,* nos 43453/04 and 31098/05, § 64, 06.07.2010, and *Mart and others v. Turkey*, no 57031/10, § 32, 19.03.2019)?
3. The intervention will first provide the relevant European standards concerning limitation of freedom of expression and incitement to violence. Then the submission will discuss the compliance of domestic law and practice with these standards. Within this context, the problem of extensive interpretation of terrorism related legislation will be assessed. İFÖD will assess further whether the national courts, in their decisions carried out a sufficient examination and an adequate balance between the applicant's right to freedom of expression and other interests at stake in the light of criteria set out and implemented by it in cases relating to freedom of expression. Subsequently, an overview of legal issues surrounding social media postings and an assessment of the impact of such publications will be provided. İFÖD will therefore assess the important issue of whether the majority of comments published on social media platforms are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited in semi closed social media platforms such as Facebook. İFÖD will argue that **a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website**. Finally, the state of the freedom of expression in Turkey will be briefly sketched. This assessment is relevant to the Court's questions involving whether the applicant's freedom of expression has been breached.

The International Legal Framework Used to Limit Speech Associated with Terrorism

4. One of the most fundamental questions in international human rights case-law regarding freedom of expression is how to assess the link between freedom of expression and violence. The simple equation between freedom of expression and violence can be explained as follows: The purpose of antiterrorism regulations is to maintain public order by means of preventing possible acts of violence, however the restrictions introduced for this purpose have an extremely high potential of violating freedom of political speech, which should be afforded the widest protection. This is because, the offence type categorised as terrorism is directly linked to political demands. Hence, the problem should be viewed not as one of making a political demand, but as resorting to violence and threats to have those demands met. It is also the case that in each instance where violence is used to pursue a political aim, there are other groups who advocate the same political aim through peaceful means. Moreover, in most cases, there will inevitably be some communication between those groups who accept violence as a legitimate means and those groups who don't in pursuing the same political demands.[1]
5. The employment of violence by some groups to achieve an aim does not justify the restriction of legitimate demands. One of the most frequently voiced legitimate demands in these instances is the cessation of State violence. Needless to say, those who believe that State violence can only be resisted through violence can criticise violence being used by the State in an effort to legitimise their own view. Yet, this does not necessarily mean that everyone who criticises State violence or methods of combating terrorism is disseminating terrorist propaganda. Since political criticism in general and criticism against the State in particular should be afforded the widest protection under freedom of expression, a distinction should be made between political expression and statements that encourage violence.[2]
6. The categorisation of statements associated with terrorism as an offence is based on the argument that **it is not the statement itself but the effect that it causes which must be prohibited**. Since the restriction of speech is problematic in terms of freedom of expression as set forth in the international human rights instruments, **there is a necessity to determine the conditions under which a statement associated with terrorism can be restricted**. Firstly, one should determine what the word 'associated' implies, because a statement condemning terrorism is also associated with terrorism. The word 'associated' denotes, in this instance, that the statement should be one that endorses acts of terrorism or their purpose, since these are the kinds of expressions that are set forth as crimes. However, because this corresponds to an extremely wide scope, restriction of statements that fall under this category are also an exception. Acts described as terrorism are, at the end of the day, means to achieve a political aim. That which is prohibited is not the political aim sought or the act of defending that particular political aim but rather, the use of violence and threats to achieve it. Different from hate speech, **speech associated with terrorism is criminalised not because of its content but because of the causal link it**

[1] Kerem Altıparmak, Yaman Akdeniz, (2017), Academics for Peace: Defending Academic Freedom in times of Crisis Electronic copy available at: https://ssrn.com/abstract=3304626, p. 66
[2] C. Walker (2002), Blackstone's Guide to Anti-Terrorism Legislation (Blackstone, London), p. 18-19.

has with damage. One must therefore establish a causal link between an act of violence and the speech in order to impose a punishment.[3]

7. Such an assessment requires consideration of two separate elements: **The causality link** and **the temporal connection**. The first link has to do with the degree to which the speech caused the act. The second link has to do with the timing of the speech. In order to understand the link between any statement and an act of violence, an assessment must be made of these two elements. Using statements in such a way as to give rise to the commission of a crime would generally be regarded as complicity in criminal law systems and its penalisation would not pose a serious legal problem even in the absence of a separate legal regulation. The direct incitement to commit a crime is described as desiring and motivating a person to commit a certain criminal act and is against the law in many countries. On the other hand, indirect incitement to crime is not criminalised in many legal systems.[4]
8. **Two fundamental problems arise in the case of terrorism-related offences**. The first is general statements which are not associated with a concrete criminal act; the second is statements that indirectly incite terrorism. In both cases, in order for criminal sanctions imposed on such statements not to violate freedom of expression, a link must be established with the violent act. Since terrorist propaganda and incitement to terrorism are regarded as criminal endangerment crimes, they need not give rise to damage for there to be a link with violence; it would suffice for such acts to be of a nature that could incite or encourage any likely violent conduct in the future. This would mean that a test to be conducted in terms of freedom of expression would be one to determine the proximity between the statement and the act. States do not have unlimited discretion in regulating and setting forth this matter within the scope of criminal law. The limits are drawn by human rights conventions and the case-law of the bodies interpreting them.[5]
9. Article 12 of the Convention on the Prevention of Terrorism requires that the provisions of the Convention to be interpreted in accordance with human rights law.[6] So, the crime of terrorist propaganda should be regulated and implemented in compliance with the ECHR and other international human rights standards. Thus, even if proscription of propaganda activities can be viewed as legitimate for purposes of combating terrorism, it is clear that arbitrary, discriminatory, racist and disproportionate restrictions are a violation of international law.

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[3] Kerem Altıparmak, Yaman Akdeniz, *ibid*. p.67.
[4] Explanatory Report on the Council of Europe's Convention on the Prevention of Terrorism, para. 97.
[5] Kerem Altıparmak, Yaman Akdeniz, Ibid. p.67.
[6] Article 12 reads as follows: "Article 12
1- Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.
2 - The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment."

The ECtHR's Multi-Pronged Incitement Test

10. The **ECtHR has developed a complex balancing test in order to evaluate whether criminalization of an expression is legitimate**. The test takes into account the varying needs of different legal systems and grants a margin of appreciation to both the ECtHR and the State Parties. Although there are arguments that this approach leads to uncertainty, it would be safe to say that in most cases, the ECtHR's balancing test yields similar results to that of the "clear and present danger test". The ECtHR's 1999 judgments in cases against Turkey and its subsequent case-law where a balancing test is applied to determine the connection between speech and violence, take into consideration the person making the speech and the medium used. This balancing approach requires **a three-pronged cumulative test based on the formula "cannot be said to incite violence or construed as inciting violence":**
    - Does the assessment take into consideration who the expression is uttered by, on what subject and through which means?
    - Is there incitement to violence?
    - Is it likely that the speech will cause violence?
11. In other words, in order for speech to be lawfully restricted under the Convention, it must be an incitement to violence and there must be a likelihood of violence occurring as a result of such incitement. The ECtHR examines a set of factors to determine whether these two conditions are met.

The Speaker, the Content and the Context

12. The ECtHR judgment in the case of Zana v. Turkey (no. 18954/91, 25.11.1997) is one of those rare cases in which the ECtHR has found Turkey not to be in violation of the Convention with respect to sanctions imposed on terrorism-related statements. The Court took into account the ambiguity of the statement made by the applicant as well as his position as former mayor of Diyarbakır and the fact that the interview in which he made the statement was circulated in a national newspaper. It is safe to say **that since the Zana judgment, the ECtHR has moved from the more objective test of 'necessity in a democratic society' to a more perpetrator-focused incitement test**. Other than this important exception, all of the below-mentioned elements should be taken into consideration as the limit to restricting freedom of expression. These elements must be observed by the prosecutor when launching an investigation and by the judge when formulating a decision and a balance must be sought between the probable danger and the rights at stake.
13. There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. The limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries (*Erdoğdu and İnce v. Turkey*, no. 25067/94, § 50, 8.7.1999; *Başkaya and Okçuoğlu v. Turkey,* no. 23536/94, § 62, 08.7.1999; *Sürek v. Turkey* (no. 4), no. 24762/94, § 57, 08.7.1999; *Sürek v. Turkey* (no.2), no. 24122/94, § 34, 8.7.1999; *Yalçın Küçük v.*

Turkey, no. 28493/95, § 38, 5.12.2002; *Erdoğdu v. Turkey*, no. 25723/94, §§ 61-62, 15.6.2000). As pointed out in the Castells judgment, national courts should display restraint in resorting to criminal sanctions in cases of criticism against government authorities (*Castells v. Spain*, no. 11798/85, § 46, 23.4.1992). Such criticism, even if harsh, should be viewed as a part of political pluralism and freedom to impart one's opinion.

14. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. The public has the right to receive information and different perspectives on a subject (*Şener v. Turkey*, no. 26680/95, § 40, 18.7.2000; *Ceylan v. Turkey*, no. 23566/94, § 34, 8.7.1999; *Sürek v. Turkey* (no.1) [GC], no. 26682/95, § 61, 08.7.1999; *Sürek v. Turkey* (no. 3), no. 24735/94. § 37, 8.7.1999; *Gerger v. Turkey*, no. 24919/94, § 48, 8.7.1999). The public has a right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them, any interference with the right to freedom of expression must take into consideration the right of the public to receive information (*Erdoğdu and İnce*, § 52; *Sürek* (no. 4), § 58). Consideration must be given to the importance of the press in light of the public's right to receive information (*Sürek v. Turkey* no.4, § 55; *Sürek* (no. 1), § 59; *Sürek and Özdemir*, § 58; Şener, § 41; *Sürek* (no. 2), § 35; Sürek (no. 3), § 38). While the press must not overstep the bounds set, inter alia, for the protection of vital State interests, such as national security or territorial integrity, against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. (*Şener,* § 41). In this regard the ability of the press to publicly disseminate views which have their place in a public debate whose existence cannot be denied cannot be restricted. (*Hertel v. Switzerland*, no. 25181/94, § 50, 25.8.1998; and *Erdoğdu,* § 72). It would be against the Convention and excessive to restrict freedom of journalistic expression to include only those ideas which are generally accepted, favourably received or considered to be harmless or indifferent (*Ayşe Öztürk v. Turkey*, no. 24914/94, § 85, 15.10.2002).

15. The title and position of the person making the speech is also important. For instance, freedom of expression, which is valuable to everyone, is particularly important for an elected representative of the people (*İbrahim Aksoy v. Turkey*, no. 28635/95, § 59, 10.10.2000; *Ceylan v. Turkey*, no. 23566/94, 8.7.1999). Scientific studies and academic freedom are also important elements. Full consideration should be given to this aspect in the dissemination of studies conducted based on expert knowledge. The restriction of freedom of expression would have to be narrower in the dissemination of the unbiased views of a sociologist about the process by which the PKK's ideology was taking hold in Turkish society and how the roots of a Kurdish State were being formed (*Erdoğdu and İnce*, § 51). Consideration should also be given to the circumstances when a statement is included in an academic piece of work on the socio-economic development of Turkey from a historical perspective (*Başkaya and Okçuoğlu v. Turkey*, no. 23536/94, § 65, 08.7.1999; *Karataş v. Turkey*, no. 23168/94, 8.7.1999).

Element of Incitement to Violence

16. Although cases brought against Turkey at the ECtHR concerning the violation of Article 10 are based on different criminal provisions, they are similar in that they all involve statements that disturb the State and the society at large, mostly criticising the government's anti-terrorism practices and its policies about the Kurdish issue, sometimes praising and legitimising an organisation, its activities or its leader.
17. In such cases, the ECtHR finds that it is not acceptable to impose criminal sanctions based solely on the statement itself. In numerous judgments issued after 2005, the ECtHR has repeatedly found violations and made reference to its earlier judgments without the need for any additional in depth examination in cases where national courts had issued decisions of imprisonment in the absence of any examination solely because the statements in question were unfavourable and amounted to propaganda and incitement to hostility and hatred (*Gözel and Özer v. Turkey; İncal v. Turkey).*
18. In order to punish a statement, it should include a call or incitement to violence. However, the mere fact that an expression is harsh and critical of the government and even one-sided does not necessarily mean that it amounts to incitement. In this regard, the ECtHR has found various statements to fall within the acceptable limits of freedom of expression including those such as, "*Kurdistan having been annexed as a colony by the Turkish State*"; the portrayal of the Turkish State as an oppressor of "Kurdistan" in "political, military, cultural [and] ideological" terms; the "racist policy of denial" vis-à-visthe Kurds being instrumental in the development of the "fascist movement" (*Başkaya and Okçuoğlu*, § 64); the romanticizing of the aims of the Kurdish movement by saying that "it is time to settle accounts"; referring to the Republic of Turkey as a "terrorist state" (*Sürek* (no. 4), § 56); the condemning of the "military action" of the State which includes the State's "dirty war against the guerrilla" and the "open war against the Kurdish people" (*Erdoğdu*, § 62); saying that "Kürdistan is burning" and "describing events as genocide" (*Şener,* § 44); claiming that the State is engaging in "massacre" or defining the conflict as "a war" *(Karkın v. Turkey*, no. 43928/98, 23.9.2003).
19. According to the ECtHR, although criticism directed at both sides would indicate that the statements are not an incitement, the one-sided nature of the expression is not sufficient reason to justify its incrimination (*Sürek and Özdemir*, § 61). On the contrary, national authorities have an obligation to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them (*Şener,* § 45). The fact that a statement is biased or that it resorts to hyperbole and distorts the truth, that fact that it is provocative and voiced as an insult against the State are not sufficient grounds on their own to criminalise speech (*Özgür Gündem v. Turkey*, no. 23144/93, § 60, 16.3.2000)
20. A reading of the Convention as a whole would naturally result in the granting of a higher degree of tolerance to harsh statements that have the ability to protect fundamental principles such as the right to life and the prohibition of torture. Uncovering the acts of state agents violating these rights is of special importance when one considers how difficult it is to unearth the truth in repressive environments. Imposing criminal penalties on people who uncover such violations and publicise them will be against the spirit of the Convention since such measures will eliminate the opportunity to conduct an effective investigation (*Yavuz and Yaylalı v. Turkey*, no. 12606/11, § 54, 17.12.2013).

21. The ECtHR does not make a clear distinction between direct and indirect incitement.[7] However, it is extremely difficult to fulfil the conditions of the test applied by the Court in cases where the statement does not openly provoke violence. Especially in cases where the accused is alleged to have intentions different from those they publicly display, the authorities have an obligation to present concrete evidence that this is the case (*Yağmurdereli v. Turkey,* § 53). Merely arguing that the terrorist organisation also voices similar views does not count as concrete evidence.
22. In its semi-pilot judgment in the case of *Gözel and Özer v. Turkey*, (no. 43453/04 and 31098/05, 06.07.2010) the ECtHR summarises a basic formula which clearly shows that the probability of the statement to cause violence must be considered when determining incitement: "*A statement cannot be proscribed only because it is a statement made by or about a terrorist organisation if it does not incite to violence, justify terrorist acts to facilitate the aims of its supporters and cannot be construed to encourage violence based on a deep and unreasonable hatred towards certain people*." In the case of Gül and Others v. Turkey, "the Court observes that, taken literally, some of the slogans shouted (such as "*Political power grows out of the barrel of the gun", "It is the barrel of the gun that will call into account*") had a violent tone. Nevertheless, having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during lawful demonstrations – which limited their potential impact on "national security" and "public order" – they cannot be interpreted as a call for violence or an uprising."(§ 41). In the case of *Yağmurdereli*, the fact that the harsh statements made by the applicant were uttered in Istanbul, hundreds of kilometres away from the conflict region, played an important role in the Court's finding that there had been a violation (§ 54).

Potential Impact of the Applicant's Facebook Publications

23. The European Court is already aware of the importance and impact of the Internet on freedom of expression (among others see *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015, § 110). So, its jurisprudence will not be repeated in this submission. However, the European Court should be mindful that **the applicant published two separate postings of a political nature on a semi closed social media platform, namely Facebook**. The users of the Facebook platform themselves decide whether to have their accounts and profiles are publicly open to anyone or whether their accounts are restricted to family and friends. Therefore, the Facebook activities of the applicant did not take place on a completely publicly accessible Internet platform, website or blog (compare *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 79).
24. The Court established that the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference (Murphy v. Ireland, no. 44179/98, § 69, ECHR 2003 IX (extracts)). According to the Court's jurisprudence, "**it is clear that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages"** (*Savva Terentyev*, § 79). It is therefore essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public. Similarly, in the admissibility

[7] Howard Davis, "Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech" [2005] E.H.R.L.R. 75.

decision of *Tamiz v. The United Kingdom* (no. 3877/14, 19.09.2017), the Court established that "millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, **the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage**" (§80-81) to another person's reputation or to state institutions to require criminal prosecutions or sanctions such as dismissal.

25. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, in his Report submitted in accordance with Human Rights Council resolution 16/4, A/67/357, of 7 September 2012 also stated that "*a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website"* (§ 46).
26. In the current application, it must be reiterated that it does not appear that the applicant was a public, well-known or influential figure at the time he published two separate postings on Facebook or when he was prosecuted (*Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131). Moreover, the applicant published two separate Facebook postings, both of which must be regarded of a political nature and the issues raised in the published postings were **undeniably part of a political debate on a matter of general and public concern.** Thirdly, the applicant was prosecuted and detained for approximately ten months, sentenced to one year, six months and 22 days imprisonment, and dismissed from civil service for his Facebook postings. Fourthly, there is no indication that the statements that the applicant published attracted any public attention. It is also important to note that, **the applicant does not appear to have been a well-known blogger or YouTuber** (*Rebechenko v. Russia*, no. 10257/17, 16.04.2019, § 25) **or a popular user of social media** (*Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, ECHR 2016), **let alone a public or influential figure** as mentioned above (contrast, *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, 11.10.2001; *Féret v. Belgium*, no. 15615/07, §§ 75 and 76), **which could have attracted public attention to his comment and thus have enhanced the potential impact of the impugned statements** (*Savva Terentyev*, § 81). In fact, the applicant's impact must be regarded very low or insignificant (*Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131).
27. İFÖD is in the opinion that in such circumstances the European Court should assess the potential of the applicant's action, in this case through publishing Facebook postings, to reach the public and pay attention to the manner in which the statements were made, and the applicant's capacity – direct or indirect – to lead to harmful consequences.

Content of the Facebook Publications Amounts to Political Speech

28. From an assessment of the full dossier and the related decisions, the local courts did not assess in full the nature of the published content by the applicant on the Facebook platform other than stating that the impugned **statements constituted propaganda of a terrorist organisation.**
29. However, the local court only focused on the **form and tenor of the impugned speech** rather than analysing the statements **"in the context of the relevant discussion and to find out which idea they sought to impart**" (*Savva Terentyev*, § 82). As the Court in Terentyev v. Russia rightly stated the local courts "made no attempt to assess the potential

of the statements **at hand to provoke any harmful consequences**, with due regard to the political and social background, against which they were made, and to the scope of their reach" (*Savva Terentyev*, § 82).

30. Furthermore, the local court should have assessed whether the impugned statements, fairly construed and seen in their immediate or wider context, could be seen **as a direct or indirect call for violence or as a justification of violence, hatred or intolerance** (see, among other authorities, *Incal v. Turkey*, 09.06.1998, § 50, Reports 1998-IV; *Özgür Gündem v. Turkey*, no. 23144/93, § 64, ECHR 2000-III; *Gündüz v. Turkey*, no. 35071/97, §§ 48 and 51, ECHR 2003-XI; *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, § 73, 12.06.2012; *Fáber v. Hungary*, no. 40721/08, §§ 52 and 56-58, 24.07.2012; and *Vona v. Hungary*, no. 35943/10, §§ 64-67, ECHR 2013). At least in one case, subsequent to the applicant's case was lodged, a criminal assize court in Mardin ruled in December 2019 to acquit a certain Mürvet Aslan, who liked Facebook content related to the Kurdistan Workers' Party (PKK), on the grounds that liking posts should be included within the scope of freedom of expression.[8] Aslan was on trial for allegedly "spreading propaganda on behalf of terrorist organizations" after he liked a number of Facebook posts that included pictures of alleged members of the PKK. The Mardin Court stated that "as **the defendant has not shared or published these posts to disseminate them to other users**, the act of propaganda has not occurred" by noting that "freedom of expression is one of the liberties that are most frequently infringed upon in the scope of the fight against terrorism."
31. İFÖD observes that both publications by the applicant **include criticism of ruling party and public authorities and they were all related to actual public debates when they were generated**. It should not be forgotten that **it is in the nature of political speech to be controversial and often virulent** (Perinçek v. Switzerland [GC], no. 27510/08, 15.10.2015, § 231) and the fact that statements contain hard-hitting criticism of official policy and communicate a one-sided view of the origin of and responsibility for the situation addressed by them is insufficient, in itself, to justify an interference with freedom of expression (Sürek and Özdemir, § 61). Within this context, it should be indicated that the applicant claimed that the first publication was mistakenly missing some part and his intention was to criticise trench digging actions of the PKK rather than praising it. His publication includes "trench a (religious) tradition" (hendek sünnet). He claimed that his intention was to write "Is trench a tradition?" (hendek sünnet mi?). Nevertheless, trial court never evaluated the intention of the applicant although establishment of *mens rea* (moral element of the crime) is sine qua non of the criminal responsibility. In any case, the publication cannot be considered incitement to violence. The second post which includes "Ankara is on the verge of falling" definitely criticises the government of the failing to prevent a bomb attack in the centre of the capital by ISIL killing more than 100 people. The applicant made reference to the prime minister's statement relating to ISIL's besiege of Kobane city in northern Syria.
32. The Court stated that that offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration; **but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely**

[8] See "Liking pictures of PKK members on social media is free speech, Turkish court says," 27.12.2019, https://www.turkishminute.com/2019/12/27/liking-pictures-of-pkk-members-on-social-media-is-free-speech-turkish-court-says/

stylistic purposes. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the substance of the ideas and information expressed (*Gül and Others v. Turkey*, no. 4870/02, § 41, 08.06.2010; *Grebneva and Alisimchi v. Russia*, no. 8918/05, § 52, 22.11.2016; *Savva Terentyev v. Russia*, no. 10692/09, § 68, 28.08.2018). The Court stresses that not every remark which may be perceived as offensive or insulting by particular individuals or their groups justifies a sanction. It is only by a careful examination of the context in which the offending, insulting or aggressive words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 of the Convention and that which forfeits its right to tolerance in a democratic society (*Vajnai v. Hungary*, no. 33629/06, §§ 53 and 57, ECHR 2008). Within this context the Court evaluated even very harsh statements like "*It would be great if in the centre of every Russian city, on the main square ... there was an oven, like at Auschwitz, in which ceremonially every day, and better yet, twice a day (say, at noon and midnight) infidel cops would be burnt. The people would be burning them. This would be the first step to cleansing society of this cop-hoodlum filth."* as a provocative metaphor, which frantically affirmed the applicant's wish to see the police "cleansed" of corrupt and abusive officers ("infidel cops"), and was the applicant's emotional appeal to take measures with a view to improving the situation, though it did not approve the language used by the applicant or the tone of his text *(Terentyev,* § 72)

Crack Down on Critical Voices

33. Considering all the above factors İFÖD would like to emphasize that, the applicant's case is not an isolated incident, rather it is a reflection of the general deterioration in the state of freedom of expression in Turkey and crack down on critical voices. It shows that any critical attitude from any person can be reprimanded harshly by the public authorities.
34. As observed by interstate institutions as well as international NGOs, the state of human rights, the rule of law and independence of the judiciary deteriorated drastically within the last five years in Turkey. Freedom of expression, freedom of the media and Internet freedom have been the most affected areas during this deterioration.
35. 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 20 point 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 problem relating to freedom of expression is evident not only in reports published by NGOs but also in reports issued by interstate oversight mechanisms. Similarly, the Venice Commission 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.[9]

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

36. The ECtHR found in a number of cases that convictions pursuant to Article 7/2 of Anti-Terrorism Act in Turkey constituted violation of Article 10 of the Convention and implementation of those judgments are examined by the Committee of Ministers under Öner and Türk group of cases under enhanced procedure (see İFÖD's Rule 9.2 Submission at https://rm.coe.int/native/09000016809a463a). Although several amendments have been made in the relevant provision to bring it in line with the Convention standards, the situation in practice nevertheless has not get better, rather worsen. The total number of prosecutions and convictions has considerably increased in recent years. While only 669 persons were convicted under Article 7/2 of Anti-Terror Law in 2014, 6.162 persons were convicted in 2017.
37. Furthermore, in 2018, the Ministry of Interior started investigations into several social media accounts in relation to the crimes of making propaganda for a terrorist organization, praising those organizations, publicly declaring affiliation with terrorist organizations, inciting people to enmity and hatred, insulting state officials, acting against indivisible integrity of the state and threatening safety of the nation and hate speech. As a result, **42.406 social media accounts were investigated** and **legal actions were taken against 18.376 accounts**.
38. As the case at hand shows extensive and unforeseeable interpretation of anti-terror legislation by domestic courts continues and there is no institution, including the Constitutional Court, to restore violation of fundamental rights. Neither the local courts, nor the Constitutional Court took account of the Convention standards or the case-law of the ECtHR which was summarized above when deciding the applicant's case.

Conclusion

39. İFÖD kindly invites the Court to take into account the general deterioration of freedom of expression in Turkey and to examine the case at hand on this background. This case shows that a trivial act publishing two social media postings critical of the government may result in people being detained, convicted and losing their jobs and only incomes and there is no single institution in Turkey to restore their rights as the whole judicial system, including the Constitutional Court, failed to restore the applicant's rights. Therefore, examination of the case speedily has crucial importance to determine systemic failure.

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İfade Özgürlüğü Derneği – İFÖD (Turkey)

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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.