Third Party Intervention

In the Case of Mehmet Ali Bul v. TURKEY (App. No. 48072/19)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

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

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

Introduction

1. İFÖD will address in its intervention in the case of *Mehmet Ali Bul v. Turkey* (**No. 48072/19**) the issue of freedom of expression of local politicians. It is understood from the Court's communication that the applicant, the former Mayor of Tunceli, had been charged with membership to a terrorist organisation and detained on these grounds. The charges against the applicant were based on his participation in demonstrations as well as certain visits made to traders in the city (visits allegedly made at the call of the leaders of the PKK) in which the group allegedly chanted slogans in favour of a terrorist organisation such as "Rights, law and justice will arrive with the PKK", "The murderous state, get out of Kurdistan", "The PKK is the people, the people are here". The content of the speeches of the applicant made during these events were also used as evidence in the investigation.
2. The Court asked the parties to address whether the applicant's freedom of expression had been breached by the detention order. In particular, the Court asked whether having regard to the activities alleged against the applicant, the context in which these facts took place, their potential to harm and the circumstances of the case, did the national courts carry out in their decisions a sufficient examination and in an appropriate balance between the interests at stake with regard to the criteria set out and implemented by it in cases relating to freedom of expression?[1]
3. İFÖD's intervention will first provide the relevant European standards concerning limitation of freedom of expression of politicians, particularly those that are allegedly incite to violence. The submission will then also discuss the background against which the applicant's case could be assessed. It is believed that the circumstances of the case under which the applicant was detained cannot be understood in isolation. From September 2016 to February 2018, 95 of 102 municipality mayors ran by DBP (the applicant's party), including four metropolitan and ten provincial municipalities, were disbanded and replaced with government appointed trustees. Within this context, criminal investigations initiated against the Kurdish politicians have been the main reason for removal of mayors. Therefore, it is considered that the current case cannot be understood without this widespread practice. Within this context, the problem of extensive interpretation of terrorism related legislation will be assessed.

The International Legal Framework Used to Limit Speech Associated with Terrorism

4. İFÖD is of the opinion that 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 categorisation of statements associated with terrorism as an offence is often based on the argument that **it is not the**

[1] *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.

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**. As noted by the former Commissioner for Human Rights of the Council of Europe it is crucial to bear in mind that **violence or the threat to use violence is an essential component of an act of terrorism**, and that restrictions of human rights in the fight against terrorism 'must be defined as precisely as possible and be necessary and proportionate to the aim pursued'.[2]

5. **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.
6. Article 12 of the Convention on the Prevention of Terrorism requires the provisions of the Convention to be interpreted in accordance with human rights law. So, the crime of terrorist propaganda should be regulated and implemented in compliance with the European Convention 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.

The European Court's Multi-Pronged Incitement Test

7. The **European Court 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 Court 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 Court's balancing test yields similar results to that of the "clear and present danger test". The European Court'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

[2] Report of 10.01.2012 (CommDH(2012)2), para. 69.

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?

8. In other words, in order for a 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 Court examines a set of factors to determine whether these two conditions are met and İFÖD believes that the Multi-Pronged Incitement Test should be considered together with the potential impact of the medium of expression concerned[3] as an important factor to determine whether social media content such as those shared on the Facebook platform can result in incitement to violence and regarded as terror propaganda.
9. In the Turkish cases in which applicants were found to have committed terrorist propaganda by local courts, the Court held that courts should have provided sufficient explanation on the questions of whether the slogans, declarations, signs and publications incriminated and the activities in question in general, having regard to their content, the context in which they took place and their capacity to cause harm, could be considered as including incitement to the use of violence, armed resistance or uprising, or as constituting hate speech, which in his view is the essential element to be taken into consideration.[4]

Politicians' Freedom of Speech

10. 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.[5]
11. The Court lastly observes that, in a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated

[3] *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).
[4] *Mart and Others v. Turkey*, no 57031/10, § 32, 19.03.2019.
[5] *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.

by peaceful means must be afforded a proper opportunity of expression through the exercise of the right to freedom of association.[6]

12. The speech and expressions of democratically elected politicians deserve very high level of protection because it is necessary to ensuring democratic principles and an open process, in addition to exemplifying the principles of pluralism "without which there is no democratic society".[7] In the Castells judgment the Court held that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.[8] In *Karacsony and Others v. Hungary*, the Court defined freedom of speech of parliamentarians as being political speech *par excellence*.[9] A parliamentarian's speech in his/her capacity as an elected representative is, no doubt, a form of political speech.[10]
13. Local politicians' freedom of speech is also strongly protected by the Convention. Indeed, in *Jerusalem v. Austria*, the applicant was a member of the Vienna Municipal Council and the Court applied in this case the same standard it has applied in parliamentarians' case.[11]
14. Although politicians mostly voice their opinions in political platforms, political speech of politicians cannot be limited to the speeches made in parliament. Indeed, the Court has given special importance to speeches of politicians made at different venues.[12]
15. As a consequence, freedom of expression is especially important for elected representatives of the people, interference with which can only be justified by very weighty reasons.[13] İFÖD is of the opinion that the mayors' speeches, as in the current case, should be protected in a similar way to other politicians.

Context and Background of Political Speech

16. In addition to the identity of the politician, the context of his/her speech should also be taken into consideration. in determining whether given remarks, taken as a whole, may be classified as inciting to violence, regard must be had to the words used and the context in which they were published, as well as to their potential impact.[14]

---

[6] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 97, ECHR 2001-IX.

[7] *Szel and Others v. Hungary*, no. 44357/13, § 63, 16.9.2014

[8] *Castells v. Spain*, no. 11798/85, § 42, 23.4.1992; *Sadak and Others v. Turkey* (2), no.25144/94, § 34, 11.6.2002; *İbrahim Aksoy v. Turkey*, no. 28635/95, § 59, 10.10.2000.

[9] *Karacsony and Others v. Hungary*, no. 42461/13, § 137, 175.2016.

[10] *Otegi Mondragon v. Spain*, no. 2034/07, § 51, 15.3.2011.

[11] *Jerusalem v. Austria*, no. 26958/95, § 36, 27.2.2001.

[12] See for instance *Castells v. Spai*n, § 43; *Otegi Mondragon v. Spain*, , no. 2034/07, 15.3.2011, § 51.

[13] *A v. United Kingdom*, no. 35373/97, § 79, 17.12.2002.

[14] *Özgür Gündem v. Turkey*, no. 23144/93, § 63, 16.3.2000.

17. In the *Otegi Mondragon* case, the Court described the background of the speech whilst underlining the narrow discretion left to national authorities:

> "the applicant's remarks concerned an issue of public interest in the Basque Country, namely the welcome extended by the Head of the government of the Basque Country to the King of Spain during the latter's official visit to the Basque Country on 26 February 2003, against the background of the closure of the Basque-language newspaper Euskaldunon Egunkaria and the detention of its senior management a few days previously, and of the latter's public allegations of ill-treatment. The applicant's statements were therefore made in the context of a debate on matters of public interest. Accordingly, the margin of appreciation available to the authorities in establishing the "necessity" of the penalty imposed on the applicant was particularly narrow".[15]

18. İFÖD is of the view that context in which the speech was made is not only relevant about the impact of the speech but also the aim of the sanction imposed on the applicant. In other words, it is considered that if a criminal sanction imposed on a politician is part of a systematic pressure upon political speech at a certain period, this background should be taken into consideration in deciding whether the measure was proportional.

Situation of Local Elected Politicians in Turkey

19. As well known, during the night of 15 to 16 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup aimed at overthrowing the democratically elected parliament, government and President of Turkey. On 20 July 2016 the government declared a state of emergency for a period of three months as from 21 July 2016; the state of emergency ended two years later in July 2018.
20. In this period the Government started to legislate through emergency decree laws and the government issued 32 decrees. The Constitutional Court denied reviewing Decree Laws in *abstracto* upon the main opposition party's appeal.
21. Despite internal and external critiques, the State of Emergency Decrees did not only relate to provisional needs of state of emergency. The decree laws also introduced permanent changes to current regulations,[16] including new regulations on local government. Indeed, with Decree No. 674, the Government introduced a new procedure to remove members of local governments. Relevant articles that amend Municipalities Law No. 5393 of 3 July 2005 are:

    a. Article 38 supplements Article 45, paragraph 1, and provides that where a mayor, deputy mayor or council member is "suspended from duty or detained or banned from public service or his/her position as a mayor or member of council terminates

[15] *Otegi Mondragon v. Spain*, , no. 2034/07, 15.3.2011, § 51.

[16] See Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD (2016)037, para. 87 et seq.

due to the offences of aiding and abetting terrorism and terrorist organisations", a replacement "shall be assigned by the authorities".

b. Article 40 of the Decree Law amends the transitional provisions of the Municipality Law with a new Article 9, providing retroactively for the application of the procedure set out in the new paragraph added by the Decree Law to Article 45 (allowing replacement by appointees of mayors, deputy mayors or council members who has been suspended, before the entry into force of the Decree Law, for the same reasons mentioned in the new paragraph added to Article 45, i.e. offences of aiding and abetting terrorism and terrorist organizations).

22. Decree-Law No. 674 was submitted to Parliament for approval, but was only approved on 10 November 2016, 70 days after its enactment. As it became part of the Municipalities Law, it has been invoked against the local Kurdish politicians even after the state of emergency, as will be explained below.
23. Other Council of Europe authorities has already had chances to evaluate the amendments made by Decree Laws in the Municipalities Law. The Venice Commission stated that the Decree Law failed to justify the link between the other measures allowed by Articles 38 *in fine* and 39 of the Decree Law, entailing severe limitations of the effective enjoyment of local self-government in the concerned municipalities and the reasons having led to the state of emergency. The Commission concluded that the new rule is a measure with far-reaching impact and raises the question as to whether it is envisaged that, in the future, in all cases of terrorism-related vacancies of local elected positions, such positions will have to be filled by persons appointed by the state authorities, for a duration which is left to their discretion.[17]
24. The Commission found it particularly worrying that, through emergency legislation, the central authorities were enabled, in the framework of the fight against terrorism, to appoint unelected mayors, vice-mayors and members of local councils, and exercise, without judicial control over the functioning of the concerned municipalities.[18]
25. Similar concerns were also raised by the Congress of Local and Regional Authorities.[19] In the Explanatory Memorandum annexed to Resolution 416 (2017) and Recommendation 397 (2017) concerning local governments in Turkey, the rapporteurs of the Congress observed that the mayors had been dismissed, in many cases, for their involvement in aiding and abetting terrorism, either materially (some are accused of having provided direct or indirect assistance using their municipalities' resources) or through statements they made, or their involvement in certain meetings deemed to be favourable to the Kurdistan Workers' Party (PKK) or, quite simply, calls for greater

[17] See Venice Commission, Opinion on the Provisions of the Emergency Decree Law no. 674 of 1 September 2016, CDL-AD(2017)021, para. 71.

[18] *Ibid*, para. 97.

[19] See Fact-finding mission on the situation of local elected representatives in Turkey, CG32(2017)13final, 29 March 2017.

self-government for certain regions of south-eastern Turkey with a Kurdish majority. The rapporteurs raised the concerns about "the alarming scale of recourse to an overly wide notion of terrorism to punish non-violent statements and criminalisation of any message that merely coincides with the perceived interests of a terrorist organisation".[20]

26. Moreover, the following events have confirmed the concerns of both bodies. Suspension of mayors and municipal and provincial councillors in the southeast and eastern regions of Turkey and their replacement by trustees started on 11 September 2016, just 10 days after the issuance of Decree Law no. 674. Altogether 95 mayors were removed from office. Considering that the Democratic Regions Party ("DBP"), sister party to the pro-Kurdish HDP, won in total 102 municipalities in 2014 elections, the government linked almost all local governments held by DBP to terrorism. 95 trustees were appointed to the 3 metropolitan municipalities, 10 provincial municipalities, 63 districts municipalities and 22 municipalities in counties. 93 co-mayors, including the mayor of Tunceli who is the applicant in the current case, were detained due to terror charges.
27. Until the local elections were held in March 2019, none of the suspended mayors were reinstated. Many of them have been prosecuted under article 314 of the Turkish Criminal Code (for membership to a terrorist organisation or aiding and abetting a terrorist organisation) and/or article 7/2 of the Anti-Terror Law (for making propaganda of a terrorist organisation).
28. Following the elections, replacement of elected mayors by trustees resumed with the decision of the Ministry of the Interior of 19 August 2019. From then on, a total of 53 HDP mayors – out of 65 – have been removed due to terrorism-related charges, such as alleged links to the armed PKK. As the Supreme Election Council ("SEC") decided to deny the mayoral mandates of six successful HDP candidates in the district municipalities of Diyarbakır, Erzurum, Kars and Van, as of today HDP holds only 6 municipalities (4 district municipalities and 2 municipalities in counties).[21] Trustees have been appointed in all 3 metropolitan municipalities (Diyarbakır, Van and Mardin) and in all provincial municipalities (Kars, Iğdır, Batman, Siirt and Hakkari).
29. As can be seen from these developments, new provisions included to the Municipality Law by Decree Law No. 674 have been applied to almost all local governors of a single party. In order to apply this provision, Minister of Interior needs an official terror charges to be brought against local governors.
30. It should be noted that all 148 mayors that have been replaced by trustees since September 2016 were found eligible to run in the elections. Articles 9 and 31 of Law

[20] *Ibid*., para. 19-20.
[21] Euronews, "31 Mart seçimlerinde 65 yerel yönetimi kazanan HDP'nin elinde 6 belediye kaldı" https://tr.euronews.com/2020/10/02/31-mart-secimlerinde-65-yerel-yonetimi-kazanan-hdp-nin-elinde-6-belediye-kald

on Local Elections refers to article 11 of the Law on Parliamentary Elections about the eligibility of candidates. According to this rule "those who are sentenced for committing a felony for a year or more" and also of "those who are prohibited from public services" are not eligible to run in elections. It means that at the time that those people were elected none of them were sentenced for committing a felony for a year or more. However, after the elections were held in March 2019, in around a year time, judicial authorities concluded that almost all local governors of HDP had committed serious terror crimes.

31. In its most recent report concerning the replacement of mayors in Diyarbakır, Mardin and Van, the Venice Commission noted that "the suspension may *de facto* well have definitive effects, given the uncertain timescale of the criminal proceedings and given the fact that none of the mayors suspended due to terrorism-related charges since October 2016 has been reinstated to date on that legal basis".[22] Considering the wide and vague criteria used to initiate terror investigations in Turkey, it is not surprising that this new provision in Municipalities Law No. 5393 has turned to be the major obstacle before local democracy as understood under the European Charter for Local Self-Government ("ECLSG").
32. İFÖD is of the opinion that facts of the current case cannot be isolated from these developments and should be read against this background. Therefore, it is advised that the applicant's position as well as the widespread application of anti-terror legislation against local politicians should be taken into consideration to understand the context in which the applicant's speech was made.

Conclusion

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.
34. Since the declaration of state of emergency and amendments made in Municipality Law by Decree Law No. 674, local governors have been the subject of constant pressure by judicial authorities using vague and wide anti-terror legislation. Bearing in mind that, according to the well-established jurisprudence of the Court, the speech and expressions of democratically elected politicians deserve very high level of protection, a strict scrutiny is required when their rights are restricted.
35. It should also be noted that a provision brought during state of emergency combined with long-lasting problems concerning anti-terror legislation became permanent. Furthermore, as shown in this submission, it is frequently used against a certain political movement. A semi-pilot judgment of the Court, concerning the freedom of

[22] Venice Commission, Opinion on the Replacement of Elected Candidates and Mayors, CDL-AD(2020)011, para. 61.

expression of local politicians would guide the Turkish authorities to invoke this procedure under very exceptional circumstances.

36. Overall, İFÖD believes that this case provides the opportunity for the Court to develop standards that link freedom of expression to the principles enumerated in the European Charter for Local Self-Government.

01.02.2021

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.