# Third Party Intervention

# In the Case of Osman Baydemir v. TURKEY (App. No. 23445/18)

**by**


## İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

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

## Introduction

1. İFÖD will address in its intervention in the case of Osman Baydemir v. Turkey (**No. 23445/18**) the limits of freedom of speech of deputies in the Parliament. It is understood from the Court's communication that the application concerns a **disciplinary sanction**, in the form of a prohibition from attending two parliamentary sessions and a deduction of two thirds of his salary for one month, imposed by the Turkish Grand National Assembly, on the applicant, a member at the material time, for having said during a speech to the Assembly: "I have a role (...) as a child of the Kurdish people and as a representative coming from Kurdistan."

2. After his speech at the Parliament, deputies of the ruling parties, AKP and MHP, requested the applicant to explain what he meant by calling a region "Kurdistan" as officially there is no place to be called Kurdistan in Turkey. The applicant and other members of HDP insisted that calling a region "Kurdistan" could not be regarded as a crime and even the President had used the term in some of his speeches. However, the Deputy President of the National Assembly, who chaired the parliamentary session in question, relied on rule 161 § 3 of the Rules of Procedure of the National Assembly and invited the General Assembly to vote to impose a disciplinary sanction on the applicant, which resulted with the prohibition from attending two parliamentary sessions and a deduction of two thirds of his salary for one month.

3. The applicant presented his defence before the General Assembly and the majority of the Parliament decided to adopt the above mentioned sanctions.

4. Relying on Article 10 of the Convention, the applicant complains of an interference with his right to freedom of expression because of the sanction imposed. The Court asked the parties to address whether there has been a violation of the applicant's freedom of expression, and especially of his right to impart information or ideas, within the meaning of Article 10 § 1 of the Convention because of the sanction which was inflicted on him for the content of the speech he had given at the National Assembly. If so, was such interference provided for by law and necessary, within the meaning of Article 10 § 2?[1]

5. The Court also asked whether the applicant had at his disposal, as required by Article 13 of the Convention, an effective domestic remedy through which he could have challenged the penalty imposed on him?[2] In particular, the Court requested parties' to provide their opinion concerning the effectiveness of the individual complaint brought by the applicant before the Constitutional Court.

6. The İFÖD's submission will first provide information about the Rules of Procedure of the Grand National Assembly and the recent amendment made on the Rules. In the second part, the submission will address European standards concerning limitation of freedom of expression of politicians, particularly those that are applicable to the speeches made in Parliament. Finally, the submission will discuss the compliance of the relevant provisions of the Rules of Procedure of the Grand National Assembly with these standards.

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1 *Karácsony and others v. Hungary* [GC], nos 42461/13 and 44357/13, § 138, 17.05.2016 and *Szanyi v. Hungary*, no 35493/13, §§ 29-45, 08.11.2016

2 *Kudla v. Poland* [GC], no. 30210 / 96, § 157, ECHR 2000 - XI.

**Rules of Procedure of the Grand National Assembly**

7. As in other member states of the Council of Europe, the conduct of deputies during their service at the Parliament is regulated not by regular laws, but the Rules of Procedure of the Grand National Assembly in Turkey. According to article 156 of the Rules of Procedure of the Turkish Grand National Assembly there are three types of sanctions that can be imposed on deputies for breaching the order: Call to order, reprimand, temporary exclusion from the Assembly.

8. Most of the sanctions aim to maintain the order of the Parliament. For instance, under article 157, deputies that interrupt others' speech, breach peace and order and utter offensive remarks might be sanctioned by call to order. However, some other provisions provide sanctions for the content of the speeches made by deputies in the Parliament. Amongst them is article 161 § 3 of the Rules which includes the penalty of "temporary exclusion from the Assembly if during the debates, a deputy insults or swears "at the President of the Republic, the Grand National Assembly of Turkey, the Speaker of the Grand National Assembly of Turkey, the Bureau of the Assembly, the presiding vice-speaker and the deputies, **the history and common past of Turkish nation**, the Constitutional order indicated in the first four articles of the Constitution, and making definitions conflicting with the administrative structure set forth in the Constitution on the basis of integrity of the Republic of Turkey with its territory and nation".

9. Article 161 § 3 of the Rules was amended to include "the history and common past of Turkish nation" on 27.7.2017 with the decision no. 1160 of the Grand National Assembly. The amendment was published on 01.08.2017 on the Official Gazette.

10. During the debates before the Parliament, the applicant's party presented a dissenting opinion, arguing the vagueness of this provision. Despite critiques, the amendment was enacted by the Parliament.

11. Another provision of the Rules of Procedure is worth also mentioning. Article 161 § 4 of the Rules prohibits "**to encourage or incite** public or state forces, or public organs, institutions, and officials to unlawful acts, riot, or dysfunctioning of the provisions of the Constitution" during Parliamentary debates. Considering that this provisions explicitly bans incitement, it can be concluded that the crimes enumerated in 161 § 3 do not require incitement to hatred or violence.

12. The amendment made with the decision no. 1160 also provides a new rule that imposes fines to deputies who have received disciplinary sanctions . Pursuant to article 163 § 3 one-month salary and one-third of the travel allowance is cut from the deputy who is reprimanded, and one-month salary and two-thirds of the travel allowance is cut from the deputy who is sentenced to temporary exclusion from the Assembly.

13. The main opposition party CHP applied to the Constitutional Court for the annulment of some provisions of the amendment made in the Rules of Procedure. The Constitutional Court on 17.10.2018 annulled three of the amended provisions.[3] Amongst them was article 163 § 3 of the Rules. The Claimant Party asked the

[3] Constitutional Court, Case No. 2017/162, Decision No. 2018/100, 17.10.2018. Official Gazette Date and No.: 03.01.2019 – 30644.

Constitutional Court to annul article 163 § 3 of the amendment that requires one-month salary and one-third of the travel allowance cut from the deputy's salary who is reprimanded, and one-month salary and two-thirds of the travel allowance cut from the deputy's salary who is sentenced to temporary exclusion from the Assembly. However, CHP did not ask the annulment of article 161 § 3 of the Rules. The Constitutional Court, rather than reviewing article 163 § 3 as a whole, decided to divide its examination into two parts. The Court concluded that the crime envisaged under 161 § 3 of the Rules, which punishes "making statements conflicting with the administrative structure set forth in the Constitution on the basis of integrity of the Republic of Turkey with its territory and nation" was vague and unforeseeable. Therefore, a fine associating this sanction was in violation of freedom of expression and left non-liability of deputies unfunctional.

14. However, as to the remainder of the provision, including the part that punishes insulting and or swearing **the history and common past of the Turkish nation**, the Constitutional Court concluded that fines that associate sanctions enumerated in previous articles were proportional. According to the Constitutional Court, all of the actions, other than the one concerning "making statements conflicting with the administrative structure set forth in the Constitution on the basis of integrity of the Republic of Turkey with its territory and nation", that are banned under articles 157 and 161 aimed to protect the maintenance of the order of the Parliament. Therefore, the Constitutional Court concluded, these acts could not be seen falling within the scope of non-liability and freedom of expression of deputies.[4] In other words, the Constitutional Court is of the opinion that a deputy who allegedly insults and/or swears to the history and common past of Turkish nation breaches the order of the Parliament and therefore that person's punishment does not violate freedom of expression.

**European Standards on the Freedom of Speech of the Parliamentarians**

15. 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.[5]

16. In addition to this, under the Convention system the speech and expressions of democratically elected politicians deserve very high level of protection because it is necessary to ensure democratic principles and an open process, in addition to exemplifying the principles of pluralism "without which there is no democratic society".[6] 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. They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of an **opposition**

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4 See para. 127 of the Constitutional Court decision.

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.

6 *Szel and Others v. Hungary*, no. 44357/13, § 63, 16.9.2014

**member of parliament**, like the applicant, **call for the closest scrutiny** on the part of the Court.[7]

17. In *Karacsony and Others v. Hungary*, the Grand Chamber defined freedom of speech of parliamentarians as being political speech *par excellence*.[8] A parliamentarian's speech in his/her capacity as an elected representative is, no doubt, a form of political speech.[9] As the Court is of the opinion that the Convention establishes a close nexus between an effective political democracy and the effective operation of the Parliament,[10] parliamentarians' freedom of speech is not only for them but for the whole society.

18. Furthermore, politicians that constitute minority in the Parliament has even more special place in the Strasbourg case-law. In its Resolution 1601 (2008) on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament, the Assembly noted the following:

> "5. Granting the parliamentary opposition a status according to which it is entitled to rights contributes to the effectiveness of a representative democracy and respect for political pluralism, and thereby to the citizens' support for and confidence in the good functioning of institutions. Establishing a fair legal and procedural framework and material conditions enabling the parliamentary minority to fulfil its role is a prerequisite for the good functioning of representative democracy. Opposition members should be able to exercise their mandate in full and under at least the same conditions as those members of parliament who support the government; they shall participate in an active and effective manner in the activities of Parliament and shall enjoy the same rights. Equal treatment of members of parliament has to be ensured in all their activities and privileges."

19. The Court has also stated that it "attaches importance to **protection of the parliamentary minority from abuse by the majority**. It will therefore examine with particular care any measure which appears to operate solely, or principally, to the disadvantage of the opposition."[11]

20. In *Szanyi v. Hungary*, the Court underlined the importance of the minority's right to speak in the Parliament:

> "In the consideration of the nature of the expression, the Court finds that **the protection of minority members and parties within Parliament** is also of concern, and special weight must be paid to ensuring their ongoing right to express opinions, and the public's right to hear those viewpoints. Given the importance of public exposure to minority views as an integral function of democracy, **minority members should have leeway to express their views, even if in harsh language, within a reasonable framework.**"[12]

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7 *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.

8 *Karacsony and Others v. Hungary*, no. 42461/13, § 137, 175.2016.

9 *Otegi Mondragon v. Spain*, no. 2034/07, § 51, 15.3.2011.

10 *Karacsony and Others v. Hungary*, no. 42461/13, § 141.

11 *Szanyi v. Hungary*, no. *35493/13*, § 33, 8.11.2016.

12 *Szanyi v. Hungary*, no. *35493/13*, § 38, 8.11.2016. See also Report on the role of the opposition in a democratic parliament (Study no. 497/2008), adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010).

21. Even the parliamentary autonomy, recognised by the Court as a common tradition of member states, should not be abused for the purpose of suppressing the freedom of expression of minority MPs, which lies at the heart of political debate in a democracy.[13]

22. The most important guarantee in democracies to protect parliamentarians that are members of minority parties against the abuse of majority is the immunity provided parliamentarians under national constitutions.[14] In *Kart v. Turkey*, the Court held that "the inherent characteristics of the system of parliamentary immunity and the resulting derogation from the ordinary law **pursue the aim of allowing free speech for representatives of the people** and **preventing partisan complaints** from interfering with parliamentary functions."[15]

23. As noted by the Venice Commission, **rules on non-liability must be distinguished from rules on internal disciplinary measures within parliament itself**, which are of a different nature, and which are usually not included in the concept of parliamentary immunity.[16] However, the Venice Commission also noted that this does not mean that internal disciplinary measures can be applied arbitrarily or in an unlimited fashion.

24. Even a deputy representing the minority does not have an absolute right to speak in the Parliament. In its leading judgment, *Karacsony and Others v. Hungary,* the Grand Chamber found a chance to discuss the limits of the freedom of parliamentary debate. A balance needs to be struck between the wide freedom of expression of the deputies, and the aim of "maintaining the proper functioning of Parliament". The Court in *Karacsony* stated that "in this context, the Court finds it important to distinguish between, on the one hand, **the substance of a parliamentary speech and, on the other hand, the time, place and manner in which such speech is conveyed**".[17]

25. This distinction is critical because according to the Court "where the underlying purpose of the relevant disciplinary rules is exclusively to ensure the effectiveness of Parliament, and hence that of the democratic process, the margin of appreciation to be afforded in this area should be a wide one".[18] However, "States have very limited latitude in regulating the content of parliamentary speech. But, some regulation may be considered necessary in order to prevent forms of expression such as direct or indirect calls for violence."[19]

26. İFÖD submits that **the most important issue concerning the limitation of a deputy's speech by a disciplinary sanction lies with this distinction**. If the rules of procedure regulate the content of the speech then the discretion left to the authorities should be extremely narrow and subject to strict scrutiny.

27. Indeed, in *Szanyi v. Hungary*, where the applicant was sanctioned for the content of his speech made in the Parliament, despite the very harsh terms used by the applicant against government, the Court concluded that "in terms of their actual impact and the

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13 *Karacsony v. Hungary*, para. 147.
14 See most recently, *Selahattin Demirtaş v. Turkey* (no.2), no.14305/17, 22.12.2020.
15 *Kart v. Turkey* [GC], no. 8917/05, § 88, ECHR 2009.
16 Report on the scope and lifting of parliamentary immunities (Study no. 714/2013), adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).
17 *Karacsony v. Hungary*, para. 140.
18 *Karacsony v. Hungary*, para. 146.
19 *Karacsony v. Hungary*, para. 140.

infringement of the rights of others, **the Court cannot see how the applicant's expressions could have disturbed the actual functioning of Parliament.** The Government have **not adduced cogent reasons** justifying the measure applied by the Speaker so as to protect Parliament's authority, allegedly challenged by the offensive accusations directed against the Government policy".[20]

**Compliance of 161 § 3 of the Rules of Procedure with the European Standards**

28. The applicant was sentenced to a disciplinary sanction which requires prohibition from attending two parliamentary sessions and a deduction of two thirds of his salary for one month under article 161 § 3 of the Rules of Procedure of the Turkish Grand National Assembly. Article 163 § 3 of the Rules also applied to the applicant.

29. The Court in examining complaints concerning Article 10 of the Convention, as in other qualified rights, uses **the three part-test**. In this part of the submission, İFÖD **will apply this test to the relevant rules**, with special focus on the principles summarised in the previous part.

30. In *Karacsony* and *Szanyi*, the Court found that section 49 (4) of the Hungarian Parliament Act met the legality requirements of Article 10 of the Convention. However, it is considered that Article 163 § 3 of the Rules and its application differ from the Hungarian Law.

31. Article 163 § 3 of the Rules of the Grand National Assembly of Turkey includes the penalty of "temporary exclusion from the Assembly if during the debates, a deputy insults or swears "at the President of the Republic, the Grand National Assembly of Turkey, the Speaker of the Grand National Assembly of Turkey, the Bureau of the Assembly, the presiding vice-speaker and the deputies, **the history and common past of Turkish nation**, the Constitutional order indicated in the first four articles of the Constitution, and making definitions conflicting with the administrative structure set forth in the Constitution on the basis of integrity of the Republic of Turkey with its territory and nation".

32. Although, *prima facie*, other parts of this provision might be seen as foreseeable, the concept of "**the history and common past of Turkish nation**" is extremely difficult to define. In *Taner Akçam v. Turkey*, with regards to article 301 of the Turkish Criminal Code, the Court concluded that article 301 of the Criminal Code did not meet the "quality of law" required by the Court's settled case-law, since its unacceptably broad terms resulted in a lack of foreseeability as to its effects.[21]

33. Article 301, which was found unforeseeable by the Court, provides that: "1. A person who publicly degrades the Turkish nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the

[20] *Szanyi v. Hungary*, no. *35493/13*, § 41, 8.11.2016.
[21] Taner Akçam v. Turkey, no. 27520/07, 25.10.2011, para. 95.

judicial bodies of the State, shall be sentenced to a penalty of imprisonment for a term of six months to two years."

34. It is submitted that the term "**the history and common past of Turkish nation**," used in the Rules of the Grand National Assembly, is no less blurred than the term "Turkish nation" used in article 301 of the Criminal Code.

35. Indeed, the implementation of article 163 § 3 of the Rules also has similarities with the implementation of article 301 of the Criminal Code. During the debates in the Constitution Commission in the Parliament, one MP asked the Chair of the Commission what "definitions conflicting with the administrative structure set forth in the Constitution" meant. At the time, the Chair of the Commission, Mustafa Şentop, responded that "federalism might fall within this category".[22]

36. The disciplinary sanction, prohibition from attending two parliamentary sessions, pursuant to article 163 § 3 of the Rules, **has been applied three times recently**. Three deputies from HDP have been sanctioned under this provision. Diyarbakır MP Garo Paylan, was sanctioned for stating in his parliamentary speech that a genocide had been committed against Armenians in Turkey in 1915, on 13.01.2017.[23]

37. In another parliamentary meeting İstanbul MP Ahmet Şık was sanctioned under article 163 § 3 of the Rules for stating that "You are kneading your arrogance created by being in power with lies and ignorance. You feed your aggression towards those who tell the truth with your helplessness. Even you know your immorality is not enough…"[24]

38. The third incidence is the applicant's case, in which he was sanctioned for stating that "I have a role (...) as a child of the Kurdish people and as a representative coming from Kurdistan." That is all the applicant said which then triggered the sanction subject to article 163 § 3 of the Rules.

39. It is obvious that the problem found by the Court concerning article 301 of the Turkish Criminal Code in *Taner Akçam* decision repeats itself in the implementation of article 163 § 3 of the Rules. In short, the provision has been used against deputies who raise voice against the State's official ideology.

40. The **second element of the three-part test** is the review of whether interference pursued a legitimate aim. In *Karacsony and Others v. Hungary*, the Court assumed that the sanction aimed at preventing disruption to the work of Parliament so as to ensure its effective operation and thus pursued the legitimate aim of "prevention of disorder". It also had the intention to protect the rights of other members of parliament, and thus pursued the aim of "protection of the rights of others".[25]

41. It is however, difficult to claim the same arguments for article 163 § 3 of the Rules. Unlike in *Karacsony*, article 163 § 3 of the Rules is not about the time, place and manner of the speech. As shown above, it is not about the way in which the speech is

[22] Türkiye Büyük Millet Meclisi Anayasa Komisyonu Tutanak Dergisi, Dönem: 26, C. 1, Yasama Yılı: 2, 15. Toplantı, 20.7.2017, p. 20.

[23] See Türkiye Büyük Millet Meclisi, Genel Kurul Tutanağı, 26. Dönem 2. Yasama Yılı, 57. Birleşim, 13 Ocak 2017.

[24] Türkiye Büyük Millet Meclisi, Genel Kurul Tutanağı, 27. Dönem 1. Yasama Yılı, 8. Birleşim 23 Temmuz 2018.

[25] *Karacsony v. Hungary*, para. 128-129.

conveyed either. Statements that are prohibited under Article 163 § 3, especially the part concerning "the history and common past of Turkish nation, the Constitutional order indicated in the first four articles of the Constitution, and making definitions conflicting with the administrative structure set forth in the Constitution on the basis of integrity of the Republic of Turkey with its territory and nation" **are sanctioned because of the substance of the speech,** regardless of the tone of the speech.

42. Considering the narrow margin of appreciation left to the State parties concerning the content of speeches made by the parliamentarians representing minorities, it is **quite difficult to find a legitimate aim** that might be justified under the Convention to impose sanctions upon views of the opposition deputies challenging official ideology.

43. Finally, the **three-part test requires an assessment** to be made to decide whether the interference is necessary in a democratic society. In *Karacsony* and *Szanyi*, the **lack of procedural guarantees** to challenge the decision of the Parliament led the Court to decide that the sanctions were not necessary in a democratic society.

44. Under article 163 (2) of the Rules, "the deputy proposed to be subjected to such a penalty has the right to defend himself/herself or to substitute a deputy to do so". However, following this defence a vote is cast to decide whether a sanction would be imposed. **No legal challenge is available against the decision of majority**. Considering that the majority represents the state ideology, the nature of the crime leads to the conclusion that a deputy who questions the State's ideological taboos should be ready to be sanctioned. In other words, the right to defence recognised under article 163 (2) **does not provide a real opportunity** or potential effective remedy for the deputy other than apologising for what he/she said.

45. The decision of the Parliament imposing sanction upon deputies **cannot be challenged before the Constitutional Court**. Article 45 (3) of Law No. 6216, on the Establishment and Rules of Procedures of the Constitutional Court, states that individual applications cannot be made directly against legislative transactions and regulatory administrative transactions and similarly, the rulings of the Constitutional Court and transactions that have been excluded from judicial review by the Constitution cannot be the subject of individual application.[26]

46. On the other hand, as already noted above, whilst deciding whether a sanction imposed upon a deputy is necessary in a democratic society, **the protection of minority members and parties within Parliament** is also of concern, and special weight must be paid to ensuring their ongoing right to express opinions, and the public's right to hear those viewpoints. Given the importance of public exposure to minority views as an integral function of democracy, **minority members should have leeway to express their views, even if in harsh language, within a reasonable framework.**"[27]

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[26] One of the deputies, Garo Paylan, lodged two applications with the Constitutional Court, one under according to article 85 of the Constitution and the other one under individual complaint mechanism. Both applications have been found inadmissible on procedural grounds. See Case No. 2017/13, Decision No. 2017/21, 9.2.2017 Official Gazette Date and No. 28.2.2017-29993; Garo Paylan Application, no. 2017/19699, 13.10.2020.

[27] *Szanyi v. Hungary*, no. *35493/13*, § 38, 8.11.2016.

47. As article 163 § 3 of the Rules does not require hatred or incitement to violence as an element to punish deputies, this **provision inevitably aims to punish peaceful minority views that question majority**. İFÖD is of the opinion that a parliamentarian's speech in the Parliament, as long as it does not affect the maintenance of the order in the Parliament, can only be restricted if it falls within the scope of Article 17 of the Convention.

48. Within this context, İFÖD would like to remind that the Court has already found in several cases violation of freedom of expression of applicants since they were punished for having disseminated separatist propaganda by referring to a particular region of Turkey as "Kurdistan".[28]

**Conclusion**

49. Considering all the above factors, İFÖD would like to emphasize that, article 163 § 3 of the Rules of Procedures **sanctions deputies not for the time, place and manner in which speech is conveyed but for the substance of the speech**.

50. It is also submitted that article 163 § 3 of the Rules of Procedures is as vague as article 301 of the Turkish Criminal Code which was found unforeseeable by the Court in *Taner Akçam v. Turkey* decision.

51. It should also be noted that article 163 § 3 of the Rules of Procedures **does not require hatred or incitement to violence as an element to punish deputies**. As this provision aims to punish peaceful views questioning the ideology of the State, only the members of minority are affected from this provision. All recent applications of this provision show the silencing effect of this provision. To the best of our knowledge, there has not been an example showing the opposite.

52. Finally, İFÖD believes that there is no legitimate aim that justifies the imposition of sanction on deputies that question the history and common past of the Turkish nation. Members of the majority can resist the views of the minority if they think they are inappropriate as long as these views do not affect the order of the Parliament.

53. Overall, İFÖD believes that this case provides the opportunity for the Court to develop the standards it adopted in *Karacsony and Szanyi* judgments further.

**Submitted on 26 February, 2021**

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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.

[28] See, for example, *Karataş v. Turkey*, no. 23168/94, 8.7.1999.