Third Party Intervention

In the Case of Recep Özdemir v. Turkey (no. 41482/19)

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 Recep Özdemir v. Turkey (**No. 41482/19**) the issue of freedom of expression on the social media platforms. In this case, the applicant was charged with committing the crime of terror propaganda on account of his activities on the Facebook social media platform. The domestic courts considered that the applicant's Facebook activities, "*had propagated the illegal organization PKK/KCK/YPG/YPJ in such a way as to legitimize, glorify and encourage the methods of coercion, violence and threat from this organization*". The applicant was put in pre-trail detention and convicted for disseminating propaganda in favour of a terrorist organization and sentenced to **four years and six months imprisonment**. The applicant complained of his pre-trial detention and infringement of his freedom of expression for his conviction and imprisonment **without invoking any article of the Convention**.
2. The applicant was accused by the authorities in particular of the following facts:
    a. **having written the following comment** "Obviously one day we will be stronger in technology, then we will demand accountability for Cizre, Sur, Silopi and other massacres that do not come to mind" under a photo of two armoured vehicles with the title "Armored vehicle manufactured by YPG (the armed branch of the Party of the Syrian Democratic Union, considered by the Turkish authorities as a branch of the PKK, Kurdistan Workers' Party, organization illegal army)";
    b. **having clicked on the "Like" icon for the following publications**: **a photo shared with the comment** "The Republic of Turkey bombs everywhere in Efrin. 200 houses were bombed yesterday in Cinderes, a neighbourhood was completely destroyed. All places are bombed in the centre of Efrin, civilians are targeted. Erdoğan clearly gave orders to bomb everywhere. But the God has a plan too, O Erdoğan. You will give accounts to God"; **a photo of the armed people, allegedly members of an illegal organization, with the comment** "I brought the photos of our fellow combatants to Efrin"; **a Facebook status which reads as follows**: "A military vehicle belonging to the Turkish army (...) was destroyed by the guerrillas of YPJ (a Kurdish military organization composed exclusively of women, considered by the Turkish authorities as a branch of the PKK), the death toll is not known, slap YPJ "; **a Facebook status which reads as follows**: "Today Efrin has shown the world his attitude and his resistance. The occupying Turkish state will bow to the people defending its territory and its culture against the most barbaric attacks in the world and will ask for forgiveness"; **a Facebook status which reads as follows**: "Two soldiers lost their lives in Afrin and Kilis, the Turkish armed forces also announced that a tank had been hit by PKK / KCK / PYD-YPG and DAECH. [Cut short] (...), four of your tanks were destroyed by the Kurdish liberation movement during the day "; **a Facebook status that reads**: "There is not a day when the YPJ does not hit other occupation targets."
    c. **having shared a video showing members of a mountain team from an illegal organization**;

d. **having shared the following Facebook status**: "If you want revolutionaries, look at Rojova, Kerkük, Şengal, Amed, Dersim. You will see a number of revolutionary heroes who have fallen (...) for a free homeland!".

3. It is understood from the case file that none of the abovementioned content was produced by the applicant, but he shared or liked the content generated by other Facebook users. The only content produced by the applicant was a comment he added to a photo generated and shared by other users of the Facebook platform (see para 1.a. above). So far as the content of the liked or shared Facebook posts by the applicant are concerned, they are all related to criticism of military operations by Turkish Army in the northern Syria.
4. The European Court asked to the parties whether the applicant has been deprived of his liberty in violation of Article 5 §§ 1 and 3 of the Convention and whether his freedom of expression had been interfered, within the meaning of Article 10(1) of the Convention. The Court also asked whether this interference was foreseen by law and necessary, within the meaning of Article 10(2) (*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 Court asked to comment, on 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).
5. The **İFÖD submission will only address issues related to Article 10**.
6. 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 the European Court 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 reach of their publication is likely to be too limited in semi closed social media platforms such as Facebook. İFÖD will argue that **content produced by third parties but shared or liked by others like the applicant to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website especially when the applicant is a minor distributor rather than the author of the impugned statements**. At the end, İFÖD will provide a procedural review model discussing the 'general principles' to be taken into account in the decision-making process of the European Court with regards to allegations of violation of freedom of expression protected by article 10 of the Convention in criminal cases.

The International Legal Framework Used to Limit Speech Associated with Terrorism

7. İFÖD is in 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 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'.[1]
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.
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. 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.

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":**

[1] Report of 10 January 2012 (CommDH(2012)2), para. 69.

• 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 and İFÖD believes that the **Multi-Pronged Incitement Test should be considered together with the potential impact of the medium of expression concerned** (*Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts)) 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.

The Speaker/Producer vs. the Distributor of Content

12. 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).
13. Within this context, there needs to be a distinction between various types of social media users and although the title and position of the person making the speech is important within the Court's jurisprudence, there may be other type of users of the social media platforms. Therefore, there needs to be a distinction between the following type of users while determining criminal responsibility if any:
    a. **The Speaker** is the person who creates, produces and owns the original content
    b. **The Distributor** is the person who shares or likes the original content
14. 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, 23.4.1992, § 46). Such criticism, even if harsh, should be viewed as a part of political pluralism and freedom to impart one's opinion.
15. Even when liability may arise for the **speaker category** within the context of social media postings and content, that may not necessarily extend to the **distributor category** for the reasons that will be explained below as **the potential impact of such distribution** needs to be evaluated further by reference to the Court's jurisprudence.

Potential Impact of the Distribution of Content on the Facebook Platform

16. There are substantial differences between the social media platforms and how the users choose to use such platforms. While, for example, Twitter is regarded as largely an open microblogging platform, Facebook is often regarded as a semi closed platform. Therefore,

the European Court should be mindful that **the applicant shared and liked a number of 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).

17. 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 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.
18. 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).
19. 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 shared five separate postings on Facebook or when he was prosecuted (*Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131). Moreover, the applicant shared and liked several Facebook postings, all 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 because they criticized actions of security forces during operations in northern Suria.** Thirdly, the applicant did not produce the content of postings, but he shared or liked contents generated by other Facebook users and already available on the platform. Fourthly, there is no indication that the **statements that the applicant published attracted any public attention**. It can be seen from the applicant's submission dossier that neither the prosecution nor the courts had any evaluation on the potential impact of the applicant's postings on the Facebook platform. At most, **his contribution to the distribution of the original content is trivial**.
20. 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** (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) considering that the content he shared on the Facebook platform was ignored by his followers or was not "liked" or shared further and there is no indication on the application dossier to suggest otherwise or to indicate that his Facebook activity contributed significantly to the distribution of the impugned content.

21. İFÖD is of the opinion that **these are important factors that needs to be taken into account** and that the European Court should assess the potential impact of the applicant's distribution of content on the Facebook platform produced by other users or speakers.

Context of the Statements and the Requirement for Incitement to Violence

22. 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.
23. 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* (nos. 43453/04 and 31098/05); *İncal v. Turkey* (no. 22678/93)).
24. Recently, in a number of cases the Court found violation of freedom of expression of the applicants since domestic courts, when convicting the applicants on account of disseminating propaganda in favour of a terrorist organisation, **failed to demonstrate that impugned acts could, having regard to the context in which they were registered and their capacity to harm**, have been regarded as containing an incitement to the use of violence, to armed resistance or to uprising, or as constituting hate speech (*Mart and others v. Turkey*, no 57031/10, 19.03.2019, § 32; *Necdet Atalay v. Turkey*, no. 76224/12, 19.11.2019, § 20, *Mehdi Tanrıkulu v. Turkey*, no. 9735/12, 05.05.2020, § 33).
25. The European Court requires that national authorities or domestic courts **should provide a sufficient explanation of the question of why the impugned content, read in the context, should be interpreted as legitimating and encouraging the methods of violence used by the terrorist organisation** and of the question of why it could not be considered as participating in a public debate on questions of general interest relating to the conflict between the PKK and the security forces (*Mehdi Tanrıkulu v. Turkey*, no. 9735/12, 05.05.2020, § 32).
26. Therefore, **in order to punish a statement, it should include a call or incitement to violence**. The ECtHR held that in the absence of a call or incitement to violence the conviction of a person for an act or statement which may be deemed to coincide with the aims or instructions of an illegal organisation was of concern (*Gülcü v. Turkey,* no.17526/10, 19.1.2016, § 112). 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-vis the Kurds being instrumental in the development of the "fascist movement" (*Başkaya and Okçuoğlu*, (nos. 23536/94 and 24408/94, § 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), no. 24762/94, § 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*, no. 25723/94, § 62); saying that "Kürdistan is burning" and "describing events as genocide" (*Şener,* no. 26680/95, § 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).

27. 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*, nos. 23927/94 and 24277/94, § 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,* no. 26680/95, § 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, 16.3.2000, § 60)
28. 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).
29. The ECtHR does not make a clear distinction between direct and indirect incitement.[2] 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,* no. 29590/96, § 53). Merely arguing that the terrorist organisation also voices similar views does not count as concrete evidence.
30. 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*

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

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."(no. 4870/02, § 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 (no. 29590/96, § 54).

31. The Court, therefore, should take into consideration the context of the statements shared by the applicant and assess further whether the shared content amounts to incitement to violence or whether such content remains within the limits of acceptable political criticism.

Content of the Facebook Publications Amounts to Political Speech

32. From an assessment of the full dossier and the related decisions, the local courts did not assess in full the nature of the written comment and shared content by the applicant on the Facebook platform other than stating that the impugned **statements glorified the actions of the PKK and denigrated the operations of security forces.**
33. However, the local courts only focused on the **form and tenor of the impugned postings** 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).
34. Furthermore, the local courts 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*, no. 22678/93, 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).
35. The Court stated 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 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).

36. İFÖD, therefore believes that in addition to context analysis, content analysis is an important necessary element for assessing this and similar applications in the future with regards to social media content.

Procedural Obligations of Article 10

37. The Court established that Article 10 imposes procedural obligations to the Contracting parties and the Court's task is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts. The Court emphasized that **the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account** when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (*Baka v. Hungary* [GC], no. 20261/12, § 161, 23.06.2016; *Kula v. Turkey*, no. 20233/06, §§ 45 and 46, 19.06.2018).
38. Within this context, the Court established that the **obligation to provide reasons for a decision is an essential procedural safeguard under Article 6 § 1 of the Convention,** as it demonstrates to the parties that their arguments have been heard, affords them the possibility of objecting to or appealing against the decision, and also serves to justify the reasons for a judicial decision to the public. This general rule, moreover, **translates into specific obligations under Articles 10** and 11 of the Convention, by **requiring domestic courts to provide "relevant" and "sufficient" reasons for an interference**. This obligation enables individuals, amongst other things, to learn about and contest the reasons behind a court decision that limits their freedom of expression or freedom of assembly, and thus offers an important procedural safeguard against arbitrary interference with the rights protected under Articles 10 and 11 of the Convention (*Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; *Obukhova v. Russia*, no. 34736/03, § 25, 08.01.2009; *Sapan v. Turkey*, no. 44102/04, §§ 40-42, 08.06.2010; *Cumhuriyet Vakfi and Others v. Turkey, no.* 28255/07, §§ 67-68, 08.10.2013; *Gülcü v. Turkey*, no.17526/10, § 114, 19.01.2016).

39. İFÖD is in the opinion that failure of domestic courts **including that of the Constitutional Court** to evaluate an impugned social media post under the light of principles developed by the European Court in the form of multi-pronged incitement test and failure in providing relevant and sufficient reasons constitutes in itself violation of procedural obligation of the state under Article 10. Such considerations and assessments as required by the European Court's jurisprudence are missing from the local courts' decision. In other words, the domestic courts "**failed to "apply standards which were in conformity with the principles embodied in Article 10**" (see *Terentyev v. Russia*, no. 25147/09, § 24, 26.01.2017; *Kommersant and Others v. Russia*, nos. 37482/10 and 37486/10, § 23, 23.06.2020). The Court should take into consideration whether domestic courts provided a reasoned decision considering all the relevant factors explained above.

Proportionality of the penalty

40. Article 7/2 of the Anti-Terror Law stipulates that those who disseminate propaganda in favour of a terrorist organisation to be punished with a sentence between one year and five years' imprisonment. It is observed that the assize court, in the case at hand, determined the basic sentence as two years by moving away from the lower limit and increased the sentence by half considering that the crime was committed through the media and also increased the sentence by one half considering that the crime was committed successively. Although the lower limit of sentence for terror propaganda is one-year imprisonment, the court determined the basic sentence as two years. It means that the court evaluated the applicant's act as a serious crime. The Court also evaluated Facebook platform as a mainstream media and increased the sentence by half for this reason. Furthermore, the Court considered every posting as a different act of crime and decided that the applicant committed a successive crime, therefore increased the sentence second time by half. As a result, the applicant was sentenced to four years and six months imprisonment without making any remission. İFÖD is of the opinion that the European Court should take into consideration whether the punishment was proportionate with the acts committed by the applicant.

Conclusion

41. 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 including trivial Facebook shared posts with very limited impact can be reprimanded harshly by the public authorities.
42. 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 improved, and in fact worsened. 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.

43. 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. Since then, persistently, such investigations and prosecutions continue.
44. Overall, İFÖD's submission shows that the ECtHR's **Multi-Pronged Incitement Test** which takes into account the distinction between different kind of social media users **(**the Speaker/Producer vs. the Distributor of Content) together with the potential impact of the distribution of content on the Facebook platform or any other social media platforms will be necessary to address applications subject to Article 10 of the Convention.

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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.