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Third Party Intervention

In the Case of Taner Kılıç v. Turkey (no. 208/18)

by

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Introduction

1. İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association) is of the opinion that the Taner Kılıç application cannot be evaluated and understood **without considering the general political context in Turkey**. In order to evaluate whether the applicant's arrest and detention was arbitrary and whether there was an effective remedy in the domestic law which should be exhausted by the applicant before lodging an individual application before the European Court of Human Rights, **the general political situation, the state of human rights and relations between the judiciary and the executive should be portrayed clearly**. Therefore, **İFÖD will confine its comments basically on the fourth question**, namely, **whether the deprivation of liberty imposed on the applicant in this case was applied for any purpose other than that envisaged by Articles 5, 10 and 11 of the Convention, in breach of Article 18** (Rasul Jafarov c Azerbaijan, No. 69981/14, §§ 153-163, March 17, 2016). However, in addition to the issues surrounding Article 18, İFÖD would like to initially make a brief comment on the question of whether the route established by Article 141 of the Code of Criminal Procedure can be considered as providing an appropriate remedy to the applicant's complaints relating to (a) his detention, which in his opinion was not based on a reasonable suspicion of having committed a criminal offense within the meaning of Article 5 § 1 (c) of the Convention; and (b) the lack of relevant and sufficient grounds for the deprivation of liberty in question (see, in particular, Buzadji v. Republic of Moldova, (GC), No. 23755/07, § 102, ECHR 2016 (extracts)).

Does Article 141 of CCP Provide An Effective Remedy?

2. To begin with the question of whether Article 141 of the CCP provides an effective remedy for the complaints of the applicant, İFÖD would like to remind that the government so far has not showed a single decision to the European Court or any such decisions have been included within the Constitutional Court decisions which shows that an assize court decided that arrest and pre-trial detention of an applicant was illegal and awarded compensation while criminal trial was continuing in another criminal court. Furthermore, the jurisprudence of the Court of Cassation does not affirm that an action for compensation under Article 141 of the CCP can be brought claiming that detention was not legal in cases where the verdict did not become final, either after the applicant had been released or after the first instance court had rendered its decision. The Court of Cassation ruled that **compensation action can be brought before the verdict became final only if the claim does not affect the result of the main case or it does not depend on the result of it** (12th Criminal Chamber of the Court of Cassation, File No: 2014/20624, Decision No: 2015/12265, Date 01/07/2015). However, arguments relating to the lawfulness or arbitrariness of the order for pre-trial detention based on the lack of facts or information which would satisfy an objective observer that the person concerned may have committed the offence cannot be separated from the main case. It is not possible to say that finding of an assize court that the evidence in the case file would not justify pre-trial detention of a suspect would not affect the outcome of the main trial as well. Therefore, **Article 141 of the CCP cannot provide an effective remedy for complaints of lawfulness of the pre-trial detention before the verdict becomes final**.

3. Up to now, the European Court never ruled that Article 141 provided an effective remedy for Article 5/1-c complaints after a suspect was released or the first instance court rendered a conviction decision and the Court never found an application inadmissible on the basis of failure to exhaust compensation action under Article 141 at that stage. In the Lütfiye Zengin judgment, **the ECtHR made a distinction between Article 5/1 and 5/3 claims with regard to Article 141 actions and made it clear that Article 141 cannot be deemed an effective remedy about the legality of arrest** (no. 36443/06, 14.4.2015, para. 66). The ECtHR in Lütfiye Zengin underlined that at no time of the internal procedure the national authorities did explicitly or implicitly recognize that the deprivation of liberty of the applicants was unlawful or contrary to law. In particular, requests of the applicants for release had been repeatedly rejected (para. 65).
4. In R.M. v. Turkey, as to Article 5/1 complaints of the applicant, the government submitted that this part of the application should be rejected, as the applicant had not brought a case under Article 141. The ECtHR rejected the government's preliminary objection on the ground that "they have not provided any explanation as to how that provision was relevant to the applicant's situation. They have also not submitted any examples where that remedy was successfully applied to provide redress in circumstances similar to the applicant's" (no. 81681/12, 13.6.2017, para. 51). In many other judgments, the ECtHR never accepted the government's preliminary objections with regard to failure to exhaust domestic remedies because the applicants failed to bring a compensation action under Article 141 of the CCP in relation with Article 5/1 or Article 5/1-c complaints (see for example *Alparslan Altan v. Turkey*, no. 12778/17, 16.04.2019, para. 87; *Mehmet Hasan Altan v. Turkey*, no. 13273/17, 20.03.2018, para. 103). It follows then **Article 141 of the CCP has never been accepted as an effective remedy for complaints about the legality of the arrest** under the European Court's jurisprudence.
5. İFÖD also would like to draw attention of the European Court to the fact that Article 141 of the CCP **provides opportunity of bringing an action for compensation against the state for many different complaints relating to protective measures in criminal procedure**. Obliging a person to file a separate action for every different complaint at different stages of the criminal procedure may deter him or her to seek remedy for violation of his or her fundamental rights because of the financial and other costs of bringing an action. For example, if such an approach is accepted, a person should file a separate compensation action for complaints relating to arrest and police custody, a separate action for lawfulness of detention, another action for duration of detention etc. No one can afford costs of such legal actions and people give up seeking remedy for violations of their rights. Such a result is not compatible with the principle of effective protection of fundamental rights. Nevertheless, İFÖD observes that in many cases complaints relating to irregularities about arrest and police custody have been found inadmissible by the Constitutional Court and by the ECtHR because applicants failed to bring an action for compensation under Article 141 of the CCP. Such a result is unforeseeable for the applicants and contributes to impunity of human rights violators and continuation of human rights violations.

Deterioration of Fundamental Rights in Turkey

6. İFÖD observes that the state of human rights, the rule of law and independence of the judiciary **deteriorated** drastically within the last five years in Turkey. This has resulted with Turkey

becoming one of the worst performers in the world in terms of freedom of assembly, freedom of expression and media freedom, as reflected in recent international reports. In 2016, Reporters Without Borders (RSF) ranked Turkey 151st of 180 countries in their World Press Freedom Index. In 2017, Turkey ranked 155th and 157th in 2018. Similarly, Freedom House classified Turkey as a 'partly free' country ranking it 156th in its 2016 media freedom index with a 20point decrease in score compared to 2010. In April 2017, it was announced that Turkey had fallen to 163rd in the global index. In January 2018, Turkey was ranked 154th and classified as 'not free' for the first time. Finally, in the most recent Freedom in The World 2019 Report, Turkey's total score was 31 out of 100 points and continued to be in the "not free" category. The country report indicated that "*the government has cracked down on NGOs since the coup attempt, summarily shutting down at least 1,500 foundations and associations and seizing their assets. The targeted groups worked on issues including torture, domestic violence, and aid to refugees and internally displaced persons (IDPs). NGO leaders also face routine harassment, arrests, and prosecutions for carrying out their activities.*"[1]

7. The crisis of rule of law and human rights in Turkey was also portrayed by the Rule of Law Index prepared by World Justice Project. While Turkey's overall score was 0.46 and ranking was 80th in 102 countries in 2015 Index, in 2019 Index Turkey's overall score has fallen to 0.42 points and its ranking became 109th out of 126 countries. In the category of fundamental rights, Turkey's score was 0.32 and ranked 122nd out of 126 countries. The lowest score was 0.06 in the sub-category of no improper government influence in the category of criminal justice. This finding of World Justice Project clearly shows that there is a widespread perception among both lawyers and lay people that government has improper influence over the criminal processes.[2]
8. The problems relating to freedom of expression is evident not only in reports published by NGOs but also in reports issued by interstate oversight mechanisms. The UN Special Rapporteur on the right to freedom of opinion and expression noted his concerns in his preliminary observations after his visit to Turkey in November 2016.[3] The Council of Europe's platform to promote the protection of journalism has also noted that Turkey has the highest number of alerts and that a large part of these involve imprisonment of journalists.[4] The Council of Europe Commissioner for Human Rights' *Memorandum on Freedom of Expression and Media Freedom in Turkey* published in February 2017, states that 'journalists have been among the most affected by the various forms of judicial harassment' and also that 'detention is the most visible and chilling form that this harassment has taken.'[5] The Memorandum also noted that 'the exceptional nature of remands in custody, and the need to provide clear legal reasoning in cases where they are necessary are not embedded in the practice of the Turkish judiciary.' It goes on to say that **many Turkish judges still continue to use the list of catalogue crimes in the Code of Criminal Procedure as grounds for detention without a careful examination of the remaining conditions of detention**. The Venice Commission also noted that without individualized decisions, and without the possibility of timely judicial review, "membership" of

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

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

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

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

[5] CommDH (2017)5, para. 79.

terrorist organizations charges and arrests without relevant and sufficient reasons, instead of restoring democracy may further undermine it.[6]

9. İFÖD completely agrees with these observations and would like to emphasize that under these conditions an isolated approach to the case at hand may cause losing sight about surrounding conditions of the applicant's accusation and detention by public authorities. Therefore, İFÖD would like to make following submissions to the Court with this intervention, drawing upon its expertise as an organization specialized in defending and promoting freedom of expression:
   - The broader political context in which the applicant was arrested and detained should be taken into account when evaluating whether his detention was arbitrary, whether there exists an affective remedy in domestic law and whether the deprivation of liberty imposed on the applicant in the present case has been applied for a purpose other than that envisaged by Articles 5, 10 and 11 of the Convention, in breach of Article 18.
   - The most important factor in the deterioration of the rule of law and human rights is the lack of judicial independence in Turkey. Independence of the judiciary has been curtailed to a significant extent in recent years and judiciary has been brought under the control of the executive.
   - Anti-terror laws are interpreted very widely and vaguely to silence dissidents and civil society including human rights defenders.

Article 18 of the Convention and Burden of Proof

10. The Court revised its case-law regarding Article 18 in a recent judgment (*Merabishvili v. Georgia* (GC), no. 72508/13, 28.11.2017). The Court clarified that a restriction can be compatible with the substantive Convention provision which authorizes it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction does not run counter to Article 18 even if it also pursues another purpose (para. 305). Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law (para. 307).
11. In the *Merabishvili* judgment, the Court also clarified its position in terms of standard and burden of proof: "*But if the two points are clearly distinguished, the questions in relation to proof become simply how it can be established whether there was an ulterior purpose and whether it was the predominant one*" (para. 309). In doing this, the Court finds that it can and should adhere to its usual approach to proof rather than special rules (para. 310).
12. The first aspect of that *approach* is, first set out in *Ireland v. the United Kingdom* (para. 160-61) and more recently confirmed in *Cyprus v. Turkey* (para. 112-13 and 115) and in *Georgia v. Russia (I)* (para. 93 and 95), that, as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin and because it can, if necessary, obtain material of its own motion (para. 311). The second aspect of the Court's approach is that the standard of proof before it is "*beyond reasonable doubt*". That standard, however, is not co-extensive with that of the national legal systems which employ it.

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

First, such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Secondly, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (para. 314). The third aspect of the Court's approach is that the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it (para. 315). There is therefore no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations (para. 316). It must however be emphasized that circumstantial evidence in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organizations or the media, or the decisions of other national or international courts are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court (para. 317).

13. The judgment also affirms the *well*-established case-law to the effect that there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies (para. 288).
14. The Court in its *Selahattin Demirtaş v. Turkey* (2) (no. 14305/17, 20.11.2018) decision depended on the following observations when reaching the conclusion that Article 18 of the Convention was violated in conjunction with Article 5: Although there was reasonable suspicion leading to applicant's arrest, the courts ordering extension of his detention failed to provide grounds that can be regarded as "sufficient" to justify its duration. The Court also found that there was political motive behind continued detention of the applicant as a co-leader of the second biggest opposition party in the parliament. When reaching this conclusion, the Court resorted to contextual analysis and considered the general political and social background to the facts of the case and the sequence of events emerging from the case file. Within this context, the Court depended on observations of independent international observers like the Commissioner for Human Rights, the Venice Commission, Amnesty International and the intervening third parties, that in view of the applicant's position on the Turkish political scene, the tense political climate in Turkey since 2014 and the speeches by the applicant's political opponents, among them the President of Turkey, it is understandable that an objective observer might suspect that the extension of the pre-trial detention of the applicant was politically motivated. The Court also took into account the opinion of the Commissioner for Human Rights, who stated that national laws were increasingly being used to silence dissenting voices (para 263-67).
15. Furthermore, the Court determined that **political nature of the applicant's detention was the predominant purpose underlying the repeated decisions to extend the applicant's pre-trial detention**. When reaching this conclusion, the Court made reference to the observations by the Commissioner for Human Rights, that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency (para. 270). The Court also observed that although the investigation in respect of the applicant had not been initiated in response to the speeches by the President of Turkey, it had been at least accelerated after he had given those speeches and stated that "the deputies of that party [the HDP] must pay the price". The Court decided, having regard to in particular the fact that the national authorities have repeatedly ordered the applicant's continued detention on insufficient grounds consisting simply of a formulaic enumeration of the grounds for detention provided for by law, that it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely

the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society (para. 272).

16. In the Selahattin Demirtaş case, the main point that lead the Court to find a violation of Article 18 was the pressure imposed upon the judiciary by the execution. In the light of these, **İFÖD would like to provide its observations about the independence of the judiciary in Turkey** as almost in all cases the Turkish Government argues that all proceedings were carried out by independent judicial bodies. With this claim the Court presuppose that all the decisions regarding arrest and detention of the journalists, civil society activists, human rights defenders and dissident were delivered by independent and impartial authorities in good faith. Nevertheless, this supposition seems very optimistic, considering the recent developments in Turkey and leaves individual rights unprotected and democratic values and the rule of law forlorn.

Why a Contextualized Approach is Needed?

17. As the jurisprudence of this Court under Article 18 clearly shows, a contextualised approach is needed to examine complaints concerning the detention of a human rights defender in an environment where civil society is harassed by judicial measures. Therefore, İFÖD invites the Court to take into account the broader political context leading up to the arrest of the applicant. **It respectfully asks the Court to adopt a contextualized approach by taking into consideration of its own case law on Article 18 of the Convention and recent political developments in Turkey**.
18. Article 18 expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself. The mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it, does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case.
19. In cases regarding with the arrest or punishment of journalists, civil society activists, human rights defenders, opposition party members and dissidents, there is often the problem of ulterior aim of public authorities to silence and punish critical voices. In most of the cases, public authorities aim to punish critical voices just because of their legitimate activities, but they accuse them of being members of terrorist organisations or supporting terrorism or even being a spy acting on behalf of a foreign country or external enemies.
20. In such cases, it is often difficult for the applicants to prove that their detention or punishment is directly ordered by the executive. In such cases, a contextualized approach is critical to protect individual human rights, namely freedom of expression and freedom of assembly and association as well as democratic values and the rule of law that are founding principles of the Council of Europe. Especially, in countries where judiciary is effectively controlled by the executive or political organs, criminal law and criminal procedures are used as tools to silence critical voices and crackdown opposition by rulers in order to maintain their power. Therefore, a contextualized approach is necessary not only to determine whether there were other purposes that are not prescribed by the Convention, but also to evaluate whether the arrest or punishment is arbitrary and whether there exist an effective remedy in domestic law to challenge the legality of detention or punishment.

21. Human rights defenders have particularly been targeted by the government through the judicial harassment since they touch upon hot topics like serious human rights violations. This has been clearly portrayed by numerous international human rights monitoring bodies[7] and international NGOs[8]. Most of these reports specifically made reference to the situation of Mr. Kılıç. UN Special Rapporteur on The Situation of Human Rights Defenders Michel Forst indicated in his World Report 2018 that "*All defenders are vulnerable given the current political situation in Turkey, including even (and sometimes especially) high profile defenders. Journalists, women defenders, defenders of the rights of Kurds and Kurdish defenders, and defenders of sexual orientation and gender identity rights also face particular risks*."[9]

22. IFÖD kindly reminds the ECtHR that Mr. Taner Kılıç, **the applicant was the executive director of the Amnesty International's Turkey Branch** (AI Turkey) when he was arrested and put into detention. He was particularly at risk because of his position as head of AI Turkey. AI Turkey had published an extensive report about massive purges of civil servants during the public emergency rule just before his detention.[10] Later on, AI Turkey Director İdil Eser was also arrested and detained on unsubstantiated charges in the Büyükada case. Mr. Kılıç was released by the trial court (Istanbul 35th Assize Court) on 31.01.2018, taking into account the state of the evidence, but, on the same day, the public prosecutor objected to the applicant's release although such a procedure was not provided by the law and the appellate court of the same level (İstanbul 36th Assize Court) decided to allow the objection of the public prosecutor and decided for the continuation of the applicant's detention on remand. **İFÖD kindly requests the ECtHR to consider possible executive influence on these unprecedented judicial decisions**.

Judicial Independence in Turkey

23. A competent, independent and impartial judiciary is fundamental to the rule of law, particularly in respect of the fair administration of justice and for the protection of human rights. It is therefore essential that a judicial system is able to guarantee the independence and effectiveness of its courts and judges. Independence of the judiciary has always been a problem in Turkey. Nevertheless, in recent years, executive control over judiciary has been intensified enormously and structural defects became apparent.
24. Following the 2010 constitutional amendments, which changed the structure of the former judicial council (High Council of Judges and Prosecutors -HSYK) and introduced a partly election system, twice the list of candidates supported by the Ministry of Justice won the elections in 2010 and 2014. This means that majority of the members of the HSYK had the support of the executive and were prone to the demands of the executive. Not surprisingly, after each election new laws were adopted by the parliament changing the structure and increasing the number of the members of both the Court of Cassation and the Council of State. In 2011 the

[7] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21875&LangID=E ; https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22390&LangID=E; http://website-pace.net/documents/19838/4246196/20180523-DefenderProtection-EN.pdf/7350b15e-61cc-4a51-b58d-a2788b3e00c4

[8] Human Rights Watch, https://www.hrw.org/world-report/2019/country-chapters/turkey; EuroMed Rights, https://euromedrights.org/country/europe/turkey/

[9] https://www.protecting-defenders.org/sites/protecting-defenders.org/files/UNSR%20HRDs-%20World%20report%202018.pdf

[10] https://www.amnesty.org.tr/public/uploads/files/GelecekKaranlikTRAmnesty(1).pdf (accessed on 02.07.2019)

number of the members of the Council of State was increased from 95 to 156, and number of the members of the Court of Cassation from 250 to 387 by the Law no 6110.[11] The basic motive behind this change was to change the composition of the members by appointing new members close to the government. Later on, it was coming to light that, most of the members elected by the new HSYK was close to Gülenists, then ally of the ruling AKP. Following the collapse of coalition between the AKP and Gülenists after 17-25 December 2013 investigations, the Ministry of Justice supported the candidates of the Union in the Judiciary Platform in 2014 HSYK elections and that list won the elections. A further intervention was made to the number of the members of high courts after that elections in 2014 and the number of the members of the Court of Cassation was increased from 387 to 516 and the number of the members of the Council of State from 156 to 195 by the Law no 6572. Structural changes were also made in the functioning of the high courts by this law and basic motive was not different from the previous one.[12]

25. In 2016 another intervention was made to the structure of the high courts; this time number of the members was reduced.[13] The number of the members of the Court of Cassation was reduced from 516 to 300 and gradually to 200, and the members of the Council of State from 195 to 116 and gradually to 90 by a law (Law no 6723).[14] The motive was to purify high courts from unwanted members.[15]
26. In 2017, structure and name of the judicial council has been changed by a constitutional amendment (Law no 6771), which will be evaluated below. This time, following the appointment of the new members of HSK, structure and functioning of the high courts changed again by an Emergency Decree Law (Decree no 696) and 100 new members were appointed to the Court of Cassation and 16 new members to the Council of State.
27. In each of the above-mentioned interventions, government produced some excuses for the changes, but **it can clearly be seen that no excuse can justify four structural reform in the form and functioning of the high courts within six years**. In each of these reforms, conditions of eligibility to membership of a high court or eligibility to be elected as president or chamber president were **also loosened in order to appoint those people who are close to the ruling party**. After each election in the HSYK almost half of the all judges were appointed to another court or to another city.
28. The political impact on the judiciary has increased following the failed coup attempt on 15 July, 2016. Two members of the Constitutional Court, five members of the High Council of Judges and Prosecutors, 140 members of the Court of Cassation, 48 members of the Council of State, 4240 judges and prosecutors, all of which were appointed under AKP governments, have been dismissed and purged. 2250 judges and prosecutors including higher courts members were arrested and some of them still remain in detention on remand. It is striking that, almost three years later, the Council of State, whose competence to hear appeals against the dismissal of judges and prosecutors has issued no decision yet. The Council of Europe's Commissioner for Human Rights found that this situation created "*an atmosphere of fear among the remaining*

[11] http://www.hurriyet.com.tr/gundem/yargitay-ve-danistayda-daire-sayilarini-attiran-tasari-yasalasti-16982030 (accessed on 26.11.2018)
[12] http://www.aljazeera.com.tr/haber/yuksek-yargida-cemaate-fren (accessed on 26.11.2018)
[13] https://www.ntv.com.tr/turkiye/yargitay-ve-danistay-uyeleriyeni-yargi-paketini-protesto-etti,OQGgmDIUVEyiXe-AR39izQ?_ref=infinite (accessed on 26.11.2018)
[14] https://www.bloomberght.com/haberler/haber/1899437-cumhurbaskani-erdogan-yargitay-ve-danistay-kanununu-onayladi (accessed on 26.11.2018)
[15] http://www.diken.com.tr/ne-yeni-yargi-ne-de-yargiya-son-darbe/ (accessed on 26.11.2018)

judges and prosecutors."[16] The European Commission also stressed that *"[t]hese dismissals had a chilling effect on the judiciary as a whole and risk widespread self censorship among judges and prosecutors. No measures were taken to restore legal guarantees ensuring the independence of the judiciary."*[17]

29. The final step that imperilled the judicial independence and that caused much international scrutiny and criticism is the most recent Constitutional amendments approved by referendum on 16 April 2017. Apart from establishing an unchecked presidential system, it also modified the composition and appointment of the now called the Council of Judges and Prosecutors (CJP - previously preceded by a "High"). Based on the new constitutional provision, the Council of Judges and Prosecutors has been reappointed. Of the thirteen members, six are now effectively appointed by the President of the Republic, including four ordinary members as well as the Minister of Justice (who acts as President of the Council) and the Under-Secretary of the Ministry of Justice. The remaining seven members are appointed by the National Assembly in which the President's party has the majority. None of the members of the Council is appointed by judges or public prosecutors. Finally, under the new constitutional regime, the President of the Republic no longer has a neutral role but may maintain political party affiliations. The Venice Commission found that this "*composition of the CJP ... would place the independence of the judiciary in serious jeopardy ... . Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice*."[18]
30. Numerous other reactions to this constitutional amendment, political impact on the judiciary and some examples of direct political interference with criminal procedures were portrayed in our third-party intervention to *Osman Kavala v. Turkey* (App. No. 28749/18) case.[19]
31. It should also be noted that the Constitutional Court is also not immune from executive and political influence considering that majority of its members are appointed by the President and two of its members were arrested and detained without decision of the Constitutional Court, although members of the Constitutional Court cannot be prosecuted without permission of the Court except *in flagrante delicto*.

Wide and Vague Interpretation of Anti-Terror Laws

32. Another worrying problem in terms of freedom of expression and freedom of assembly and association is applying anti-terror laws to silence dissent voices and to crackdown civil society. Journalists, civil society activists, human rights defenders and opposition politicians are generally accused of being member of a terrorist organization or aiding a terrorist organization or even attempting to overthrow government and they are arrested and detained on the basis of their legitimate activities or opinions.
33. The Turkish domestic law requires the involvement of violence to punish expression related to terrorism. However, people are arrested or even sentenced to imprisonment without providing

[16] Abdullah Zeydan others v. Turkey, ECtHR, Application no. 25453/17 and others, Third party intervention by the Council of Europe Commissioner for Human Rights, Doc. CommDH(2017)33, 2 November 2017, para. 35
[17] European Commission, Turkey 2018 Report, Doc. No. SWD(2018) 153 final, 17 April 2018, p.23.
[18] Venice Commission, Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 207, adopted at its plenary session, 10- 11 March 2017, Doc. CDL-AD(2017)005-e, para. 119
[19] Submitted to the Court on 17 January 2019

any evidence showing the suspect had resort to violence or incited to violence. Judicial authorities do **not distinguish between content involving legitimate criticism of the government and content serving for the aims of the alleged terrorist organization.** In most of the cases a correlation is established between the aim of the alleged terrorist organization to overthrow elected government and the suspects' criticism of the government and suspects are accused of terrorism related crimes. **This approach equalizes criticism of government with terrorist activity and leaves no room for democratic and critical opposition.**

34. During the state of emergency period, **reprisals against human rights defenders, including judicial harassment or arbitrary arrests of some human rights defenders on several occasions in Turkey have been witnessed and well documented in several reports** (see generally New restrictions on NGO activities in Council of Europe member States (Report by Committee on Legal Affairs and Human Rights Rapporteur: Mr Yves CRUCHTEN, Doc. 14570, 07 June, 2018 and Protecting human rights defenders in Council of Europe member States (Report By Committee on Legal Affairs and Human Rights Rapporteur: Mr Egidijus VAREIKIS, Doc. 14567, 06 June, 2018). Therefore, **civil society activists or human rights defenders were targeted because of their legitimate activities but they were accused of terrorism related crimes on the basis of false evidence. Typical example of such unsubstantiated charges can be seen in the Büyükada case in which Mr. Kılıç is also on trial.** The Human Rights Commissioner defined this application as "judicial harassment" and said that in recent times, and especially after the failed coup attempt, various types of judicial harassment have been imposed upon different groups and sectors in Turkey.[20]
35. The Venice Commission recommended that the established criteria by the Court of Cassation in relation to crime of membership to a terrorist organisation such as "continuity, diversity and intensity", "organic relationship" to an organisation or acted knowingly and willingly within the "hierarchical structure" of the organisation, should be applied strictly. The loose application of these criteria may give rise to issues concerning in particular the principle of legality within the meaning of Article 7 ECHR. Secondly, the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation.[21]
36. Recently, ECtHR, found unforeseeable the application of Article 220/6 and 220/7 of the Turkish Criminal Code in concrete cases and ruled for the violation of Article 11 of the Convention in *Işıkırık v. Turkey, Bakır and others v. Turkey* and *İmret v. Turkey* cases.
37. In the current case, Mr. Kılıç was accused of being a member of alleged FETÖ organization on the basis of having downloaded an application called Bylock on his cell phone; subscription to certain publications, such as the daily Zaman; the fact that his sister was married to the publisher of this newspaper; the fact that his children were enrolled in schools managed by the organization in question and closed by the decree-laws and accounts opened at Bank Asya Bank. Later it was **revealed by an expert report that he never downloaded or used the Bylock application**. He was never accused of any violent activity or supporting violence and all his actions were legal when they were committed. **However, Mr. Kılıç was arrested in the context of an operation against allegedly Gülenist lawyers**. But his file was separated from others' and **later joined to the Büyükada case**. As mentioned earlier, AI Turkey published an extensive report about purges of civil servants under the state of emergency rule just before his

[20] Memorandum on freedom of expression and media freedom in Turkey, CommDH (2017) 5, 15.2.2017.
[21] Venice Commission, Opinion On Articles 216, 299, 301 And 314 Of The Penal Code Of Turkey, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), para. 106-107.

arrest. Later another director of AI Turkey İdil Eser was also detained on similar terrorism related accusations in the Büyükada case.

38. The media campaign and accusations of spying and plotting an uprising against the government from government circles against human rights defenders in the Büyükada case was proven to be false later on. But nine human rights defenders including Mr. Kılıç were detained on the basis of those unsubstantiated charges. This operation created an atmosphere of fear among NGOs and human rights organisations and negatively affected their activities. Most of the NGOs were reluctant in monitoring and reporting human rights violations during the public emergency rule.

Conclusion

39. As set out above, İFÖD provides an overview of the legal principles to be applied in cases concerning the rights guaranteed under Articles 5, 10, 11 and 18 of the Convention. The proper application of these principles is critical in periods where essential components of a democratic society, such as a freedom of expression and freedom of assembly and association are under threat. **Cases such as the present one represent an important opportunity for the Court to apply the strictest of scrutiny in such a context to ensure that civil society activists, journalists, and outspoken critics are not subject to charges that are politically-motivated, unjustified with reference to the exigencies of the situation and repugnant to the obligations set out under the Convention**.
40. Although it takes time for such practices to be examined by the ECtHR, these developments have reached a level that cannot be ignored by the ECtHR. The Court, as a measure against detention being used as a systematic and pervasive instrument to silence dissent in Turkey and other countries, has adopted changes to its priority policies effective as of 22 May 2017 to speed up the processing of such applications.[22] The ECtHR has thus widened the category of 'urgent' applications, which formerly comprised applications that showed risk to life or health of applicants, to include these new cases. The category of urgent applications now includes those instances where the applicant is deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights. İFÖD believes that the current application of Taner Kılıç falls in to this category and requires a swift decision as the applicant's detention and repeated decisions to extend the applicant's detention as well as refusal of applying the decision of trial court's to release him was politically motivated and requires the consideration of Article 18 together with Articles 5, 10 and 11.

09.07.2019

İfade Özgürlüğü Derneği – İFÖD (Turkey)

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

[22] See http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf