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Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

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Communication from NGOs (İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association),İnsan Hakları Derneği (İHD-Human Rights Association),Eşit Haklar için İzleme Derneği (ESHİD-Association for Monitoring Equal Rights),Hak İnsiyatifi Derneği (HİD-Right Initiative Association),İnsan Hakları Gündemi Derneği (İHGD-Human Rights Agenda Association) (05/02/2021) in the case of Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17) and reply from the authorities (16/02/2021).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1398e réunion (mars 2021) (DH)

Communication d'ONG (İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association),İnsan Hakları Derneği (İHD-Human Rights Association),Eşit Haklar için İzleme Derneği (ESHİD-Association for Monitoring Equal Rights),Hak İnsiyatifi Derneği (HİD-Right Initiative Association),İnsan Hakları Gündemi Derneği (İHGD-Human Rights Agenda Association) (05/02/2021) concernant l'affaire Selahattin Demirtaş c. Turquie (n° 2) (Requête n° 14305/17) et réponse des autorités (16/02/2021) ***[anglais uniquement]***

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

RULE 9.2 COMMUNICATION

in the Case of *Selahattin Demirtaş (No.2) v. Turkey* (no. 140305/17)

by

İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association)
İnsan Hakları Derneği (İHD-Human Rights Association)
Eşit Haklar için İzleme Derneği (ESHİD-Association for Monitoring Equal Rights)
Hak İnsiyatifi Derneği (HİD-Right Initiative Association)
İnsan Hakları Gündemi Derneği (İHGD-Human Rights Agenda Association)

05 February, 2021

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

DGI Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECtHR
F-67075 Strasbourg Cedex
FRANCE

05.02.2021

Rule 9.2 Communication from İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association), **İnsan Hakları Derneği** (İHD - Human Rights Association), **Eşit Haklar için İzleme Derneği** (ESHİD - Association for Monitoring Equal Rights) **Hak İnsiyatifi Derneği** (HİD-Right Initiative Association), **İnsan Hakları Gündemi Derneği** (İHGD - Human Rights Agenda Association) **(in the Case of *Selahattin Demirtaş (No.2) v. Turkey* (Application no. 140305/17)**

1. In line with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, **İfade Özgürlüğü Derneği** (İFÖD – Freedom of Expression Association), **İnsan Hakları Derneği** (İHD - Human Rights Association), **Eşit Haklar için İzleme Derneği** (ESHİD - Association for Monitoring Equal Rights) **Hak İnsiyatifi Derneği** (HİD - Right Initiative Association), İnsan Hakları Gündemi Derneği (İHGD - Human Rights Agenda Association) (hereinafter "**the NGOs**") present this submission regarding the execution of the European Court of Human Rights ("**the European Court**") judgment in the case of **Selahattin Demirtaş (No. 2) v. Turkey**.

2. **İFÖD** is an independent non-profit and non-governmental organization which aims to protect and foster the right to freedom of opinion and expression in Turkey. **ESHID** is an independent non-governmental organisation established in 2010 with the focus of election monitoring, access to justice for persons with disabilities, freedom of assembly, discrimination based on race, ethnicity, religion or belief, and protection and support for human rights defenders. **HID** is an independent non-governmental organisation established in 2018 to defend human rights and rule of law. **İHGD** is an independent non-governmental organisation established in in 2003 to defend human rights at national and international level. **İHD** is an independent non-governmental organisation established in 1986 as the first human rights organisation following 1980 coup d'Etat to defend human rights in Turkey for all.

3. The aim of this submission is to update the Committee of Ministers concerning the persistent failure of Turkish authorities in full and effective implementation of both individual and general measures in the case of **Selahattin Demirtaş (No. 2) v. Turkey** with respect to developments after the European Court of Human Rights' decision of 22 December 2020.

4. The Grand Chamber of the European Court found violations of Article 5(1) and 5(3) (right to liberty and security), Article 10 (freedom of expression), Article 18 (limitation on use of restrictions on rights) taken together with Article 5, and Protocol No. 1, Article 3 (right to free elections) of the European Convention on Human Rights.

5. The European Court also found that the continuation of Mr Demirtaş' pre-trial detention would entail a prolongation of the violations, as well as breaching the obligation of Turkey to abide by the Court's judgment in accordance with Article 46(1) of the Convention.[1]

[1] *Selahattin Demirtaş v. Turkey (no.2)* (GC), no. 14305/17, 22.12.2020, para 442.

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6. This judgment requires the government **to adopt a comprehensive action plan** that contains both individual and general measures to implement the judgment. This submission, however, will focus on the **implementation of one particular finding** in the judgment, namely the procedure under which the applicant's parliamentary immunity was lifted.

7. The NGOs consider that this particular violation is one of the main items that should be immediately addressed by the government both for the applicant and other former and current MPs under the same condition. As will be noted below, the Grand Chamber, in its judgment concluded that the Constitutional amendment that lifted the applicant's immunity which then led to a number of criminal proceedings against him, did not meet the legality requirements envisaged under the Convention. As a consequence, any criminal procedure initiated following this amendment should also been regarded flawed.

8. This finding has very wide implications. First of all, criminal prosecutions that were addressed by the Grand Chamber judgment had been initiated following this constitutional amendment. Secondly, all the other ongoing criminal cases brought against the applicant before different criminal courts are directly affected from this finding. However, this finding also affects other criminal cases initiated against other MPs. These cases are also pending before the European Court in two different sets of cases. In the first set, the applicants, similar to Mr. Demirtaş, claim that their right to liberty was violated due to political criminal cases lodged with after the Constitutional amendment.[2] They all claim, as Mr. Demirtaş, that the Constitutional amendment which lifted their parliamentary immunity was not foreseeable. In the second set of cases, 41 MPs claimed that the constitutional amendment per se violated their right to expression.[3] Both of these two sets of cases have already been communicated to the government. However, as can be seen from the annex attached to this submission, those 41 MPs are being prosecuted in 655 separate criminal cases. Therefore, the consequences of this finding of the Grand Chamber is much wider than the scope of the individual case decided by the Court.

9. However, judicial authorities, neither in the cases brought against the applicant nor against the other MPs, have taken the findings of the Grand Chamber concerning immunities into account. The NGOs consider that this part of the ruling should directly be addressed by the Committee of Ministers in its first examination of the decision. NGOs consider for this purpose that it is necessary to inform the Committee of Ministers about the developments concerning this particular issue.

10. In **Part I**, this submission will brief the Committee of Ministers about the Constitutional amendment and the following events. In **Part II**, the submission will summarise the findings of the Court on the immunity issue with reference to the Venice Commission Opinion on the same issue. In **Part III**, the submission will inform the Committee of Ministers about the Government's response to the Grand Chamber judgment. In **Part IV**, this submission will examine the judicial authorities' approach to the immunity issue, before and after the Grand Chamber judgment. In **Part V**, the NGOs will present their recommendations to the Committee of Ministers.

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2 In the cases of Figen Yüksekdağ Şenoğlu, İdris Baluken, Besime Konca, Abdullah Zeydan, Nihat Akdoğan, Selma Irmak, Ferhat Encü, Gülser Yıldırım, Nursel Aydoğan, Çağlar Demirel and Ayhan Bilgen the Court communicated the applications to the government along with Selahattin Demirtaş and 11 other applications (no. 14305/17, 29.06.2017). Burcu Çelik v. Turkey (no. 68853/17, 12.09.2017) was also communicated to the government. All other applications are still pending.

3 *Encü and Others v. Turkey* (no. 56543/16, 25.05.2020) and *Kerestecioğlu Demir v. Turkey* (no. 68136/16, 05.03.2019).

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Part I: The Constitutional Amendment, Consequences and Reactions

11. The President of Turkey, Mr. Recep Tayyip Erdoğan, following the elections held in 7 July 2015, invited Parliament to lift the immunity of deputies several times. Amongst them the speech delivered on 15 March, 2016 and cited by the Grand Chamber was as follows:

> "We must immediately settle the issue of immunity. Parliament must move forward quickly. [We cannot discuss whether to lift the immunity of just] one or two people. We need to adopt a principle. What is this principle? Those who cause the death of fifty-two people by urging my Kurdish brothers to pour into the streets will show up in Parliament, those who say that the PKK, the PYD [Democratic Union Party] and the YPG are behind them will have clean hands, is that it? If Parliament does not take the necessary action, this nation and history will hold it accountable."

12. In a response to these speeches, majority of the Parliament, composed of members from the ruling AKP and MHP submitted a proposal envisaging the temporary lifting of impunity of deputies. On 12 April 2016, the National Assembly adopted this proposal as constitutional amendment which added a provisional Article 20 to the Constitution. Provisional Article 20 reads as follows:

> "On the date when this Article is adopted by the Grand National Assembly of Turkey, the provision of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to members who are the subject of requests for the lifting of immunity which have been submitted by the authorities with the power to investigate or grant leave for an investigation or prosecution, the public prosecutor's office or the courts to the Ministry of Justice, to the Prime Minister's Office, to the Office of the President of the Grand National Assembly of Turkey and to the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee.
>
> Within fifteen days of the entry into force of this Article, any files with the chair of the Joint Committee comprising the members of the Constitutional Committee and the Justice Committee, the Office of the President of the Grand National Assembly of Turkey, the Prime Minister's Office and the Ministry of Justice concerning the lifting of parliamentary immunity shall be returned to the competent authority so that it can take the necessary action."

13. On 8 June 2016 the constitutional amendment was published in the Official Gazette. It came into force on the same day. Upon request of seventy opposition MPs, the Constitutional Court considered and held in a unanimous decision that the act adopted by the National Assembly on 12 April 2016 could not be reviewed under Article 85 of the Constitution because it had all formal elements of a constitutional amendment. The Constitutional Court, in individual applications brought, also concluded that it had no competence to review the constitutionality of a constitutional amendment.[4]

14. The constitutional amendment affected a total of **154 of the 550 members of the National Assembly** at that time, including fifty-nine from the CHP, fifty-five from the HDP, twenty-nine from the AKP and ten from the MHP. It also concerned one independent member of the parliament.[5] Subsequently, 800 investigation reports were prepared in relation to the 154 MPs, out of which 518 of those were related to 55 HDP deputies, 93 files were related to Mr. Demirtaş, while 50 files were related to AKP deputies. Although files about 29 AKP and 10 MHP deputies were sent to the Parliament, **none of them has been prosecuted or if they have**

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4 *Selahattin Demirtaş Application*, App No. 2016/25189, 21.12.2017, para. 139-143.
5 *Selahattin Demirtaş v. Turkey (no.2)* (GC), no. 14305/17, 22.12.2020, para 57.

been prosecuted, then found guilty of any crimes.[6] 17 HDP and 1 CHP deputies have been detained and others have been prosecuted. While no deputy has ever been detained for ordinary crimes, all HDP deputies have been detained for being a member of a terrorist organisation. All detained deputies were charged **not for deeds, but for speeches they made at different venues, party meetings, demonstrations, and funerals**. Consequently, although they have been charged for being member of a terrorist organization none of them has been accused of committing violent acts.

15. On this issue, the Venice Commission also observed that "while some of the files concern ordinary crimes such as smuggling, embezzlement, most of the files for which inviolability was removed by the Amendment of 20.05.2016 concern offences related to speech, such as insulting the President, insulting a public officer, terror propaganda or incitement to hatred".[7]

16. The Venice Commission after examining the Amendment in full, concluded that "the constitutional amendment of 12 April 2016 was an ad hoc, "**one shot**" *ad homines* measure directed against 139 individual deputies for cases that were already pending before the Assembly. Acting as the constituent power, the Grand National Assembly maintained the regime of immunity as established in Articles 83 and 85 of the Constitution for the future but derogated from this regime for specific cases concerning identifiable individuals while using general language. This is a misuse of the constitutional amendment procedure".[8]

17. Following the constitutional amendment forty-one HDP MPs, including Mr. Demirtaş, applied to the Court claiming that the constitutional amendment, per se, **interfered with the exercise of their freedom of expression** and the amendment did not meet the legality standards of the Convention.[9] At least twelve other HDP MPs lodged applications with the Court about their detention.[10] Those cases have been communicated to the Government and still pending before the Chamber.

Part II: Grand Chamber's Findings

18. Mr. Demirtaş claimed before the Grand Chamber that neither the constitutional amendment lifting his parliamentary immunity nor the basis for his pre-trial detention and the criminal proceedings instituted against him satisfied the "quality of the law" requirement defined in the Court's case-law.[11]

19. The Court, firstly observed that like many other member states there were two types of parliamentary immunity on members of parliament: non-liability and inviolability.[12] It is

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6 It should be noted that this issue is contested by the Government but the Grand Chamber, referring to the Government's Submission stated that "In their submission, five members from the AKP, nine from the CHP and one from the MHP had also been convicted after their parliamentary immunity had been lifted. At the hearing on 18 September 2019, a specific question was put to the parties on this issue of contention. The **Government**, while repeating their argument, **were unable to show** that members of parliament belonging to the bloc of the ruling parties, namely the AKP and the MHP, **had also been convicted and/or deprived of their liberty**." See *Selahattin Demirtaş v. Turkey (no.2)* (GC), no. 14305/17, 22.12.2020, para 427.

7 Venice Commission, Opinion on The Suspension of The Second Paragraph of Article 83 of The Constitution (Parliamentary Inviolability) (CDL-AD(2016) 027, para. 50 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2016)027-e

8 Venice Commission, para. 80

9 See note 3.

10 See note 2.

11 *Selahattin Demirtaş v. Turkey (no.2)* (GC), no. 14305/17, 22.12.2020, para 226.

12 *Ibid*, para 257.

necessary, therefore, to examine the Court's observations on the effects of the Constitutional Amendment on two different types of immunities separately.

20. As to the **first category**, the Court observed that parliamentary non-liability is absolute, permits of no exception, does not allow any investigative measures. The Court also stated that "As both parties also stated at the hearing, it is clear that repeating a political speech outside the National Assembly cannot be construed as being limited to repeating the same words that were used in Parliament".[13] Provisional Article 20 of the Constitution did not amend the first paragraph of Article 83 of the Constitution.

21. After closely examining the arguments of the parties, the Grand Chamber found that despite the fact that the applicant argued plausibly that, in terms of their content, the speeches referred to by the Government were similar to speeches he had given in proceedings of the National Assembly and notwithstanding the safeguard enshrined in the first paragraph of Article 83 of the Constitution, the judicial authorities placed him in pre-trial detention and prosecuted him mainly on account of his political speeches, without any assessment of whether his statements were protected by parliamentary non-liability.[14]

22. On the other hand, as to the inviolability rule, stipulated in paragraph 2 of Article 83 of the Constitution, the Court opined in line with the Venice Commission. The Court held that even assuming that the impugned speeches had not been covered by the protection afforded under the first paragraph of Article 83 of the Constitution, the constitutional amendment of 20 May 2016 in itself raises an issue in terms of foreseeability. The Court considered that "as a result of the amendment, the National Assembly was no longer required to perform an individual assessment of the situation of each of the members of parliament concerned, to the detriment of their rights as secured under the Constitution. In the Court's view, the amendment created a situation that was not foreseeable for the members of parliament concerned".[15]

23. For the Court, a constitutional amendment that explicitly targets certain individuals could only be labelled as a one-off *ad homines* amendment. Therefore, the Court subscribed to the Venice Commission's clear finding that this was a "**misuse of the constitutional amendment procedure**".[16] With regard to inviolability principle the Court stated that:

> "The Court's case-law indicates that the foreseeability requirement is satisfied where the individual can know from the wording of the relevant legislation, and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, among other authorities, Güler and Uğur, § 50, and Kudrevičius and Others, § 108)[17]. In the present case, having regard to the wording of the first two paragraphs of Article 83 of the Constitution and the interpretation, or rather lack thereof, of that provision by the national courts, the Court considers that the interference with the exercise of the applicant's freedom of expression was not "prescribed by law" in that it did not satisfy the requirement of foreseeability, since in defending a political viewpoint, the applicant could legitimately expect to enjoy the benefit of the constitutional legal framework in place, affording the protection of immunity for political speech and constitutional procedural safeguards (see, mutatis mutandis, Lykourezos v. Greece, no. 33554/03, §§ 54-56, ECHR 2006-VIII)".[18]

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13 *Ibid*, para 259.
14 *Ibid*, para 263.
15 *Ibid*, para 268.
16 *Ibid*, para 269.
17 *Güler and Uğur v. Turkey*, nos. 31706/10 and 33088/10, 2 December 2014; *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, ECHR 2015.
18 *Demirtaş (2)*, para 270.

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Part III: The Government's Response

24. The President and other high-level politicians condemned the Court for its ruling in the Selahattin Demirtaş case. President Erdoğan said the European Court was acting on behalf of a "terrorist" and repeated his view that Mr. Demirtaş is responsible for the deaths of dozens in street protests that are at the core of the charges against him.[19]

25. Moreover, the Minister of Interior Mr. Süleyman Soylu echoed the President of Turkey and claimed that the judgment of the Grand Chamber should be ignored: "Demirtaş is a terrorist. The European Court of Human Rights ruling, whatever the reason, is meaningless".[20] Devlet Bahçeli, the leader of MHP and the coalition partner of the ruling AKP agreed with the President and the Minister by stating that "when we look at Demirtaş, we see a terrorist. We do not accept, and we reject the European Court's decision that denies our national will and our courts."[21] As a result of these political statements, it is argued by the Government supporters that the decisions of the European Court are not binding in substance and the decisions can only guide domestic judicial authorities.[22]

26. Considering the Grand Chamber's assessment concerning the dependency of the judiciary in Turkey, **these statements cannot be overemphasized**. The Court, reminding the Venice Commission Opinion on the Constitutional Amendment creating the Presidential system, noted that

> "bearing in mind the prospect of the President's party enjoying a majority in Parliament, which was practically guaranteed under the system of simultaneous elections, the Venice Commission took the view that the composition of the Supreme Council would seriously endanger the independence of the judiciary, because it was the main self-governing body of the judiciary, overseeing appointments, promotions, transfers, disciplinary measures and the dismissal of judges and public prosecutors. It added that "[g]etting control over [the Supreme Council] 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". The reports and opinions by international observers, in particular the comments by the Commissioner for Human Rights, indicate 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, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters."[23]

27. As will be seen below, this observation was once again confirmed by the fact that, after the reaction of high-level politicians to the Court's judgment, not a single judge or court could dare to implement the Grand Chamber's findings concerning immunities in criminal proceedings ongoing before the domestic courts.

Part IV: Handling of Immunity Issue by Domestic Authorities

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19 See https://www.reuters.com/article/turkey-security-demirtas-int/erdogan-european-court-ruling-on-jailed-kurdish-politician-hypocritical-idUSKBN28X160

20 See https://www.aa.com.tr/en/turkey/echr-ruling-on-terrorist-hdp-leader-is-meaningless/2087175

21 See https://www.hurriyetdailynews.com/mhp-leader-interior-minister-slam-echrs-ruling-on-demirtas-161118

22 See https://www.hurriyet.com.tr/gundem/atanmissiniz-demek-yeni-vesayet-uretme-talebidir-41699803

23 *Selahattin Demirtaş v. Turkey (no.2)* (GC), no. 14305/17, 22.12.2020, para 434.

28. İFÖD had a chance to examine the effects of the constitutional amendment that lifted the immunity of deputies, in its third party opinion submitted in the case of *Encu and 39 others v. Turkey*.[24]

29. *Encu and 39 Others v. Turkey* application dossier included 549 preliminary investigation files against 40 applicants whose individual application forms were sent to İFÖD by the Court. In other words, parliamentary immunities of those 40 MPs were lifted for 549 preliminary investigations by provisional article 20 of the Turkish Constitution.

30. Within those 549 preliminary investigation files, the MPs were charged for a total of 655 separate crimes as some of the investigations included more than one charge. It can be seen from the applications that almost all the 655 charges are related to political speeches and political activities of the applicants. Almost all of the 40 applicant MPs were charged with the crimes of **terror propaganda** (36 separate applicants) and **violation of law on meetings and demonstrations** (29 separate applicants) and 28 applicant MPs were charged with both of these crimes. The MPs were also accused of other speech related crimes such as **insulting the president of Turkey** (17 separate applicants) or **insulting public officials** (9 separate applicants), **insulting the state organs** (13 separate applicants), **praising crime or criminals** (11 separate applicants), as well as other such crimes. **13 MPs** including Mr. Selahattin Demirtaş were charged with the combined crimes of terror propaganda, violation of law on meetings and demonstrations and with the crime of insulting the president of Turkey. **5 of these 13 MPs** including Mr. Selahattin Demirtaş were also charged with the crimes under article 314 of the Criminal Code which criminalises the establishment, command or membership of an armed organisation.

31. Prior to the unprecedented, provisional constitutional amendment, MPs in Turkey benefited from absolute immunity for their political speeches, just like in many democratic countries. Thus, there is no doubt that while making a speech, defending a view, a member of parliament would be fully entitled to believe that he/she will benefit from this constitutional protection of absolute immunity and constitutional procedural safeguards provided for his/her political speech. Although, the provisional article 20 of the Constitution did not affect literally the non-liability of the MPs, in effect, as explained above, most of the charges against the opposition MPs were based on their political speeches and political activities. However, as can be seen in detail in **figures 1 & 2 below**, Selahattin **Demirtaş**, who was the co-chair of HDP and also the presidential candidate for HDP in both 2014 and 2018, was subjected to **93 separate criminal investigations** and was charged with **120 separate crimes**. Pervin **Buldan**, who was also the co-chair of HDP was subjected to **51 separate criminal investigations** and was charged with **51 separate crimes**. Ferhat Encu, the former HDP MP and the main applicant in the case of *Encu and 39 Others v. Turkey* was subjected to **17 separate criminal investigations** and was charged with **28 separate crimes**.

[24] See İFÖD Third Party Intervention in the Case of Encu v. Turkey (no. 56543/16) and other 39 applications, at https://ifade.org.tr/reports/IFOD_ECtHR_Ferhat_Encu_Third_Party_Intervention.pdf

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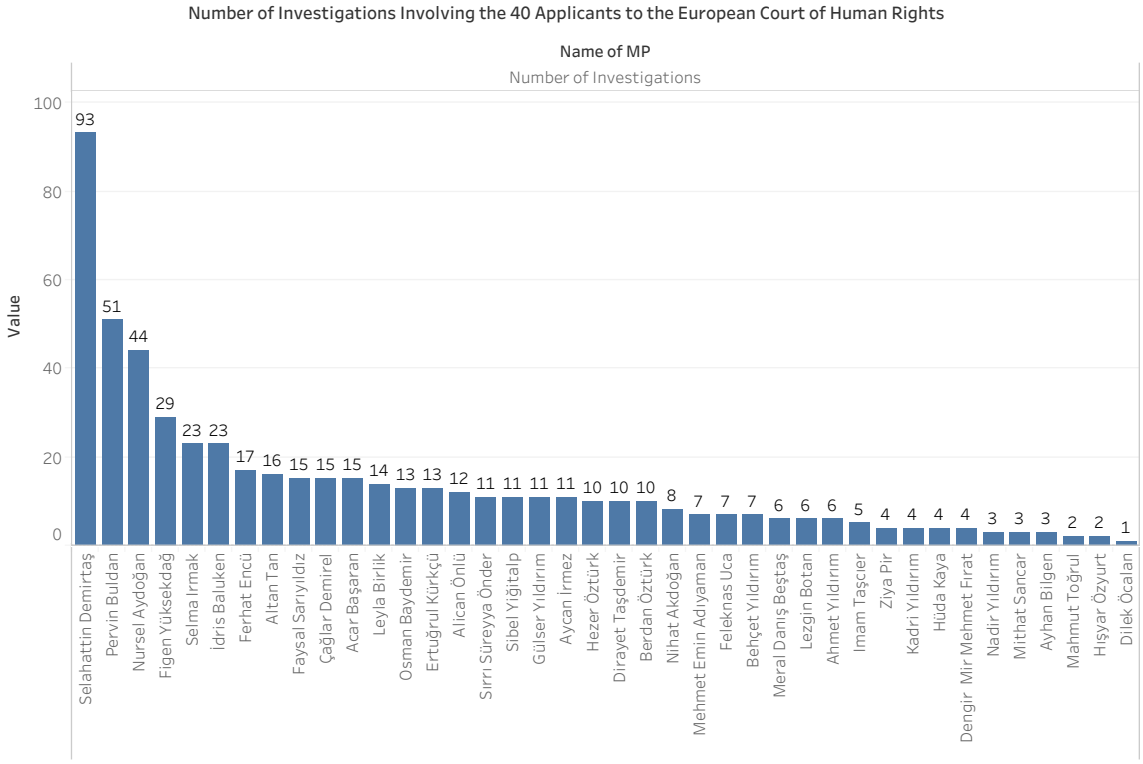

Figure 1

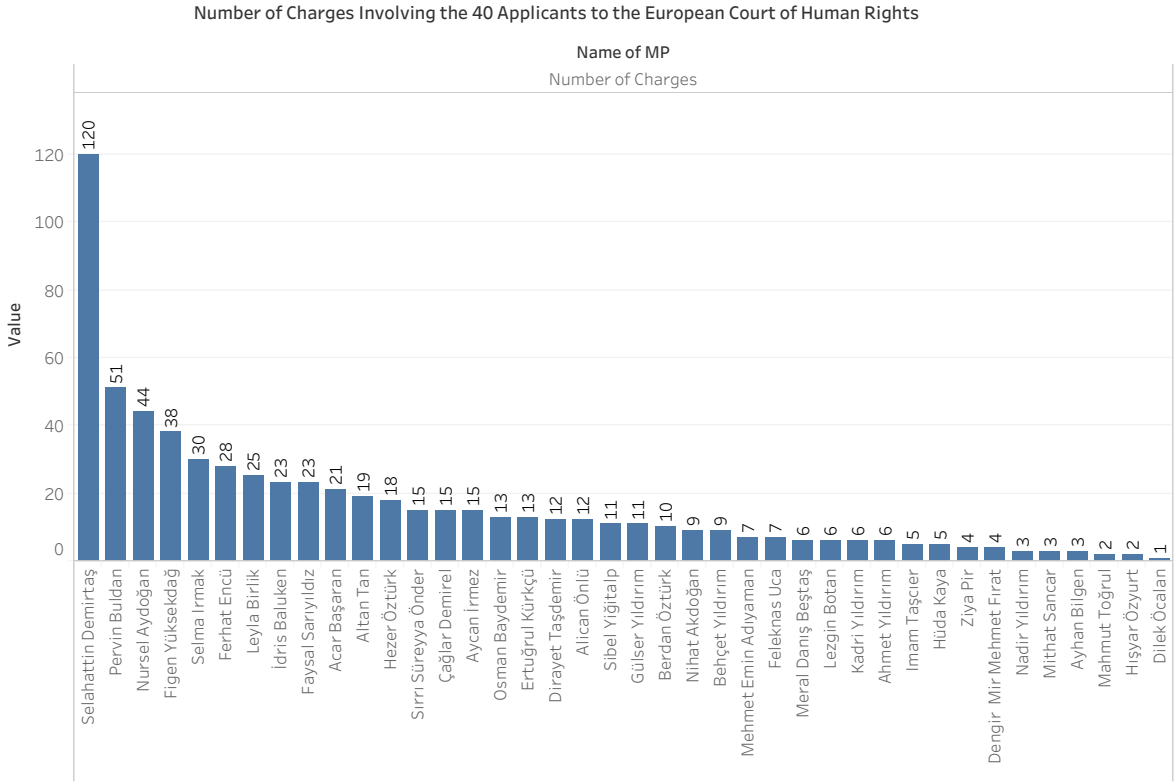

Figure 2

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32. An assessment of the application dossiers seems to suggest that the prosecutors and the criminal courts never examined whether the impugned speeches constituted political speech covered by absolute parliamentary immunity. Therefore, it is difficult to argue that the provisional constitutional amendment did not affect the non-liability of the MPs. Moreover, the courts of first instance, the Court of Cassation as well as the Constitutional Court in almost all cases did not take into consideration the whole of the speeches and main purpose of the speakers when evaluating whether an expression constitute incitement to violence or resulting in the other crimes the MPs were charged with. In other words, content and context analysis as required by the European Court was often not considered in addition to the disregarding of the parliamentary immunity issue.

33. The NGOs are of the opinion that the unprecedented, one-off and retroactive constitutional amendment, introduced after the applicants made their speeches over a span of approximately ten years as members of the Parliament, was not foreseeable as the Grand Chamber concluded in the Demirtaş judgment.

34. The position of the Turkish judicial authorities has not been changed since the Grand Chamber's judgment *in Selahattin Demirtaş v. Turkey* (No. 2). As noted above there are more than 500 criminal charges at the very least and numerous criminal cases pending before different criminal courts against former and current HDP MPs. In none of these ongoing prosecutions, criminal courts ended detention or dropped charges against defendants taking into account the Court's observations about the unforeseeability of the constitutional amendment.

35. On the contrary, the Ankara Public Prosecutor Office prepared a new indictment in early January 2021 charging Mr. Selahattin Demirtaş and other former MPs whose immunity was lifted by constitutional amendment. Demirtaş was under pre-trial detention since 20 September 2019 in the related criminal investigation leading to the January 2021 indictment. However, the European Court considered that this detention was not a separate detention period but the continuation of the detention started on 4 November 2016. This is why the European Court, rather than calling this detention as a new one, indicated that the detention that started on 20 September 2019 was a "**return to pre-trial detention**".[25]

36. On 7 January 2021, the Ankara 22nd Assize Court accepted the new indictment. Mr. Demirtaş and other defendants now face 30 new charges in a new criminal trial, the first hearing of which is set for 25 April 2021. An assessment of the 3.530 pages of the new indictment reveals that almost all evidence against Mr. Demirtaş and the other defendants is their political speeches and activities that took place in between 2013 to 2019. The applicant remained an MP until the 2018 elections and detained since 4 November, 2016.

37. Despite this clear fact, the prosecutor did not examine whether the activities of the former MPs would fall within the scope of parliamentary immunity, in particular non-liability. This deficiency was not remedied by the Ankara 22nd Assize Court either. In the interim decision, the Ankara 22nd Assize Court requested information from the Parliament about the political statements mentioned in the indictment and the date of which they were made in the parliamentary proceedings and whether some of the statements made at a later date could be seen as having the same content as statements already made in parliament. It is clear from this request that during the 15 months in which Mr. Demirtaş and other MPs remained in custody, no investigation about their parliamentary immunity was made. The Assize Court seems to assume that the only speeches that are the "same" as and made "after" those delivered in

25 *Selahattin Demirtaş v. Turkey (no.2)* (GC), no. 14305/17, 22.12.2020, paras 114-118; 426-433; 440.

Parliament can fall within the scope of parliamentary immunity. The applicant and other MPs made a lot of statements reflecting the political views of their party in the relevant period. Although, not all of them were the repetition word by word of what had been said in the Parliament, these statements should also be protected under the scope of parliamentary immunity.

38. However, even if the concept of non-liability is interpreted narrowly to include only the statements made in the Parliament and repeated afterwards, criminal procedures that were initiated following the constitutional amendment cannot be regarded as valid as the Court also found that lifting of immunities of MPs (inviolability) by one of *ad homines* constitutional amendment was unforeseeable. In order to implement this finding of the Court, IFÖD considers that all judicial decisions taken before former MPs term in Parliament terminated should be held void. As a consequence, if an MP's immunity is continuing due to his/her re-election in 2018 elections, criminal prosecution against that individual cannot continue. If, however, an MP's status terminated in 2018 with the end of previous parliamentary session, only judicial decisions that were taken after the elections could be seen as valid. Therefore, courts should examine these different alternatives about defendants before taking any criminal action.

39. As a result, it is clear that the Grand Chamber's findings concerning immunities is one of the vital parts of the judgment. The NGOs consider that this part of the judgment should be one of the first items that would be addressed in the first decision of the Committee of Ministers. The Committee of Ministers should address the issue as an individual measure, as far as it concerns Mr. Demirtaş's cases. However, the NGOs believe, this should also be included as part of general measures, since the other opposition MPs have also been directly affected with this problematic constitutional amendment.

Part V: Recommendations

The NGOs' Recommendations with Regards to Individual Measures

I. The NGOs kindly invite the Committee of Ministers to call for the immediate release of Mr. Selahattin Demirtaş as required by the European Court judgment, emphasizing that no new evidence has been submitted by the government to justify the continuation of Mr. Demirtaş's detention under different charges old or new, that all the evidence shown by the government has already been addressed in the Court's judgment.

II. The NGOs kindly invite the Committee of Ministers to request the Government to drop all charges under which Mr. Demirtaş has been investigated and detained as required by the European Court's findings relating to Articles 5, 10, 5 + 18 and P1-3 of the Convention, as all charges brought against him fall within the scope of his parliamentary immunity.

The NGOs' Recommendations with Regards to General Measures

The NGOs will present another submission with regards to the general measures to be taken by the authorities in order to ensure independence and impartiality of the judiciary to comply with the findings of the Court in relation to violation of Article 18. In this submission, the NGOs confined their recommendations to the issue of parliamentary immunities. In order to implement the European Court's findings of violations in relation to Articles 5, 10, 5+ 18 and P1-3 of the Convention, the NGOs kindly invite the Committee of Ministers to request from Turkey to address following recommendations in its action plan:

I. Amend the Constitution to abolish provisional article 20.

II. Drop all charges brought against former MPs, whose parliamentary immunity were lifted through the Constitutional Amendment.

III. Take measures to prevent prosecution of former MPs acts that fall within non-liability category, even after their immunity has come to an end.

IV. Ensure that no criminal case is continued against those whose immunity is still continuing.

V. Ensure that all judicial decisions taken against former MPs, whilst their immunity continued until the General Elections were held in 2018, be found void and null.

VI. Finally, the NGOs kindly invite the Committee of Ministers to ask the government to provide detailed statistical data (not just percentages) with regards to criminal investigations, criminal prosecutions and the outcome of such prosecutions (guilty, not guilty, suspended sentences) as well as detailed information about the length of criminal sentences relating to offenses categorized as "crimes against the state" generally. The same statistical data should also be provided specifically with regards to 154 of the 550 members of the National Assembly for whom the parliamentary immunities were lifted by provisional article 20 of the Turkish Constitution.

İFADE ÖZGÜRLÜĞÜ DERNEĞİ
Osmanağa Mah. Hasırcıbaşı Cad.
No:24/4 Kadıköy/İSTANBUL
Kadıköy V.D. 4700644051
Kütük No: 34-235/076

İfade Özgürlüğü Derneği – İFÖD (Turkey)

Web: https://ifade.org.tr Twitter: @ifadeorgtr

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