



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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**Third party intervention
by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

Applications:

Abdullah Zeydan v. Turkey (no. 25453/17)
Ayhan Bilgen v. Turkey (no. 41087/17)
Besime Konca v. Turkey (no. 25445/17)
Çağlar Demirel v. Turkey (no. 39732/17)
Ferhat Encü v. Turkey (no. 25464/17)
Figen Yüksekdağ Şenoğlu v. Turkey (no. 14332/17)
Gülser Yıldırım v. Turkey (no. 31033/17)
İdris Baluken v. Turkey (no. 24585/17)
Nihat Akdoğan v. Turkey (no. 25462/17)
Nursel Aydoğan v. Turkey (no. 36268/17)
Selahattin Demirtaş v. Turkey (no. 14305/17)
Selam Irmak v. Turkey (no. 25463/17)

Introduction

1. On 15 September 2017, the Council of Europe Commissioner for Human Rights (hereinafter: 'the Commissioner') informed the European Court of Human Rights (hereinafter: 'the Court') of his decision to intervene as a third party in the Court's proceedings, in accordance with Article 36, paragraph 3 of the European Convention on Human Rights (hereinafter: 'the Convention'), and to submit written observations in respect of a group of twelve applications concerning Turkey on issues pertaining notably to the freedom of expression and right to liberty and security of parliamentarians.
2. The Commissioner has a mandate to foster the effective observance of human rights; to assist member states in the implementation of Council of Europe human rights instruments; to identify possible shortcomings in the law and practice concerning human rights; and to provide advice and information regarding the protection of human rights and the prevention of human rights violations.
3. Freedom of expression has been a priority theme for the Commissioner. With respect to Turkey, the Commissioner and his predecessor have worked extensively on addressing the persistent pattern of violations of freedom of expression, including in the context of the fight against terrorism, stemming from the statutory legislation in force and its judicial interpretation, both of which fall short of the standards set by Article 10 of the Convention.
4. The Commissioner observes that this pattern has considerably strengthened in recent years, in the context of an intensification of the fight against terrorism and the implementation of emergency measures following the attempted coup d'état of July 2016, with markedly negative consequences for those expressing criticism of official policy, in particular on issues related to the situation in South-Eastern Turkey. In this context, the lifting of immunities of parliamentarians from prosecution, notably for terrorism-related offences, has been a matter of concern not only for the Commissioner but also for a number of other international institutions, including the Parliamentary Assembly of the Council of Europe (hereinafter: 'PACE')¹ and the European Commission for Democracy through Law (hereinafter: 'the Venice Commission')².
5. The present submission draws from two visits the Commissioner carried out to Turkey on selected human rights issues from 6 to 14 April 2016 (Istanbul, Ankara and Diyarbakır) and from 27 to 29 September 2016 (Ankara), his ensuing Memorandum on Freedom of Expression and Media Freedom³, as well as on continuous country monitoring. It also refers extensively to another recent submission of the Commissioner to the Court on cases concerning freedom of expression and the right to liberty of journalists in Turkey,⁴ in which the Commissioner addressed a number of pressing concerns that in his view also fully apply to the situation covered by the present submission. During these visits, the Commissioner held discussions with a number of state authorities and met with the representatives of national and international non-governmental organisations, as well as parliamentarians, journalists, civil society members, academics and lawyers. The overall picture unfortunately revealed serious interferences with freedom of expression and the right to liberty and security of various groups in society who express critical views on government's policies, including parliamentarians.
6. Having regard to the key role of opposition parliamentarians in a functioning democracy, Section I of the present written submission addresses the interferences with their freedom of expression and right to liberty and security. Section II addresses more generally the systematic targeting of those who express dissenting views from official policy, particularly on issues related to the situation in South-

¹ PACE [Resolution 2156 \(2017\)](#) and [Resolution 2121 \(2016\)](#) on the functioning of democratic institutions in Turkey, adopted on 25 April 2017 and 22 June 2016 respectively.

² Venice Commission Opinion on the suspension of the second paragraph of Article 83 of the Constitution of Turkey (parliamentary inviolability), [CDL-AD\(2016\)027](#), 14 October 2016.

³ Memorandum on freedom of expression and media freedom in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2017\)5](#), 15 February 2017.

⁴ Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, [CommDH\(2017\)29](#), 10 October 2017.

Eastern Turkey, and reiterates concerns regarding judicial independence and impartiality. These sections are followed by the Commissioner's conclusions.

I. Observations on parliamentarians' freedom of expression and the right to liberty and security

7. At the outset, the Commissioner reiterates the findings in his Memorandum on Freedom of Expression and Media Freedom that the lifting of the immunities of 154 members of parliament (hereinafter: 'MPs'), against whom prosecutions had been sought, was a particularly disturbing manifestation of state action unduly restricting freedom of speech in Turkey, which was also regarded as an *ad hoc*, "one shot" and "*ad homines*" measure and a misuse of the constitutional amendment procedure by the Venice Commission and PACE⁵. While this measure covered MPs from all parties, it disproportionately affected the opposition, in particular the People's Democratic Party (*Halkların Demokratik Partisi*, hereinafter 'HDP'): nearly all MPs of the HDP (55 out of 59) were concerned by the lifting of immunity and eventually faced criminal investigations and/or proceedings. In this regard, the Commissioner notes with concern that twelve HDP MPs, including the co-chairs of the party, Mr Selahattin Demirtaş and Ms Figen Yüksekdağ, were arrested and subsequently detained on remand. The former has been in detention for almost a year, whilst the latter was convicted and consequently lost her parliamentary seat on 21 February 2017.
8. The Commissioner is concerned that the majority of the impugned acts for which immunity was removed related to statements made by MPs, which were qualified as disseminating terrorist propaganda, supporting terrorist groups, incitement to hatred, insulting the President or insulting a public officer. The preamble of the constitutional amendment itself stated that the purpose underlying the lifting of immunities was to address public indignation about *inter alia*, the "statements of certain deputies constituting emotional and moral support to terrorism".
9. In this respect, the Commissioner must stress one more time that Turkey's criminal provisions on the security of the state, terrorism, denigrating state organs or insulting the President or other officials are prone to arbitrary application due both to their vague formulation and their overly broad interpretation by the judges and prosecutors, including in respect to statements and persons that clearly do not incite violence. The incompatibility of this situation with the standards of Article 10 of the Convention has been confirmed by the large numbers of cases in which the Court found Turkey in violation of this article.
10. In addition, the Commissioner notes the elevated level of protection of speech the Court grants to elected representatives due to the important role they play in contributing to public debate on the most controversial issues of a political nature and representing the people who vote for them. In its relevant judgments the Court accordingly concluded that interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny, which also protects them from politically motivated criminal proceedings and from pressure or abuse on the part of the majority.⁶
11. In this respect, the Commissioner recalls the Court's finding of a violation in cases concerning the dissolution of the Democratic Society Party (DTP), a precursor of the HDP, mainly on the basis of statements made by some of their members, which were deemed by the Turkish courts as supporting terrorism or incitement to violence and found by the Court to be protected under Article 10.⁷ The Commissioner notes, in particular, that the statements in those cases were very similar to the statements which were used as justification for the lifting of the immunities of the HDP MPs. The Commissioner recalls in particular the Court's finding that the mere fact that there are parallels between the principles defended by a political party and an illegal terrorist organisation, such as those

⁵ *Op.cit.*, [CommDH\(2017\)5](#), para.59; *Op.cit.*, [CDL-AD\(2016\)027](#), para. 73.; *Op.cit.*, [Resolution 2156 \(2017\)](#), para.10.

⁶ See, for example, *Karácsony and Others v. Hungary* [GC] (Nos. 42461/13 and 44357/13), judgment of 17 May 2016, paras. 137-138.

⁷ *DTP and others v. Turkey* (Nos. 3840/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10), judgment of 12 January 2016

of the Kurdistan Workers' Party (hereinafter "the PKK"), does not suffice to conclude that the political party approved of the use of violence or supported terrorism.

12. The Commissioner observes that the lifting of the immunities which resulted in the prosecution and detention of opposition MPs had a serious negative impact not only on their freedom of expression and political activities, but also on public debate in general. Most notably, as observed by the Venice Commission, the parliamentary debate and procedure which led to the adoption in April 2017 of constitutional amendments introducing profound changes in Turkey's political system took place in a context where several MPs from the second largest opposition party were in jail and did not provide a genuine opportunity for open discussions with all the political forces present in parliament.⁸
13. As regards the MPs' right to liberty and security, the Commissioner notes that the initial reason cited by the Turkish authorities for the detention of the HDP MPs was their refusal to comply with the summons to personally appear before the public prosecutor. However, as the Commissioner observed in his Memorandum on Freedom of Expression and Media Freedom, even after having forcibly been made to give evidence, a number of MPs were still in prison and as a result, unable to carry out their parliamentary mandate at a crucial juncture,⁹ as mentioned in the previous paragraph.
14. The Commissioner finally underlines that the observations contained in his submission to the Court on cases concerning the freedom of expression and right to liberty of journalists in Turkey are also applicable in the context of the detention of MPs, particularly with regard to the lack of relevant and sufficient reasoning as well as evidential grounds in the detention orders of criminal judgeships of peace. Moreover, similarly to the journalists who are applicants in the cases covered by the aforementioned intervention, the rights of the MPs to effectively challenge their detention was affected by restrictions of access to their lawyers and to the investigation file or by their inability to appear before a judge in person for extended periods of time.¹⁰

II. Observations on the targeting of those expressing dissenting views and the role of the judiciary

15. The Commissioner notes that undue restrictions of freedom of expression and the right to liberty and security of those expressing views critical of official policy, particularly on issues related to the situation in South-Eastern Turkey, have considerably intensified in recent years, in the context of vast anti-terrorism operations in South-Eastern Turkey and the implementation of sweeping emergency measures following the attempted coup d'état in July 2016. The Commissioner has worked extensively on the human rights implications deriving from both sets of events.
16. In the Memorandum on the human rights implications of anti-terrorism operations in South-Eastern Turkey, the Commissioner noted that civil society members reporting on the human rights violations caused by the operations were not only prevented from carrying out their activities, but also subjected to vilification campaigns. For example, the Commissioner noted with concern a statement by the President of the Turkish Republic on 7 April 2016 which referred to certain NGOs, without naming them explicitly, publishing reports on the situation in South-Eastern Turkey, and which challenged their role in writing such reports, stating that they should be "countered" (*üzerine gitmek*).¹¹

⁸ Venice Commission Opinion No. 875/2017 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 2017, [CDL-AD\(2017\)005](#), paragraph 131.

⁹ *Op.cit.*, [CommDH\(2017\)5](#), para. 59.

¹⁰ *Op. cit.*, [CommDH\(2017\)29](#), paras 18 -26.

¹¹ Memorandum on the human rights implications of anti-terrorism operations in South-Eastern Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)39](#), 2 December 2016, para 69.

17. In his Memorandum on Freedom of Expression and Media Freedom, the Commissioner also voiced serious concern at the adverse consequences (including disciplinary sanctions, dismissals and police investigations) facing approximately seven hundred academics for organising a petition campaign denouncing the government's actions in the context of curfews and anti-terrorism operations in South-Eastern Turkey and calling for an end to violence there and the resumption of negotiations. The Commissioner reiterates that he regards this declaration as falling clearly within the boundaries of freedom of expression, and the concerns behind it as legitimate and of interest to the public, in particular given the many human rights violations which, according to the Commissioner, were indeed committed during the curfews and anti-terrorism operations. The academics were targeted by members of the government and pro-government press, as well as the judiciary: already on 18 January 2016, criminal investigations had started against numerous members of the group, some of which resulted in prosecutions based on Article 7§2 of the Anti-Terrorism Law and Article 301 of the Turkish Criminal Code.
18. The Commissioner also reiterates the findings in his Memorandum on Freedom of Expression and Media Freedom and his recent submission to the Court on cases concerning the freedom of expression and right to liberty of journalists in Turkey as regards the hardening of the authorities' stance vis-à-vis any opposition groups or individuals in the aftermath of the attempted coup d'état, illustrated by the detention of a number of prominent journalists and human rights defenders for their alleged links with terrorist organisations with insufficient or no evidential grounds. The Commissioner sees the detention of HDP MPs as part and parcel of a more general pattern of repression against different groups in Turkey who are critical of official policy.
19. The Commissioner notes that through emergency legislation (Decree no. 674) introduced in September 2016, the Law on Municipalities was amended to permit the removal of elected regional officials from office in municipalities suspected of supporting terrorism, which mainly affected municipalities run by the Democratic Regions' Party (hereinafter "the DBP"), the sister party of the HDP. Subsequently, mayors in 82 of the 103 municipalities controlled by the DBP were suspended from office due to their alleged links with the PKK and replaced with government-appointed trustees. In this regard, the Commissioner points to the differential treatment between the DBP-run municipalities and four other municipalities controlled by other political parties, where elected local representatives were allowed to take over the duties of mayors who were also removed from office on the basis of Decree no. 674. The Commissioner notes that the Venice Commission concluded in its recent Opinion on the Emergency Decree Laws that the measures introduced via Decree no. 674, which allow central authorities to appoint unelected mayors, vice-mayors and members of local councils without judicial control, went beyond what is permitted by the Turkish Constitution and by international law.¹²
20. Against this background, the Commissioner emphasises the importance of the independence and impartiality of the judiciary for protecting the human rights of individuals against arbitrary practices. Unfortunately, however, the deterioration of the situation as regards undue interferences in freedom of expression and the right to liberty and security as described above has gone hand-in-hand with the erosion of the independence and impartiality of the Turkish judiciary. The Commissioner takes note of the fact that a number of international bodies including the Venice Commission, the Group of States against Corruption (GRECO), the European Union and the International Commission of Jurists have raised similar concerns regarding judicial independence in Turkey.¹³
21. In this respect the Commissioner recalls the numerous reported instances of the executive's direct or indirect interference with the assessment of judicial authorities and occasions when high-ranking officials have publicly disregarded the legitimacy of the Turkish Constitutional Court's ECHR-compliant decision. The Commissioner underscores that the political pressure on the judiciary has been seriously aggravated after the state of emergency, which in turn increased the reluctance

¹² Venice Commission Opinion No. 888/ 2017 on the Provisions of the Emergency Decree Law No.674 which concern the exercise of Local Democracy in Turkey, [CDL-AD\(2017\)021](#), adopted 9 October 2017, paras. 95-96.

¹³ *Op.cit.*, [CommDH\(2017\)5](#), para. 128.

among Turkish judges and prosecutors to draw attention to themselves, for example by taking controversial decisions upholding human rights.

22. It is against this background that the Commissioner observes the Constitutional Court's delay -- of almost one year at the time of this writing -- in examining the individual applications lodged by the MPs in the cases at stake. This delay sits ill with the urgency of the rights at stake, the gravity of the allegations, and the Constitutional Court's own previous decision holding that the lengthy pre-trial detention of an opposition MP constituted a violation of his right to liberty as well as the voters' will under the right to free elections.¹⁴ As this delay is already unreasonably long, persons challenging detention in Turkey will be increasingly justified in questioning whether the Constitutional Court can still provide a remedy for an effective review of continued detention at present.

Conclusions

23. The Commissioner sees the recent detention and prosecution of opposition parliamentarians as part of a broader pattern of repression against those expressing dissent or criticism of the authorities -- and particularly of official policy on issues related to the situation in South-Eastern Turkey -- which is currently prevailing in Turkey. He highlights in particular that:
- In the aftermath of the constitutional amendment lifting parliamentary immunities, many HDP MPs have faced judicial proceedings and detention on the basis of terrorism-related and other charges on account of their legitimate exercise of the right to freedom of expression.
 - This is notably facilitated by the fact that certain criminal provisions on the security of the state, terrorism, denigrating state organs or insulting the President or other officials are prone to arbitrary application due to their vague formulation as well as their overly broad interpretation by judges and prosecutors, including to statements that clearly do not incite violence.
 - As a result of their detention and prosecution, the opposition MPs were prevented from carrying out their parliamentary mandate and from effectively representing those who voted for them.
 - Decisions of domestic courts often fall short of justifying the need to resort to pre-trial detention or its extension as they lack sufficient reasoning.
 - A number of restrictions to suspects' procedural rights introduced during the state of emergency have significantly curtailed the right to obtain an effective review of detention.
 - Numerous instances of actions unduly restricting the freedom of expression and the right to liberty and security not only of parliamentarians but also of locally elected mayors, as well as academics, journalists and human rights defenders who express criticism of official policy -- notably on issues related to the situation in South-Eastern Turkey -- indicate that laws and procedures are currently used to silence dissenting voices in these fields.
 - Upholding the right to freedom of expression is at present all the more difficult as a result of a marked erosion of the independence and impartiality of the judiciary in Turkey.

¹⁴ [Decision](#) of the Turkish Constitutional Court in the case of *Balbay* (No. 2012/1272), 4 December 2013.