

GI General Directorate of Human Rights and Rule of Law
Department of Execution of ECHR Decisions
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FRANCE

December 02, 2022

It is the additional observation of the Diyarbakir Bar Association regarding the implementation of the decision of Encü and Others v. Turkey (Application No: 56543/16) to Rule 9.2 of the Committee of Ministers' Rules of Procedure.

LOGIN

1. Diyarbakir Bar Association presents its observations and recommendations by the Committee of Ministers under Rule 9(2) of the Statute of the Committee of Ministers on "Supervision of the execution of decisions and friendly settlement conditions" regarding the legislative and judicial situation in Turkey for the implementation of the Encü and Others v. Turkey decision. .

2. Bar Associations in Turkey were established within the scope of the Law No. 1136 on Advocacy and are a professional organization in the nature of a public institution, whose members are all lawyers. In addition to the duties imposed on them by the law as a professional organization, they are the institutional organization of lawyers as a part of the judicial system and contribute to the development of law.

In the 76th article of the Law on Advocacy numbered 1136, bar associations are entitled to "develop the profession of attorneyship, ensure honesty and trust in the relations of professionals with each other and business owners, defend and protect the professional order, morality, dignity, rule of law, human rights, and meet the common needs of lawyers." It is defined as a professional organization in the nature of a public institution that carries out all the works for the purpose, has a legal personality and continues its activities according to democratic principles. Article 95 of the same law also states that 'defending and protecting the rule of law and human rights and making these concepts work' is among the duties of the Board of Directors of the Bar Association.

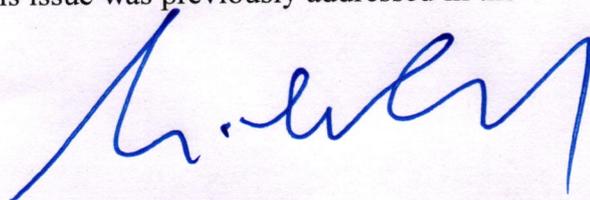
Diyarbakir Bar Association was established in 1927 and continues its monitoring and reporting activities in the field with the centers it has established for legal support since it is in a region where violations of rights are very intense.

Diyarbakir Bar Association conducts research on legal problems and rights violations faced by individuals and groups of individuals due to national or international authorities, aims to develop "human rights and freedoms", uses all national or international legal remedies in the most effective way, and acts against all kinds of discrimination and violation of rights. It is an independent non-governmental non-governmental organization that fights against, documents and reports violations of rights, and advocates in national and international mechanisms.

BACKGROUND

The European Court of Human Rights (ECHR) gave a violation decision on the application of Encü and Others v. Turkey (Application No: 56543/16) on February 1, 2022, and the said decision became final on the same date.

In the said decision, the ECHR made an examination within the scope of Article 10 of the Convention, which regulates freedom of expression; He stated that this amendment regarding the lifting of the parliamentary immunity of the applicants with the constitutional amendment made on 20 May 2016 was not foreseeable and that this issue was previously addressed in the



ECHR's decisions in *Selahattin Demirtaş (No.2) (14305/17)* and *Kerestecioğlu Demir (68136/16)*. It held that there had been a violation of Article .

Standard Procedure for Lifting Legislative Immunity in Turkey

A. Constitutional basis

1. Paragraph 2 of Article 83 of the Turkish Constitution contains the provision that "A deputy who is alleged to have committed a crime before or after the election cannot be detained, interrogated, detained or tried unless the Assembly decides". This provision is in line with the principle of parliamentary immunity of the members of the Assembly; It brings two exceptions: 'The delinquent state of the deputy' and 'Offences within the scope of Article 14 of the Constitution, provided that the investigation has been started before the election'. With the amendment, the second paragraph of Article 83 has been temporarily suspended.

2. Article 83/3 of the Constitution. According to the article, the execution of a penalty sentence imposed on a member of the Grand National Assembly of Turkey before or after his election is left to the expiration of his membership.

3. Article 76 of the Constitution, which regulates the eligibility to be elected as a Member of Parliament: "Those who are banned from public service, sentenced to a total of one year or more imprisonment and heavy imprisonment, excluding negligent crimes; disgraceful crimes such as embezzlement, embezzlement, corruption, bribery, theft, fraud, forgery, abuse of faith, fraudulent bankruptcy, smuggling, collusion in official tenders and purchases, revealing state secrets, participating in terrorist acts and inciting and encouraging such acts. Those who have been convicted of one of their crimes cannot be elected as members of parliament even if they are pardoned".

4. According to Article 135 of the Parliamentary Rules of Procedure (hereinafter Internal Regulation), the membership of a deputy who has been convicted of a crime specified in Article 76 of the Constitution shall be terminated. In such a case, it is understood that there is no need for the Parliament to vote in order to lose the membership. Because, according to Article 136 of the Rules of Procedure, membership ends when the final court decision about the deputy is submitted to the General Assembly.

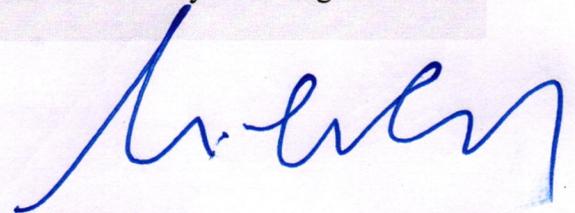
5. According to Article 85 of the Constitution, the relevant deputy (or another deputy) can apply to the Constitutional Court for the annulment of the decision within seven days, starting from the date of its decision. The Constitutional Court may annul the Parliament's decision on the ground that the decision is contrary to the Constitution, the law or the Rules of Procedure.

B. Procedures and Guarantees in the Rules of Procedure of the Turkish Grand National Assembly

1. The procedure to be followed for lifting the legislative immunity is based on Articles 83 and 85 of the Constitution. Detailed rules are included in the bylaws.

2. When a member of parliament is alleged to have committed a crime, prosecutors and courts may request that his immunity be lifted. This request is forwarded to the Presidency by the Ministry of Justice to be submitted to the Speaker of the Assembly.

3. The Presidency of the Assembly transfers this request to the Joint Committee, which is composed of the members of the Constitution and Justice Committees. The Joint Commission is chaired by the President of the Constitutional Commission. The Deputy Chairman, spokesperson and clerk of the Constitutional Commission carry out the same duties in the Joint Commission. (Rule 131 of the Rules of Procedure). The Chairman of the Joint Commission constitutes a five-member preparatory commission by drawing names to examine the immunity files.



4. The Preparatory Commission, which consists of five people, submits a report to the Joint Commission within one month at the latest after taking office. The commission can listen to the relevant deputy but not a witness (Rule 132).

5. The Joint Commission discusses the report prepared by the Preparatory Commission and concludes it in a month. The Joint Commission decides to lift the immunity or to postpone the prosecution until the expiration of his capacity as a deputy or minister (Rule 133).

6. The report of the Joint Commission is read in the General Assembly if the prosecution is postponed. If this report is not objected to in writing within ten days, it becomes final (minimum number of objections is not specified) (Rule 133/3). If the report is in the form of lifting the immunity or if it is objected, it is discussed and voted in the General Assembly.

7. If the deputy whose immunity is requested to be lifted, he/she can defend himself orally in the Preparatory Committee, the Joint Committee and the General Assembly or have a member defend himself. The last word before the General Assembly is given to the defense.

C. Constitutional Amendment of 12 April 2016

1. On 12 April 2016, the National Assembly adopted an amendment adding the Provisional Article 20 to the Constitution. Provisional Article 20 is as follows: "On the date this article was adopted in the Turkish Grand National Assembly; from the authorities authorized to investigate or authorize an investigation or prosecution, from the Office of Chief Public Prosecutor and from the courts; The provisions of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to the deputies who have files regarding the lifting of their legislative immunity that have been transferred to the Ministry of Justice, the Prime Ministry, the Presidency of the Turkish Grand National Assembly or the Presidency of the Joint Commission composed of members of the Constitution and Justice commissions. Within fifteen days from the effective date of this article; The files regarding the lifting of legislative immunity in the Presidency of the Joint Commission, which is composed of the members of the Constitution and Justice commissions, the Presidency of the Grand National Assembly of Turkey, the Prime Ministry and the Ministry of Justice, are returned to the competent authority in order to take necessary action."

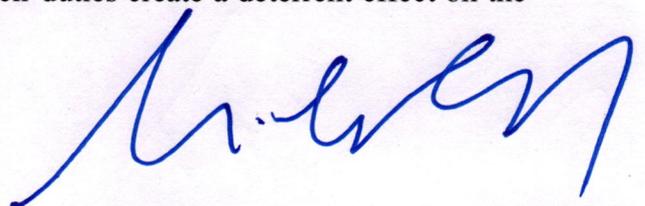
2. Provisional Article 20 of the Constitution entered into force on 20 May 2016 and was completely "consumed" within 15 days; On June 4, 2016, all pending files were returned to the relevant competent authority for the purpose of 'taking the necessary action'.

3. Accordingly, immunity has been lifted in respect of all requests referred to the National Assembly for the lifting of immunity until the date of publication of the Amendment. On the other hand, files coming after this date were processed according to the procedure regulated in Articles 83 and 85 of the Constitution and the Rules of Procedure of the Grand National Assembly of Turkey.

D. Immunity and Freedom of Expression in the Current Situation in Turkey

1. The deputy represents his voters and defends their interests by drawing attention to their concerns. In this respect, interferences with the freedom of expression of an opposition deputy should be carefully examined by the court. Regarding the legislative immunity, as stated in the case-law of the ECHR, "Legislative immunity, the inherent qualities of its system and the purpose of exemption from ordinary law, is to provide free expression to the representatives of the people and to prevent complaints and arbitrary judicial practices by individuals from different political groups from impeding parliamentary functions."

2. Judicial threats and criminal sanctions for deputies due to their activities outside the Parliament and their political discourses related to their duties create a deterrent effect on the execution of the duty of deputies.



3. The Venice Commission also expressed its concerns about the broad interpretation of the articles of the Turkish Penal Code, which leads to the prosecution of individuals for their statements. In its Opinion published in March 2016 on Articles 216, 299, 301 and 314 of the Turkish Penal Code, the Commission examined the provisions of the penal code on freedom of expression and stated that these articles "cause excessive sanctions and are applied too broadly and the relevant case-law of Article 10. penalizes the behaviors protected under Article 19 of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. In particular, Article 216 of the Penal Code (incitement to hatred and hostility and humiliation) "should not be used to punish harsh criticism of government policies" (para. 124). Because of its excessive use, article 299 (Insulting the President) should be repealed altogether (para. 126). Article 301 (Denigrating the Turkish Nation, the State of the Republic of Turkey, the Institutions and Bodies of the State) should be amended to eliminate the problems caused by ambiguous statements (para. 127). Article 314 should be interpreted narrowly and the provision in article 220 (Establishing an Organization to Commit a Crime) "Anyone who commits a crime on behalf of the organization without being a member of the organization is also punished for the crime of being a member of the organization" should be abolished. The Opinion also concluded that the practices of the courts applying these provisions did not sufficiently alleviate these problems.

4. While such restrictions on freedom of expression are problematic for anyone prosecuted under these provisions, they have a particularly negative impact on MPs who are unable to express their political views outside of Parliament without fear of criminal prosecution. With the lifting of the immunity of 139 MPs, the amendment of 12 April 2016 exposes MPs to the risk of arbitrary punishment for rhetoric related to their activities as members of the Assembly.

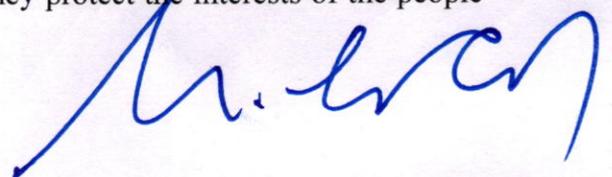
Information on the Proceedings of the Deputies and the Non-Implementation of the Encü and Others v. Turkey Decision

1. In terms of the accusation in the proceedings before the Constitutional Amendment numbered 6718, the subject of the accusation consists mostly of discourses and actions that should be evaluated within the scope of participation in political party activities, freedom of association and freedom of thought and expression. Due to the actions and discourses that are within the scope of fundamental rights and freedoms and that are considered not to constitute a crime, deputies are given the opportunity to act as a deputy under the threat of the judiciary, and some deputies are prevented from fulfilling their duties by applying protection measures such as detention, arrest, etc.

2. The level of democracy of a state can be measured by its ability to secure all kinds of discussion, including the most extreme ideas and thoughts, for the development of the state, society and its individuals. Freedom of expression can really be talked about when all citizens of a state can express their opinions without worrying about going to jail or being tried in criminal courts. Moreover, considering that the person exercising this right is a deputy, he should benefit more from this right.

3. As stated in the reports of the Venice Commission on freedom of thought and expression and immunity of parliamentarians, it was determined that the judicial practice in Turkey had a difficult time, that a fair trial could not be talked about, and that fundamental rights and freedoms were violated. However, it has been stated that the Constitutional amendment numbered 6718 regarding the lifting of immunities is contrary to the norms of European Law and violates fundamental rights and freedoms in terms of the right to vote and to be elected, the right to representation and the right to participate in political party activities.

4. Freedom of expression is important for everyone, but this is even stronger for deputies, who are elected representatives of the people, because they protect the interests of the people



they represent. Therefore, interferences with the freedom of expression of attorneys need to be examined more strictly. Essentially, the immunity granted to MPs is an institutional privilege given to the Parliament rather than to individual individuals. This guarantee exists to enable the representatives of the people to speak freely and to carry out their parliamentary functions without being interrupted by partisan grievances. In this way, it will be possible to act in accordance with the principle of separation of powers between the legislature and the judiciary.

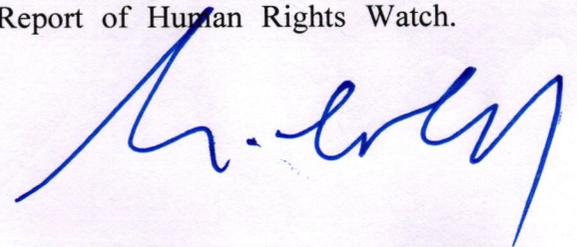
5. The purpose of lifting the immunity is to silence the opposition and even to make it impossible for the opposition deputies to engage in politics. As the Venice Commission has stated, immunities exist to protect attorneys against such harassment (Venice Commission, para. 88). With the lifting of immunity, HDP deputies have been consistently targeted. The trials were held under extraordinary conditions and with the arbitrariness brought by the State of Emergency, violating fundamental rights and freedoms. In this process, where all HDP members carry out political activities under the threat of the judiciary, HDP deputies have been stripped of their seats in parliament, along with detention, arrest and punishment decisions. The right of opposition deputies to engage in political party activities has been blocked and violated by taking into account the state of emergency for political purposes and interests.

6. Considering that, in essence, the actions and discourses that were the subject of the trial were aimed at the fulfillment of the political activity and the duties and responsibilities of the deputy, it should have been acquitted in domestic law because the ECHR's *Encü and Others v. Turkey* decision was in violation of Article 10 of the Convention. However, in the current judicial practice in Turkey, decisions are rendered by refusing the ECHR decision about the applicant MPs, who have been given a verdict of violation by the ECHR, whose trial continues in domestic law, or who have been sentenced. While a definitive violation decision should be enforced within the scope of Article 46 of the ECHR, we observe the attitudes and judicial activities of the Turkish judicial practice towards non-implementation of the violation decision. This situation shows that the contract law has been violated by the domestic judicial authorities.

7. The European Convention on Human Rights (ECHR), which the decisions of the ECHR are binding on the Contracting States, is expressed in a way that does not allow for doubt and distortion under Article 46. Being a party to the ECHR requires recognizing the mandatory jurisdiction of the ECHR and taking remedial measures required by the decisions of violations rendered as a result of the exercise of this jurisdiction. The whole ECHR system is based on goodwill and confidence that the bindingness of the ECHR decisions for the parties against which a violation decision is made is not open to discussion and that necessary measures will be taken.

8. The ECHR notes that its decisions are essentially decisive and that, in general, it is primarily for the State concerned to choose the means by which it will use its domestic law to fulfill its obligation under Article 46 of the ECHR, subject to the supervision of the Committee of Ministers. Exceptionally, however, in order to assist the respondent State in fulfilling its obligations under Article 46, the ECHR seeks to indicate the type of action that could be taken to put an end to a systemic situation that it has found to exist. As the ECHR stated in its *Encü and Others v. Turkey* decision, the continuation of criminal proceedings, subjecting them to arbitrary proceedings under the threat of the judiciary, together with the abolition of immunities with the constitutional amendment, has a deterrent effect on participation in political party activities.

9. The deepening of the human rights crisis, along with the erosion of the rule of law and democracy, is also demonstrated in the 2020 World Report of Human Rights Watch.



Regarding Turkey, the report states that “executive control and political influence over the judiciary cause courts to systematically accept bogus indictments and to issue arrests and convictions of individuals and groups the government deems political opponents without convincing evidence that they have committed crimes”.

10. Turkey's judicial practice ignores the fair trial guarantees and legal procedures, arbitrarily and violating the right to legal security with the overly broadly defined provisions of the legal legislation, citizens are exposed to judicial threats, acts under protection in accordance with international human rights law are violated with different unlawful motives. is seen.

11. Political issues are subject to accusations within the scope of judicial activity, and freedom of political discussion is violated. In this direction, the criticisms and activities of citizens and deputies who have dissenting opinions turn into an arbitrary judicial threat with the excessive interpretation of the law, and it has a deterrent effect on the use of fundamental rights and freedoms, especially freedom of expression.

12. Structural problems identified within the scope of violation by the European Court of Human Rights still continue in Turkey. The aforementioned Constitutional article creates a climate of self-censorship in the eyes of the deputies and also poses the threat of arrest and criminal prosecution.

13. The ECHR's decision of violation regarding HDP deputies, in essence, concerns the violation of freedom of thought and expression, and constitutes the core of the accusations that are subject to judicial activity after the lifting of immunity. In this context, in accordance with the violation decision of the ECHR, which has become final, while the domestic judicial authorities should decide within the scope of the trial, a significant number of convictions are given, applications for retrials are rejected and the violation decisions are avoided.

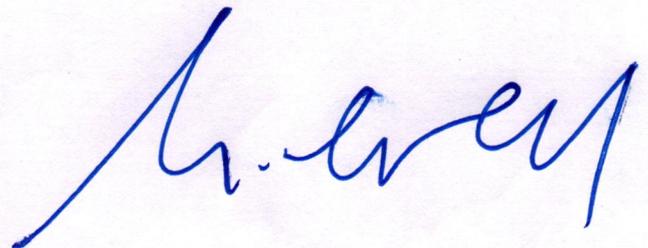
EVALUATION

1. The Constitutional Amendment of 12 April 2016 is a 'one-time' temporary and personal regulation on 139 deputies regarding the proceedings currently pending in the Parliament. Using its power of founding power, the TGNA has preserved the immunity regime in Articles 83 and 85 of the Constitution for future files, but has made an exception to this regime in terms of certain reports regarding people whose identities are known, although it uses a general language. This is an abuse of the constitutional amendment procedure.

2. After the constitutional amendment that clearly violated the law of the Convention, the proceedings in which statements made on the basis of freedom of thought and expression, political party activity and participation in activities within this scope are the subject of accusations are continuing.

3. In the decision of Ferhat Encu and Others v. Turkey, the ECHR did not find a violation in terms of mere trial procedure. Since the ECHR ruled that the applicant's immunity was lifted unpredictably due to his freedom of expression, it found that there was no legal basis for the arrest and conviction that took place as a result of this. These are not violations that can be remedied by retrial and reaching the same conclusion. For this reason, the ECHR decreed the only solution to remedy these violations and stated that the investigations initiated against the applicant at that time were clearly unconstitutional and therefore collapsed. Despite the judicial practice in domestic law to the contrary, in the process after the lifting of immunity, the decision of violation must be fulfilled immediately in the case files that are ongoing or have been decided.

CONCLUSION AND RECOMMENDATIONS



- ✓ It is observed that the structural problems regarding freedom of expression continue and no effective solution has been produced by the authorities.
- ✓ It is observed that judicial practice and domestic legislation cause violations of fundamental rights and freedoms of a structural nature.
- ✓ Provisional Article 20 of the Constitution does not meet the requirement of the Committee of Ministers to fully comply with the case-law of the Court in terms of standards of predictability and necessity in a democratic society.
- ✓ The government should be requested to submit detailed data on the criminal proceedings of the deputies, including decisions on investigation, arrest, non-prosecution, conviction and acquittal.
- ✓ The Encü and Others v. Turkey decision should be included in the scope of qualified monitoring and freedom of expression as the basic elements of a democratic society should be reviewed more frequently and regularly by the Committee of Ministers in terms of legislative measures.

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