**The Turkish Constitutional Court, Zubeyde Fusun Ustel and Others (Academics for Peace), 26.7.2019, no. 2018/17635**

**1. Summary and outcome**

The Constitutional Court concluded that the condemnation of the applicants, 10 academics from different universities in Turkey on charge of “propagandizing for a terrorist organization’’ for having signed a petition criticizing State’s military operations violated the right to freedom of expression guaranteed by Article 26 of the Constitution. On January 11, 2016, the applicants who were among the 1128 academics and researchers calling themselves “Academics for Peace’’ signed a petition entitled “We will not be a part to these crime.’’ The petition denounced the excessive lethal force used by security forces during anti-terror operations in Southeastern Turkey and invited the Government to take initiative for ending the armed conflict. The applicants were subsequently indicted by the Istanbul Public Prosecutor of disseminating propaganda on behalf of the armed organization PKK (Kurdistan Workers’ Party). All applicants were convicted to fifteen months of imprisonment under Article 7(2) of the Anti-Terror Law for terrorist propaganda. The pronouncement of the judgment was suspended for all applicants except Prof. Zubeyde Fusun Ustel. The Constitutional Court, by a judgment rendered with 8 for and 8 against votes, concluded that the right to freedom of expression of 10 academics was violated by the related imprisonment.

**2. The facts**

On January 11, 2016, 1128 academics from Turkey and abroad, by signing a petition entitled “We will not be a part to this crime’’, called for an end to human rights violations during the curfews declared by the State in different cities of Southeastern Turkey in 2015. The petition criticized Turkish state for compelling its citizens in Kurdish provinces to hunger by implementing long lasting and round-the-clock curfews, for attacking civil settlements with heavy weapons, and it called for the abandon of the “*deliberate and planned massacre and deportation of Kurdish and other peoples of the region’’.* It demanded from the Government to ensure accountability for grave violations of the right to life, liberty and security and the prohibition of torture and ill treatment and to compensate damages inflicted on victims. The statement also issued a call for returning to the peace process that had been interrupted after the national elections of June 7, 2015 and urged the Government to take the responsibility for establishing a lasting peace.

Since the date of release of the petition, signatory academics have been subject to political and legal repression and the total number of signatories increased to 2218 as the public support grew. 405 academics were dismissed from their posts and banned from public service as of the date of Constitutional Court’s decision with decree-laws issued following the declaration of a nation-wide state of emergency in July 2016 after an attempted military coup. In addition to expulsions, a large number of academics faced preventive suspension from their office or was forced to retire. In September 2017, the Istanbul Public Prosecutor started to file individual indictments against the signatories under Article 7(2) of Turkish Anti-Terror Law for disseminating terrorist propaganda on behalf of PKK. As of September 2019, 793 signatories are put on trial and 204 were sentenced to a prison sentence. While for 164 academics, the pronouncement of the judgment is suspended -since they accepted the mechanism of the deferment of the announcement of the verdict (DAV)-, which means they will be on probation for a period of 5 years, 36 academics were sentenced to prison sentence without suspension.[[1]](#footnote-1)

The applicants are among those who had their judgments delivered. All of the applicants were convicted to 15 months of imprisonment with a suspension except Prof. Zubeyde Fusun Ustel who, after the approval of her sentence by the Court of Appeal on February 25, 2019 was imprisoned on May 8, 2019 and was released on July 22, 2019; four days before the Constitutional Court delivered its judgment.

The applicants filed individual applications before the Constitutional Court after their sentence became definitive, arguing that their conviction violated their right to freedom of expression and to a fair trial. The Constitutional Court decided to merge individual applications of 10 academics into one file and deferred it to its General Assembly on July 3, 2019.

**3. Decision Overview**

The applicants argued before the Court that the inflicted statement was essentially indented to call for peace, that academic freedom must be provided with a broader protection for its potential contribution to public interest and that academics, as citizens, were entitled to freely express their opinion on political matters. They further contented that their conviction did not meet the “prescribed by law’’ test since the petition was not justifying, praising or encouraging the use of violence pursuant to Article 7(2) of Anti-Terror Law. According to the applicants, the Government must have tolerated the harsh and disturbing criticism in the petition. The Government responded that the impugned petition must be considered within the particular context in which it had been published where violent terrorist attacks were escalating in Southeastern provinces and security forces were obliged to take military measures against several declarations of self-governance by PKK. Drawing on the Council of Europe Convention on the Prevention of Terrorism, the Government argued that specific restrictions on messages that may constitute direct or indirect incitement to terrorist acts were compatible with the European Convention on Human Rights. It also urged the Court to take into account the manner, in which the impugned expressions were disseminated, the audience that it intended to influence, thus the potential impact of the expression while assessing the necessity of the restriction.

As to the condition of being ‘prescribed by law’, recalling the amendment adopted in 2013 of Article 7(2) of the Anti-terror law defining the crime of propaganda as “*justifying, praising or inciting the use of coercion or violence by a terrorist organization*’’*,* the applicants argued that their conviction resulted from a broad interpretation of the Article, which was against the will of the legislator. Hence, in their case, Article 7(2) was not interpreted in such a manner that enabled them to foresee the consequences of their action. Therefore, they argued that their conviction constituted an interference that could not be considered as prescribed by law.

However, the Court did not deem necessary to address this issue as it decided to examine the merits of the case in terms of the necessity of the interference. Considering first the issue of ‘incitement to violence’, the Court recalled that not all kinds of expression of opinion related to terror constituted a crime under Turkish law but only disseminating propaganda in such a way as to justify, praise or encourage the use of methods by terrorist organizations constituting coercion, violence or threats. Hence declaring opinions that are in line with the ideology, social or political goals of the terrorist organization and with its opinions on political, economic and social issues cannot be considered as propaganda of terrorism even if they are linked to terror or to a terrorist organization, unless they include expressions encouraging the use of violence or posing a threat for committing terrorist offenses. [para. 80-81].

The Court observed that while establishing the fact of incitement to violence, criminal courts essentially based their reasoning on a supposed call raised by one of the PKK leaders to the intellectuals in the country two months before the publication of the petition. However, the Court noticed that while motivating their judgment, the courts did not show any evidence beyond presumption that established that signatories had actually followed the orders of PKK [para. 89]. The Court held that in the absence of certain and reliable evidences, the conviction of people by criminal courts and public authorities on the basis of hypothetical assumptions that a certain statement had been made by following the orders of an organization would place a great pressure on freedom of expression [para. 95].

The second reason for conviction of signatories was the fact that the call for ending the armed conflict was solely addressed to the State. Criminal courts particularly relied on the fact that academics did not mention the responsibility of armed terrorist organization in the commission of violent acts. In this respect, the Court held that punishing individuals who made certain suggestions to the State on issues that seriously affected social life for not considering legal and illegal actors as equal parts and for appealing only to the State and not to the terrorist organization would completely eradicate public debate. Furthermore, according to the Court, the fact that information or opinions are one sided cannot be the only reason for interfering with freedom of expression [para. 97].

The Constitutional Court is of opinion that even though the impugned petition included strong statements and heavy accusations; it actually urges those who use public force to act within the limits of law and resolve issues with non-violent methods [para. 98]. In this sense, there is no doubt that the petition concerns questions of public interest as it expresses a certain point of view on the events that lasted ten months and had caused massive migration, death and physical injury to many people. Hence, it must be rigorously established that the restriction on a statement of opinion is strictly required by a pressing social need [para. 101].

As regards the criticism towards public authorities, the Court recalled that the limits of acceptable criticism were even wider for a politician, and in a democratic system, the actions or omissions of public authorities must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, public authorities have possibilities to react or respond to the attacks or criticism towards them by using different means. Hence, they should display restraint in resorting to criminal proceedings for replying to unjustified verbal attacks. [para. 106-107].

In this regard, the Court pointed out that, even if they were extremely harsh, the statements in the petition did not directly target a person or an official. Therefore, according to the Court, the argument upheld by criminal courts stating that the petition aimed at humiliating our country in international area cannot be accepted as a legitimate reason to interfere with freedom of expression. The Court concluded that it was constitutionally impossible to punish people for terrorist propaganda on the basis of hypothetical assumptions and to limit their freedom of expression on the basis of reputation and prestige of authorities. The Court further noted that, taken as a whole, the impugned petition called the authorities for ending the armed conflict and guaranteeing the principles and norms related to the right to life. When a statement of opinion is related to the right to life guaranteed under Article 17 of the Constitution, the criticism towards the actions of official authorities must be received with a greater degree of tolerance [para. 108-109].

Later, acknowledging the link between the petition and academic freedom, the Court held that it was crucially important for the country and society that academics could express themselves even outside the realm of their professional expertise and defy the most powerful opinions on the most critical and delicate political matters [para. 113].

Assessing physical elements of the crime defined under Article 7(2), the Court reiterated that after the amendment of April 30, 2013, the crime of terrorist propaganda was considered to be committed only if the propaganda was made in such a manner that legitimizes, praises or incites the use of methods constituting coercion, violence or threats. In this regard, while determining whether the crime is committed or not, a direct and objective link must be established between the elements of the offence and the action. In other words, the conclusion must not consist of a subjective interpretation that ascribes a remote meaning to expressions of the text beyond the wording of the law [para. 117]. Accordingly, the Court recalled once again that statements related to social and individual problems arising from State’s legitimate struggle against terrorism could not be considered as expressions of thoughts and opinions capable of encouraging or raising the awareness of people intended to engage in terrorist acts and of increasing the risk that such criminal acts may be committed [para. 119]. In this sense, the impugned petition cannot be considered as encouraging the use of methods of terrorist organization that consist of coercion, violence or threats since it does not include expressions leading people to violent acts or statements causing a danger that terrorist acts will be committed. The Court concluded that in their judgments, none of the criminal courts clarified in which way the petition *justified, praised or encouraged* methods that consisted of coercion or threat. Therefore, the reasons adduced by criminal courts in their decisions of conviction cannot be considered to be *relevant and sufficient* [para. 122].

On the question of proportionality of the interference, underlining the particular importance of freedom of expression for the applicants, being academics whose life is centered around doing research, expressing opinions, participating to conferences and seminars and advancing arguments, the Court held that even if the prison sentence was deferred, the punishment had a chilling effect on the applicants, that could deter them in the future from expressing their opinions. Consequently, according to the Court, it must be admitted that the probability of execution of sentences inflicted on applicants caused them stress and fear of being punished [para. 135].

The Constitutional Court ultimately declared that in a democratic society, the imposition of a sentence that served self-censorship reflex rendered the decisions and actions of public authorities unquestionable. However, in a democratic society, the State is expected to contribute to the public debate by effectively responding to the criticism by making use of wide range of sources of information and means of communication rather than impeding a debate of higher public interest through threats of punishment [para. 137].

In the light of the above reasoning, the Court concluded­ that the interference with the applicants’ freedom of expression was not necessary in a democratic society and as a result, violated Article 26 of the Constitution.

**4. Expands expression**

The judgment of the Constitutional Court is very important as it strongly affirms the standards of freedom of expression and clearly establishes that political expressions that do not encourage or incite to violence or hatred, cannot be subject to criminal punishment even though they are disturbing or provoking for the State or are in line with the opinions and aims of an armed organization. The Constitutional Court requires a solid and clear link to be established beyond hypothetical assumptions between the content of the expression and the act of violence or a real or intended risk of harm. Hence, it is impossible to criminally repress expressions for not equally addressing the responsibility of all actors of an armed conflict. The decision is also remarkable in that it defines academic freedom in very broad terms and recognizes its particular importance for an open and free public debate. The decision does not only concern 705 academics who are currently indicted in Turkey on charge of terrorist propaganda but also has a great significance for all political dissidents and human rights defenders, who face the risk of conviction and imprisonment for demanding peace and criticizing State’s policies.

**5. Global Perspective**

**Related International and/or regional laws**

Constitution of Turkey, Article 26

ECHR, Article 10

Turkish Anti-Terror Law, Article 7/2

Council of Europe Convention on the Prevention of Terrorism, Article 5

Turkish Constitutional Court, Bekir Coşkun [GC], B. No: 2014/12151, (2015)

 Mehmet Ali Aydın [GC], App. No: 2013/9343, (2015)

 Hakan Yiğit, App. No: 2015/3378, (2017)

 Kemal Kılıçdaroğlu, App. No: 2014/1577, (2017)

 Tansel Çölaşan, App. No: 2014/6128, (2015)

 Abdullah Öcalan [Gc], App. No: 2013/409, (2014)

 Ayşe Çelikel, App. No: 2017/36722,(2019)

 Eğitim ve Bilim Emekçileri Sendikası ve diğerleri [GC],

 App. No: 2014/920, (2017)

 Fatih Taş [GK], App. No: 2013/1461, (2014)

 Bejdar Ro Amed, App. No: 2013/7363, (2015)

 Ferhat Üstündağ, App. No: 2014/15428, (2018)

ECtHR,Handyside/United Kingdom, App. No: 5493/72, (1976)

1. <https://barisicinakademisyenler.net/node/431> [↑](#footnote-ref-1)