EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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ECHR 375 (2021)
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Interpretation by the domestic courts of the legislation used to convict the applicant following the failed military coup in 2016, for opinions expressed in 2015, was unforeseeable

In today's **Chamber** judgment[1] in the case of Yasin Özdemir v. Turkey (application no. 14606/18) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the criminal conviction of the applicant, a teacher, for praising crime and criminals, on account of comments which he had posted on the social networks in April 2015, in favour of the Gülenist organisation and its leader (Fethullah Gülen).

The Court noted the following points:

- When the applicant had posted his messages, they had contained ideas and opinions expressed in the framework of public debates on certain sensitive subjects (his viewpoint on the underlying facts of the judicial investigations initiated on 17 and 25 December 2013 into allegations of corruption, his criticism of the policies conducted by the political authorities against the opposition, and his criticism of the alleged relations between the political authorities and an armed Islamist organisation). Those opinions had not incited people to commit violence or revolt.

- At the material time no members of the Gülenist movement had been convicted with final effect of being leaders or members of an illegal or terrorist organisation.

- Article 215 § 1 of the Turkish Penal Code had, *inter alia*, made the penalisation of comments considered as praising crime or criminals subject to the condition that those comments gave rise to a clear and present danger to public order. The criminal court which had convicted the applicant had considered that the failed military coup launched in July 2016, long after the applicant had posted his comments, in April 2015, had amounted to just such a danger.

In that regard, the Court held that the applicant could not reasonably be expected to have foreseen that the impugned comments, which had clearly opposed the Government's line but had constituted peaceful contributions to a public debate and had not incited people to revolt, might give rise to a real and immediate risk of disorder, such as an attempted military coup, over one year later. The fact of basing a conviction on circular reasoning, as the court in question had done in the instant case, amounted to an excessively broad interpretation of the law and a circumvention by the court in question of the obstacle set up by the legislature to ambiguous accusations punishing the expression of peaceful opinions in a public debate. The Court took the view that such a broad interpretation of Article 215 of the Penal Code had been unforeseeable for the applicant at the material time.

Consequently, the interference in the applicant's exercise of his right to freedom of expression had failed to meet the "quality of the law" requirement under Article 10 of the Convention.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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Principal facts

The applicant, Yasin Özdemir, is a Turkish national who was born in 1980 and lives in Adana (Turkey).

In June 2016 the Isparta public prosecutor's office ordered the police to conduct research on social media (Facebook, Twitter and Instagram) to identify Internet users who belonged to terrorist organisations.

In the same month, the Isparta Security Directorate prepared a report, classified as secret, on the comments posted by the applicant on Facebook in reaction to articles or news about the "Gülenist" organisation by the pro-government newspaper *Yenişafak*.

In July 2016 the applicant was dismissed, pursuant to Legislative Decree no. 667 (adopted by the Council of Ministers during the state of emergency imposed following the attempted coup of 15 July 2016), on the grounds that he had previously been employed in a private school affiliated to the "FETÖ/PYD terrorist organisation", which had been closed down under the same Legislative Decree.

In August 2016 the applicant was placed in police custody, then in pre-trial detention, as the authorities suspected him of being a member of the FETÖ/PYD organisation or of disseminating propaganda in its favour.

In November 2016 the Isparta Assize Court sentenced the applicant to seven months and fifteen days' imprisonment, under Article 215 § 1 of the Turkish Criminal Code, finding that the applicant's actions fell within the offence of praising crime and criminals. The assize court also decided to suspend the delivery of the judgment convicting the applicant (meaning that it would be set aside if he was not convicted of any offence of the same type for a period of five years).

In its judgment, the assize court drew attention to the FETÖ/PYD's organisational structures and operating methods, and held that it was an armed organisation, in that it had carried out several attacks in Turkey through its members who were employees of the armed forces or the police. As to the condition provided for in Article 215 § 1 of the Criminal Code, under which statements considered as praising crime and criminals had to present a clear and present danger to public order, the assize court considered that the attempted coup of July 2016 amounted to such a danger.

An appeal lodged by the applicant and an individual application to the Turkish Constitutional Court were dismissed.

Complaints, procedure and composition of the Court

Relying on Article 10 of the Convention (freedom of expression), the applicant complained about his conviction, arguing that at the time he had published the contested comments, the organisation in question had not been known as a terrorist organisation.

The application was lodged with the European Court of Human Rights on 12 March 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Jon Fridrik **Kjølbro** (Denmark), *President*,
Aleš **Pejchal** (the Czech Republic),
Valeriu **Griţco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Branko **Lubarda** (Serbia),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Turkey),

and also Hasan **Bakırcı**, *Deputy Section Registrar.*

Decision of the Court

Article 10 (freedom of expression)

The Court considered that the applicant's criminal conviction and the decision to stay delivery of judgment given at the close of proceedings in the present case, which had subjected the applicant to a five-year stay of execution, amounted to genuine and effective restrictions, and that they therefore amounted to an "interference" with the applicant's exercise of his right to freedom of expression.

It decided to consider whether the domestic law as interpreted and applied in the present case had been foreseeable when the applicant had posted the comments which had led to his conviction.

The Court noted that the applicant had been convicted with final effect of praising crime or criminals, and that his conviction had been based solely on the comments which he had posted on Facebook concerning newspaper articles.

The Court took the view that the comments in question had mainly consisted of the applicant's opinions on topical political issues: his criticism of measures adopted by the administrative and judicial authorities to combat the Gülenist organisation, his point of view on the underlying facts of the judicial investigations conducted from 17 to 25 December 2013 into allegations of corruption, his critique of the policies conducted by the political authorities against the opposition, and his criticism of the alleged relations between the political authorities and an armed Islamist organisation.

At the time of their publication, the messages had contained ideas and opinions expressed in the framework of public debates on certain sensitive subjects – similar ideas had already been expressed not only by members of the Gülenist movement but also by the legal opposition, including political opposition parties, as well as by the national and international media. Furthermore, those opinions had in no way incited people to commit violence or revolt.

In the Court's view, the fact that members of the Gülenist movement had launched an attempted coup almost fifteen months later, using a section of the opinions expressed as an excuse, altered nothing in the above-mentioned findings concerning the freedom to express such opinions during public debates.

The Court pointed out that an interpretation of criminal law leading to confusion between, on the one hand, criticism levelled at the Government in the framework of public debates, and on the other, pretexts used by terrorist organisations to justify their acts of violence, was necessarily incompatible with both Turkish national law, which recognised public freedoms, and the Convention provisions protecting individuals against arbitrary infringements of those Convention freedoms.

The Court observed that at the material time no members of the Gülenist movement had been finally convicted of being leaders or members of an illegal or terrorist organisation, even though the group had been considered dangerous by some parts of the executive. Indeed, the question whether the movement was an educational and religious community or an organisation endeavouring unlawfully to infiltrate the State organs had been the subject of heated public debate in April 2015, around the time when the applicant had published the impugned comments.

It further noted that Article 215 § 1 of the Turkish Criminal Code laid down safeguards against excessively broad interpretations of the law to the detriment of persons charged with offences, in particular making the criminalisation of statements considered as praising crime or criminals subject to the condition that those comments gave rise to a clear and present danger to public order. It observed that the criminal court which had convicted the applicant had considered that the failed military coup which had been launched in July 2016, long after the applicant had posted his comments in April 2015, had amounted to just such a danger. The Court considered that the applicant could not reasonably be expected to have foreseen that the impugned comments, which

had opposed the Government's line but which had constituted peaceful contributions to a public debate and had incited no one to revolt, might give rise to a real and immediate risk of disorder, such as an attempted military coup, over one year later. The fact of basing a conviction on circular reasoning, as the court in question had done in the instant case, amounted to an excessively broad interpretation of the law and a circumvention by that court of the obstacle set up by the legislature to ambiguous accusations punishing the expression of peaceful opinions in a public debate.

Consequently, the Court considered that such a broad interpretation of the relevant provision of criminal law (Article 215 of the Penal Code) had been unforeseeable for the applicant at the material time.

As regards Article 15 of the Convention and the Turkish derogation, the Court noted that Article 215 § 1 of the Penal Code had not been amended during the state of emergency and that no derogating measure was applicable to the situation.

Having established that the interference with the applicant's exercise of his right to freedom of expression had failed to meet the "quality of the law" requirement, the Court found that there had been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court ruled that no award could be made for damages and costs and expenses because the applicant had not lodged his claim for just satisfaction in accordance with the Rules of Court.

The judgment is available only in French.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Inci Ertekin (tel : + 33 3 90 21 55 30)
Tracey Turner-Tretz (tel : + 33 3 88 41 35 30)
Denis Lambert (tel : + 33 3 90 21 41 09)
Neil Connolly (tel : + 33 3 90 21 48 05)
Jane Swift (tel : + 33 3 88 41 29 04)