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The ECHR's Oversight in Karaca:

Failing to Unveil The Ulterior Motive and Acknowledge The Violation of The Journalist's Right to Freedom of Expression

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Abstract

Following the 17/25 investigations which implicated the members of the Erdogan government and his own family in a colossal scale corruption scandal, Erdogan and his fellows have initiated a relentless campaign against the Hizmet (Gülen) Movement, accusing the Movement of framing a conspiracy to overthrow his government under the pretext of corruption investigations. Then, a failed coup attempt came into play on July 15, 2016, which Erdogan called as "a gift from God". In the aftermath of the failed coup attempt, hundreds of thousands of perceived members of the Movement were arrested and subjected to politically motivated criminal proceedings on trumped-up terrorism charges as if they had anything to do with the failed coup attempt. Hidayet Karaca, a journalist since 1994 and the General Director of Samanyolu TV at the time of his arrest, was one of the victims of the Government's brutal crackdown on the Movement. He was arrested long before the coup attempt and charged with leading an armed terrorist organization on bogus charges. Recently, he received a judgment from the ECHR, concluding, inter alia, that his excessive pre-trial detention in prison was a violation of his rights under Article 5 of the European Convention. However, the Court did not find a violation of his right to freedom of expression, notwithstanding that the core of the criminal proceedings levied against him was rested upon his authorization of the broadcast of three episodes conjoined with a TV series. This article delves into two pivotal aspects of the case: first, the importance of scrutinizing the case's contextual backdrop as an indispensable path to deciphering the ulterior motive in the case, and the Court's failure to acknowledge the primary issue in the case, that is central to the determination of violation of the applicant's right to freedom of expression.

Key words: The European Court of Human Rights, Political Trials, Ulterior Motive, Right to Freedom of Expression, Erdogan Government, Hizmet Movement

Introduction

On June 20, 2023, the European Court of Human Rights ("the ECHR", or "the Court" hereinafter) delivered a controversial decision concerning a case brought by a Turkish national Hidayet Karaca, a journalist since 1994. He was the General Coordinator of Samanyolu TV when arrested on December 14, 2014, and then charged with serious terrorism crimes on the grounds that he had

had the episodes broadcast on one of the Samanyolu Media Group's TV channels as part of a series that insinuated that the Tahşiyeciler, a religious group in Türkiye, were terrorists.[1] He was convicted of founding and leading an armed terrorist organization, and handed down an aggravated life sentence on charges of attempting to overturn the constitutional order. The applicant was charged with, and convicted of, attempting to overthrow the constitutional order although he had been in jail for more than eighteen months when the controversial coup attempt took place on July 15, 2016.[2]

While the ECHR found the violations of the applicant's several rights protected under Article 5 of the European Convention on Human Rights (the Convention), the decision has far-reaching implications especially for the freedom of expression that warrants careful scholarly attention.

The Court's decision should attract academic attention especially with regard to its conclusion that there was no need to discuss the applicant's right to freedom of expression in the context of his arrest and detention in conjunction with his right to liberty and security under Article 5/1 of the Convention.

This paper analyzes the flaws in the judgment of the court for its failure to acknowledge the potential violation of the applicant's right to freedom of expression. The paper will address the following crucial questions, organized under two main grounds, with which the Court's reasoning failed to reckon.

First, did the Court take the background of the case into account? Did the Court acknowledge the difference between the timing of the broadcasting of the episodes and the timing of the applicant's inclusion by the Turkish government into the case giving the political developments preceding it? Did the Court pay attention to the fact that the case specifically handpicked by the Government to revenge on the officers who were involved in the December 2013 investigation against the ministers of the Erdogan government and his own family? And was the Court vigilant against the Government's attempt to frame a case where it could declare the whole community as an armed terrorist organization on the ground of airing some ridiculous episodes that insinuated the Tahşiyeciler group was involved in terrorist activities? And thus did the Court buy the whole story presented by the Turkish government without doubt?

Second, did the Court acknowledge that there was an interference with the applicant's right to freedom of expression? In that regard, did the Court acknowledge that the applicant's arrest and subsequent detention was not based on a defamation claim that might have been the case, but on Articles, 220 (Establishing Organisations for the Purpose of Committing Crimes), 314 (Leading and Armed Organisation), in conjunction with the Anti-Terror Law, which the Court already

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[1] Affaire Karaca c. Türkiye, *(Requête N° 25285/15), Arrêt Du 20 Juin 2023 ; [Case of Karaca v. Türkiye, (Application no. 25285/15), Jugement of 20 June 2023].*

[2] See for the news about Hidayet Karaca case, "Journalist Hidayet Karaca has been held alone in a Prison Cell for more than 8 Years", Stockholm Center for Freedom, December 26, 2022 available at: https://stockholmcf.org/journalist-hidayet-karaca-has-been-held-alone-in-a-prison-cell-for-more-than-8-years/ (Retrieved on June 23, 2023).

concluded that the broad and arbitrary interpretation by the Turkish judiciary of these Articles has given rise to the violation of the Convention rights? Did the Court acknowledge that the applicant's impugned act of authorization to broadcast the episodes was never treated by neither the police officers nor the judicial bodies involved in the criminal proceedings as crime report nor was taken as having any evidentiary value in any stage of the criminal proceedings? Did the Court, thus, acknowledge that the interference was not prescribed by law? Did the Court acknowledge that one of the main issues in the case is the Government's content-based restriction on the applicant's right to freedom of expression? Did the Court acknowledge that the impugned episodes were examined by the Turkish Broadcasting Authority which concluded that the characters and the events in the episodes were fictitious and did not cause any violation of the law? Did the Court acknowledge that the decision of the Broadcasting Authority was never called into question by the Government? Did the Court acknowledge that the message conveyed through the medium of TV series to the public about a radical religious group, whose leader and members already portrayed the Mr. F. Gulen and Hizmet movement as being the enemy of Islamic faith? Did the Court acknowledge that the scripts of the episodes in question consisted of fictitious characters and events, relating to the Tahşiyeciler group though, within a metaphorical and artistic expression? Did the Court acknowledge that metaphorical and artistic expression of political nature receives the highest degree of protection under the right to freedom of expression? Finally, did the Court acknowledge that given the severe nature of the restriction imposed on the applicant, the interference was not necessary in a democratic society as it relates to the airing of episodes as part of a TV series which occurred more than five years ago, and examined by the Turkish Broadcasting Authority which concluded that there was no violation of law?

Regrettably, the Court failed to address the issues cited above appropriately. For example, the background of the case is indispensable to the analysis of any cases brought against the perceived members of the Gülen/Hizmet community. Besides, the Court's inattentive use of FETÖ (Fetullahist Terrorist Organization), an acronym first created by the leaders of ultra-nationalist movements[3], who regarded the Gülen community as the agents of *imperialist West*, then used by the Turkish government after the notorious corruption scandal to condemn Hizmet Movement as an armed terrorist organization. Since the movement always called itself as "Hizmet" (meaning "service" in English)[4], it will be fair to use the name chosen by the Community itself, instead of using the Turkish government's locution, labeling the movement following the corruption investigations as a terrorist organization on bogus accusations in severe violation of the presumption of innocence of hundreds of thousands of individuals affiliated with the Movement.

This becomes vital if it anyway relates to the cases of the members of the police or of the judiciary, who took part in the December 2013 investigations which implicated the Erdogan government and his own family in corruption. Before reading any case of this sort, one should keep in mind that

[3] The leader of Vatan Partisi (Patriot Party), an ultra-nationalist political party, Mr. Doğu Perinçek told that "we named (the Community) as FETÖ, and the Turkish State adopted this name 10-15 years after us. See Yeni Asya newspaper, 17 November 2021, available at https://www.yeniasya.com.tr/dizi/perincek-feto-adini-biz-verdik-devlet-kabul-etti_553281 (Retrieved on 9/1/2023).

[4] For information about the movement's aims and activities, visit the its own website, available at https://www.gulenmovement.com/gulen-movement/what-is-the-gulen-movement

fifteen of the police officers/chiefs who took part in the corruption investigations were handed down aggravated life sentences by the newly structured judiciary on the ground that they attempted to overthrow the Erdogan's government[5] while all the suspects who were involved in the notorious corruption scandal were acquitted of all charges[6].

On the other hand, the Court did not conduct a proper analysis of the applicant's complaint under Article 10 -right to freedom of expression. In this case, applicant's arrest and detention was based on his act that falls within the ambit of Article 10. The evidence demonstrating that he might have committed the crime of which he was charged merges into the same evidence as the one employed by the national authorities to justify his arrest and detention. If it was to justify his arrest and detention under Article 5/1 of the Convention, the Court must have concluded either that there was no interference with the applicant's right to freedom of expression because the impugned acts attributed to the applicant do not fall within the normative scope of the right or that the interference might be justified one of the grounds laid down in the second paragraph of the Article 10.

This paper will argue that the applicant's conduct -his authorization of airing the impugned episodes of the TV series-through which his arrest and detention was justified falls within the ambit of his right to freedom of expression; and then, his arrest and detention could not be justified without first examining the case under the second paragraph of Article 10. Such an argument leads us to conclude that the facts of Article 5/1 is the cause while those of Article 10 is the effect in the case. Violation of Article 10 in the case automatically leads us to accept the violation of Article 5/1 in the case.

Finally, our analysis framed under the foregoing questions will be limited to two major points, which I will argue that the Court failed to address adequately. First, the importance of the background of the case to demonstrate if there was a violation of the Article 18 of the Convention in conjuction particularly with the applicant's right to freedom of expression. I will argue that the examination of Article 18 in this case merges into the examination of Article 10 under the question of whether the authorities pursued a legitimate aim proportioned to the measures taken in the case and cannot be disassociated from the question of whether there was an ulterior purpose pursued by the authorities when arresting, prosecuting, detaining (and later convicting)[7] the applicant. Second, central to the applicant's case is whether the Court properly examined the applicant's complaint and arguments under Article 10 (right to freedom of expression) of the Convention where it concluded that there was no violation of the applicant's right to freedom of expression.[8]

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[5] DW, (2019), "17 Aralık Davasında 15 Sanığa Ağırlaştırılmış Müeebet Hapis" available at: https://www.dw.com/tr/17-aral%C4%B1k-davas%C4%B1nda-15-san%C4%B1%C4%9Fa-a%C4%9F%C4%B1rla%C5%9Ft%C4%B1r%C4%B1lm%C4%B1%C5%9F-m%C3%BCebbet-hapis/a-47967623

[6] Aykut Küçükkaya, (2015), "Yolsuzluk Dosyaları Itinayla Kapatılır" [Corruption Files are Closed with Due Diligence], Cumhuriyet, available at: https://www.cumhuriyet.com.tr/haber/yolsuzluk-dosyalari-itinayla-kapatilir-276837

[7] It is important to note that the applicant's conviction has not been examined in this case because the applicant's application was limited to the examination of Articles 5 and 10; and Article 18 in conjunction with these articles.

[8] In the court's order, the analysis of any complaint under Article 18 of the Convention comes after the findings of violations of other rights connected to the Article 18 complaint. In this paper, I have changed this order and placed the Article 18 complaint before the examination of the violation of the applicant's right to freedom of expression

I. Political developments relevant to the assessment of the Applicant's arrest and subsequent detention

President Erdogan's AKP (Adalet ve Kalkinma Partisi/Justice and Development Party) came to power in 2002 promising more democracy, rule of law, and justice especially for those who had been oppressed by the Turkish State's official ideology. Kurds[9], Alevis[10], religious minorities (Christians and Jews) and the religious denominations (Muslim sects) were among those people crushed by this ideology.[11]

The state's strict secularist practice didn't allow the use of headscarves by the students at all levels of their education, and the ban extended to the private schools. During the late 1990's, the headscarf ban imposed by the state has led to the exclusion of numerous women from higher education, while many others have faced suspension or termination of their public jobs.[12]

The AKP's pledge to EU membership and the harmonization of Turkey's legal system with EU standards were welcomed by the liberals and social democrats of the country as well as the EU and the USA.[13] Furthermore, Turkey's economic growth in the first decade of the AKP ruling was called a success story.[14] By effectively eliminating the clout of the bureaucracy against his government through EU-prompted reforms[15], Erdogan has also gradually consolidated power, assuming an increasingly dominant role as a sole figure within the country.

The first incident by which Erdogan tested the strength of his power was the internationally renowned Gezi protests. Despite the dissenting voices among his peers as to how the government should deal with the incident, he took a harsh and uncompromising stance towards the protestors, calling their actions a coup attempt organized by the elite as part of foreign powers' conspiracy to topple down his elected government. Gezi protests were suppressed violently, and the protestors

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under Article 10. This is because, peculiar to this case, the examination of the background of the case is of crucial importance to the examination of other complaints. This case cannot be understood without examining the entire political framework preceding the case.

[9] See Neophytos G. Loizides, "State Ideology and the Kurds in Turkey", Middle Eastern Studies, Vol. 46, No. 4 (July 2010), pp. 513-527.

[10] David Zeidan, "The Alevi of Anatolia", **Middle East Review of International Affairs,** Vol. 3 No. 4 (December 1999), available at https://ciaotest.cc.columbia.edu/olj/meria/meria99_zed02.html

[11] Ramazan Kılınç, "International Pressure, Domestic Politics, and the Dynamics of Religious Freedom", Comparative Politics, Vol. 46, No. 2 (January 2014), pp. 127-145, available at https://www.jstor.org/stable/43664095

[12] See Human Rights Watch's report on the headscarf ban in Turkey available at https://www.hrw.org/news/2004/06/28/turkey-headscarf-ban-stifles-academic-freedom

[13] Cenap Çakmak, "Alternatives: Turkish Journal of International Relations, Vol.2, No.3&4, Fall&Winter 2003", available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://dergipark.org.tr/tr/download/article-file/19426

[14] Elvan Aktas, "The rise and the fall of the Turkish economic success story under AKP (JDP)", *Cont Islam* **11**, 171–183 (2017). https://doi.org/10.1007/s11562-017-0381-y

[15] During this period, death penalty was abolished, freedom of expression and media was strengthened, anti-terror laws were revised, the state of emergency in the Southeast Turkey was lifted, non-Muslim foundations were allowed to acquire property in the country, etc. See Fuat Canan, "Main Costs and Benefits of Turkish Accession to the European Union, Insight Turkey, Vol. 9, N. 2. p. 11.

were subjected to criminal proceedings.[16] A prominent Turkish philanthropist and human rights defender Osman Kavala was arrested in Istanbul on October 18, 2017, convicted of attempting to overthrow the constitutional order, and sentenced to aggravated life imprisonment without parole.[17] Having secured the conviction of Kavala despite the judgment of the ECtHR[18], Erdogan sent a strong message to the dissenters that he would not tolerate the events like Gezi against his government.

The second one was the notorious 17/25 December 2013 corruption cases in which numerous ministers within his government, as well as members of his own family, were involved.[19] The corruption cases would be seen as the last chance for Turkey to rid the government of corruption, and to exit the road to autocracy. However, as in the case of Gezi protests, Erdogan called the cases an international conspiracy plotted by the agents of the foreign powers to bring down his government. Erdogan accused the Gülen/Hizmet movement of having fabricated the charges and plotting against him through the members of the Movement within the judiciary and the police.[20] The Movement is a faith-based civil society movement inspired by Fethullah Gülen, a cleric living in reclusive exile in Pennsylvania in the USA.[21]

Following the corruption cases, Erdogan immediately waged a relentless war against the perceived members or the supporters of the Movement, by calling them as assassins, religious deviants, grave robbers, blood sucking leeches, vampires, the chaos gang, the pawns of Turkey's enemies, we'll walk into their caves, we'll do this witch hunt, remove your children from their schools, they won't get even water from us"[22], as viruses and cancer cells with the body of Ummah (Muslim community) that must be removed off or literally excised.[23] He took several crucial measures to make sure that there would be no future case against his government.

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[16] Elif Andac-Jones, "The Gezi Protests in Turkey: On Movement Spirit, Coalition Building, and Responding to Authoritarianism", SAIS Review of International Affairs, Vol. 40 no. 2 (Summer–Fall 2020), pp. 87-95.
[17] Thomas Poole, "Osman Kavala: Turkish activist sentenced to life in prison", BBC News, available at: https://www.bbc.com/news/world-europe-61218241 ; see also "An Explanatory Note on the Case of Osman Kavala v Turkey and the Infringement Proceedings before the Grand Chamber of the European Court of Human Rights" in prepared by Başak Çalı, Philip Leach, available at: https://www.osmankavala.org/en/statements-about-osman-kavala/1714-an-explanatory-note-on-the-case-of-osman-kavala-v-turkey (Retrieved on 20 July 2022).
[18] Case of Kavala v. Turkey, *(Application no.* 28749/18*),* Judgment of 10 December 2019.
[19] Berivan Orucoglu, (2015), "Why Turkey's Mother of All Corruption Scandals Refuses to Go Away", Foreign Policy, available at: https://foreignpolicy.com/2015/01/06/why-turkeys-mother-of-all-corruption-scandals-refuses-to-go-away/ (Retrieved on January 6, 2023); Constanze Letsch, (2013), "Turkish Ministers' Sons Arrested in Corruption and Bribery Investigations", The Guardian, available at: https://www.theguardian.com/world/2013/dec/17/turkish-ministers-sons-arrested-corruption-investigation (Retrieved on January 6, 2023).
[20] Betsy Ree, "Turkish opposition calls for Erdogan to be investigated for corruption", The Guardian, available at: https://www.theguardian.com/world/2014/feb/25/recep-tayyip-erdogan-investigated-corruption-turkey
[21] Information is available at the Gulen movement's website: https://www.gulenmovement.com/what-is-hizmet-movement.html
[22] https://www.youtube.com/watch?v=hHBUk5ssv28 (Retrieved on 07/25/2023).
[23] "Turkey's Erdogan says will continue cleaning 'virus' from state institutions" Reuters, available at https://www.reuters.com/article/us-turkey-security-erdogan/turkeys-erdogan-says-will-continue-cleaning-virus-from-state-institutions-idUSKCN0ZX0FT

The first step was to displace all the officers and the prosecutors who took part in the corruption investigations. The cases were removed from the prosecutors and reassigned to newly appointed ones.[24]

On February 15, 2014, AKP-controlled Turkish Parliament enacted a manifestly unconstitutional law which permitted Erdogan government to reshuffle the Supreme Board of Judges and Prosecutors, an independent judicial body responsible for appointing, promoting, reassigning, suspending, dismissing judges and prosecutors as well as admitting them to the profession. This was a Christmas tree bill (or omnibus bill, literally "bag bill" in Turkish torba yasa) covering many unrelated areas; but the purpose of the bill was to create a more AKP-friendly judiciary.[25]

The following local elections held in March 2014 was the litmus test for his avowed strategy. Erdogan emerged from the elections with a resounding victory, as he confounded others' assumptions by witnessing a slight surge in support for his party.[26]

Election results would also be the test for his relentless war against the Gulen/Hizmet community.[27] It was through securing the endorsement of the voters that Erdogan triumphantly validated his war against the Movement, solidifying his position and affirming his next course of action.

On June 28, 2014, the government established special Peace Judgeships by Law no. 6545 to bypass the jurisdiction of the general courts in matters of restrictions imposed on the liberty and property of persons.[28] The government's main purpose of setting up special Magistrates was to control the whole judicial processes. As the government had already designed the judiciary through the unconstitutional enactment, the next move was to appoint a small number of peace judges who would ultimately decide the right to liberty and property of individuals who couldn't challenge the decisions of the peace judges before any other courts. As the Venice Commission stated in its report that "the system of horizontal appeal system among a small number of peace judge is very problematic and cannot be justified with the need for specialization."[29]

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[24] Nick Tattersall, Daren Butler, "Turkey dismisses corruption case that has dogged PM Erdogan", Reuters, available at: https://www.reuters.com/article/us-turkey-corruption-idUSBREA410NE20140502

[25] "Turkish MPs Brawl over Bill", DW, at https://www.dw.com/en/turkish-parliament-passes-bill-giving-more-government-control-over-judiciary/a-17435621 (Retrieved on June 2, 2023).

[26] Bekir Berat Özipek, "Türkiye Siyasetinde 2014 Cumhurbaşkanlığı Seçimi", Liberal Düşünce, Yıl 19, Sayı 75, Yaz 2014, pp. 95-96.

[27] The elections was supposed to be between the opposition and the ruling AKP but it was presented by the leaders of the AKP, particularly by Erdoğan, as the war between the old Turkey's actors and the those of the new Turkey which he claimed the true representative of the will of the people. Gülenist community, Erdoğan constantly alleged, was the representative of the foreign powers that was enstrumentalized to overthrow representative of the will of the Turkish people. See for a pro-AKP analysis of the elections Id., 93-105.

[28] The Law was adopted by the Parliament on June 18 June 2014 and came into effect on 28 June 2014, the date it was published in the official gazette. See the Turkish Official Gazette for the text of the law establishing Peace Judgeships under its Article 48 of the Law) available at: https://www.resmigazete.gov.tr/eskiler/2014/06/20140628-9.htm

[29] See Venice Commission's Turkey Opinion, No. 852 / 2016, "Opinion on The Duties, Competences and Functioning of The Criminal Peace Judgeships", Adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), p. 5, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282017%29004-e (Retrieved on January 6, 2023).

Turkish government's diligent endeavors in redesigning the judiciary immediately born fruits: All the defendants in the corruption cases were ultimately acquitted[30] while the police officers who took part in the corruption cases were not only dismissed from their jobs but also subjected to criminal proceedings which ended up with their conviction, and their being sentenced to aggravated life in prison.[31] Reza Zarrab, the main figure in the cases, was later arrested in the US, pled guilty, and convicted based on the same evidence as having been presented in the notorious December corruption cases.[32]

Therefore, the context in which the applicant and hundreds of thousands of others were subjected to politically motivated unjust criminal proceedings should have been taken into account by the ECtHR.

II. Background and the Facts of the Applicant's Arrest and Subsequent Conviction

The applicant went to the Istanbul Police Directorate to answer the summons and give his depositions as part of the criminal accusations directed against him; he was taken into police custody by the officers of the anti-terrorism section upon the public prosecutor's order. On 18 December 2014, the applicant appeared before the Istanbul 1st Peace Judgeship along with other ten suspects. On the same day, the Justice of the Peace ordered the remand in custody of several persons, including the applicant whose detention was grounded on founding and leading a terrorist organization within the context of Gulen Movement which Erdogan blamed for orchestrating the corruption cases against his government.[33]

The judgeship relied solely on the actions committed by the applicant five years prior to his prosecution, seeking to draw a connection between those past events and the present circumstances that emerged following the notorious December corruption cases. The following observations were made by the Judgeship about the applicant's case[34]:

On April 6, 2009, Fetullah Gülen, the leader of the Movement, asserted, in a speech broadcast on the website www.herkul.org, that the armed terrorist organization al-Qaeda would act in Türkiye and the Islamist groupuscule called Tahşiyeciler would be used by the Terrorist organization for that purpose. Gülen argued that the members of the Tahşiyeciler would receive ammunition to commit terrorist acts for provocative purposes.[35]

Following Gulen's speech, precisely on April 9, 2009, a television channel under the umbrella of the Samanyolu group, which the applicant was serving as its director and allegedly affiliated with

[30] Aykut Küçükkaya, (2015), "Yolsuzluk Dosyaları Itinayla Kapatılır", Cumhuriyet, available at: https://www.cumhuriyet.com.tr/haber/yolsuzluk-dosyalari-itinayla-kapatilir-276837
[31] DW, (2019), "17 Aralık Davasında 15 Sanığa Ağırlaştırılmış Müeebet Hapis" available at: https://www.dw.com/tr/17-aral%C4%B1k-davas%C4%B1nda-15-san%C4%B1%C4%9Fa-a%C4%9F%C4%B1rla%C5%9Ft%C4%B1r%C4%B1lm%C4%B1%C5%9F-m%C3%BCebbet-hapis/a-47967623
[32] Benjamin Weiser, "Reza Zarrab, Turk at Center of Iran Sanctions Case, Is Helping Prosecution", New York Times, November 28, 2017, available at: https://www.nytimes.com/2017/11/28/world/europe/reza-zarrab-turkey-iran.html
[33] Affaire Karaca, pr. 18-21.
[34] See for the relevant facts of the case described in the ECtHR's judgment of Affaire Karaca, pr. 18-29.
[35] Affaire Karaca, pr. 11.

the media division of the organization overseen by Fetullah Gülen, aired the 64th episode of the series Tek Türkiye. Notably, this particular episode featured the discussions surrounding the creation of a group with intent to engage in terrorist activities for the purpose of creating chaotic atmosphere in the country.[36]

On April 29, 2009, the Istanbul Police Directorate requested the Counter-Terrorism Department to initiate an investigation into the Tahşiyeciler group. The request highlighted concerns that the group's expressions had the potential to fuel societal discrimination and ignite religious and intellectual conflict. This apprehension arose from the group's practice of criticizing other religious communities and factions, whom the Tahşiyeciler deemed to be opposed to religion. Thus, the leader and several members of the group were subjected to criminal prosecution, and subsequently convicted by an Assize Court of forming and leading or being a member of an armed terrorist organization.[37]

The judgment of the Assize Court was quashed by the Court of Cassation on procedural grounds, and the case was retried by the Istanbul Assize Court which, on December 15, 2015, delivered its decision that acquitted all the defendants in the case of all charges.

Following the Court of Cassation ruling, the leader of the group, M.N. Turan filed a complaint against the applicant and several other individuals for slanderous denunciation. Upon the complaint, the Istanbul Public Prosecutor's Office opened an investigation against journalists, producers, scriptwriters, directors and police officers, including the applicant, in order to determine whether they had committed "the offences of slanderous denunciation, falsification of official documents and unlawful deprivation of liberty" to the detriment of the complainant and other persons, who had been illegally held in pre-trial detention for around seventeen months and were still being subjected to criminal proceedings for "belonging to the structure of the armed terrorist organization Al-Qaeda", an offence of which they had been accused in 2009.[38]

Turan argued that the Tahşiyeciler had no connection with the al-Qaeda terrorist organization and that they were targeted by Fetullah Gülen's group because they were doctrinally opposed to Fetullah Gülen's views and actions on issues such as interfaith dialogue, how to view other religions.[39] He added that the alleged members of the Gulen Movement working within the Istanbul Security Directorate had prepared, in breach of laws and regulations, false documents

[36] Id.
[37] Affaire Karaca, pr. 13.
[38] The leader of the group argued that Tahşiyeciler ("the annotators") had criticized interfaith dialogue, donations to educational establishments and the liberal interpretation of the hijab-wearing issue championed by the Fetullahist movement, and that Fetullah Gülen, the leader of this group, had taken a stand in his speeches against the tahşiyeciler group. Turan noted that, in two episodes of a television series produced by the Samanyolu group, the tahşiyeciler group had been portrayed as a branch of al-Qaeda, that the applicant had discussed this part of the script with Fetullah Gülen by telephone and that, following this discussion, he had arranged the content of certain broadcasts in such a way as to influence public opinion to the detriment of the Tahşiyeciler, as the they wished. Affaire Karaca, pr. 19.
[39] F. Gülen has constantly being criticized by other religious sects in Turkey for advocating dialog with other faiths. "Gülen stresses that wherever a Muslim is, even outside a Muslim polity; he or she has to obey the law of the land, to respect others' rights and to be just. He does not see the world not in terms of Muslims versus others." See Dr. Ihsan Yilmaz, "The Other, East & West and Fethullah Gülen as Border Transgressor", available at https://www.gulenmovement.com/east-west-fethullah-gulen-border-transgressor.html (Retrieved on June 6, 2023).

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intended to make it appear that an offence of a terrorist nature had been committed where in fact this was not the case.[40]

Upon the complaint of the leader of the Tahşiyeciler, the Peace Judgeship ordered the applicant's arrest, and issued a search warrant for his home and the place of work. In the early hours of December 14, 2014, officers from the Istanbul Security Directorate's anti-terrorism department raided the applicant's home to take him into custody; on learning that he was at work, they instructed his son that he should accompany them to the Istanbul Security Directorate's premises to make a statement[41].

On the same day, the applicant went to the Istanbul Security Directorate where he was taken into custody by anti-terrorism branch on the orders of the Istanbul Public Prosecutor's Office in connection with a pending criminal investigation, which was directed against several journalists and police officers suspected of having joined the Movement inspired by Fetullah Gülen. The only evidentiary connection between the applicant and the criminal proceedings launched against the Tahşiyeciler was that the applicant had had the episodes broadcast on one of the Samanyolu media group's channels as part of a television series Tek Türkiye that insinuated that the Tahşiyeciler would commit terrorist acts linked to al-Qaida.[42]

On December 18, 2014, the applicant was brought before the Istanbul Peace Judgeship no. 1 for the purpose of interrogation. By a decision of December 18, 2014, which was notified to all the suspects on December 19, 2014, the Judge ordered the remand in custody of several persons, including the applicant, who was suspected of founding and leading a terrorist organization.[43]

The Peace Judge maintained that the applicant had discussed the episodes with Fetullah Gülen by telephone and that, following this discussion, he had changed the content of impugned broadcasts in such a way as to influence public opinion that the Tahşiyeciler were involved in terrorist activity; then, the perceived members of the Movement within the police department abused their power when they initiated criminal investigation against the Tahşiyeciler group. The Judge argued that a certain number of police officers belonging to the Movement had acted on the orders of their hierarchy within the movement, freeing themselves from their administrative hierarchy, and these officers, who were armed agents of the State, had, under the pretext of fighting terrorism, abused their power in order to threaten and repress their opponents within society. The Judge recalled that, according to the jurisprudence of the Court of Cassation, "moral duress" was one of the constitutive elements of the crime of undermining the constitutional order. He concluded that there was a strong suspicion that some of the suspects, among them was the applicant, were leaders and some of them were members, of a terrorist organization within the meaning of articles 1 and 7 of anti-terrorism law no. 3713, as he qualified the Movement as an armed terrorist organization. Such a qualification is no doubt part of the Erdogan government's avowed annihilation plan against the Movement.[44]

[40] Affaire Karaca, pr. 18-19.
[41] Affaire Karaca, pr. 21-22.
[42] Affaire Karaca, pr. 25.
[43] Id.
[44] Id.

There was no evidence indicating whether the criminal investigation against the Tahşiyeciler group was initiated on the orders of Fethullah Gulen or whether the police officers acted on the broadcasting of the episodes. The applicant submitted in his defense the contrary evidence to prove that there was no connection between the broadcasting of the episodes and the criminal investigation directed against the Tahşiyeciler group. For example, the applicant argued that the investigation had been started at least six months before the F. Gulen's speech, the impugned episodes were filmed long before the alleged conversation between F. Gulen and the applicant, F. Gulen never targeted the group despite the Group's public vilification against the Gulenist community.[45] Above all, such connections were supposed to be proved in any criminal case by the prosecution beyond a reasonable doubt even in the absence of the defendant's submissions against them. It seems that neither the prosecution nor the peace judge ever attempted to refute the applicant's arguments that there was no connection between the broadcasting of the episodes and the criminal investigation launched against the Tahşiyeciler group.

Furthermore, the Erdogan government's alliance with radical Islamist groups is not a secret to the world. Selahattin Demirtas, jailed former pro Kurdish Peoples' Democratic Party co-chair, stated in his defense that "the judiciary that has kept me in prison for two years with this evidence. Look, Ayşenur İnci, an ISIS militant who is wanted with a 1.5 million TL reward, surrendered to security forces at the Khabur Border Gate and was released with a judicial control order on December 19, 2018. … your judges there deemed it a violation of the law to imprison a high-level ISIS terrorist wanted in the blue category even for one day!"[46] Erdogan has, for example, recently allied with Huda-Par, which is equated with a Kurdish armed group called Hezbollah and accounted for the brutal murders occurred in 1990's. This alliance enabled the party to win four seats in the Parliament.[47]

After all, Erdogan government was in power when the applicant authorized the broadcast in question. The only change in the political and juridical atmosphere is that Erdogan's alliance has changed significantly following the December 2013 corruption cases. As Erdogan called the December cases a coup against his government plotted by the Gulenists, his government vehemently encouraged the others to claim the same to convince society that they are coup plotters. During that period, the Tahşiyeciler group presented a favorable opportunity to implicate the Gulenist community in a conspiracy charge. The European Court did take into account neither the timing nor the political motives of the criminal proceedings against the applicant and the other defendants in the case. The Court has unreasonably left the applicant to answer irrelevant questions, such as whether the evidence presented in the case of the Tahşiyeciler was sufficient to

[45] See Affaire Karaca, pr. 32, 33, 34.

[46] Demirtaş'tan mahkemeye: IŞİD'li terörist serbest, biz ise tutuklu! (From Demirtaş to the Court: ISIS militant is set free while keeping us detained!), available at https://www.basnews.com/tr/babat/496255

[47] Dorian Jones, "Ahead of Turkey's Election, Erdogan Turns to Radical Islamist Party" VOA News, available at https://www.voanews.com/a/ahead-of-turkey-s-election-erdogan-turns-to-radical-islamist-party-/7087709.html (Retrieved on 11/9/2023); Yusuf Selman Inanc, "Huda-Par: Erdogan's allies accused of being the Kurdish Hezbollah", available at https://www.middleeasteye.net/news/huda-par-erdogan-kurdish-allies-hezbollah-accused-being (Retrieved on 11/9/2023).

justify the initiation of the criminal proceedings against them as if the applicant had played any role in the criminal proceedings against the group.

III. The European Court's Findings in the Case

The Court

- held, by a 6-to-1 vote, that the application is inadmissible as regards the complaints concerning the applicant's continued detention on remand despite the decision of the criminal court ordering his release (Article 5 § 1 of the Convention), *and as regards the complaints under Article 10 of the Convention;* [emphasis added]
- held, by a 6-to-1 vote, that there has been no violation of Article 5 § 1 of the Convention (as regards the alleged absence of reasonable grounds to suspect the applicant of having committed an offence);
- unanimously held that the application inadmissible as regards the alleged violation of the principle of nullum crimen, nulla poena sine lege (Article 7 of the Convention);
- unanimously held that there has been a violation of Article 5 § 1 of the Convention on account of the irregularity of the decisions to keep the applicant in pre-trial detention taken by the justices of the peace whom he had challenged, and that there has been a violation of Article 5 § 4 of the Convention on account of the absence of sufficient guarantees to enable him to satisfy himself that his continued pre-trial detention had been decided by an "independent and impartial tribunal";
- unanimously held that there has been a violation of Article 5 § 3 of the Convention on account of the excessive length of the pre-trial detention;
- unanimously held that there is no need to examine further the admissibility and merits of the other complaints under Article 5 § 4 of the Convention (e.g. access to investigation file);

Each finding deserves a separate analysis of the facts and the law. However, our analysis is limited to the applicant's arguments under Article 10 of the Convention and to the examination of the political motive behind the case in conjunction with his right to freedom of expression. On the other hand, as the Court rightly pointed out, the determination of some issues requires the final conclusion of the criminal proceedings against the applicant under the domestic law; such issues should be decided by the Court upon the submission of the applicant's relevant application which is also pending before the Court. For example, a complaint under Article 7 of the Convention falls within that category.[48] Before delving into the confusing complexity of the Court's freedom of

[48] I would argue, though, that there is a strong connection between the quality of law analysis conducted under articles 5, 8, 10,11 and the principle of legality under Article 7, the Court's way of analysis of the principle of legality under Article 7 does not unfortunately extend to the quality of law analysis under the said articles of the Convention. Nevertheless, an in-dept exploration of the intricacies of my arguments pertaining to this matter is a subject better suited for a separate future study. For the present discourse, I will yield to the Court's established approach, acknowledging and respecting its traditional methodology that the examination of such matters under Article 7 requires the final conclusion of the case in the domestic legal system.

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expression analysis in the case, it is pertinent to evaluate the Court's overall opinion through the following observations.

It can be argued that the issues related to the applicant's arrest and detention under Article 5 cannot be separable from the issues to be examined under his free speech complaint. As the applicant's arrest and detention was based on his authorization to the airing of the impugned episodes as part of a TV series, it is logically and legally impossible to separate the any analysis to be conducted under Article 5 from that to be conducted under Article 10 of the Convention. In our case, when the Court found sufficient grounds for the applicant's arrest and initial detention under Article 5, it did not feel obligated to conduct a thorough examination into the applicant's complaint under Article 10 of the Convention.

However, when a person was arrested/detained for his speech/expression, the first thing to be concluded is whether there has been an interference with the person's right to freedom of expression. To justify the restriction, the Court must examine the facts of the case in terms of whether the restriction might be justified for one the grounds cited under the second paragraph of Article 10 of the Convention.

The Court notes that there was no evidence whether the applicant's acts as the insertion of the impugned episodes into the TV series had played any role in the criminal proceeding directed against the Tahşiyeciler group. In fact, given that the investigation against the said group had been started six months before Gulen's impugned speech, the applicant's acts as having had the episodes broadcast had no relevance to the case.[49] Then, the inclusion of the applicant and other journalists into the case was to frame a case whereby the whole community would be declared by a judicial decision as an armed terrorist organization.

Despite the Court's relatively right position in the case where it says "the Court cannot examine separately, without indulging in speculation, the applicant's status as a political opponent that might result from his alleged membership of this group"[50], such position should not absolve the Court from a duty to analyze the underlying facts of the case if they are critical to the conclusion of the case. The examination of the applicant's complaints under both Article 5 and Article 10 necessitates a thorough analysis of the background of the case. This approach would enable the identification of any political motive underlying the applicant's criminal prosecution and trial, even without invoking the examination of the case under Article 18 of the Convention, particularly in the absence of a specific complaint under Article 18 by the applicant. Examination of the background, especially of the applicant's position in relation to the Government's brazen hostility against the Hizmet movement would not be considered a speculation as so suggested by the Court in the case.[51]

[49] See Affaire Karaca, pr. 32, 33, 34.
[50] Affaire Karaca, pr. 159.
[51] Id.

IV. The Court's Established Case Law on the Determination of the Political Motive to be Scrutinized under Article 18 of the Convention and the Judge Schembri Orland's Dissenting Opinion

A. The Purpose and the Implications of Article 18

Implementation of Article 18 in a case has far-reaching implications for the state of democracy and the rule of law in the respective country.

Article 18 reads as:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

The main purpose of Article 18 is "to prevent an abuse of restrictions for purposes contrary to the Convention and thus creates an autonomous role for its application."[52] It is an additional safeguard against the would-be governments' attempts to manipulate the criminal justice system to bypass the Convention's protection.[53] However, the Court for a long time struggled to find out how to adjudicate on Article 18 of the Convention. As Schmaltz elucidated,

> "The need to clarify the case law did not arise until well into the late nineteen-nineties and early two thousands. After the entry into force of the Convention in 1953, more than five decades passed before the Court found a separate breach of Article 18 ECHR for the first time in 2004. Between then and December 2020, there have been another 17 cases (19 if one counts Chamber and Grand Chamber judgments separately) in which the Court held that the respondent Government had breached Article 18. What is striking – and alarming – is the increase of judgments finding a violation of Article 18 ECHR in recent years, namely since 2016: 15 of the 20 judgments finding a violation of Article 18 ECHR were handed down over the course of four years between March 2016 and December 2020. This of course raises questions, namely whether this is an indicator for the state of democracy – or rather its demise – in Europe."[54]

As of 1 January 2024, the number of cases decided by the Court finding violation of Article 18 has reached twenty-four with the inclusion of two cases from Russia and one case from Türkiye.[55] Can

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[52] Christiane Schmaltz, "The European Court of Human Rights and Article 18 –An Indicator for the State of Democracy in Europe?", (2021), p. 37, available in Nomos eLibrary at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nomos-elibrary.de/10.5771/9783748923503-35.pdf (Retrieved on 12/09/2023); See also "Guide on Article 18 of the European Convention on Human Rights" 1st edition, 31 March 2018, p. 5 et seq. available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.echr.coe.int/documents/d/echr/Guide_Art_18_ENG (Retrieved on 12/09/2023).

[53] Corina Heri, "Loyalty, Subsidiarity, and Article 18 echr: How the ECtHR Deals with *Mala Fide* Limitations of Rights", European Convention on Human Rights Law Review 1 (2020), 26 et seq.

[54] Schmaltz, 38.

[55] Here is the full list of the cases under Article 18 decided so far by the Court, finding a violation: Cases against Azarbaijan (11): Case of Democracy and Human Rights Resource Centre And Mustafayev v. Azerbaijan, Application nos. 74288/14, 64568/16, Judgment of 14/10/2021; Case of Azizov and Novruzlu v. Azerbaijan, Application nos. 65583/13 70106/13, Judgment of 18/02/2021; Case of Ibrahimov And Mammadov v. Azerbaijan, Application nos. 63571/16 74143/16 2883/17, Case of Yunusova and Yunusov v. Azerbaijan (No. 2), Application

this development be interpreted as the sign of the demise of democracy in the Continent? Probably. To answer this question, one must review the list of the countries against which the Court found a violation of Article 18 to determine if any manifest democratic flaws within them exist.[56] With eleven cases in the list of Article 18 violations, Azerbaijan accounts for nearly half of the total number of cases. Russia has a share of five cases in this list, followed by Türkiye (3), Ukraine (2), Poland (1), Bulgaria (1), Moldova (1), and Georgia (1). There are not any Western European countries on the list, though Poland and Bulgaria are the members of the European Union. In recent years the first three countries, Azerbaijan, Russia, and Türkiye, have been classified as "*authoritarian*" or *"not free*". This shows correlation between the quality of democracy, rule of law and Article 18 violations. Decline of democracy and rule of law in both Russia and Turkey in the last decade is evident.[57]

The common feature of all cases listed above is that the victims of the violations are the dissidents or the opponents of the governments.[58] In most cases there are criminal prosecutions brought

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no. 68817/14, Judgment of 16/07/2020; Judgment of 13/02/2020; Case of Khadija Ismayilova v. Azerbaijan (No. 2), Application no. 30778/15, Judgment of 27/02/2020; Case of Natig Jafarov v. Azerbaijan, Application nos. 64581/16, Judgment of 07/11/2019; Case of Rashad Hasanov and Others v. Azerbaijan, Application nos. 48653/13 52464/13 65597/13, Judgment of 07/06/2018; Case of Aliyev v. Azerbaijan, Application nos.68762/14 71200/14, Judgment of 20/09/2018; Case of Mammadli v. Azerbaijan, Application no. 47145/14, Judgment of 19/04/2018; Case of Rasul Jafarov v. Azerbaijan, Application no. 69981/14, Judgment of 17/03/2016; Case of Ilgar Mammadov v. Azerbaijan, Application no. 15172/13, Judgment of 22/05/2014;
Cases Against Russia(5): Case of Kogan And Others v. Russia, Application no. 54003/20, Judgment of 07/03/2023; Case of Kutayev v. Russia, Application no. 17912/15, Judgment of 24/01/2023; Case of Navalnyy v. Russia, Application nos. 29580/12 36847/12 11252/13, Judgment of 15/11/2018; Case of Gusinskiy v. Russia, Application no. 70276/01, Judgment of 19/05/2004; Case of Navalnyy v. Russia (No. 2), Application no. 43734/14, Judgment of 09/04/2019;
Cases Against Türkiye (3): Case of Yüksekdağ Şenoğlu and Others v. Türkiye, Application nos. 14332/17 24585/17 25445/17, Judgment of 08/11/2022; Case of Selahattin Demirtaş v. Turkey (No. 2), Application no. 14305/17, Judgment of 22/12/2020; Case of Kavala v. Turkey, Application no. 28749/18, Judgment of 10/12/2019;
Cases against Ukraine (2): Case of Tymoshenko v. Ukraine, Application no. 49872/11, Judgment of 30/04/2013; Case of Lutsenko v. Ukraine, Application no. 6492/11, Judgment of 03/07/2012; Case against Georgia: Case of Merabishvili v. Georgia, Application no. 72508/13, Judgment of 28/11/2017;
Case against Moldova (1): Case of Cebotari v. Moldova, Application no. 35615/06, Judgment of 13/11/2007;
Case against Poland (1): Case of Juszczyszyn v. Poland, Application no. 35599/20, Judgment of 06/10/2022;
Case against Bulgaria (1): Case of Miroslava Todorova v. Bulgaria, Application no. 40072/13, Judgment of 19/10/2021.

[56] Başak Çalı articulates that the expansion of the Court's jurisdiction to Turkiye in 1990 (following the Turkiye's acception of the Court's compulsory jurisdiction), and later to Eastern, Central European, and Caucasus states introduced the Court with "large volumes of right to life, torture, and disappearance cases".

[57] See for a comparative analysis of decline of democracy in Azerbaijan, Türkiye, and Russia, Kürşat Çınar, The Decline of Democracy in Turkey: A Comparative Study of Hegemonic Party Rule, (1st Ed. Routledge 2019). See also for democratic index, The Economist "The World's most, and least, Democratic Countries in 2022 available at https://www.economist.com/graphic-detail/2023/02/01/the-worlds-most-and-least-democratic-countries-in-2022 ; and Freedom House database available at https://freedomhouse.org/report/nations-transit/2023/war-deepens-regional-divide/explore-data ; Tsampi identifies this connection in the following words: "It goes without saying that the prohibition of the misuse of power pertains to the protection of the values of democracy and the rule of law", Aikaterini Tsampi, "The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of contre-pouvoirs within the State after all?",Netherlands Quarterly of Human Rights (2020), p. 146.

[58] For example, in Merabishvili v. Georgia, the applicant was the chief opposition party in Georgia. In Navalnyv v. Russia, the applicant Aleksey Anatolyevich Navalnyy was a political activist, opposition leader, anti-corruption campaigner and popular blogger. In Lutsenko v. Ukraine, the applicant was a former Minister of the Interior and the

against the defendants to punish the dissidents or force them to act in a particular way desired by their governments.[59] The authoritarian governments utilize the judicial organs to accomplish rulers' desired outcomes. Almost in all cases, the judiciary artfully feigns adherence to procedural rules to demonstrate the domestic legal system provides an effective remedy in cases of human rights violations. Çalı elaborates:

> "What is more, semi-authoritarian regimes typically exercise strong control over the judiciary or curb the powers of the judiciary and thus prevent the Convention standards from having any real purchase as domestic legal remedies. For semi-authoritarian regimes, the attitude towards the Convention system is no longer a good faith acceptance of the standards developed by the European Court of Human Rights. Instead, these regimes offer a systemic challenge to the authority of the Convention system and the Convention's non-negotiable structural requirement of pluralist democracy and rule of law as underpinning human rights protections."[60]

As the ulterior purpose is mostly political and directed to eliminate the dissent, the criminal proceedings brought against the applicants are of political nature too. This is not to say all political trials fall within the ambit of Article 18's ulterior motive. Generally speaking, political trials are defined as trials where

> "the government *uses the judicial process against its opponents (including foreign enemies and internal dissidents) who have not violated formal, generally enforced laws or who have violated only formal laws against political dissent*. This can happen when a formal law prohibits opposition to the government or the constitutional order that the government protects, in which case the normal judicial process rules can be respected, or when charges are trumped

leader of the opposition party Narodna Samooborona. In Tymoshenko v. Ukraine, the applicant is the leader of the Batkivshchyna political party and of Yulia Tymoshenko's Bloc. In Ilgar Mammadov v. Azerbaijan, the applicant was a political figure, involved in various political organisations and local and international non-governmental organisations , co-founder of the Republican Alternative Civic Movement. In Rasul Jafarov v. Azerbaijan, the applicant was "a well-known civil society activist and human rights defender. He is the Chairman and one of the co-founders of Human Rights Club, a non-governmental organisation (NGO)." In Selahattin Demirtaş v. Türkiye, the applicant was the co-chairman of the pro-Kurdish Party. In Case of Yüksekdağ Şenoğlu and Others v. Türkiye, the applicants were the members of the pro-Kurdish party. In Kavala v. Türkiye, the applicant was a businessman, is a human-rights defender; was involved in setting up numerous non-governmental organisations ("NGOs") and civil-society movements in the country. In Gusinskiy v. Russia, the applicant was "a former Chairman of the Board of and majority shareholder in ZAO Media Most, a private Russian media holding company, which owned NTV, a popular television channel." In Kutayev v. Russia, the applicant wasa politician and human rights activist. In all these cases, the Governments pursued an ulterior purpose other than prescribed under the respective article of the Convention under which the applicants' rights were interfered. See also Tsampi, p. 147.

[59] In two of the said cases, Case of Juszczyszyn v. Poland and Case of Miroslava v. Bulgaria, the applicants were judges who were subjected to disciplinary proceedings because of their attitudes towards their governments (the ruling authorities). In Gusinkiy the Government's ulterior purpose was to force the applicant to transfer the Media shares to a State-controlled company. Similarly, in Cebotari case the government's ulterior purpose was to force the applicant to "put pressure on him with a view to hindering Oferta Plus from pursuing its application before the Court."

[60] Başak Çalı, "Coping with Crisis: Whether the Variable Geometry in The Jurisprudence of The European Court of Human Rights", Wisc. Int. L. J., 252, (2018).

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> up, and the defendant is convicted of violating laws that have not been violated or that are very general and not enforced against people unless they are critics of the government."[61]

Political trials are mostly based on trumped up charges, or at least pursue an ulterior purpose other than the ones proclaimed in the government's (the domestic authorities') claim that the targeted persons might have committed the criminal acts of which they are accused. Typically, in many political cases, the judges relax the rule of law, by lowering the standard of proof, or allowing the admission of evidence in the trial which would otherwise not be the case. As Prof. Posner states:

> "In this way, the judge must be complicit in the government's effort to selectively apply vague, general laws against particular defendants, or even in the trumping up of charges when no such laws can be used."[62]

Selective application of the laws is one of the favorite practices of authoritarian governments to establish their authoritarian regimes without infringing upon the basic norms of international law.[63] Unfortunately, the Strasbourg system does not provide a safeguard against the selective implementation of the laws as long as the applicable law meets the quality of law standards.[64] Article 18 cannot come into play to unveil the political motive behind the case unless the application of the impugned law(s) violates one of the applicant's substantive rights under the Convention.[65]

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[61] Eric A. Posner, "Political Trials in Domestic and International Law", 55 Duke Law Journal 75 (2005), p. 87.
[62] Ibid, 118.
[63] See Cynthia Barmore, "Authoritarian Pretext and the Fourth Amendment", Harvard Civil Rights-Civil Liberties Law Review 51, (2016), p. 275 et seq.
[64] Selective application of laws differs from the arbitrary interpretation of laws. In the latter case, the interpretation would lead to a violation of the principle of legality, which is directly guaranteed by Article 7, or may lead to the violation of a substantive right under Articles 8 to 11, through the conclusion of lack of quality of law standards laid down by the "prescribed by law" requirement. In contrast, the selective application of laws does not lead to a violation of the principle of legality as long as the interference has a basis under the national law and satisfies the quality of law standards developed by the Court. On the other hand, selective application of law may call for the application of Article 14 in conjunction. However, the Court's approach to the recognition of an Article 14 violation requires the applicant to demonstrate with direct evidence that his case was singled out the by the Government with a discriminatory purpose. As is in an Article 18 case, the burden of proof lies on the part of the applicant to demonstrate the existence of discrimination. See for example, Case of Oao Neftyanaya Kompaniya Yukos v. Russia, (Application no. 14902/04), Judgment of 20/09/2011,pr. 612-616; see also an analysis of the case, Winfried H. A. M. van den Muijsenbergh/Sam Rezai, "Corporations and the European Convention on Human Rights", Global Business & Development Law Journal, Vol. 25, Issue 1, p. 65 et seq.
[65] In that sense, the application of Article 18 shares similarities with the procedural guidelines applied to Article 14 cases. Both Article 14 and 18 hold no independent position and thus may only be invoked with a substantive right violation claim, such as the violation of right to liberty and security, or right to freedom of expression, etc. However, unlike the application of the Article 18, Article 14 can be applied to a case where there was no violation of the substantive right invoked by the applicant in conjunction with Article 14. This difference puts Article 14 in a more autonomous position compared to Article 18.
See "Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention", available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG#:~:text=%E2%80%9CThe%20enjoyment%20of%20the%20rights,%2C%20birth%20or%20other%20status.%E2%80%9D

The Strasbourg system can be regarded as a safeguard against the arbitrary implementation of the laws at national level even though the Court, under certain circumstances, leaves some room to the State parties in accordance with its margin of appreciation doctrine to address the difficult issues arising in cases especially where there is no European consensus on them. However, margin appreciation doctrine does not grant the State to bypass the principle of legality or the arbitrary and discriminatory application of the laws.[66] The discretion that would be left to States under margin of appreciation doctrine should not allow the State parties to bypass the convention's protection through the instrumentalization of the criminal justice system with an ulterior purpose to persecute the governments' opponents.

Liberal legalism is one of the main foundations of the rule of law and democratic governance imbedded in the Convention. Article 7 of the Convention guarantees one of the basic principles of modern criminal law: *Nulla poena sine lege*, meaning that "no punishment without law". On the other hand, the second paragraphs of Articles 8 to 11 contain some specific requirements for the interference by the governments with the rights and freedoms.[67] One of the requirements is that it must be shown that the restrictions imposed on the said rights must be prescribed by law. The Strasbourg jurisprudence, the Commission and the Court, established a three-fold test for determining whether the interference was prescribed by law. First, the restrictions must be prescribed by law under national legal system; second, the law must be accessible; and third, it "must be formulated in such a way that a person can foresee, to a degree that is reasonable in the circumstances, the consequences which a given action will entail."[68]

Prior to the application of the three-fold test, the Court examines whether the restriction is expressly authorized by the Convention. This principle is not directly stated by the Convention under Articles 8 to 11. However, it is presumed to exist in the Convention system that could be inferred from the wording of Article 18.[69]

The Court is expected to be vigilant to the Government's manipulation of the laws, especially where the laws that were applied to the applicant's case are different than those which should normally have been applied to the case. For example, it cannot be said that the quality of law standard is satisfied under the circumstances, where the national authorities applied in a typical defamation case the anti-terror law -in lieu of the defamation laws- to ensure the applicant's arrest and continued detention that would not have otherwise been warranted under the national law. In such a case, it's not for the European Court to correct the government's manipulative intend to

[66] See , especially for the critics of the Court's margin of appreciation doctrine, Michael R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights", The International and Comparative Law Quarterly, Jul., 1999, Vol. 48, No. 3 (Jul., 1999), pp. 638-650; Hutchinson argues that while the Court's margin of appreciation doctrine seems attractive to the preservation of the idea of respect for the sovereignty of States, reliance on the doctrine is an announcement of deference, and not coherent jurisprudential principle.
[67] Article 8 guarantees the Right to respect for private and family life; Article 9, *Freedom of thought, conscience and religion*; Article 10, *the Right to Freedom of Expression*; and Article 11, *Freedom of assembly and association*.
[68] Jacobs/White/Ovey, The European Convention on Human Rights, 7th Edition, (Oxford, 2017), p. 341 et seq.
[69] Ibid, 343.

justify the interference, instead of uncovering the ulterior purpose pursued by the national authorities to persecute the applicant for political reasons peculiar to the case.[70]

While the Court might easily identify the systemic violations of human rights committed by these regimes[71], its reluctance to disclose the political motive lying behind the violations in individual cases encourages the impugned regime to persist in its feigning. The Court's compromise by not ruling on the political motive under Article 18 in such cases appears, at least in Turkish context, not to be working as the Turkish government continue to commit the same atrocities against the targeted groups and individuals with unabated momentum.[72]

B. The Court's Established Case Law: Determination of Article 18 Violation in A Case

Deciphering the political motive in a legal case stands as one of the Court's most intricate challenges. It is hard to say that in all these issues the Court has established a consistent and seamless body of jurisprudence under Article 18. As discussed above, deciphering the political motive in cases categorized as systemic violations committed by a State party would mean to reveal quality of the regime. In other words, the judgments finding a violation of Article 18 (especially of systemic nature) may "qualify as a doctrinal response to the cunning progression of the evil of totalitarianism."[73]

In a typical Article 18 case, the applicants assert that the Government's interference with their Convention rights did not pursue the aims stated through the case, but an ulterior purpose driven with a political motive to persecute the applicant. In contrast to the applicants' assertions, the Government argues that there was no ulterior motive in, for example, the prosecution (and/or conviction) of the applicant as the criminal proceeding was brought against the applicant only to bring him to the justice for his alleged criminal acts involved in their case.[74] The Court must figure out which side's arguments are more persuasive and supported by the facts of the case. This complex task is compounded by a myriad of factors. Herein, we endeavor to discern and delineate the following intricacies arising in Article 18 cases.

First, infringement of Article 18 cannot be asserted alone, but only in conjunction with a substantive Convention right. For example, the applicant may claim that his arrest and detention

[70] This is indeed not a hypothesis to make an example, but it mirrors the facts of the Karaca case. We will devote a particular attention to the examination of the said case, especially with regard to the potential violation of the applicant's right to freedom of expression, which the Court erroneously refused to acknowledge in the case.

[71] See one of the landmark cases in which the Grand Chamber of the Court found that the applicant's conviction led to the violations of Article 7 (legality of criminal punishment), 6 (right to fair trial), and Article 11 (right to freedom of assembly and association). The Court further emphasized that the identified violation presents a systemic pattern, urging the State party to furnish a comprehensive solution to address the underlying problem in the country. Yüksel Yalçınkaya v. Türkiye, *(Application no.* 15669/20*),* Judgment of 26 September 2023; See for a succinct analysis of the Case, Hakan Kaplankaya, "Yüksel Yalçınkaya v. Türkiye: Systemic Violations of the Nullum Crimen Principle by a Founding Member of the CoE", Opinio Juris, (19/12/2023), available at https://opiniojuris.org/2023/12/19/yuksel-yalcinkaya-v-turkiye-systemic-violations-of-the-nullum-crimen-nulla-poena-sine-lege-principle-in-a-founding-member-of-the-council-of-europe/

[72] See, for example, internationally renowned novelist and journalist Ahmet Altan's case, infra note 83.

[73] Tsampi, p. 135.

[74] See the list of cases where the court found a violation of Article 18. Supra note 55.

was not only unlawful and thus in violation of Article 5 of the Convention, but also was conducted with a political motive (ulterior motive), and thus in violation of Article 18.

When it comes to the adjudication of a free speech case under Article 10 in conjunction with a potential Article 18 violation complaint, the case may become a maze of extraordinary confusion. This is because the determination of any (potential) violation of Article 10 must precede the determination of the lawfulness of the arrest or detention under Article 5 of the Convention, not vice versa. On the other hand, in every case, the conclusion of a potential violation of a Convention right must precede the determination of a potential violation of Article 18. This does not mean that the determination of political motive prior to the conclusion of violation of a Convention right is strictly prohibited by the Convention system. In many cases, the determination of the political motive would help the determination of unwarranted interference by the governments with a Convention right.

Second, another technical issue is whether the Court can review a complaint under Article 18 in conjunction with, for example, Article 6 or 7, which do not involve any express restrictions. The Court so far has not permitted the introduction of claims under this head relying on the wording of Article 18. The Court's opinion on this matter reflects a legal formalism as opposed to its dynamic or evaluative approach to the interpretation of the Convention.[75] As the Convention is a living instrument it can be expected in future the Court will adopt a different view than this one, and permit the examination of Article 18 in conjunction with Articles 6, and 7 too, that makes the Court more like a law-making body rather than a passive interpreter.[76]

A more delicate and controversial issue arising under Article 18 adjudication is that on whose side the burden of proof should lie. To this date, the Court has not adhered to a consistent path in its Article 18 adjudication, particularly in laying down standards for the standard of burden of proof in cases brought before it. This inconsistency is especially evident when deciding on which party should bear the burden of proof in the determination of whether there was an ulterior motive in the Government's breach of the impugned right(s). In some cases, the Court required a higher standard for the applicants to prove that the government acted with an ulterior purpose, while in some other cases it adopted a more "lenient" standard of proof. There are not any specific factors through which the Court's various approaches to the issue might be justified.[77] But what would happen if the impugned restriction was imposed for both an ulterior purpose and a legitimate purpose? The Grand Chamber of the Court in *Merabishvili v. Georgia* answers this question:

[75] In Ilgar Mammadov v. Azerbaijan, the Joint Concurring Opinion argued: "Although the situation in Europe today cannot be compared to that in Europe in 1950, the importance of this Article has not diminished. The right to a fair trial under Article 6 is one of the guarantees with reference to which fundamental abuses by a state may likely manifest themselves. Therefore, trials before a court must never be used for 'ulterior purposes.' This is the *conditio sine qua non*; the very basis for the idea of 'fair trial' as understood in the Convention. Almost all the other guarantees are futile if this most basic guarantee is called into question or undermined." See for the quote and the debates on the issue, Schmaltz, p. 42 *et seq.; for the Court's approach to the interpretation of the Convention, see* Jacobs/White/Ovey, p. 64 *et seq.*

[76] See Luzius Wildhaber, "The European Court of Human Rights: The Past, The Present, The Future", American University International Law Review 22, no. 4 (2007): 521-538.

[77] See for the discussion over the standard of proof issue, Schmaltz, 46 et seq.

> "A right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention; in other words, that it pursues a plurality of purposes. The question in such situations is whether the prescribed purpose invariably expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is some intermediary answer. … Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law."

However, the problem would not be clarified unless the standard of proof in such a case has been determined. In other words, should the burden of proof shift to the Government once the applicant has established a prima facie case of ulterior motive. Schmaltz argues:

> "in Article 18 ECHR cases, the State has (at least) a so called 'secondary onus of presentation' *(sekundare Darlegungslast)*, which obliges the State to address and rebut the allegations of the applicant in a sufficiently substantiated manner."[78]

Schmaltz' argument is not only compelling for the realization of individual justice but also aligns with the most proper interpretation of Article 18, considering the purpose and objectives of this Article is to prevent the would-be governments from oppressing the dissent and persecuting their opponents by manipulating the criminal justice system.

Nevertheless, it is not possible to infer from the Court's jurisprudence such a conclusion that the burden of proof would shift if the applicant established his prima facie case on the existence of an ulterior purpose in his case.[79] In some cases, the Court could require the applicants to "provide 'incontrovertible and direct proof' of a violation of Article 18 and show that 'the whole legal machinery of the respondent state' had been' ab initio misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention'."[80] In Selahattin Demirtaş v. Türkiye (no.2) the Court used a more lenient test than the one it was used in Merabishvili, which was named as "Predominant Purpose Test".[81]

Under the predominant purpose test, the Court first determines whether there was plurality of purposes in the case; then, it focuses on the question of which of the purposes was dominant in the case. The Court in Demirtaş concluded that the political purpose was dominant, and then there was

[78] Schmaltz, 46.
[79] Schmaltz concludes that "the standard of proof is officially that of beyond a reasonable doubt. However, the application of this standard depends on the facts in question and the Convention right at state. … in assessing the evidence, the Court is not bound by predetermined formulae for its assessment of the evidence; rather, its conclusion is based on a free evaluation of all evidence put before it." at p. 47.
[80] Heri, 30, with her quotes from the Court's landmark case, Merabishvili v. Georgia; This argument was introduced by the Turkish government in Demirtaş, but it was rejected by the Grand Chamber of the Court. For the Turkish Government's argument, see Selahattin Demirtaş v. Türkiye (no. 2), Application no. 14305/17*),* Judgment of 22 December 2020, pr. 413; for the Court's rejection of the Government's argument see pr. 421 (quoting the principles set out in Merabishvili).
[81] Heri, 39.

a violation of Article 18 in conjunction with Article 5. In doing so the Court determined that "the purposes put forward by the authorities for the applicant's pre-trial detention were merely cover for an ulterior political purpose'; and found that "it has been established beyond reasonable doubt that the applicant's detention, especially during two crucial campaigns relating to the referendum and the presidential election, pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society."[82]

In order to determine whether the ulterior purpose (or a political motive) exists in the case, the Court examines the background of the case, and other facts which are not indeed directly involved in the applicant's tried case since the ulterior motive is the ones which mostly remain obscured by the presented facts of the applicant's case, potentially lying beyond the scope of the current proceedings and perhaps rooted in undisclosed background circumstances. In other words, the Court may not only admit direct evidence but also circumstantial evidence to figure out whether there was an ulterior purpose involved in the case. The Court clearly outlined this approach in Ahmet Altan case:

> "There is no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations. Circumstantial evidence in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court."[83]

The applicant Ahmet Altan was a renowned journalist and novelist, whose stance against the military intervention is so firm that one may reasonably infer that he would be the last person to have concluded that he incited a military coup against the government. The evidence submitted by the prosecution to justify his arrest and subsequent detention was one of his speeches in a television talk show in which he allegedly disseminated "subliminal message" that there would be a military coup to bring down the Erdogan government. Let's quote from his writings which led to his arrest and detention:

> "We are face to face with an incomprehensible situation. A man who has declared he would not abide by the Constitution is running the country singlehandedly in defiance of the Constitution. He has taken – to quote his supporters – the judiciary under his control, placed his adherents at almost every level of government, the media controlled by him adopts and supports all of his contradictory remarks without even questioning them, the political party that he once led has committed some kind of political suicide to turn into a crowd of servants, he can crush anyone who disagrees with him, administrative posts in universities are packed with those who fully submit to him, he can seize the property of businessmen who annoy him, opposition parties are watching all that is happening in a strange state of

[82] Demirtaş v. Turkey, pr. 436-438.
[83] Case of Ahmet Hüsrev Altan v. Türkiye, (Application no. 13252/17), judgment of 13/04/2021, pr. 237.

> surrender, and moreover, they even support him when it comes to the most crucial matters. In the administration of this man who holds such immense and unlawful power, the wildest fantasies of the military tutelage which he used to say he was opposed to are being realised; all the aspirations of this tutelage that it could never achieve on its own are now becoming real. Kurdish cities are being razed to the ground with tanks and artillery; people are being burned to death in basements. Kurdish neighbourhoods are being wiped off the map. Kurdish deputies' parliamentary immunity is being lifted. … Laws that ban military officials from being prosecuted even if they commit a crime are being passed. The authority of the generals is made to outweigh civilian authority. The road is being paved for the military tutelage to seize back authority by way of legislation. …"[84]

The Court concluded that the applicant's right to liberty and security under Article 5/1 was violated on the basis that there was no reasonable suspicion that he might have committed any criminal offence. Same way, the Court also concluded that the applicant's detention was not based on factual evidence giving rise to strong suspicion that he might have committed an offence. Even though the conclusion of the Court is right, the Court's limited depth of legal analysis of the applicant's complaints under Article 10 is obvious. If these words articulated by the applicant as a journalist could be admitted as proving that the applicant had known the botched coup attempt, and tried to justify it, there would be no room to criticize an authoritarian government even though everything what you said was true.

The European Court's following words could be taken as more than a procedural turn, but a true compromise extended to the Turkish government[85], possibly obscuring the gravity of the violations committed as part of its agenda involving crimes against humanity. The Court rejected the applicant's arguments under Article 18 complaint with the following words:

> "The Court observes that the stated aim of the measures imposed on the applicant was to carry out an investigation to establish whether he had indeed committed the offences of which he was accused. In this connection, the Court notes that the applicant was placed in pre-trial detention shortly after the attempted coup, which had caused serious disruption and considerable loss of life. At the material time, the authorities were investigating the infiltration of all public institutions and organisations, as well as *the media network that had been established by FETÖ/PDY to manipulate public perception and legitimize a potential coup.* The applicant was subsequently placed in pre-trial detention and prosecuted, together with sixteen other accused persons, for attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, or to prevent them from discharging their duties, and of committing offences on behalf of a terrorist organisation without being a member of it. Given the serious

[84] Ibid. pr. 11.

[85] It's because the 'procedural turn' -even if it's a new way of the Court's deference to the National authorities- is premised on good faith domestic engagement with the Convention principles. It's impossible in Ahmet Altan case that the Turkish authorities acted in good faith as the Court suggested. For a full discussion on the Court's way of deference to State Parties under 'procedural turn', Miles Jackson, "Judicial Avoidance at The European Court of Human Rights: Institutional Authority, The Procedural Turn, and Docket Control", International Journal of Constitutional Law, Volume 20, Issue 1, (2022), Pages 112–140, available at https://doi.org/10.1093/icon/moac003

https://doi.org/10.5281/zenodo.21384325

> disruption and the considerable loss of life resulting from these events, *it was perfectly legitimate for the domestic authorities to carry out investigations following the attempted coup*." [emphasis added].

Then, the Court concluded:

> "At this point, the Court reiterates that the mere fact that the applicant has been prosecuted or placed in pre-trial detention does not automatically indicate that the aim pursued by such measures was to silence him. In the Court's view, the authorities' acts do not substantiate any other interpretation of events than that the predominant purpose of keeping the applicant in detention was to ensure the smooth conduct of the criminal investigation.[86] [T]he Court accepts that the applicant's detention based on such serious charges had a chilling effect on the applicant's willingness to express his views in public and was liable to create a climate of self-censorship affecting him and all journalists reporting and commenting on the running of the government and on various political issues of the day. Nevertheless, this finding is likewise insufficient by itself to conclude that there has been a violation of Article 18."[87]

To the Court, it is perfectly fine for the Turkish government to bring criminal proceedings and detain a renowned journalist and novelist for a long time provided that the case was linked to Hizmet movement and the botched coup attempt -regardless of how the accusations were unsubstantiated and irrelevant to the case. To the Court, this could not be construed that the Government pursued an ulterior aim, for example, to silence the journalist, but may legitimately construed that the Government intended with the criminal proceedings to reveal whether the defendant (applicant) had committed the alleged crime regardless of how ridiculous the accusations directed against the journalist. This is an acceptable approach to the protection of human rights, and totally incompatible with the background of the case.

One may defend the Court saying that the Court already found the violations of the applicant's rights under other articles, including his right to freedom of expression. So, was it important also to find a violation of Article 18 in the case? In the context of the case, I argue that its significance extends beyond the mere adjudication of an Article 18 violation. The Court's linguistic choices, which should have been displayed with precision, bear particular importance, elevating this judgment to a realm where the language chosen becomes a critical facet for cases, which might be brought by the perceived members of the Hizmet Movement.

In the context of a very controversial coup attempt, dozens of journalists were charged with ridiculous accusations, such as attempting to overthrow the constitutional order, or being a member of an armed terrorist organization. No evidence was presented to support such accusations in any of the cases. Despite this background, the Court stated as a fact that "*the media network that had been established by FETÖ/PDY to manipulate public perception and legitimize a potential coup.*" Such an allegation is not a fact, but an unsubstantiated allegation presented by the Government as part of its narrative about the Hizmet movement. How could the Court leap to such a firm

[86] Ibid. pr. 243.
[87] Ibid. pr. 244.

conclusion that the media institutions affiliated with the Hizmet Movement were established to justify an upcoming military coup? What was the evidence submitted by the Government to support this conclusion? If the Court was to accept every allegation put forward by the Turkish government as an undisputable fact of the case to be relied on, how could it maintain an impartial position between the applicants claiming to be victims of violations of their fundamental rights (especially the ones involving an Article 18 claim) and the governments claiming that they did not violate the applicants' rights -or at least they acted in good faith in *persecuting* their opponents?

On the face of the fact that the applicant was arrested on 21 September 2016 and was not released until 14 April 2021, kept behind bars for more than four years, based on evidence cited from his writings as nothing more than a work of critical journalism, how could the Court be convinced that the Government acted in good faith, without an ulterior purpose pursued to silence or punish him for his strong criticisms of the Erdogan government? Thus, the Court arrived at a conclusion that the Government's purpose throughout the criminal proceedings brought against the applicant for several years was just to identify if the applicant had committed the alleged offence. And the Court urges the reader of this case to believe that the Government acted in good faith in the persecution of a renowned journalist and novelist along with other hundreds of thousands of innocent people.

Regrettably, the Court's obvious reluctance to dismiss the Government's manifestly unsubstantiated or wholly irrelevant arguments in the applicants' cases, which are affiliated with Hizmet movement, casts a shadow over its pivotal role in protecting the rights of the persecuted victims under the Convention. The Turkish government submits in every case, which it relates to the Hizmet movement, its own version of a very controversial coup attempt, along with one-sided description of the movement, regardless of whether such arguments are relevant to the case. Such a blatant utilization by the Turkish Government of the Court only discredits its reputation, at least in the eyes of the persecuted victims, and sends a message to the world that there is little wrong with the authoritarian governments' massive persecution of their opponents. Such attitude cannot be regarded a shift from the Strasbourg system's 'embedding phase' to 'age of subsidiarity', but a shift from age of subsidiarity to an injudicious compromise extended to an authoritarian government that serves the semi-justification of the Government's brazen violations of human rights.[88]

The following examples from the Court's case law illustrate, in the context of targeting journalists for their dissent, the Court's approach to, and examination of, the existence of ulterior purpose along with the stated or the legitimate purpose which the authorities pursued.[89]

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[88] I have borrowed the terms "embedding phase" and "age of subsidiarity" from R. Spano. Embedding phase is divided into two different periods of time: substantive and procedural. The common feature of embedding phase is that the Court "gives substance to these norms for the primordial purpose of infusing them into the domestic legal systems." Procedural embedding phase refers to Court's more strict rules through which the applicants are required to be more diligent in complying with such strict rules when they raise their complaints under the Convention. The term 'age of subsidiarity' refers to period in which the Court deferred to the national authorities under the margin of appreciation doctrine. For the background of these terms, see Robert Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law", Human Rights Law Review, (2018).
[89] I urge my reader to compare these cases with Ahmet Altan to see if there is an unjustifiable difference between them.

The Court in Ismayilova questioned "whether there is proof that the authorities' actions were actually driven by an ulterior purpose."[90] The applicant was a freelance journalist in public and non-governmental organizations and working in the Baku office of "Azadliq Radio". The applicant in the said case was charged with inciting a person to commit suicide. The Court didn't satisfy with the Government's arguments that the applicant was not arrested due to his journalistic activity but a totally separate crime (inciting someone to commit suicide).[91]

Before concluding that the authorities acted with an ulterior motive to punish the applicant, the Court referred to its case law in which it found that "the respondent State reflected a pattern of arbitrary arrest and detention of government critics, civil society activists and human rights defenders through retaliatory prosecutions and misuse of criminal law, in breach of Article 18."[92] The Court took attention to the applicant's position as "a well-known investigative journalist who published a number of articles criticizing members of the government and their families for alleged corruption and illegal business activities."[93]

The Court noted that the applicant was initially arrested on a false claim made as a result of coercion, and later on, the authorities charged the applicant with additional crimes.[94]

The Court also noted that the applicant's arrest was coupled with stigmatizing statements, particularly made by the then head of the Presidential Administration two days prior to her arrest, which accused her of spreading lies about members of the government. The statements accused her of working for the foreign secret services" and committing an act of "treason."[95]

According to the Court, such statements were the harbinger of the criminal proceedings brought against the applicant. In other words, the statements were either a directive for the judicial authorities to act accordingly, or part of a broader plan framed against the applicant. Therefore, the Court concluded that the statements were proof of the political motive behind the case.[96]

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[90] Khadija Ismayilova v. Azerbaijan, (Application no. 30778/15), Judgment of 27/02/2020 pr.112.
[91] Id. pr. 21 et seq.
[92] Id. pr. 113.
[93] Id. pr. 115; See, for the Court's reference to the "ulterior motive", Case of Navalnyy v. Russia (No.2), (Application no. 43734/14, Judgment of 09/04/2019, pr. 93.
[94] Id. pr. 116.
[95] Id. pr. 117.
[96] Such a statement constitutes a violation of the person's right to the presumption of innocence under Article 6/2 of the Convention. However, determination of any issues arising under Article 6 (right to a fair trial) depends on the conclusion of the applicants' cases in the domestic legal system. Therefore, the applicant in Karaca submitted another application following the final Cassation judgment on the merits of his case to the Court which is to decide other issues, such as the determination of whether there have been violations of the applicant's rights under Article 6 or 7 of the Convention. Nevertheless, this is not to say that the Court would have to wait for the final judgment in the applicant's case to decide whether there has been a political motive underlying the case. The Court should have looked into the context of the case to determine the political motive, then to decide the case accordingly because any analysis under Article 5 of the Convention does not depend on the final conclusion of the case under the domestic laws of the State Parties. On the other hand, it appears from the case that the Court accepted all the facts as the undisputed facts of the case as submitted by the Government and avoided the counter arguments on the existence of the facts which resulted in the denial of the applicant's fundamental rights secured under Article 5 of the Convention. Regarding the violation of the right to presumption of innocence, see Case of Ilgar Mammadov v. Azerbaijan, *(Application no.* 15172/13*),* Judgment of 22 May 2014, pr. 127-128.

In Ilgar Mammadov[97], the Court was vigilant to the Government's arguments to suggest that the applicant was not arrested and detained based on his journalistic activity but on separate criminal charges, that is, on organizing or actively participating in actions causing a breach of public order; and on resistance to or violence against public officials, posing a threat to their life or health.[98] The Court concluded that "the actual purpose of the impugned measures was to silence or punish Mr. Mammadov for having criticized the government and for having attempted to disseminate what he believed to be true information which the government was trying to hide."[99]

C. Determination of Political Motive in Karaca Matters

Determination of the political motive is of vital importance to the conclusion of Karaca case. It requires a full-fledged examination of the background of the case, namely the political developments surrounding the case. From the facts of how the applicant's case was initiated to the facts demonstrating the Turkish government's avowed hostility against the applicant and the movement he belongs to. Indeed, the Court is not a stranger to politically motivated cases. For example, the Court in Jafarov v. Azerbaijan draws attention to the recent developments preceding to the applicant's arrest:

> "In recent years a number of human rights activists, lawyers, politicians, journalists and other government critics have been arrested and/or charged with various criminal offences. Those arrests generated wide publicity and were condemned by a number of international organisations, NGOs and prominent individuals."[100]

The political context in which the applicant in Karaca was targeted by the Turkish government is much brighter than that exists in Jafarov case. If this was a defamation case the Court's elusive free speech analysis might be less striking, but it was not. Mr. Karaca was charged with the crime of terrorism based on the facts of the defamation case, along with hundreds of thousands of innocent people, a fact that should have been taken into account as a background examination, which was overlooked by the Court. UN WGAD concluded that the widespread and massive imprisonment of the members of the Hizmet Movement on politically motivated charges might amount to crimes against humanity under international law.[101]

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[97] Case of Ilgar Mammadov v. Azerbaijan (G.C.), *(Application no.* 15172/13*),* Judgment of 29 May 2019.
[98] Id. pr. 15.
[99] Id. pr. 35; The actual or real purpose of the Government's interference with the applicant's right has been resolutely sought by the European Court in other cases. See, example, Case of Selahattin Demirtaş v. Turkey, G.C. (no.2), (Application no. 14305/17), Judgment of 22/12/2020, pr. 423 et seq.
[100] Jafarov v. Azerbaijan, pr. 10.
[101] UN Working Group on Arbitrary Detention (WGAD), in one of its opinions, stated that "The present case is the latest in a series of cases concerning individuals with alleged links to the Hizmet movement that has come before the Working Group in the past three years. In all these cases, the Working Group has found that the detention of the concerned individuals was arbitrary. A pattern is emerging whereby those with alleged links to the Hizmet movement are being targeted on the basis of their political or other opinion, in violation of article 26 of the Covenant. Accordingly, the Working Group finds that the Government of Turkey detained Mr. Kart based on prohibited grounds for discrimination, and that his detention was thus arbitrary, falling under category V." Opinion No. 66/2020 concerning Levent Kart (Turkey), 2 February 2021, pr. 65, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/024/62/PDF/G2102462.pdf?OpenElement; See also "During the past three years, the Working Group has noted a significant increase in the number of cases brought before it concerning arbitrary

However, the majority of the Court Chamber in Karaca avoided reviewing the background of the case from the perspective of the applicant, which might only bring the Court closer to seeing the facts underlying political character of the Government's action against the applicant. Instead, the majority opted for the Government's version of the events without even questioning the authenticity of them, which was clearly raised by the applicant in the case.

Judge Schembri Orland, the sole dissenting voice in this momentous case, elaborately brought forth the underlying facts relevant to understanding the context of the case that the majority failed to observe. She stated:

> "Admittedly, this case presents a certain complexity given the religious, cultural and political context in Türkiye at the time. However, I believe that the guiding principles of the Convention do not authorize the Court to dispense with an analysis of the charge of terrorism brought against the applicant, which is indisputably predominant, and to confine itself to discussing the charges of slanderous denunciation. This would be equal to ignoring how serious it is to accuse people of a particularly odious offence against democracy and to prosecute them for this offence in the absence of any reasonable ground.[102] … The applicant was arrested as part of a crackdown targeting journalists and media representatives in particular. The decision of 18 December 2014 ordering his detention stated that it was justified in view of the telephone conversations that had taken place between him and Fetullah Gülen, the Movement's leader, and the role he had played in preparing and broadcasting the episodes in question."[103]

She drew attention to the central point in the case that the applicant was not charged for his involvement in slanderous denunciation but for a totally different scheme, that is, his alleged involvement in crimes of terrorism. And the majority in the decision failed to see such crucial point that the applicant's arrest and subsequent detention was, though, based on his authorization to broadcast the impugned episodes, but the criminal charge brought against him was that he was leading an armed terrorist organization. Judge Orland went on to argue that:

> "In the present case, the question of the likelihood of the existence of a link between the preparation of a television series and participation in the leadership of a terrorist organization, the reason put forward by the judges in support of the applicant's continued pre-trial detention, is highly problematic, and calls for a thorough examination from the angle of Article 5 § 1 of the Convention"; which the majority in the decision did not conduct.

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detention in Turkey. The Working Group expresses grave concern about the pattern established by all these cases and recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity. Opinion No. 47/2020 concerning Kahraman Demirez, Mustafa Erdem, Hasan Hüseyin Günakan, Yusuf Karabina, Osman Karakaya and Cihan Özkan (Turkey and Kosovo), 25 September 2020, pr. 101, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/239/79/PDF/G2023979.pdf?OpenElement

[102] Affaire Karaca, Dissenting opinion of Judge Schembri Orland, pr. 2.

[103] Id., pr. 4.

She asserts that the Court must have conducted "a thorough examination" to determine if there was a political motive behind the criminal proceedings brought against the applicant. Normally, determination of the political motive requires a separate analysis of the applicant's complaints under Article 18 in conjunction with Article 5 of the Convention that the Court sidestepped.

As suggested by Judge Orland -and we elaborated above, precedents already exist where the Court has indeed undertaken a similar examination into the facts of the case under Article 18. This has been done to ascertain whether there was an underlying motive behind the actions of the authorities.

Although the Court seems to be aware of the background of the case, it deliberately avoided the evaluation of the underlying facts which would take the Court to the determination of the political motivation behind the case. For example, the Court does not consider as a relevant factor the Turkish government's hostile attitude towards the Community that emerged after the notorious corruption cases. And it is not secret that following the corruption cases Erdogan formed alliances with individuals, groups, and communities who harbored hostility towards the Gulenist community. This point is highlighted by F. Keller:

> "Erdogan was in desperate need of political allies and a basis in society. He needed more "boots on the ground" against the masses, and a firmer grip on the state apparatus. He came to the only conclusion possible: he needed to reconcile with the ultra-nationalists and the parts of the "deep state" he was in conflict with before."[104]

As Erdogan called the December 2013 corruption cases a judicial coup plotted by Gulenists; anyone, any group who had undergone a criminal investigation or been convicted of any crime had the opportunity to declare his innocence and challenge the decisions against them on the same basis as Erdogan did about the corruption cases.[105]

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[104] Florian Keller, "Turkey, Erdogan and the deep state", In Defence of Marxism, (21 June 2021), available at: https://www.marxist.com/turkey-erdogan-and-the-deep-state.htm

[105] There are hundreds of such allegations: For example, a businessmen who was subject to criminal trials for his conspiracy to commit bid rigging in a government tender scheme alleged that his criminal prosecution and trial was frame against him by the Gulenists; and he secured his acquittal. See, "FETO framed…" Kocaeli KOZ, available at: https://www.kocaelikoz.com/haber/5803828/feto-hem-kumpas-kurdu-hem-de# (Retrieved on 2 July, 2023); President of the Gaziantep province Soccer Club alleged that "FETO framed cases against him and some other clubs", available at https://www.haberturk.com/spor/futbol/haber/1270512-ibrahim-kizil-feto-bize-de-kumpas-kurdu (Retrieved on 2 July, 2023); Cubbeli Ahmet Hoca, leader of a religious sect, alleged that "He was framed by FETO upon the order of MOSSAD", the religious leader was charged with conspiracy to women trafficking, sexual assault, fraud in official documents, etc. However, he was acquitted of all charges after he alleged that he was framed by FETO, available at: https://www.star.com.tr/guncel/feto-mossadin-emriyle-bana-kumpas-kurdu-haber-1081451/ , see about his acquittal decision, Sozcu newspaper, 3 March 2016, available at: https://www.sozcu.com.tr/cubbeli-ahmet-davasinda-karar-cikti-wp1119924 (Retrieved on 2 July, 2023); A member of Turkish Constitutional Court was accused of beating his wife, and defended himself alleging that "this is a FETO operation to discredit my reputation before my candidacy for the Court membership, see for the details of the news InternetHaber, available at: https://www.internethaber.com/anayasa-mahkemesi-uyeligine-aday-olan-irfan-fidan-esini-dovdu-mu-fidanda-aciklama-geldi-2148130h-yorumlari.htm ; The defendants in conspiracy case (conspiracy to organize prostitution) defended themselves that "they were framed by FETO", see for the details of the news CNN TURK, available at: https://www.cnnturk.com/turkiye/fuhus-yaptirmaktan-yargilanan-kisi-de-kendini-feto-kumpasi-diye-savundu

Furthermore, while forming new alliances with the religious or secular groups hostile to the Gulenist community, Erdogan put the blame on the Gulenists for all the evil that is in the world and for all the grievances that the individuals or groups had undergone whereas he successfully absolved himself and his government from any perceived injustice in the society.

Following the December corruption cases Erdogan publicly called on to the members or the supporters of the Gulenist community whether to side with him or face dire consequences that would befall upon them. Those who sided with him have so far been awarded lucrative government positions while those who did not side with him faced a torrent of persecution by being subjected to malicious criminal proceedings.

Bulent Kenes, an exiled journalist, wrote in twitter that "It is weird, but true: Two columnists of Today's Zaman, where I used to be the Founding Editor-in-Chief, have been appointed to the two most critical positions in Turkey. Mehmet Şimşek, one of our economy writers [columnists], has taken charge of the economy once again, while İbrahim Kalın has become the Head of MIT (National Intelligence Organization). And they call me a 'terrorist,' how about that?"[106]

Vice president of the Bank Asya was appointed by the Government as the Chairman of the Capital Markets Board of Turkey, while thousands of others were convicted for holding a personal account with the Bank.[107]

As the US Supreme Court Justice J.M. Harlan, in his famous dissent in Plessy where the majority upheld a racially segregated practice on the notorious "equal but separate" doctrine, wrote that "everyone knows that the statute in question had its origin in the purpose,…"[108], everyone knows how this case was planned and staged by the Erdogan government as part of his relentless revenge against the Gulenist Community. The Government deliberately handpicked this particular case as a means to exact retribution upon and take revenge on the officers involved in the corruption cases of December 2013. Notably, the arrest of the suspects, including the applicant, was orchestrated with calculated timing, coinciding with the anniversary of the said corruption cases.

Nevertheless, any violation of Article 18 cannot be an independent issue but can be concluded only in conjunction with the violation of the person's other rights guaranteed under the Convention.[109] Therefore, it is important to determine whether, for example, the applicant's arrest and detention was contrary to the rules and principles formulated under Article 5 of the Convention or whether the applicant's arrest and detention was a violation of his right to freedom of expression.

(Retrieved on 2 July, 2023). There are countless examples in which the suspects of the most serious crimes defended themselves as "they were all framed by FETO".

[106] https://twitter.com/bkenes/status/1665873605996032001 (June 5, 2023).

[107] Yenicag Gazetesi, 7 Temmuz 2023, available at https://www.yenicaggazetesi.com.tr/bank-asya-eski-yoneticisi-spkya-baskan-atandi-189951h.htm (June 27, 2023).

[108] Plessy v. Ferguson, 163 U.S. 537 (1896); See John A. Powell, " The Law and Significance of Plessy", Journal Articles, (February 17, 2021), available at: https://belonging.berkeley.edu/law-and-significance-plessy (Retrived on 6/27/2023).

[109] For the Court's thorough analysis on the examination of Article 18 of the Convention, see Case of Merabishvili v. Georgia, (Application no. 72508/13), Judgment of 28/11/2017, pr. 270 et seq.

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Any potential violation of Article 5 cannot -and should not have been- decided without concluding whether there was a violation of Article 10 in this case simply because the evidence utilized to justify the applicant's arrest and detention merges into the same evidence to determine whether the applicant's right to freedom of expression was violated.

Karaca was arrested and detained on his authorization to broadcast the three episodes as part of a TV series but charged with and convicted of leading and founding an armed terrorist organization based on the same evidence. Therefore, on the one hand, his arrest and detention appeared to be justified by his authorization of the impugned episodes, which was considered by the European Court as a slanderous denunciation; on the other hand, his arrest and detention was justified by the domestic courts -on the same evidence though- on a totally different basis, that is, the leading an armed terrorist organization. The discrepancy between the evidence and the charges was not appreciated by the European Court to conclude that the applicant's arrest and detention could not have been justified based on the slanderous denunciation charges under Article 100 of the Criminal Procedure.[110] Hence, the nature of the charges were shifted from an ordinary slander case to that of a very serious terrorism to justify the applicant's detention.

[110] Article 100 of the CCP sets out, *numerus clausus*, the situations in which the suspect's detention in reman can be justified. These are:
Grounds for arrest with a warrant
Article 100 – (1) If there are facts that tend to show the existence of a strong suspicion of a crime and an existing "ground for arrest", an arrest warrant against the suspect or accused may be rendered. There shall be no arrest warrant rendered if arrest is not proportionate to the importance of the case, expected punishment or security measure.
…
(3) If strong grounds for suspicion are present, that the below mentioned crimes have been committed, then "the ground for arrest with a warrant" may be deemed as existing:
a) Following crimes as defined in the Turkish Penal Code dated 26.9.2004 and No. 5237:
1. Genocide and crimes against humanity (Arts. 76, 77, 78),
2. Killing with intent (Arts. 81, 82, 83),
3. Intended wounding committed by a gun (Art. 86/3-a) and intended wounding which has been aggravated by its result (Art. 87)
4. Torture (Arts. 94, 95),
5. Sexual assault (Art. 102, except for subparagraph 1),
6. Sexual abuse of children (Art. 103),
7. Theft (Arts. 141, 142), and aggravated theft (Arts. 148, 149)
8. Producing and trading with narcotic or stimulating substances (Art. 188),
9. Forming an organization in order to commit crimes (Art. 220, except for subparagraphs 2, 7 and 8),
10. Crimes against the security of the state (Arts. 302, 303, 304, 307, 308),
11. Crimes against the Constitutional order and crimes against the functioning of this system (Arts. 309, 310, 311, 312, 313, 314, 315),
b) Smuggling with guns, as defined in Act on Guns and Knifes and other Tools, dated 10.7.1953, No. 6136, (Art. 12),
c) The crime of embezzlement as defined in Act on Banks, dated 18.6.1999, No. 4389, Art. 22, subparagraphs (3) and (4),
d) Crimes defined in Combating smuggling Act, dated 10.7.2003, No. 4926, and carry imprisonment as punishment,
e) Crimes defined in Act on Protection of Cultural and Natural Substances, dated 21.7.1983, No. 2863, Arts. 68 and 74,
f) Crime of intentionally start a fire in forests, as defined in Act on Forests, dated 31.8.1956, No. 6831, Art. 110, subsections 4 and 5.

Moreover, applicant's arrest and subsequent detention cannot be disassociated from his act of having had the allegedly (but not indeed) slanderous episodes broadcast as part the TV series. Thus, his arrest under Article 5 of the Convention cannot be disconnected from the exercise of his right to freedom of expression under Article 10 of the Convention.

In other words, if the interference with the applicant's right to freedom of expression could not be justified under Article 10/2, his arrest and detention, which is based on the applicant's same act as his exercise of right to freedom of expression, should also not be justified.

Furthermore, any inquiry into the existence of the political motive under Article 18 in conjunction with Article 5 of the Convention is indispensable with the examination of the possible violation of the applicant's right to freedom of expression.

The domestic courts did not pay tribute to the decision of the Turkish Broadcasting Authority in which it concluded that the characters and the events are fictitious in that its broadcasting in no way infringed the provisions of Law, and the European Court has avoided to acknowledge that the applicant's arrest and detention was just part of an avowed annihilation plan, that was not a secret to the world.

In brief, if it was to determine whether there was a political motive underlying the case, there would be few clearer examples than this case to conclude the existence of the ulterior purpose lying behind it. There is no need to repeat the Erdoğan government's avowed plan aimed at the annihilation of the Hizmet Community following the corruption investigations which Erdoğan and his fellows called it as a judicial coup framed by the members of the Gulenist community within police and the judiciary. It should be noted that the officers who conducted the corruption investigations were sentenced to aggravated life imprisonment, while all the defendants in the case were acquitted of all charges based on bogus coup attempt narrative. The media outlets affiliated with the supporters of the Community were seized by the Government through the judicial authorizations, and the journalists working within the media companies were immediately fired by the Government's trustees following the seizures.[111] Such practice may be regarded as the practice of "*enemy criminal law*" (Feindstrafrecht), referring to "anyone whose criminal actions meant the denial of the legal system as a whole, e.g. terrorists", a concept developed by the German scholar Günther Jakobs.[112]

Now, we can proceed to the Court's analysis of the right to freedom of expression in the case to determine whether there was a violation of Article 10 of the Convention, which the Court failed to

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(4) In cases where the committed crime is punishable with judicial fine, or with imprisonment not more than one year at the upper level, no arrest warrant shall be issued.
As elucidated in the article, it is evident that the accusation of denunciation does not fall within the circumstances that could warrant and justify the applicant's remand detention, rendering it legally untenable.

[111] See the Heading I in this work, titled "Political Developments Relevant to the Assessment of the Applicant's Arrest and Subsequent Detention".

[112] See, for a profound study on the concept of "enemy criminal law", Felix Golser, "The Concept of Special Criminal Law as A Weapon against 'Enemies of the Society'", Studia Iuridica, Issue LXVII, (2016), available at: https://bibliotekanauki.pl/articles/902801.pdf (Retrieved on 11/9/2023).

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acknowledge. Then, we will turn to assess whether any such violation necessitates the recognition of the applicant's right to liberty and security under Article 5 of the Convention.

IV. The Court's Confusing Ruling: Strained and Elusive Freedom of Expression Analysis

The Court has just tangled a mess of confusion in its examination of the applicant's complaint regarding the alleged violation of his right to freedom of expression. Article 10 of the Convention provides under the heading of "Freedom of expression":

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The first paragraph of the Article stipulates the normative scope of the right while the second paragraph sets the framework within which any restriction to be imposed on the right shall be regulated and thus might be justified.[113]

Our task is not to give an account of the freedom of expression in the Court's jurisprudence but will be tailored to analyze the Court's conclusion and reasoning in this particular case about the applicant's complaint regarding the violation of his right to freedom of expression.

Instead of following its classical analysis typically in a freedom of expression case, the court took a perplexing position in its examination of the applicant's complaint. I will apply the Court's traditional method to the case and show how the Court has failed to observe its own jurisprudence.

In its typical approach to analyzing freedom of expression cases, the Court adheres to a structured sequence of steps to conclude whether there has been a violation of the applicant's right. These steps are as follows: (1) whether there was an interference with the applicant's right, (2) whether the interference was prescribed by law, (3) whether the government pursued a legitimate aim, (4) whether the interference was necessary in a democratic society.

To determine whether there has been a violation of the applicant's right to freedom of expression, the examination of each point becomes imperative. In most cases, the final step holds paramount

[113] See, for a thorough analysis of the Court's free speech jurisprudence, Jeaan-Francois Flauss, "The European Court of Human Rights and the Freedom of Expression", Indiana Law Journal, Vol. 84, Issue (2009).

importance in the conclusion of the case and is two-fold. Therefore, even if the Court's analysis of the first three steps favors the government's stance, any imposed restrictions must still pass the test of "necessary in a democratic society". In the first prong of the test lies the question of whether the interference corresponds to a "pressing social need" while the second prong of the test addresses the issue of whether the interference be "proportioned to the legitimate aim pursued" by the government.[114]

I will examine each step, which the Court did not follow in this case to determine whether there was a violation of the applicant's right to freedom of expression, to analyze the Court's conclusion.

A. Whether There was an Interference with the Applicant's Right to Freedom of Expression

To determine whether there was an interference with the applicant's right to freedom of expression, there are three things that must be considered:

In the first prong of the analysis, it should be determined whether there was an exercise by the applicant of his right to freedom of expression. Second, whether the nature of government's intervention qualifies as an interference. And third, whether "the portrayal, even in the context of fiction, of a specific religious group as a terrorist organization" can be seen "as part of the ordinary work of a journalist"; and if it was not seen as such, then the government's interference based on the act should not be "reviewed" under the right to freedom of expression. The last question should be analyzed under a different heading such as whether the interference could be justified on one or several of the grounds cited under the second paragraph of Article 10.[115]

In that context the Government argued that "the purpose of the investigation against the applicant was not related solely to the fact that he had authorized the broadcasting of the television series in question."[116] This is the Turkish Government's long-standing traditional argument about its crack down on journalists. The government asserts the same argument as was once articulated by the Ministry of Justice Bekir Bozdag that "there is no person detained in Turkey's prisons because of practicing journalism, but there are those whose profession are journalism".[117]

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[114] See the Court's recent judgment in Affaire Manole c. République de Moldova**,** *(Requête no* 26360/19*),* Arret du 6 Juillet 2023 *[*Case of Manole v. Republic of Moldova, (*Application No. 26360/19*), judgment of 6 July 2023] in which the Court carefully analyzed each step before concluding that there was a violation of the applicant's right to freedom of expression. In this case, the court started with examining whether there was an interference with the applicant's right to freedom of expression even though the parties did not question the issue. Then, the Court examined whether the interference was prescribed by law, whether the government pursued a legitimate aim, to all of which the Court responded affirmatively.

[115] The last part is the most confusing part of the Court's reasoning. In order to discuss whether there was an interference with the applicant's right to freedom of expression, the Court has to conclude that whether the content of the episodes involves any factual truth, or simply based on unsubstantiated allegations that should require the analysis of the facts of the case under second paragraph of Article 10. In other words, to conduct such analysis the Court has to decide first there was an interference with the applicant's right to freedom of expression, and then, the interference was justified under the second paragraph. For the Court's bizarre reasoning see Afaire Karaca, pr. 102.

[116] Affaire Karaca, pr. 153.

[117] Evrensel Gazetesi, 11 Ocak 2017, available at https://www.evrensel.net/haber/303701/bekir-bozdag-gazetecilikten-tutuklu-olan-kimse-yok (June 15, 2023).

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The ECtHR, in the following words, appears to agree with the Government:

> "The Court recalls that it examined above the question of whether the applicant's arrest arose from facts connected with the exercise by him of his rights under the Convention. It answered in the negative, considering that the suspicions formulated against the applicant at the time of his arrest did not relate to his expression, *by means of articles or written or oral messages, of opinions or criticisms concerning the ideas propagated by the Tahşiyeciler, but to his alleged involvement in a possibly qualified and organized slanderous denunciation, resulting in the deprivation of the members of this group of their liberty* (see, mutatis mutandis, Kotlyar v. Russia, nos. 38825/16 and 2 others, §§ 41 and 43 44, 12 July 2022). Moreover, such a vehement, general attack on a religious group, linking the group as a whole to terrorist acts, would be contrary to the values proclaimed and guaranteed by the Convention (see, mutatis mutandis, Norwwod v. Ireland (dec.), no. 23131/03, 16 November 2004)."[118] [emphasis added].

In this part of the Court's argument, I will examine the two main issues that the Court raised in the case. First, whether it's possible to detach the content of the episodes from the applicant's decision to authorize their broadcast. Second, whether the content of the episodes did not serve the public debate in any meaningful manner, or it was simply a part of a broader conspiracy against the *Tahşiyeciler* group.

1. *The Court's Efforts to Detach the Content of the Episodes from the Applicant's Alleged Act of having Authorized the Broadcast*

The Court's reasoning is at odds with the plain understanding of what an exercise of freedom of expression should mean. What were the applicant's impugned acts for which he was prosecuted? According to the ECtHR, it was "*his alleged involvement in a possibly qualified and organized slanderous denunciation, resulting in the deprivation of the members of this group of their liberty.*" Again, what were the applicant's acts which the Court viewed as an "*alleged involvement in a possibly qualified and organized slanderous denunciation*"?

It is alleged that the applicant had a conversation on the phone with F. Gulen, and following that conversation, he decided to add three more episodes to the TV series that attacked the reputation of Tahşiyeciler group by linking the group to Al-Qaida terrorist organization. It was not applicant's decision to add the impugned episodes to the Series but was their content which was the subject-matter of the criminal proceedings. Neither the prosecution nor the peace judge might have accused the applicant simply on the grounds of his position to decide the addition of the episodes to the Series without examining allegedly incriminating content of the episodes about the Tahşiyeciler. In other words, what they did first was to examine the content of the episodes, then, to conclude that the content of the episodes was attacking the reputation of the Tahşiyeciler by linking them to a terrorist organization. In brief, the content of the episodes is an indispensable part with the accusations directed against the applicant.

[118] Affaire Karaca, pr. 154.

Then, the question is whether the applicant's decision to add the episodes to the Series falls within the ambit of the normative scope of the right to freedom of expression. The Court seems to answer this question in negative concluding that the acts in question should not be considered as an exercise of his right to freedom of expression. To the Court, applicant's decision to add the episodes to the Series shall not be considered his own critiques against the Tahşiyeciler that would have been expressed "*by means of articles or written or oral messages, of opinions or criticisms..*" We cannot but extrapolate from the Court's reasoning that it would fall within the ambit of the applicant's right to freedom of expression if he clearly accused the Tahşiyeciler of being involved in acts of terrorism "*by means of [his] articles or written or oral messages, of opinions or criticisms*" instead of adding the impugned episodes which probably consisted of fictitious characters and events allegedly related to the group in question.

Such a conclusion is devoid of any logical consistency for at least two reasons. First, whether the speech is conduct or abstract words is not a matter in a free speech case to determine whether the act falls within the scope of right to freedom of expression. It is the act's communicative impact on the minds of the audience that matters. Then, if the speech acts are devoid of any communicative impact, it does not matter whether the speech acts are of words or conduct. Such acts do not fall within the normative ambit of the right to freedom of expression. In the same vein, if the acts are aimed at communicating the message to the audience, such acts should be considered to be the exercise of the right to freedom of expression even despite the act itself not being speech at all.[119] The act of burning a flag[120] can be considered a form of expression, just as the removal of books from school library shelves[121] can also be regarded as an act of speech that are protected by the right to freedom of expression.

There is no doubt that novels and movies, along with scholarly articles, political speeches, academic lectures, and other forms of expression, are deserving of the same recognition as qualified speeches protected by the Convention under Article 10. These diverse mediums contain valuable content protected by the right to freedom of expression.

Does an editor's decision to add certain content to a magazine's article series fall within the exercise of her right to freedom of expression? Does a movie director's decision to add certain content to scenarios when she is directing fall into the exercise of her right to freedom of expression? Suppose that the director's addition to the movie scenarios damages the reputation of a religious group known with its radical views. Does it matter if the director made this decision after speaking with a political party or a community leader?

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[119] There are plenty of study on the speech acts and the communicative impact of the speech. I conducted a detailed analysis of the speech acts in my freedom of expression book. As the book is in Turkish, I will cite a few sources in English for the reader to show that the speech acts or the expression are not limited to the words, nor can the words be disassociated from the conduct in the context of a free speech analysis. See Katrina Hoch, "Expressive Conduct", available at: https://www.mtsu.edu/first-amendment/article/952/expressive-conduct ; Etsuko Oishi, "Austin's Speech Act Theory and the Speech Situation", Esercizi Filosofici 1, 2006, pp. 1-14 available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www2.units.it/eserfilo/art106/oishi106.pdf

[120] Texas v. Johnson, 491 U.S. 397 (1989).

[121] See the US Supreme Court's Board of Education v. Pico, 457 U.S. 853 (1982).

Alas, the Court's reasoning mandates the reader to conclude in all the hypotheses that neither the editor's work nor that of the movie director shall fall within the normative scope of the right to freedom of expression because they do not constitute a *legitimate* exercise of the right but should be construed as potentially a part of a conspiracy schema if it was so alleged by the prosecution. Such an interpretation would render the right practically an illusion, a nullity, especially in a politically motivated case.

The simple question should be whether the domestic authorities relied on the content of the episodes or not. As the European Court concludes, based on the conclusion of the Turkish judicial authorities, that the content of the impugned episodes was a gratuitous attack on the reputation of Tahşiyeciler group, it is imperative for the Court to hold that there was content-based restriction imposed on the applicant's right to freedom of expression. Instead of asking this simple question, the Court preferred to align itself with the Turkish government's odious arguments about journalism and freedom of expression by disregarding the link between the evidence and the charge directed against the applicant. The Court failed to acknowledge that the restriction imposed on the applicant's right to freedom of expression was not a content-neutral restriction.[122]

The position taken by the Court in this case stands in stark contrast to the Court's own long-established and principled free speech jurisprudence. The Court's principled human rights adjudication does not buy the governments' arguments that "the applicant was not charged with the crime due to the exercise of his rights." Against the governments' arguments of such sort, the Court examined whether the applicants were charged with the alleged crimes based on evidence that was indeed related to his exercise of fundamental rights and freedoms protected by the Convention. If the Court determined, for example, that the applicant was charged with being a member of an armed terrorist organization based on the evidence establishing that the applicant participated in a protest organized in favor of a terrorist organization, the Court would not buy the government's story that the applicant was not charged with having participated in the protest -that would be considered an exercise of his fundamental right- but with being a member of a terrorist organization. Or the Court would not be convinced if the government argued that the applicant was charged with being an armed terrorist organization, not charged with distributing pamphlets which would otherwise be considered as an exercise of his fundamental right.[123] This is the right position that the Court has taken so far to prevent the would-be governments' efforts to manipulate the nature of the criminal charges and thus to bypass the Convention's protection.

Therefore, the Court's approach in the following cases mirrors its function as a safeguard against the violations of individual rights serving individual justice as well as its more generalized mission serving constitutional justice.[124]

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[122] See for an analysis of content-based and content-neutral restriction on speech, John Fee, "Speech Discrimination", Boston University Law Review, Vol. 85 (2005), p. 1103.
[123] The reader may follow the subsequent paragraphs to see the Court's relevant judgments.
[124] Discussions about the Court's main mission and role as an international institution generally revolves around the questions of whether the Court is a machinery that is to establish the constitutional principles for the Continent or it is more of an institution delivering individual justice. The Court is expected to play both roles without compromising its most important mission as providing individual remedies for the victims of the Convention rights.

For example, the Court in Ilıcak case, by referring to the Turkish authorities' brazen treatment of the journalist in the context of so-called fight against terrorism, stated:

> "It follows that the logic followed by the authorities who ordered the applicant's pre-trial detention in the present case in order to equate her work as a journalist for certain mass media outlets and her articles and interviews on subjects of public interest debate with the activities of a terrorist organization cannot be considered an acceptable assessment of the facts."[125]

The Court in Işıkırık dismissed the Government's argument that the applicant was convicted on his exercise of the right to freedom of assembly but on his membership in a terrorist organization. The Court stated:

> "In the instant case, the Court considers that there has been an interference with the applicant's exercise of his right to freedom of assembly on account of his conviction for membership of an illegal organisation under Articles 220 § 6 and 314 § 2 of the Criminal Code based on his participation in a funeral and a demonstration."[126]

Citing from the statement of the Commissioner for Human Rights of the Council of Europe, the Court drew attention to the long-standing problem arising from the application of the said Articles of Criminal Code and the Articles of the Anti-terror law:

> *"This means that any allegation of terrorist activity must be established with convincing evidence and beyond any reasonable doubt. Experience has shown time and time again that any deviation from established human rights principles in the fight against terrorism, including in the functioning of the judiciary, ultimately serves the interests of terrorist organisations.*
>
> *In this connection, it is crucial to bear in mind that violence or the threat to use violence is an essential component of an act of terrorism, and that restrictions of human rights in the fight against terrorism 'must be defined as precisely as possible and be necessary and proportionate to the aim pursued'".*[127]

It is important to note that when the Government argued, in Imret that:

> "[S]ince the applicant had been convicted of aiding an illegal organization and not of participation in illegal demonstrations, there had been no interference with his right to freedom of assembly[128]… the applicant had been convicted on the grounds that he had participated in various demonstrations during which he had chanted slogans inciting

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See for the discussions Patricia Egli, "Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms : Towards a More Effective Control Mechanism?", 17 Journal of Transnational Law & Policy (2007), p. 23 et seq.; See also Bill Bowring, "The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR", Goettingen Journal of International Law 2 (2010) 2, p. 600 et seq.

[125] Affaire Ilicak c. Turquie (No 2), (Requête No 1210/17), Arrêt du 14 Décembre 2021 pr. 143.

[126] Case of Işıkırık v. Turkey, (Application no. 41226/09), Judgment of 14 November 2017, pr. 54.

[127] *Case of Imret v. Turkey (no.2), (Application no. 57316/10, Judgment of 10 July 2018, pr.23.*

[128] *Case of Imret v. Turkey (no.2), pr. 36.*

> violence, and had carried banners praising the PKK. The Government considered that the case was not comparable to that of Faruk Temel v. Turkey (no. 16853/05, 1 February 2011) given that the applicant in the latter case had been convicted for reading out a press statement at one public meeting, whereas the applicant in the present case had participated in several demonstrations during which he had shown his support for the PKK and had acted as a member of that organisation. They concluded that the applicant's conviction under Articles 220 § 7 and 314 § 2 of the Criminal Code corresponded to a pressing social need and was necessary in a democratic society[129]";

this Court concluded that:

> "[A]n interference with the exercise of freedom of peaceful assembly doesn't need to amount to an outright ban, whether legal or de facto, but can consist of various other measures taken by the authorities. The term "restrictions" in Article 11/2 must be interpreted as including both measures taken before or during an act of assembly and those, such as punitive measures, taken afterwards… Thus the Court has found in a number of cases that penalties imposed for taking part in a rally amounted to an interference with the right to freedom of assembly…"[130]. In the instant case, the Court considers that there has been an interference with the exercise of the applicant's right to freedom of assembly on account of his conviction for membership of an illegal organisation under Articles 220 § 7 and 314 § 2 of the Criminal Code, based on his participation in the public meetings listed in the indictment and the Diyarbakır Assize Court's judgment of 26 September 2006."[131]

The Court should have followed the same path in the present case as it did in other cases, and should have dismissed the Government's argument that the applicant was not accused of disseminating the defamatory content of the episodes but charged with founding and leading an armed terrorist organization regarding not only the applicant's prolonged detention but also for his initial arrest and detention.

Judge Orland underlines the important facts of the case that the majority in the decision has failed to observe as she stated:

> "The domestic courts indulged in certain suppositions which, in relation to the applicant, were at best hypothetical and required a more rigorous analysis, particularly in view of the extreme seriousness of the accusations. Nothing in the domestic courts' analysis of the communications that had taken place between the applicant and Fetullah Gülen suggested that there was any evidence to suggest that the applicant had been involved in a pernicious plot to assist in overthrowing the government by illegal means. Surely, an accusation of terrorism must be based on more than the dissemination of biased content, even if the latter is of the nature of a propaganda (in which case it might not benefit from the protection of Article 10 of the Convention), right?"[132]

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[129] *Case of Imret v. Turkey (no.2), pr. 38.*
[130] *Case of Imret v. Turkey (no.2), pr. 39.*
[131] *Case of Imret v. Turkey (no.2), pr. 40.*
[132] Affaire Karaca, Dissenting opinion of Judge Schembri Orland, pr. 7.

The domestic authorities charge the applicant with leading an armed terrorist authorization as if the applicant had been a part of a pernicious coup against the government simply on the grounds that he authorized the broadcasting of some episodes as part of a TV series produced based on fiction (as concluded by the Turkish Broadcasting Authority when they were aired). The domestic courts did not deem it necessary to explain the causal link between the allegedly defamatory fictitious episodes' broadcast and leading an armed terrorist organization. Such an absurd position taken by the Turkish authorities seems to be at least partially accepted by the Court.

Today, the Turkish government has been employing the same argument in thousands of cases where the people have been charged with being a member of an armed terrorist organization simply on the grounds of exercising their fundamental rights and freedoms even in the most innocent and peaceful manner. For example, people are convicted of being a member of an armed terrorist organization on the grounds of either downloading a chat application or holding a bank account with a Gulenist affiliated bank operating under the supervision of the authorities like any other bank or being a member of a trade union legally operating under the law of the country. In all these activities, the government showed no illegal activity which would be attributable to the defendants who have but fallen victim to the government's atrocities.[133]

It is important to note that all such activities as holding a bank account with BankAsya or using Bylock chat application allegedly used exclusively by the members of the Gulen movement or being a member a trade union or of an association affiliated with Gulen movement, do not constitute a criminal act to be considered as evidence of a crime of terrorism (of being a member of an armed terrorist organization). The Grand Chamber of the ECHR recently announced one of its landmark judgments in the case of Yüksel Yalçınkaya v. Türkiye, brought by a Turkish national, a public-school teacher who were convicted by the Turkish courts of being a member an armed terrorist organization (being a member of Gulen movement) on the above-cited evidence. The Grand Chamber concluded that the applicant's rights guaranteed under Articles 6, 7, and 11 of the Convention were violated simply because the evidence relied on by the domestic courts constituted of the acts which were not criminal, and the domestic courts refused to provide the applicant with the opportunity to challenge the evidential value of the alleged acts during the course his trial. The most important of all among the violations is that of Article 7 which protects the principle of *nullum crimen nulla poena sine lege* (no crime and punishment without law).[134]

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[133] See for the Stockholm Center for Freedom's Report about the Turkish government's crackdown on Gulenists and Kurdish minority in the country, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://usercontent.one/wp/stockholmcf.org/wp-content/uploads/2023/02/Human-Rights-in-Turkey-Year-in-Review-2022.pdf?media=1685028663
the AST Report on Bank Asya available at: file:///C:/Users/kemal/Downloads/JS7_UPR35_TUR_E_Main.pdf

[134] Yüksel Yalçınkaya v. Türkiye [GC] - 15669/20, Judgment of 26.9.2023; See for the scholarly comments on the Grand Chamber judgement, Emre Turgut, "Article 7 Shockwaves, Bylock and Beyond: Unpacking The Grand Chamber's Yalçınkaya Judgment" Strasbourg Observers, October 13, 2023, available at: https://strasbourgobservers.com/2023/10/13/article-7-shockwaves-bylock-and-beyond-unpacking-the-grand-chambers-yalcinkaya-judgment/ (Retrieved on 26 October 2023); Hakan Kaplankaya, "Yüksel Yalçınkaya v. Türkiye: Systemic Violations of the Nullum Crimen Principle by a Founding Member of the CoE", OpinioJuris, 19 December 2023, available at: https://opiniojuris.org/2023/12/19/yuksel-yalcinkaya-v-turkiye-systemic-violations-of-

In accordance with the Committee of Ministers' Resolution, the Court is invited "to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".[135]

The systemic nature of the violations stemming from the arbitrary interpretation of the provisions of the criminal code and the anti-terror law in politically motivated cases brought against hundreds of thousands of perceived members or the supporters of the Gulen movement proves that the domestic courts' manipulation of evidence in the victims' trials is manifest.

One can draw parallels between the Yüksel Yalçınkaya case and the Hidayet Karaca case, wherein the domestic courts, in both instances, leaned on and relied upon the non-criminal acts of the defendants as the evidence of crime of terrorism in the absence of other relevant evidence to substantiate such a presumption. The Grand Chamber of the Court ferreted out the manipulation of the admission of the evidence by the Turkish courts in Yalçınkaya, and thus concluded that the applicant's exercise of his right to freedom of assembly and association should not solely be admitted as evidence of a crime in the absence of other evidence supporting such inference, while the Chamber of the Court in Karaca failed to reckon such a manipulation by the domestic courts of the evidence when they treated the applicant's exercise of his right to freedom of expression as evidence of crime of terrorism in the absence no relevant evidence to support such an inference.

Thus far, it has been elucidated that the applicant's decision to add the new episodes to the Series was an exercise of his right to freedom of expression just the same as a movie director's addition of some chapters to the movie scenarios she is directing, or as an editor's decision to add new content to the article series published in her magazine.

And now we can turn to the second prong of the Court's reasoning in this part of the question, that is, whether there was an act of intervention by the government with the applicant's right that it could be qualified an interference.

2. *Should the Nature of the Government's Intervention with the Applicant's Right to Freedom of Expression be Qualified as an Interference under Article 10?*

To answer the question, we need to determine the nature of the government's intervening act. In our case, the applicant was not denied a government grant or award because of his alleged conduct; he was subjected to serious criminal proceedings, was arrested, and kept in detention for a long time until he was convicted of founding and leading an armed terrorist organization. Thus, the only remaining question pertains to whether the applicant was deprived of his liberty and security as a consequence of exercising his right to freedom of expression.

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the-nullum-crimen-nulla-poena-sine-lege-principle-in-a-founding-member-of-the-council-of-europe/ (Retrieved on 21 December 2023).

[135] Resolution (2004)3 of the Committee of Ministers on Judgments Revealing An Underlying Systemic Problem, (Adopted by the Committee of Ministers on 12 May 2004,
at its 114th Session), available at 9/12/2023).
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd190 (Retrieved on/

We may apply the basic causation formula to our case to determine whether the applicant was subjected to criminal proceedings through which he was deprived of his liberty because of his acts as part of the exercise of his right to freedom of expression.

In that context the Government asserts that "the purpose of the investigation against the applicant was not related solely to the fact that he had authorized the broadcasting of the television series in question."[136] To determine whether the government's argument has valid grounds, we should answer the question whether his act as having had the impugned episodes broadcast was the cause-in-fact of his arrest and the criminal proceedings launched against him. Then, let's apply the basic "but for" formula to the facts of the case.[137]

Under what conditions should the applicant's arrest be deemed the result of his conduct for the purpose of holding him criminally responsible? Would he have been charged in the case *but for* his alleged act of having authorized the broadcasting of the impugned episodes which allegedly implicated the Tahşiyeciler group in terrorism? What would be the other grounds for which his arrest would have been justified? There is nothing in the case to suggest that anything other than the applicant's authorization of the broadcasting of the three episodes played a role in his arrest and the criminal charges brought against him. That is of course what we formally see in his case. The evidence on which the judicial authorities rested for their justification for the applicant's detention (and later conviction) was cited in the Constitutional Court's decision. Notable, among the evidence are the recordings published on the Movement's website, the dialogues in the impugned TV series, news about the Tahşiyeciler, the phone conversation between the applicant and F. Gulen, and the depositions taken from the scenarists, directors, and producers of the TV series.[138] Like the domestic courts, the ECHR did not look into this evidence to conclude how such evidence makes the applicant part of a legal case brought against the Tahşiyeciler. In fact, Tahşiyeciler was just a pretext for the Government to utilize in the achievement of the real motivation which lies behind the case, that is, Erdogan government's avowed plan to annihilate the Hizmet movement following the December 2013 corruption investigations.

3. Should the Examination of a Complaint under Article 10 depend on the Final Conclusion of the Applicant's Case under Domestic Law?

The Government has neither raised nor has the Court considered the question of whether the complaint for the alleged breach of freedom of expression might be heard before the final conclusion of the case under domestic law. This would be an issue in a case where the applicant alleged that there was a violation of his fair trial rights protected under Article 6 of the Convention but should not be an issue in a free speech case where the Court's chilling effect doctrine warrants the Court to decide if there was a violation of the right to freedom of expression even in a case where the criminal proceedings ended with postponement of the pronouncement of the judgment

[136] Affaire Karaca, pr. 153.
[137] There are myriads of studies about the issue of causation in law. See, for example, Paul K. Ryu, "Causation in Criminal Law", University of Pennsylvania Law Review 26, no. 6 (April 1958): 773-805; Daniel J. Bansal, "Causation in Criminal Law", A Doctoral Thesis Submitted to the University of Birmingham, e-theses repository available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://etheses.bham.ac.uk/id/eprint/11085/1/Bansal2020PhD.pdf
[138] See Affaire Karaca, pr. 67.

or even with no criminal sanction.[139] Henceforth, it is unnecessary for us to examine the question of whether there was any interference with the applicant's right to freedom of expression during the preliminary phases of the criminal proceedings. It can be briefly said that the applicant's arrest and detention for his impugned act is sufficient to conclude that there was an interference under the Court's chilling effect doctrine, warranting the applicant's direct victim status.[140]

4. *Applicant's alleged involvement in a Possibly Organized Slanderous Denunciation: Confusing the Analysis of "Expression" with that of "Conduct"*

Should the applicant's complaint regarding the violation of his right to freedom of expression be dismissed on the grounds that the impugned act was not an expression but was related to his alleged involvement in a *possibly qualified and organized slanderous denunciation?*

We already addressed this issue above when considering the question of whether the applicant's act of having authorized the broadcast could be separable from the content of the episodes insinuating a fictitious theory of conspiracy in which Tahşiyeciler would be utilized by some obscure deep state actors in terrorist activity. We decisively concluded that there is no way to detach the content of the episodes from the applicant's act (of his authorization of the broadcasting them). It would be preposterous to assert that the applicant's act was not an expression because it's involved in a slanderous denunciation. Such an approach confuses the distinction between the normative scope of the right to freedom expression and legitimate grounds for which the right might be restricted.[141]

Suppose that politician (A) calls another politician as corrupt and crook; in response to this statement the other politician (B) writes a novel in which he insinuates that the politician (A) is being involved in terrorist activity. Politician (A) sues (B) his insinuation. Now, suppose that the Court decides that the portrayal by (B) of (A), even in a fictitious way, insinuating him in terrorist activity should not be considered as an exercise of (B)'s right to freedom of expression because it is a gratuitous attack on the personality of (A) without relying on substantiated facts or truth. Such a reasoning obviously confuses the difference between the normative scope of the right and the justification of the restriction imposed on the right under the second paragraph of Article 10. The Court's reasoning may precariously lead to the exclusion of most protected speech from the ambit of the right to freedom of expression without having recourse to any free speech test which would otherwise be applied to the case.

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[139] See about the Court's chilling effect doctrine, Trine Baumbach, "Chilling Effect as a European Court of Human Rights Concept in Media Law Cases", Bergen Journal of Criminal Law & Criminal Justice, May 2018, available at: https://www.researchgate.net/journal/Bergen-Journal-of-Criminal-Law-Criminal-Justice-1894-4183 (Retrieved on 2 June, 2023); see also the Court's Altuğ Taner Akçam v. Türkiye, app. 27520/07, Judgment of 25 October 2011.

[140] Chilling effect doctrine was barrowed from the US Supreme Court first by the German Constitutional Court in 1960's, then, the European Court of Human Rights in its *Donnelly and others v. UK* judgment, dated 5 April 1973. See, for the Court's using of the phrase, Laurent Pech, "The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, The Rule of Law, and Fundamental Rights in the EU", Open Society European Policy Institute (2021), see p. 8 and footnote 11; available at https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect (Retrieved on 10/9/2023).

[141] I elucidated such distinction elsewhere in of my works on the right to freedom of expression. The work, however, is in Turkish language. See Kemal Sahin, İfade Özgürlüğü, Gerekçeleri ve Sınırları [Freedom of Expression, Its Rationale and Limits], Oniki Levha Yayıncılık, 2009, pp. 323-346.

It is thus far clear that the applicant's alleged act falls within the scope of the exercise of his right to freedom of expression and that the applicant's such act was the cause-in-fact of his arrest and the criminal proceedings brought against him. As we can decisively conclude that there was an interference with the applicant's right to freedom of expression, we should now move to the next step where we can review whether the interference was prescribed by law.

B. Whether the interference was prescribed by law

As regards the issue of whether the interference was prescribed by law, the Court examines the quality of law which has been applied to the applicant's case. For the law to pass this test, it must be formulated with sufficient precision to enable the person to regulate her conduct. In that regard, the law must be foreseeable and accessible to it by the individuals. Even when legal provisions are clear and foreseeable, the Court examines both their interpretation and application in concrete cases by judicial authorities. If the authorities interpret and apply the law without sufficient precision, leading to arbitrary consequences, the Court should find the law lacking the necessary qualification to satisfy the Convention's requirements under Article.[142]

1. The Court's Twisted Reasoning and Distortion of its own Precedent as to the Legal Grounds of the Applicant's Prosecution and Detention

The Court appears to be aware of the possible critiques which may be directed against its conclusion that there was no interference with the applicant's right to freedom of expression in the case when it stated:

> "The Court is not unaware of the applicant's hypothesis that the broadcast in a television series of two episodes portraying the Tahşiyeciler as terrorists, taken in isolation from all the acts of which the applicant was accused at the time of his arrest, may be regarded as an act falling within the scope of Article 10 of the Convention."[143]…"Assuming that this hypothesis is accepted, the Court recalls that it has already found that the arrest was in accordance with the law."[144]

Therefore, the Court bypassed the question of whether the interference was prescribed by law, and moved on to the consideration of the issue of whether the Government pursued a legitimate aim. Had the Court answered the question of whether the interference was prescribed by law, the Court would have to consider the quality of the law under which the interference was prescribed.[145] This

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[142] Guide on Article 10 of the European Convention on Human Rights, p. 20 et Seq.; See also recent judgements of the Court: Selahattin Demirtaş v. Türkiye; Yüksel Yalçınkaya v. Türkiye; Case of Rustamzade v. Azerbaijan (No. 2), *(Application No.* 22323/16*), Judgment of 23 February 2023.* In the latter two cases the Court concluded that although the law was formulated with sufficient precision to qualify a law within the meaning of the Convention, the interpretation and the practice of the law by the judicial authorities was so arbitrary that it couldn't be considered to be foreseeable and accessible by the individuals.

[143] Affaire Karaca, pr. 155.

[144] Affaire Karaca, pr. 156.

[145] "The expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects." The applicant "must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." This is not just about the wording of the provisions of the law but also about how the law is interpreted by the authorities in

would be a hard task for the Court to perform because the legal instrument utilized by the Turkish government was not the one the Court would find appropriate during its examination.

With a total disregard and apparent eagerness, the Court bypassed this issue which would otherwise have to consider the improper application of the anti-terror law to a case where the defendant's act might only be considered for a typical defamation charge which had also been dismissed by the Turkish Broadcasting Authority. The said episodes did not give rise to the fabrication of evidence against the Tahşiyeciler group, nor was utilized by the authorities as evidence at any stage of the criminal proceedings against the Group.[146]

The Court overlooked the fact that the applicant was accused of founding and leading an armed terrorist organization for his alleged act of having authorized the broadcasting of the episodes on the TV channel he was directing. Besides that, the peace judge had relied on the fact that the applicant allowed the TV channel to broadcast news with content that was challenging and criticizing the government's decision to close down and ban the further operation of preparatory schools to cut off the financial and human resources of the Gulenist community. To the peace judge, the applicant had made such decisions pursuant to his consultation with F. Gulen, the leader of the Community.

Therefore, it should be concluded that the applicant was accused of, and charged with, leading an armed terrorist organization based on the evidence directly related to the exercise of his right to freedom of expression. And it is not possible to conclude that the applicant was accused of founding and leading the said "criminal organization" without relying on his authorization to broadcast the episodes in question.

To avoid facing its firmly established conclusion that the practice of Articles 314, 220 of the Turkish penal code and the provisions of the Anti-Terror law (no. 3713) by the Turkish judiciary lacks the quality of law required by the Convention because the laws in question are being interpreted by the Turkish judiciary so arbitrarily that they should be qualified as "law" within the meaning of the Convention , the Court had to bypass the issue. There is no need here to reconsider the arbitrary application of such laws by the judicial authorities in a way to suppress any dissent in the country.

As to the foreseeability requirement, in the case of Işıkırık v. Turkey, the Court found a violation of Article 11 of the Convention on the ground that the applicant's criminal conviction under Articles 220/6 and 314/2 of the Criminal Code had not been prescribed by law. In that case the applicant had been prosecuted and subjected to criminal punishment because of his participation in two public meetings –a funeral and a demonstration- and his conduct therein. The domestic

practice. Case of Satakunnan Markkinapörssi Oy and Satamedia Oy V. Finland, (Application no. 931/13), Judgment of 27 June 2017. pr. 142-154.

[146] There was no basis that the airing of the episodes could be considered to trigger a criminal investigation against the applicant under Article 267 (Offences Against the Judicial Bodies or Court), Article 271 (fabricating an offence), Article 277 (Attempting to Influence Persons Charged with a Judicial Duty, An Expert Witness or Witness). There is nothing in the case file demonstrating that the judicial authorities or the officers of the police department did rely on the episodes in their investigations into the conduct of the Tahşiyeciler group nor is any indication that the story presented in the episodes had any evidentiary value.

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courts held that the applicant had acted on behalf of the PKK and thus should be convicted of being a member of that organisation pursuant to Article 220/6 of the Criminal Code. The Court stated:

> *"In the light of the aforementioned considerations, the Court concludes that Article 220 § 6 of the Criminal Code was not "foreseeable" in its application since it did not afford the applicant the legal protection against arbitrary interference with his right under Article 11 of the Convention."*[147]

The Court's following remarks, in Imret Case, are of particular importance to the applicant's case:

> *"The mere fact of being present at ten demonstrations during a period of one year, allegedly organised in line with the PKK's strategies, and of acting in a manner and expressing opinions which the domestic courts deemed to be in favour of the leader of that organisation, were considered by those courts to be sufficient to conclude that the applicant, a local politician, had aided the PKK and could therefore be punished as an actual member. The Court notes in contrast that when Article 314 of the Criminal Code is applied alone, the domestic courts must have regard to the "diversity and intensity" of the acts of the accused along with their "continuity" (see paragraph 100 of the Venice Commission's Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey in paragraph 22 above). However, when the same Article was applied in connection with Article 220 § 7 in the applicant's case, he was convicted of membership of an armed organisation merely on account of the continuity of his acts, namely his attendance at ten public meetings, which, according to the first instance court, had been held in line with the strategies of the PKK, and making speeches. Hence, the Court finds that when applied in connection with Article 220 § 7, the criteria for a conviction under Article 314 § 2 of the Criminal Code were extensively applied to the detriment of the applicant."*[148]

The Court went on to look into the facts of the case and the Turkish judicial authorities' interpretation of Articles 314 and 220 of the Penal Code to conclude whether the facts of case warrant the application of the said articles to the applicant's case. In that regard, the Court stated:

> *"Similarly, when Article 314 is applied alone, the courts assess whether an accused person has committed offences within the "hierarchical structure" of an armed organisation. On the other hand, when the same Article was applied with reference to Article 220 § 7 in the applicant's case, the question of whether he had acted within a hierarchy became irrelevant and he was convicted of membership of an armed organisation simply because he was considered to have aided the PKK. In sum, as the applicant's case demonstrates, the array of acts that potentially constitute a basis for the application of a severe criminal sanction in the form of imprisonment, under Article 220 § 7 of the Criminal Code, is so vast that the wording of the provision, including its extensive interpretation by the domestic courts, does*

[147] Case of Işıkırık v. Turkey, pr. 70.
[148] *Case of Imret v. Turkey (no.2), pr. 55.*

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> *not afford a sufficient measure of protection against arbitrary interference by the public authorities."*[149]

The Court in Ilicak case concluded "that the interference with the applicant's exercise of the rights and freedoms guaranteed by Article 10 § 1 of the Convention cannot be justified under Article 10 § 2 since it was not prescribed by law"[150] because the applicant was accused of, and charged with, being a member of the media branch of the terrorist organization [Gulen/Hizmet community], who acted for a purpose of the organization, is one of the main perpetrators of the crime of attempting to overthrow the constitutional order."[151] The Court paid no tribute to the Turkish authorities' arguments that the applicant was not charged on her lawful journalistic activities but on her link to the terrorist organization. The Court easily riddled out that the nature of the evidence utilized by the Turkish authorities to link her to "the armed terrorist organization" consisted of what she had performed within the framework of her journalistic activity that should be regarded as the exercise of her right to freedom of expression.

Similarly, the Court in Deniz Yücel case dismissed the Government's arguments that the applicant was not charged for his journalistic activities but for his acts of terrorism. According to the Government, Mr. Yücel was arrested and subsequently detained on, inter alia, making the propaganda of FETO/PDY as he argued in one of his articles that there is no credible evidence that the failed coup attempt was orchestrated by Gulenists. It concluded that the applicant's right to freedom of expression was violated.[152]

In the present case the Court disregarded its own precedent and allowed the Turkish authorities' manipulation and distortion of the facts of case. The Court seems to yield to the Government's assertion that the applicant was not prosecuted and detained based solely on his authorization to broadcast the impugned episodes. On the other hand, the Court, however, did not accept the Government's argument that the applicant's arrest and prolonged detention could be justified on the presumption that "he is leading an armed terrorist organization", namely the Gulen community. The Court seems to compromise between the applicant's right to freedom of expression and the Government's argument that the applicant's detention could be justified on his link to the Gulen/Hizmet community. To facilitate that compromise, the Court limited its examination to the facts of the alleged conspiracy to commit the crime of denunciation against the Tahşiyeciler group, and the applicant's involvement in the conspiracy.

In contrast to the Government's assertions, the Court has never adopted an approach that simply being a member of the Gulen community would be sufficient for the persons' detention or conviction under Article 220 or 314 of the Turkish Penal Code in conjunction with the provisions of anti-terror law (No. 3713). However, the Court in the present case justified the (initial) arrest of a journalist, involving politically motivated accusations, for his only act as an exercise of his right to freedom of expression. By finding its own ground to justify the applicant's initial arrest, the Court set aside the assessment of the Government's argument that the applicant was indeed

[149] *Case of Imret v. Turkey (no.2), pr. 56.*
[150] Ilicak c. Turquie (No 2), pr. 201.
[151] Ilicak c. Turquie (No 2), pr. 84.
[152] Affaire İlker Deniz Yücel c. Turquie, *(Requête No* 27684/17*)*, Arrêt du 25 janvier 2022.

prosecuted in accordance with his links to "an armed terrorist organization", the Gulen Community. Such a compromise led to the sacrifice of the applicant's right to freedom of expression in exchange for relatively saving him from the trumped-up terrorism charges which will also be reviewed by the Court some time in future as the applicant already lodged another application with the Court.

However, the Court's stance with the Government's distorted version of the facts of the case was much firmer and clearer in another politically motivated case Kavala v. Türkiye, which it stated:

> "The Court notes, in particular, that in the bill of indictment the prosecutor's office described the Gezi events as the result of action by a group of individuals who were influential in civil society and who had acted behind the scenes. According to the prosecutor's office, this group of individuals formed "a *sui generis* structure" and was led in Turkey by the applicant, who was himself supported by foreign actors, and specifically an American businessman. Against this background the prosecution accused the applicant of leading this criminal association, by exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government. This approach on the part of the prosecutor's office led it to list several acts allegedly committed by this "*sui generis* structure" and to attach them, in an unverifiable manner, to a criminal aim, namely an attempt to overthrow the Government through force and violence. However, the facts imputed to the applicant, which were used as the basis for the questions put to him in the interview and with which he was subsequently charged by the prosecutor's office, are legal activities, isolated acts which, at first sight, are unrelated to each other, or activities which were clearly related to the exercise of a Convention right. In any event, they were non-violent activities."[153]

The Court should have seen the Government's manipulation of facts in Karaca case especially given the background of the case required the Court to be more vigilant about the Government's position with the applicant.

We might expect that the Court, in its unwavering commitment to justice, shall not tolerate the flagrant misuse of anti-terror laws by the Turkish government. The number of criminal proceedings being initiated against innocent individuals based on their perceived membership in Gulenist community under these provisions is dramatically increasing and nearing one million today.[154] The UN Working Group on Arbitrary Detention (WGAD) stated in of its opinions concerning the application of a Turkish national that "[t]he present case is the latest in a series of cases concerning individuals with alleged links to the Hizmet movement that has come before the Working Group during the past three years. In all these cases, the Working Group has found that the detention of the concerned individuals was arbitrary, and it appears that a pattern is emerging whereby those with alleged links to the Hizmet movement are being targeted on the basis of their political or other

[153] Kavala v. Türkiye, (*(Application no.* 28749/18*),* Judgment of 10 December 2019, pr. 145-146.
[154] See for the statement of the former Interior Ministry, Süleyman Soylu available at: https://www.icisleri.gov.tr/bakanimiz-sn-suleyman-soylunun-15-temmuz-mesaji

opinion."[155] The Grand Chamber of the Court has ruled in its landmark case Yalçınkaya that the applicant was charged with, and convicted of, crime of terrorism on his lawful (non-criminal acts) and more than eight-thousand cases involving the same facts are pending before it, and that more than one-hundred thousand cases of the similar sort potentially will be brought from Turkey before the court.[156]

As I already underscored, it is imperative to reiterate that such practice has unequivocally transcended the threshold of crimes against humanity, as duly recognized and documented by the esteemed UN Body (WGAD).[157]

2. *A possible Defamation Charge would not Permit the Turkish Authorities to Arrest, and Keep the Applicant behind Bars, for nine years with no Prospect of Release*

If the Court had examined the issue, it would have to conclude that the relevant provisions of the Code of Criminal Procedure do not warrant the judicial authority to order the applicant's detention in prison. The law that might be applicable to the case was not the anti-terror law in conjunction with the said articles of the Penal Code (more specifically, "leading an armed terrorist organization") but the law of defamation which would not warrant the applicant's detention in prison. If the Court had examined the law, it would have to decide that the relevant provisions both under the criminal code and the anti-terror law arbitrarily applied to the case, and there was no reasonable suspicion that the applicant might have committed a crime of terrorism by having authorized the airing of the impugned TV series episodes. It is obvious that the interference was not prescribed by law because the law was applied to the applicant's case with absolute arbitrariness. The Court in Ilıcak case stated:

> "[The Court] also noted that, under Article 100 of the Turkish Code of Criminal Procedure, a person may be remanded in custody only where there are factual grounds for strong suspicion that he or she has committed an offence; in this respect, it considered that the absence of reasonable grounds should have implied, a fortiori, the absence of strong suspicion when the national authorities were asked to assess the lawfulness of the detention."[158]

The Court's formulation can only be read to infer that the applicant's arrest and subsequent detention must be based on the "strong suspicion" that the applicant might have committed the crime of which he was suspected. In the present case, despite the Court's elusive reasoning, the applicant was arrested on leading an armed terrorist organization not on his possible involvement in a defamation scheme. In this context, the Judge Orland's dissenting opinion is of particular importance:

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[155] The UN Working Group on Arbitrary Detention, Opinion No. 74/2020 concerning Nermin Yasar (Turkey), 28 January 2021, pr. 79; the opinion of the WGAD can be reached at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/021/83/PDF/G2102183.pdf?OpenElement (Retrieved on September 21, 2023).
[156] Affaire Karaca, pr. 413-418.
[157] Visit the website of the UN WGAD for its opinions about Turkiye, available at: https://wgad-opinions.ohchr.org/search/results (Last visit on January 3, 2024).
[158] Affaire Ilicak c. Turquie (No 2), (Requête No 1210/17), Arrêt du 14 Décembre 2021 pr. 199.

> "The domestic court's reasoning becomes even more superficial when one takes into account the fact that terrorism is one of the so-called "categorized" offences which, under domestic law, justify a presumption in favor of detention. It goes without saying that a charge of slanderous denunciation is not on the same level as a charge of terrorism, and if it had been the only charge brought, then the question of the accused's continued pre-trial detention would have been examined in the light of different criteria, based on a totally different context. For this reason, the failure to analyze the broader context of a terrorism-related approach and its applicability, even on a prima facie basis, at the time of the applicant's detention and each of his subsequent applications for provisional release may have undermined the guarantee of the rights protected by Article 5 § 1 c) of the Convention."[159]

In addition to Judge Orland's observations in her dissent, it is crucial to note that, were it not for the terrorism charges, the pertinent provisions of the Turkish Criminal Procedure would not justify the applicant's arrest and subsequent detention. Judge Orland placed considerable emphasis on an essential matter—the applicant's astute assertion regarding the baseless accusation of terrorism that had been unjustly leveled against him. She profoundly acknowledged that "[t]errorism served as the context and motivation for the coordinated crackdown on [the applicant] and other members of the media sector. This factor should therefore not have been dissociated from the Court's examination. In fact, the "overqualification" of the disputed facts was confirmed by the fact that the applicant was ultimately prosecuted precisely for terrorism;[160]" and not for the alleged slanderous denunciation.

Therefore, the applicant was not arrested and detained on the grounds of an alleged slanderous denunciation scheme, as the Court has opted to rely on. Instead, his arrest and continued detention (and then his conviction) have all been based on the founding and leading an armed terrorist organization although the content of evidence has not changed in both scenarios.

Finally, it becomes clear that the domestic courts' interpretation of the anti-terror laws in the applicant's case cannot be said to be foreseeable and devoid of arbitrariness, and thus cannot be qualified as law within the meaning of the Convention.

C. Whether the Government Pursued a Legitimate Aim

The Convention organs generally accept the purpose apparent in the decisions of the domestic authorities and are reluctant to dig deeper into the case, for example, to find out whether there was also an ulterior purpose other than stated by, or appeared in, the decisions of the national authorities.[161] However, as we discussed above in detail, the Court must be vigilant to the practices of the authoritarian governments, especially against their opponents, especially the issue comes before the Court "*in sheep's clothing*".[162] In other words, the Court must examine the background

[159] Affaire Karaca, Dissenting opinion of Judge Schembri Orland, pr. 9.
[160] Id., pr. 11.
[161] Berend Hovius, "Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of The Charter", p. 239 et seq.
[162] US Supreme Court Justice Scalia in his dissenting opinion wrote the following words: " *"Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to*

of the case to determine whether the applicant was specifically targeted by the government, especially instrumentalizing the judiciary to punish and silence its opponents. The Court must also examine the facts of the case in terms of how the applicant's case was handled by the government, such as the way he was arrested, the way the criminal proceedings were brought against him, etc.[163] If the Court determines that the case is such sort as the facts discloses the Government is potentially abusing the criminal proceedings to punish its opponents, the presumption of *good faith* in the government's actions should to be shifted to the presumption of *bad faith* in the case.[164]

The Karaca case, as we discussed above, presents a purely political case framed by the government to persecute its opponents as part of a larger plan. Regrettably, the Court failed to take the background of the case to see the multiple purposes in the case it has arrived at the following conclusion:

> "It further considers that this measure can be said to have pursued the aim of protecting the rights of others (in particular the presumption of innocence of the Tahşiyeciler) and the defence of order and the prevention of crime (in particular the prevention of the use of judicial bodies as a tool of repression against adversaries)."[165]

With this conclusion, the Court appears to have bought the story presented by the Government which asserted that the criminal proceedings initiated against the Tahşiyeciler were a concerted action framed by the Gulenists and the applicant's act of having authorized the broadcasting of the episodes was part of such a broad plan orchestrated by the Gulenists against their opponents. The Court's reasoning for the determination of whether the Government had pursued a legitimate aim within the meaning of the second paragraph of Article 10 has two folds.

First, the applicant's detention and the subsequent criminal proceedings brought against him were all aimed to protect the rights of others, in particular, to protect the presumption of innocence of the Tahşiyeciler. Second, the Government's interference with the applicant's right to freedom of expression was aimed at the "prevention of crime (in particular the prevention of the use of judicial bodies as a tool of repression against adversaries)." As both grounds meet at the same point, I do not need to make a separate analysis of the Court's reasoning.

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effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." Scalia's words are cited from the US Supreme Court decision, Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting), by J. Khan in the context of his 18 Analysis. See Jeffrey Kahn, "the Anti-Deference Device: Article 18 of the European Convention on Human Rights", Journal of Transnational Law & Policy, Vol. 31, (2022), p. 117, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4256813 (Retrieved on January 4, 2024).

[163] See, for a critical analysis of the Court's reluctance to examine the political motive under Article 18, Egidijus Kūris, "Article 18 of the European Convention on Human Rights: The (In)consistency of The Strasbourg Court's Approach", Slovo of the National School of Judges of Ukraine: The Professional National Scientific and Practical Legal Magazine, (2027), available at https://slovo.nsj.gov.ua/index.php/en/archive-of-rooms1/2017-1/2-19-2017/15-arh-2017-en/248-article-18-of-the-european-human-rights-convention-the-approach-of-the-strasbourg-court-p3 (Retrieved January 1, 2024).

[164] See, for an historical analysis of good faith and bad faith in the context of both the purpose and the interpretation of Article 18, Kahn, p. 118 et seq.

[165] Affaire Karaca, pr. 156.

https://doi.org/10.5281/zenodo.21384325

It appears that the Court intentionally disregards the background of the case and the applicant's arguments on a priori grounds and welcomes the Government's arguments as absolute truth. The Court disregards the fact that the applicant's impugned act was his authorization of the broadcasting of the three episodes, and nothing more. There was no evidence to suggest that the applicant's act was part of the alleged judicial conspiracy against the Tahşiyeciler.

Even tough the Court was to accept that the aim of the criminal proceedings was to protect the rights of the Tahşiyeciler, this recognition should not have barred the Court from digging deeper into the question of whether there was a plurality of purposes which were clearly raised by the applicant in the case. As we already considered this part under our Article 18 analysis above, we will here only examine the existence of ulterior purpose, which appears more dominant in the case, regarding the arguments advanced by the applicant.

The applicant asserted that the television series on which the peace judge relied in his arrest/detention order had been produced and filmed by audiovisual companies outside the Samanyolu group. They explained that the offending episodes of the series had been shown to viewers in April 2009, well before the telephone conversations between the applicant and Fetullah Gülen and the authorization that the latter had allegedly given personally. The applicant's arguments were not refuted or challenged during the criminal proceedings against him.[166]

There was no evidence that the broadcasting of the three episodes played any role in the criminal proceedings against the group.

There was contrary evidence presented by the applicant's lawyer that the investigation had been started at least six months before Gulen's speech about the Tahşiyeciler.[167] The conviction of the leader and some members of the Tahşiyeciler was not based on the alleged conspiracy theory. The Tahşiyeciler was known for their extremist ideology, and their hostility to the secular government as cited in the Court's decision.

Following the December corruption cases, the Government formed alliances with individuals, groups, communities who harbored hostility towards Gulenist community. Almost every individual or group who were subjected to criminal proceedings before the corruption cases of December 2013 alleged that they were the victims of a conspiracy framed by the Gulenists.

Moreover, it is not our task here, nor was the applicant's in the case, to determine whether the criminal proceedings brought against Tahşiyeciler were based on sufficient evidence proving that they might have committed the alleged crime. The applicant was neither the prosecutor nor the judge of the criminal case initiated against the Tahşiyeciler. His only connection to the case was that he authorized the broadcasting of impugned episodes and nothing more.

Furthermore, given that the leader and some members of the group were convicted on concrete evidence suggesting that they might have committed the alleged crimes, the applicant's act of authorization to broadcast some episodes insinuating that the Group were involved in terrorist activities could not be treated baseless or gratuitous attack on the reputations of the Tahşiyeciler.

[166] Affaire Karaca, pr. 34.
[167] Affaire Karaca, pr. 33.

The Court of Cassation's decision to quash the trial court's judgement convicting the Tahşiyeciler on procedural grounds came more than five years after the broadcasting of episodes.

It is not possible to conclude that the evidence used against the Tahşiyeciler was framed against them. The information cited by the Court from the decision of the peace judgeship shows that there were hand grenades and some other ammunition obtained from the defendants. The Turkish Courts' reasoning does not convince an objective reader that the case was a frame against the group. Again, the applicant should not have been expected to answer all these questions regarding the possible flaws in the criminal proceedings against the group as he was neither the prosecutor nor the judge of the case. Such questions should be answered by the officers, prosecutors, and the judges who were involved in the criminal case against the Tahşiyeciler.

Therefore, the Court was wrong to assert that "in the present case that it is clear from the findings of the judicial authorities involved in the applicant's arrest that the television broadcast in question was not based on any precise facts, did not contain any reliable and accurate information and was apparently aimed solely at gratuitously attacking an opposing religious group by means of accusations of terrorism." The omission of the court to examine the Broadcasting Authority's decision on the impugned episodes is perplexing and raises questions regarding the rationale behind such avoidance. Hence, as the applicant was not included to the cases of the police officers who conducted the 17/25 December corruption investigations against the members of the government on the ground that he was part of defamation scheme but that his position facilitated the designation of the Hizmet movement as an armed terrorist organization by the government-controlled judiciary. Hence, the aim pursued by the authorities is of purely political nature serving solely the government's avowed political objectives.

D. Whether the Interference was Necessary in a Democratic Society

1. General Observations

Having found (1) that there was an interference with the applicant's right to freedom of expression, (2) that the interference was not prescribed by law, and (3) that the government did not pursue a legitimate aim, one may need not to consider whether the restriction was necessary in a democratic society to conclude that there has been a violation of the applicant's right to freedom of expression. In order for the interference to be justified under the second paragraph of Article 10 of the Convention, the government's interference with the right shall pass the test under each heading.[168] The last prong of the test, whether the interference was necessary in a democratic society, forms the stricter part of the test. Therefore, an interference that passes the first three parts of the test would still need to pass the last part of the test. The Court's well-established precedent regards the value of the right to freedom of expression as the basis of a democratic society.[169]

[168] The Court may not deem it necessary to examine the other parts of the test if it decided for example, that the interference in question was not prescribed by law. See Affaire Baydemir c. Türkiye, *(Requête No* 23445/18*),* Arrêt du 13 juin 2023, pr. 55.

[169] According to the Court, "…even assuming that the interference was in accordance with the law and pursued the legitimate aims of "the prevention of disorder" and "the protection of the rights of others", it [may] not "necessary in a democratic society". See Case of Glukhin v. Russia, *(Application no.* 11519/20*), Judgment of 4 July 2023* pr. 55. The Convention rights under Articles have common features regarding the practice of the rights and their

The Court, accordingly, set out the following principles to be observed in every free speech adjudication[170]:

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."[171]
>
> "[T]he protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the contents of information which is collected and/or

limitations. See for a general and concise information Council of Europe website available at: https://www.coe.int/en/web/echr-toolkit/les-articles-8-a-11 (Retrieved on 11 July 2023); See for a comprehensive information about the Court's jurisprudence under Article 10 of the Convention, Guide on Article 10 of the European Convention on Human Rights, Updated on 31 August 2022, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://rm.coe.int/guide-on-article-10-freedom-of-expression-eng/native/1680ad61d6 (Retrieved on 11 July 2023).

[170] See for some of the Court's landmark decisions under Article 10: Case of Handyside v. The United Kingdom, *(Application no.* 5493/72), Judgment of 7 December 1976 ; Case of Svetova And Others v. Russia (Application No. 54714/17), Judgment of 24 January 2023; Case of Standard Verlagsgesellschaft Mbh v. Austria (No. 3), *(Application No.* 39378/15*),* Judgment of 7 December 2021; Castells v. Spain, *(Application no. 11798/85), Judgment of 23 April 1992; Case of Goodwin v. The United Kingdom, (Application No.* 17488/90*), Judgment Of 27 March 1996; Case of Incal v. Turkey, (41/1997/825/1031), Judgment of 9 June 1998;* Case of Bédat v. Switzerland, (Application No. 56925/08), Judgment of 29 March 2016;

[171] Case of Bédat v. Switzerland, pr. 48.

> disseminated by journalistic means. In its judgment in *Pentikäinen*, the Court pointed out that the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly".[172]

The Court did not follow these principles in the present case and yielded to the Government's observations about the facts of the case. Given the disparity between the Court's conclusion and ours, it is imperative that we undertake a distinct and thorough analysis of this aspect of the case as well. To convince the reader that the criminal proceedings which led to the applicant's arrest and subsequent detention might be justified under Article 5 § 1 (c) of the Convention, the Court states:

> "In light of these considerations, […] the criminal file contained information capable of convincing an objective observer that the applicant may have committed at least some of the offences for which he was being prosecuted. It considers that it must therefore be concluded that the applicant can be regarded as having been arrested on the basis of reasonable grounds for suspecting him of having committed a criminal offence, within the meaning of Article 5 § 1 (c) of the Convention."[173]

Since the applicant's arrest and the criminal proceedings that were brought against him is based on his act of authorization to broadcast the episodes in question, it is not necessary to distinguish between the analysis of his right to liberty and of his right to freedom of expression because the former is the sanction imposed on the applicant for the exercise of the latter. The Court made this point clear in its Ilıcak decision by stating that:

> "[T]he legality requirements laid down in Articles 5 and 10 of the Convention are both aimed at protecting the individual against arbitrariness. It follows that a detention measure which is not lawful, provided that it constitutes an interference with one of the freedoms guaranteed by the Convention, cannot in principle be regarded as a restriction provided for by national law on that freedom".[174]

In the similar vein the Court emphasized the connection between Article 5 and Article 10 of the Convention with following reasoning:

> "In the present case, the applicant's arrest and detention constituted an interference with the exercise of her rights under Article 10 of the Convention. The Court has already found that the applicant's detention was not based on plausible grounds for suspecting that she had committed an offence within the meaning of Article 5 § 1 (c) of the Convention, and that there had therefore been a violation of her right to liberty and security under Article 5 § 1."[175]

The basic principles of legal logic require us to hold that the justification of the person's deprivation of liberty on the grounds of his exercise of right to freedom of expression cannot be disassociated from the justification of the interference with the person's right to freedom of

[172] Id., pr. 50.
[173] Affaire Karaca, pr. 103.
[174] Ilicak c. Turquie (No 2), pr. 200.
[175] Id., pr. 199.

expression. Therefore, it is vital to determine the grounds of the applicant's detention whether it relates to the exercise of his right to freedom of expression.

The Court does not identify which acts of the applicant led him to being a suspect in the case and which offences the applicant might have committed. However, the Court acknowledges the certain events and acts through which the applicant became a suspect for some of the alleged crimes; but probably not the crimes with which he was ultimately charged by the Turkish authorities. So, we can begin with the first incident, the applicant's conversation with F. Gulen, that the Court found relevant to his case.

2. *Relevance of the Applicant's Phone Conversation with Fethullah Gulen to His Case*

The Court seems to be indifferent to any debate on the matter of whether the telephonic conversation between the applicant and F. Gulen was indeed excluded from the case file because it had been obtained unlawfully. Even though such an exclusion is necessary to comply with the domestic law, I deem it unnecessary for our purposes to enact such an exclusion; instead, I will urge the reader to take steps with me to scrutinize the content of F. Gülen's speech published on the Movement's website Herkul.org. at the material time. The Court, quoting from the decision of the peace judge, cites the following excerpt from F. Gulen's speech:

"İrtica paranoyası" ("paranoia about fundamentalism"), where he makes it clear "that they'll be able to invent something that they'll call Tahşiye (...) they'll call them Tahşiyeciler, then they'll give them Kalashnikovs [fully automatic guns], *they'll call people, who don't even have a pin [needle], terrorists (...)* these are decisions made by certain people in the neither-fish-nor-flesh-councils (...)"[176] [emphasis added].

Gülen, in his speech, "explained the meanings, origins, and areas of use of the concepts of religious reaction and apostate in response to a question. He also stated that a group had been provoking society to divide and fragment it from the beginning…" drawing "attention to this point, emphasizing the need to beware of the provocations of hidden and dark forces… emphasize[d] human dignity and honor and list[ed] the parameters for living together in peace. He [did] not make a direct accusation, [did] not refer to a specific act, but talk[ed] about possible plans and dangers."[177]

Gülen's speech bears no semblance of adverse imputations toward the Tahşiyeciler group, nor of any trace of hate speech. Instead, he articulates cautionary words, foreseeing the potential entrapment of these innocent individuals in the nefarious utilization in the hands of malicious actors.

Then, how did the Turkish judicial authorities present this conversation as part of a conspiracy against the Tahşiyeciler? And how did the Court (ECtHR) take such evidence suggesting that the applicant might have been part of the conspiracy against the group because of his conversation with F. Gulen, and his authorization to broadcast three episodes as part of a TV series? Let's start with the first one.

As the Turkish government's sole perspective following the December 2013 corruption cases was to implicate the whole Community in a criminal activity that it might qualify the Community as an armed terrorist organization, it desperately needed a case where the F. Gulen, the leader of the

[176] Affaire Karaca, pr. 26.
[177] Talip Aydin, "The ECtHR should take action", Politurco (July 11, 2023) available at: https://politurco.com/the-ecthr-should-take-action.html

Community, had taken a part. It did not matter for the Government to question whether a TV series episode would be suitable to call the Community whose avowed principles and ideology run counter to violence of any kind; a community, whose leader and members have been harshly criticized by other religious groups in Turkey for being friendly to other beliefs and for interpreting the Islamic jihad (holy war concept) as every soul's inner struggle with his/her own self not as a real war against the enemies of Islam.[178] There is no need to repeat the instruments of Erdogan's relentless war against the Community. One may consider that the most effective instrument utilized against the perceived members, or the sympathizers of the Community is the Turkish judiciary. The persons have been faced preposterous accusations against which no lawyer can prepare a defense because these persons are subjected to bogus terrorism charges and convicted through sham trials for their purely innocent acts.[179]

The following questions should have been asked by the European Court to determine whether the applicant's arrest and detention might be justified on the existence of reasonable suspicion that he might have committed the crimes (founding and leading an armed terrorist organization) of which he was accused.

First, what was the relevance of F. Gulen's speech to the applicant's (act of) authorization to broadcast the episodes? As F. Gulen warned that some obscure actors would implicate the innocent members of the Tahşiyeciler group in terrorist activity, how would he want the authorities to launch criminal proceedings against the group? Is there any evidence suggesting that the authorities acted on Gulen's speech? Within this line of inquiry, it may be argued, to the contrary, that Gulen's speech could not be interpreted to support any criminal proceedings targeting the "innocent" members of the Tahşiyeciler group. His speech was nothing more than a clear warning against such accusations that would target the group.[180]

So, is there any evidence suggesting that the broadcasting had played any role in the authorities' decision to launch the criminal proceedings against the group? Furthermore, is there any evidence that the applicant's decision to authorize the broadcasting of the episodes had any connection with the authorities' decision to launch the criminal investigation?

If this is not fiction but a real case, there appears no evidence to support either conclusion in affirmative too.

Therefore, the Turkish judicial authorities' grounds of accusations dramatically differ from those of the European Court's justification for the applicant's initial arrest and detention. The Turkish authorities' unique grounds of criminal proceedings against the applicant consist of founding and leading an armed terrorist organization while the European Court's justification for the criminal

[178] F. Gulen describe Islamic concept Jihad as two fold: "Ataining internal perfection is the *greater jihad*; helping others attain it is the *lesser jihad*." See "Lesser and greater jihad", available at: https://www.gulenmovement.com/lesser-greater-jihad.html

[179] UN Special Raporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey conducted an official visit to Turkey after the botched coup attempt. The rapporteur took attention to such absurd charges with the following words: "Prosecutors regularly accuse individuals of unprovable – and impossible to defend against – allegations". For the Report see the UN digital library available at: https://www.ohchr.org/en/documents/country-reports/ahrc3522add3-report-special-rapporteur-promotion-and-protection-right

[180] This point was clearly highlighted by the applicant's lawyers in all the proceedings before the domestic courts. The ECtHR also cites that point as part of the facts of the case. See Affaire Karaca, pr. 33.

proceedings against the applicant is based on his involvement in the "slanderous denunciation" of the Tahşiyeciler group.

However, both the Turkish judicial authorities and the European Court have relied on the same evidence presented in the case file. As the only evidence on which the government implicated the applicant in the "slanderous denunciation" was his authorization to broadcast the impugned episodes, we can turn to the examination of the content of the episodes, which portrayed the Tahşiyeciler group as terrorists, to conclude whether the applicant's arrest and subsequent detention in prison could be justified and was necessary in a democratic society.

3 *Relevant Decision of the Turkish Broadcasting Authority (RTÜK) on the Question of whether the Content of the Impugned Episodes were Defamatory and Deserves any Sanction against the TV Channel*

It must be noted as an important fact of the case that the Turkish Broadcasting Authority had previously examined the television series in question and had given its opinion on them by a decision of March 27, 2014, in which it had found that the events and characters in the said series were fictional and that its broadcasting in no way infringed the provisions of Law no. 6112 on Radio and Television Broadcasting.[181] The Government did not try to discredit the Turkish Broadcasting Authority's conclusion as being part of the conspiracy against the Tahşiyeciler.

Remarkably, the Court possesses the awareness that the impugned episodes were already examined by the Turkish Broadcasting Authority, which concluded that no legal transgressions or encroachments upon the rights of the group occurred nor were there any violation of the law. This conclusion was based on the understanding that the characters depicted were fictional and did not explicitly target the group's members.

More than five years after the broadcast, and despite the conclusion of the Broadcasting Authority to the contrary, the newly designed Turkish judiciary found that the content of the episodes depicted the Tahşiyeciler group as terrorists, and the criminal proceedings initiated against the group was a plot framed by the Gulenists. The Court should have asked the Government to answer question *on what grounds did the Broadcasting Authority conclude that the characters in the Series were fictitious and there had been no violation of law by the broadcasting of the contested episodes*. Did the Erdogan government call the decision of the Authority into question? In fact, the Government never contested the decision of the Authority whose members are selected by the parliament, and do represent the different political parties.

It was the Erdogan government which was ruling the country when the episodes aired for which no violation of law was found, and it is the same Erdogan government which initiated the criminal proceedings against the applicant based on the broadcasting of the episodes.

Against this backdrop, the European Court, with an impatient and prompt alacrity, jumps in the following conclusion:

> "The Court considers that a broadcast with such an objective, combined with the other incriminating acts of which the applicant and the other suspects are suspected, cannot be regarded as the dissemination of information in good faith with a view to contributing to a debate on a subject of general interest. Provided that its character as slanderous libel is confirmed at the end of the criminal proceedings, such dissemination could well undermine

[181] Affaire Karaca, pr. 83.

> the presumption of innocence of the Tahşiyeciler and would be contrary to journalistic ethics. The Court therefore accepts that there was a compelling social need to conduct a criminal investigation into the defamatory and accusatory allegations allegedly directed in an organized manner by the applicant and the other suspects against the Tahşiyeciler, and including, where appropriate, the arrest of certain suspects with a view to questioning them or carrying out other investigative acts."[182]

The Court's language is replete with the same rhetoric used by the Turkish Government for the description of the Gulenist community. The Court makes the same generalization as the Turkish courts do in cases against the perceived members of the Community.

The Court does not say what the "other incriminating acts of which the applicant…[is] suspected" are in this case. His involvement in the case was based solely on his authorization to broadcast the three episodes which allegedly implicated the Tahşiyeciler in the terrorist activity.

The Court justifies the applicant's arrest on the ground that the applicant had failed to foresee that the broadcasting of the episodes would impair the presumption of innocence of the Tahşiyeciler. The Court disregarded the decision of the Turkish Broadcasting Authority that "the characters used in the episodes are fictitious that its broadcasting in no way infringed the provisions of Law."

The Court should have taken into account the fact that the complaint filed by the leader of the Tahşiyeciler came more than five years after the broadcasting of the impugned episodes. There is no indication in the file that the leader of the group had filed a criminal or civil lawsuit against the applicant until his conviction was quashed by the Court of Cassation on procedural grounds.

In this context, the fact that the leader of the Tahşiyeciler and some other defendants in the case were acquitted of all charges directed against them on the grounds that the whole criminal proceedings were a conspiracy framed by Gulenists is not convincing given the nature of the evidence obtained from the defendants and the Government's stance with the case. Whether the evidence was framed by the officers involved in the case was not based on any convincing evidence provided for by the Turkish authorities. Indeed, this is not for the applicant, who had taken no part in the proceedings and whose impugned act had played no role in the proceedings, to answer. The content of the broadcast could and should only be considered in the context of the time it was aired. And this was already done by the Turkish Broadcasting Authority which concluded in favor of the TV channel. While the Court has valued the presumption of innocence of the Tahşiyeciler group, it has disregarded the presumption of the innocence of the applicant simply because of his authorization to broadcast the episodes fictitiously implicating the group in terrorist activity.

The Court simply took the interpretation by the Turkish authorities of the facts as undisputable truth -regardless of how the facts were distorted and manipulated by the judicial authorities to bring the applicant into this weird case. The Court sought for no evidence whether there was any connection between the applicant's authorization to broadcast the impugned episodes and the criminal proceedings launched against the Tahşiyeciler group in the context of determination of the existence of a conspiracy against the Group. The Court did not look into the acquittal decision for the Tahşiyeciler to examine whether the criminal proceedings initiated against the Tahşiyeciler had no basis and was totally arbitrary and motivated through a revenge operation by the alleged members of the Gulenists within police. Indeed, the Court disregarded the applicant's arguments to the contrary, that there had been no link between his authorization to air the episodes as part of

[182] Affaire Karaca, pr. 158.

the TV series and the possible conspiracy against the Tahşiyeciler allegedly formed by the members of the judiciary / the police officers and the applicant.

If the Court was to accept the Turkish courts' findings in every politically motivated case like the one before us, it would also have to accept the Turkish courts arguments in other cases of this sort. More specifically, the Court will have to accept the Turkish courts' conclusions that December 2013 corruption investigations were a judicial coup framed by the Gulenists despite the fact that the main actors of the case pled guilty in the US[183], that the Gezi protests was an attempted coup plotted by the agents of the foreign powers in Turkey to bring down his elected government[184], the botched coup attempt of July 15, 2016 was plotted by the Gulenist community despite many inconsistencies and the flaws involving the controversial attempt.

In all these scenarios, it is expected from the European Court to be vigilant against the distortion of facts by the Turkish authorities because the actors, in all politically motivated cases, are not the politicians but the judicial bodies through which gross injustice and violations of human rights committed against innocent individuals.

4 The Court's Disregard for the Value of Artistic Expression in Public Debates

The European Court's following conclusion should deserve the attention of the readers of its judgments on the freedom of expression:

> "The portrayal*, even in the context of fiction*, of a specific religious group as a terrorist organization cannot be seen as part of the ordinary work of a journalist, which consists in reporting to the public relevant information in the context of debates of public interest. Even if drawing the public's attention to radicalized groups that pose a threat to citizens' security may fall within the ordinary professional life of journalists, such an act, when directed against third parties (whose right to respect for their reputation is guaranteed by the Convention) and not against the authorities holding public power, cannot be performed gratuitously: *in order for it to be covered by freedom of expression and freedom of the press, it must be based on a discussion founded on accurate factual information.* The Court notes that the television broadcasts in question in no way contained such a discussion."[185] [emphasis added].

The Court's reasoning brings about numerous issues that fundamentally undermine the established precedent and jurisprudence in the realm of free speech adjudication. The reasoning employed is not only inconsistent with the Court's own body of legal decisions, but also stands in stark contradiction to the fundamental principles of legal logic.[186]

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[183] Ellias Groll, "Turkish Gold Dealer Pleads Guilty in Politically Explosive Sanctions Trial", Foreign Policy, (November 28, 2017), available at: https://foreignpolicy.com/2017/11/28/turkish-gold-dealer-pleads-guilty-in-politically-explosive-sanctions-trial-iran-zarrab-erdogan/

[184] The Court has not paid tribute to the Government's assertions that the Gezi protests were plotted by foreign powers to topple down the AKP Government and Mr. Osman Kavala was the representative of these foreign powers, organizing the event. See the Court's landmark case, Kavala v. Türkiye, especially see pr. 139-155.

[185] Affaire Karaca, pr. 102.

[186] The ECtHR, in Giniewski, stated that "[a]lthough the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely. While the published text, as the applicant himself acknowledges, contains conclusions and phrases which may offend, shock or

First, the applicant was subjected to criminal proceedings not just because of the applicant's act of having had the episodes broadcast but because of the content of the episodes that contained the alleged slanderous depiction of the Tahşiyeciler group. It would be preposterous to distinguish the act of authorization from the content of the episodes. If we were to imagine a scenario where the episodes had portrayed the group as participating in terrorist activities, would there still have been a comparable case against the applicant? I think no reasonable person would answer the question affirmatively.

Moreover, given the Tahşiyeciler group's publicly hostile stance against the democratic secular government system, and their harsh critics against the Gulenist community for their position with other beliefs, it was wrong to say that the episodes in question did not convey any political message, and contribute to the public discussion.

Furthermore, the message in question was conveyed to the public through the medium of a television series within a scenario, which should be regarded as an artistic expression. It is widely recognized that metaphorical and artistic expressions receive the highest degree of protection, particularly when they pertain to public discourse. E.J. Eberle elaborately summarizes the value of artistic expression to human life:

> "First, art is special because it partakes of the creative process central and unique to human existence. Second, art provides an avenue to dimensions of human life less accessible by ordinary rational or cognitive processes. Art is a portal to nonrational, non-cognitive, non-discursive dimensions to human life, offering a fuller conception of the human person. Third, art functions as a private sphere of freedom not subject or susceptible, on the whole, to the normal rules of society. Within this private sphere of freedom, a person can contemplate and muse over elements of the human condition free from the pressures or

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disturb some people, the Court has reiterated on several occasions that such views do not in themselves preclude the enjoyment of freedom of expression. Moreover, the article in question is no "gratuitously offensive", or insulting, and does not incite disrespect or hatred. Nor does it cast doubt in any way on clearly established historical facts." In Giniewski, the journalist directly criticizes the Catholic belief, and asserts that the Catholic Church's belief "led to 'led to anti-Semitism and prepared the ground in which the idea and implementation of Auschwitz took seed'". The author did not articulate these words to public authorities, but to a religious community. The author's article was not a scripture for a movie scenario nor a novel in which all the characters described in the work were fictitious. I totally agree with the Court's conclusion in this case that "the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought." However, the same Court in Karaca concluded that the "[t]he portrayal*, even in the context of fiction*, of a specific religious group as a terrorist organization cannot be seen as part of the ordinary work of a journalist, which consists in reporting to the public relevant information in the context of debates of public interest." How did the Court arrived in a conclusion in Giniewski that the ideas contained in the impugned article were based on the factual truth, while the ideas and arguments contained in the movie scenario were not, -because the Turkish government argued that they were not? Considering the Tahsiyeciler group was a radical religious group, publicly recognizing the Jihadist ideology, advocating the use of violence to achieve the goals pursued by *Ummah*, and the possibility of their instrumentalization by the deep state actors in the country to create chaos in the country, their portrayals as involving in terrorist activity in a movie scenario in the fiction context cannot be said to have no contribution to the public debate but a gratuitous attack on their reputation. See Giniewski v. France, (Application No. 64016/00), Judgment of January 31, 2006; For an interpretation of the Court's case, see Françoise Tulkens, "Freedom of Religion under the European Convention on Human Rights: A Precious Asset", BYU L. Rev. Vol. 2014, Issue 3, (2014), p. 509 et seq.

sanctions of normal social forces. Each of these justifications suggests that art speech warrants protection."[187]

The speech in question does not have to be directed against the public authorities to receive such protection if the other party was already involved in the public discourse against the party whose expression are being questioned.

The Court, in a baffling manner, treats the metaphorical and artistic expression -however fictitious it would be- as unprotected speech, and suggests that if the speech in question had been directly articulated by the applicant instead of having authorized its broadcast within a fictitious TV series, it would have been treated as protected speech.

The confusing reasoning employed by the Court in the case casts doubt upon countless movie scenarios, seemingly stripping them of the protection afforded by the fundamental right to freedom of expression. This line of argumentation jeopardizes not only cinematic narratives, but also extends its reach to encompass novels, paintings, theatrical sketches, and a plethora of other artistic forms that thrive on creative expression.

The traditional disclaimer that "all the characters appearing in this Series are fictitious; any resemblance to real persons, living or dead, is purely coincidental" would mean nothing in face of the Court's bizarre reasoning.

Assuming that the characters and events had not been fictitious and identifiable by the public as the Tahşiyeciler group, and alleging that they were being used by the dark actors of the deep state to create provocative and instable atmosphere in the country; such approach would not automatically strip the expression off its value. On the contrary, such perspective would lead us to treat the expression as a political speech.

In that case, the nature of the public discourse initiated by the Tahşiyeciler about the Gulen/Hizmet movement should have been taken into account before concluding whether the restrictions imposed on the applicant's right to freedom of expression was necessary in a democratic society. It should be noted that the leaders of the Tahşiyeciler group publicly (and through the publication of books) criticized Fethullah Gulen for his ideas and opinions interfaith dialog and other Islamic issues. The leaders of the Tahşiyeciler called the Gulen and his ideas "heretic". [188] In fact, such position was taken by the AKP Government and its government-friendly judiciary.[189]

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[187] Edward J. Eberle, "Art as Speech", University of Pennsylvania Journal of Law and Social Change, Vol. 11, (2007), p. 6.

[188] The leader of Tahşiyeciler, Mehmet Dogan stated in an interview, published in December 2014, by Yeniakit Newspaper stated that "It is to be acknowledged that these sacred lands, entrusted to us because of the fights of our glorious ancestors who brandished their swords across three continents, are constantly subjected to attacks and threats by envious eyes. Fetullah Gülen and his team, on the other hand, are putting our nation, especially our youth, to sleep with the fallacy of tolerance and interfaith dialogue." He states that he published his ideas in a book series called Rumuz'ul Kur'an (Signs of Qur'an). See for the interview, "O kitap Gülen Hareketi'nin 2014'te zayıflayacağını nasıl bildi? [How did that book predicted that the Gulen movement would fade away in 2014?], available at: https://www.yeniakit.com.tr/haber/o-kitap-gulen-hareketinin-2014te-zayiflayacagini-nasil-bildi-40431.html (Retrieved on November 5, 2023).

[189] The bill of indictment prepared by the Office of the Izmir Chief Public Prosecutor alleged that Fethullah Gulen was appointed by Pope Jean Paul as a secret cardinal after he met the Pope in Vatican. For the content of the news, see YeniŞafak nespaper, 9/06/2016, avaiable at: https://www.yenisafak.com/gundem/gizli-kardinal-gulenin-misyonerlik-mansetleri-2524479 , (Retrieved on September 2, 2023).

While the European Court seemingly acknowledges the animosity exhibited by the Tahşiyeciler group towards the Gulenists as an indicative factor supporting the possibility of retaliatory actions from the alleged Community members within the judicial and law enforcement department, it astonishingly overlooks the broader context of the case—the fact that the Gulenists have been the primary target of the government's relentless pursuit for annihilation plan following the December 2013 corruption cases.

In a hypothetical scenario, if the members of a radical Islamist group were acquitted of all charges by the Erdogan government as a result of a novel alliance he formed with the said group, the Turkish judiciary could potentially indict Steven Spielberg based on the portrayal of the group's involvement in terrorist activities within one of his films. And the European Court would deny the protection of the Convention under Article 10 to Spielberg if the reasoning employed in this decision was to apply to the case. Such dimensions of the case were brilliantly highlighted by Judge Orland in her dissenting:

> "It is interesting to review the reasoning that the Assize Court, sitting in a chamber specializing in organized crime, held in its judgment of December 15, 2015 in relation to the grounds on which the Tahşiyeciler group could not be considered a terrorist group (paragraph 16 of the judgment). This reasoning would have been equally relevant in the present case. In its analysis, the Assize Court considered that despite the extremist views defended by this group, which included the notions of Mahdi and jihad (which could be tantamount to hate speech), and despite its leader's rejection of the fundamental values enshrined in the Turkish Constitution, this group did not aim to overthrow the existing constitutional order."[190]

Despite the extremist position explicitly taken by the Tahşiyeciler group and the concrete evidence acquired against them, the domestic courts, which were re-structured by the government following the December 2013 corruption cases, acquitted the group of all charges, and concluded that the group did not engage in terrorist activity. The same courts, on the other hand, arrived -to Judge Orland's surprise[191]-at the conclusion that the applicant is leading an armed terrorist organization -because the police officers who conducted the investigation against the Tahşiyeciler group had guns- and simply on the grounds of his authorization to broadcast the episodes in which the events and the characters were fictitious. The Courts did not deem it necessary to look for whether there was any evidence to suggest the existence of any link between the criminal investigation against the Tahşiyeciler and the applicant's decision to authorize the broadcast. As in thousands of the other cases, the courts have just looked for evidence whether the person was associated with the Gulen/Hizmet movement that would suffice for them to convict the person of leading, or at least being a member, of an armed terrorist organization. The Court in fact is no stranger to the Turkish courts' abusive practices. [192]

[190] Affaire Karaca, Dissenting opinion of Judge Schembri Orland, pr. 12.
[191] Orland did not hide her surprise and states: "However, in the present case, none of the courts referred to, not even the Constitutional Court, made such a finding in the context of its analysis under Article 5 § 1." Id.
[192] The another perspective on a conflictual situation cannot be reconciled with the freedom to receive or communicate information or ideas." See *Gözel and Özer v. Turkey,* pr. 61-63.
[192] Opinion no: A/HRC/WGAD/2020/51, para. 102; Opinion no: A/HRC/WGAD/2020/47, para. 101; Opinion no: A/HRC/WGAD/2020/67, para, 96; Opinion no: A/HRC/WGAD/2020/66, para. 67; Opinion no: A/HRC/WGAD/2020/84, para. 76.

[192] See Turkish State News Agency's (Anadolu Ajansı) report on the secular journalist's convictions: "Emin Çöleşan ve Necati Doğru'ya FETÖ'ye yardım suçundan hapis cezası", available at: https://www.aa.com.tr/tr/turkiye/emin-colasan-ve-necati-dogruya-fetoye-yardim-sucundan-hapis-cezasi/1685225
"At the final hearing of the trial held on December 27, 2019, the İstanbul 37th Heavy Penal Court ruled that Emin Çölaşan and Necati Doğru should be sentenced to 3 years, 6 months, 15 days in prison; Mustafa Çetin and Metin Yılmaz to 3 years, 4 months in prison; Gökmen Ulu, Yücel Arı and Yonca Yücekaleli to 2 years, 1 month in prison on charge of "knowingly and willingly aiding the Fethullahist Terrorist Organization (FETÖ)," which is held responsible for the failed coup attempt on July 15, 2016." See Bianet-English News, available at: https://bianet.org/english/human-rights/232668-prison-sentences-upheld-in-trial-of-sozcu-newspaper

[192] See https://www.icj.org/chapter-5-standards-and-techniques-of-review-in-domestic-adjudication-of-esc-rights-2/5-4-proportionality/ (Retrieved on 8/10/2023).

[192] Steven Greer, "Constitutionalizing Adjudication Under the European Convention on Human Rights", 23 OXFORD J. LEGAL STUD. 428 (2003).

[192] For a comparison between the principle of proportionality under ECHR and the balancing test under the jurisprudence of the US Supreme Court, see Stavros Tsakyrakis, "Proportionality: An assault on human rights?", 7 Int'l J. Const. L. 468, 493 (2009). available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://watermark.silverchair.com/mop011.pdf?token=AQECAHi208BE49Ooan9kkhW_Ercy7Dm3ZL_9Cf3qfKAc485ysgAAA0swggNHBgkqhkiG9w0BBwagggM4MIIDNAIBADCCAy0GCSqGSIb3DQEHATAeBglghkgBZQMEAS4wEQQMJg4wqQ8FMuLGl1xIAgEQgIIC_hiFzI_xOyArBqSRjpxKRdXCxJ2gC_hoHpiigTgKXlcqZ-VbtL2a_lbD5v_lsLbzB5yCjCKX60WIMaeVDu_232X3Exgx0znWQxRLZh3poVUG6oMMdQq1JZ4FtpaSgMo5fIB25_3FfYn5EsxpLUR_hrSFtZEiHvyDHjd7hwldHOAE4phL-m1HfPPmK7nvAZ2cB2FRlCTM3wmjTcl3REZUeZsd3ryyWOmhXkcm3T7weahmpE6Mg47OoywwxQyCSGXBCovjTBHW4eO3hdJbYi4qbVZ1Hy6WiBkPuSaG1qwGcXoEg236Yoc9_ExlxFIsULem8H--H8tTjuSpunF-iTyr4kXYR1rF_MInf3PVCZ_pHpw599WiThAgURVphQl9GuOk0vmGOW1xBHSZIeU9ITOMAgNxWdlc5WAMU4M1y1bw2CU0Ueot_Cq99b9uT1-bYQOMRoFrbnAbXU791IhrcihN69P18u1WsYNM73Hum6suHJIH3NnyKjbWVw1LwJn2inlds_p3jb8zjCdyFCM_6bfd4cnMinwl61P0ol4nmFOkRveNUo_feJGyCTcbuU1WUnHtuuwVc3CIxgbqpI3Awav-SJYxQPdooRcQUHbw4Mmk5SjXbk25Oq1U-ClYB_mxcbt58UMGwpSt7zGz-oRXyn3DynQoDBRffFYZ7AqLmn6ifWFMJIRjtpmnLCOzWzBxJXzYglgA4Vo1VOUppKbPpPkxsqjnVnla8kWfxHOjcgacJ_-m7jUj6nORW1N9bA7S0W6stYX3SLbtV4_IXxkquUy-kJr-82UStVP_TOnnVaJz_AGb7jHmNY5x2WgymYu_sjhMdIEoWDOD5uyQSoG_wWoR87Nd66vSfAEM0R44IA-aa-q0lGFgS7ZstM6J6D4jBc_-RyFror7S68hOfBQmOZmImyQKN4mTFsvMZLlB7ahWyidOcxjMIPuRmEk5tB0g6Gaezzh_FHOmByjMqnnN1iV1YY3e_FNWVfvOVCO2V65QtqFyjUvrev7WcppuS9RINXo

[192] See Talya Ucaryilmaz 'The Principle of Proportionality in Modern Ius Gentium' (2021) 36(1) Utrecht Journal of International and European Law pp. 14–32. DOI: https://doi.org/10.5334/ujiel.529

[192] See, for an analysis of utilitarian perspective regarding the balancing of rights, Jeremy Letwin, "Proportionality, Stringency and Utility in the Jurisprudence of the European Court of Human Rights", Human Rights Law Review, (Oxford, 2023), available at https://academic.oup.com/hrlr/article/23/3/ngad014/7187930#407185638 (Retrieved on December 18, 2023).

[192] Case of Bédat v. Switzerland, pr. 79; Case of Ürper And Others V. Turkey, (Applications Nos.14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 And 54637/07), judgment of 20 October 2009.

[192] A criminal fine without requiring a deprivation of liberty in case that the convicted pay the fine might be considered to be "disproportionate to the aim pursued". See Case of Fragoso Dacosta v. Spain, *(Application No.* 27926/21*), 8 June 2023, pr. 33-34;* See also Case of Halet v. Luxembourg, (Application No. 21884/18), Judgment Of 14 February 2023 where the court find the criminal sanction imposed on the applicant disproportionate to the legitimate aim pursued. In this regard, one Euro civil fine may lead to the violation of the freedom of expression. See Affaire RTBF c. Belgique (No 2), *(Requête No* 417/15*),* Arrêt du 13 décembre 2022. Or 1000 Euros administrative fine might be enough to consider the sanction disproportioned to the aim pursued. See Affaire Mestan c. Bulgarie, (Requête No 24108/15), Arrêt du 2 mai 2023. A university publishing house's decision not to continue to distribute a children's book, involving the depictions of same-sex marriage would be considered an interference, a

measure that didn't pursue a legitimate aim under Article 10/2 of the Convention. See Case of Macatė v. Lithuania, *(Application No.* 61435/19*), 23 January 2023.*

[192] I argued elsewhere that the application of Article 17 of the Convention to the free speech cases brings many problems and conflicts with its aim of protecting democracy against its enemies. It is because it allows would-be governments to curtail the speech beyond what can be acceptable in a democratic society. See Kemal Sahin, İfade Özgürlüğü, pp. 473 et seq.; See also Paulo Lobba, "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime", European Journal of International Law, Vol. 26, Issue 1, February 2015; Paulien Morree, "The Interpretation of Article 17 ECHR in Legal Doctrine", in: Rights and Wrongs under the ECHR, Published online by Cambridge University Press, 12 December 2017.

[192] Norwood v. United Kingdom, (*Application no. 23131/03*), Decision of 16 July 2004.

[192] The Court's established free speech doctrine requires the authorities to assess the speech in a case involving a public debate in terms of whether the parties to the discourse voluntarily laid themselves open to the critics by engaging in a both-sided debate. In this case, as the Tahşiyeciler already voiced their harsh critics against the Gulen/Hizmet movement, they should expect the critics will be conducted against them by the other party. See, e.g., Case of Lingens v. Austria, *(Application no.* 9815/82*),* Judgment of 8 July 1986.

[192] This is quoted from the Ryan Gingeras' words by Matthew Wills, in "The Turkish Origins of the Deep State", available at https://daily.jstor.org/the-unacknowledged-origins-of-the-deep-state/

[192] See Steven A. Cook, "The Deep State Mirage in Turkey", Council on Foreign Relations, available at: https://www.cfr.org/blog/deep-state-mirage-turkey : see for a detailed analysis of the roots of the deep state in Turkey, Mehtap Soyler, The Turkish Deep State: State Consolidation, Civil-Military Relations and Democracy, Routledge, (2015).

[192] Dexter Filkins, "Deep State", New Yorker, (March 12, 2012), available at: https://www.newyorker.com/magazine/2012/03/12/the-deep-state

[192] See for the images of Volkswagen Transporters mini vans, https://en.wikipedia.org/wiki/Volkswagen_Transporter

[192] Deniz Yurt, "Beyaz Toroslarin Yerini Siyah Transporterlar Aldi" Ahval News, (December 31, 2017), available at: https://ahvalnews.com/tr/kacirilma/beyaz-torosun-yerini-siyah-transporter-aldi-son-kurban-umit-horzum

[192] Kemal Göktaş, "Kanlı bir Seçim Oyunu" [A Bloody Election Game], Heinrich Böll Siftung Derneği Türkiye Temsilciliği, 5 Kasım 2015, available at: https://tr.boell.org/tr/2015/11/05/kanli-bir-secim-oyunu (Retrieved on 8 June 2023).

[192] Sarah Laskow, " The Turkish Deep State: What life is like when the conspiracy is real:, (October 13, 2015), available at: https://www.atlasobscura.com/articles/the-turkish-deep-state-what-life-is-like-when-the-conspiracy-is-real

[192] In this sense, the application of Article 17 in favor of the victims of the Government's atrocities would serve the protection of the essence of the right in question. Article 17 might be employed to set a limitation to the restriction which was aimed to impose on the fundamental right. See for the discussion about the different applications of Article 17, Sébastien Van Drooghenbroeck and Cecilia Rizcallah, "The ECHR and the Essence of Fundamental Rights:
Searching for Sugar in Hot Milk?, German Law Journal (2019), pp. 907 et seq.
gross and systemic violations human rights against the perceived members of the Hizmet movement committed through the practices of theTurkish courts have been identified by the Grand Chamber of the EctHR in Yalçınkaya v. Türkiye. The European Court previously established that the interpretation of certain provisions of the Anti-Terrör Laws by the Turkish courts' led to systemic violations of applicants' right to freedom of expression. See for example, Affaire Gözel et Özer c. Turquie, *(Requêtes Nos* 43453/04 *Et* 31098/05), Arret du 6 Juillet, 2010). In this judgment the Court concluded that ""In these cases, as in the present case, domestic judges had convicted media professionals solely on the basis that they had published statements of the terrorist organizations, without conducting any analysis of the content of the impugned writings or the context in which they were published. In its analysis, the Court also established that none of these writings urged violence, armed resistance, or uprising, and they did not constitute hate speech. … In the eyes of the Court, the repetitive condemnation of owners, editors, or chief editors of periodicals, accompanied by a ban on publication, solely on the grounds that they had published statements under Article 6 § 2 of Law No. 3713, may also partially censor media professionals and limit their ability to publicly express an opinion – provided, of course, that they do not directly or indirectly advocate the commission of terrorist offenses – which has a place in public debate, especially since, as demonstrated in the present case, the terms

Erdogan government's crackdown on the perceived or actual members of the Hizmet community has been amounted to the crimes against humanity articulated under Article 7 of the Rome Statute on the International Criminal Court as suggested by the United Nations Working Group on Arbitrary Detention (WGAD). The UN Working Group on Arbitrary Detention has explicitly stated that the pattern of detention imposed upon the perceived members or the sympathizers of the Gulenist Community following the controversial coup attempt may, under specific circumstances, amount to crimes against humanity, involving widespread or systematic imprisonment or other severe violations of international law.[193]

The notorious FETÖ (Fethullahçı Terör Örgütü/Fethullahist Terrorist Organization) locution has been an effective instrument of the Government in the execution of its annihilation plan against the perceived members of the Gulenist community. Under the FETÖ locution, the number of such criminal prosecutions against the perceived members of the Community exceeds half a million.

Journalists like Emin Çölaşan, whose hostility against the Gulen/Hizmet community is well-known, have been convicted of the aiding and abetting an armed terrorist organization (namely the Hizmet movement) despite not being a member of the said organization for publishing the dramatic stories of the victims of the Government's brutal crackdown.[194]

When they bring their cases before the ECtHR, the Government would argue that "they were not convicted for expressing their opinions on the public debates but for their acts as aiding and abetting the terrorist organization." Regrettably, the Court's reasoning in this case would leave the journalists unprotected because they were not convicted for sharing their opinions about the public matters but for having aided a terrorist organization.

I do not think the Court would take such an injudicious position in such cases and pay any tribute to the Turkish government's brazen arguments. Unfortunately, the Court has assumed an exceedingly contentious stance in this case, leaving the journalists, writers, editors, unprotected and vulnerable to the whims and biases of an authoritarian government that has already demonstrated its enmity towards the identity of the applicant.

5 Proportionality of the Sanction Imposed on the Applicant

'statements or tracts of terrorist organizations' have been interpreted in a very vague manner. In particular, the repression of media professionals carried out mechanically based on the aforementioned provision without considering their objective (compare with Jersild, cited above, § 36) or the right of the public to be informed from another perspective on a conflictual situation cannot be reconciled with the freedom to receive or communicate information or ideas." See *Gözel and Özer v. Turkey,* pr. 61-63.

[193] Opinion no: A/HRC/WGAD/2020/51, para. 102; Opinion no: A/HRC/WGAD/2020/47, para. 101; Opinion no: A/HRC/WGAD/2020/67, para, 96; Opinion no: A/HRC/WGAD/2020/66, para. 67; Opinion no: A/HRC/WGAD/2020/84, para. 76.

[194] See Turkish State News Agency's (Anadolu Ajansı) report on the secular journalist's convictions: "Emin Çöleşan ve Necati Doğru'ya FETÖ'ye yardım suçundan hapis cezası", available at: https://www.aa.com.tr/tr/turkiye/emin-colasan-ve-necati-dogruya-fetoye-yardim-sucundan-hapis-cezasi/1685225

"At the final hearing of the trial held on December 27, 2019, the İstanbul 37th Heavy Penal Court ruled that Emin Çölaşan and Necati Doğru should be sentenced to 3 years, 6 months, 15 days in prison; Mustafa Çetin and Metin Yılmaz to 3 years, 4 months in prison; Gökmen Ulu, Yücel Arı and Yonca Yücekaleli to 2 years, 1 month in prison on charge of "knowingly and willingly aiding the Fethullahist Terrorist Organization (FETÖ)," which is held responsible for the failed coup attempt on July 15, 2016." See Bianet-English News, available at: https://bianet.org/english/human-rights/232668-prison-sentences-upheld-in-trial-of-sozcu-newspaper

International Commission of Jurists defines the principle of proportionality with the following words:

> "The test of proportionality requires that limitation or restriction of a human right […] is proportionate with the (legitimate) reasons [prescribed] for such limitation."[195]

The principle "implies a presumption that the right should be upheld compelling grounds for interfering with it in pursuit of a legitimate public interest worth pursuing by the most effective and least given the costs involved. This is a more demanding test than that of proof on a 'balance of probabilities', yet lower than the strict or absolute necessity stronger versions of the 'priority principle."[196] To strike a fair balance between the individual right and the other public interests, public authorities must employ the least restrictive measure to tailor the limitation to the extent that is not more than necessary in the case.[197] And this job requires a complex calculation of various interests involved in the case.[198] As this is not an Algebra calculation, it leaves a fair amount of discretion to the judges although in some cases the outcome, the solution, might be so evident that it does not even require any lawyering skill to conclude that there the measure employed in the case is disproportionate to the end pursued by the authorities.[199]

It is a well-known dictum of the Court that "the nature and severity of the penalties imposed are further factors to be taken into account when assessing the proportionality of an interference. [T]he

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[195] See https://www.icj.org/chapter-5-standards-and-techniques-of-review-in-domestic-adjudication-of-esc-rights-2/5-4-proportionality/ (Retrieved on 8/10/2023).

[196] Steven Greer, "Constitutionalizing Adjudication Under the European Convention on Human Rights", 23 OXFORD J. LEGAL STUD. 428 (2003).

[197] For a comparison between the principle of proportionality under ECHR and the balancing test under the jurisprudence of the US Supreme Court, see Stavros Tsakyrakis, "Proportionality: An assault on human rights?", 7 Int'l J. Const. L. 468, 493 (2009). available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://watermark.silverchair.com/mop011.pdf?token=AQECAHi208BE49Ooan9kkhW_Ercy7Dm3ZL_9Cf3qfKAc485ysgAAA0swggNHBgkqhkiG9w0BBwagggM4MIIDNAIBADCCAy0GCSqGSIb3DQEHATAeBglghkgBZQMEAS4wEQQMJg4wqQ8FMuLGl1xIAgEQgIIC_hiFzI_xOyArBqSRjpxKRdXCxJ2gC_hoHpiigTgKXlcqZ-VbtL2a_lbD5v_lsLbzB5yCjCKX60WIMaeVDu_232X3Exgx0znWQxRLZh3poVUG6oMMdQq1JZ4FtpaSgMo5fIB25_3FfYn5EsxpLUR_hrSFtZEiHvyDHjd7hwldHOAE4phL-m1HfPPmK7nvAZ2cB2FRlCTM3wmjTcl3REZUeZsd3ryyWOmhXkcm3T7weahmpE6Mg47OoywwxQyCSGXBCovjTBHW4eO3hdJbYi4qbVZ1Hy6WiBkPuSaG1qwGcXoEg236Yoc9_ExlxFIsULem8H--H8tTjuSpunF-iTyr4kXYR1rF_MInf3PVCZ_pHpw599WiThAgURVphQl9GuOk0vmGOW1xBHSZIeU9ITOMAgNxWdlc5WAMU4M1y1bw2CU0Ueot_Cq99b9uT1-bYQOMRoFrbnAbXU791IhrcihN69P18u1WsYNM73Hum6suHJIH3NnyKjbWVw1LwJn2inlds_p3jb8zjCdyFCM_6bfd4cnMinwl61P0ol4nmFOkRveNUo_feJGyCTcbuU1WUnHtuuwVc3CIxgbqpI3Awav-SJYxQPdooRcQUHbw4Mmk5SjXbk25Oq1U-ClYB_mxcbt58UMGwpSt7zGz-oRXyn3DynQoDBRffFYZ7AqLmn6ifWFMJIRjtpmnLCOzWzBxJXzYglgA4Vo1VOUppKbPpPkxsqjnVnla8kWfxHOjcgacJ_-m7jUj6nORW1N9bA7S0W6stYX3SLbtV4_IXxkquUy-kJr-82UStVP_TOnnVaJz_AGb7jHmNY5x2WgymYu_sjhMdIEoWDOD5uyQSoG_wWoR87Nd66vSfAEM0R44IA-aa-q0lGFgS7ZstM6J6D4jBc_-RyFror7S68hOfBQmOZmImyQKN4mTFsvMZLlB7ahWyidOcxjMIPuRmEk5tB0g6Gaezzh_FHOmByjMqnnN1iV1YY3e_FNWVfvOVCO2V65QtqFyjUvrev7WcppuS9RINXo

[198] See Talya Ucaryilmaz 'The Principle of Proportionality in Modern Ius Gentium' (2021) 36(1) Utrecht Journal of International and European Law pp. 14–32. DOI: https://doi.org/10.5334/ujiel.529

[199] See, for an analysis of utilitarian perspective regarding the balancing of rights, Jeremy Letwin, "Proportionality, Stringency and Utility in the Jurisprudence of the European Court of Human Rights", Human Rights Law Review, (Oxford, 2023), available at https://academic.oup.com/hrlr/article/23/3/ngad014/7187930#407185638 (Retrieved on December 18, 2023).

Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in performing its task as purveyor of information and public watchdog. In that connection, the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed."[200]

Now, the question is whether the monetary fine that would be imposed on the TV company is a harsher sanction than the criminal proceedings conducted against the applicant which led to the severe deprivation of his right to liberty and security.[201] It should be reiterated that the applicant's impugned act was examined by the Turkish Broadcasting Authority which concluded that there was no violation of law on grounds that the characters and the events were fictitious.

The applicant was not fined or sentenced to minor imprisonment for his authorization to broadcast the fictional episodes which insinuated that the Tahşiyeciler group was being utilized by the deep state actors to create provocation in the country. The applicant has been severely deprived of his right to liberty and security for having had the episodes broadcast on the TV channel which he was directing whereas no fine was found appropriate by the Broadcasting Authority to be imposed on the TV company on the ground of any violation of personal rights or of any law. There is nothing in the case demonstrating that the leader or the members of the Tahşiyeciler group brought legal action against the decision of the Broadcasting Authority before an administrative court.

The applicant was charged with founding and leading an armed terrorist organization and sentenced to thirty-one-year of imprisonment. When the Court decided his case, he was behind bars for nine years, and expecting no prospect of release. It appears that the government utilized the judiciary to persecute the applicant under the pretext of a private defamation scheme.

Considering the severity and the nature of the criminal charges directed against the applicant at the time of his arrest and subsequent detention, the Court should have concluded that there was a violation of the applicant's right to freedom of expression even solely on the basis of proportionality issue.

Given the clear background of the case articulated above, one cannot help but question how the Court arrived at the perplexing conclusion that the arrest and subsequent detention of the applicant, simply for his act of having had the three episodes aired as part of a television series, could be

[200] Case of Bédat v. Switzerland, pr. 79; Case of Ürper And Others V. Turkey, (Applications Nos.14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 And 54637/07), judgment of 20 October 2009.

[201] A criminal fine without requiring a deprivation of liberty in case that the convicted pay the fine might be considered to be "disproportionate to the aim pursued". See Case of Fragoso Dacosta v. Spain, *(Application No.* 27926/21*), 8 June 2023, pr. 33-34;* See also Case of Halet v. Luxembourg, (Application No. 21884/18), Judgment Of 14 February 2023 where the court find the criminal sanction imposed on the applicant disproportionate to the legitimate aim pursued. In this regard, one Euro civil fine may lead to the violation of the freedom of expression. See Affaire RTBF c. Belgique (No 2), *(Requête No* 417/15*),* Arrêt du 13 décembre 2022. Or 1000 Euros administrative fine might be enough to consider the sanction disproportioned to the aim pursued. See Affaire Mestan c. Bulgarie, (Requête No 24108/15), Arrêt du 2 mai 2023. A university publishing house's decision not to continue to distribute a children's book, involving the depictions of same-sex marriage would be considered an interference, a measure that didn't pursue a legitimate aim under Article 10/2 of the Convention. See Case of Macatė v. Lithuania, *(Application No.* 61435/19*), 23 January 2023.*

deemed necessary in a democratic society. In doing so, the Court has relinquished its impartial position towards both parties of the case, manifestly aligning itself with the Government by unreservedly embracing every narrative put forth by the latter, all the while disregarding the factual evidence presented by the applicant.

V. Whether the Court implicitly Applied Article 17 of the Convention to the Case on the basis that the Content of the Episodes is devoid of any Factual Truth but a Gratuitous Attack on the Group

Article 17 of the Convention, under the heading of Prohibition of abuse of rights, states:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 17 of the Convention is an exceptional tool by which the Court may declare cases inadmissible if it establishes that the applicant's exercise of his right was indeed utilized to destroy the rights and freedoms set out in the convention. In other words, if the applicant's act was to engage in an activity aimed at the destruction of the political system without which the Convention cannot stand, the Court may declare the application admissible under Article 17.[202]

It seems that the Court implicitly applied Article 17 to the applicant's case as it states:

> "Moreover, such a vehement, general attack on a religious group, linking the group as a whole to terrorist acts, would be contrary to the values proclaimed and guaranteed by the Convention."

Such a conclusion may be inferred from both the language of the Court and from the Court's reference in the case to one of its previous decisions in which the Court explicitly applied Article 17 of the Convention. The Court's reference to its decision of Norwood v. United Kingdom[203] (the court cited the case as "Norwwod v. Ireland" by an inadvertent typographical error) may imply that it tacitly applied Article 17 to the applicant's complaint under Article 10. This would have been the case if the applicant's authorization to broadcast the episodes was just to implicate the Tahşiyeciler in terrorist activity without any plausible ground -at least from the applicant's perspective. And there are other differences between the Norwood and Karaca cases.

The Court, in Norwood, concluded that the applicant displayed a poster supplied by the ultra-nationalist right-wing party (BNP) which accused the Muslims of committing the terrorist attack on the World Trade Center. The applicant was charged with violating the Crime and Disorder Act,

[202] I argued elsewhere that the application of Article 17 of the Convention to the free speech cases brings many problems and conflicts with its aim of protecting democracy against its enemies. It is because it allows would-be governments to curtail the speech beyond what can be acceptable in a democratic society. See Kemal Sahin, İfade Özgürlüğü, pp. 473 et seq.; See also Paulo Lobba, "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime", European Journal of International Law, Vol. 26, Issue 1, February 2015; Paulien Morree, "The Interpretation of Article 17 ECHR in Legal Doctrine", in: Rights and Wrongs under the ECHR, Published online by Cambridge University Press, 12 December 2017.

[203] Norwood v. United Kingdom, (*Application no. 23131/03*), Decision of 16 July 2004.

and fined GBP 300. The Court's decision in Norwood is not devoid of flaws. However, there are clear differences between the Norwood and Karaca cases, that is, the applicant in Norwood was subject to fine, while the applicant in Karaca was arrested and imprisoned on terrorism charges. Second, the applicant in Norwood displayed a sign in which he unequivocally implicated the Muslims in a concrete horrific terror act, and used a performative speech act that Islam should be out of Britian to protect British people while in Karaca, the episodes were fictitious, referring to no concrete terrorist acts. Third, the applicant in Norwood was prosecuted immediately after his act in question while the applicant in Karaca was prosecuted more than five years after the broadcast of the episodes whose content had been examined by the Turkish Broadcasting Authority immediately after the broadcast that concluded the characters, and the events were all fictitious and did refer no real persons.

Therefore, the Court's implicit reference to Article 17 has no basis in the applicant's case. Even if we accept the government's argument that there was a tension between the Gulenists and the Tahşiyeciler, we cannot justify the application of Article 17 to the applicant's case simply because the applicant authorized the broadcasting of the episodes as part of a TV series considering the latter group had constantly denunciated the former group as being associated with religious apostasy and heresy. In doing that, the Tahşiyeciler voluntarily made themselves part of the public debate and a target for the former group's critics.[204]

Moreover, despite the harsh critics directed by the leader of the Tahşiyeciler against the Gulenists, F. Gulen's speech cannot be labeled as hate speech containing any defamatory words, but it could be considered as a warning against the deep state actors' possible utilization of the group for the purpose of creating chaos in the country. This is not a groundless and unwarranted assault on the Tahşiyeciler, as the pervasive presence of the deep state apparatus in the country has long remained a topic of fervent discourse throughout the history of the modern Turkey. The Tahşiyeciler group's acquittal decision did not convincingly establish that the case was a frame based on fabricated evidence provided by the Gulenists. Instead, the decision appears to be carefully ordered one by the Erdogan government to execute his revenge plan. It is also not the applicant but the police officers and the judicial authorities who were to answer such questions of whether there was a flaw in the original case against the Tahşiyeciler group.

Furthermore, the content of the episodes was taking the public's attention metaphorically to the deep state issue in the country. Over and above that, it was fiction, part of a TV series just like myriads of other movies or series whose content delves into the very heart of public issues of hot debate and controversy.

[204] The Court's established free speech doctrine requires the authorities to assess the speech in a case involving a public debate in terms of whether the parties to the discourse voluntarily laid themselves open to the critics by engaging in a both-sided debate. In this case, as the Tahşiyeciler already voiced their harsh critics against the Gulen/Hizmet movement, they should expect the critics will be conducted against them by the other party. See, e.g., Case of Lingens v. Austria, *(Application no.* 9815/82*),* Judgment of 8 July 1986.

If one writes deep state in Turkey on the google search engine, she will come across lots of information about the deep state actors in Turkey. Let's take a closer look at the deep state in Turkey.

The Turkish phrase *derin devlet* literally means "*deep state*." The term "generally refers to a kind of shadow or parallel system of government in which unofficial or publicly unacknowledged individuals play important roles in defining and implementing state policy."[205] Here is a brief description of the concept of *deep state* in the context of Turkey:

> "The concept of the deep state can be traced back to Turkey, where an alleged network of military officers, intelligence operatives, policemen, organized crime figures, academics, journalists, and politicians work behind the scenes as a sort of shadow government. This coalition of forces is believed to work in concert to ensure the integrity of Turkey's republican system that Mustafa Kemal—known commonly as Ataturk—founded in 1923. These are groups that benefit politically and economically from, and as a result are defenders of, this political order. The cabal is thus believed to be responsible for coups, assassinations, and a variety other plots to undermine Kurdish nationalism; discredit Islamism; prevent recognition of the Armenian genocide; and, at one time, fight communism."[206]

Filkins notes that prosecutors, historians, and journalists, all assert that "the deep state bears responsibility for the deaths of numerous individuals, including dissident political leaders, intellectuals, and journalists. This clandestine network played a central role in countering the Kurdish insurgency during the 1980s and 1990s, commonly referred to as the "dirty war," which resulted in the deaths or disappearances of tens of thousands of guerrillas and civilians. In predominantly Kurdish cities like Diyarbakır, death squads operated with alarming impunity, often employing a distinctive white Renault sedan to transport military-age Kurdish males, many of whom never returned. The mere sight of a white Renault would prompt the streets to empty, as it had become synonymous with imminent danger."[207]

The deep state, far from disappearing under AKP rule, has forged a symbiotic alliance with the Erdogan government. Having woven intricate ties with the deep state operatives, Erdogan deftly harnessed their influence to strategically maneuver against his opponents, capitalizing on this alliance as a potent political weapon. In fact, the white Renaults which, was equated with deep state actors and the symbol of death and disappearance, have been replaced with black

[205] This is quoted from the Ryan Gingeras' words by Matthew Wills, in "The Turkish Origins of the Deep State", available at https://daily.jstor.org/the-unacknowledged-origins-of-the-deep-state/
[206] See Steven A. Cook, "The Deep State Mirage in Turkey", Council on Foreign Relations, available at: https://www.cfr.org/blog/deep-state-mirage-turkey : see for a detailed analysis of the roots of the deep state in Turkey, Mehtap Soyler, The Turkish Deep State: State Consolidation, Civil-Military Relations and Democracy, Routledge, (2015).
[207] Dexter Filkins, "Deep State", New Yorker, (March 12, 2012), available at: https://www.newyorker.com/magazine/2012/03/12/the-deep-state

Transporters[208] to carry out the same operations -this time not just in southeastern part of Turkey but across the country.[209]

Two suicide bombers detonated explosives outside the Ankara train station that claimed more than one hundred lives of those gathered for a peace rally. The question was being asked who was behind the bombing? Many people believed that the bombing was the deep state's act in order to secure a victory for Erdogan in the upcoming elections by creating an unstable political atmosphere as if this was the result of the last elections, held on 7 June 2015, requiring a compromise between Erdogan and the opposition to form a government. In fact, that bombing and similar events occurred in the country between the two elections served its very purpose by bringing the victory that Erdogan desperately needed to establish his authoritarian government.[210]

"The consensus about the deep state", Laskow wrote on the bombing, "one is that it's a combination of people with power in official circles, underground circles or both, who believe that their vision for Turkey is the correct one, that they should take action to protect that vision, even if it means pursuing illegal and violent activities, including extrajudicial killings."[211]

There might be some arguments as to what extent the deep state exists in Turkey. Such arguments are irrelevant to the background of the applicant's case. It is astonishing that the European Court dismissed any argument for the deep state, and jumped to the conclusion that the content of the impugned episodes was devoid of any factual basis but a "gratuitous attack" on the Tahşiyeciler group.

The Court promptly dismissed the applicant's arguments that the leader and some members of the Group were convicted of the alleged crimes by the trial court on the basis of factual evidence such as the hand grenades and other ammunition obtained from the defendants.

The Court did not examine the files of the Tahşiyeciler group; instead, it simply relied on the decision of the peace judge who argued that the criminal proceedings against the Tahşiyeciler was a conspiracy framed by the perceived members of the Gulenists within police and the judiciary.

In this context, the applicant had to answer the questions of whether there was a flaw or the traces of conspiracy in the impugned criminal proceedings in which the applicant had taken no part. The Court failed to see the facts that there was no connection between the broadcast of the episodes and the criminal proceedings which had been started months before the phone conversation between the applicant and Fethullah Gulen about the airing of the episodes. Therefore, no evidence in the case suggests that the applicant's conversation with F. Gulen had played a role in the criminal

[208] See for the images of Volkswagen Transporters mini vans, https://en.wikipedia.org/wiki/Volkswagen_Transporter

[209] Deniz Yurt, "Beyaz Toroslarin Yerini Siyah Transporterlar Aldi" Ahval News, (December 31, 2017), available at: https://ahvalnews.com/tr/kacirilma/beyaz-torosun-yerini-siyah-transporter-aldi-son-kurban-umit-horzum

[210] Kemal Göktaş, "Kanlı bir Seçim Oyunu" [A Bloody Election Game], Heinrich Böll Siftung Derneği Türkiye Temsilciliği, 5 Kasım 2015, available at: https://tr.boell.org/tr/2015/11/05/kanli-bir-secim-oyunu (Retrieved on 8 June 2023).

[211] Sarah Laskow, " The Turkish Deep State: What life is like when the conspiracy is real:, (October 13, 2015), available at: https://www.atlasobscura.com/articles/the-turkish-deep-state-what-life-is-like-when-the-conspiracy-is-real

investigations against the group. The episodes in question did not create false evidence that would be used against the group in question and nothing from the episodes was relied on by the authorities at any stages of the criminal proceedings against the Tahşiyeciler.

Moreover, in view of this setting, the Court disregarded the fact that the Turkish Broadcasting Authority concluded that the events and the characters in the episodes were fictitious and there had been no violation of law. The decision of the Authority was never contested by either the domestic courts or by the government on the ground that the Authority's action was part of the conspiracy framed by the Gulenists.

Furthermore, the Court considered the fictitious episodes as being more pernicious than, for example, a direct attack by the journalist through his opinion columns in the newspaper or through his comments on a TV news. This is a bizarre interpretation of artistic expression involving political messages.

Finally, the Court, in a controversial manner, concluded that the episodes did not contribute to the public discussion because it did not bear any message conveying to the public. Then, the Court did not answer how the episodes portrayed the group as being involved in terrorist activity without sending a message to the public that the group would be instrumentalized by the deep state actors in terrorist activity to create a provocation against the religious groups, including but not limited to the Tahşiyeciler in the country. If Article 17 had been to play a role in this case, it should have been on the applicant's side as the Government's avowed aims are to persecute the applicant because of his Hizmet identity. The Government has been utilizing anti-terror laws to persecute journalists, academics, teachers, judges, human rights defenders, etc. Employing anti-terror laws in an alleged defamation scheme not only renders the right to freedom of expression ineffective, but also aims at the destruction of free democratic society as such practice is not limited to the applicant's case but systemic and massive. Even implying the application of Article 17 in favor of the Government to the determination of the applicant's right to freedom of expression claim can only be seen a brazen compromise extended to an authoritarian regime in exchange for a pathetic recognition from it.[212]

CONCLUDING REMARKS

The analysis of the background of Karaca case clearly demonstrates that the Turkish government pursued an ulterior aim to persecute the applicant. In other words, the entire criminal proceedings levied against him were/are just a stage to ensure the applicant's persecution. Karaca is not alone to suffer the consequences of the Government's atrocities. Renowned journalists, politicians, human rights defenders, academics, lawyers are still behind bars or facing grave criminal proceedings framed on trumped-up, terrorism charges imposed through sham trials. The background analysis is one of the crucial features of human rights adjudication especially when it

[212] In this sense, the application of Article 17 in favor of the victims of the Government's atrocities would serve the protection of the essence of the right in question. Article 17 might be employed to set a limitation to the restriction which was aimed to impose on the fundamental right. See for the discussion about the different applications of Article 17, Sébastien Van Drooghenbroeck and Cecilia Rizcallah, "The ECHR and the Essence of Fundamental Rights:
Searching for Sugar in Hot Milk?, German Law Journal (2019), pp. 907 et seq.

https://doi.org/10.5281/zenodo.21384325

comes to the determination of whether the case is of political nature, or whether the authorities pursued an ulterior motive to persecute the individuals by instrumentalizing the criminal justice system. In such a case, the Court must be vigilant to the authenticity of the facts submitted by the government because the political motive might strongly imply the existence of an authoritarian practice.

The Court's choice of seeing the facts only from the government's perspective and admitting every factual issue as an undisputable fact submitted by the government leaves the applicant, and the other applicants in the same situation, an unfavorable -and mostly a miserable- position before the Court in advancing their claims and arguments. It does not serve justice at all but violates the basic principles of a fair trial. In doing so, the Court loses its impartiality in the eyes of the victims of the grave and massive human rights violations committed by the government. A democratic government which adheres to the principle of rule of law might not be expected to distort the facts it presents before an international court. However, in the case of authoritarian regimes, the Court should not be expected to keep the same attitude towards the examination of the facts submitted by the governments, especially when the case concerns the persecution of the government's political opponents.

The court, regrettably, exhibited a disconcerting departure from its well-established body of jurisprudence, as it disregarded the profound implications for the freedom of expression that the Karaca case presents. In a perplexing twist, the ECHR failed to acknowledge the crucial significance of the evidence presented by the prosecution requesting the applicant's arrest and detention, the same evidence on which the Judgeship relied in its detention order to demonstrate the existence of reasonable suspicion that the applicant might have committed the alleged crimes, and thus to justify the detention of the applicant on the same grounds.

Having chosen instead to place undue emphasis on matters peripheral to the very core of contention—the content illustrated within the impugned episodes of the derisive television series. By removing this pivotal fact from the fabric of the case, the court inadvertently stripped the case of any substantial foundation, rendering its subsequent conclusions devoid of logical coherence and legitimacy. The Court's efforts to detach the content of the episodes from the applicant's act of having had the episodes broadcast on the TV channel have no meaning. Its attempt to detach the content of the episodes from the applicant's authorization to broadcast them on the TV channel bears no logical coherence.

The Court disregarded the fact that the episodes in question played no role in the criminal proceedings directed against the Tahşiyeciler group. For example, the content of the episodes was not treated by the judicial authorities or the police department as a crime report, nor was it considered as evidence of the crime against the Group at any stage of the criminal proceedings. In the absence of such evidence, there is no basis left to rely on the existence of an alleged crime of slanderous denunciation. Therefore, the Court's reasoning that the applicant might have committed at least some of the crimes with which he was charged is not based on a consistent foundation.

The Court disregarded the fact that the episodes were part of a TV series, and the Turkish Broadcasting Authority concluded that all the characters and the events in the episodes were fictitious and had no resemblance to the Tahşiyeciler Group in question.

The Court has created a mess of confusion in the adjudication of freedom of expression by its failure to acknowledge the strong connection between the charges directed against the applicant and the evidence used to justify his detention. Such a failure has the potential to allow the would-be governments to bypass the Article 10 protection simply by changing the nature of the criminal charges which might be brought based on the evidence involving the people's exercise of their right to freedom of expression.

Today, every journalist feels obliged to use the FETÖ [Fethullahist Terrorist Organization] locution to avoid the Government's oppression. There has also been concerted action carried out by the journalists whose bosses act in accordance with the government's directions. Hundreds of thousands of people have been persecuted on the grounds of their connection to the Gulen/Hizmet movement for their very lawful acts like holding a bank account with Bank Asya while the Tahşiyeciler were prosecuted on concrete evidence like possessing ammunition, hand grenades. Should the ECHR unconditionally credit the Turkish government's arguments and the findings of the Turkish courts, there would be no prospect for the innocent to receive the protection of the Convention against the brazen violations of their rights.

As suggested by the UN WGAD, the courts have been instrumentalized by the Turkish government to commit crimes against humanity. When the future courts will be to determine that the persecution of the perceived members of the Gulen/Hizmet movement were committed through the sham judicial processes concocted to achieve Erdogan's personal revenge on the Community, all the journalists, editors of the newspapers, movie scenarists, producers, CEO's of TV companies, etc., who used the FETÖ locution, would be subject to the same criminal proceedings -just as the ones the applicant was being subjected to- because of their accomplice in the commission of the crimes against humanity committed by the Erdogan government. And the European Court of Human Rights would say no word to the prosecution of thousands of media workers as it were to apply the reasoning to potential future free speech cases, which it constructed in the applicant's case.

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Başak Çalı articulates that the expansion of the Court's jurisdiction to Turkiye in 1990 (following the Turkiye's acception of the Court's compulsory jurisdiction), and later to Eastern, Central European, and Caucasus states introduced the Court with "large volumes of right to life, torture, and disappearance cases".

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