Turkey's abuse of its anti-terror laws and the significance of the ECHR's Demirtaş Judgment

Ali Yıldız

Jan 02 2021 09:32 Gmt+3
Last Updated On: Jan 10 2021 07:47 Gmt+3

On 22 December 2020, the Grand Chamber (GC) of the European Court of Human Rights delivered a landmark judgment on the application of Selahattin Demirtaş, the imprisoned politician and former co-chair of the People's Democratic Party (HDP).

The judgment is seminal in many respects and worthy of careful consideration. This article looks at the Grand Chamber's determination on Turkey's main anti-terror provision, namely Article 314 of the Turkish Penal Code;

"1. Anyone who forms or leads an armed organisation with the purpose of committing the offences listed in the fourth and fifth parts of this chapter shall be sentenced to a term of imprisonment of ten to fifteen years.

2. Anyone who joins an organisation referred to in the first paragraph of this Article shall be sentenced to a term of imprisonment of five to ten years.

3. The other provisions governing the forming of an organisation for criminal purposes shall also apply in this context."

Mr Demirtaş, like hundreds of thousands of others, was detained under Art. 314, and eventually convicted for terrorist activity. Since 2013, the Turkish Government has increasingly been using Article 314 to prosecute those it perceives to be members of certain groups or critical of its policies. According to the latest data, between 2013 and 2019, 392,176 individuals have been charged and 220,000 have been convicted under Article 314. There has been a dramatic increase in such charges with more than 80% of them taking place after the 2016 coup attempt.

Neither the Penal Code nor the Anti-Terrorism Law contain a definition of an armed terrorist organization or the offence of membership to one, which makes these articles prone to arbitrary application and abuse. Although the Court of Cassation have on different occasions tried to remedy the absence of a legal definition, its inconsistent approach and apparent pandering to

the executive made an already bad situation worse. As the judiciary is increasingly subjugated under the executive, the question of who may be deemed a terrorist is determined by the political currents of the time.

The ECHR, in the cases of Isikirik v Turkey (2017) and Imret v Turkey (2018), established that the subsidiary anti-terror provision, namely Art. 220 § 6-7 of the Penal Code did not afford legal protection against arbitrary interference with Article 11, right to freedom of assembly and association, as it did not provide legal certainty and was therefore not "foreseeable".

In Parmak & Bakir (2019), the ECtHR dealt with Art. 314 § 2 in terms of amendments made to the Anti-Terror Law (no:3713) between 2013 and 2017. In that judgment, the Court first held that "the essence of the offence of membership of a terrorist organization is to join an association goal and mode of operation of which was to resort to the criminal use of force, violence and mass intimidation in order to advance certain political or ideological causes. (And) .. actual violence, or the intent to use such violence, is central to the definition of the offence (Parmak & Bakir § 68).", the Court then went on to say that Turkey's domestic courts had unjustifiably extended the reach of the criminal law to the applicant's case in contravention of the guarantees of Article 7.

Although the Parmak & Bakir judgment has been quite significant, it did not pertain to the right to security and liberty or freedom of expression, but the implications and uncertainties caused by the amendments made to the anti-terror legislation.

In the case of Demirtas (2), the ECHR examined Art. 314 with regard to the legality of the interference into Arts. 5 and 10 of the Convention.

Article 10 of the Convention and Art. 314 of the Turkish Penal Code

The Grand Chamber (GC) of the European Court of Human Rights applied its quality of law test to the Art. 314 of Penal Code. The GC by also referring to the Venice Commission's opinion that "the domestic courts often tended to decide on a person's membership of an armed organisation on the basis of very weak evidence" held that "the range of acts that may have justified the applicant's pre-trial detention in connection with serious offences punishable under Article 314 of the Criminal Code is so broad that the content of that Article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities." Consequently, the GC concluded the interferences with the applicant's freedom of expression under Art. 314 did not comply with the requirement of the quality of law, and therefore constituted a violation of Article 10.

Article 5 § 1 of the Convention and Art. 314 of the Turkish Penal Code

The GC, having established the violation of Art. 10 of the Convention and with specific reference to the Venice Commission’s above-mentioned opinion, held that “the range of acts that could have justified the applicant’s pre-trial detention under Article 314 of the Criminal Code was so broad that the content of that provision, coupled with its interpretation by the domestic courts, did not afford adequate protection against arbitrary interference by the national authorities. On that account, it found that the terrorism-related offences at issue, as interpreted and applied in the present case, were not “foreseeable”. Consequently, the GC concluded there had been a violation of Article 5 § 1 of the Convention.

The two conclusions reached by the GC are extremely significant as the Court (GC) found, for the first time, that Art. 314 was not foreseeable and did not comply with the requirement of the quality of law. The conclusions the GC reached could not be more accurate as in Turkey people are being convicted under anti-terror laws for who they are, rather than what they might have done. Details of their private lives are enough for them to be indicted and eventually be convicted of terrorism. A tweet one may have posted, a book or a newspaper one might have subscribed to, a phone call he or she might have received from an unknown number could be considered evidence of terrorist activity. It could therefore be said that Mr Demirtaş and his lawyers did not only achieve very significant judgment for their own case but have also done so for the hundreds of thousands of people convicted under the same provision who are now able to use it as a precedent.