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FREEDOM OF EXPRESSION IN TURKEY: OBSERVATIONS ON LEGISLATION AND THE JUDICIARY

COMMENTS AND RECOMMENDATIONS

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İHOP and its members (helsinki Citizens assembly, Human Rights Association and Amnesty International Turkey) have been placing a special emphasis on freedom of expression, which is a cross-cutting issue affecting several categories of rights and freedoms, political rights and freedoms, freedom of assembly and association. The latest research of İHOP on freedom of expression has been prepared by Lawyer Hüsnü Öndül. This research aims at identifying restrictive laws and regulations in the field of freedom of expression and the attitude of the judiciary (prosecutors, judges and courts at all levels of the judiciary) with respect to the case law of the European Court of Human Rights under Article 10 of the European Convention on Human Rights. Lawyer Öndül examined 57 files (indictments and detailed judgments of the courts) at various levels of the judiciary, starting from local district courts to the highest court of appeals, against the criteria applied by the ECtHR on freedom of expression. The results of this study have been published in Turkish by İHOP. This document is the translation of the comments and recommendations listed under the 4th section of the study "Freedom of Expression in Turkey: Observations on Legislation and Judiciary." Turkish version of this report is available at http://ihop.org.tr.

With the present study on the state of freedom of expression in Turkey, we want to make some comments and recommendations. It appears that the problem has two dimensions, relating to legislative arrangements in the first and to practice of the judiciary in the second. We believe our comments and recommendations will make a modest contribution to the protection of the right to freedom of expression. Many comments made here may have been expressed earlier by academics, members of the media or lawyers on various occasions. The study underlines that in particular there is need to closely scrutinize shortcomings in judicial practices and to have enforcement officials impart the standards of the ECHR, both of which require multi-dimensional efforts including training in the first place.

COMMENTS

1- Mostly, no reasoning appears in the sample of indictments and court decisions examined in the context of the present report. There is no discussion or analysis of why opinions which are claimed as constituting an offense are so, and there is no reference to the context in which an opinion is expressed. A reasoning is not developed in the light of such discussions and analyses. As can be observed in sample indictments and court decisions, mostly the event in question is described and then it is concluded that an offense has been committed through reference to a specific article or repeating the text of the article concerned.

2- The absence of reasoning is observed also in decisions of non-prosecution taken by Public Prosecutors or in decisions of acquittal by Courts.

3- In indictments and court decisions, references to the European Convention on Human Rights (ECHR) and to decisions of the European Court of Human Rights (ECtHR) are rare and only general in nature. In relation to freedom of expression, there are cases in which Public Prosecutors and judges state that this freedom is recognized in the ECHR and protected by the Constitution and other relevant laws. Nevertheless, there is no specific application of the provisions of the ECHR and decisions of the ECtHR to individual cases in examined indictments or court decisions.

4- In indictments and court decisions examined, no opinion was found discussing the compliance of the article to be applied with Article 10 of the ECHR.

5- In cases where the ECtHR found systemic problems (i.e. decision on the case Ürper and others v. Turkey) it is observed that prosecutors and judges had followed the same flawed approach. This state indicates the existence of serious problems in observing the rule that the Convention shall prevail, as provided by Article 90 in the Constitution, when the provisions of the Convention and domestic law are in contrast. The same situation is also problematic in respect to the obligation to comply with final decisions undertaken according to Article 46 of the ECHR.

6- The following are common to all indictments and court decisions examined: There is no indictment or court decision which followed the method adopted by the ECtHR in the context of bringing restrictions to rights; in the context of restricting the freedom of expression, other than merely stating the legal basis, there is no questioning whether the legal provision is in accord with the principle of the rule of law; there is no statement of any legitimate purpose and no discussion whether restrictions are actually needed in a democratic society; and there is no assessment whether the legal provision applied is proportional or not. Given all these, it does not seem possible to apply the ECHR firstly in national judiciary organs and to ensure that this application takes place in line with the case-law of the ECtHR. In other words, the objective of legally protecting human rights in all States Parties to the ECHR will not be attained in Turkey. Another outcome of the same state of affairs will be the failure in setting standards (protection of human rights in the same way in all States Parties to the Convention) applicable in all States.

7- It is observed that articles whose application is requested or actually applied in indictments and court decisions are in disaccord with ECHR and ECtHR standards in terms of both normative arrangement and application. Examples include the provisions of the ATL (Anti-Terror Law) and TPC (Turkish Penal Code) that prohibit propaganda in general terms including opinions expressed without any resort to force and violence. The same disaccord is also observed in the practice of applying heavier penalties in the case of offenses committed through the media and in offenses of defamation.

8- In indictments and court decisions examined, it is observed that ECtHR decisions adopted in

relation to criteria stated in ECHR Article 10/2 are not taken into account and concepts in Article 10/2 are not used in specific cases. Yet, the ECtHR is the highest and ultimate supervisory body in construing the ECHR.

9- In indictments and court decisions examined, there is no assessment whether opinions prosecuted imply any violence or not; instead such terms as “propaganda”, “provoking the people” or “degradation” excerpted from law texts are merely repeated.

10- The Law no. 5651 entitled “Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publication” is applied in a manner to block access to many sites and there are many decisions blocking access without justification other than merely referring to articles from the law.

11- In enforcing the Law no. 5651, decisions to block access can be given only in respect of catalogue offences listed in Article 8 and of the Law no. 5846 on Intellectual and Artistic Works. Yet, administrative bodies and the judiciary take decisions for banning access or give cautionary judgments, which runs counter to the rule that human rights can be restricted only as prescribed by law as stated in the ECtHR.

12- The Law no. 5651 is enforced in practice so as to block access not only to any specific content but to the whole system. This practice called “domain based blocking” is in contrast with the criteria of “necessity” and “proportionality” envisaged by the Constitution and ECtHR.

13- Decisions taken for blocking access on the basis of Law no. 5651 or other legislation are in contrast with ECHR Article 10/2. As pointed out by Akdeniz and Altıparmak: “Decisions of blocking under Law no. 5651 run counter to fundamental guarantees enshrined in the Constitution and international human rights law. Content providers are not given the opportunity to assert that their websites are in compliance with law. The whole process is managed in secrecy and justifications are not shared with the public. In few cases we had the chance to examine, it is observed that courts do not thoroughly examine claims raised and miss constitutional principles that strike a balance between fundamental freedoms and pressing social needs.”[26]

14- Articles 6 (in particular Article 6/2 as pointed out by the decision on the case Gözel and Özer v. Turkey and Article 6/5 and as pointed out by the decision on the case Ürper and others v. Turkey) and 7 (in particular Article 7/2 as pointed out by the decision on the case Gül and others v. Turkey) are still applied, in spite of the decisions of the ECtHR in a way to threaten freedom of expression. When applying these articles, no query is made whether “resort to violence”, “instigating violence”, “implying violence”, “hate speech targeting specific persons”, “armed resistance” or “call for armed resistance” actually exist.

15- Article 301 of the Turkish Penal Code is still in effect in spite of decisions on such cases as Fırat Dink v. Turkey and Altuğ Taner Akçam v. Turkey and constitutes a threat to freedom of expression.

16- Articles 215 and 216 in the Turkish Penal Code are still in contrast with the principles of clarity, certainty and predictability. As such, these articles pose a threat to freedom of expression just as the case with Article 310.

17- Articles 285 and 286 in the Turkish Penal Code have serious problems in terms of right to information and freedom of press. Again, these problems are related to the principles of clarity and predictability.

18- The provision in Article 62 of the Law no. 5275 on the Enforcement of Penal and Security Measures is problematic in terms of freedom of expression.

[26] İnternet: Girilmesi Tehlikeli ve Yasaktır (Internet: Restricted Access), p: 166 available at http://www.ihop.org.tr/english/index.php?option=com_content&view=article&id=97

19- The TPC Article on Obscenity is not in compliance with the principles of clarity and predictability. While the judiciary decides on products that are considered obscene and administrative bodies decide, for example, on blocking internet access, neither could substantiate this decision on the ground of any social necessity responded to in a democratic society.

20- There are no well established standards in indictments and court decisions. A consistent consideration of such fundamental principles as prescription by law, legitimate purpose and necessity in a democratic society could be found in none of the indictments and court decisions examined for this report. Also, these indictments and court decisions have no serious case examination, any analysis, discussion and demonstration of text contents and contexts. Furthermore, there are also indictments and court decisions in which:

- there is no justification at all,
- the term freedom of expression appears nowhere, and
- there is no reference to the ECHR and ECtHR case law.

21- In terms of the rule of restricting human rights only as prescribed by law as stressed by the ECtHR in relation to Anti-terror Law Articles 6/2, 6/5 and TPC Article 301 that it considered problematic, it is found that the provision entitling courts to “find a law or decree unconstitutional” as provided by Constitutional Article 152 is not observed by courts with due regard to Constitutional Article 90 and the way of “checking for constitutionality” is not pursued.

RECOMMENDATIONS

I-Recommendations for Amendments in Articles

1- Keeping in mind the options of totally annulling the Anti-Terror Law or its articles listed below,

a- Without excluding the option of totally lifting the Anti-Terror Law (ATL) and courts with special authority, Article 1 in ATL which defines terror too broadly and without reference to violence must be amended[27],

b- Article 6/2 which envisages imprisonment from 1 to 3 years to those "printing or publishing declarations or leaflets emanating from terrorist organisations " which is criticized by the ECtHR in its decision on the case Gözel and Özer v. Turkey must be amended.,

c- Article 6/5 which the ECtHR found as amounting to censorship for allowing the banning future publications in its decision on the case Ürper and others v. Turkey must be amended,

d- Article 7/2 on engaging in propaganda of terrorist organizations which is the basis of practices criticized by the ECtHR in its decisions on cases Gül and others v. Turkey and Çamyar and Berktaş v. Turkey must be amended,

e- Article 5 which specifies that punishments given on the basis of this act shall be increased by a half must be amended,

f- The TPC Article 301, whose existence is deemed as threat to freedom of expression by the decision on the case Altuğ Taner Akçam v. Turkey must be annulled.

g- TPC Article 318, which does not recognize conscientious objection as a human right and which has become unenforceable following the binding decision of the ECtHR Grand Chamber in the case Bayatyan v. Armenia must be annulled in the light of decisions on cases Erçep v. Turkey and Feti Demirtaş v. Turkey.

2- Besides 17 laws mentioned in the first part of the report, there is need for amendments in the following articles of the Penal Code: Harming the honour, reputation or dignity of another person (Article 125), Defamation of a public officer (Article 125), Soliciting, encouraging or supporting a person to commit suicide (Article 84), Violation of communicational secrecy (Article 132), Secrecy of private life (Article 134), Praising the offense and the offender (Article 215), Provoking people to hatred and hostility (Article 216), Offences against public peace through the press (Article 218), Violating the secrecy of investigation (Article 285), Recording of sound and vision during investigation or prosecution processes (Article 286), Attempt to influence fair trial (Article 288), Insulting the President (Article 299), acting against basic national interests for personal gain (Article 305), Openly provoking people not to obey the laws (Article 217), Establishing a criminal organization and making propaganda on its behalf (Article 220), Acts violating laws on hat wearing and Turkish alphabet (Article 222), Indecency (Article 226), Misconduct in Office (Article 257), Slander (Article 267), Making false statements as a witness (Article 273), Supporting the offender (Article 283), Membership to illegal armed organizations (Article 314), Provision of information relating to the security of the state (Article 327), Disclosure of information relating to public security and political interests of the State (Article 329), Provision of restricted information (Article

[27] For a similar suggestion see, UN Commission on Human Rights, first report by Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, 24 March 2006, E7 CN 4/2006/98 Add:2 Translation: http://www.ihop.org.tr/index.php?option=com_content&view=article&id=124

334) and Disclosure of restricted information (Article 336).

In the articulation of articles mentioned above, there are several problems including the following: disaccord with restriction criteria as stated in ECHR Article 10/2; possibility of abuse by bringing broader restrictions and ambiguity in and unpredictability of some concepts and definitions. In short, these articles are problematic in terms of clarity, exactness and predictability. As stated above, Article 301 has a character threatening freedom of expression and this point is also stressed by the ECtHR in the case of Altuğ Taner Akçam v. Turkey (Altuğ Taner Akçam v. Turkey, Application no: 27520/07 – 25 October 2011). Articles relating to "praising", "propaganda" and "activities in line with the objectives of the organization" (TPC Articles 215 and 220/6-7-8) again lack clarity and predictability and thus have the potential of restricting freedom of expression even when there is no implication of violence at all. Obscenity is not defined in law and there is no clarity as to why it is an offense or should be deemed so.

TPC Articles 132, 133,134, 285 and 288 are also worth noting particularly in terms of freedom of press.[28] These articles are formulated in such a way as to pose a threat to the function of the media to inform the public about issues that need to be debated, and also to the rights of receiving and having access to information and the rights of the media and media professionals to transmit news or information.

The provisions envisaging monetary fines of the press instead of imprisonment and increase in sentences when offenses are committed through the press must be abolished. What constitutes a problem in terms of freedom of expression are TPC Articles 327, 329, 334 and 336 which run counter to the principles of "prescription by law", clarity and predictability. These articles are problematic particularly with respect to the freedom of press. They threaten the right of the public to receive news and information.

3- In Article 1 of the Law no. 5816 on Offenses against Atatürk, open and gross insult to the memory of Atatürk is considered as an offense. The issue can be assessed in the context of ECHR Article 8. However, the existing provision may be construed so as to consider any criticism of Atatürk as an offense as well. Hence it will be appropriate to supplement the article with the notion of freedom of criticism. As it stands now, the article has the potential of restricting freedom of expression. Hence it cannot be considered clear and predictable enough.

4- The Law no 5651 on Regulating Broadcasting by Internet and Suppression of Crimes Committed through Internet Broadcasting must be abolished.[29] While the purpose of the law is stated as protecting children from unlawful and harmful internet sites, the practice has assumed dimensions entailing direct censorship for all. Thus, a new policy is needed in this field. The new arrangement, as suggested by Akdeniz and Altıparmak, "should be developed on the basis of respect to the right of all adult citizens of Turkey to have access to all kinds of internet content and to the right of consumption." To translate these principles into life, the new initiative should adopt the principles of transparency, clarity and pluralism. Particular attention needs to be given to the following four fundamental principles:

a- Regulations related to internet access and use should be respectful to the principles of international human rights law, particularly to freedom of expression and privacy of communication.

b- Restrictions must be as prescribed by law, proportional and in accordance with the norms of democracy.

[28] We support and draw attention to the draft law proposed by CHP Deputy Oktay Ekşi on 20 November 2011 on the amendment of these articles and annulment of Articles 327, 329, 334 and 336.

[29] The same suggestion can be found also on page 168 in "Internet: Girilmesi Tehlikeli ve Yasaktır" by Akdeniz and Altıparmak.

c- Any content, saving, reading or visualizing of which is not considered as offense, must not be covered in regulations related to internet content.

d- As stated by the European Commission "problems of principle (caused by unlawful and harmful content) radically differ from each other and they require different legal and technological responses. It will be dangerous to mix up the issue of children's access to pornographic content for adults with other issues. The new initiative must certainly take this important difference into consideration."[30]

5- The Information Technologies and Communication Authority cites provisions in some laws allowing for "precautionary measures" as the basis of decisions banning internet access. (Reserving the request for full abolishment of these provisions including those in the Law no. 5651) articles in various laws that need to be amended are as follows:

Annex article 4 in the Law on Intellectual and Artistic Works; Article 8, paragraph 5 and indent (k) in the Law on the Organization and Duties of Tobacco and Alcohol Market Regulatory Authority; provisions of Commercial Law related to unfair competition (Articles 56 and 58 in the former law and Articles 54, 55 and 56 in the present one); Article 6 paragraph 4 in the Anti-Terror Law; Articles 24 and 25 in Turkish Civil Code; Article 101 of Annulled Law on Civil Procedures (389 and following articles in the new law); Article 5 of the Law on Betting in Football and Other Sports Contests; Article 6 of the Law on the Establishment of the Head Office for Religious Affairs; and Articles 9, 76 and 77 of the Law Decree on the Protection of Trademarks.

6- The "Procedures and Principles Related to Safe Internet Use" which took effect on 2 November 2011 should be abolished as the Law no. 5651 should. Firstly, these procedures introduce the State filtering of internet content. Secondly, a stereotype concept of child/family is exalted and imposed. The authorization of the State in filtering and deciding on which sites should be accessible cannot be accepted in the context of freedom of expression. Turkey is the only OSCE (Organization for Security and Cooperation in Europe) country that resorts to central filtering.[31]

7- Articles 78 to 90 and 96 in the Law on Political Parties must be amended since they include unclear statements in contrast with freedom of expression and principles of clarity and predictability. These articles also include bans and restrictions over a rather large area (pertaining to minorities, religion and faith, bans on discussing the character of the regime and official ideology, ban on using languages other than Turkish, restrictions on various other rights and freedoms).

8- The Law no. 1117 on Protecting Minors from Harmful Publications must be abolished. As in the case of Law no. 5651, here too there is need for a legislative arrangement fully respecting international human rights law and freedom of expression. The legislation pertaining to children must be based on principles enshrined in the UN Convention on the Rights of the Child and the best interest of the child must be the starting point.

9- Articles in the Law no. 6112 on the Higher Board for Radio and Television (RTÜK) which are too vague and also restrictive on freedom of expression by introducing much broader restrictions than criteria specific in ECHR Article 10/2 must be amended. To be more specific, these are Articles 5, 7, 8, 18, 32, 33 and 46 in the law mentioned.

10 – Consideration of commitment of an offense through the press as an aggravating factor as envisaged in Articles 285, 288 and 318 of Turkish Penal Code must be abandoned. This requires

[30] Ibid, p (169-170)

[31] See, academic awareness against BTK filtering practices and call on all university presidencies, 9 January 2012, Bianet/ ANF)

amendments in articles mentioned. (For the same approach see Arnaud Amouroux in "İfade Özgürlüğü, İlkeler ve Türkiye", İletişim Publications, İstanbul 2007 pp.45-54).

11- The heading of Article 19 in the Law no. 5187 on Press, which is "influencing the judiciary" at present, must be changed to "crime reporting" (See, "İfade Özgürlüğü, İlkeler ve Türkiye", p. 221, suggestion by Fikret İlkiz).

12- Conscientious objection must be recognized as a human right and TPC Article 318 must be abolished. Also to be abolished is Article 45 of the Military Penal Law related to conscientious objection, which restricts freedom of religion and conscience.

13- Offenses related to insulting and libel must be deleted from criminal laws since issues emerging as a result of opinions expressed must be dealt with not by criminal but private law. The coverage of expressed opinions by criminal laws and particularly the possibility of being criminally punished as a result of expression relating to public officials or state institutions increases the risk of auto-censoring and threatens free debate of public issues. The limits put to the criticism of public officials must be kept wider.

14- TPC Articles 220/6-7-8 and 314 must be re-articulated. In these Articles too, provisions relating to being punishable as a member of a terrorist organization while actually not being a member, and engaging in propaganda serving the purposes of a terrorist organization, are too vague and prone to broad and arbitrary interpretation. Hence, these Articles are also in contrast with the principles of being prescribed by law, clarity, predictability and the rule of law.

II-Recommendations Relating to the Judiciary

1- It must be ensured that public prosecutors and judges are duly informed about and trained in international human rights law.

2- Public prosecutors and judges must be informed in detail and given training in the European Convention on Human Rights and decisions of the European Court of Human Rights as the highest body overseeing the implementation of the Convention.

3- Public prosecutors and judges must be informed in detail and given training in ECHR Article 10/2 and decisions pertaining to various countries including Turkey on the basis of this Article.

4- The ECHR and ECtHR should be an inherent part of all in-service training programmes designed for public prosecutors and judges.

5- Public prosecutors and judges need to be trained in the principle of the rule of law which entails effective legal checks on interventions by official authorities to the rights of individuals (i.e. the case of Silver and others v. Great Britain). It must be consistently stressed that their duty is to protect human rights. As aptly stated by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe in paragraph 93 of his report "Freedom of Expression and Media Freedom in Turkey": "There are also studies showing that members of the judiciary in Turkey see their primary role as protecting the interests of the state, as opposed to upholding the human rights of individuals, rule of law and democracy." [*]

6- It must be incorporated into relevant regulations that judicial practices in compliance with the

[*] https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1884670&SecMode=1&DocId=1765908&Usage=2

ECHR and ECtHR decisions are leading criteria in assessing the performance of public prosecutors and judges.

7- Public prosecutors must abandon the practice of bringing suits on the basis of investigation reports prepared by the police, who are directly under the Ministry of Interior and thus a part of the executive, by following and reading daily papers, periodicals, books and brochures.

8 –A functioning judicial police must be adopted and the influence of the executive on this institution and practice must be avoided. The judicial police must be trained to discharge its duties in accordance with respect for human rights and freedom of expression.

9- Similarly, such practices as detention, interrogation and prosecution of persons on the basis of records taken by the police during meetings and demonstrations must be abandoned.

10- Transparency and clarity must be ensured in all court decisions (judicial and administrative). All decisions by higher tribunals including those related to freedom of expression must be accessible to all and hence published.

11- All decisions related to freedom of expression taken by courts or administrative bodies must be with clear and accessible justification. The current practice is mired in examples to the contrary despite the existence of constitutional and legal provisions.

12- In indictments and decisions relating to freedom of expression, the practice of merely stating the opinion expressed and then enlisting related penal articles must be abandoned.

13- In indictments and court decisions, a path running parallel to the procedure adopted by the ECtHR must be pursued. In matters related to freedom of expression, criteria stated in Article 10/2 of the Convention must be taken as the basis. The following questions must be considered, responded to and stated in indictments and court decisions: Whether there is any legislation allowing for restriction; whether the law concerned is clear and predictable; what is considered as legitimate purpose and whether any restriction on the basis of this purpose is necessary/inevitable in a democratic society and whether the restriction envisaged is proportional or not. As demonstrated in guidebooks prepared by the Council of Europe in relation to freedom of expression, freedom is the principle and even when restrictions are imposed this must be backed by "proper and sufficiently convincing" justification. As pointed out by Andreotti[32], the method to adopt in examining applications related to freedom of expression in general is to analyse both the text and the content at the same time. Similar views/recommendations can be found also by Prof. Türkan Yalçın Sancar in her article titled "Once more on the freedom of thought and once more on Article 301" in the book "Freedom of Expression and Turkey": "Important tasks fall upon courts at this point. They must avoid taking statements singularly by isolating them from their context and must strictly address them in their original context." (p.140)

14- Besides the suggestion of abolishing the Law no. 5651, no ban on access should be introduced on the basis of other legislation as long as this law remains in effect. Ban on access is an encroachment upon freedom of expression. In relation to internet access, there is only one regulation: the Law no. 5651. Decisions to prohibit access in matters not prescribed by this law and by resorting to unauthorized means, merely on the basis of analogy with other laws not related to the issue means unlawful intervention in freedom of expression. The judiciary must avoid such decisions not substantiated by any law. Intervention in freedom of expression not based on any law is sheer violation of Article 10/2 even without any need to discuss the content.

[32] Onur Andreotti, Civan Turmangil, Joint Project on Strengthening the Role of Higher Judiciary Organs in the Context of European Standards, 1-2-3 December 2010 . Also see Onur Andreotti's presentation "'safeguarding the authority and impartiality of the judiciary' as one of the legitimate purposes for restricting freedom of expression" p.1-2 http://www.yargitay.gov.tr/abproje/belge/sunum/rt5/civan-onur_art9-10-11_notes.pdf

15- In terms of both headings and content, decisions of higher tribunals must confirm to the decisions of the ECtHR with respect to such principles as prescription by law, legitimate purpose and necessity in a free and democratic society. Cases must be reviewed with due consideration of compliance with ECHR and decisions of the ECtHR.

16- Here, we agree with and repeat the advice of Thomas Hammarberg, European Council Human Rights Commissioner, made in paragraph 100 of his report mentioned above in Article 5: “In the Commissioner’s opinion the problems relating to freedom of expression and freedom of the media in Turkey can only be resolved if the judges and courts at all levels, and in particular the supreme courts, take full account of ECHR standards and embed them in their decisions concerning possible restrictions of freedom of expression.“

17- As pointed out by Hammarberg’s in his report “Administration of Justice and Protection of Human Rights in Turkey” (paragraph 23), public prosecutors should scrupulously perform their function – gate keeping function- as provided in Articles 170 to 175 of the Code of Criminal Procedures and prevent threats to freedoms posed by prosecutions and initiated cases.

18-In the light of the principle that human rights can be restricted only as prescribed by law, courts must resort to “checking for constitutionality” by taking due account of possibilities introduced by Constitutional Articles 90 and 152 when any legislation is problematic in terms of clarity, predictability and the rule of law.