

The Second Section of the European Court of Human Rights (ECHR), with a judgement of February 1st 2022, found a violation of the freedom of expression, guaranteed by art. 10 of the European Convention on Human Rights, by Turkey.

At the time of the facts, the applicants were parliamentarians belonging to an opposition political party (HDP); they turned to the European Court to challenge the waiver of their parliamentary immunity, which occurred due to their political views and decreed with a constitutional amendment of May 20th 2016. Following this amendment, criminal proceedings were initiated against them and fourteen deputies belonging to their political party were placed in pre-trial detention.

In light of its current jurisprudence and the nature of the complaint lodged by the applicants, the European Court found that the issues raised in the present case can be examined on the basis of art. 10 of the Convention.

The Turkish government has stated that the applicants have in no way demonstrated how the constitutional amendment of May 20th 2016 affected their rights guaranteed by the article in question, considering that they cannot be considered «victims» of a violation of the same. Furthermore, in its view, the applicants have not exhausted the internal remedies. In support of this thesis, the European Court's jurisprudence was recalled according to which the applicants must lodge an individual appeal before the Constitutional Court before turning to the European Court with an individual application. Finally, the Government indicated that, in June 2016, the HDP filed a complaint with the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union on behalf of fifty-five parliamentarians, including the applicants. By presenting their complaints to another international investigation or settlement body, they would have violated art. 35, §2, lett. (b) of the Convention, according to which: «the Court shall not deal with any application submitted under Article 34 that: [...] (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information».

The European Court, in the light of what was decided in a recent case (*Kerestecioğlu Demir v. Turkey*, n. 68136/16, § 31, 4 May 2021), rejected all the aforementioned objections raised by the Turkish government, given their identity. The Strasbourg judges then disregarded what the Turkish authorities said in relation to the absence of interference in the applicants' exercise of the right to freedom of expression. In fact, recalling the consolidated jurisprudence regarding the foreseeability of the constitutional amendment of 20 May 2016 (*Selahattin Demirtaş v. Turkey* (n. 2), n. 14305/17, §§ 264-270, 22 December 2020 and *Kerestecioğlu Demir v. Turkey*, cited above, §§ 66-72), the ECHR affirmed that the argumentative process and the conclusions of such similar cases also apply to the applicants in the present case, given that the waiver of their parliamentary immunity derives from the same constitutional amendment. Parliamentary inviolability shielded elected representatives from any arrest, detention or prosecution during their term of office without the consent of the National Assembly. However, following the amendment, political statements by members of parliament had become punishable under criminal law, without availability of the safeguards against applications to lift their immunity provided for under Articles 83 and 85 of the Turkish Constitution. In particular, the National Assembly was no longer required to perform an individual assessment of the situation of each of the members of parliament concerned. While it had maintained the regime of immunity, it had, at the same time, made it inapplicable to certain identifiable members of parliament on the basis of general and objective wording. The Court therefore fully subscribed to the Venice Commission's clear finding that this one-off unprecedented amendment had been aimed expressly at specific statements by members of parliament, particularly those of the opposition, and thus had been a "misuse of the constitutional amendment procedure", in violation of art. 10 of the Convention.

Riferimenti Normativi:

- art. 10 Convenzione Europea dei Diritti dell'Uomo