# Third Party Intervention

# In the Case of Bayram Yorulmaz v. Turkey (no. 41400/19)

**by**

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## I. Introduction

1. İFÖD will address in its intervention in the case of Bayram Yorulmaz v. Turkey (**No. 41400/19**) the issue of freedom of expression in social media and defamation of politicians in Turkey.

2. It is understood from the case file that the applicant, who was a public official at the Adıyaman courthouse at the time of alleged events, was convicted to eleven months and twenty days' imprisonment with a suspended sentence for the offense of insulting a public official (the former Prime Minister Erdoğan) subject to article 125/3 of the Criminal Code because of a post he **shared** on his Facebook account. Later on, the applicant was dismissed from public duty by a decree law during the state of emergency period because of his alleged connection with PKK (Kurdistan Workers' Party, an illegal organisation).

3. The **shared** publication in question contained two photos of the former Prime Minister Erdoğan holding paintings showing minors and was accompanied by the following sentence: "They give and receive by grinning paintings of the people whom they condemned to death as a gift... What is it? Boldness? Impudence? Perversion?" (*Ölüme mahkum ettikleri insanların tablolarını sırıta sırıta hediye olarak alıp veriyorlar... Ne bu şimdi? Yüzsüzlük? Arsızlık? Sapıklık?*). It is **understood** from the case file that **the applicant did not produce the impugned content, but he merely shared the content generated by another Facebook user**. The criminal courts considered that the comment made in this publication was likely to degrade the former Prime Minister among the people and undermine his honour, dignity and reputation.

4. Relying on Articles 9 and 10 of the Convention, the applicant alleged that his criminal conviction infringed his right to freedom of expression. The Court asked to the parties whether there was interference with the applicant's freedom of expression, and especially his right to impart information or ideas, within the meaning of Article 10 § 1 of the Convention, and if so, whether that interference was prescribed by law, within the meaning of Article 10 § 2, and finally whether the national courts carried out an adequate balance, in compliance with the criteria established by the Court's case-law, between the applicant's right to freedom of expression and the right to opposing party to respect for his private life?[1]

5. The İFÖD's submission will discuss the legal issues surrounding social media posts in terms of their impact on the reputation of elected politicians such as mayors, ministers, and especially the Prime Minister within the context of Turkey. İFÖD will therefore assess the important issue of whether the majority of comments published on social media platforms are likely to be too trivial in character, and/or the reach of their publication is likely to be too limited in semi closed social media platforms such as

[1] *Axel Springer AG v. Germany* [GC], no 39954/08, 07.02.2012, §§ 89-95; *Von Hannover v. Germany (no.2)* [GC], nos. 40660/08 and 60641/08, §§ 108 113, ECHR 2012. See also *Couderc and Hachette Filipacchi Associés v. France* [GC], no.40454 / 07, § 93, ECHR 2015 (extracts).

Facebook. İFÖD will also argue that **content produced by third parties but shared or liked by others to a small and restricted group of Facebook users should not carry the same weight as a statement published on a mainstream website. Distinctions should be also made between minor distributors and authors of the impugned statements**.

6. Although the provision of the Criminal Code (article 125/3) under which the applicant was convicted criminalizes insults to public officers in connection to the performance of their public duty, this provision is often used to silence critical voices against high level politicians and the members of the government. Therefore, the İFÖD submission will focus on the use of defamation law to protect politicians against fair criticism in Turkey. As will be shown in the present submission, with regard to political issues, defamation laws are often applied in favour of the government officials to silence fair criticism against the government which as a result stifles democracy and pluralism. It is submitted that the current case should be reviewed against this background.

7. The intervention will first provide the relevant European standards concerning defamation **(Section II**). The submission will then discuss the compliance of domestic law with these standards. Firstly, the nature and reason of higher protection provided to public servants by article 125/3 of the Criminal Code and the inequality it causes will be assessed (**Section III**). Secondly, Constitutional Court's jurisprudence which allegedly implements the Council of Europe's decriminalisation policy in defamation cases will be reviewed (**Section IV**). As the legal protection provided to President Erdoğan, (formerly the prime minister of Turkey at the time the applicant shared the impugned post) differs from all politicians in the Turkish legal system, his unprecedented and unique position before the Constitutional Court (**Section VI**) will also be evaluated to present a full picture of the problem.

## II. European Standards with Regard to Defamation of Politicians

8. According to the established caselaw of the Court the right to the protection of one's reputation is a right which falls under Article 8 of the Convention. However, in order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and must have been made in such a manner as to cause prejudice to personal enjoyment of the right to respect for private life.[2] The Court, in the admissibility decision of *Tamiz v. The United Kingdom* established that "**millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage**" to another person's reputation or to state institutions to require criminal prosecutions or sanctions such as dismissal.[3]

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2 *A. v. Norway*, no. 28070/06, 09.04.2009, § 64; *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012, § 83.

3 *Tamiz v. The United Kingdom* (dec), no 3877/14, 19.09.2017, §§ 80-81.

9. Where Article 8 is engaged, by the aim of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8. When weighing up the right to freedom of expression against the right to respect for private life the relevant criteria are as follows: **first,** the contribution to a debate of general interest; **second,** the degree of notoriety of the person affected and the subject matter of the news report; **third,** the prior conduct of the person affected; **fourth**, the way in which the information was obtained and its veracity; **fifth**, the content, form and consequences of the publication; and **sixth**, the severity of the sanction imposed.[4] **İFÖD submit that this test should be considered together with the potential impact of the medium of expression concerned**[5] as an important factor in determining whether social media content such as those shared on Facebook can constitute defamation.

**The Speaker/Producer vs. the Distributor of Content**

**10.** There is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest. Within this context, there needs to be a distinction between various types of social media users. Although the title and position of the person making the speech is important within the Court's jurisprudence, there may be other types of users of social media platforms previously not considered by this Court. Therefore, there needs to be a distinction between the following type of users while determining criminal responsibility if any:

a. **The Speaker** is the person who **creates**, **produces** and **owns** the original content

b. **The Direct Distributor** is the person who **shares** the original content

c. **The Indirect Distributor** is the person who **likes** the original content

11. Even when liability may arise for the speaker category within the context of social media postings and content, that may not necessarily extend to the distributor category as the potential impact of such distribution needs to be evaluated further by reference to the Court's jurisprudence.

**Potential Impact of the Distribution of Content on Facebook**

12. There are substantial differences between the various social media platforms and how the users choose to use these platforms. While, for example, Twitter is regarded as largely an open microblogging platform, Facebook is often regarded as a semi closed

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4 *Axel Springer AG v. Germany* [GC], no 39954/08, 07.02.2012, §§ 83, 89-95; *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, §§ 108 et seq. 07/02/2012; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, 10.11.2015; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 88, 27.06.2017.

5 *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).

platform given that users largely post on their Facebook "wall" that is visible to their "friends" (unless they make the content accessible to anyone). The users of Facebook themselves decide whether to have their accounts and profiles publicly open to anyone or whether their accounts are restricted to family and friends. Therefore, İFÖD believes it is important to consider the nature of the platform on which the impugned posts were made; that is whether they were made on a completely publicly accessible Internet platform, website or blog or on semi-private platform.

13. The Court established that the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference. According to the Court's jurisprudence, "**it is clear that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages**".[6] It is therefore essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public.[7]

14. Therefore, İFÖD suggest that distinctions should be made between whether the posts were made by a public, well-known or influential figure,[8] or a well-known blogger or YouTuber[9] or a popular user of social media,[10] which could have attracted public attention to his comment and thus have enhanced the potential impact of the impugned statements at the time he shared postings on Facebook or when he was prosecuted.[11] Secondly, the Court should also take into account the content of shared postings whether they had a political nature and whether they were part of a political debate on a matter of general and public concern. Thirdly, the Court should be mindful of the fact that the applicant did not produce the content of posting, but he shared content generated by another Facebook user and already available on the platform. Fourthly, the Court should also consider whether the statement shared by the applicant attracted any public attention. Fifthly, the Court should assess whether the original speaker of the content was identified, and if this is the case whether a criminal investigation has been conducted against that person. Finally, the Court should examine whether domestic judicial authorities evaluated the potential impact of the applicant's postings on Facebook and his trivial role in distribution of the original content.

15. İFÖD is of the opinion that **these are important factors that needs to be taken into account** and that the Court should assess in the present case.

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6 *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 79.

7 The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, in his Report submitted in accordance with Human Rights Council resolution 16/4, A/67/357, of 07.09.2012 also stated that "a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website." See at https://undocs.org/pdf?symbol=en/A/67/357, § 46.

8 Contrast, *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, 11.10.2001; *Féret v. Belgium*, no. 15615/07, §§ 75 and 76.

9 *Rebechenko v. Russia*, no. 10257/17, 16.04.2019, § 25.

10 *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, ECHR 2016.

11 *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 81.

**Political Speech and Public Debate**

16. Political speech is afforded a privileged status under the Convention. As noted by the Court in *Lingens v. Austria* "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention".[12] Other matters of public interest also deserve same level of protection.[13] It follows then the margin of appreciation available to the authorities in assessing the "necessity" of measures restricting expressions related to matters of general concern is particularly limited.

17. Due to the important relationship between freedom of expression and democracy, statements that relate to a debate on a matter of general concern, and that constitute political or militant expression are entitled to a high level of protection of the right to freedom of expression.[14]

**Statements Against Politicians**

18. As a result of this approach the Court has also observed that "the limits of acceptable criticism are wider as regards a politician than as regards a private individual.[15] A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.[16] However, the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention.[17]

19. It is, therefore, necessary to distinguish statements targeting the private life of a politician[18] and public role he/she plays in society.[19] If the person attacked is a public servant, the Court pays particular attention to whether the attacks were professional or personal. However, it is important to note that the Court is of the opinion that civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.[20] However, **this protection cannot be provided to politicians who are in the middle of political debates.** The Court drew a fundamental distinction between the statement of facts capable of contributing to a debate in a democratic society relating to politicians in the

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12 *Lingens v. Austria*, no. 9815/82, 08.07.1986, § 42.
13 *Thorgeir Thorgeirson v. Iceland*, no. 13778/88, 25.6.1992, § 64.
14 *Lindon, Otchakovsky-Laurens and July v. France*, no. 21279/02, 22.10.2007, §. 48.
15 *Fedchenko v. Russia*, no. 33333/04, 11.2.2010, § 33; *Tuşalp v. Turkey*, no. 32131/08, 21.2.2012, § 45.
16 *Lopes Gomes Da Silva v. Portugal*, no. 37698/97, 28.9.2000, § 30.
17 *Tuşalp v. Turkey*, no. 32131/08, 21.2.2012, § 45.
18 See for instance, *Tammer v. Estonia*, no. 41205/98, 06.02.2001.
19 *Cojocaru v. Romania*, no. 32104/06, 10.2.2015, §. 95.
20 *Janowski v. Pologne* [GC], no. 25716/94, 21.1.1999, § 33; *Busuioc v. Moldova*, no. 61513/00, 21.12. 2004, § 64; *Taffin and Contribuables Associes v. France*, no. 42396/04, 18.2.2010, § 64.

exercise of their functions, and the reporting of details of an individual's private life, where it did not.[21]

20. Another important principle developed in the case law of the Court relating to defamation of politicians is that providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention.[22] Such a **privileged protection cannot be provided to heads of state, prime ministers, ministers or other politicians**.[23] Following the Court's principles, any internal law protecting by special or higher penalties politicians and all high-ranking officials in general against insult or defamation, in particular by the press, would be incompatible with Article 10.

21. The context in which the expression is used is also crucial.[24] Article 10 protects also the use of exaggerated or even offensive language, especially in cases where journalists are reacting to what the politician said.[25] Polemical statements responding a politician's expression concerning a matter of general interest, cannot be restricted as long as the person who criticises the politician does not show deliberate carelessness in his/her wording.[26] The Court commented that the distinction between statements of fact and value judgments is of less significance where the impugned statement is made in the course of a lively political debate at local level and where elected officials and journalists should enjoy a wide freedom to criticise the actions of a local authority, even where the statements made may lack a clear basis in fact. [27]

22. An offensive statement may fall outside the protection of freedom of expression where the sole intend of the offensive statement is to insult.[28] However, as noted by the Court in the *Lopes Gomes Da Silva* judgment, political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.[29] In that case the Court found that the article had not been a gratuitous personal attack but had been based on facts, supported by an objective explanation on a matter of political debate.

23. Therefore, **domestic courts should not take passages out of context and isolate particular phrases as defamatory**. The use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic

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21 *Otegi Mondragon v. Spain*, no. 2034/07, 15.3.2011, § 57.

22 *Artun and Güvener v. Turkey*, no. 75510/01, 26.7. 2007, § 31; *Önal v. Turkey* (no. 2), no. 44982/07, 02.7.2019; *Otegi Mondragon v. Spain*, no. 2034/07, 15.3.2011*; Stern Taulats and Roura Capellara v. Spain*, no. 51168/15, 13.3.2018.

23 *Tuşalp v. Turkey, Turhan v. Turkey*, no. 48176/99, 19.5.2005, § 25.

24 *Tammer v. Estonia*, no. 41205/98, 06.02.2001, § 61.

25 *Oberschlick* (No. 2), no. 20834/92, 1.7.1997, § 32. Exaggeration and distortion of reality, inherent in satire, is also protected under Article 10. See *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, 25.1.2007, para. 33; *Eon v. France*, no. 26118/10, 14.6.2013, § 60.

26 *Unabhangige Initiative Informationsvielfalt v. Austria*, no. 28525/95, 26.02.2002, § 43.

27 *Lombardo and Others v. Malta*, no. 7333/06, 24.4.2007, § 60.

28 See for instance, *Rujak v. Croatia*, no. 57942/10, 02.10.2010, § 30.

29 *Lopes Gomes Da Silva*, no. 37698/97, 28.9.2000, § 34.

purposes. In *Tuşalp*, the Court observed that the domestic courts, in their examination of the case, omitted to set the impugned remarks within the context and the form in which they were expressed. [30] In *Instytut Ekonomichnykh Reform, Tov v. Ukraine* the Court also stated that the hypothetical grammatical forms and the satirical tone employed by the author were the relevant factors to be taken into account by the local courts to decide whether a journalist's article was defamatory or not.[31]

24. Furthermore, the dominant position which the Government and its members occupy makes it necessary for them – and for the authorities in general – **to display restraint in resorting to criminal proceedings and the associated custodial measures**, particularly where other means are available for replying to the unjustified attacks and criticisms of their adversaries.[32] Within this context, the Court held several times that criminal sanctions imposed on people expressing views on a matter of general concern **creates chilling effect** that works to the detriment of society as a whole, is likewise a factor which goes to the proportionality.[33]

**Article 125/3-a of the Turkish Criminal Code**

25. Article 125 of the Turkish Criminal Code criminalises defamation. According to this provision someone who insults another person should be sanctioned from three months to 2 years imprisonment. However, **the third paragraph of the Article brings a higher protection for civil servants**. If the crime is committed against a public servant in connection to the performance of his/her public duty, the penalty cannot be less than a year.

26. As stated above although the Court accepts that civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks, this provision and its implementation is in conflict with the Convention.[34]

27. Firstly, although the protection of public servants for a common interest is acceptable under the Court's jurisprudence, **it is doubtful** whether this protection justifies **privileged protection or stronger penalties** in defamation cases where the victim is a public servant.

28. Secondly, as the present case shows, **the judiciary in Turkey makes no distinction between elected politicians like prime minister, ministers and mayors and**

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30 *Roland Dumas v. France*, no. 34875/07, 15.7.2010, §§ 50-51.

31 *Instytut Ekonomichnykh Reform, Tov v. Ukraine*, no. 61561/08, 2.6.2016, § 56

32 *Kandzhov v. Bulgaria*, no. 68294/01, 06.11.2008, § 73. See further *Erdoğdu and İnce v. Turkey*, no. 25067/94, § 50, 8.7.1999; *Başkaya and Okçuoğlu v. Turkey*, no. 23536/94, § 62, 08.7.1999; *Sürek v. Turkey* (no. 4), no. 24762/94, § 57, 08.7.1999; *Sürek v. Turkey* (no.2), no. 24122/94, § 34, 8.7.1999; *Yalçın Küçük v. Turkey*, no. 28493/95, § 38, 5.12.2002; *Erdoğdu v. Turkey*, no. 25723/94, §§ 61-62, 15.6.2000.

33 *Cumpana* and *Mazare v. Romania*, no. 33348/96, 17.12.2004, § 114.

34 Turkish Constitutional Court while rejecting the annulment of article 125/3-a under contention of constitutionality process maintained that aim of the rule was to protect public interest. As a consequence, the Court held that heavier sentences for common interest are justified. See E. 2012/78, K. 2012/111, 12.9.2012.

**appointed public servants in the implementation of this provision**. The prime minister, ministers and mayors are considered "public servants" in implementation of this provision. Nevertheless, unlike public servants, a politician lays himself open to close scrutiny of his every word and deed by both journalists and the public at large and he must display a greater degree of tolerance. However, ignoring this difference, judicial authorities provide a higher protection to the politicians in power by using Article 125/3-a. As the provision states that heavier penalty should be imposed when the insult is made in connection to the performance of public duty, reaction of an individual to a politician concerning his/her political decisions are deemed falling in this category.

29. Thirdly, **this provision causes an inequality between politicians in power and opposition**. Politicians, including former prime ministers, ministers, mayors etc. are all protected by article 125/3-a, whilst opposition politicians are subject to the less protective article 125/1 as they are not deemed as public servants. Another significant difference between articles 125/1 and 125/3-a should also be highlighted. Under article 125/1, the victim should bring a complaint to the public prosecutor's office irrespective of the severity of the insult, whereas an investigation subject to article 125/3-a might be initiated directly by the public prosecutors without the necessity of lodging a complaint. Anonymous complaints by third parties and/or information provided by different sources is enough to initiate an investigation under article 125/3-a. It follows then the public prosecutor can prosecute a person for insulting a minister even when the minister is not aware of the statement. This is not the case for opposition politicians. Thus, the law treats politicians in power and opposition unequally.

30. Article 125/3-a has been widely and systematically used by the members of the ruling party. For instance, former Mayor of Ankara announced on Twitter that he initiated 3000 defamation cases against his critics.[35] Journalists and other individuals have been charged and convicted in numerous cases for insulting the former prime ministers Ahmet Davutoğlu[36] Binali Yıldırım[37] and Recep Tayyip Erdoğan[38] and other ministers.[39]

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[35] See CoE Human Rights Commissioner, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para. 57.

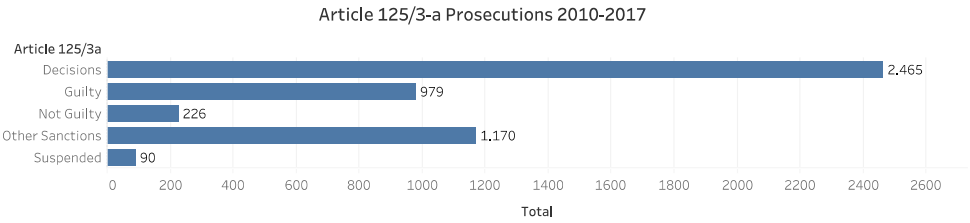
[36] Bülent Keneş Case, Ankara 37. Asliye Ceza Mahkemesi, 2015/977E, 2016/78K; Sevgi Akarçeşme and Others case, Ankara 32. Asliye Ceza Mahkemesi, 2015/350 E, 2015/865K.

[37] Ferhat Tunç Case, İstanbul Büyükçekmece 16 Asliye Ceza Mahkemesi https://www.evrensel.net/haber/389487/binali-yildirima-hakaret-iddiasiyla-yargilanan-ferhat-tuncun-durusmasi-ertelendi

[38] İbrahim Öztürk Case, Kütahya Asliye Ceza Mahkemesi, 2015/828E , 16.02.2016; Bülent Keneş Case, Ankara 14. Asliye Ceza Mahkemesi, 2014/780E 2015/466K; Canan Kaftancıoğlu Case, İstanbul 37. Ağır Ceza Mahkemesi, E. 2019/171, K. 2019/322. See further http://bianet.org/bianet/medya/174342-erdogan-ve-hakaret-tck-299-125-in-uc-ayi; https://t24.com.tr/haber/son-3-aylik-medya-gozlem-raporu-sansur-yayin-yasagi-tehdit-sorusturma-gozalti-tutuklama-olum,352456

[39] Ankara 29. Asliye Ceza Mahkemesi, 2015/13 E, 2015/1311K. In this case the defendant was convicted for insulting Erdoğan, Davutoğlu, Arınç and Bozdağ. He received 5 years and 9 months imprisonment in total.

31. Although this figure includes civil suits, total number is still striking. On the other hand, the official statistics are not detailed and only available until 2017, so the more recent yearly statistics for 2018 and 2019 are not available for evaluation. Therefore, the number of on-going cases as well as criminal investigations involving article 125/3-a remains unknown. Available statistics show that 2465 decisions were issued between 2010-2017 under article 125/3-a and 979 people were found guilty, 90 persons received suspended sentences and 1170 people received other sanctions. The official statistics do not provide details on who were the "public servants" defamed and whether and how many of these for example involved the prime minister. The number of on-going cases as well as criminal investigations involving article 125/3-a remains unknown.




## Constitutional Court Jurisprudence on Decriminalisation

32. In Resolution 1577 (2007) entitled "Towards decriminalisation of defamation" the Parliamentary Assembly called on member states to apply legislation with the utmost restraint and insists on procedural safeguards enabling anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility. In Recommendation 1814 (2007), the Parliamentary Assembly, referring to Resolution 1577 (2007), called on the Committee of Ministers "to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them into line with the case-law of the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions".

33. The Constitutional Court, referring to the Recommendations of the PACE[40] and the jurisprudence of the European Court,[41] has found some applications which brought by individuals who claim that their personality rights (reputation) were violated as a result of failure of public prosecutors to prosecute insults directed against them as inadmissible on the ground that the applicants had not exhausted available legal

[40] PACE, Towards decriminalisation of defamation, Resolution 1577, 04.10.2007, para, 11, 13, 17; PACE, Towards decriminalisation of defamation, Resolution 1814, 04.10.2007, § 1; PACE, Respect for media freedom, Recommendation 1897, 27.1.2010, para. 11.

[41] *Šabanović v. Serbia*, no. 5995/06, 31.5.2011, § 43*; Niskasaari v. Finland*, no. 37520/07, 6.7.2010, § 77.

remedies, i.e. civil suits.[42] Constitutional Court's approach was also approved by the European Court in *Yakup Saygılı v. Turkey*[43]and *Gülen v. Turkey*[44]applications.

34. However **rather than being a move towards decriminalisation of defamation** this move **has caused an unfair implementation** of criminal law in defamation cases. The provision that criminalises defamation still exists in the Criminal Code. Since the Constitutional Court did not make a distinction on insults that fall within criminal scope and those fall within civil scope, prosecutors have unfettered discretion in prosecuting insults under article 125/3-a as well as article 299 when the president of Turkey is involved. **At best** the Constitutional Court's attempt to decriminalise insults is futile considering the fact that prosecutors have indicted 224.681 individuals in 2018[45] and 243.781 in 2019[46] under article 125 of the Criminal Code. The statistics also include *ipso facto* investigation of insults against public servants. **At worst**, it is contradictory as the Constitutional Court requires applicants who claim to be defamed to exhaust all available remedies in relation to defamation including initiating civil lawsuits before applying to the Constitutional Court. By way of example, if an individual complains that a government minister defamed her and her complaint is dismissed by a public prosecutor, she will have to also initiate a civil claim against that minister before the Constitutional Court considers that application. This inconsistent approach in turn favours the government officials or the so called high level public servants as the Constitutional Court's jurisprudence does not decriminalise defamation and creates a de facto inequality between ordinary citizens and elected high ranking public servants.

35. Secondly, the Constitutional Court in defamation cases where it did not find a violation of freedom of expression has not discussed the proportionality of criminal sanctions. Indeed, both in the present case and in the *Umut Kılıç* application, where the applicant was convicted for insulting the President,[47] proportionality of prison sentences in a defamation case were not evaluated.

36. Furthermore, the relevant provision was brought to the Constitutional Court under contention of constitutionality process. The local court that brought the challenge

[42] Adnan Oktar (2) Application, no. 2013/514, 2.10.2013, § 40; Adnan Oktar (3) Application, no. 2013/1123, 2.10.2013, § 44; Fetullah Gülen Application, no. 2014/12225, 14.7.2015.
[43] *Yakup Saygılı v. Turkey*, no. 42914/16, 11.7.2017.
[44] *Gülen v. Turkey*, nos. 38197/16, 38384/16, 38389/16 et al. 08.09.2020.
[45] Adalet İstatistikleri (Justice Statistics), 2018, p. 93.
[46] Adalet İstatistikleri (Justice Statistics), 2019, p. 93.
[47] Umut Kılıç Application, no. 2015/16643, 4.4.2018.

claimed that the punishment envisaged under article 125/3-a was disproportional and should be annulled. The Plenary of the Constitutional Court unanimously concluded that the lawmaker had discretion under its crime policy to decide which acts should be criminalised and how and rejected the request for annulment.[48]

37. Therefore, the result is odd at best. If an individual, regardless of the severity of the insult, does not bring a civil case, cannot apply to the Constitutional Court and then subsequently to the European Court. However, a case of a politician in power, without his/her complaint brought to the criminal court by prosecutors and criminal sanctions imposed in those cases are not questioned by the same Constitutional Court that cites Council of Europe instruments to support decriminalisation of defamation. Considering the problems relating to the independence of judiciary and public prosecutors, this approach of the Constitutional Court creates inequality between opposition politicians and the politicians in power in terms of access to justice for violation of their reputation. While complaints of opposition politicians against the ruling party politicians are never accepted and they are never prosecuted, the complaints by ruling party politicians are generally accepted and prosecution is commenced against opposition politicians. The same can also be said for all the dissidents, especially the opposition media, journalists, activists and civil society organisations.

38. On the other hand, the Constitutional Court systematically disregard the caselaw of the European Court in cases related to defamation of Mr. Erdoğan. For example, in the Kemal Kılıçdaroğlu application, the applicant who was the leader of the opposition party was sanctioned to pay compensation to Mr. Erdoğan for a speech he had made at the Parliament. The Constitutional Court not only did decide that this speech is not protected by the parliamentary immunity of the applicant but also found that the decision of the local court had not breached the Constitution.[49] While deciding against the applicant, the Constitutional Court disregarded the context in which the speech was made. Recently, the European Court found violation of freedom of expression of Mr. Kılıçdaroğlu in the same case.[50] The Court stated that the Constitutional Court, merely highlighted the abstract nature of certain remarks without engaging in any in-depth analysis of the question.[51]

39. The Constitutional Court has found several individual applications filed by individuals who were convicted or were condemned to pay compensation for defaming Mr. Erdoğan in civil or criminal cases inadmissible on the grounds of unsubstantiated

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48 See E. 2012/78, K. 2012/111, 12.9.2012.

49 Kemal Kılıçdaroğlu Application, no. 2014/1577, 25.10.2017. For a similar decision of the Constitutional Court see Ömür Çağdaş Ersoy application. The Constitutional Court in this application also disregarded the Strasbourg jurisprudence and found the sanction imposed on the applicant as proportional. Ömür Çağdaş Ersoy Application, no. 2015/11715, 12.12.2018.

50 *Kılıçdaroğlu v. Turkey*, no. 16558/18, 27.10.2020.

51 *Kılıçdaroğlu*, § 57.

complaints. In the Mustafa Akaydın[52] case, the applicant who was a mayoral candidate from an opposition party when he made the impugned speeches was condemned to pay compensation to Mr. Erdoğan. He filed an individual application before the Constitutional Court claiming that his freedom of expression was violated. However, the Constitutional Court found the application inadmissible on the ground that the applicant failed to prove violation of his rights. The Constitutional Court repeated the same reasoning in the Abdurrahman Erol Özkoray application[53] and in the current case as well. Nevertheless, such an application of unsubstantiated complaints doctrines is completely in contradiction with the European Court's jurisprudence.

40. It is considered, therefore, the Constitutional Court as other domestic courts have constantly failed to apply the Strasbourg standards in cases to which Mr. Erdoğan is a party.

**Conclusion**

41. As illustrated article 125/3-a of the Turkish Criminal Code has been used to silence opposition and to provide privileged protection to politicians in power which stifles the public debate in Turkey, contrary to well established case-law of the Strasbourg Court.

**42.** IFÖD kindly invites the Court to take into the consideration that article 125/3a is in contradiction with the Convention standards and Turkish judicial practices exacerbate detrimental impact of this provision on political speech.

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**İfade Özgürlüğü Derneği (İFÖD)** has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.

[52] Mustafa Akaydın, App. No: 2015/14800, 8/1/2020.
[53] Abdurrahman Erol Özkoray, App. No: 2015/798, 9.01.2020, para. 24