Third Party Intervention

In the Case of Kemal Kılıçdaroğlu v. Türkiye (no. 52720/21)

by

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I. Introduction and Background

1. İFÖD will address in its third-party intervention in the case of *Kılıçdaroğlu v. Türkiye* (no. 52720/21)[1] the procedure of appointment of judges to the Turkish Constitutional Court ("TCC") and will assess its impact on the objective impartiality of the Court. It will also evaluate the constitutional as well as statutory provisions which enable individuals to challenge the impartiality of or remove a judge for reasons of alleged bias against an applicant in the context of individual application to the TCC and their implications for the freedom of expression.

2. It is understood from the Court's communication that the applicant, the chairman of Cumhuriyet Halk Partisi (People's Republican Party – "the CHP"), the main opposition party of Türkiye, was ordered to pay non-pecuniary damages in defamation proceedings lodged by a former Minister of Youth and Sports. Relying on Article 10 of the Convention and Article 26 of the Turkish Constitution, he lodged an individual application with the Constitutional Court. In a decision of 10.03.2021, the Constitutional Court, sitting in a panel of five judges, including the newly elected member İrfan Fidan, declared the applicant's application inadmissible due to its submission after the application deadline had passed.

3. The applicant complains under Article 6 § 1 of the Convention that the Constitutional Court was not impartial because, at the time of consideration of his application, **judge İrfan Fidan had already filed civil defamation proceedings against the applicant** in connection with a speech the applicant had delivered on 22.12.2020 in the CHP group meeting held in the Turkish Grand National Assembly. The applicant in a speech recently after Fidan's election to the TCC, criticised the appointment of Fidan to the TCC without actually serving at the Court of Cassation and the members of the court for voting for him, describing the situation as a grave indicator of the influence of the executive over the judiciary. Kılıçdaroğlu also voiced the allegations that Fidan had plagiarised in a bill of indictment while serving as the chief public prosecutor of Istanbul. He referred to the original source and the bill of indictment written by Fidan and accused him of being an "information thief", dramatically expressing the gravity of the act of plagiarism and the violation of professional ethics. The applicant further complains under Article 10 of the Convention about the violation of his freedom of expression in connection with the proceedings whereby he was ordered to pay non-pecuniary damages to the former Minister of Youth and Sports.

4. The Court asked the parties, *inter alia,* having regard to the participation of judge İrfan Fidan in the proceedings before the Constitutional Court, whether the panel which examined the applicant's individual appeal was an "impartial tribunal" within the meaning of Article 6 § 1 of the Convention (*Morice v. France* [GC], no. 29369/10, §§ 73-78, ECHR 2015). The Court further asked whether there has been a violation of the applicant's right to freedom of expression, contrary to Article 10 of the Convention (*Kılıçdaroğlu v. Turkey*, no. 16558/18, §§ 42-46, 27.10.2020).

5. In this third-party intervention, İFÖD will provide the Court the background information on the problems related to the subjective and objective impartiality of the TCC. In this connection, İFÖD will first briefly summarize the European Court's case-law on the principles for an impartial tribunal. Secondly, İFÖD will inform the Court of the establishment and structure of the TCC. Thirdly, İFÖD will provide the Court with detailed information on the appointment procedure of judges to the TCC, with a special emphasis on the public reaction caused by some of the recent appointments. Fourthly, the constitutional and statutory regulations guaranteeing the independence and impartiality of judges and prosecutors in general and with regard to the TCC judges, particularly conditions for the recusal

[1] İFÖD submitted its request for leave to intervene on 10.03.2023 in the case of *Kılıçdaroğlu v. Türkiye* (no. 52720/21), communicated on 1 February 2023 and made public on 20 February 2023. The President of the Second Section has granted leave, under Rule 44 § 3 of the Rules of Court, for İFÖD to make written submissions to the Court on 25.05.2023.

of judges in case of concerns of partiality will be conveyed. Fifthly, the case-law of the TCC concerning the applications lodged therewith in cases of perceived or alleged bias of its members will be brought to the Court's attention. Finally, based on this overview, İFÖD will also provide an assessment of eight applications lodged by the applicant with the Constitutional Court, the formation of the section panels and how the judges voted in those decisions in connection with by whom they were appointed. İFÖD believes this will be valuable to the European Court in terms of assessing the impartiality of the TCC judges and its repercussions for the freedom of expression of the applicants as the Court's case-law on the questions relating to the freedom of expression of high-level politicians in matters of public interest is extensive.

II. The Court's Case-Law on the Principles for an Impartial Tribunal

6. First of all, the right to an "independent and impartial tribunal established by law" includes three main characteristics which are closely interrelated. The concept of a "tribunal established by law", together with the concepts of "independence" and "impartiality" of a tribunal, forms part of the "**institutional requirements**" of Article 6 § 1. The Court has held, in particular, that a judicial body which does not satisfy the requirements of independence - **in particular from the executive** - and of impartiality may not even be characterised as a "tribunal" for the purposes of Article 6 § 1 (*Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18, 12.03.2019, §§ 232-233). Moreover, when establishing whether a court can be considered to be "independent" within the meaning of Article 6 § 1, the Court has regard, *inter alia*, **to the manner of appointment of its members**, which pertains to the domain of the establishment of a "tribunal". Accordingly, while they each serve specific purposes as distinct fair trial guarantees, there is a **common thread** running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the **fundamental principles of the rule of law** and the **separation of powers** (*ibid*., §§ 232-233).

7. Within this context, the Court found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" and that it called for strict scrutiny. Breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case "irregular" (*Advance Pharma Sp. Z O.O v. Poland*, no. 1469/20, 03.02.2022, § 294).

8. It is the **responsibility of the individual judge to identify any impediments to his or her participation** and either to withdraw or, when faced with a situation in which it is arguable that he or she should be disqualified, although not unequivocally excluded by law, to bring the matter to the attention of the parties in order to allow them to challenge the participation of the judge (*Sigríður Elín Sigfúsdóttir v. Iceland*, no. 41382/17, 25.02.2020, § 35). Therefore, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (*Morice v. France [GC]*, no. 29369/10, 23.04.2015, § 78; *Škrlj v. Croatia*, no. 32953/13, 11.07.2019, § 43).

9. According to the Court, there are two possible situations in which the question of a lack of judicial impartiality arises (*Kyprianou v. Cyprus [GC]*, no. 73797/01, 15.12.2005, § 121):

- **i.** The first is functional in nature and concerns, for instance, the exercise of **different functions within the judicial process by the same person**, or hierarchical or other links with another person involved in the proceedings;
- **ii.** the second is of a **personal character** and derives from the conduct of the judges in a given case.

10. With regard to functional impartiality, the European Court found that the fact that a judge was once a member of the public prosecutor's department is not in and of itself a reason for fearing that he lacks impartiality (*Paunović v. Serbia*, no. 54574/07, 3.12.2019, §§ 38-43). Nevertheless, if an individual, after holding in that department an office whose nature is such that he may have to deal with a given

matter in the course of his duties, subsequently sits in the same case as a judge, the public is entitled to fear that he does not offer sufficient guarantees of impartiality (*Piersack v. Belgium*, 01.10.1982, Series A no. 53, § 30 (b) and (d)). As will be seen from some examples, this situation often arises in Türkiye, as almost all the judges are appointed to the Constitutional Court, after holding extensive administrative prerogatives and responsibilities. Within this context, the Council of Judges and Prosecutors ("the CJP") plays an indirect role in the appointment of some members of the TCC since it has an important role in the appointment of members of the Court of Cassation and the Council of State. Combined with the composition of the CJP and the fact that the Minister of Justice and his deputy are natural members of the council, the shadow of the executive is very likely to be cast on the election of the members of the judiciary.

11. On personal impartiality, the European Court considered that the president of a court who publicly used expressions which implied that he had already formed **an unfavourable view of the applicant's case before presiding over the court** that had to decide it, clearly appears incompatible with the impartiality required of any court, as laid down in Article 6 § 1 of the Convention. The statements made by the President of the court were such as to objectively justify the applicant's fears as to his impartiality (*Buscemi v. Italy*, no. 29569/95, ECHR 1999-VI). The Court stressed that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges (*Lavents v. Latvia*, no. 58442/00, 28.11.2002, § 118).

12. It must be reiterated that the common thread running through the institutional requirements of a tribunal is even more evident in cases where the impartiality of a court is compromised in a context whereby the **alleged bias of a member of the court is a result of the applicant's critical commentary about the independence of the very same court/judge**. In a sense, the alleged dependence of the court becomes a core element for the impartial behaviour of a member of the court. İFÖD is of the opinion that the case at hand opens up new pathways for the Court to elucidate the vitality of the inter-relatedness of independence and impartiality principles in the Convention system. This is even more so due to the fact that faith in the judiciary and the rule of law in the Contracting States can be restored or re-established only through such an accurate assessment of the Court. Bearing in mind democratic participation for and public discussion about the separation of powers in a regime falls unquestionably under the ambit of the exercising of freedom of expression in matters of public interest, the implications of such an evaluation would have benefits for the right protected by Article 10.

III. An Overview of the Turkish Constitutional Court's Establishment and Structure

13. The TCC's power to receive individual applications was introduced to the Constitution with the amendments made on the 12.09.2010 referendum. Thereby, the working procedures and principles of the TCC were redetermined by Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court on 30.03.2011. With the 2010 amendment, the number of members of the Constitutional Court was increased to 17 and it was adopted to work in two Sections *("Bölüm")* and a Plenary *("Genel Kurul")* session.[2] Sections have the authority to convene under the deputy president with the participation of four members and make decisions regarding individual applications. In each Sections, three Commissions composed of two judges were established *("Komisyon")* to decide on

[2] The Plenary convenes with a minimum of 10 members under the chairmanship of the President or Deputy President, and the Sections are composed of a Section President (Deputy President of the Court) and five members.

the admissibility of individual applications. The number of members of the Constitutional Court was reduced to 15 with Law No. 6771.

14. Article 27 of the Rules of the Court (12.07.2012, amended on 06.11.2018) holds that "the members who will serve in the Sections except for the Deputy Presidents shall be determined by the President according to the source through which they have been elected and the principle of balanced distribution between the Sections. Upon the request of the relevant member or upon the proposal of one of the Deputy Presidents, the President may decide to change the members of the Section." According to article 29 of the Rules of the Court, "for the purpose of forming the committees in the Sections, the members of the Section, except the Deputy President, shall be listed in order of seniority.

15. The composition of the Sections is subject to the appreciation of the President of the court and is based on rotation. The assessment conducted by the President is not subject to review, aside from the members' and deputy presidents' incidental proposals to reassign a member to the other Section. The yearly allocation and arrangement list is to be shared with the members of the Court, and not the public or any individual applicant. Even if the members of a given section can be assumed via the published individual application decisions, it is not entirely possible to do so, because the composition of a section is changed every month by rotation.

16. Moreover, in the case of inability to reach a quorum from within the Section, a member of the other Section is to be assigned. As a corollary, one cannot be cognizant of the composition of a certain section even in a given year, due to the rotation, proposal, and reassignment procedures envisaged. This point was noted by the Venice Commission[3] which stated that the composition should be predetermined in advance for a certain period of time in order to exclude the possibility to influence a case through an *ad hoc* composition. Moreover, it is also noted with regard to the failure to meet a quorum in a Section and assignment of members from the other Section, that it should be done by lot or by a list agreed upon in advance.[4]

17. Finally, it is worth noting that although the agendas of the Sections are published on the Constitutional Court's website along with the application number each week, they are only published once the Sections include them in their agenda to decide upon the applications. The publication of the incumbent Section to which a specific case is assigned at this late stage renders it impossible for applicants to be informed, in a timely manner, of which Section, hence which judges will handle their applications and hamper the possibility of challenging their impartiality. More importantly, at any stage, the **applicants do not know which judges are included in the relevant formation of the Sections**. The applicants only find out the names of the judges once the decisions are either communicated to the applicant or published by the TCC.

IV. The Appointment of Judges to the Turkish Constitutional Court

18. In terms of the appointment of the judges to the TCC, the President of the Republic has a great influence over the process. When assessed from a general perspective, the head of the executive, directly and indirectly appoints most members of the TCC. In other words, the President and the ruling party that is presided over by the President appoint a dominant majority of the TCC. In fact, as of the time of this submission, every member of the TCC has been elected directly or indirectly by the ruling party AKP and/or the former President Abdullah Gül and the current President Erdoğan. As a corollary, the influence of the executive over the Constitutional Court is highly significant.

3 Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey, Adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), p. 6.

4 *Ibid.*, p. 7.

19. One of the recent examples of such a politically motivated appointment involves the appointment of judge Irfan Fidan. Mr Fidan was Istanbul's Chief Public Prosecutor between 26.07.2016 and 26.11.2020. Before becoming the chief prosecutor, Fidan played a pivotal role in the closure of important investigations of public interest which would have political consequences. As the chief public prosecutor has vast administrative duties and powers, it is without question that they exercise control over the prosecutors of lower ranks. Accordingly, during his term at the office of the chief public prosecutor, Mr. Fidan enjoyed a wide range of control and supervision over the prosecutorial branch of the Istanbul courthouse. In high-profile cases investigated and prosecuted by the prosecutors, Mr. Fidan was involved highly in most. For instance, he prepared the criminal indictment for journalists Can Dündar and Erdem Gül, the Academics for Peace as well as the human rights defenders and civil society leaders of the Gezi Park case. As highlighted by Dr. Sen, "a look at recent TCC judgments finding violations of constitutional rights reveals that almost all of them originate from criminal cases either directly prosecuted by Fidan, or which he was indirectly involved in, in his former capacity as the Istanbul Chief Public Prosecutor…"[5]

20. During December 2020, Fidan was promoted to the Court of Cassation as a judge. Before even serving as a judge or handling a single case for that matter, after six days of appointment, he announced his candidacy for becoming a judge at the Constitutional Court and received the highest votes among the three candidates. Unsurprisingly, on 22.01.2021, the President appointed Mr. Fidan, as a member of the Constitutional Court.

21. The appointment of Mr Fidan became a central point of political discussion on the independence and impartiality of the judiciary in Türkiye. Prof. Gözler, a prominent constitutional law professor in Türkiye, found that on average, the 44 former Constitutional Court judges who were elected and appointed from the Court of Cassation served nine and a half years in the latter, before joining the TCC.[6] The crux of the controversy was the fact that even though the appointment was legal on paper and in line with the constitutional and statutory *prima facie*, there existed a number of nuances in the chain of events implying interference by the executive. In addition to the alleged influence of the executive in his appointment, Mr. Fidan was accused of plagiarism by the applicant on 23.12.2021.[7] Kılıçdaroğlu mentioned the voting process that led to the appointment of Fidan to the TCC and argued that the members of the Court of Cassation that voted for him were "instructed", implying the influence of the executive over the high court. The applicant also alleged that Fidan, while writing the indictment in the case of journalists Can Dündar and Erdem Gül, included the scholarly work of an academic without citing the source, therefore plagiarising, which is also a criminal act under the national regulations on intellectual property, in addition to being a violation of academic and professional ethics. In his parliamentary speech that attracted a high degree of public attention, the applicant called Fidan "an information thief", implying that he "stole" the scholarly work and that he did not belong to the highest and most respectable court of Türkiye. Following this public statement,

5 "…To illustrate, these decisions include *Z. Füsun Üstel and others (Academics for Peace), Can Dündar-Erdem Gül, Mehmet Altan, Şahin Alpay, Enis Berberoğlu and Atilla Taş*. He was also the main actor behind very important criminal cases, such as Gezi Park, Businessman Osman Kavala, Sledgehammer, FETO media trial and Büyükada" I.G., Sen, "The Final Death Blow to the Turkish Constitutional Court", Verfassungsblog, 28.01.2021, at https://verfassungsblog.de/death-blow-tcc/.

6 Kemal Gözler, "Elveda Anayasa Mahkemesi: İrfan Fidan Olayı", Annex-1, (available at: www.anayasa.gen.tr/irfan-fidan-olayi.htm) (Published: 23 January 2021).

7 See GazeteDuvar, "Kılıçdaroğlu'nun İrfan Fidan tepkisi: Hırsızın AYM'de ne işi var", 23.12.2020, at https://www.gazeteduvar.com.tr/kilicdaroglunun-irfan-fidan-tepkisi-hirsizin-aymde-ne-isi-var-haber-1508009.

Fidan filed a lawsuit against Kılıçdaroğlu for non-pecuniary damages on the grounds of violation of his personal rights on 01.02.2021 after he was appointed as a judge to the Constitutional Court.

22. Mr Fidan's appointment process is extremely problematic when assessed against the European Court's standards with regard to Article 6 § 1 of the European Convention. The European Court's case-law on the matter foresees a **higher threshold** on the merit of the judges appointed to the high courts and takes into consideration the moral integrity and professional competence of the appointees. However, the above-summarised chain of events raises serious questions regarding the moral positions and qualifications of the respective TCC judge. More importantly, the European Court recalled on many occasions that in order to establish whether a tribunal can be considered as "**independent**", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (*Findlay v. the United Kingdom*, no. 22107/93, 25.02.1997, § 73). As to the question of "**impartiality**", there are **two aspects** to this requirement. **First**, the tribunal must be subjectively free of personal prejudice or bias. **Secondly**, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (*Pullar v. the United Kingdom*, 10.06.1996, Reports 1996-III, p. 792, § 30). As noted by the Court, the concepts of **independence** and **objective impartiality** are closely linked. However, as a Constitutional Court judge, Fidan initiated defamation proceedings against the applicant and this alone raises serious doubts about the subjective and objective requirements of impartiality.

23. Strikingly, Mr. Fidan's appointment is not unique. Similarly, before his appointment as a member of the TCC, **Selahaddin Menteş** served as the Chairman of the State of Emergency Inquiry Commission ("*OHAL Komisyonu*") between May and October 2017. Between 18.10.2017 and 21.07.2018, he served as Undersecretary of the Ministry of Justice. On 21.07.2018, he was appointed as Deputy Minister of Justice. Mr. Menteş was elected as a member of the Constitutional Court directly by President Erdoğan on 06.07.2019. As the individuals lodge with the TCC thousands of applications following the dismissal decisions of the *ad hoc* organ of the State of Emergency Inquiry Commission, the position held by Mr. Menteş holds great importance.

24. Another similar trend of this sort of politically motivated appointment to the TCC involves the appointment of **Muhterem Ince**. While Mr. Ince was holding the position of Deputy Minister of Interior, on 23.05.2022, he applied as a candidate for the Court of Audit membership considering that there will soon be a vacancy in the Constitutional Court from the quota of the Court of Audit. He was elected as a member of the Court of Audit on 29.06.2022. He was then nominated for a judgeship at the TCC and was elected by the Grand National Assembly of Türkiye on 05.10.2022, after almost three months of being appointed to the Court of Audit. This is yet another fast-track, politically motivated appointment to the TCC. The appointment process of Yıldız Seferinoğlu and Recai Akyel among others also raise similar impartiality concerns as the issue is not limited to one or two members of the Court. In short, out of the fifteen judges currently serving on the Constitutional Court, seven owe their appointments to President Erdoğan. If one also includes Muhterem İnce, who was appointed by the Turkish Grand National Assembly, this tally rises to eight judges who can be attributed to the ruling party's influence. Furthermore, Kenan Yaşar, who was put forth by the Turkish Bar Association, also secured his appointment through the AKP's majority in the Turkish Grand National Assembly. Notably, none of the judges currently in office were appointed prior to Abdullah Gül's tenure, who was the first president that had organic ties with the AKP before being elected as the President of the republic.

25. As explained above, the current formation of the TCC is highly problematic both in terms of independence and the impartiality of the court. It is deemed important to highlight the fact that the roles occupied by the TCC judges are ones that come with great political responsibilities as well as a

hierarchical position over the lower levels of the state apparatus. The independence of a tribunal, as understood by the ECtHR, cannot justifiably be complied with in light of the above-mentioned politically motivated designing of the TCC. There is no doubt that such politically motivated appointments have impaired the institutional impartiality of the TCC. Moreover, assessed against the ECtHR case-law, the personal bias expressed by a member of the TCC against several high-level opposition politicians, for their comments on the judicial system of Türkiye signifies a trend in which personal impartiality is compromised. Moreover, as will be mentioned in detail in the section below, the legal guarantees against excluding doubts regarding the bias are ineffective and unenforced.

V. Regulations Guaranteeing the Independence and Impartiality of Judges in General and with Regard to the Constitutional Court Judges

26. Articles 146-153 of the Turkish Constitution regulate the formation of the TCC. The rules for the judiciary in general and specifically the principle of judicial independence are enshrined in articles 138 *et. seq.* As noted by the Venice Commission, the principle of the independence of judges applies to both the judges of the ordinary judiciary and those of the constitutional courts. It is even more important to adhere closely to these principles so far as judges of constitutional courts are concerned.[8]

27. On the statutory level, Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court (30.03.2011) specifically envisages the claims for the recusation of a TCC judge. Pursuant to article 59/1-ç of the Law, the president and members, *inter alia*, shall not hear cases and proceedings in which **they have acted as judges, prosecutors, or arbitrators**, or in which they have testified as witnesses or experts. Article 60 holds that the President and members may be recused on the grounds that there are circumstances justifying the belief that they cannot act impartially. In this case, a final decision shall be taken in the Plenary or Sections without the attendance of the member concerned.

28. Finally, in the event that the President and members abstain from hearing the case or matter based on the reasons set forth in articles 59 and 60, the Plenary shall render its final decision on the matter. However, the member who was requested to withdraw may not participate in the voting of the Plenary.

29. It is not clear from the wording of the Law when and how recusation claims should be submitted by an applicant. Similarly, the procedure is not precisely defined. As the Law stipulates that the Plenary *or* Sections will take a final decision on the recusation claims, it is not clear whether such claims can be assessed by the Plenary in case the application is referred to it by a Section pursuant to article 25/1-d of the Rules of the Court. It is similarly unclear whether the Sections would hold a final decision on recusation claims entailed in an application referred to the Plenary. In any event, the rule stipulating that the decision of a Section regarding a recusation claim is final is concerning, as the Plenary could have been entrusted with the power to review such decisions of the Sections.

30. Most importantly, in light of the ever-changing composition of the Sections, it must be submitted that an individual cannot presuppose in advance whether the allegedly partial member of the TCC will sit at the appointed Section and handle a specific case. Moreover, bearing in mind the fact that it takes a considerable amount of time between the lodging of an application and the TCC coming to a decision about a specific application, it is not always probable for applicants to challenge the impartiality of a member pre-emptively. As the applicants cannot know *ex ante* when their applications are going to be handled, up until the point where the Sections announce their weekly agendas, and as this process

[8] Venice Commission, Opinion on draft amendments to the Law on the Constitutional Court of Latvia, CDL-AD(2009)042.

may take up to eight years in some instances,[9] it is burdensome to confer upon the applicants the responsibility to keep track of the weekly agendas over such a long period of time.

VI. The Case-Law of the TCC with Regard to the Applications Lodged Therewith in Cases of Alleged Bias of Its Members

31. The case-law of the TCC on the recusation claims cannot be said to be extensive. To put it precisely, there exists no example of the Sections or the Plenary assessing such recusation claims put forward by an applicant within the procedure of individual application. Therefore, the above-mentioned ambiguity of the recusation process in the individual application system is not resolved via the case-law of the TCC. However, the TCC has had many chances to assess such claims within the annulment procedure, which will be examined shortly. The normative effect of the *locus decidendi* of the annulment decisions on the individual application process cannot be established without hesitancy as there is not a clear regulation on this matter, although the TCC is known to be generous in using cross-references in its individual application and annulment decisions.[10]

32. The TCC was challenged within the annulment procedure regarding the impartiality of one of its members, fairly recently. The Court first dismissed the claims with an unforeseeable interpretation of article 38/2 of Law No. 6216. The recusation claims in the 2011/131 E., 2013/22 K., 31.01.2013 decision was dismissed on the procedural ground that the signatures of all the MPs were not present, although it is stated in article 38 of Law No. 6216 that only two MPs' signatures on the petition of an annulment lawsuit shall suffice. Following an appeal by the MPs stating that there exists no such procedural limitation clause stipulated in Law No. 6216 and the rejection on procedural grounds decision of the TCC was arbitrary, the Plenary concluded that its decision on the matter was final and could not be challenged pursuant to article 60/2 of Law No. 6216, with its decision 2011 E., 2012/110 K., 18.07.2012.

33. The TCC then followed another path and in a series of annulment applications[11] lodged by the main opposition party CHP ("the Republican People's Party"), where the impartiality of the then-president Haşim Kılıç was challenged. In the petition for the lawsuit of MPs of the CHP, it is stated that the President of the Constitutional Court, Haşim Kılıç, made some statements about the Republican People's Party to the Ambassador to Türkiye of the United States in 2003, according to the information available on the Internet, in files publicly known as the Wikileaks documents. The statements of the President are alleged to state that the CHP creates an unprincipled and unattainable image for itself by giving the appearance of opposition.[12] It was claimed by the CHP MPs that Kılıç

9 *Hüseyin El ve Nazlı Şirin El* [GA], App. No: 2014/15345, 07.04.2022.

10 The Turkish Constitutional Court has cited in its *Tahir Gökatalay* (App. No: 2013/1780, 20.03.2014) decision, which was one of the early decisions of the court, many of its annulment decisions regarding the independence and impartiality of a court such as AYM, E. 2002/170, K. 2004/54, K.T. 5/5/2004; E. 2005/55, K. 2006/4, K.T. 5/1/2006; E. 1992/39, K. 1993/19, K.T. 29.04.1993. In its subsequent case-law of individual applications, the TCC predominantly refers back to this individual application decision, rather than the annulment decisions. However, none of the cited individual application and annulment decisions relate to the impartiality of the TCC judges.

11 2011/144 E., 2013/23 K, 31.1.2013; 2011/143 E., 2013/18 K., 17.01.2013; 2011/146 E., 2013/11 K., 10.01.2013; 2011/145 E., 2013/70 K., 06.06.2013; 2011/147 E., 2012/152 K., 11.10.2012; 2011/148 E., 2012/186 K., 22.11.2012; 2011/149 E., 2012/187 K., 22.11.2012; 2011/141 E., 2013/10 K., 10.01.2013; 2011/139 E., 2012/205, 27.12.2012; 2011/150, 2013/30 K., 14.02.2013; 2011/140, 2012/185 K., 22.11.2012; 2011/142, 2013/52, 03.04.2013.

12 Decision No. 2011/123 E., 2013/26 K., 06.02.2013.

could not deliver an impartial decision in the cases in which the Republican People's Party is a party, and he was requested to be recused in accordance with articles 59/1-d and 60/1 of Law No. 6216.

34. The Constitutional Court, in its reasoning, noted that the authenticity of the Wikileaks documents was not verified and that the president declined the accusations. In addition to the rejection of the claims, pursuant to article 60/5 of Law No. 6216, it was deemed necessary to impose a disciplinary fine of 500 TL on the applicants because of their *mala fide*.

35. More recently and more importantly, the **Constitutional Court rejected** the Peoples' Democratic Party's ("HDP") **request for the recusal of İrfan Fidan** in the HDP closure case.[13] The HDP had noted that İrfan Fidan took part as a prosecutor in previous investigations against at least 47 HDP members who are also facing a ban from politics in the party closure case and therefore demanded his recusal in September 2022. While the Constitutional Court has rejected HDP's request for the recusal of İrfan Fidan, no reasoned decision was published by the Court on its website, indicating a completely non-transparent process.

36. The above-presented review of the case-law of the TCC on the recusal claims of its members demonstrates the inefficiency of the procedure. Similar to the annulment and party closure procedures, the individual application process did not entail any withdrawal of the members of the Court so far. Accordingly, it is deemed imperative to assess the voting behaviours of the members of the TCC with regard to the individual applications of the applicant, in order to establish the impact of the appointments made by the President of Türkiye.

37. To that end, İFÖD assessed the number of individual applications submitted by the applicant to the Constitutional Court, claiming violations of his right to freedom of expression. The subsequent step involved scrutinising how many of these applications were found inadmissible or resulted with a no-violation decision. Following this, İFÖD constructed a timeline to scrutinise the composition of the judicial panels both prior to and following İrfan Fidan's appointment. Similarly, İFÖD assessed the composition of the Sections which included Fidan and determined whether their appointments were also made by President Erdoğan. Additionally, İFÖD sought whether any similar judgments to that of Kemal Kılıçdaroğlu (5) (App. No: 2018/5977, 10.03.2021) exist which form the basis of the current application in front of the European Court.

38. First of all, the applicant filed a total of eight applications to the Constitutional Court, only two of which were declared as violations of his freedom of expression. Six of these applications were decided by the First Section and two by the Second Section of the Constitutional Court. Both Sections issued one judgment of violation each. Out of the other six applications, three were found admissible but no violation was found in those cases. So far, one of these applications resulted in a violation of Article 10 at the European Court level.[14] When İFÖD assessed the three inadmissible applications, these were deemed to be all filed after the application submission deadline. One of these applications resulted in the pending case before the ECtHR.

39. After the appointment of İrfan Fidan as a judge on 23.01.2021, the First Section of the Constitutional Court decided on a total of three applications lodged by Kılıçdaroğlu. While Fidan was involved in two of these applications, Selahaddin Menteş was involved in all of these three applications. In the two applications in which Fidan and Menteş appeared together, they were in the majority. First, they were in the majority when Kılıçdaroğlu (5) (App. No: 2018/5977, 10.03.2021) application was found

13 See Bianet, "Constitutional Court rejects HDP request for recusal of judge in closure case," 20.09.2022, at https://bianet.org/5/94/267408-constitutional-court-rejects-hdp-request-for-recusal-of-judge-in-closure-case.

14 *Kılıçdaroğlu v. Turkey*, no. 16558/18, 27.10.2021.

inadmissible. Secondly and more importantly, they were also in the 3-2 majority when Kılıçdaroğlu (8) (App. No: 2019/11406, 26.05.2022) application resulted with a no violation decision.

40. In Kılıçdaroğlu (7) application (App. No. 2019/4676, 31.03.2022), in which Fidan did not take part, the First Section decided by a majority vote (4-1) that there was a violation of freedom of expression, with Menteş dissenting. It should also be noted that both Kılıçdaroğlu (7) and Kılıçdaroğlu (8) applications were decided after the ECtHR's decision in *Kılıçdaroğlu v. Türkiye* (no. 16558/18, 27.10.2021). However, these two decisions did not cite or refer to the European Court's decision. The only decision which refers to the European Court's decision is Kılıçdaroğlu (6) (2017/27971, 18.05.2021) which is another 3-2 no-violation decision. The majority voters in this case are all appointed by President Erdoğan (Kadir Özkaya, Yıldız Seferinoğlu, Basri Bağcı).

41. Moreover, Kılıçdaroğlu (5) application was lodged on 05.03.2018 and the civil defamation proceedings were initiated by Fidan against Kılıçdaroğlu on 01.02.2021. In other words, Fidan initiated the defamation case against Kılıçdaroğlu, after he was appointed as a judge at the Constitutional Court on 23.01.2021. Just over a month later, on 10.03.2021, Fidan participated in the deliberations in that case and did not recuse himself. The applicant instead, unaware of his presence in the formation of the Section, could not challenge his involvement in the proceedings.

42. Finally, three of the five judges on the Kemal Kılıçdaroğlu (5) and Kılıçdaroğlu (8) applications panels, in which Fidan, Menteş and Recai Akyel took part were appointed by President Erdoğan. While these judgements did not declare a violation, a similar situation applies to the composition of the Second Section. The majority of the panel delivering the judgement in Kılıçdaroğlu (6) application was also appointed by President Erdoğan (Kadir Özkaya, Yıldız Seferinoğlu and Basri Bağcı). The only exception was the Kılıçdaroğlu application (7), which resulted in a judgement of violation by a majority vote. While İrfan Fidan was not on this panel, the majority (Recai Akyel, Yusuf Şevki Hakyemez and Selahaddin Menteş) were appointed by President Erdoğan. While only Menteş dissented, the subject matter of this particular application did not concern high-level politicians, but corruption allegations concerning the Kayseri Metropolitan Municipality. The circumstances of the case are the same as in Kılıçdaroğlu application (3). None of the judges on the Panel which decided Kılıçdaroğlu application (3) was appointed by Erdoğan.

43. The assessment made above and the patterns disclosed indicate serious doubts that the Constitutional Court judges may have systematically acted in a biased manner. In conclusion, there exists a systemic problem entrenched within a political landscape wherein judges have secured their positions through appointments made by President Erdoğan. It is paramount to recognize that this predicament is not an isolated or by chance occurrence but instead manifests as an enduring and calculated behavioural trend. What takes centre stage in this context is the post-appointment conduct of the judges. They are not mere recipients of appointments; rather, they consistently cast their votes in concert with a specific ideology or political orientation. This gives rise to substantial apprehensions regarding the autonomy of the judicial system and the potential for political motives or affiliations to exert undue influence. It is therefore substantially established that the prominent opposition figures cannot enjoy the protection of their right to freedom of expression by the highest court in Türkiye. In fact, the constant and increasing number of SLAPP cases (strategic litigation against public participation) targeting opposition politicians such as the applicant, create a chilling effect on their right to freely express themselves, preventing them from participating in political debate and commenting on matters of public interest such as the appointment of judges to the Constitutional Court. In return, the applicants cannot rely on an effective legal remedy at the Constitutional Court level as clearly shown in this submission with regards to the applicant's decided individual applications at the Constitutional Court level.

44. The issue at hand is intricately woven into the fabric of the political system, where the executive branch holds the authority to appoint judges. Consequently, when judges appointed under a particular administration consistently align with that administration's political agenda, it raises questions about the judiciary's ability to serve as a truly impartial and independent branch of the State. The judiciary, traditionally seen as a bastion of fairness and justice, must remain free from the sway of political interests to uphold the principles of a just and equitable society.

45. The European Court emphasised strongly in a recent revision judgment that to ensure the rigorous implementation of the principle of judicial impartiality, the inability of a judge to sit for any reason, including because he or she has previously acted in the case in another capacity, **is not solely dependent on the positions of the parties to the proceedings**. Therefore, "the responsibility for the implementation of the principle of objective impartiality, cannot clearly be left to the sole initiative of the parties" (*X v. The Czech Republic*, no. 64886/19, 30.03.2023, Judgment (Revision), § 15).

46. As explained above, in the event that the applicants cannot know in advance the composition of Sections and Commissions of the Turkish Constitutional Court which handle their applications, **the judges in question should withdraw themselves *proprio motu*** in clear cases of conflict of interests due to the obligation imposed on the judiciary with the Court's above-mentioned case-law. Judge Fidan, who initiated defamation proceedings against the applicant after he was appointed as a judge at the Constitutional Court should have certainly withdrawn once appointed to the Section deciding the applicant's case. However, **İFÖD is not aware of any such instance in the history of the Turkish Constitutional Court.** The system certainly lacks not only checks and balances but also transparency.

47. The procedural requirements enshrined in Article 6 of the Convention carry even greater weight when the expressions relate to a public debate which pertains to the very foundations of democracy and the rule of law. Despite the existence of available mechanisms for the withdrawal of a judge, the fact that the mechanisms have never been used before raises plausible doubts regarding the impartiality of judges appointed at the high courts in Türkiye including at the Constitutional Court level.

48. Therefore, İFÖD disputes that the appointment and recusal procedures comply with the European Court's standards set in its *Findlay v. the United Kingdom* (no. 22107/93, 25.02.1997, § 73) and the more recent cases of *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18, 12.03.2019) and *Advance Pharma Sp. Z O.O v. Poland* (no. 1469/20, 03.02.2022) with regards to impartiality.

VII. Conclusion

1. As noted by the Court in *Cumhuriyet Vakfı and others v. Türkiye* (no. 28255/07, 08.10.2013), obligations imposed on the state parties under Article 6 of the Convention also offer an important procedural safeguard against arbitrary interferences with the rights protected under Article 10 of the Convention.

2. İFÖD considers that when judges appointed under a particular administration consistently align with that administration's political agenda, it raises questions about the judiciary's ability to serve as a truly impartial and independent branch of the State. The politically motivated appointments to the TCC have certainly impaired the institutional impartiality of the Court.

3. As submitted above, one cannot be cognizant of the composition of a certain Section of the Turkish Constitutional Court even in a given year, due to the rotation, proposal, and reassignment procedures envisaged. This hampers the ability of the applicants to assess whether they should challenge a member's bias or impartiality or assess whether there is a conflict of interest requiring the recusal of a judge.

4. İFÖD is of the opinion that the ambiguous wording of the relevant provisions of Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court fails to provide for a foreseeable

procedure for recusal claims against members of the Constitutional Court. Therefore, the Turkish legal system fails to provide guarantees against personal bias and impartiality of members of the Constitutional Court.

5. İFÖD is of the opinion that the relevant Section of the Constitutional Court which decided the applicant's application was not an "impartial tribunal" within the meaning of Article 6 § 1 of the Convention due to the fact that Judge Fidan, who initiated defamation proceedings against the applicant after he was appointed as a judge at the Constitutional Court, did not recuse himself. This certainly raises serious doubts with regards to the standards set by the European Court in terms of the "**institutional requirements**" of Article 6 § 1 of the Convention.

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