Third Party Intervention

In the Case of Mustafa Akaydın v. Turkey (no. 23332/20)

by

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I. Introduction

1. İFÖD will address in its intervention in the case of Mustafa Akaydın v. Turkey (**No. 23332/20)** the issue of balancing between the freedom of expression of a politician and defamation of the Prime Minister in Turkey.

2. It is understood from the case file that the application concerns civil proceedings for damages brought by the former Prime Minister of Turkey, Recep Tayyip Erdoğan, who is currently the President of the Republic of Turkey against the applicant, who was the mayor of Antalya and a member of the main opposition party at the time the legal dispute took place. At the end of the trial the applicant was ordered to pay the former Prime Minister 6.000 TRY (approximately 2.207 Euros at the material time) because of the content of a speech the applicant gave on 19.05.2013, during the celebration of Commemoration of Atatürk, Youth and Sports Day. The impugned speech read as follows:

> "... We do not want a Prime Minister with the reins in Obama's hands. We also do not want a Prime Minister who will be swept in the bathroom when his job is finished. We want a real man. A real man. We don't want a homeland ruled from Kandil or Imralı either. Do we want too much? We want freedom for our intellectuals, our commanders, our journalists, Silivri, Hasdal and Sincan ..." *("... biz ipleri Obama'nın elinde Başbakan istemiyoruz, biz işi bitince tuvalete süpürülecek Başbakan da istemiyoruz. Biz Kandil'den, İmralı'dan yönetilen bir vatan da istemiyoruz. Biz aydınlarımıza, komutanlarımıza, gazetecilerimize, Silivri'ye, Hasdal'a, Sincan'a özgürlük istiyoruz...*").

3. The Ankara High Court, in ordering the applicant to pay damages, found that the applicant's comments went beyond the bounds of criticism and violated the applicant's personal rights. The 4th Civil Chamber of the Court of Cassation firstly quashed the decision of the first instance court on 16.11.2014 on the grounds that "*the plaintiff and the defendant both are political personalities, the impugned speech concern an issue of general interest, the plaintiff must endure harsh criticism, the whole speech remains within the limits of criticism and will not constitute an attack on personality rights*." Nevertheless, the same Chamber reversed its own decision and upheld the decision of the first instance court on 18.05.2015 upon the request of the revision of decision ("Karar Düzeltme") by the plaintiff. The Second Section of the Constitutional Court declared unanimously the applicant's individual application **inadmissible** on the grounds that the applicant **had not sufficiently substantiated** his allegation of violation of his right to freedom of expression by providing detailed explanations of the criteria to be taken into account when balancing the interests at stake. The applicant was also sentenced to 11 months and 20 days imprisonment in a criminal case brought against him on account of the same speech by the Antalya 28th Criminal Court on 20.01.2015. The court postponed the sentence, and the verdict became final. Nevertheless, **the criminal case is not subject** of the current case.

4. The applicant, relying on Article 10 of the Convention, alleged that his right to freedom of expression has been violated on account of the decisions of the domestic courts

condemning applicant to pay 6.000 TRY to the former Prime Minister as a compensation for defamation. 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. İFÖD, in its submission, will assess the current state of civil defamation proceedings involving the former Prime Minister and the current President of Turkey. The submission will also include an assessment of the jurisprudence of the Constitutional Court with regards to defamation cases and the submission will evaluate whether the Court's jurisprudence is in line with the European Court's jurisprudence in view of the statutes and functions of the persons concerned, as well as the context, the nature and the content of the speech in question by the applicant and the amount of damages awarded by the courts of first instance.

6. Finally, İFÖD's submission will address the Court's question on whether the domestic courts, in their decisions, carry out an adequate balance, in compliance with the criteria established by the European Court's case-law, between the applicant's right to freedom of expression and the right of the opposing party to respect for his private life.

7. 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.

8. 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. (**Section III**). Within this context, Constitutional Court's jurisprudence 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. In this respect, recent judgments of the Court against Turkey with regards to civil defamation cases will be summarized.

[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).

II. European Standards with Regard to Defamation of Politicians

9. The Court accepts that freedom of expression can legitimately be limited in order to protect another person's reputation. 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]

10. 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. However, in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life.[3] Within this context, the Court has long held that "political expression", including **expression on matters of public interest and concern**, requires a high level of protection under Article 10.[4]

11. 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.[5] Moreover, within this context, it is important to take into consideration the impact of the statements made and assess further whether there was any significant damage caused to a high level politician with the impugned speech.

12. According to the Court's established case-law, the test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.[6] The margin of appreciation left to the national authorities in

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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 See, inter alia, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 07.02.2012, *Delfi AS v. Estonia* [GC], no. 64569/09, § 137, ECHR 2015, and *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 76, 27.06.2017.

4 *Thorgeir Thorgeirson v. Iceland*, no. 13778/88, 25.06.1992, Series A no. 239.

5 *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.

6 *The Sunday Times v. the United Kingdom (no. 1)*, 26.04.1979, § 62, Series A no. 30.

assessing whether such a "need" exists and what measures should be adopted to deal with it is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.

i. Political Speech and Public Debate

13. 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".[7] Other matters of public interest also deserve same level of protection.[8] 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.

14. 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.[9]

ii. Statements Against Politicians

15. The Court consistently observed that "the limits of acceptable criticism are wider as regards a politician than as regards a private individual.[10] 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.[11] However, the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention.[12]

16. It is, therefore, necessary to distinguish statements **targeting the private life of a politician**[13] and **public role he/she plays in society**.[14] 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.[15] However, **this protection cannot be provided to politicians who are in the middle of political debates.** The

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7 *Lingens v. Austria*, no. 9815/82, 08.07.1986, § 42.
8 *Thorgeir Thorgeirson v. Iceland*, no. 13778/88, 25.6.1992, § 64.
9 *Lindon, Otchakovsky-Laurens and July v. France*, no. 21279/02, 22.10.2007, §. 48.
10 *Fedchenko v. Russia*, no. 33333/04, 11.2.2010, § 33; *Tuşalp v. Turkey*, no. 32131/08, 21.2.2012, § 45.
11 *Lopes Gomes Da Silva v. Portugal*, no. 37698/97, 28.9.2000, § 30.
12 *Tuşalp v. Turkey*, no. 32131/08, 21.2.2012, § 45.
13 See for instance, *Tammer v. Estonia*, no. 41205/98, 06.02.2001.
14 *Cojocaru v. Romania*, no. 32104/06, 10.2.2015, §. 95.
15 *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.

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 exercise of their functions, and the reporting of details of an individual's private life, where it did not.[16]

17. 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.[17] Such a **privileged protection cannot be provided to heads of state, prime ministers, ministers or other politicians**.[18] 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.

18. The **context** in which the expression is used is also crucial.[19] Article 10 protects also the use of exaggerated or even offensive language, especially in cases where journalists are reacting to what the politician said.[20] 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.[21] The Court commented that the distinction between **statements of fact** and **value judgments**[22] 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. [23]

19. An offensive statement may fall outside the protection of freedom of expression where the sole intend of the offensive statement is to insult.[24] 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.[25] 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

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

17 *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.

18 *Tuşalp v. Turkey, Turhan v. Turkey*, no. 48176/99, 19.5.2005, para. 25.

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

20 *Oberschlick* (No. 2), no. 20834/92, 1.7.1997, § 32. Exageration 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.

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

22 In the case of *Scharsach and News Verlagsgesellschaft v. Austria* (no. 39394/98, 13.11.2003) which concerned the use of the term "**closet Nazi**" to describe a politician, the national courts had considered the term to be a statement of fact and had never examined the question whether it could be considered as a value judgment (§ 40).

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

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

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

explanation on a matter of political debate. 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 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. [26] 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.[27]

20. 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.[28] 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.[29] Although this application does not concern criminal proceedings, the essence of the Court's principled approach is also applicable to especially vexatious and repeated civil proceedings for defamation initiated by high level politicians.

III. Civil Defamation Cases

21. Articles 24 and 25 of the Turkish Civil Code (Law No. 4721) provides protection for personality rights and article 58 of the Law of Obligations (Law No. 6098) stipulates the right to file a lawsuit for seeking compensation for the infringement of personality rights. Article 24 of Law No. 4721 reads as follows:

> "*Any individual who is a victim of an unlawful infringement of his personality rights may seek protection from the courts against persons who have caused such infringement.*
>
> *Any infringement which is not based on the agreement of the person concerned, on a superior public or private interest, or on a statutory power, is unlawful."*

22. The relevant part of the third paragraph of article 25 of the Civil Code reads as follows:

> "*The plaintiff's right to seek damages ... shall be reserved."*

23. Article 58 of the Code of Obligations reads as follows:

> "*Any individual whose personality rights have been infringed unlawfully may claim a sum of money by way of compensation for the non-pecuniary damage sustained.*

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

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

[28] *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.

[29] *Cumpana* and *Mazare v. Romania*, no. 33348/96, 17.12.2004, § 114.

The court may also indicate a different form of redress, or decide to combine the two forms of compensation, or merely issue a reprimand against the perpetrator of the infringement. It may further order the publication of its decision."

24. It should be noted that filing of civil lawsuits by the President, ministers, members of ruling party and high-ranking officials against critical voices including opposition party members, journalist, academics, and ordinary citizens constitutes an important method of silencing them. Considering the problems with regards to independence of judiciary, success rate of such lawsuits seems to be considerably very high for the President and other category of claimants mentioned above. Moreover, court decisions ordering payment of compensation are capable of deterring others from criticising politicians in the context of a debate on a question of public interest. Therefore, İFÖD believes that strict application of the Convention principles and the Court's caselaw in this regard in the civil lawsuits by domestic courts is extremely important in terms of protection of freedom of expression and democratic debate.

25. In order to exemplify the significance of the problem in Turkey, some examples of civil lawsuits brought by the president will be summarized here. The exact number of civil lawsuits involving defamation initiated by President **is unknown** in the absence of official statistics. However, President Erdoğan filed considerable number of lawsuits against the leader of main opposition party ("CHP") Kemal Kılıçdaroğlu for his political criticisms. Recent examples of such civil actions brought by the President can be found in media news coverage. For example, according to the news report of Euronews[30] on 16.07.2020, Istanbul Anadolu 20th Civil Court of First Instance, in a retrial after the Regional Court of Appeal quashed its decision ruled that Kemal Kılıçdaroğlu should pay damages for the amount of 359.000 TRY to the President and his relatives as a compensation for non-pecuniary damages for a speech he made in his party group in the Parliament in 2017. In his speech, Kılıçdaroğlu alleged that some relatives of the President Erdoğan had companies in the Isle of Man and funds were transferred to those companies. Similarly, Istanbul Anadolu 5th Civil Court of First Instance also ruled in another case involving the same speech that Mr. Kılıçdaroğlu should pay damages for the amount of 197.000 TRY to the President.

26. Another recent example involves President Erdoğan filing a lawsuit against Kılıçdaroğlu demanding 2.000.000 TRY for his allegations that the President's family has wealth abroad.[31] In another example the President sued Kılıçdaroğlu for 500.000 TRY for his parliamentary speech over FETÖ claims.[32] In a further example, the President sued Kılıçdaroğlu for 100.000 TRY in 2015 over his allegations of the presence of water

[30] Euronews, https://tr.euronews.com/2020/07/16/k-l-cdaroglu-man-adas-ile-ilgili-erdogan-ve-yak-nlar-na-359-bin-tl-tazminat-odeyecek, 16.07.2020, at https://tr.euronews.com/2020/07/16/k-l-cdaroglu-man-adas-ile-ilgili-erdogan-ve-yak-nlar-na-359-bin-tl-tazminat-odeyecek; Turkish Minute, "Kılıçdaroğlu fined another $52,000 over offshore money transfer allegations involving Erdoğan," 16.07.2020, at https://www.turkishminute.com/2020/07/16/kilicdaroglu-fined-another-52000-over-offshore-money-transfer-allegations-involving-erdogan/

[31] See https://www.duvarenglish.com/politics/2020/08/18/erdogan-sues-chp-chair-kilicdaroglu-for-2-million-liras-over-comments-on-family-wealth/

closets made of gold in the presidential palace bathrooms.[33] There are numerous similar news coverage involving civil lawsuits of defamation initiated by the President in the media.[34] While President Erdoğan has not lost a single case brought against him, he has won in total 822.000 TRY (approx. 92.450 EUR) in fifteen different defamation cases he brought against Mr. Kemal Kılıçdaroğlu in the last ten years.[35] All statements made by Mr. Kılıçdaroğlu have been part of public debate in which he criticised the government's position on several issues. The recent news also shows that the amount of compensation demanded by the president and awarded by the courts also very high. In a recent case the President demanded 2.000.000 TL as a compensation for breach of his personal rights. This amount is equal to 860 minimum wage in Turkey (net minimum wage in Turkey is 2.324,70 TL).

27. The President's civil defamation lawsuits target not only the leader of the main opposition party but other politicians[36] and journalists as well.[37] These cases show that President Erdoğan and other AKP politicians do not hesitate to file civil lawsuits as well as criminal complaints involving defamation against their critics and regularly obtain blocking and removal decisions claiming defamation.[38] For instance, former Mayor of Ankara announced on Twitter that he initiated 3.000 defamation cases against his critics.[39]

28. The Committee of Ministers under its role for monitoring the execution of the judgments of the Court, following the recent additional report of the Turkish government on

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[32] See https://www.hurriyetdailynews.com/erdogan-sues-kilicdaroglu-for-500-000-liras-over-feto-claims-152024

[33] See https://www.aa.com.tr/en/turkey/erdogan-sues-kilicdaroglu-over-golden-toilet-spat/40839

[34] See for example https://www.reuters.com/article/us-turkey-president/erdogan-sues-turkeys-main-opposition-leader-over-dictator-remark-idUSKCN0UW1FR; https://stockholmcf.org/turkeys-erdogan-sues-chp-leader-this-time-for-tl-500000-in-non-pecuniary-damages/; https://www.cumhuriyet.com.tr/haber/erdogandan-kilicdarogluna-250-bin-tllik-tazminat-davasi-1080513

[35] See http://www.cumhuriyet.com.tr/haber/turkiye/1030394/kilicdarogluna-8-senede-822-bin-tl-ceza.html

[36] See https://www.aa.com.tr/tr/turkiye/cumhurbaskani-erdogandan-chpli-ozkoca-1-milyon-liralik-tazminat-davasi/1755167

[37] According to a news report, until 2018, President Erdoğan won 418.000 Turkish liras compensation from the lawsuits he filed against other politicians and journalists including Kemal Kılıçdaroğlu 147.000 TRY, Devlet Bahçeli 44. 500 TRY, Cem Uzan 40.000 TRY, Memduh Bayraktaroğlu 25.000 TRY, Haluk Koç 20.000 TRY, Ali Topuz 15.000 TRY, Deniz Baykal 10.000 TRY, Müjdat Gezen 10.000 TRY Deniz Bölükbaşı 10.000 TRY, Necati Doğru 10.000 TRY, Özdal Üçer 10.000 TRY, Ahmet Ersin 10.000 TRY, Zeki Sezer 10.000 TRY, Evrensel newspaper 10.000 TRY, Erkan Mumcu 7.000 TRY, Yılmaz Özdil 7.000 TRY, Aydınlık newspaper 5.000 TRY, Erbil Tuşalp 5.000 TRY, Journalist Cüneyt Arcayürek 5.000 TRY, Journalist Merdan Yanardağ 5.000 TRY, Journalist Perihan Mağden 5.000 TRY, Oktay Vural 4.000 TRY, Journalist Kemal Baytaş 3.000 TRY. https://onedio.com/haber/cumhurbaskani-erdogan-bugune-kadar-actigi-tazminat-davalarindan-ne-kadar-kazandi-832833

[38] See generally examples of blocking decisions involving politicians and defamation through https://ifade.org.tr/engelliweb/. Note further Akdeniz, Y. & Güven, O., EngelliWeb 2019: An Iceberg of Unseen Internet Censorship in Turkey, İFÖD, August 2020, p.16, at https://ifade.org.tr/reports/EngelliWeb_2019_Eng.pdf.

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

Pakdemirli Group of Cases concerning civil defamation cases[40], observed that "Although the emerging case-law of the Court of Cassation and the Constitutional Court seem to be in compliance with the Convention standards, it appears that the outstanding issues concerning civil defamation remain unresolved since 2005 when the Court's judgment on the Pakdemirli case became final". The government cannot provide reliable statistics displaying the outcome of civil cases initiated by the President and Prime Minister. As a result, the Committee also requested authorities to provide statistical data displaying the number of civil and criminal defamation cases introduced within the past five years, in particular by the President, Prime Minister or other politicians, and their outcome.[41]

IV. The Turkish Constitutional Court's Jurisprudence in Defamation Cases

29. Although the Constitutional Court produced some jurisprudence parallel to that of the European Court in the area of freedom of expression, İFÖD observes that there is some inconsistency between the jurisprudence of the Constitutional Court and the European Court in relation to defamation cases. For example, the Constitutional Court did not discuss the proportionality of criminal sanctions where it did not find a violation of freedom of expression in defamation cases. Indeed, in both *Ömür Çağdaş Ersoy*[42] and *Umut Kılıç*[43] applications, where the applicants were convicted for insulting the former Prime Minister Erdoğan and the President respectively, the proportionality of prison sentences in defamation cases were not evaluated by the Constitutional Court. Both cases were deemed inadmissible by the Constitutional Court.

30. Furthermore, article 125/3-a of the Criminal Court was brought before the Constitutional Court under contention of constitutionality process. The local court that brought the challenge in relation to article 125/3-a claimed that the punishment envisaged under article 125/3-a was disproportionate and should be annulled. The Plenary Assembly of the Constitutional Court unanimously concluded that the lawmaker had discretion under its crime policy to decide which acts should be criminalised and rejected the request for annulment.[44] The Constitutional Court did not take into account the position of elected politicians such as ministers, prime minister and mayors in terms of obligation to tolerate criticism.

31. Article 299 of the Criminal Code was also brought before the Constitutional Court under contention of constitutionality process. Two domestic courts bringing this claim to the Constitutional Court relying on the jurisprudence of the European Court argued that privileged position provided to the President under this provision violates the equality

[40] Communication from the authorities (22/05/2020) in the PAKDEMIRLI group v. Turkey (Application No. 35839/97), DH-DD(2020)452, 25.5.2020.

[41] Status of Execution in Pakdemirli v. Turkey Group of Cases. Available at http://hudoc.exec.coe.int/eng?i=004-37218.

[42] *Ömür Çağdaş Ersoy Application*, no. 2015/11715, 12/12/2018. Application pending at the European Court of Human Rights, no. 19165/19, communicated on 06.09.2019.

[43] *Umut Kılıç Application, no.* 2015/16643, 4.4.2018.

[44] See E. 2012/78, K. 2012/111, 12.9.2012.

principle of the Constitution. However, the Constitutional Court deliberately ignored the well-established case law of the European Court and rejected the request.[45]

32. Although 128.872 persons were subjected to a criminal investigation, 63.041 persons were prosecuted and 9.544 persons were convicted as of end of 2019 subject to article 299 of the Criminal Code,[46] the number of individual applications decided by the Constitutional Court is strikingly low since 2014 when Erdoğan become the President of Turkey. The Constitutional Court has decided only in one case so far. In the *Umut Kılıç* application, the Constitutional Court ignored the Court's jurisprudence relating to insult to heads of states and found the application inadmissible.[47] In *Ömür Çağdaş Ersoy* application, where the applicant was convicted for defaming the Prime Minister (Erdoğan), the applicant also relied on the Strasbourg jurisprudence. However, unlike conflicting rights cases decided by the Constitutional Court, standards developed under the Strasbourg jurisprudence was not applied and the sanction imposed on the applicant was found proportionate.[48] Considering that more than 9.000 persons have been convicted for insulting the President, an explanation is needed on how the Constitutional Court could not find a single violation in those cases in the last six years.

33. The Constitutional Court's position relating to civil defamation cases in which the President is a party is also not in compliance with the Strasbourg jurisprudence. For example, in the *Kemal Kılıçdaroğlu* application, the applicant who is 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. However, 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] The European Court especially emphasized that domestic courts, in their examination of the case, **failed to set the impugned remarks within the context** and **the form** in which **they had been expressed**. In particular they failed to make a distinction between "facts" and "value judgments", but merely considered whether

45 See E.2016/25, K.2016/186, 14/12/2016

46 See https://www.birgun.net/haber/5-yilda-63-bin-kisiye-cumhurbaskani-na-hakaret-davasi-322790

47 *Umut Kılıç Application, no.* 2015/16643, 4.4.2018.

48 *Ömür Çağdaş Ersoy Application,* no. 2015/11715, 12.12.2018.

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.

the expressions used in the speeches were capable of causing damage to the plaintiff's personal rights and reputation.[52]

34. The disparity between the Constitutional Court and the European Court jurisprudence seems to be solely related to cases in which President Erdoğan is a party. The Constitutional Court has implemented the *Axel Springer* test in cases where there is a conflict between the right to protection of reputation and the freedom of expression and the *Axel Springer* test has been successfully utilised by the Constitutional Court in many of its decisions.[53] Nevertheless, in cases to which Mr. Erdoğan is a party, *Axel Springer* test is not applied and in fact completely ignored. This was also the case in the *Neşe Özgen*[54] application in which the applicant claimed that she had been defamed by the President's speech. The case was found manifestly ill-founded without assessing the applicant's allegations.

35. Moreover, the Constitutional Court has found several individual applications filed by individuals who were convicted or were sentenced to pay compensation for defaming Mr. Erdoğan in civil or criminal cases inadmissible on the **grounds of unsubstantiated complaints**. In the current Mustafa Akaydın[55] case, the applicant who was a mayoral candidate from an opposition party when he made the impugned speeches was sentenced 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[56] and in the *Bayram Yorulmaz*[57] case as well. Nevertheless, such an application of **unsubstantiated complaints doctrine** is completely in contradiction with the European Court's jurisprudence.[58] The European Court, for example, examined a complaint which had been found inadmissible by the Latvian Constitutional Court on the basis of unsubstantiated claims ground and found violation of the Convention.[59]

36. 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. It is important to add that, so far, the Constitutional Court did not find a violation of

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52 *Kılıçdaroğlu*, § 64.

53 Nilgün Halloran Application, no. 2012/1184, 16/7/2014, § 41; Adnan Oktar Application (3), no. 2013/1123, 2/10/2013, § 33; Bekir Coşkun Application, no. 2014/12151, 4/6/2015, § 45; Önder Balıkçı Application no. 2014/5552, 26/10/2017, § 44).

54 Neşe Özgen Application, no. 2018/23127, 1.4.2019

55 *Mustafa Akaydın*, App. No: 2015/14800, 8/1/2020.

56 *Abdurrahman Erol Özkoray*, App. No: 2015/798, 9.01.2020, § 24

57 *Bayram Yorulmaz*, pending before the European Court, no. 41400/19.

58 See, Practical Guide on Admissibility Criteria, p.72-73. According to the Guide, the Court may declare the application inadmissible as being manifestly ill-founded if the applicant simply cites one or more provisions of the Convention without explaining in what way they have been breached, unless this is obvious from the facts of the case. Available at https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

59 *Ēcis v. Latvia*, no. 12879/09, 10.01.2019.

freedom of expression and freedom of the press in cases involving Erdoğan as the alleged victim, or defendant in civil court cases of defamation or even in relation to Internet blocking cases for which the president of Turkey requested the blocking orders.

Conclusion

37. As illustrated in this submission civil defamation lawsuits have 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.

38. IFÖD kindly invites the Court to take into the consideration that the Constitutional Court's application of unsubstantiated complaints doctrine in freedom of speech cases is unforeseeable and in contradiction with the Convention standards. İFÖD is of the opinion that such an approach to individual application also violates the right to access to court of the applicants.

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