Third Party Intervention

In the Case of Ömür Çağdaş Ersoy v. Turkey (no. 19165/19)

by

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I. Introduction

1. İFÖD will address in its intervention in the case of Ömür Çağdaş Ersoy v. Turkey (**No. 19165/19**) the issue of defamation of politicians in Turkey. 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 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.
2. The intervention will first provide the relevant European standards concerning defamation **(Section II**). Then the submission will 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 of the President Erdoğan, formerly prime minister at the time the applicant was convicted, differs from all politicians in Turkish legal system, his unprecedented and unique position before criminal courts (**Section V**) and before the Constitutional Court (**Section VI**) will also be evaluated to present a full picture of the problem.

European Standards with Regard to Defamation of Politicians

Political Speech and Public Debate

3. The Court's case law relating to defamation and freedom of expression is voluminous. The conflict between the right to protection of reputation with the freedom of expression has been the subject of the Court's expansive jurisprudence. Limitations of space prevent us to comment on this rich case law in details. However, the most relevant principles developed by the Court and other institutions of the CoE need to be recalled to review the situation in Turkey concerning defamation to politicians cases.
4. 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".[1] Other matters of public interest also deserve same level of protection.[2] 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.
5. 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.[3]

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1 Lingens v. Austria, no. 9815/82, 08.07.1986, para. 42.
2 Thorgeir Thorgeirson v. Iceland, no. 13778/88, 25.6.1992, para. 64.
3 Lindon, Otchakovsky-Laurens and July v. France, no. 21279/02, 22.10.2007, para. 48.

Statements Against Politicians

6. 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.[4] 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.[5] However, the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention.[6]
7. It is, therefore, necessary to distinguish statements targeting the private life of a politician[7] and public role he/she plays in society.[8] 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.[9] 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 exercise of their functions, and the reporting of details of an individual's private life, where it did not.[10]
8. 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.[11] Such a **privileged protection cannot be provided to heads of state, prime ministers, ministers or other politicians**.[12] 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.
9. The context in which the expression is used is also crucial.[13] Article 10 protects also the use of exaggerated or even offensive language, especially in cases where journalists are reacting to what the politician said.[14] 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.[15] The Court commented

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4 Fedchenko v. Russia, no. 33333/04, 11.2.2010, para. 33; Tuşalp v. Turkey, no. 32131/08, 21.2.2012, para. 45.
5 Lopes Gomes Da Silva v. Portugal, no. 37698/97, 28.9.2000, para. 30.
6 Tuşalp, para. 45.
7 See for instance, Tammer v. Estonia, no. 41205/98, 06.02.2001.
8 Cojocaru v. Romania, no. 32104/06, 10.2.2015, para. 95.
9 Janowski v. Pologne [GC], no. 25716/94, 21.1.1999, para. 33; Busuioc v. Moldova, no. 61513/00, 21.12. 2004, para. 64; Taffin and Contribuables Associes v. France, no. 42396/04, 18.2.2010, para. 64.
10 Otegi Mondragon v. Spain, no. 2034/07, 15.3.2011, para. 57.
11 Artun and Güvener v. Turkey, no. 75510/01, 26.7. 2007, para. 31; Önal v. Turkey (no. 2), no. 44982/07, 02.7.2019; Otegi Mondragon v. Spain; Stern Taulats and Roura Capellara v. Spain, no. 51168/15, 13.3.2018.
12 Tuşalp v. Turkey, Turhan v. Turkey, no. 48176/99, 19.5.2005, para. 25.
13 Tammer v. Estonia, no. 41205/98, 06.02.2001, para. 61.
14 Oberschlick (No. 2), no. 20834/92, 1.7.1997, para. 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, para. 60.
15 Unabhangige Initiative Informationsvielfalt v. Austria, on. 28525/95, para. 43.

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. [16]

10. An offensive statement may fall outside the protection of freedom of expression where the sole intend of the offensive statement is to insult.[17] 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.[18] 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.
11. 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. [19] 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 which states "And [if I had an offer] to become a member of parliament, as in Ganna German's case? That is, for a flat in Kyiv?" be called defamation.[20]
12. Linked to political speech is expression in the form of public protest or demonstration that will also engage Article 10. In *Kandzhov v. Bulgaria*, the applicant put in the centre of Pleven two stands and two posters reading "We, the supporters of the UDF, call for the resignation of **the top idiot** of the Government Teodosiy Simeonov". In finding violation of Article 10 of the Convention, the Court stated that "the events must be seen in the context of a political debate which, although, critical of the Government, was not violent. Thus, as found by the Supreme Court of Cassation, the applicant's actions on 10 July 2000 were entirely peaceful, did not obstruct any passers-by and were hardly likely to provoke others to violence. However, the authorities in Pleven chose to react vigorously and on the spot in order to silence the applicant and shield the Minister of Justice from any public expression of criticism. In a democratic system the actions or omissions of the Government and of its members must be subject to close scrutiny by the press and public opinion. 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**".[21]

Criminal Sanctions and Chilling Effect

13. The Court held 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.[22] That's why the Court is called for when

16 Lombardo and Others v. Malta, no. 7333/06, 24.4.2007, para. 60.
17 See for instance, Rujak v. Croatia, no. 57942/10, 02.10.2010, para. 30.
18 Lopes Gomes Da Silva, para. 34.
19 Roland Dumas v. France, no. 34875/07, 15.7.2010, para. 50-51.
20 Instytut Ekonomichnykh Reform, Tov v. Ukraine, no. 61561/08, 2.6.2016, para. 56
21 Kandzhov v. Bulgaria, no. 68294/01, 06.11.2008, para. 73.
22 Cumpana and Mazare v. Romania, no. 33348/96, 17.12.2004, para. 114.

the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.[23] A classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest, according to the Court, present no justification whatsoever for the imposition of a prison sentence, as such a sanction, by its very nature, will inevitably have a chilling effect. The fact that the applicants did not serve their prison sentence does not alter that conclusion.[24]

14. The Court held that the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings when replying even to the unjustified attacks and criticisms of its adversaries, particularly where other means are available.[25] In *Raichinov v. Bulgaria*, the Court showed when criminal sanctions might be acceptable in defamation cases: "It is true that the possibility of recurring to criminal proceedings in order to protect a person's reputation or pursue another legitimate aim under paragraph 2 of Article 10 cannot be seen as automatically contravening that provision, as in certain grave cases – for instance in the case of speech inciting to violence – that may prove to be a proportionate response. However, the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies".[26]
15. 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".

Article 125/3-a of the Turkish Criminal Code

16. 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.
17. 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.[27]
18. Firstly, although protection of public servant for common interest is acceptable under the Court's jurisprudence, **it is doubtful whether this protection justifies heavier punishment in defamation cases where the victim is a public servant**.
19. Secondly, as the present case shows, **the judiciary in Turkey makes no distinction between elected politicians like prime minister, ministers and mayors and appointed public**

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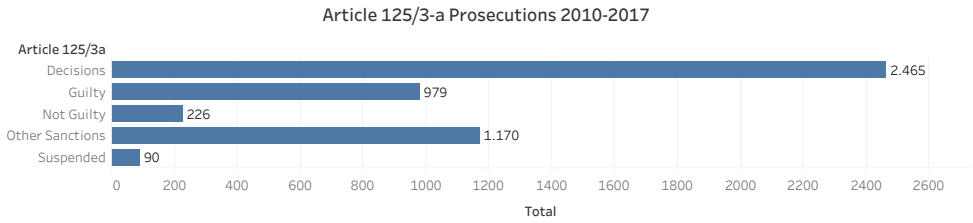
23 Tonsbergs Blad AS and Haukum v. Norway, no. 510/04, 1.3.2007, para. 88.
24 Cumpana and Mazare, para. 116.
25 Fatullayev v. Azerbaijan, no. 40984/07, 22.4.2010, para. 116.
26 Raichinov v. Bulgaria, 47579/99, 20.4.2006, para. 50.
27 Turkish Constitutional Court while rejecting the annulment of article 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.

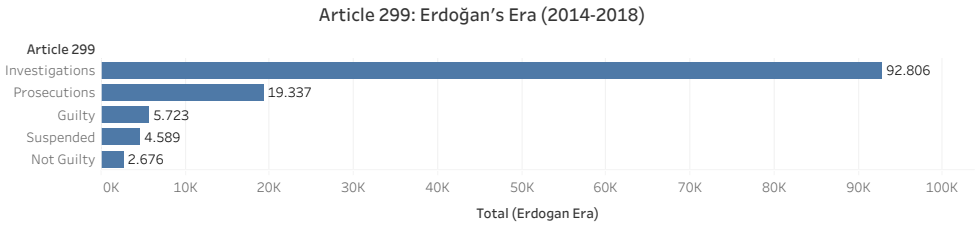
servants in the implementation of this provision. The prime minister, ministers and mayors are considered "public servants" in implementation of this provision. Nevertheless, unlike public servants, a politician lays himself open to close scrutiny of his every word and deed by both journalists and the 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.

20. Thirdly, **this provision causes an inequality between politicians in power and opposition**. Politicians, including prime minister, ministers, mayors etc. are protected by article 125/3-a, whilst opposition politicians are subject to the less protective article 125/1 as they cannot be called public servant. Another difference between 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 investigation under article 125/3-a might be initiated directly by the public prosecutor without a complaint. 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.
21. 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.[28] Although this figure includes civil suits, total number is still striking.
22. Official statistics are not detailed and only available until 2017 and 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.



23. The decrease in the number of article 125/3-a prosecutions could be linked to the sharp increase in the number of criminal investigations and prosecutions involving the crime of defaming the President of Turkey under article 299 of the Criminal Code since Erdoğan become the President of Turkey in August 2014. As will be seen below, 92.806 criminal investigation and 19.337 criminal prosecutions took place as of end of 2018.

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



24. Journalists and other individuals have been charged and convicted in numerous cases for insulting the former prime ministers Ahmet Davutoğlu[29] and Recep Tayyip Erdoğan[30] and other ministers.[31]

Constitutional Court Jurisprudence on Decriminalisation

25. As the European Court, the Constitutional Court has received numerous applications, under individual complaint mechanism system, from individuals who claim that their reputation had been breached due to failure of public prosecutors to prosecute insult directed against them. The Constitutional Court, referring to the Recommendations of the PACE [32] and the jurisprudence of the European Court,[33] has found applications inadmissible on the ground that the applicants had not exhausted available legal remedies, i.e. civil suits.[34] Constitutional Court's approach was also approved by the European Court in *Yakup Saygılı v. Turkey*.[35]
26. However **rather than being a move towards decriminalisation of defamation this move has caused an unfair implementation of criminal law in criminal defamation cases**. The provision that criminalises defamation still exists in the Criminal Code. Since the Constitutional Court did not make a distinction on defamations that fall within criminal scope and those fall within civil scope, prosecutors have unfettered discretion in prosecuting insults under article 125 and article 299 when the president of Turkey is involved. Indeed while on the one hand those who plan to apply to the Constitutional Court have to bring a civil suit to exhaust legal remedies, prosecutors have brought 224.681 cases only in 2018 under article 125 of the Criminal Code which relates to defamation.[36] It is not clear why some people have to bring civil cases whereas prosecutors charge hundreds of thousands of people for defamation every year. As long as the threshold for defamation cases remains unclear and while the

29 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

30 İbrahin 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 also news reports available at: 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

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

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

33 Šabanović/Serbia, no. 5995/06, 31.5.2011, para. 43; Niskasaari/Finlandiya, no. 37520/07, 6.7.2010, para. 77.

34 Adnan Oktar (2) application, no. 2013/514, 2.10.2013, para. 40; Adnan Oktar (3) application, no. 2013/1123, 2.10.2013, para. 44; Fetullah Gülen application, no. 2014/12225, 14.7.2015.

35 Yakup Saygılı v. Turkey, no. 42914/16, 11.7.2017.

36 Adalet İstatistikleri, 2018, p. 93.

Constitutional Court's jurisprudence does not decriminalise defamation, but on the contrary causes an unequal and arbitrary application of criminal law which works in favour of the government.

27. Secondly, unlike ordinary defamations, defamation against public servants is investigated *ipso facto* by the prosecutor. Therefore, **public servants who are allegedly insulted by citizens are not required to bring civil cases against these acts**. In other words, whilst citizens' complaints against public servants could be rejected, public servants are not asked to bring civil cases to exhaust legal remedies.
28. Thirdly, 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,[37] proportionality of prison sentences in a defamation case were not evaluated.
29. Furthermore, the relevant provision was brought to the Constitutional Court under contention of constitutionality process. The local court that brought the challenge 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.[38]
30. 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 after to the ECtHR. 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 CoE 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. While the opposing and dissenting media, journalists and others are always subject to prosecution subsequent to complaints by the government officials complaints against the members of the ruling party and media supporting the ruling party are generally and systematically rejected.

Erdoğan's Special Position in Turkish Law

31. President Erdoğan, who was prime minister in the present case when the incident took place, has an unprecedented and unique position before the domestic courts. Infamous insult to President provision and its application is well known and reported. As the figures above shows 92.806 persons were subjected to a criminal investigation and 19.337 persons were prosecuted in total under this provision. Considering the high number of prosecutions and guilty verdicts, the number of individual applications decided by the Constitutional Court is strikingly low at only one which was found inadmissible as will be explained below.
32. However, the President's privileged position can also be seen in civil cases pending before different courts. While the prosecutors have decided that the President have been insulted

[37] Umut Kılıç Application, no. 2015/16643, 4.4.2018.
[38] See E. 2012/78, K. 2012/111, 12.9.2012.

92.806 times as of end of 2018 so far not a single person could win a case against him at civil courts.

33. For instance, the President as a response to peace petitioners who signed a declaration calling for an end to armed conflict then continuing in the south east part of the country, had fired off an angry tirade against "those so-called intellectuals" accusing them of "treason" and being the "fifth columns" of foreign powers, sympathising with terrorists and bent on undermining Turkey's national security. Prof. Neşe Özgen and Prof. Baskın Oran sued Mr. Erdoğan for this speech in civil courts claiming defamation. In the Baskın Oran case, although it was well known that Mr. Oran was one of the petitioners the Court of Cassation held that as his name was not included in Erdoğan's speech he had no right to sue the President.[39] Prof. Özgen's case was also finalised at the Court of Cassation.[40]
34. While Mr. Erdoğan has not lost a single case brought against him, he has won in total 822 thousand Turkish Liras in fifteen different defamation cases he brought against the leader of the main opposition party, Mr. Kemal Kılıçdaroğlu in the last ten years.[41] All statements made by Mr. Kılıçdaroğlu have been part of public debate in which he criticised the government's position on several issues.

Constitutional Court in Erdoğan Cases

35. The Constitutional Court is not an exception in "Erdoğan Cases". Article 299 which is relating to insult to president was brought to the Constitutional Court under contention of constitutionality process.[42] Domestic courts bringing this claim to the Constitutional Court relying on the jurisprudence of the ECtHR argued that privileged position provided to the President under this provision violates the equality principle of the Constitution. However, the Constitutional Court deliberately ignored the well-established case law of the Strasbourg Court and rejected the request.
36. As shown above, thousands of people have been convicted under article 299 after Erdoğan became president. However, the Constitutional Court has decided only in one case so far. In the Umut Kılıç application, once again the Constitutional Court ignored the ECtHR's jurisprudence relating to insult to heads of states and found the application inadmissible.[43] In Ömür Çağdaş Ersoy application, applicant of the present case 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 proportional.[44]
37. 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.[45] While deciding against the applicant, the Constitutional Court disregarded the context in which the speech was made.

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39 Court of Cessation, 4th Civil Chamber, E. 2017/3236, K. 2018/2317, 27.3.2018.
40 Court of Cessation, 4th Civil Chamber, E. 2017/4070, K. 2018/2911, 11.4.2018.
41 http://www.cumhuriyet.com.tr/haber/turkiye/1030394/kilicdarogluna-8-senede-822-bin-tl-ceza.html
42 E:2016/25, K:2016/186, 14.12.2016.
43 Umut Kılıç Application, no. 2015/16643, 4.4.2018.
44 Ömür Çağdaş Ersoy Application, no. 2015/11715, 12.12.2018.
45 Kemal Kılıçdaroğlu Application, no. 2014/1577, 25.10.2017.

38. 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.[46] Nevertheless, in cases to which Mr. Erdoğan is a party, Axel Springer test is not applied. Apart from the Kılıçdaroğlu application already mentioned, this was also the case in the Neşe Özgen application claimed that she had been defamed by the President's speech.[47] The case was found manifestly ill-founded without assessing the applicant's allegations.
39. 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.
40. Finally, it is important to add that, so far, the Constitutional Court did not find a violation of 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

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.

10.12.2019

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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.

[46] İlhan Cihaner, Application No: 2013/5574, 30.06.2014, §§ 66-73; Nilgün Halloran, Application No: 2012/1184, 16.07.2014, § 41; Kadir Sağdıç, Application No: 2013/6617, 08.04.2015, §§ 58-66.

[47] Neşe Özgen Application, no. 2018/23127, 1.4.2019.