Third Party Intervention

In the Case of Vedat Şorli v. Turkey (no. 42048/19)

by

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Introduction

1. İFÖD will address in its intervention in the case of Vedat Şorli v. Turkey (**no. 42048/19**) the issue of freedom of expression on the social media platforms and **insulting the President of the Republic of Turkey** (article 299 Turkish Criminal Code). In this case, the applicant was detained and then convicted to a term of imprisonment of eleven months and twenty days with suspension of the pronouncement of the judgment with regards to two postings made by the applicant on the Facebook social media platform. Applicant's first Facebook posting concerns the **sharing** of a well-known photo collage involving the President of Turkey and the former US president, Barack Obama. In this collage, Obama seems to be kissing the President of the Turkish Republic who is portrayed in woman's clothes with long hair and President Erdoğan states on a balloon written in Kurdish "Are you going to register the title to Syria in my name, my dear husband?" ("*Suriye tapusunu adıma yapacan mı kocacım*"). The second publication concerned the **sharing** of photos of the former Prime Minister of Turkey, Ahmet Davutoğlu and the President Erdoğan with the following comment:

   > "Let your blood-fed power sink (...) / Let your seats be solidified by dint of taking lives sink (...) / Let your luxurious lives that you live with the dreams you steal sink (...) / Let your presidency, your power, your ambitions sink (...) " ("*Kandan beslenen iktidarınız yerin dibine batsın / Can aldıkça sağlamlaştırdığınız / koltuklarınız yerin dibine batsın / Çaldığınız hayallerle yaşağıdınız lüks hayatlarınız / yerin dibine batsın / Başkanlığınız da / İktidarınız da / Hırslarınız da / Yerin dibine batsın!!!*"

2. It is understood from the case file that the applicant **did not produce the above content but shared the content generated** by other Facebook users. So far as the content of the shared Facebook post by the applicant is concerned, it seems to be related to criticism of Turkey's foreign policy as well as the Presidential system.

3. The European Court of Human Rights ("the Court") asked to the parties whether there has been an interference with the applicant's right to freedom of expression, and especially with his right to impart information or ideas, within the meaning of Article 10 § 1 of the Convention and if so, whether the interference was provided by law by taking into account the position of the addressee ("President of Turkey") of the disputed publications, the context in which the content was shared, the specific features of the social network on which these publications were shared, the nature of the sentence imposed. Additionally, the Court also asked whether the national courts, in their decisions, strike an appropriate balance, respecting the criteria established by the Court's case-law, between the applicant's right to freedom of expression and the right to respect the private life of the complainant.[1]

4. As will be shown in the İFÖD submission, criminal defamation provisions are often applied in favour of the government officials and in particular in favour of the President of Turkey to silence fair criticism which as a result stifles democracy and pluralism. It is submitted that the current case should be reviewed against this background. The submission will discuss the compliance of domestic law and practice with the European

[1] *Axel Springer AG v. Germany* [GC], no 39954/08, §§ 89-95), 7.02.2012, *Von Hannover v. Germany* (no. 2) [GC], nos 40660/08 and 60641/08, §§ 108-113, ECHR 2012; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, ECHR 2015 (extracts).

Court's jurisprudence and legal standards.[2] Subsequently, an overview of legal issues surrounding social media postings and an assessment of the impact of such publications will be provided. İFÖD will therefore assess the important issue of whether the majority of comments published on social media platforms are likely to be too trivial in character, and/or the reach of their publication is likely to be too limited in semi closed social media platforms such as Facebook. İFÖD will argue that content produced by third parties **but shared or liked by others to a small and restricted group of Facebook users should not carry the same** weight as a statement published on a mainstream website. **Distinctions should be also made between minor distributors and authors of the impugned statements**. In conclusion, İFÖD will provide **a procedural review model** discussing the 'general principles' that should be taken into account with regards to allegations of violation of freedom of expression protected by article 10 of the Convention in criminal cases.

I. European Standards with Regard to Defamation of Politicians

A. Political Speech and Public Debate

5. 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".[3] 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.[4] 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.

B. 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.[5] 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.[6] However, the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention.[7]

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2 *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.

3 *Lingens v. Austria*, no. 9815/82, 08.07.1986, § 42.

4 *Lindon, Otchakovsky-Laurens and July v. France*, no. 21279/02, 22.10.2007, § 48.

5 *Fedchenko v. Russia*, no. 33333/04, 11.2.2010, § 33; *Tuşalp v. Turkey*, no. 32131/08, 21.2.2012, § 45.

6 *Lopes Gomes Da Silva v. Portugal*, no. 37698/97, 28.9.2000, § 30.

7 *Tuşalp v. Turkey*, no. 32131/08, 21.2.2012, §. 45.

7. It is, therefore, necessary to distinguish **statements targeting the private life of a politician**[8] and **public role he/she plays in society**.[9] If the person attacked is a public servant, the Court pays particular attention to whether the attacks were professional or personal. Within this context, 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.[10] 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.[11]

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 or by the imposition of special or higher criminal penalties against insult or defamation in particular by the press will not, as a rule, be in keeping with the spirit of the Convention and with Article 10.[12] Such a **privileged protection cannot be provided especially to the heads of state, prime ministers, ministers or other high level politicians**[13] as the State's interest in protecting the reputation of its own head of State cannot serve as justification for affording that individual privileged status or special protection vis-à-vis the right to convey information and opinions concerning him.[14] The Court in *Artun and Güvener*[15] and most recently, in *Önal* (no. 2),[16] considered within the context of criminal sanctions involving insult to the President of the Republic that **persons holding public office in the State** and representing the competent authorities as guarantors of the public order institution **must be self-restrained in the use of criminal proceedings**.[17] No doubt, President Erdoğan is a politician rather than a King as in Spain in which the King occupies a neutral position in political debate or it was previously in Turkey when the Presidents acted as statesman rather than as politicians. In any case, criticism of a constitutional institution is not excluded from the scope of the right to freedom of expression and even symbol of State Unity such as a King is shielded from all criticism in the exercise of his official duties.[18]

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8 See for instance, *Tammer v. Estonia*, no. 41205/98, 06.02.2001.

9 *Cojocaru v. Romania*, no. 32104/06, 10.2.2015, § 95.

10 *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.

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

12 *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*, no. 2034/07, 15.3.2011; *Stern Taulats and Roura Capellara v. Spain*, no. 51168/15, 13.3.2018.

13 *Tuşalp v. Turkey*, no. 32131/08, 21.2.2012; *Turhan v. Turkey*, no. 48176/99, 19.5.2005, para. 25.

14 See, mutatis mutandis, *Colombani and Others v. Fran*ce, no. 51279/99, § 68, ECHR 2002-V; *Artun and Güvener*, no. 75510/01, 26.7. 2007, § 31; and *Otegi Mondragon v. Spain*, no. 2034/07, 15.3.2011, § 55.

15 *Artun and Güvener v. Turkey*, no. 75510/01, 26.7. 2007.

16 *Önal v. Turkey* (no. 2), no. 44982/07, 02.7.2019.

17 See with regard to excessive protection of the status of the President of the Republic in civil cases, *Pakdemirli v. Turkey*, no. 35839/97, 22.02.2005, § 52.

18 *Otegi Mondragon v. Spain*, no. 2034/07, 15.3.2011, § 56.

9. Moreover, **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 a politician said.[20] Polemical statements responding to 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] In other words, a degree of immoderation is allowed according to the Court.[22]

10. On the other hand, an offensive statement may fall outside the protection of freedom of expression where the sole intend of the offensive statement is to insult.[23] 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.[24]

11. Therefore, **domestic courts should not take passages out of context and isolate particular phrases as defamatory** and 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.[25] 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.[26]

12. 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.[27] 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.[28]

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

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

21 *Unabhangige Initiative Informationsvielfalt v. Austria*, on. 28525/95, para. 43.

22 *Mamère v. France*, no. 12697/03, 07.11.2006, para. 25.

23 See for instance, *Rujak v. Croatia*, no. 57942/10, 02.10.2010, para. 30.

24 *Lopes Gomes Da Silva v. Portugal*, no. 37698/97, 28.9.2000, para. 34.

25 *Tuşalp v. Turkey*, nos. 32131/08 and 41617/08, 21.02.2012, § 48; *Roland Dumas v. France*, no. 34875/07, 15.7.2010, §§ 50-51.

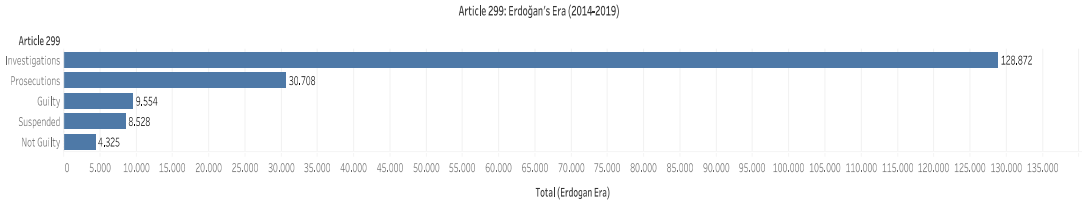
26 *Instytut Ekonomichnykh Reform, Tov v. Ukraine*, no. 61561/08, 2.6.2016, para. 56

27 *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.

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

C. Article 299 of the Turkish Criminal Code

13. The applicant has been found guilty subject to article 299 of the Turkish Criminal Code which criminalises insult to the President of Turkey. According to this provision, someone who defames the President of Turkey shall be imprisoned for a term of one to four years. The use of article 299 increased significantly during the term of office of President Abdullah Gül. Together with the Presidency of Recep Tayyip Erdoğan, the use of article 299 peaked and the provision became one under which thousands of people were indicted from politicians to journalists and students to celebrities. As will be seen below, **128.872 criminal investigations** and **30.738 criminal prosecutions** took place during the Presidency of Erdoğan (2014-2019) involving article 299 of the Criminal Code.



14. The details of the majority of the criminal investigations and prosecutions are unknown and it is not clear whether the investigations and prosecutions make a distinction between statement of facts and value judgments or what percentage of these involve harsh swear words and insults as alleged often by the government.

15. The high number of criminal investigations and prosecutions was also noticed by the Venice Commission, which in its report of March 2016 stated about this provision that the provision "fails to take into account the European consensus which indicates that States should either decriminalise defamation of the Head of State or limit this offence to the most serious forms of verbal attacks against them. The Commission considers that the only solution to prevent further violations of Article 10 of the ECHR is the complete abrogation of Article 299."[29]

D. Special Treatment for the President of Turkey in Turkish Law

16. President Erdoğan seems to have an unprecedented and unique position before the domestic courts. As the figures above shows 128.872 persons were subjected to a criminal investigation and 30.738 persons were prosecuted for insulting President Erdoğan as of end of 2019. The applicant, therefore, is just one of them.

17. Firstly, it should be noted that the **Court of Cassation systematically ignored the case-law of the European Court** when dealing with the cases related to defamation of the President of Turkey subject to article 299 of the Criminal Code. An examination of 460 decisions of the Court of Cassation between April 2015 and June 2017 revealed that 388 of these were delivered by the 16th Criminal Chamber and there were only two references to the judgments of the European Court and only in the dissenting opinions.[30] Nevertheless, the same Chamber regularly made references systematically in its decisions

[29] Venice Commission, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, No. 831/2015, Strasbourg, 15.03.2016.

[30] See decisions of the 16th Criminal Chamber, E: 2016/1780, K: 2016/3567, 24.05.2016; E: 2016/1783, K: 2016/4413, 22.06.2016

to the ECtHR judgments in the cases related to the terrorist propaganda subject to Article 7/2 of the Law No. 3713.[31] More importantly, a considerate number of not guilty verdicts involving article 299 are overturned by the Court of Cassation or quashed when not guilty verdicts finalised at the local courts level are referred to the Court of Cassation by written order of the Ministry of Justice ("Kanun Yararına Bozma") subject to article 309 of the Code of Criminal Procedure.[32] Finally, the 16th Criminal Chamber of the Court of Cassation considered exactly the same photo collage involving the President of Turkey and the former US president, Barack Obama in two separate decisions. In one appeal decision, the 16th Criminal Chamber reversed the not guilty verdict of a lower court involving the photo collage by a majority verdict.[33] In the other case, the 16th Criminal Chamber, by way of a written order of the Ministry of Justice ("Kanun Yararına Bozma"), decided to quash the "not guilty verdict" of a lower court involving the same photo collage.[34]

18. Secondly, considering the high number of prosecutions and guilty verdicts, **the number of individual applications decided by the Constitutional Court is strikingly low with only one decision** so far which was found inadmissible. Even though the Constitutional Court has implemented the Axel Springer test in cases where there is a conflict between the right to protection of reputation and freedom of expression, nevertheless, in cases to which Mr. Erdoğan is a party, Axel Springer test is not applied. In the Umut Kılıç application, the Constitutional Court ignored the European Court's jurisprudence relating to insult to heads of states and found the application inadmissible.[35] The Constitutional Court also ignored the European Court's jurisprudence when considering article 299 under contention of constitutionality process.[36] Domestic courts bringing this claim to the Constitutional Court relying on the jurisprudence of the European Court argued that the privileged position provided to the President under this provision violates the equality principle of the Constitution. However, the Constitutional Court rejected this request.

19. The Constitutional Court in applications brought concerning civil cases has adopted the same pro-President approach. In the Neşe Özgen application, the applicant claimed that she had been defamed by a speech made by the President.[37] The case was found manifestly ill-founded without assessing the applicant's allegations. Similarly, in the Kemal Kılıçdaroğlu application, the applicant who is the leader of the main 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.[38] While deciding against the applicant, the Constitutional Court disregarded the context in which the speech was made. This case was

[31] See for example E: 2016/6853, K:2017/1107, 23.02.2017.

[32] See for example decisions of the 16th Criminal Chamber: E: 2019/11164 K: 2020/2033, 06.03.2020; E: 2019/11075, K: 2020/1805, 06.03.2020.

[33] See E: 2016/1783, K: 2016/4413.

[34] See E: 2017/1949, K: 2016/5852.

[35] Umut Kılıç Application, no. 2015/16643, 4.4.2018. Note also the inadmissibility decision in the case of Ömür Çağdaş Ersoy (Application, no. 2015/11715, 12.12.2018) which concerned insult to a public servant, namely Prime Minister Erdoğan subject to article 125/3c of the Turkish Criminal Code.

[36] E: 2016/25, K: 2016/186, 14.12.2016.

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

[38] Kemal Kılıçdaroğlu, Application, no. 2014/1577, 25.10.2017.

taken to the European Court and recently the European Court found a violation of Article 10 in the case of *Kemal Kılıçdaroğlu v. Turkey*.[39] In its decision, the European Court was critical of the Constitutional Court's approach as well as the local courts' decisions by stating that "assuming, as the domestic courts did, that the language and expressions used in the two speeches were provocative and coarse, and that some of the expressions could legitimately be described as offensive, they were nevertheless essentially made up of value judgments and not concrete statements of fact."[40] According to the European Court, "this aspect was not taken into consideration by the civil courts, **which carried out no analysis** of the question whether the impugned expressions had a sufficient factual basis. As to the Constitutional Court, **it merely highlighted the abstract nature of certain remarks without engaging in any in-depth analysis of this question**."[41] The Court, therefore concluded that the 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**. According to the Court, the local courts, including the Constitutional Court **failed to make a distinction between "facts" and "value judgments"**, but merely considered whether the expressions used in the speeches were capable of causing damage to the plaintiff's personality rights and reputation.[42] More importantly and finally the Court stated that "the domestic courts are required to examine whether the context of the case, the public interest and the intention of the person who made the impugned remarks justified the possible use of a degree of provocation or exaggeration.[43] It should be recalled that according to the Court, the national courts' discretion in striking a balance between the right to freedom of expression and the right to respect private life is narrowed in criminal defamation cases, in favour of freedom of expression.[44]

20. Moreover, the Constitutional Court has found several individual applications filed by individuals who were convicted or were condemned to pay compensation for defaming Mr. Erdoğan in civil or criminal cases **inadmissible** on the grounds of **unsubstantiated complaints**. In the Mustafa Akaydın[45] case, the applicant who was a mayoral candidate from an opposition party when he made the impugned speeches was condemned to pay compensation to Mr. Erdoğan. When he filed an individual application claiming that his freedom of expression was violated, 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[46] and in relation to the current applicant's application[47] as well. Nevertheless, such an application of unsubstantiated complaints doctrine is completely in contradiction with the European Court's jurisprudence.

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39 *Kemal Kılıçdaroğlu v. Turkey*, no. 16558/18, 27.10.2020.

40 Compare *Keller v. Hungary* (dec.), no. 33352/02, 04.04.2006 and see, inter alia, *Tuşalp v. Turkey*, nos. 32131/08 and 41617/08, 21.02.2012, § 47.

41 Kemal Kılıçdaroğlu v. Turkey, no. 16558/18, 27.10.2020, § 57.

42 Kemal Kılıçdaroğlu v. Turkey, no. 16558/18, 27.10.2020, § 64.

43 *Ibid*.

44 See mutatis mutandis, *Cumpana and Mazare v. Romania*, no. 33348/96, 17.12.2004, § 115.

45 Mustafa Akaydın, App. No: 2015/14800, 8.01.2020.

46 Abdurrahman Erol Özkoray, App. No: 2015/798, 9.01.2020, para. 24

47 Vedat Şorli, App. No: 2017/37028, 21.03.2019.

21. It is submitted, therefore, that the Constitutional Court as well as other domestic courts **continue to fail to apply the Strasbourg standards in cases to which the President of Turkey is a party**.[48]

E. The Speaker/Producer vs. the Distributor of Internet Content

22. It is also important to assess the impact of social media postings and legal issues surrounding such postings in this submission. Within this context, first of all, **there needs to be a distinction between various types of social media users**. Although the title and position of the person making the speech is important within the Court's jurisprudence, there may be other types of users of social media platforms previously not considered by the Court. Therefore, there needs to be a distinction between the following type of users while determining criminal responsibility if any:

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

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

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

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

F. Potential Impact of the Distribution of Content on Facebook

24. There are substantial differences between the various social media platforms and how the users choose to use these platforms. While, for example, Twitter is regarded as largely an open microblogging platform, **Facebook** is often regarded as a **semi closed platform** given that users largely post on their Facebook "wall" that is visible to their "friends" (unless they make the content accessible to anyone). Therefore, the users of the Facebook platform decide themselves whether to have their accounts and profiles publicly open to anyone or whether their accounts are restricted to family and friends. Therefore, İFÖD believe it is important to consider **the nature of the platform on which the impugned posts were made**; that is whether they were made on a completely publicly accessible Internet platform, website or blog or on a semi-private platform.[49]

25. The Court established that the **potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference**.[50] According to the Court's jurisprudence, "it is clear that **the reach and thus potential impact of a statement released online with a small readership is certainly not the same** as that of a statement published on mainstream or highly visited web pages".[51] It is therefore essential to assess the potential influence of an online publication to determine

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48 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.

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

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

51 *Savva Terentyev*, § 79.

the scope of its reach to the public. Similarly, in the admissibility decision of *Tamiz v. The United Kingdom*,[52] the Court established that "millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, **the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage**"[53] to another person's reputation or to state institutions to require criminal prosecutions or sanctions such as dismissal.[54]

26. Therefore, İFÖD suggests that distinctions should be made between whether the posts were made by a **public**, **well-known or influential figure**,[55] or **a well-known blogger** or **YouTuber**[56] or a **popular user of social media**,[57] **which could have attracted public attention to his comment and thus have enhanced the potential impact of the impugned statements**[58] and/or whether an applicant **shared or liked** such content contributing to its direct or indirect distribution rather than originally posting such content to social media platforms.[59] If the applicant did not produce the impugned content, the Court should be mindful of the applicant's contribution to the distribution of content generated by other Facebook users which is already available on the platform. Within this context, the Court should also assess whether the original speaker of the content was identified, and if this is the case whether a criminal investigation has been conducted against that person.

27. Finally, the Court should examine whether domestic judicial authorities evaluated the potential impact of the applicant's postings on Facebook and/or **his trivial role in the distribution of the original content.**

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

G. Content of the Facebook Publications

29. Moreover, the Court should also take into account the content of shared postings and consider whether they had a political nature and whether they were **part of a political debate on a matter of general and public concern** and whether the **statements shared** by the applicants **attracted any public attention**.

30. The Court's well-established case law holds that political speech enjoys high protection and there is little scope under Article 10 § 2 of the Convention for restrictions on political

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52 *Tamiz v. The United Kingdom*, no. 3877/14, 19.09.2017.

53 *Tamiz v. The United Kingdom*, no. 3877/14, 19.09.2017, § 80-81.

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

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

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

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

58 *Savva Terentyev*, § 81.

59 *Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131.

speech or on debate on matters of public interest. The margin of appreciation of States is thus reduced where a debate on a matter of public interest is concerned.[60] Therefore, the local courts should consider whether the nature of the online content at issue in a given case constitutes political speech or relates to matters of public interest. They should analyse statements **"in the context of the relevant discussion and to find out which idea they sought to impart**".[61] The Court rightly stated in *Terentyev v. Russia* that the local courts "made no attempt to assess the potential of the statements **at hand to provoke any harmful consequences**, with due regard to the political and social background, against which they were made, and to the scope of their reach".[62]

31. Furthermore, the local courts should assess whether the impugned statements, are fairly construed and seen in their immediate or wider context, can be seen **as a direct or indirect call for violence or as a justification of violence, hatred or intolerance**.[63]

32. The Court stated that offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration; **but 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**. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the substance of the ideas and information expressed.[64] The Court stresses that not every remark which may be perceived as offensive or insulting by particular individuals or their groups justifies a sanction. It is only by a careful examination of the context in which the offending, insulting or aggressive words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 of the Convention and that which forfeits its right to tolerance in a democratic society.[65] Within this context, though the Court did not approve of the language used by the applicant or the tone of his text, the Court in Savva Terentyev considered even very harsh statements like "It would be great if in the centre of every Russian city, on the main square... there was an oven, like at Auschwitz, in which ceremonially every day, and better yet, twice a day (say, at noon and midnight) infidel cops would be burnt. The people would be burning them. This would be the first step to cleansing society of this cop-hoodlum filth." to be a provocative metaphor, which frantically affirmed the applicant's wish to see the police "cleansed" of corrupt and abusive officers ("infidel cops") and which was the applicant's emotional appeal to take measures with a view to improving the situation.[66]

33. İFÖD, therefore, believes that in addition to context analysis, content analysis is an important necessary element for assessing this and similar applications in the future with regards to social media content.

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60 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, [GC], no. 931/13, § 167, 27.06.2017.

61 *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 82.

62 *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 82.

63 See, among other authorities, *Incal v. Turkey*, no. 22678/93, 09.06.1998, § 50, Reports 1998-IV; *Özgür Gündem v. Turkey*, no. 23144/93, § 64, ECHR 2000-III; *Gündüz v. Turkey*, no. 35071/97, §§ 48 and 51, ECHR 2003-XI; *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, § 73, 12.06.2012; *Fáber v. Hungary*, no. 40721/08, §§ 52 and 56-58, 24.07.2012 and *Vona v. Hungary*, no. 35943/10, §§ 64-67, ECHR 2013.

64 *Gül and Others v. Turkey*, no. 4870/02, § 41, 08.06.2010; *Grebneva and Alisimchi v. Russia*, no. 8918/05, § 52, 22.11.2016; *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 68.

65 *Vajnai v. Hungary*, no. 33629/06, §§ 53 and 57, ECHR 2008.

66 *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 72.

Conclusion

34. As illustrated article 299 of the Turkish Criminal Code has been used to silence criticism and to provide privileged protection to the President of Turkey as a high level politician in power which detrimentally stifles the public debate in Turkey, contrary to well established case-law of the Strasbourg Court.
35. İFÖD kindly invites the Court to take into the consideration that article 299 is in contradiction with the Convention standards and Turkish judicial practices exacerbate detrimental impact of this provision on political speech.
36. Finally, İFÖD kindly invites the Court to take into account the criteria for assessing the impact of social media postings and the distinction between various types of social media users especially on semi closed platforms such as Facebook.

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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.