

İFADE ÖZGÜRLÜĞÜ DERNEĞİ
TRIAL MONITORING REPORT
CANAN COŞKUN, BARIŞ PEHLİVAN
Anti-Terrorism Law Art. 6/1

I. Introduction

1. This trial monitoring report is prepared by İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association), a non-profit and non-governmental organization that aims to protect and foster the right to freedom of opinion and expression in Turkey. İFÖD based its monitoring report on the standards set by the case-law of the European Court of Human Rights on the right to a fair trial and the right to freedom of expression and press freedom as guaranteed by Articles 6 and 10 of the European Convention on Human Rights.
2. **Canan Coşkun;** is an independent journalist who has followed many proceedings of public interest. Coşkun received the Contemporary Journalists Association's Mustafa Ekmekçi News Award (2016), Metin Göktepe Journalism Award (2017), the European Union Investigative Journalism Young Journalist Award (2016) and most recently the Sedat Simavi Journalism Award for her news report on "Death at the Police Station". Additionally, she is the author of the book "This is the Courtroom: Judicial Regime in the New Turkey", published by İletişim Publishing, which details the cases she has followed in the courtrooms.
3. **Barış Pehlivan;** is a successful journalist who has worked for years as a reporter and editor for mainstream news programs and Turkey's leading newspapers such as Cumhuriyet. Pehlivan has received the Contemporary Journalists Association Rafet Genç News Award (2016), Yeditepe University Best Debut Book Award (2018), Turkish Publishers Association 2019 Freedom of Thought and Expression Author Award, Language Association Emin Özdemir Award (2019), Contemporary Journalists Association Review Research Award (2020), He received the Halit Çelenk Law Award (2020), the Federation of Intellectual Clubs Promising Journalism of the Year Award (2020), the Chamber of Architects Ankara Branch Emre Madran Conservation Area Solidarity Award (2023) and the Press Freedom and Media Research Association Press Freedom Award. Barış Pehlivan has also brought the facts and allegations about many politicians, ministers and businesspeople close to the government to the public through books co-authored with journalist Barış Terkoğlu, including "Leak: Famous Turks in Wikileaks," "Confidential: Turkey's Secrets in Secret Documents," "Metastasis," "Metastasis 2: The Clamp," and most recently "SS".
4. **Akın Gürlek** has worked as a judge for many years and has been a member of the Council of Judges and Prosecutors as the Deputy Minister of Justice since 29 August 2023. Gürlek is a public figure who has attracted the attention of the public and the press with his judgments against many opposition politicians and journalists, especially during his years as a judge.
5. The specific case concerns the alleged identification by two members of the press of a former judge, now a senior bureaucrat, as a target of terrorist organizations. Therefore, the Monitoring Report will first present the background of these news reports. In the second part of the report, the legal proceedings initiated against the journalists Canan Coşkun and Barış Pehlivan on the basis of a complaint filed by Akın Gürlek on 31 December 2021 will be explained. In the last part of the report, the legal proceedings initiated against journalists Coşkun and Pehlivan under Article 6 of the Anti-Terrorism Law will be evaluated in the light of the doctrine, the jurisprudence of the Constitutional Court and the European Court of Human Rights regarding

freedom of expression and freedom of the press, which are protected by Articles 26 and 28 of the Constitution and Article 10 of the European Convention on Human Rights.

II. Background Information

6. Former Interior Minister Süleyman Soylu stated during the budget talks at the Grand National Assembly of Türkiye on 09 December 2021 that of the 33,000 new staff recruited by the IBB (Istanbul Metropolitan Municipality), 577 out of 12,000 people checked were affiliated with a terrorist organization. Minister Soylu added that out of these 577 individuals, 455 had records related to the PKK and KCK, 80 to the DHKP-C, and 20 to the MLKP.¹ All these allegations made by Soylu against the IBB administration and Mayor İmamoğlu were closely followed by the public and reported by many media outlets.
7. In response to these allegations, Mayor İmamoğlu replied to Minister Soylu. İmamoğlu stated that if there were employees of the municipality who were linked to terrorist organizations, actions should be taken against these individuals, but no such efforts had been made. He harshly criticized Soylu for his claims. Mayor İmamoğlu's statements were also reported by numerous news websites² and following these statements, an *entry* titled "*10 december 2021 ekrem imamoğlu statements*" was opened on the Ekşi Sözlük platform.³
8. Following the statements of Soylu and İmamoğlu, President Recep Tayyip Erdoğan also made a statement on the allegations of dismissal of IBB employees at the AKP Istanbul Expanded Provincial Consultative Assembly Meeting on 26 December 2021.⁴
9. Following this process, on 26 December 2021, the Ministry's official Twitter account shared an announcement that an investigation was initiated into allegations that IBB employees were linked to terrorist organizations.⁵
10. Following the Ministry's statement on its official account, it was stated on the IBB's⁶ account, that the employees had been put under suspicion and that all employees would seek their legal rights. In addition, Ekrem İmamoğlu⁷ also stated that he stands by the municipality workers with the tweet he shared from his official account.
11. In this context, former Interior Minister Süleyman Soylu made statements that IBB employees were associated with the Association for Solidarity and Aid with Religious Scholars ("DİAYDER")⁸ and after these statements, municipality employees and officials were charged

¹ See <https://www.ensonhaber.com/gundem/ibbde-ise-alinan-557-personelin-teror-baglantis-desifre-oldu>.

² See <https://medyascope.tv/2021/12/10/ibb-baskani-imamoglundan-icisleri-bakan-soyluya-cevap-bagimsiz-saglik-kuruluslarina-cagrim-psikolojisi-ciddi-derecede-bozuk-sayin-bakan-ile-ilgili-bir-analiz-yapsinlar/>, <https://www.sozcu.com.tr/imamoglundan-suleyman-soyluya-cok-sert-tepki-wp6818921>, <https://tr.euronews.com/2021/12/10/tisk-baskan-asgari-ucret-teklifimiz-en-az-3-bin-500-lira>, <https://www.indyturk.com/node/446031/siyaset/i%CC%87mamo%C4%9Flundan-soylunun-iddias%C4%B1nayan%C4%B1t-ba%C4%9F%C4%B1ms%C4%B1z-sa%C4%9Fı%C4%B1k-kurulu%C5%9Flar%C4%B1-bakanla>.

³ See <https://eksisozluk.com/10-aralik-2021-ekrem-imamoglu-aciklamalari—7105811>.

⁴ See <https://www.aa.com.tr/tr/gundem/cumhurbaskani-erdogan-buradan-39-belediyemize-sesleniyorum-hayvan-barinaklarini-ihmal-etmeyiniz/2457872>.

⁵ See https://x.com/tc_icisleri/status/1475141919466569735?s=46.

⁶ See <https://twitter.com/istanbulbld/status/1475151875095805952>.

⁷ See https://twitter.com/ekrem_imamoglu/status/1475174667207991300.

⁸ See <https://www.youtube.com/watch?v=zo9s1fPCHIU>.

with "knowingly and willingly aiding an armed terrorist organization without being a member of it" for distributing aid cards to DİAYDER members and legal proceedings were initiated.

12. Canan Coşkun wrote an article entitled "*DİAYDER Indictment: The Judge of the Case is 'Familiar,' The Oldest Evidence Dates Back 16 Years*" published on 29 December 2021, on the Diken news website (<https://www.diken.com.tr/diayder-iddianamesi-davanin-hakimi-tanidik-delillerin-en-eskisi-16-yil-onceden/>). In the article, Coşkun detailed the 335-page indictment prepared against IBB employees and provided legal information from a previous case involving DİAYDER officials, who were allegedly aided by the municipality. Coşkun announced her news on this process, which is of great concern to the public, on her official Twitter account by directly adding some parts of her news.⁹
13. Coşkun also wrote the news article titled "*DİAYDER Trial: The defendant accused of 'terrorism' got into IBB with the reference of Binali Yıldırım*", which was published on 18 February 2022 on Diken Internet news website at the URL address <https://www.diken.com.tr/diayder-davasi-terorle-suclanan-sanik-binali-yildirim-referansiyla-ibbye-girmis/>. The article reports on the developments in the first hearing of the trial against IBB employees. Coşkun shared her tweet by directly quoting some parts of the article she wrote, similar to the one above, in order to announce the news by presenting excerpts from the news.¹⁰
14. Journalist Barış Pehlivan made the following statements regarding the legal proceedings initiated in the programme¹¹ broadcast on Halk TV on 30 December 2021:

*"(...)Can I explain? The whole issue is asking for a dormitory from the state, and the state says no, you will go to a sect dormitory, now look, I am going to tell you a chain, I am going to try to tell you a picture of the fact that this issue is not such individual, isolated, small issues. Now what are we talking about? We are constantly saying in these publications that in this case, this person received this much punishment, what kind of thing is this, for example, in this country, did they punish the writers of Sözcü newspaper for aiding FETÖ. They punished Canan Kaftancıoğlu for years for her tweets, didn't they? Selahattin Demirtaş is currently in jail for being member of terrorist organization, isn't he? Selcuk Kozağaçlı is in jail for the organization of I don't know what, they confiscated Can Dündar's properties, they did this. Now, look, in many of these cases that we are discussing in Turkey, which we believe to be political, there is a president of the court who gives the verdict, the same man who gives the verdict in all of them, Akın GÜRLEK, who is the president of one of the Assize Courts in Istanbul. I'll tell you about an interesting chain. As I said, Akın Gürlek is the person who sentenced in many cases like the ones that I mentioned. Akın Gürlek is a president described by Kemal Kılıçdaroğlu as the new Zekeriya Öz of the new Turkey (...)"*¹²
15. Istanbul Chief Public Prosecutor's Office issued an indictment on 12 April 2022 against Canan Coşkun's tweets, which consisted of the announcing a news report by quoting parts of it, and Barış Pehlivan's statements in a programme broadcast on Halk TV. The indictment was accepted by the Istanbul 34th Assize Court. The journalists were charged under Article 6/1 of the Anti-Terror Law ("TMK") for "*targeting people who took part in the fight against terrorism*" in Istanbul 34th Assize Court file no. 2022/251.

⁹ See <https://twitter.com/canancoskun/status/1476590611868393480>.

¹⁰ See <https://twitter.com/canancoskun/status/1494604182707445760?s=46>.

¹¹ See <https://www.youtube.com/watch?v=gUc1PS3ZFho>.

¹² Indictment dated 12.04.2022.

III. The Legal Process

A. General Information

16. İFÖD has followed the trial against journalists Coşkun and Pehlivan on the charge of "*targeting people who have taken part in the fight against terrorism*" under Article 6/1 of the TMK with the file number 2022/251 of the Istanbul 34th Assize Court since the first hearing held on 27 October 2022 following the acceptance of the indictment.
17. İFÖD legal team followed all the hearings and made observations on the proceedings. At the fourth and final hearing of the case on 13 June 2023, the defendants were acquitted. The Public Prosecutor appealed the acquittal decision on 14 July 2023 and the participant Akın Gürlek appealed the acquittal decision on 07 August 2023. Following the appeal filed by the Public Prosecutor and the participant, the file was sent to the Istanbul Regional Court of Appeals for review. As of the date of this Observation Report, the file is pending before the Istanbul Regional Court of Appeals.

B. Investigation Stage and Indictment

18. The investigation was initiated on the grounds of Canan Coşkun's tweets on her Twitter account @canancoskun on 29 December 2021 and Barış Pehlivan's statements in the programme broadcast on Halk TV on 30 December 2021, and on the grounds of committing the crime of "*targeting people who took part in the fight against terrorism*" pursuant to Article 6/1 of the Anti-Terror Law ("TMK").
19. With a petition dated 31 December 2021 and numbered 2021/1127, Akın Gürlek filed a complaint against Canan Coşkun and Barış Pehlivan, stating that he had been targeted by the above-mentioned statements. Thereupon, the Istanbul Chief Public Prosecutor's Office initiated an investigation into Coşkun's and Pehlivan's statements under the number 2022/112 on the charge of targeting persons who took part in the fight against terrorism, which is regulated under Article 6 of the TMK.
20. In her statement taken by the Public Prosecutor, Canan Coşkun stated that the social media posts that were the subject of the investigation were newsworthy, that many news articles had been made about the complainant Gürlek, that she had also made news about the complainant as a news item in order to make a note in history, that Gürlek's photographs and name were mentioned on many news sites, that she did not find it fair to file a complaint against her, that her news and content were within the scope of freedom of the press and that for this reason she wrote about the complainant and would continue to write about the complainant, and requested a decision of non-prosecution.
21. As a result of the investigation, the Public Prosecutor, in his indictment dated 12 April 2022, most of which consists of the above-mentioned tweets of Canan Coşkun and the direct addition of Pehlivan's speech in the program he participated in, asserted the view that the right to freedom of expression and press freedom regulated in Article 10 of the European Convention on Human Rights is not an unlimited right, without making any specific evaluation of Coşkun's and Pehlivan's statements¹³ and demanded that Canan Coşkun and Barış Pehlivan be sentenced under Article 6/1 of the Anti-Terror Law.

¹³ *Ibid.*

C. Prosecution Phase

22. The first hearing of the case was held on 27.10.2022, the second hearing on 17.01.2023, the third hearing on 09.05.2023, and the fourth and final hearing on 13.06.2023.
23. In the first hearing on 27.10.2022, Barış Pehlivan's counsel submitted a request for recusal of the judge regarding the president of Istanbul 34th Assize Court before this hearing. In the defense of Barış Pehlivan's counsel at the hearing, it was emphasized that Pehlivan is a dissident journalist and that the President of the Istanbul 34th Assize Court issued a detention order against Barış Pehlivan in 2020 when he was working as the Istanbul 8th Criminal Judge of Peace and that a complaint was filed to the Council of Judges and Prosecutors ("HSK") against the president of the Istanbul 34th Assize Court, who is currently authorized and in charge of the case, due to the discussions that took place during this process, and that there is animosity between them since this complaint is at the stage of being examined by the General Assembly, and that the recusal of the judge was also requested orally.
24. Canan Coşkun's counsel, on the other hand, drew attention to the differences in the content of the statements and stated that the statements expressed differently by different names would not result in a joint trial only because they were written in the same complaint petition.
25. The request of Barış Pehlivan's counsel for recusal of the judge was evaluated, and after the President of the Istanbul 34th Assize Court expressed the opinion that the request for recusal of the judge should be rejected, it was decided to send the request to the Istanbul 35th High Criminal Court for evaluation.
26. The request of Pehlivan's attorney for the recusal of the judge was rejected by the decision of the Istanbul 35th Assize Court on 28.11.2022 because the grounds for the recusal of the judge did not exist. Accordingly, an objection was filed to the Istanbul 36th Assize Court. The Istanbul 36th Assize Court definitively rejected the appeal, stating that the decision of the Istanbul 35th Assize Court was correct.
27. At the second hearing of the case on 17.01.2023, the defenses of Coşkun and Pehlivan were taken. Coşkun's counsel firstly stated that there was no connection between Barış Pehlivan's statements made on different days and in different contexts and Coşkun's post announcing the news, and repeated the request for separation of the case files. The prosecution requested that Canan Coşkun's counsel's motion for separation, be rejected in view of the stage of the trial, and the court rejected the counsel's request. In addition, it was decided to give Canan Coşkun's counsel 15 days to present his defence, to reject Barış Pehlivan's counsel's request to hear Kemal Kılıçdaroğlu as a witness and other requests, and to accept Akın Gürlek's request to involve in the trial.
28. In the third hearing of the case, which was held on 9 May 2023, the public prosecutor's plea made his closing statements. The prosecutor directly added the posts, and statements of Canan Coşkun and Barış Pehlivan that were the subject of the file, stating that "Coşkun's tweets dated 29.12.2021 and 18.02.2022 dated 29.12.2021 and 18.02. 2022 and Pehlivan's statements in the program he participated in on Halk TV exceeded the limits of freedom of expression, endangered the security of the complainant by revealing his identity information who is actively involved in the fight against all terrorist organizations as part of his duty, the courts he served in, the files he prosecuted during his duty, and it is established that they committed the crime of identifying the participant as target to terrorist organizations".
29. Finally, in the fourth hearing of the case held on 13.06.2023, it was decided to acquit both defendants pursuant to Article 223/2-a of the Law No 5271 the Code of Criminal Procedure

("CMK"), for reasons to be explained in the reasoned verdict, "since the act attributed to the defendants was not defined as a crime.

D. The Reasoned Judgement

30. The Court referred to the doctrine and the criteria related to freedom of expression and freedom of the press established by the ECtHR and stated that these criteria should be included in the reasoning of the judgments.¹⁴ The court evaluated the offense attributed to the defendants in the light of the case-law of the ECtHR¹⁵, the Constitutional Court¹⁶ and the Court of Cassation¹⁷ and stated that the news article must be up-to-date, it must be in the public interest and there must be a logical connection between the way the news article is announced and the subject matter. Furthermore, the Court pointed out that if the informative value of the news is high, people have an obligation to tolerate the news to that extent, and referred to the ECtHR's case law on the right of the public to receive information and the ECtHR's jurisprudence that news reports by journalists on verifiable issues are accepted within the scope of freedom of expression. Referring to the precedent decisions of the Court of Cassation, the Court stated that freedom of the press may include exaggeration and incitement to a certain extent, and decided that the elements of the offense under Article 6/1 of the TMK were not established examining the news reports in context, and acquitted the defendants contrary to the Public Prosecutor's plea on the grounds that the news reports were within the scope of the right to freedom of expression.

E. Appeal Process

31. Istanbul Chief Public Prosecutor's Office filed an appeal against the judgment on 14.07.2023. The appeal petition repeated the points stated in the indictment and in the closing statements and did not make a different assessment beyond that. The Public Prosecutor argued that the defendants had endangered the security of the participant, who was actively involved in the fight against all terrorist organizations by virtue of his duties by disclosing his identity, the courts in which he served, the cases he prosecuted in the course of his duties, by exceeding the limits of freedom of thought and freedom of expression in the nature of news reporting, and that it was established that they had committed the crime of identifying the participant as target to the terrorist organizations and requested the reversal of the acquittal decision.
32. The lawyer of the participant Akın Gürlek also filed an appeal against the verdict on 07.08.2023. In the petition of appeal, it was stated that Coşkun's Twitter posts and Pehlivan's statements in the program broadcast on Halk TV exceeded the limits of freedom of expression, the information shared was outdated, the identity information of the participant, who was actively involved in the fight against all terrorist organizations by virtue of his duties, the identity information of the participant, the courts in which he served, the information of the files he handled in the course of his duties were shared, endangering the security of the participant, and finally, it was stated that it was a major deficiency not to query the defendants

¹⁴ For the referred book see, Derda Gökmen, *Terörle Mücadele Kanunu ve Devlet Sırlarına Karşı Suçlar*, 2017, p. 173.

¹⁵ See. *Lehideux ve Isomi v France*, no: 24662/94, 23.09.1998; *Nilsen and Johnsen v. Norway*, no: 23118/93, 25.11.1999; *Sunday Times v. UK*, no: 6538/74, 26.04.1979; *Lingens v. Austria*, no: 9815/82, 22.04.2013; *Dalban v. Romania*, no: 28114/95, 28.09.1999.

¹⁶ *İlhan Cihaner (2)*, B. No: 2013/5574, 30/6/2014.

¹⁷ See Yargıtay CGK, 162-181 E. K.T: 11.07.2006, Yargıtay CGK, 2007/7-28/34 E., K.T: 13.02.2007, Yargıtay CGK, 9/63-65 E. K.T: 24.4.1989, Yargıtay CGK, 8/2999-10 E., K.T: 25.01.1993, Yargıtay 9. CD, 2009/14883 E., 2011/30914 K., Yargıtay 16. CD, 2015/4065 E., 2015/2095 K.

from TEMBİS terrorism and crime information bank. The lawyer of the participant requested the reversal of decision of acquittal of the Assize Court in the case no. 2022/251 and decision no. 2023/285.

IV. Legal Assessments

A. In terms of Acceptance of Indictment

33. Article 160 of the Code of Criminal Procedure, Law No. 5271 ("CMK") lists the duties of the Public Prosecutor, according to which, *"As soon as the public prosecutor learns of a situation that gives the impression that a crime has been committed through denunciation or any other means, he/she is obliged to immediately start investigating the truth of the matter in order to decide whether there is a place to open a public case" and "to collect and preserve the evidence in favor of and against the suspect and to protect the rights of the suspect in order to investigate the material truth and to ensure a fair trial"*. If, following the collection of evidence, there is sufficient suspicion that a crime has been committed, the public prosecutor will file an indictment (CMK170 (2)).
34. Article 170/5 of the CMK states that as a result of the prosecutor's obligation to investigate the facts; *"In the conclusion of the indictment, not only the matters against the suspect, but also the matters in favor of the suspect shall be put forward."* The indictment dated 12.04.2022 does not include an assessment of the matters in favor of the suspects.
35. In their defense, the defendants and their lawyers alleged that the Public Prosecutor failed to conduct an efficient and effective investigation, failed to investigate matters favorable to the defendants, and failed to establish a link between the crime and the criminal acts. However, İFÖD observed that the Istanbul 34th Assize Court did not evaluate the points raised by the defendants and their lawyers against the indictment.
36. According to the case law of the Constitutional Court and the ECtHR, the initiation of an investigation and a lawsuit against a person for acts within the scope of freedom of expression constitutes an interference with freedom of expression in itself due to its deterrent effect (*Altuğ Taner Akçam v. Turkey*, no: 27520/07, 25.10.2011 § 68; *Dilipak v. Turkey*, 29680/05, 15.09.2015 §§ 44-51). It should be taken into account that it is a legal obligation for the investigation and prosecution authorities to consider the case law of the Constitutional Court and the ECtHR in their proceedings.

B. Article 6 of the Antiterrorism Law entitled "Disclosure and Publication"

37. Article 6 of the Anti-Terrorism Law No. 3713 reads as follows: *"...those who disclose or publish the identities of public officials who have taken part in the fight against terrorism or who target them in this way shall be sentenced to imprisonment from one year to three years."* For the material element of the crime to be realized, *a- the public official must have taken part in the fight against terrorism, b- his/her identity must not be known c- his/her identity must be disclosed, published or targeted due to the fight against terrorism.* The value to be protected by the crime is to prevent damage to persons who may be targeted by terrorist organizations by disclosing their identities.
38. As can be seen, this crime can only be committed against a public official who has taken part in the fight against terrorism. Taking part in the fight against terrorism should be narrowly

interpreted as public officials who actually participate in anti-terror operations or provide intelligence support to these operations.¹⁸

39. Secondly, in terms of the act of disclosure and publication of the identity shown in the crime type, the identity of the public official with the above qualifications must be “confidential” information that is “kept confidential for the service”. If the perpetrator, who learns the identity of the public official kept secret, discloses or publishes the identity of the public official due to the fact that the public official has taken part in the fight against terrorism, it can be said that this crime has occurred.
40. Thirdly, for identifying as a target, which is another act shown in the crime type, to occur, the important point is that the terms used in the publication and the general content of the publication should have the characteristics of creating a serious danger of harm. In other words, with the terms used in the publication, there must be a call for a crime against the person who has served in the fight against terrorism.¹⁹
41. In a television program, defendant Barış Pehlivan talked about the names who were tried by Akın Gürlek, who is known by everyone and about whom there have been many news reports, during his years as a judge. In his statement, Pehlivan directly quoted Kılıçdaroğlu, who was the CHP Chairman at the time. Coşkun, on the other hand, in her post of 29 December 2021, which is the subject of the lawsuit, mentioned Gürlek's decisions which were known to everyone and about which too much news was made. Coşkun's tweet on 18 February 2022, directly cited the legal developments in the first hearing of the case, which was closely followed by the public regarding the accusations against İBB and Ekrem İmamoğlu by the Court of which Gürlek is a judge.
42. In conclusion, neither the name Akın Gürlek nor the cases and decisions in which Akın Gürlek was involved as a judge were mentioned for the first time by the defendants Coşkun and Pehlivan. On the contrary, Akın Gürlek is a political and public figure whose decisions were criticized by former CHP Chairman Kılıçdaroğlu, who was quoted by Barış Pehlivan. Therefore, it is clear that the above-mentioned material elements of the crime stipulated under Article 6 of the Anti-Terrorism Law are not met with regard to the statements and posts of the defendants.

C. In terms of the Right to Freedom of Expression and Press

43. The right to freedom of expression and freedom of the press is guaranteed by Article 26 of the Constitution and Article 10 of the European Convention on Human Rights, and restrictions and interference with the right to freedom of expression must be carried out within the limited grounds and legitimate aims prescribed by law in accordance with Articles 13 and 26 of the Constitution and Article 10/2 of the European Convention on Human Rights, the requirements of the democratic social order and a proportionate balance between the aim of the restriction and its means, without prejudice to the essence of the right (*Emin Aydın Application*, B. No: 2013/2602, 23.01.2014, para. 56; *Youtube Llc Corporation Service Company and others [GK] Application*, B. No: 2014/4705, 29.05.2014, para. 53). Interventions to freedom of expression must first of all be compulsory or exceptional measures and must be the last resort or the last measure to be taken. Otherwise, these restrictions cannot be considered as measures in line with

¹⁸ Köprülü, Timuçin, “Terörle Mücadelede Görev Almış Kamu Görevlisinin Hüviyetinin Açıklanması, Yayınlanması ve Hedef Gösterilmesi Suçu (Tmk Md. 6/1.) Suç ve Ceza 2021 Sayı: 3, s. 503; Bayraktar, Köksal: “Teröre Destek Suçu”, Prof. Dr. Çetin Özek Armağanı, Galatasaray Üniversitesi Yayını, İstanbul 2004, s.178.

¹⁹ *Ibid*, s.178.

the requirements of the democratic social order (Constitutional Court B. No: 2013/2602, 23.01.2014, para. 48). The rights of Canan Coşkun and Barış Pehlivan to freedom of expression and freedom of the press will be evaluated in terms of the deterrent effect of the trial subject to this Trial Monitoring Report, considering that both defendants are journalists.

44. Firstly, it should be noted that the defendants in the case in question, Canan Coşkun and Barış Pehlivan, are journalists and therefore have a *public watchdog* role. According to the case law of the ECtHR, the opening of investigations and prosecutions for acts within the scope of freedom of expression constitutes in itself an interference with freedom of expression. This is because the threat of investigation and prosecution of journalists may discourage them from participating in debates on matters of public interest and may result in the press refraining from reporting on matters of public interest. It is clear that this situation would cause the press to refrain from fulfilling its functions guaranteed by the freedom of the press and freedom of expression, thus causing a *chilling effect*. As a matter of fact, in many judgments, the ECtHR has found violations of the right to freedom of expression and of the press, stating that the fear of sanctions for the exercise of freedom of expression and the press, which may discourage a person from making similar statements in the future, causes a *chilling effect* (*Lombardo and others v. Malta*, no., 24.04.20077333/06, § 61, *Association Ekin v. France*, no. 39288/98, 18.01.2000 and *Aktan v. Turkey*, no. 20863/02, 23.09.2008, §§ 27-28).
45. In the case examined in this Trial Monitoring Report, it is observed that the journalists have been under criminal threat since the indictment dated 12.04.2022 prepared by the Istanbul Chief Public Prosecutor's Office based on their statements in the television program and social media posts. In this case, even though the journalists were acquitted, they have faced this threat since the beginning of the investigation. It is observed that the threat of punishment has not yet ended as the Public Prosecutor and the participant Akın Gürlek have appealed against the acquittal decision.
46. The Constitutional Court has determined that the press, being aware of its duties and responsibilities, has a duty to report every matter of public interest (Constitutional Court, *Kadir Sağdıç* [GK], B. No: 2013/6617, 8/4/2015 § 51). In other words, when it comes to events, persons and institutions that concern the public, the press has the right and duty to publish information and documents on the subject, in short, to provide news. The fulfillment of the press's duty to inform will also establish the public's right to information, thus enabling the press to fulfill its role as a watchdog on behalf of the public (*Observer and Guardian v. the United Kingdom*, no. 13585/88, 26.11.1991; *Sunday Times v. the United Kingdom*, no. 6538/74, *Kjeldsen, BuskMadsen and Pedersen v. Denmark*, nos. 5095/71, 5920/72 and 5926/72, *BladetTromso and Stensaas v. Norway*, no. 21980/93).
47. In a free political system, the actions and transactions of the state and public institutions should be subject to the scrutiny of the press and the public as well as of the judicial and administrative authorities. By subjecting the political decisions, actions and omissions of organs exercising public power to strict scrutiny and by facilitating the participation of citizens in the decision-making process, the written, audio or visual press guarantees the healthy functioning of democracy and the self-realization of the individual (see Constitutional Court, *İlhan Cihaner* (2) Constitutional Court, B. No: 2013/5574, 30/6/2014, § 57; ECHR, *Lingens v. Austria*, no: 9815/82, 8/7/1986, § 41; *Özgür Radyo-Ses Radyo Televizyon Yapım ve Tanıtım AŞ v. Turkey*, no: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30. 03.2006 § 78; *Erdogdu and İnce v. Turkey*, nos: 25067/94, 25068/94, 8/7/1999, § 48). Therefore, freedom of the press is a valid and vital freedom for everyone (see Constitutional Court, E.1997/19, K.1997/66, K.T. 23/10/1997; *Abdullah Öcalan*, § 75).

48. Freedom of expression and freedom of the press provide much stronger protection for news and statements whose content is of close concern to the public. In this sense, in cases of news and statements on matters of public interest, restrictions on freedom of the press should be interpreted narrowly and statements on such matters should be restricted only in the presence of very strong reasons (*Sürek v. Turkey (1)*, no: 26682/95, para 61, *Taranenko v. Russia*, no: 19554/05, 13.10.2014, § 77). Decisions to the contrary would constitute an interference with the freedom to discuss matters of public interest, which is at the very heart of the concept of a democratic society. And such decisions are likely to discourage journalists from contributing to the public debate on issues affecting the life of society. For the same reason, such a sanction would prevent the press from fulfilling its duty to provide information and act as a watchdog of public opinion. (*Lingens v. Austria*, no:9815/82, 08.07.1986).
49. In conclusion, İFÖD is of the opinion that the allegations against the employees of İBB and Mayor Ekrem İmamoğlu, as well as the proceedings that have been initiated, should first be considered as a matter of public interest. Although the defendants were acquitted, İFÖD would like to emphasize that, according to the criteria mentioned above, the mere fact that the dissenting journalists Canan Coşkun and Barış Pehlivan faced legal proceedings constitutes an unjustified interference in their right to freedom of expression and the press and could have a chilling effect.

D. In terms of the Principle of Impartiality

50. Under Article 6 of the European Convention on Human Rights, the right to be tried by an impartial court is regulated as an element of the right to a fair trial. According to the case law of the Constitutional Court, the impartiality of the courts is an implicit element of the right to a fair trial regulated under Article 36 of the Constitution (*Hikmet Kopar and Others*, B. No: 2014/14061, 08.04.2015, para. 108). In this context, in accordance with the principle of the integrity of the Constitution, Articles 138, 139 and 149 of the Constitution are the fundamental provisions guaranteeing the right to be tried by an impartial court (*Tahir Gökatalay*, B. No: 2013/1780, 20.03.2014, para. 60).
51. The impartiality of the court means the absence of bias, prejudice, and self-interest that could influence the resolution of the dispute and the absence of opinions or interests in favor of or against the parties to the case. Impartiality has two dimensions, subjective and objective. In this context, the personal impartiality of the judge as an individual in the case at hand must be taken into account, as well as the impression given by the court as an institution (*Mehmet Baransu (2)*, B. No: 2015/7231, 17.05.2016, paras. 73-74; *Hidayet Karaca [GK]*, B. No: 2015/144, 14.07.2015, para. 78; *Tahir Gökatalay*, para. 110).
52. The counsel for one of the defendants, Barış Pehlivan, has requested the recusal of the presiding judge of Istanbul 34th Assize Court. This request is based on the fact that the presiding judge issued an arrest warrant for Barış Pehlivan during his term as a judge of the peace, leading to animosity and a subsequent complaint to the Council of Judges and Prosecutors (“HSK”), which is still under consideration by the HSK General Assembly. Therefore, it is clear that the examination of the recusal request should be evaluated in the light of all these principles and criteria.
53. Barış Pehlivan's counsel based his request for recusal not only on the previous arrest warrant issued against his client, but also on the hostility of the judge in question towards the dissident personality of the defendant Pehlivan. On the other hand, considering the fact that the complaint to the HSK has not yet been finalized and that he may face a relevant penalty and disciplinary sanction as a result of this investigation, it is clear that this may create an animosity on the part

of the president of the Istanbul 34th Assize Court that may affect his decision. However, the evaluation of the request for recusal did not examine all these issues and did not make a legal assessment of whether the animosity was such as to cast a shadow on the impartiality and independence of the judge. As a result, it is clear that the decision, which lacks all these principles and evaluations, violates the first paragraph of Article 6 of the European Convention on Human Rights and the Constitution.

E. In terms of the Right to a Reasoned Judgment

54. The right to a reasoned judgment aims to ensure and supervise the fair trial of individuals; it is also necessary for the parties to know whether the claims they put forward during the proceedings have been examined in accordance with the rules; and it is also necessary for the public to know the reasons for the judicial decisions taken in their name in a democratic society (*Sencer Başat ve diğerleri* [GK], B. No: 2013/7800, 18.06.2014, §§ 31, 34). Although the aforementioned obligation of the courts cannot be understood as an obligation to respond in detail in the reasoned decision to all claims and defenses raised in the proceedings (*Yasemin Ekşi*, B. No: 2013/5486, 04.12.2013, § 56) it should be understood from the reasoned decision that the merits of the case have been examined. Exactly what elements should be included in a judgment depends on the nature and circumstances of the case, and if the claims and defenses clearly put forward during the proceedings have an impact on the outcome of the case, these procedural and substantive issues that are directly related to the case must be answered by the court with reasonable justification (*Sencer Başat ve diğerleri*, § 35). Otherwise, the fact that the claims that affect the outcome of the case are left unanswered will lead to a violation of the right to a reasoned judgment (*Ruşen Melih Nebigil*, B. No: 2014/2037, 17.07.2018, §§ 24-29). Moreover, as stated by the Constitutional Court, "it will not be possible to appeal effectively against a decision whose grounds are unknown, and it cannot be expected that the review to be carried out in the appeal procedure will be effective" (*Vesim Parlak*, B. No: 2012/1034, 20.03.2014, § 34).
55. Firstly, as explained in detail above under the heading "*Prosecution Phase*", the request of Barış Pehlivan's counsel for the recusal of the judge was initially rejected by the Istanbul 35th Assize Court in a decision that is subject to appeal. Upon the objection, it was definitively rejected by the Istanbul 36th Assize Court with the decision no. 2022/2034. In both decisions, there was no evaluation of the points made orally by Pehlivan's counsel, and in the one-paragraph decision, it was decided to reject the request by directly adding the provisions of the law. İFÖD would like to draw attention to the fact that, it is very important for the progress of the proceedings that the decisions on each request at each stage of the proceedings are justified according to the criteria mentioned above.
56. Secondly, the Istanbul 34th Assize Court, in its decisions rejecting the request to hear Kılıçdaroğlu as a witness and rejecting Coşkun's request for separation of case files, did not make any assessment that met the above criteria Coşkun's request for separation of case files was rejected in a single sentence, citing the stage of the proceedings. However, the only thing that the statements made by different people on different dates in different ways have in common is that they are about Akın Gürlek. Therefore, although there is no legal connection that would require the posts subject to the file, which have different contexts and methods of expression, to be tried together, the unjustified rejection of the request for separation of case files was also found problematic in terms of the right to a reasoned judgment.
57. Thirdly and finally, in accordance with the above-mentioned decisions and criteria, the right to a reasoned judgment in criminal proceedings requires, firstly, an examination of the admissibility of the evidence of the alleged offence, and secondly, an assesment of the elements

of the offence in terms of the conformity of the alleged act with the type of offence defined by the law. If the elements of the offense is not evaluated, the ability of the prosecutor, the accused or the participants to apply and respond to legal remedies will be limited. In the reasoned decision of the Istanbul 34th Assize Court dated 13.06.2023, it is observed that an evaluation of freedom of expression was made on the basis of the principles in terms of the crimes subject to the case; however, the reasoned judgment did not include an evaluation in terms of the elements of the crime.

V. Conclusion

- 58.** As explained in detail in this Report prepared by İFÖD, there were many serious and unlawful violations of the right to a fair trial and freedom of expression throughout the trial of journalists Canan Coşkun and Barış Pehlivan. In this context, first of all, no examination was made throughout the trial regarding Canan Coşkun and Barış Pehlivan's posts made at different times and in different ways, and legal proceedings were initiated against the defendants based on a one-page complaint petition in which even the date of the television program Barış Pehlivan attended was misspelled. In summary, the indictment did not examine how and in what way Pehlivan and Coşkun committed the offense specified in the indictment, it abstractly demanded punishment, and the guarantees of criminal procedure and fair trial were not observed during the investigation phase.
- 59.** During the prosecution, the trial continued without examining the defenses and requests of the lawyers of Coşkun and Pehlivan. No evaluation was made regarding the defenses of defendants Canan Coşkun and Barış Pehlivan. Moreover, it has been observed that especially in the indictment at the investigation stage and in the opinion on the merits at the prosecution stage, there was no evaluation of the case law of the ECtHR and the Constitutional Court, the fact that Pehlivan and Coşkun are journalists and that Akın Gürlek, who took part in the trial, is not an ordinary judge, but has become a political figure about whom much has been reported. .
- 60.** In conclusion, as a result of the trial monitored by İFÖD within the scope of this Trial Monitoring Report, it has been observed that this whole process is one of the examples of judicial repression, censorship and silencing of opposition journalists, politicians, human rights defenders, and academics in Turkey. The impact of the trial of journalists Coşkun and Pehlivan is not limited to the defendants as individuals; this trial has the capacity to weaken and silence dissenting voices in public opinion. This could undermine the most fundamental principles and guarantees of human rights, as well as undermine the very essence of impartiality and trust in the law.

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