



İFADE ÖZGÜRLÜĞÜ DERNEĞİ
TRIAL MONITORING REPORT
THE CASE OF CANAN COŞKUN, CAN UĞUR, ALİ AÇAR:
Anti-Terror Law Article 6

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. In this report, İFÖD based its observations on standards set out by the European Court of Human Rights' case law regarding the right to fair trial and right to freedom of expression as protected by Articles 6 and 10 of the European Convention on Human Rights.
2. 'Gezi Park Protests' is a phrase commonly used for describing the protests that started on 27 May 2013 to prevent the implementation of environment and reconstruction plan of the Istanbul Metropolitan Municipality in Gezi Parc of Istanbul Taksim Square which involves the construction of a shopping mall. Within the scope of the protests, a group of activists having environmental awareness set up camps to stop the construction equipment from entering the Gezi Parkı. Following the police's attempt to disperse the protesters by using disproportionate force, large masses protesting the government and its politics attended the demonstrations.
3. The protests were supported by various non-governmental organizations, professional organizations, trade unions, political parties, performers, musicians, directors, and it has turned into one of Turkey's most attended social movements. The protests escalated in June and July and spread over many numerous cities. Many citizens were injured or died due to the police's disproportionate use of force.
4. 14 years old Berkin Elvan is among the citizens who have died due to disproportionate use of force. Berkin Elvan was treated in the intensive care unit for 269 days after a tear gas capsule fired by the police hit Berkin's head during the Gezi Park protests on 16 June 2013. Berkin lost her life on 11 March 2014. Berkin's death had wide repercussions on the public. Journalists working for various media outlets published numerous news on the investigation that was conducted for the criminals to be unraveled.
5. On 11 March 2016, Canan Coşkun and Ali Uçar published the article entitled "*The police officer who allegedly shot Berkin Elvan did not remember his place of duty*" in <https://www.cumhuriyet.com.tr/haber/berkin-elvani-vurdugu-iddia-edilen-polis-gorev-yaptigi-yeri-hatirlamadi-496038>. In the article, details on the interrogation of the suspected police officer E.Y was disclosed. The article revealed that as a result of the examination of CCTV recordings, one police officer, E.Y, was identified as a suspect within the scope of the investigation. It is reported that the police officer did not remember either the date of the incident or his place of duty. The relevant part of the article is as follows:

"Berkin's long-standing investigation regarding the perpetrator has come to an end. The Gendarmerie Criminal Laboratory analyzed the footage recorded by TOMA (anti-riot vehicle) on the day of the incident. In this respect, the number of suspects was reduced to one. On 9 March, three prosecutors questioned the suspected policeman E.Y. at the

*Istanbul Chief Public Prosecutor's Office. In his statement, the suspected policeman E.Y. stated...'*¹

6. On the same date, Journalist Can Uğur published the article entitled "*The reason for the confidentiality order in the Berkin's investigation is to prevent damage to the reputation of the murderer*" on <https://www.birgun.net/haber/berkin-sorusturmasindaki-gizlilik-kararinin-sebebi-katilin-itibari-zedelenmesin-1060419>. Regarding the investigation of Berkin Elvan's murder, it is reported that confidentiality order had been given to protect the reputation of the suspect E.Y. Added that E.Y did not remember his place of duty and the date during his interrogation. The relevant part of the article is as follows

*"According to the official report, in the statement taken at the Istanbul Chief Public Prosecutor's Office on March 9, E.Y., defended himself as follows: "I came to Istanbul in November 2011. It was my first place of duty. Therefore, I do not remember the exact location of the crime. I don't remember the day of the incident either. It is because, at the Gezi events, I was on duty in many places. I did not use a gas rifle because I did not have a license".*²

7. In the above-mentioned articles, on 9 March 2016, it was reported that the Istanbul Chief Public Prosecutor's Office took the statement of a police officer concerning Berkin Elvan's murder. In this regard, the articles had been published on 11 March 2016 after the suspect police officer gave his statement. In the articles, the statement of the police officer was reported and the name of the suspect police officer was coded. It is not possible to identify the suspect police officer from the information contained in the articles. Furthermore, the photo of the suspect police officer was blurred, and his information was anonymized.
8. On 21 November 2019, Istanbul Chief Public Prosecutor's Office filed an indictment for journalists Canan Coşkun, Ali Açar, and Cansever Uğur due to their above-mentioned articles. The indictment was admitted by İstanbul 34th Assize Court. Within the scope of the case file with the docket number 2019/188 of the Istanbul 34th Assize Court, the journalists stood to trial on the ground that they have allegedly committed a crime stipulated in the article 6 (1) of Anti-Terror Law namely '*marking those who fight against terrorism as a target*'.

1. Background Information

9. İFÖD was monitoring the trial of Canan Coşkun, Ali Açar, and Cansever Uğur which is before the Istanbul 34th Assize Court with the docket number 2019/188. The case is on allegations of committing the crime of "*marking those who fight against terrorism as a target*" as stipulated in article 6 (1) of Anti-Terror Law. İFÖD was observing the case since its first hearing dated 17.09.2020 and subsequent to the indictment was admitted by the court.

¹ See Ali Açar, Canan Coşkun, "*The police officer who allegedly shot Berkin Elvan did not remember his place of duty*", 11.03.2016, Cumhuriyet Newspaper, Available at <https://www.cumhuriyet.com.tr/haber/berkin-elvani-vurdugu-iddia-edilen-polis-gorev-yaptigi-yeri-hatirlamadi-496038>.

² See Can Uğur, "*The reason for the confidentiality order in the Berkin's investigation is not to damage the reputation of the murderer*", 11.03.2016, Birgün Newspaper, Available at <https://www.birgun.net/haber/berkin-sorusturmasindaki-gizlilik-kararinin-sebebi-katilin-itibari-zedelenmesin-106041>.

10. İFÖD's legal team have participated in all the hearings and made observations on the prosecution. However, due to the Covid-19 global epidemic as defined by the World Health Organization, and the measures are taken in this respect, İFÖD's legal team could not physically attend the hearings except for the hearing dated 17.09.2020. For monitoring the trial, İFÖD's legal team communicated with the defendants' lawyers, learned their opinion, and collected the case documents.
11. On 07.10.2021, İFÖD's legal team attended the sixth and final hearing of the case. The defendants were acquitted in the final hearing. On 21.01.2022, the Public Prosecutor appealed against the decision. Subsequently, the case was sent to the Istanbul Regional Court of Justice for examination. The case is pending before the court by the time hereby trial monitoring report has been drafted.

2. Investigation Stage and the Indictment

12. The investigation began with the allegation that the suspects committed the crime of *"marking those who fight against terrorism as a target"* pursuant to the 1st paragraph of Article 6 of the Anti-Terror Law by publishing articles via the Internet on 11.03.2016.
13. On 30.03.2016, Istanbul Chief Public Prosecutor's Office issued a warrant to the Istanbul Police Department requesting the information on the author of the articles *"The police officer who allegedly shot Berkin Elvan did not remember his place of duty"* and *"The reason for the confidentiality order in the Berkin's investigation is to prevent damage to the reputation of the murderer"* which were published respectively on www.cumhuriyet.com and www.birgun.com. As a result, Istanbul Police Department identified that the relevant articles were written by Journalists Canan Coşkun, Ali Açar, and Cansever Uğur.
14. In her statement taken by the Public Prosecutor, Canan Coşkun claimed that she had drafted the impugned article together with Ali Acar. Added that she had accessed the information in the article through the lawyers of the defendants. Canan Coşkun argued that they had written the article in a way that the name along with the photograph of Berkin Elvan's murder suspect cannot be recognizable. Subsequently, Ali Acar, in his interrogation, stated that his article was based on the press release organized for the memorial of Berkin Elvan in which Berkin Elvan's lawyers made a public statement regarding the ongoing prosecution of the murder. Cansever Uğur, on the other hand, argued that he pursued the public interest with his article. He stated that he had only conveyed the facts and his article is within the scope of freedom of expression and press.
15. At the end of the investigation stage, the public prosecutor prepared an indictment. In the indictment, dated 21.11.2019, the prosecutor requested Canan Coşkun, Ali Açar, and Cansever Uğur to be convicted for committing the crime stipulated in article 6 (1) of the Anti-Terror Law. The prosecutor stated that terrorist activities had been carried out in regard to the death of Berkin Elvan and the suspect police officer E.Y could be marked by the terrorist organizations because of the articles. The public prosecutor added that *"Considering that the name E.Y and photograph of the suspect used in the content of the relevant articles rend it possible to recognize the suspect identified in Istanbul Public Prosecutor's Office's investigation file with the docket number 2013/155787."*

3. Prosecution Stage

a. 1st Hearing Dated 17.03.2020

16. The first hearing of the case was held on 17.03.2020. Although the date of the first hearing was set as 09.04.2020, due to the Covid-19 outbreak, Istanbul 34th Assize Court, *ex officio*, held the hearing and decided to postpone it to 17.09.2020. In this hearing, the Court also decided to give notice to the police officer F.D., for adding him as a complainant, however, the name of the police officer was not mentioned in any of the articles.

b. 2nd Hearing Dated 17.09.2020

17. The second hearing of the case was held on 17.09.2020. Except for Ali Acar, the defendants Canan Coşkun, and Can Uğur, were personally participated in the hearing through the Audio and Visual Information System ('SEGBİS') from different courthouses. The defendants had represented themselves with their lawyers.
18. The court reminded the defendants of their rights. The Court further stated that the defendants were prosecuted because of their articles in which they have allegedly disclosed the identity of a police officer who was the suspect of the investigation carried out for Berkin Elvan's murder, and added that they were accused of committing the crime of '*marking those who fight against terrorism as a target*' pursuant article 6 (1) of Anti-Terror Law.
19. In his defense, Cansever Uğur stated that the identity of the policeman was not disclosed in their article. He added that they did not publish the photograph of the suspect police officer on the website of Birgün Newspaper. Cansever Uğur argued that the article was prepared in accordance with the universal values of journalism. He claimed that the article was mainly about the confidentiality order within the scope of the investigation carried out regarding Berkin Elvan's death. He further explained that they only conveyed the opinions of the lawyers on the confidentiality order.
20. One of the judges stated that the name of the policeman was declared in the article. Cansever Uğur responded they had only used the initials of the suspected police officer. He defended that in cases where confidentiality plays an important role, the journalists may use the initials of the people and it is in accordance with the law. He maintained there had been no incident related to revealing the identity of the police officer or caused by the articles. In her defense, Canan Coşkun stated that prior to the publication of the article, for three years, the police officer who caused the death of Berkin Elvan was unknown. In this regard, she admitted that they were following the case for three years and they got in contact with the public prosecutor and lawyers for acquiring information. Canan Coşkun added that she received the investigation file from the lawyers and she learned the identity of the police officer on this occasion. She pointed out that although they knew the identity of the officer, they coded the police officer's surname with its initial and they blurred his photograph. Canan Coşkun emphasized that they monitored the case for journalistic purposes and the article served the public interest. The president of the court asked Canan Coşkun's opinion on the confidentiality order given within the investigation file. Canan Coşkun responded that they acquired the identity of the police officer prior to the confidentiality order, and she added that she published numerous articles regarding the cases in which there was a confidentiality order, however, she was not prosecuted for any of them.

21. Since Ali Açar did not attend the hearing, his statement couldn't be taken by the Court. The representative of Ali Açar requested time for Ali Açar to attend the next hearing.
22. The Court decided that next hearing Ali Açar shall be present, otherwise, an arrest warrant would be issued, a warrant will be issued to Istanbul Police Department requesting information about the duty of the suspect police officer E.Y as identified in the investigation file with the docket number 2013/155787, a warrant will be issued to Cybercrime Department concerning the murder of Berkin Elvan requesting "*whether there is any news, information or declaration, etc. containing this incident become the subject matter of the terrorist organizations.*"

c. 3rd Hearing Dated 10.11.2020

23. The third hearing of the case was held on 17.09.2020. In the third hearing, one of the three judges on the panel of judges changed. The defendants attended the hearing from different courthouses. The defendant Ali Açar attended the hearing as the Court ordered in its previous hearing.
24. In the second hearing, the presiding judge stated that Istanbul 17th Assize Court responded to the court's request on whether the murder of Berkin Elvan was undertaken by terrorist organizations. In its response, Istanbul 17th Assize Court declared that there was no finding demonstrating the murder of Berkin Elvan was undertaken by terrorist organizations.
25. In the third hearing, Istanbul 34th Assize Court interrogated Ali Açar. The defendant Ali Açar stated that he had reported the press release in his article. Added that the police officer was not marked as a target in the article.
26. In the second place, the Court interrogated Canan Coşkun. Canan Coşkun stated that they have noticed another police officer named F.D became a party to the case at hand. Canan Coşkun added that at the time she published her article, the prosecutor had not prepared an indictment regarding the case before Istanbul 17th Assize Court, and she did not mention the police officer F.D in her article. In this regard, Canan Coşkun objected to police officer F. D's victim status.
27. The lawyer of Canan Coşkun reiterated that, in his client's article, the name of the police officer, E.Y. was coded and his photograph was blurred. He argued that it was not possible to identify the police officer from the article.
28. The lawyer of Cansever Uğur stated that due to the natural disaster that occurred in Izmir, his defendant couldn't participate in the hearing and he would be present at the next hearing. The lawyer further objected to F. D's victim status. The defendant argued that the scope of article 6 of the Anti-Terror Law was overly broad. In this regard, there is an interference with the defendant's right to impart information. In terms of the murder of Berkin Elvan, the lawyer claimed that the article of his client is on a matter of public interest, therefore, no matter if the grievant is a public servant, he could be subject to articles and news. The lawyer added that the press has a right and duty to publish these kinds of articles.
29. At last, Ali Açar's lawyer took the floor and noted that when the article is considered as a whole the identity of E.Y was not revealed, his name was coded and, thus, objective elements of the crime did not exist in the present case. Added that when the article was published, the memorial of Berkin Elvan was followed by the public, and the incident was still important in the public discourse. He maintained that as a reporter, his client reported the press release in his article.
30. In the third hearing, the court gave time to the defendants to present their detailed defenses on the documents that were added to the case file. The Court requested Istanbul 17th Assize

Court to provide information on whether in its case file with the docket number 2016/325, the name E.Y. was mentioned or not. In case the response is affirmative, the Court asked Istanbul 17th Assize Court to present the name, surname, and registration number of the E.Y. The Court decided to ask the Istanbul Police Department about the name, surname, and registration number of E.Y once the Istanbul 17th Assize Court responses to its request. The fourth hearing of the case was decided to be held on 23.02.2021 at 09:50 am.

d. 4th Hearing Dated 23.02.2021

31. The fourth hearing of the case was held on 23.02.2021. In the fourth hearing, one of the three judges on the panel was changed. The defendants had represented themselves with their lawyers. Except for Ali Açar, the defendants attended the hearing through the Audio and Visual Information System ('SEGBİS') from different courthouses.
32. In the fourth hearing, Istanbul 17th Assize Court responded to the Court's request on the information of E.Y as demanded in the previous hearing. In the meantime, the Court asked to the Istanbul Police Department in which unit E.Y. worked for. Istanbul Police Department informed the Court. The Police Department sent a response to the Court and stated that the file was directed to the Riot Police Department. By the date of the fourth hearing, the relevant branch of the Riot Police Department did not respond to the Court's request. The lawyers and the public prosecutor asked for necessary procedures to be completed until the next hearing. The Court decided to request information on E.Y from the relevant branch of the Riot Police Department. The fifth hearing of the case was decided to be held on 08.06.2021 at 10.30 am.

e. 5th Hearing Dated 08.06.2021

33. The fifth hearing of the case was held on 08.06.2021. The judges on the panel are the same with the 4th hearing of the case. Only Canan Coşkun and her lawyer attended the hearing. The other defendants and their lawyers were not present before the Court for the fifth hearing.
34. In the fifth hearing, the relevant branch of the Riot Police Department responded to the Court's request. The public prosecutor gave his opinion on the merits of the case. The public prosecutor argued that, considering how the name and photograph of police officer E.Y was presented in the articles, police officer E.Y could have been recognized. The public prosecutor recalled that the public prosecutor Mehmet Selim Kiraz, who was working on the case file of Berkin Elvan, was murdered by the members of the DHKP/C terrorist organization. The public prosecutor referred to the statements of terrorists in which they declared that they will reveal the photograph and registration number of the guilty police officer and then they will punish them. In this regard, the public prosecutor claimed that subject to article 6 (1) of the Anti-Terror Law, defendants should be separately punished for marking state officials that were assigned in the fight against terrorists as targets.
35. The lawyer of Canan Coşkun asked for time for preparing their defense on the public prosecutor's defense. The Court gave time to the defendants to prepare their defenses until the sixth hearing that would be held on 07.10.2021 at 09.50 am.

f. 6th Hearing Dated 07.10.2021

36. The sixth hearing of the case was held on 07.10.2021. In the sixth hearing, one of the three judges on the panel of judges was changed. The defendants, Canan Coşkun and Cansever Uğur attended the hearing together with their lawyers. The defendant Ali Açar represented himself with his lawyer.
37. At first, the lawyers made their defenses against the public prosecutor's opinion. In her defense, Canan Coşkun stated that including the article subject to the proceedings, she published articles on all stages of the investigation on Berkin Elvan's murder. By the date of the article, the lawyers of Berkin Elvan made a press release in which they stated the name of the suspect police officer. She added that following this press release, she acquired the photograph and testimony of the suspect police officer. She further stated she didn't intend to mark the suspect police officer as a target for the terrorist organizations. Subsequently, the lawyer of Canan Coşkun argued that after the murder of Berkin Elvan the investigation become part of public debate and added that no progress have been made in the investigation for a long time. The lawyer emphasized that even though the prosecutor didn't comment on these matters, these should be given particular importance for the case at hand. The lawyer pointed out that due to the lack of progress at the investigation stage, the lawyers started a hunger strike and the aim of the article was to report the hunger strike. According to the lawyer, even though the police department responded to the Court's request to provide information on the identity of the police officer with a demand from the Court to share more information on the open identity of the police officer E.Y, it is not possible for the terrorist organization to reach to the identity of the police officer from a single article, therefore, the objective elements of the crime did not occur in the present case.
38. In the second place, the lawyer of Cansever Uğur took the floor. He argued that the public prosecutor in his indictment as well as his opinion failed to explain how the police officer was marked as a target. The lawyer added that the alleged offense was not typical. The lawyer also noted that the legal interest stated in the decision on confidentiality of the investigation was the protection of the suspect's reputation. In addition, according to the defense counsel, the photograph of the police officer was blurred and it was too small for people the recognize the police officer. In this regard, for the defense counsel, it was not possible to identify the police officer through his photograph. He added that the Court couldn't ascertain whether the suspect police officer served in the fight against terrorism. The defense counsel argued that before publishing an article, it is not possible to expect a journalist to investigate whether the suspect police officer was marked by the terrorist organizations, in this regard, it is sufficient for the journalist to publish an article that is in accordance with the apparent truth. Furthermore, the defense counsel claimed that the public prosecutor based his opinion on two articles, and he didn't conduct any research before requesting the defendants to be sentenced, however, in the present case, the objective elements of the crime did not occur.
39. At last, the lawyer of the Ali Açar took the floor. He argued that the defendant Ali Açar did not refer to the clear identity of the police officer and the objective elements of the offense did not occur in the present case. The lawyer requested the acquittal of the defendant.
40. The court acquitted the defendants at the sixth hearing.

4. Decision and Appeal Procedure

41. Contrary to the Public Prosecutor’s opinion and request, on 07 October 2021, Istanbul 34th Assize Court acquitted the defendants on the ground that Article 6 of Anti-Terror Law stipulates the revealing the identity of the persons served in the fight against terror, however, in the present case, a mere reference to the names was not enough to decide the objective elements of the offense occurred in the case at hand.
42. The Court mentioned the doctrine and the standards set out by the ECtHR on the freedom of expression and press. Added that these criteria should be considered in its reasoned decision.³ In its examination of the charges, the Court referred to the decisions delivered by ECtHR⁴, the Constitutional Court⁵, and the Court of Cassation.⁶ In this regard, the Court reminded that articles should be up-to-date, and there should be a causal link between the public interest and articles. The Court further drew attention to that in cases the subject matter of an article is newsworthy, the victims are under the obligation to bear the consequences of its publication. The Court also cited the ECHR’s case-law on the right of the public to receive information and stated that as long as journalists check the information provided to the public to a reasonable extent, an article should be considered within the scope of freedom of expression.⁷ Referring to the decisions of the Court of Cassation, the Court expressed that freedom of the press may cover exaggeration and incitement to a certain degree, and added that when the context of the news is considered as a whole, the objective elements of the crime stipulated in article 6 (1) of the Anti-Terror Law did not occur, in this regard, the defendants were acquitted on the grounds that the articles are within the scope of the right to freedom of expression.
43. On 21.01.2022, the Istanbul Chief Public Prosecutor's Office appealed against the decision. The prosecutor, who appealed against the decision, repeated his arguments that he already stated in the indictment as well as in his opinion presented to the Court in the 6th hearing, and did not make any other assessment beyond what he already claimed. In its appeal, the public prosecutor briefly stated that the suspect police officer could have been recognized from the way his photograph and name were published in the article. The prosecutor added that the terrorist organizations were highly interested in the case of Berkin Elvan’s murder. In this regard, the prosecutor was of the opinion that terrorist organizations could have taken advantage of the incident and marked the suspect police officer. The prosecutor claimed that the acquittal of the defendants is contrary to the law, therefore, the decision should be lifted.

³ For the book referred by the public prosecutor see Derda Gökmen, “*Anti-Terror Law and Offense Against State Secrets*”, 2017, p. 173.

⁴ For the ECHR judgements referred by the public prosecutor see. *Lehideux and Isomi v. France*, no: 24662/94, 23.09.1998; *Nilsen and Johnsen v. Norway*, no: 23118/93, 25.11.1999; *Sunday Times v. United Kingdom*, no: 6538/74, 26.04.1979; *Lingens v. Austria*, no: 9815/82, 22.04.2013; *Dalban v. Romania*, no: 28114/95, 28.09.1999.

⁵ *İlhan Cihaner (2)*, no: 2013/5574, 30.6.2014.

⁶ For the referred decisions of the Court of Cassation see the Court of Cassation, General Assembly of Criminal Chambers, Docket no. 9/63-65 dated 11.07.2006, docket no. 2007/7-28/34 dated 13.02.2007, Docket no. 9/63-65 dated 24.4.1989, docket no. 8/2999-10 dated 25.01.1993, the 9th Chamber of the Court Cassation, Docket no. 2009/14883 E., Decision no. 2011/30914, the 16th Chamber of the Court Cassation, Docket no. 2015/4065, Decision no. 2015/2095.

⁷ For the referred ECHR judgement see. *Dalban v. Romania*, no: 28114/95, 28.09.1999.

5. Considerations in Terms of Freedom of Expression

a. Article 6 of Anti-Terror Law in the light of ECHR Case-law

44. In its numerous decisions, ECHR examined article 6 of the Anti-Terror Law which stipulates the offense as, “*those who disclose or publish the identities of state officials assigned in the fight against terrorism or those who mark persons as targets, in the same manner, shall be punished...*”. This offense requires taking an urgent measure. In fact, the state officials mentioned in the relevant articles are accused of causing severe human rights violations. Thus, they are likely to be both, hated and marked by terrorist organizations. According to ECHR, mere reference to the state officials fighting against terrorism in the news, does not necessarily require a punishment. In its decisions regarding the prohibition to publish the identities of state officials assigned in the fight against terrorism, ECHR states that “*Although the statements were not presented in a manner which could be regarded as incitement to violence against the officers concerned or the authorities, they were capable of exposing the officers to strong public contempt*” and added that “*At the time of the publication of the news report in the present case, the information in issue, identifying specific police and gendarme officers with serious misconduct, was already in the public domain*⁸.”
45. In *Saygılı and Karataş v. Turkey* decision, while the Court was examining the verdict that was based on publishing the identity of the person fighting against the terrorism, it noted that distinct and various factors had to be taken into account by the domestic courts, including the context in which the article in question was published, the background of the article, and the surrounding circumstances of the reported issue. The Court ruled that the expressions used in the article subject to the application have not been evaluated as a whole and have not been examined in their context. The Court decided that the identities and duties of the state officials mentioned in the news were already revealed. The Court pointed out that “*...in fact, the identities of the two public officials had already been in the public domain since at least 19 July 1996, the date on which the Parliamentary Inquiry Commission’s Report into the murder of Metin Göktepe had been published...*”. Despite the state officials could have been exposed to serious public hatred, the legal interest in concealing the identities of the state officials considerably diminished, and, the harm intended to be prevented with the envisaged measure had already occurred. However, the domestic courts failed to make an examination in this respect. (*Saygılı and Karataş v. Turkey*, no. 6875/05, 16.01.2018, §§ 37-39).
46. As may be seen, for the ECtHR, the concepts such as state secrets or the fight against terrorism are not by themselves sufficient to restrict freedom of the press. In this regard, it is necessary to observe several factors of the news. These include the title of the writer, context, purpose, whether the news carries out any thread on alleged offense and whether identities were already disclosed on another occasion.

b. Admission of the Indictment

47. The duties of the prosecutor are listed in article 160 of the Law no 5271 of the Turkish Criminal Procedure Code as follows: “*As soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of*

⁸ *Sürek (2) v. Turkey*, no. 24122/94, 8.7.1999, para. 37-40.

crime or any other way, she/he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not.” and “In order to investigate the factual truth and to secure a fair trial, the public prosecutor is obliged... to collect and secure evidence in favor and in disfavor of the suspect, and to protect the rights of the suspect.” At the end of the investigation phase, if collected evidence constitutes sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare an indictment. (Turkish Criminal Procedure Code Article 170 (2)).

48. The prosecutor, among its other obligations, shall lead an investigation of the facts, and according to article 170 (5) of the Turkish Criminal Procedure Code, *“The conclusion section of the indictment shall include not only the issues that are disfavorable to the suspect but also issues in his favor.”* However, in the indictment drafted on 21.10.2019, the prosecutor did not make any evaluation of the fact that may be in favor of the suspects.
49. The defendants and their counselors argued that the Public Prosecutor did neither lead an effective investigation nor make any assessment in favor of the defendants. In addition, for the defendants, the prosecutor failed to establish a link between the offense and the acts. İFÖD observed that Istanbul 34th Assize Court did not make any examination concerning the defendants’ arguments against the indictment.
50. According to the case-law of both ECtHR and the Constitutional Court, any investigation carried out or criminal proceedings based on the acts that shall be considered within the scope of freedom of expression, by itself, cause a chilling effect and this constitutes an interference to the freedom of expression. (Altuğ Taner Akçam v. Turkey, no: 27520/07, 25.10.2011 § 68.; Dilipak v. Turkey, 29680/05, 15.09.2015 §§ 44-51). It should also be taken into account that the judicial authorities are under the obligation to respect case-law of the ECtHR and the Constitutional Court.

c. The Principle of Immediacy

51. The principle of immediacy is considered within the scope of the right to a fair trial and it is one of the fundamental principles of the criminal law. The principle of immediacy requires that all evidence collected in the course of the proceedings shall be discussed and assessed by the judge who will rule on the case. In this regard, the criminal procedural law serves judges to directly examine the evidence and question the defendants. In accordance with the law and procedure, they base their decisions on evidence and their conscience. In fact, article 216 of the Turkish Criminal Procedure Law stipulates that *“In the discussion regarding the evidence that has been presented, the permission to speak in the following order shall be granted to the intervening party or his representative, the public prosecutor, the accused, and his defense counsel or his legal representative.”* Added that article 217 of Turkish Criminal Procedure Law states that *“The judge shall only rely upon evidence that is presented at the main hearing and has been discussed in his presence while forming his judgment. This evidence is subject to the free discretion of the conscious opinion of the judge.”*
52. According to ECHR, the domestic court’s failure to conduct a trial in breach of the principle of immediacy does not necessarily lead to a violation of the right to a fair trial. However, in case the judge may be replaced during the course of proceedings, ECtHR points out the importance of the necessity of providing appropriate means for the appointed judge to examine the evidence and witness. (*Cutean v. Romania*, no. 53150/12, 02.12.2014, para. 61). In another decision, ECtHR found a violation of Article 6 of the Convention due to the verdict of conviction delivered by a judge, who did not directly examine the evidence or

did not attend the hearings in the course of the proceeding. (*Svanidze v. Georgia*, 37809/08, 25.07.2019, para. 34-38; *Cutean v. Romania*, 53150/12, 02.12.2014, para. 70)

53. Within the scope of this trial monitoring report, it was observed that the court held six hearings. Except for the head judge, the judges were changed in four of the six hearings. The same judicial panel only served in the first and second hearings. Considering the first hearing was postponed due to the Covid-19 pandemic, the panel that served in the first and second hearings conducted only one trial. Following the initial change in the panel, the new judge panel was also subject to frequent changes. Only, in the fourth and fifth hearings, the judicial panel was the same as the previous panel. Thus, the same panel consecutively served at most once. In the course of proceedings, the defendants were not informed of why the panel was frequently changing.
54. İFÖD observed that the judicial panel changed frequently during the six hearings. It is understood that the defendants were not informed of the reason for the changes. It is thought that frequent changes in the panel undermined the principles of face-to-face confrontation and immediacy

d. In terms of the Reasoning of Judgement

55. The right to a reasoned decision aims to ensure the fairness of the trial. It is also necessary for the parties to understand whether their claims have been examined in accordance with the law. The right to a reasoned decision is also required in a democratic society for the public to comprehend the reasons for a judicial decision. (*Sencer Başat and others*, no. 2013/7800, 18.06.2014, §§ 31, 34). Nevertheless, the aforementioned obligation of the courts to deliver reasoned decisions, cannot be understood as the necessity of responding to all claims and defenses put forward in the course of the proceedings. In this regard, the right to a reasoned decision requires the court to explain the main issues and claims. (*Yasemin Ekşi*, no. 2013/5486, 04.12.2013, § 56). The elements that should be considered in a judgment depend on the surrounding circumstances and conditions of the case at hand. In case the claims and defenses put forward during the trial will have an impact on the outcome, the courts shall reasonably explain the necessary issues from their procedural and substantive aspects. (*Sencer Başat and others*, § 35). Leaving the claims that may have an impact on the outcome unanswered, will result in a violation of the right to a reasoned decision. (*Ruşen Melih Nebigil*, no. 2014/2037, 17.07.2018, §§ 24-29). In addition, as the Constitutional Court stated, “*The legal remedy cannot be considered effective in case the justification is unknown to the claimant. Likewise, the examination carried out on such legal remedy cannot be effective.*” (*Vesim Parlak*, no. 2012/1034, 20.03.2014, § 34).
56. In its reasoned decision dated 07.10.2021, Istanbul 34th Assize Court based its decision on the common principles of the freedom of expression in its examination of the charges. However, it is observed that the reasoned judgment lacks the evaluation of objective elements of the offense under the mentioned principles. The right to a reasoned decision requires, first, examining the admissibility of the evidence presented, and then evaluating the conformity of objective elements of the offense with the definition of the offense in the law. In the absence of an examination on objective elements of the offense, the right to legal remedy of the prosecutor, the defendants, or the participants would be restricted. In addition, Istanbul 34th Assize Court failed to examine whether the identity and duty of the police officer whose initials were mentioned in the relevant articles, were available in other resources. This investigation was not conducted at any stage of the proceedings.

e. Legal Interest Protected by the Criminal Law

57. The defendants stood to trial for allegedly committing the crime stipulated in article 6 of the Anti-Terror Law. The relevant provision is as follows:

“Announcement and publication

Article 6 – Those who announce or publish that a crime will be committed by terrorist organizations against persons, in a way that makes it possible that these persons can be identified, whether or not by specifying their names and identities, or those who disclose or publish the identities of state officials that were assigned in the fight against terrorism or those who mark persons as targets, in the same manner, shall be punished with imprisonment from one to three years. ...”

58. In terms of victims, the relevant provision protects (i) state officials fighting against terrorism and (ii) people who are marked by terrorist organizations to commit a crime against them. In the defendant’s impugned article, the initials of the suspect police officer were coded and the police officer was in charge of dispersing the protestors in the Gezi Park events. Bearing in mind that the relevant police officer was not in the counter-terrorism units, it is not possible to claim that dispersing the protesters is a fight against terrorism. In its indictment, the public prosecutor was of the opinion that the police officer whose initials were mentioned in the articles was marked by the terrorist organizations because of the impugned articles.
59. The envisaged offense aims to protect people who may be marked by terrorist organizations from being subject to a crime in case their identity reveals. Considering the case at hand, the Gezi Park Events began on 27.05.2013. Berkin Elvan, on the other hand, suffered a head injury during the police intervention on the protesters on 16.06.2013. He passed away on 11.03.2014 in the hospital where he was treated. The Public Prosecutor Selim Kiraz, who was investigating the murder of Berkin Elvan, was killed on 31.03.2015 by members of the DHKP-C Terrorist organization. The impugned articles were published on 11.03.2016. In this regard, the date of publication corresponds to two years after the death of Berkin Elvan and about one year after the murder of the Public Prosecutor Selim Kiraz by the members of the DHKP/C organization. However, the indictment was prepared on 21.11.2019, almost three years after the articles were published. The content of the articles is about the fact that the identity of the murderer in the case of Berkin Elvan could not have been identified even two years after his death.
60. In the present case, it is understood that the impugned articles concern the effectiveness of the investigation regarding the death of a 14-year-old boy who was injured in the head during the intervention of the law enforcement in demonstrations.
61. The state’s obligation stemming from the Constitution requires to conduct an effective investigation in case of a law enforcement's interference with the right to life as a result of the disproportionate use of force. Any deficiency in this regard will cause impunity and damage the principle of the rule of law. For this reason, it is one of the main duties of the press, as a public watchdog, to inspect whether deaths caused by the disproportionate use of force by the law enforcement agencies are being effectively investigated. It is clear that there is public interest in publishing articles on whether the investigation stage was in accordance with constitutional principles where disproportionate use of force by law enforcement led to the death of a 14-year-old child. In this regard, the impugned articles contributed to the public debate.

62. There must be a grave concern for arguing that the indirect inclusion of the suspects' identities in the articles may make these persons the target of a terrorist organization. In such a case, it should be taken into account that the authorities at the investigation and prosecution stages have obligations to strike a fair balance between values such as the state's positive obligations in relation to the right to life, the right to freedom of the press, the press's role as a public watchdog, the protection of the right to life of law enforcement officers and importance of combating impunity.

f. The Duty of Press and Impunity in Turkey

63. Berkin Elvan was not the first child to die after being hit on the head by a gas canister. Similar incidents have occurred in Turkey and no effective investigation has been carried out on these grave incidents. Thus, deaths resulting from the disproportionate use of force by the police resulted in impunity. ECHR's *Mızrak and Atay v. Turkey* no: 65146/12, 18.10.2016 judgment is related to a similar incident akin to Berkin Elvan's death. 8-year-old Enes Ata and 14-year-old Mahsum Mızrak lost their lives on 30 March 2006 because gas canisters hit their heads during the police intervention at the demonstration held in Diyarbakır. Following the deaths of Enes Ata and Mahsum Mızrak in 2006, an investigation was launched and a public lawsuit was filed on 03.11.2009. The applicants lodged an application to the ECtHR on 22.09.2012. The basis of their application was the fact that more than 6 years had passed since the death of Enes Ata and Mahsum Mızrak, in this regard, there was a suspicion that the trial would not serve to reveal the criminals. On 18.10.2016, the ECHR decided that the right to life had been violated on both procedural and substantive grounds, and stated that an effective investigation had not been carried out. Three years after this decision, on 10.10.2019, the suspect police officers were acquitted at the last hearing.
64. Likewise, in its *Abdullah Yaşa and others v. Turkey*, no. 44827/08, 16.07.2013 judgment, ECHR ruled on the application of 13 years old applicant who was shot in his face by a tear gas canister when he left his home to visit his aunt during the demonstration that took place in Diyarbakır between 28-31.03.2006. After the incident, the applicant filed a criminal complaint against the police officer. However, the public prosecutor delivered a non-prosecution decision and based its decision of non-prosecution on the following justification "Consequently, the police officers were not criminally liable because they had acted in self-defense within the meaning of Article 25 § 1 of the Criminal Code, and in the exercise of their functions as set out in Article 24 of the same Code. [They] had shot tear-gas grenades in order to disperse the demonstrators who had gathered illegally and were attacking the officers by throwing stones, sticks, and Molotov cocktails." Subsequently, the applicants' appeal against the decision of non-prosecution was dismissed. The Court observed that the shot was direct and followed a flat trajectory. Added that at the time of the facts Turkish law lacked any specific provisions on the use of tear-gas grenades and the police officers had not been given appropriate training. Therefore, the interference was not necessary and proportionate. The court ruled that there had been a violation of Article 3 of the Convention. (para. 47-50)
65. After the ECHR's decision on *Abdullah Yaşa and others*, the Constitutional Court was once again examined the same incident. The applicants had filed a full remedy action against the administration due to the damage they have suffered. Administrative courts dismissed the case, deciding that the administration could not be held responsible on the grounds that the applicant had participated in illegal demonstrations, therefore, the damage caused by the

applicant's own fault. (*Abdullah Yaşa* [GK], no: 2015/12486, 5/11/2020, para. 24-28). The Constitutional Court referred to the ECHR's above-mentioned judgment on the criminal case. According to the Constitutional Court “*Considering the clear contradiction between evidence obtained in criminal proceedings that ECHR based its decision on the violation of the right to an effective remedy and administrative court's rejection of the applicant's compensation claim against the damages occurred by the violation, it is ruled that the right to an effective remedy has been violated...*” (para. 72.) Therefore, the Constitutional Court, in its recent decision, adopted the ECHR's reasoning in the cases concerning people who were injured or died due to the intervention of law enforcement officers in the illegal demonstrations. Similar to the ECtHR, the Constitutional Court ruled a violation of article 3 of the Convention.

66. As can be seen, impunity in Turkey is a sensitive issue for the public. In the present case, the political background should also be taken into account in order to understand the impugned articles as a whole. In this regard, by the publication of articles on 11.03.2016, the murder of Berkin Elvan was newsworthy and also important to the public. As a matter of fact, after Berkin Elvan's death, the prosecutor who was leading the investigation changed six times, and many police officers were dismissed from the charges.⁹ For this reason, on 14.01.2016 that as in the meantime 945th day of Berkin Elvan's death, Berkin Elvan's lawyers started a hunger strike due to the lack of progress in the investigation.¹⁰ During this process, in order to prevent the public from losing interest in the investigation, lawyers representing Berkin Elvan's family made numerous press releases regarding the investigation.
67. In case 11.03.2016 dated articles were to be examined by an objective observer; it would be seen that the lawyers' press release and their declaration of ending their hunger strike were reported.
68. In this regard, public debate on public issues is an absolute necessity for democratic societies, rule of law, and respect for human rights. These are in principle the core of the European Convention on Human Rights. It is in the interest of the democratic society that the press acts as the "public watchdog" when providing information on matters of public concern. ECHR discussed the role that the press plays as a watchdog for the first time in *Lingens v. Austria*, no.9815/82, 08.07.1986, and the importance of being a social and public watchdog increased in recent years (*Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, 08.11. 2016, § 167).
69. In the present case, there is no doubt that the articles published by the defendants were on the investigation of Berkin Elvan's death, and it is a matter of public interest. The articles should be examined within the scope of the public's right to information. In this regard, it is considered that the information on the investigation stage as provided in the articles were having public interest. It is clear that the public has the right to information and debate on the investigation carried out on the murder of a 14-year-old boy who was hit by a gas canister fired by a police officer. In fact, since the beginning of the 1990s, unsolved murders is a political and problematic issue in Turkey. The perpetrators could not be identified and,

⁹ See Perpetrator Not-Unknown: Site for Monitoring Trials on Human Rights “*In Berkin Elvan Investigation: Lawsuit Against the Police Officer, Non-Prosecution of His Supervisor*” 03.12.2016, Available at <https://www.failibelli.org/berkin-elvan-sorusturmasinda-tek-polise-dava-amirine-takipsizlik/>.

¹⁰ See Cumhuriyet Newspaper, “*They started a hunger strike for Berkin Elvan*”, 16.03.2021, Available at <https://www.cumhuriyet.com.tr/haber/berkin-elvan-icin-aclik-grevine-basladilar-463887>.

in this regard, the ECtHR found violations in numerous applications.¹¹ Thus, the press has a greater duty to keep these issues on the public agenda and to prevent the unsolved murders to be covered up. As a matter of fact, the press closely followed the investigation and prosecution stages in the case of Berkin Elvan.¹²

g. Considerations of the Proceeding From the Perspective of Chilling Effect

70. According to the case-law of the ECtHR, even initiating an investigation and carrying out prosecutions for actions that should be considered within the scope of freedom of expression constitutes an interference with the right to freedom of expression. The threat of investigation and prosecution of journalists may deter journalists from expressing their opinions on matters of public interest and may result in the press refraining from reporting on issues of public interest. It is clear that this causes the press to abstain from performing its duties that are guaranteed by the freedom of press and expression, and thus it creates a chilling effect. On many occasions, the ECtHR stated that the threat of sanctions that may result from exercising the right to freedom of expression and press may discourage people from making similar statements in the future. In this regard, the ECtHR found that it may cause a chilling effect and ruled that the right to freedom of expression and press was violated. (*Lombardo and others v. Malta*, no., 24.04.20077333/06, § 61, *Association Ekin/Fransa*, no. 39288/98, 18.01.2000 ve *Aktan v. Turkey*, no. 20863/02, 23.09.2008, §§ 27-28).
71. It is observed that the journalists, who were aiming to fight against impunity, are under the threat of punishment since the investigation initiated by the Istanbul Chief Public Prosecutor's Office upon the publication of their 11.03.2016 dated articles. In this regard, although the journalists were acquitted, nearly 5 years after the investigation was initiated against them, the threat of punishment has not come to an end due to the Public Prosecutor's objection to the acquittal of the defendants on 21.01.2022.

6. Reference

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¹¹ For the research on impunity and unsolved murders in Turkey see https://hakikatadalethafiza.org/wp-content/uploads/2021/11/Cezasizlik_KovusturmaSureci.pdf.

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