



İFADE ÖZGÜRLÜĞÜ DERNEĞİ TRIAL MONITORING REPORT

Canan Kaftancıoğlu

Articles 299, 125(3), 301, 216 of the Turkish Criminal Code, Law No. 5237

Article 7(2) of the Anti-Terrorism Code, Law No. 3713

I. Introduction and Background

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 established by the European Court of Human Rights (“ECtHR”) jurisprudence on articles 6 and 10 of the European Convention on Human Rights (“ECHR”) which safeguard the right to a fair trial and the freedom of expression and press.
2. The aim of this report is to examine the trial of Mrs. Canan Kaftancıoğlu, which was initiated right after her election to the office of the head of the CHP [the main opposition Republican People's Party (CHP)] Istanbul branch and concerned her Tweets dating back to five years ago.
3. After the taking of the office of the head of the CHP by Kemal Kılıçdaroğlu at the CHP Party Assembly on 22 May 2010, Kaftancıoğlu has taken up an active role in the party affairs and became a prospective MP candidate for the third election-area in Istanbul province. Between 2011 and 2012, she held the role of the Deputy Head of the CHP Istanbul branch responsible for Press, Culture, and Communications; and between 2012 and 2014, she was the interim head of the CHP Istanbul branch. In the 2014 elections, she was one of the candidates for Maltepe's mayorship. In the 36th Ordinary Provincial Congress of CHP Istanbul held on 13 January 2018, Kaftancıoğlu was elected as the CHP's Istanbul Provincial President. At the local elections held on 31 March, 2019 and the repeat election held on 23 June 2019, the candidate of the CHP Ekrem İmamoğlu secured the majority of the votes and won the election. Due to the significance of the local election results of Istanbul regarding the overall politics of Turkey, the election results were perceived as a major loss by the government and a success by the opposition. Canan Kaftancıoğlu is seen as the prominent actor influencing the outcome of the elections as the head of the CHP Istanbul branch.
4. Following her taking up the office of the head of the CHP Istanbul branch on 13 January 2018, a number of politicians of the Adalet ve Kalkınma Partisi [Justice and Development Party (“AKP”)], the Milliyetçi Hareket Partisi [Nationalist Movement party (“MHP”)], and the CHP expressed criticisms regarding her acquiring this position. There have been many news and reports on media about her, her political background, personal life while her old posts on social media platforms have been the subject of public discussion. Kaftancıoğlu’s old Twitter posts, which date back years

ago, have been grounds for prosecution. As a matter of fact, only a day after her election to the office of the head of the CHP Istanbul branch, on 14 January 2018, the Istanbul Head Prosecutor's Office gave a verbal order to the Istanbul Police Department instructing them to investigate Kaftancıoğlu's social media activities.

5. On Monday the 15th of January 2018, the President of the Republic of Turkey and the Head of the AKP Recep Tayyip Erdoğan via his attorneys, submitted a criminal complaint against Kaftancıoğlu for the crime of insulting the president. On 16 January 2018, President Erdoğan showed in a presentation during his party's group meeting Kaftancıoğlu's old social media posts and the audience booed. Erdoğan framed Kaftancıoğlu as a terrorist and a marginal while declaring that Kaftancıoğlu was demeaning the nation, accusing the Turkish state of murder and underestimating the public reaction to the attempted *coup d'état* of 15 July 2016. In his speech, he claimed that *'Kaftancıoğlu attacked the values of the country with Marxist terminology'* and *'She is a perfect fit for the political party such as that of the CHP where a type like Kılıçdaroğlu is the leader... My friends and I pressed charges against her for instigating criminal activities. What kind of a politician is she? They are going to pay for this.'*¹ These words were conceived by the judiciary and the public as a directive. Following these comments, a high number of people published insulting and threatening posts on social media platforms about Kaftancıoğlu.
6. Following Erdoğan's comments, on 16 January 2018, Kaftancıoğlu via her social media accounts, denounced these allegations and claimed that they were false and defamatory.² On January 17th, 2018, Kaftancıoğlu published an extensive reply to the criticisms and argued that her female presence was seen as a threat in the male-dominated politics. While announcing that she stands by her viewpoint during the Gezi protests in 2013, she apologized to the president for her tweet that showed a graffiti which entailed a slur word about Erdoğan's mother.³
7. Shortly after her election to the office of the head of the CHP Istanbul branch and President Erdoğan's harsh comments during his party's group meeting, a wave of negative publications against Kaftancıoğlu began. In this regard, Kaftancıoğlu became the subject of a hateful and degrading media campaign.
8. Kaftancıoğlu's posts from 2013 and 2017 have been reported without context. To this end, the newspaper Sabah published this news with the note that the prosecutions have been initiated.⁴ Similarly, a website named Gazete Doğu, published the

¹ Anadolu Ajansı, "Cumhurbaşkanı Erdoğan: CHP İstanbul'a bir il başkanı seçmiş ki tam facia" ("President Erdoğan: A disastrous leader for CHP Istanbul branch"), 16.01.2018, <https://www.aa.com.tr/tr/turkiye/cumhurbaskani-erdogan-chp-istanbula-bir-il-baskani-secmis-ki-tam-bir-facia/1032465>

² Gazete Duvar, "Canan Kaftancıoğlu: Erdoğan'a çok teşekkür ederim" ("Canan Kaftancıoğlu: My thanks to Erdoğan"), 16.01.2018, <https://www.gazeteduvar.com.tr/politika/2018/01/16/canan-kaftancioglu-erdogana-cok-tesekkurederim/>

³ Gazete Duvar, "Canan Kaftancıoğlu, Erdoğan'dan özür diledi" ("Canan Kaftancıoğlu apologized to Erdoğan"), 17.01.2018, <https://www.gazeteduvar.com.tr/politika/2018/01/17/canan-kaftancioglu-korkuyorlar-saldiriyorlar/>

⁴ Sabah, "İşte CHP İstanbul İl Başkanı Canan Kaftancıoğlu'nun skandal tweetleri!" ("Scandalous tweets by the head of the CHP Istanbul branch"), 16.01.2018, <https://www.sabah.com.tr/galeri/turkiye/iste-chp-istanbul-il-baskani-canan-kaftancioglunun-skandal-tweetleri>

screenshots of the said tweets contained in the bill of indictment and alleged that Kaftancıoğlu framed the people who resisted the attempted *coup d'état* as ISIS supporters in an effort to frame Kaftancıoğlu's anti-violence posts as an insult to the public and provocation.⁵

9. On 17 January 2018, the newspaper Yeni Akit published one of Kaftancıoğlu's old posts from 2013 about Sakine Cansız.⁶ Although her post consisted of a critique of the unsolved murder of Sakine Cansız in France, Kaftancıoğlu was accused of supporting a PKK member.⁷ Moreover, the newspaper claimed that the said tweet was deleted later by Kaftancıoğlu, even though that was never the case.
10. In an article by Zekeriya Say dated 20/01/2018 published in Yeni Akit, it was claimed that Kaftancıoğlu's opinions on Mustafa Kemal Atatürk were not conceived well by the CHP administration. The article followed with comments on Kaftancıoğlu's political stance, concerning her husband, her father-in-law, and some events to commemorate the latter.⁸
11. In Ersoy Dede's article published on 18/01/2018 in the newspaper Sabah,⁹ there appeared some comments on Kaftancıoğlu as well. In this regard, her political social media posts as well as her personal ones were heavily criticized. At the end of this report, it was noted that Kaftancıoğlu's 'lawful political adventure' could not continue and that '*This lady is a threat to the national security. Either CHP will teach her a lesson or she should do what's necessary.*'¹⁰
12. In the news report by Sabah, dated 19/01/2018, it was suggested, with reference to an article by Nedim Şener, that Kaftancıoğlu was elected as a result of the pressure coming from Kılıçdaroğlu, that her election was controversial and there have been problems occurring within the CHP because of her having been elected. In the report, Kaftancıoğlu was illustrated as a person lenient towards the PKK (Kurdistan Workers' Party) and FETÖ (Fetullahist Terrorist Organisation), and it was argued that

⁵ Gazete Doğu, "CHP'li Başkan'dan Skandal Tweetler", ("Scandalous tweets by the head of the CHP Istanbul branch"), 15.01.2018, <http://www.gazetedogu.com/chp-li-baskan-dan-skandal-tweetler/6054/>

⁶ Yeni Akit, "Canan Kaftancıoğlu'nun skandalları bitmiyor", ("More scandalous tweets by Canan Kaftancıoğlu"), 17.01.2018, <https://www.yeniakit.com.tr/haber/canan-kaftancioglunun-skandallari-bitmiyor-414730.html>

⁷ Aynı konuda benzer bir haberler için bkz. Yeni Şafak, "Skandalları bitmiyor: PKK'lı teröristin ölümüne böyle ağlamış", ("More scandals: She cried over the death of a PKK terrorist"), 17.01.2018, <https://www.yenisafak.com/gundem/skandallari-bitmiyor-pkkli-teroristin-olumune-boyle-aglamis-3014863>;

Milli Gazete, "Canan Kaftancıoğlu'nun skandal tweetleri bitmiyor", ("More scandals of Canan Kaftancıoğlu"), 18.01.2018, <https://www.milligazete.com.tr/haber/1487742/canan-kaftancioglunun-skandal-tweetleri-bitmiyor>

⁸ Yeni Akit, "'Acar gelin' Canan Kaftancıoğlu", 20.01.2018, <https://www.yeniakit.com.tr/yazarlar/zekeriya-say/acar-gelin-canan-kaftancioglu-22716.html>; Haber Popüler, "Canan Kaftancıoğlu'ndan skandal PKK mesajı!", ("Scandalous terrorist message by Kaftancıoğlu"), 18.01.2018, <http://www.haberpouler.com/gundem/canan-kaftancioglundan-skandal-pkk-mesaji-h3530.html>

⁹ Yeni Aktüel, "Canan Hanım Bir Ulusal Güvenlik Sorunudur", (Kaftancıoğlu is a national security problem"), 18.01.2018, <https://www.sabah.com.tr/yazarlar/aktuel/ersoy-dede/2018/01/18/canan-hanim-bir-ulusal-guvenlik-sorunudur>

¹⁰ Sabah, "Canan Kaftancıoğlu bir ulusal güvenlik sorunudur!", (Kaftancıoğlu is a national security problem"), 18.01.2018, <https://www.sabah.com.tr/gundem/2018/01/18/canan-kaftancioglu-bir-ulusal-guvenlik-sorunudur>

she was the cause of problems within the party. These allegations were not supported by evidence of any sort.¹¹

13. Alongside the criticisms and negative reactions on social media platforms, numerous petitions accusing Kaftancıoğlu with reference to her old posts were submitted via Prime ministry Communication Center (Başbakanlık İletişim Merkezi -“BİMER”). Consequently, starting from the first day after she was elected as the head of the CHP Istanbul branch on 13 January 2018 and with the verbal order of the Istanbul Chief Public Prosecutor, investigations for 5 different crimes in 6 prosecution case files were initiated against Kaftancıoğlu. All six of these case files were merged within the investigation file conducted by the Istanbul Chief Prosecutor’s Office.
14. On 22/05/2019, the bill of indictment, based on Kaftancıoğlu’s social media posts was presented by the Istanbul Chief Prosecutor’s Office. The bill of indictment was accepted by the Istanbul 37th Assize Court. Kaftancıoğlu was tried for the crimes of insulting the president, insulting a public official, denigrating the Turkish Republic, inciting the public to hatred and hostility, and terrorism propaganda. The trial process ended on the third and last session on 06/09/2019. Istanbul 37th Assize Court convicted Kaftancıoğlu for 9 years 8 months and 20 days of imprisonment on 5 charges based on her 35 social media posts.
15. Canan Kaftancıoğlu appealed the judgment at the district court level. The 2nd Penal Chamber of the Istanbul District Court of Justice dismissed the appeal on 23/06/2020 with the legal reasoning consisting of a single sentence which stated that ‘*there has not been any unlawfulness in the procedure and application of the rules....*’. Finally, Kaftancıoğlu appealed the decision of the 2nd Penal Chamber of the Istanbul District Court of Justice. The 3rd Penal Chamber of the Court of Cassation approved the convictions regarding the crime of insulting a public officer and denigrating the Turkish republic and reduced the sentence of 1 year and 16 months of imprisonment to 1 year and 9 months. Moreover, the 3rd Penal Chamber of the Court of Cassation annulled the sentences based on the crimes of terrorism and armed terrorist group propaganda as well as inciting the public to hatred and hostility due to the lack of the necessary conditions for these crimes to occur. The 3rd Penal Chamber of the Court of Cassation sentenced Kaftancıoğlu to 4 years 11 months and 20 days of imprisonment on the charges of insulting a public official, insulting the president, and denigrating the Turkish Republic.

II. The Legal Process

16. This trial monitoring report prepared by the İfade Özgürlüğü Derneği (İFÖD-Freedom of Expression Association) aims to inform the public about the legal process conducted by the Istanbul 37th Assize Court and provide a legal analysis of the court decision which led to the conviction on five different charges of Kaftancıoğlu, who is a prominent opposition politician and a rights defender that was subjected to judicial harassment motivated by a political agenda. As will be explained below, the legal

¹¹ Sabah, “Canan Kaftancıoğlu hakkında şok iddialar”, (Stunning allegations about Kaftancıoğlu”) 19.01.2018, <https://www.sabah.com.tr/gundem/2018/01/19/canan-kaftancioglu-hakkinda-sok-iddialar>

process set out right after her political career took a lead. On this note, the trial of Kaftancıoğlu stands as a noteworthy example of the use of the judiciary as a means of the authoritarian backlash in Turkey.

17. İFÖD has been monitoring Kaftancıoğlu's case, file numbered 2019/171, at the Istanbul 37th Assize Court since the acceptance of the bill of indictment by the court and the first hearing held on 28/06/2019.
18. İFÖD Legal Team attended all of the hearings and has been observing the proceedings. İFÖD Legal Team evaluated the whole of the process and made observations based on the submissions and comments made by the attorneys of the accused and the entirety of the legal documents found in the case file.

A. The Prosecution Phase and the Bill of Indictment

19. On the 14th of January 2018, the Istanbul Chief Prosecutor's Office gave a verbal order to Istanbul Police Department instructing them to investigate Kaftancıoğlu's social media activities. Although the prosecutors are permitted, pursuant to article 161/3 of the Turkish Code of Criminal Procedure ("the CCP") (Law No. 5271), to give verbal orders if the circumstances of the case require promptness, such orders must be handed in in a written format as soon as possible after the issuing of the verbal order. It must be noted here that the prosecutor's office has not provided a written version of the said order during the whole of the investigation phase, nor has it explained the reasons for the perceived requirement of the promptness of the circumstances in Kaftancıoğlu's case. The preparatory documents prepared by the Istanbul Police Department on 15 January 2018 were included in the investigation file. On the same date, the criminal complaints lodged for the crime of insulting the president (TCC article 299), made by President Erdoğan's attorneys, were submitted.
20. Within a short period of time, several investigations were initiated throughout the whole country against Kaftancıoğlu concerning various crime allegations, as well as several criminal complaints and BİMER petition submissions. Within the first 1,5 years following the first prosecution initiated by the Istanbul Chief Prosecutor's office in 2018, there have been five other investigation files issued by Istanbul Chief Prosecutor's Office and three separate investigation files issued, respectively, by Küçükçekmece Chief Prosecutor's Office, Istanbul Anatolia Chief Prosecutor's Office and Ankara Chief Prosecutor's Office; coming up at eight investigation files in total.¹²
21. Alongside these developments, on 15 January 2018, criminal complaints were submitted by President Erdoğan against Kaftancıoğlu concerning the crime of insulting the president (article 299 of the TCC) as well as another complaint submitted on 24 January 2018 concerning the crimes of insult via social media and insulting the president. Furthermore, it was reported on 14 January 2018 to the judicial authorities by the President that Kaftancıoğlu allegedly committed the crime

¹² Respectively; investigation File Nos. 2018/9470, 2018/33482, 2018/19725, 2018/23534, and 2019/77334 of Istanbul Chief Prosecutor's Office; investigation File No. 2018/6466 of Küçükçekmece Chief Prosecutor's Office; investigation File No. 2018/15837 of Istanbul Anatolia Chief Prosecutor's Office; investigation File No. 2018/806 of Ankara Chief Prosecutor's Office

of denigrating the Turkish nation, the Republic of Turkey, and the state institutions and organs (article 301 of the TCC). On 18 January 2018, two BİMER complaints against Kaftancıoğlu were submitted, one of them being an anonymous one. These complaints concerned the allegations about the crime of insulting the president (article 299 of the TCC). On 22 January 2018, 7 individuals submitted a joint criminal complaint against Kaftancıoğlu. The plaintiffs, identifying themselves as veterans of the attempted *coup d'état* of 15 July 2016, alleged that Kaftancıoğlu committed the crimes of Insulting the Memory of a Person (article 130 of the TCC), Inciting the Public to Hatred and Hostility (article 216 of the TCC), and Defamation (article 267 of the TCC). On 29 April 2019, Istanbul Chief Prosecutor's Office initiated an investigation under article 7/2 of the Anti-Terrorism Code ("the ATC"). A tweet of hers dated 11/02/2013 on the murder of Sakine Cansız and her friends with the comment "*As Sakine Cansız said, 'The history of humanity starts with women. Humanity loses when it treats women poorly.' And humanity lost again.*" was included in an investigation case file that was issued after her appearance in a broadcasting show on Habertürk TV on 27 April 2019.

22. Finally, on 22 May 2019, the eight investigation files which concerned eight separate complaints submitted on various dates and places¹³ were merged into a single case file, numbered 2018/27321 and it was decided to conduct the investigation based on this single file.
23. On 18 January 2018, referring to an investigative report prepared by the Istanbul Police Department on 15 January 2018, the interim Istanbul Chief Prosecutor requested from the Ministry of Justice Directorate for Criminal Affairs a permit for conducting the investigation, under file number 2018/9470, regarding the crimes of Insulting the President (article 299 of the TCC), Denigrating the Turkish Nation, the Turkish Republic and the Turkish Grand National Assembly (article 301/1 of the TCC), and Denigrating the Turkish Republic, Its Judiciary, the Military and Security Institutions (article 301/2 of the TCC).
24. On 30 January 2018, in its reply, the Ministry of Justice Directorate for Criminal Affairs noted that the said crimes were subjected to different criminal procedures, and required that the case files be separated and treated individually while indicating that the prosecutor should have clearly demarcated which protected value was denigrated under article 301 and with which of Kaftancıoğlu's words. Moreover, the ministry noted that there was no need for an investigation permit for the crime of insulting the president under article 299 as that article only prescribed a permit request for the prosecution phase.
25. On 12 February 2018, the prosecutor's office separated the files as the investigation under article 301 necessitated an investigation permit. In that regard, the prosecutor's office requested from the Ministry of Justice Directorate for Criminal Affairs an investigation permit under article 301/4 of the TCC. As can be seen from this chain of events, the prosecutor's office conducted an investigation regarding a crime that requires an investigation permit without acquiring one and submitted its investigation file's content attached to its request.

¹³ See footnote 12 and accompanying text.

26. On 22 May 2018, the Ministry of Justice Directorate for Criminal Affairs, in its reply, noted that it was of the opinion that Kaftancıoğlu's tweets fell within the ambit of 'publicly denigrating the Republic of Turkey' and granted the permit for investigation. In its reply, Kaftancıoğlu's tweets were presented but there appeared no reasoning as to why the said tweets constituted the act of denigrating publicly the Republic of Turkey. Furthermore, there appeared no evaluation of the political identity and role of Kaftancıoğlu and in what context and when the said tweets were posted, rendering the investigation permit without legal reasoning. Hence, as the said investigation permit did not entail the necessary qualities prescribed by the Ministry of Justice in its directive¹⁴ on the investigation permits under articles 299 and 301 of the Turkish Criminal Code, it does not hold up to the standards of legality, does not constitute a substantial investigation permit but can at best be considered a formalistic one. Therefore, the investigation for the crime regulated in article 301 of the Turkish Criminal Code was initiated and conducted unlawfully.
27. On 13 February 2018, the public prosecutor's office requested from the Ministry of Justice Directorate for Criminal Affairs a permit for prosecution under article 299 of the TCC for the crime of insulting the president. On 22 May 2018, the Ministry of Justice Directorate for Criminal Affairs provided its opinion in its letter. It indicated that some of Kaftancıoğlu's posts were published before the acquisition of the office of the president by Erdoğan, rendering article 299 of the TCC inapplicable with regard to the said social media posts. Concerning the posts dated after Erdoğan's presidency, the Directorate opined in favour of granting the prosecution permit under article 299/3 of the TCC. Consequently, eight out of the nine tweets included in the prosecution permit request were present in the bill of indictment.
28. The prerogative of the Ministry of Justice in this context is limited to merely granting or rejecting such requests made by the judicial authorities. However, in its reply, it suggested that some of the tweets contained in the permit request could not constitute the crime of insulting the president as they predated Erdoğan's presidency. Hence, the Ministry of Justice made an evaluation of the evidence and suggested to the prosecutor's office the applicable rules in the case. Thus, it can be said that the manner in which the prosecution permit, which is a *sine qua non* condition for the prosecution of the crime of insulting the president, is obtained by the prosecutor's office bears controversy.
29. Furthermore, the political position of Kaftancıoğlu and the contextual background of the said social media posts were once again not taken into consideration during the granting of this prosecution permit, rendering the decision devoid of any legal reasoning. Hence, the said prosecution permit, which did not encompass any of the criteria established in the Ministry of Justice Directive, cannot be regarded as a substantial permit, but solely a formalistic one, rendering the fulfilment of the necessary conditions questionable.

¹⁴ Adalet Bakanlığının B.03.0.CİG.0.00.00.05/010.06.02/17-1 sayılı ve 09.05.2008 tarih ve 18/1 Numaralı Genelgesi, (Ministry of Justice directive on the investigation permits under articles 299 and 301 of the Turkish Criminal Code, No.18/1, dated 09.05.2008), https://www.adalet.gov.tr/Genelgeler/genelge_pdf/18-1.pdf

- 30.** There exists a ground for reasonable doubt regarding the timing of the granting of the permits by the Ministry of Justice. The Ministry granted the said permits 12 days before the presidential elections held on 24 June 2018, after waiting for a long time following their receipt by the Ministry.
- 31.** Throughout the prosecution process, no evidence in favour of Kaftancıoğlu was collected by the prosecution. On that note, in addition to the wholesale dismissal of her explanations about her posts, the dates of the tweets and the statistics about user engagement with the said social media posts were ignored. It is clear that the investigation remained ineffective due to the lack of an analysis based on the context and the effects of the events.
- 32.** Prior to the merging of the investigation files, on 12 December 2018, Kaftancıoğlu's testimony was taken by the public prosecutor regarding the charges under articles 125, 216, 299, and 301 of the TCC. Despite there being an ongoing investigation under article 7/2 of the Anti-Terrorism Code, her testimony regarding the terrorism charges was never taken by the public prosecutor during the investigation process.
- 33.** On 22 May 2018, the bill of indictment, which consisted of 7 pages, was issued. In the bill of indictment with eight plaintiffs, including President Erdoğan, Kaftancıoğlu was accused of the following crimes due to her tweets dating between 2012 and 2017,

 - a. The crime of insulting the president under article 299/1 of the TCC with six Twitter posts,
 - b. The crime of insulting a public official under articles 125/1, 125/3-1, 125/4 of the TCC with eleven Twitter posts,
 - c. The crime of publicly denigrating the Republic of Türkiye under articles 301/1 and 301/2 with nine Twitter posts,
 - d. The crime of inciting the public to hatred and hostility under article 216/1 of the TCC with nine Twitter posts,
 - e. The crime regulated in article 7/2 of the Anti-Terrorism Code with a Twitter post, dated 11/01/2013, and her speech on a TV broadcast, dated 27/04/2019.
- 34.** The bill of indictment consisted of a run-down of the said tweets and did not entail any legal reasoning. Specifically, the dates of the social media posts, their context, and the logical correlation between the tweets and the criminal charges were not provided. It sufficed to suggest that Kaftancıoğlu's tweets constituted the alleged crimes. The only legal reasoning enumerated was her tweet from 11/02/2013 with the note that said "*As Sakine Cansız said, 'The history of humanity starts with women. Humanity loses when it treats women poorly.' And humanity lost again.*" was classified as terrorist propaganda as it "*was disseminating the narration of the founder of the PKK terrorist organization, who was wanted with a red notice, and was classifying her death as a loss of humanity*".
- 35.** Even though each tweet was posted on a different date and in a specific context, each allegedly constituting a different crime, all of the posts were entailed in a single bill of indictment. However, there is no legitimate reason for allocating a single bill of indictment about actions that do not relate to one particular subject. Moreover, there is

no reasonable explanation as to why there was only a single bill of indictment even though the different crimes Kaftancıoğlu was charged with were under the jurisdiction of different courts.

B. Prosecution Phase

- 36.** On 27 May 2019, the bill of indictment prepared by the Istanbul Chief Prosecutor's Office was accepted by the Istanbul 37th Assize Court. Even though four out of the five crimes Kaftancıoğlu was charged with fell under the jurisdiction of the penal court of the first instance and there was no legal correlation between the acts, the Istanbul 37th Assize Court did not relinquish jurisdiction in favour of a first instance penal court and ran the prosecution process itself. There appeared allegations in the media about the panel of judges of the Istanbul 37th Assize Court and specifically the head of the panel concerning his political stance, raising important questions about the impartiality of the court.¹⁵ The former co-chair of the Halkların Demokratik Partisi [Democratic Party of the Peoples ("HDP")] Selahattin Demirtaş, former HDP MP Sırrı Süreyya Önder and many lawyer members of the Çağdaş Hukukçular Derneği [Progressive Lawyers Association (ÇHD)] were prosecuted and convicted by a court which was presided by the judge Akın Gürlek.¹⁶ Moreover, judge Akın Gürlek was present at the panel of the court which prosecuted many defendants of the Academics for Peace group. Following the Constitutional Court's violation judgment in the Academic for Peace case, judge Akın Gürlek publicly denounced the Constitutional Court judgment and rejected the requests for retrial pursuant to the violation judgment.¹⁷ The prosecution process of Kaftancıoğlu consisted of three hearings in total for five crimes she was charged with.

1. First Hearing of 28.06.2019

- 37.** Kaftancıoğlu submitted an additional time request for her defence, due to the fact that the bill of indictment was served to her over the period of her electoral campaign. Following the rejection of this request by the panel, Kaftancıoğlu's lawyers requested that the judges be removed from the case on the basis that they were not impartial, which was later rejected as well. Between the time of the removal of the judges request and the final decision thereon, the court took the testimonies of the plaintiffs and their lawyers, as well as accepted the submission of a CD as evidence to the case file. Following the receipt of this piece of evidence, Kaftancıoğlu's lawyers again

¹⁵ T24, "Kaftancıoğlu bu mahkemeye özel olarak düşürüldü; bu mahkeme engizisyon mahkemesi", ("Kaftancıoğlu was set up, this court is a scam"), 08.09.2019, <https://t24.com.tr/haber/kaftancioglu-bu-mahkemeye-ozel-olarak-dusuruldu-bu-mahkeme-engizisyon-mahkemesi,838496>, Evrensel, "Barolar: Adil yargılanma hakkını ihlal eden heyet değişsin", ("Bar Associations: the panel must be replaced due to partiality"), 07.03.2019, <https://www.evrensel.net/haber/375183/barolar-adil-yargilama-hakkini-ihlal-eden-mahkeme-heyeti-degissin>

¹⁶ Gazete Duvar, "Tartışmalı davaların hakimi Akın Gürlek, bakan yardımcılığına atandı", ("The reputant judge Akın Gürlek was assigned as deputy minister") 02.06.2022, <https://www.gazeteduvar.com.tr/tartismali-davalarin-hakimi-akin-gurlek-bakan-yardimciligina-atandi-haber-1567442>.

¹⁷ Independent Türkçe, "Mahkeme AYM'nin Barış Akademisyenleri ile İlgili Hak İhlali Kararını Tanımadı", ("The court denounced the violation judgment of the Constitutional Court on Academics for Peace"), 02.11.2019, <https://www.independentturkish.com/node/87781/haber/mahkeme-aymnin-baris-akademisyenleri-ile-ilgili-hak-ihlali-kararini-tanimadi>.

requested that the judges be removed from the case as they were not impartial, and this request was rejected as well. During the hearing, lawyer Ömer Kavilli was removed from the courtroom for contempt of court. In the wake of the arguments in the courtroom, the court decided on a recess and gave Kaftancıoğlu time to submit her defence.

2. Second Hearing of 18.07.2019

- 38.** A high number of journalists, international observers and media representatives were present at the second hearing, to which many ordinary citizens also showed up in solidarity with Kaftancıoğlu. Kaftancıoğlu submitted her oral defence regarding the charges. A new trial prosecutor was assigned to the case in place of the first trial prosecutor who was present at the first hearing. Hence, the newly assigned prosecutor became involved in the case for the first time only at the second hearing. The newly assigned trial prosecutor who had to have very little information on the case requested that Kaftancıoğlu be convicted of all charges and presented his opinion to the court, already prepared for submission and contained in a USB device. This demonstrates that the prosecution acted and constructed its opinion without any regard for the defence of the accused, which is the most fundamental piece of evidence in her favour.
- 39.** After the hearing, a crowd was waiting for Kaftancıoğlu outside of the courtroom, and she greeted them with a poem called “An attempted satire on a provocateur” by Nazım Hikmet Ran. She later posted the same poem on her social media accounts.

3. Third hearing of 06.09.2019

- 40.** Kaftancıoğlu briefly summarized her defence and argued that her posts constituted the exercise of her freedom of expression. The court informed her that the poem she read after the last hearing was included in the case file as evidence. Kaftancıoğlu’s lawyers pointed out the procedural shortcomings throughout the whole prosecution phase and submitted a written defence of 102 pages. Following Kaftancıoğlu’s last words, the court announced its decision. Kaftancıoğlu was convicted to 9 years 8 months and 20 days of imprisonment on all five charges for 35 tweet posts.

4. The pro-governmental media’s defamatory news campaign against Kaftancıoğlu

- 41.** Over the prosecution phase and in the wake of the sentence, the pro-government media ran a vast defamation campaign against Kaftancıoğlu, as well as an influx of a high number of social media posts of similar kinds. Specifically bothered by the fact that the international press condemned her conviction as a violation of her freedom of expression, the pro-government media alleged that her allegedly pro-terrorism tweets were ignored¹⁸ and made highly insulting statements such as claiming that she ate pork, committed election fraud and would do anything to impact the policies of the

¹⁸ Yeni Akit, “Canan Kaftancıoğlu’na verilen Ceza Tüm Dünyada Son Dakika ile Duyuruldu”, (“Kaftancıoğlu’s conviction interests the whole world”), 06.09.2019, <https://www.yeniakit.com.tr/haber/canan-kaftanciogluna-verilen-ceza-tum-dunyada-son-dakika-ile-duyuruldu-918954.html>.

CHP.¹⁹ It was alleged that Kaftancıoğlu threatened the panel of judges with her poem and that she accused them of being servants.²⁰ It was further questioned by the pro-government press as to why Kaftancıoğlu was still not arrested despite the conviction judgment.²¹

5. The Sentence

42. Kaftancıoğlu was convicted to 9 years 8 months and 20 days of imprisonment in total for five offences by the Istanbul 37th Assize Court: 1 year and 6 months of imprisonment for the crime of “terrorism propaganda” stipulated in article 7/2 of the Anti-Terrorism Code, 1 year 6 months and 20 days of imprisonment for the crime of “publicly insulting a public official” stipulated in article 125/3 of the TCC, 2 years and 4 months of imprisonment for the crime of “publicly insulting the president” stipulated in article 299/1 of the TCC, 1 year and 8 months of imprisonment for the crime of “publicly denigrating the Republic of Türkiye” stipulated in article 301/1 of the TCC and 2 years and 8 months of imprisonment for the crime of “inciting the public to hatred and hostility” under article 216/1 of the TCC.
43. The court decided that there were no grounds for applying the remission of the sentence clause enshrined in article 62 of the TCC and the deferral of the conviction clause regulated in article 51 of the TCC due to the fact that Kaftancıoğlu accused the court of “being a servant and an equerry” and “not being independent” by reading the poem “An attempted satire on a provocateur” by Nazım Hikmet Ran after the second hearing.
44. Moreover, pursuant to article 53 of the TCC, legal consequences of being convicted to imprisonment for committing an intentional crime are losing the rights to vote, to stand for elections and to be a manager or an auditor for political parties. Therefore, the Istanbul 37th Assize Court’s decision infringed upon Kaftancıoğlu’s political rights.

C. District Court Level

45. The Istanbul 37th Assize Court’s decision was appealed by Kaftancıoğlu’s lawyers at the District Court level. Approximately 9 months later, on 23.06.2020, the sentence was upheld by the 2nd Penal Chamber of the Istanbul District Court of Justice. The 2nd Penal Chamber of the Istanbul District Court of Justice did not provide any legal reasoning for its judgment. The reasoning consisted of only one sentence which read “...it was understood from the case file that there was no unlawfulness in the decision...”. It was noted in the judgment that the judgment could be appealed at the

¹⁹ Sabah, “Canan Kaftancıoğlu ikiyüzlülüklerini böyle itiraf etti”, (“Kaftancıoğlu admitted to her scams”), 13.06.2019, <https://www.sabah.com.tr/video/haber/canan-kaftancioglu-ikiyuzluluklerini-boyle-itiraf-etti>.

²⁰ Yeni Akit, “Yine Rahat Duramadı Kaftancıoğlu’ndan Mahkemedен Çıkar Çıkmaz Hakime Hakaret”, (“Insulted the judge right after the hearing”), 18.07.2019, <https://www.yeniakit.com.tr/haber/yine-rahat-durmadi-kaftancioglundan-mahkemedен-cikar-cikmaz-hakime-hakaret-848358.html>; Sabah, “Canan Kaftancıoğlu’nun Mahkemeyi Tehdit Ettiği Şiir Dosyada”, (“The poem with which Kaftancıoğlu threatened the court entered the case file”), 06.09.2019, <https://www.sabah.com.tr/gundem/2019/09/06/canan-kaftancioglunun-mahkemeyi-tehdit-ettiği-siir-dosyada>.

²¹ Yeni Akit, “Adalet Karar verdi! Peki Canan Kaftancıoğlu neden tutuklanmadı?”, (“Justice restored! Why isn’t Kaftancıoğlu arrested yet?”), 06.09.2019, <https://www.yeniakit.com.tr/haber/adalet-karar-verdi-peki-canan-kaftancioglu-neden-tutuklanmadi-919133.html>.

Court of Cassation level. On the same day, Kaftancıoğlu's attorney Doğuşcan Aydın Aygün made a public announcement about their appeal being rejected without any legal reasoning and that they will be applying for a review of the judgment at the Court of Cassation level.²² Kaftancıoğlu commented that the timing of the judgment was significant as the CHP won the local elections in Istanbul on the same day the year before the judgment.²³

D. Court of Cassation Level

46. Kaftancıoğlu appealed against the decision of the 2nd Penal Chamber of the Istanbul District Court of Justice at the Court of Cassation level. The decision was reviewed by the 3rd Penal Chamber of the Court of Cassation and the judgment was released on 10.05.2022. The 3rd Penal Chamber of the Court of Cassation upheld the decision on publicly denigrating the Turkish republic and publicly insulting a public official, by stating that *“the procedural guarantees were respected during the process; the evidence was acquired lawfully; the party submissions of both the defence and the prosecution were present in the file and discussed substantively throughout the process enabling the review; the conviction was based on certain, consistent and coherent findings; the acts were classified properly and suited the definition of the crimes; the sentence was customized for the defendant; the reasons for appeal submitted by the defence attorney were not found to be pertinent.”*
47. The 3rd Penal Chamber of the Court of Cassation found that Kaftancıoğlu's post of 20.10.2017 which read *“I don't know how to put it into words...Tayyip is a thief”* did not fall under the ambit of the crime of insulting the President. Therefore, the 3rd Penal Chamber of the Court of Cassation did not apply the provision for successive offences and reduced the sentence to 1 year and 9 months of imprisonment from 1 year and 16 months.
48. For the crime of terrorism propaganda, the 3rd Penal Chamber of the Court of Cassation reiterated that the crime must have been committed by *“instigating or legitimizing the violent means and methods used by the terrorist organisations”*. The Court of Cassation quashed the judgment by stating that Kaftancıoğlu's tweet dated 11.01.2013 which read *“The history of humanity starts with women. Humanity loses when it treats women poorly.’ And humanity lost again.”* did not constitute a crime.
49. Lastly, in its analysis of the crime of instigating the public to hatred and hostility, the court of cassation indicated that *“when taken into consideration that the political posts of the defendant who is a well-known oppositional figure did not constitute an imminent threat to the public order and were merely offensive, disrespectful and shocking; she must have been acquitted, instead of convicted”* and annulled the judgment.
50. In sum, the 3rd Penal Chamber of the Court of Cassation sentenced Kaftancıoğlu to 4 years 11 months and 20 days of imprisonment on the charges of insulting a public official, insulting the president, and denigrating the Turkish Republic. Moreover, pursuant to article 53 of the TCC, the approving judgment of the Court of Cassation

²² <https://twitter.com/doguscanaygun/status/1275443049800204288>

²³ https://twitter.com/Canan_Kaftanci/status/1275443421453250567

infringed upon Kaftancıoğlu's rights to vote, to stand for elections and to be a manager or an auditor for political parties.

III. Legal Analysis

A. The Crime of Insulting the President of Türkiye (Article 299 of the TCC)

51. The rationale behind the regulation of the crime of insulting the president stipulated in article 299 of the TCC is to protect the official capacity of the Presidency. However, the ECtHR noted that the mere fact that a person is a president cannot justify granting them a higher degree of protection.²⁴ According to the well-established case-law of the ECtHR, any criminal law provision granting a higher level of protection to the president of a state will constitute a violation of article 10 of the Convention. This principle is all the more important when the protection afforded to the president is juxtaposed against the freedom of expression of individuals.²⁵ Bearing in mind the reaction Kaftancıoğlu's tweets drew at the time of their posting, it cannot be argued that they had any real effect on President Erdoğan's personal or professional life or caused a decline in his reputation. Considering the ECtHR case-law on the issue, specifically *Önal/Türkiye*, it is confirmed that article 299 of the TCC is at odds with the Court's and the Turkish Constitutional Court's case-law and cannot be the legal basis of interference with the freedom of expression of individuals.²⁶
52. The ECtHR in *Vedat Şorli/Türkiye* recently found that the freedom of expression of an individual was violated due to having been convicted for the crime of insulting the president. In this quasi-pilot judgment, the Court found that the violation was stemming from the wording and application of article 299 of the TCC. The Court found that granting special protection to the President was incompatible with the Convention and that the aim of protecting the reputation of the President cannot justify the interventions with the people's rights to freedom of expression. It was concluded that as the violation was stemming from the wording and application of article 299 of the TCC, the Contracting State was under the obligation to align its domestic law with the standards enshrined in the judgment pursuant to article 46 of the Convention. Although the Government appealed against the judgment at the Grand Chamber level, the relevant panel of the Court denied the request and the judgment was finalized on 28.02.2022. In *Vedat Şorli/Türkiye*, the ECtHR found that the violation was the direct result of article 299 of the TCC and that the implementation of its judgment shall be the alignment of the said article with the Convention pursuant to article 46 of the Convention.
53. Kaftancıoğlu's conviction handed by the Istanbul 37th Assize Court is dated 06.09.2019 and the 2nd Penal Chamber of the Istanbul District Court of Justice rejected the appeals on 23.06.2020. The conviction sentence was imposed two years prior to the *Vedat Şorli* judgment of the ECtHR. Though the Istanbul 37th Assize

²⁴ *Colombani/Fransa*, no. 51279/99, 25.6.2002, §§ 68-69; *Pakdemirli/Türkiye* no. 35839/97, 22.2.2005, §§ 51-52.

²⁵ *Artun and Güvener/Türkiye*, no. 75510/01, 26.6.2007, § 31; *Önal/Türkiye* (2), no. 44982/07, 02.07.2019, § 40.

²⁶ *Yaman Akdeniz & Kerem Altıparmak*, "TCK 299: Olmayan Hükümün Gazabı mı?" *Güncel Hukuk*, Ekim 2015, no 10-142, 42-44.

Court and the 2nd Penal Chamber of the Istanbul District Court of Justice could not have applied the judgment of the ECtHR, the Court of Cassation was in a place to apply it, since the Vedat Şorli judgment was given on 19.10.2021 and became final on 28.02.2022. The decision of the Court of Cassation dates back to 10.05.2022, which means that the Court of Cassation decision was pronounced 3 months after the *Vedat Şorli* judgment. It must be noted that the *Vedat Şorli* judgment of the ECtHR was not the first-ever judgment delivered by the European Court regarding article 299 of the TCC and was ignored by the Turkish courts. The Istanbul 37th Assize Court cited in its decision the case-law of the Court of Cassation but failed to mention or take into account in its *obiter dictum* the case-law of the ECtHR or the Constitutional Court of Türkiye on the crime of insulting the President. The courts conducted no balancing exercise with regard to the political roles of both the President and Kaftancıoğlu, even though the President has been the head of the ruling party, AKP, since April 2017 and, since July 2018, the head of the executive power who bears political accountability. Thus, as the most prominent figure in Turkish politics for the last 15 years, President Erdoğan is in a position that requires him to be open to serious criticism. In its analysis of the crime of insulting the president, the courts failed to consider the context in which Kaftancıoğlu's tweets were posted and that they were part of a public debate.

54. As explained above, article 299 of the TCC is incompatible with article 10 of the Convention and the Court's case-law on the issue. Pursuant to article 90/5 of the Turkish Constitution "*In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*" According to the case-law of the Turkish Constitutional Court, a provision of law conflicting with an international agreement of the said kind is considered subject to tacit abolishment even if it is compatible with the Constitution. The fact that this aspect of the applied rule was not taken into consideration throughout the process is argued to be a deficiency.

B. The crime of insulting a public official (Article 125/3 of the TCC)

55. The crime of insulting a public official regulated in article 125/3 of the TCC is a reflection of the protection of the reputation of individuals as enshrined in article 8 of the Convention and article 17 of the Turkish Constitution. The crime stipulated in article 125/3-a is an aggravated version of the crime of defamation which prohibits insulting a public official for the actions performed in his/her official capacity. It accedes that the defendants would be subject to an aggravated sentence as a result. It must be borne in mind that it does not suffice to establish that the insult is addressed at a public official but it must also be established that it is also targeting a public official for his/her actions performed in his/her official capacity.²⁷ It must be highlighted that the said rule cannot be applied with regard to high-level politicians, pursuant to the case-law of the ECtHR, the Constitutional Court and the Court of Cassation.

²⁷ AYM, 2012/78 E, 2012/111 K, 12.09.2012.

56. The ECtHR noted in this regard that *“This article also applied when the defamatory comments were made against elected politicians occupying posts of responsibility, such as a Prime Minister, considered by those authorities as State officials within the meaning of this provision. This practice did not seem to be in conformity with the Court’s case-law, which stated that the limits of acceptable criticism were wider with regard to a politician, in that capacity than with regard to a private individual. In this connection, the Court reiterated its previous conclusion that providing increased protection by means of a special law on insults was not, as a rule, in keeping with the spirit of the Convention (Colombani and others/Fransa, no. 51279/99, § 69, ECHR 2002-V, Otegi Mondragon, § 55 and Önal/Türkiye (no. 2), no. 44982/07, § 40, 02.07.2019). It also pointed out that, while it was perfectly legitimate for persons representing the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions required the authorities to display restraint in resorting to criminal proceedings (Otegi Mondragon, § 58).”*²⁸
57. It is submitted in the Court’s and the concurring Constitutional Court case-law²⁹ that in cases of insult, who the addressee is of importance. It is because the acceptable degree of criticism aimed at politicians is higher³⁰ and that the politicians who are under scrutiny of their opponents are obliged to endure a higher level of criticism than any regular citizen.³¹ It goes without question to say that the publicity the politicians have and the fact that they exercise political power causes them to endure a greater degree of criticism than regular individuals.³²
58. However, the court of first instance submitted that the words “thief” and “idiot” aimed at the Prime Minister of Türkiye were considered insult by the public and the domestic case-law. The court reasoned that defamatory statements could not be considered an expression of ideas and criticism and that Kaftancıoğlu’s statements did not fall within the ambit of the protection granted by the right to freedom of expression. The court did not analyse the context in which the statements were made and the doctrine of a higher degree of acceptable criticism of politicians, as well as the constituent elements of the crime stipulated in article 125/3 of the TCC. Moreover, the case-law regarding the assessment of the effects of the expressions was disregarded.³³

²⁸ Ömür Çağdaş Ersoy/Türkiye, no. 19165/19, 15.6.2021, § 58.

²⁹ Janowski/Poland, no. 25716/94, 21.01.1999, § 33; Lesnik/Slovakia, no. 35640/97, 11.03.2003, § 53; Steur/The Netherlands, no. 39657/98, 28.10.2003, § 40; Mustafa Erdoğan and others/Türkiye, no. 346/04, 39779/04, 27.05.2014, § 42.

³⁰ Feldek/Slovakia, no. 29032/95, 12/7/2001, § 74.

³¹ AYM, Turgut Altınok, no. 2017/36724, 29.01.2020, § 31.

³² AYM Emin Aydın, no. 2013/2602, 23.01.2014, Bekir Coşkun, no. 2014/12151, 4/6/2015; Ali Rıza Üçer (2), no. 2013/8598, 2/7/2015; ECtHR Tuşalp/Türkiye, no. 32131/08 and no. 41617/08, 21.02.2012; Lingens/Austria, no. 9815/82, 08.07.1986; Oberschlick/Austria, no. 11662/85, 23.05.1991; Feldek/Slovakia, no. 29032/95, Eon/France, no. 26118/10, 14.03.2013; Mladina D.D. Ljubljana/Slovenia, no. 20981/10, 17.04.2014.

³³ AYM Mustafa Tepeli, 01.03.2017, No: 2014/5831, § 31; Kadir Sağdıç, No: 2013/6617, 8/4/2015 [GK], § 39; İlhan Cihaner, No: 2013/5574, 30/6/2014, § 45, 56; ECtHR Tuşalp/Türkiye, no: 32131/08 and 41617/08, 21.02.2012 § 49; Erla Hlynsdottir/Iceland (No. 3), no: 54145/10, 02.06.2010, para. 60; Mater/Türkiye, no:

59. The 2nd Penal Chamber of the Istanbul District Court of Justice, as well as the 3rd Penal Chamber of the Court of Cassation, approved the conviction sentence passed on Kaftancıoğlu without due regard to the case-law whereby the said article could not be applied in relation to criticism aimed at high-level politicians and the acceptable degree of critique about political figures is higher than about regular citizens. It was not taken into account that each post by Kaftancıoğlu related to a topical discussion at the time of their publication and she expressed her opinions on her capacity as a political figure.

C. The Crime of Denigrating the Turkish nation, the Republic of Turkey, the State Institutions and Organs (Article 301 of the TCC)

60. The crime of denigrating the Turkish nation, the Republic of Türkiye, and the state institutions and organs is regulated in article 301 of the Turkish Criminal Code. The rationale behind the rule is to protect the reputation of the Republic of Türkiye and the state institutions, as well as to ensure their effective functioning. The ECtHR concluded in its *Taner Akçam/Türkiye* judgment that article 301 of the TCC was not foreseeable and did not provide adequate legal safeguards. The Court stated that the procedure for requesting an investigation permit from the Ministry of Justice gave leeway to political manoeuvring rather than constituting a safeguard against misuse of the article.³⁴ In this regard, the Court found that the changing of hands of the legislative and executive powers could provoke the risk of judicial harassment of, specifically critical, persons.³⁵ The Court indicated in its relevant case-law that the acceptable degree of criticism with regard to politicians is much higher than ordinary persons. In that context, criminal sanctions imposed on the exercise of the freedom of expression must be confined to instances of incitement to violence.³⁶

61. The Istanbul 37th Assize Court applied the aggravation clauses in its decision on article 301 of the TCC on the basis of Kaftancıoğlu's intentions. The court decided that there were no grounds for applying the remission of the sentence clause enshrined in article 62 of the TCC due to the fact that Kaftancıoğlu accused the court by reading a poem outside of the courtroom. In the decision, each post was not analysed on its own as pieces of evidence and was taken out of context. On that note, although the tweets should have been assessed individually and within their context,³⁷ the phrases "genocide", "murderer" and "thief" were singled out by the court and evaluated as criminal. However, these phrases were used to point out the culture of impunity in Türkiye. Impunity for public officials is considered to be one of the most crucial problems of a democracy based on the rule of law. It is without question that participating through social media in a public discussion relating to the culture of impunity for grave violations of human rights bears public interest. In the domestic

54997/08, 16.07.2013, § 52; *Axel Springer AG/Germany [GC]*, no. 39954/08, 07.02.2012, § 83; *Tamiz/United Kingdom*, no.3877/14, 19/09/2017.

³⁴ *Taner Akçam/ Türkiye*, no. 27520/07, 25.10.2011, § 68.

³⁵ *Ibid*, § 82.

³⁶ *Ceylan/Türkiye*, no. 23556/94, 08.07.1999.

³⁷ *Nilgün Holloran*, no. 2012/1184, 16.07.2014, § 52.

courts' judgments, neither the pressing social need³⁸ nor the adequate and sufficient reasoning for the interference with Kaftancıoğlu's freedom of expression was not established.

D. The Crime of “Terrorism Propaganda” (Article 7/2 of the Anti-Terrorism Code)

- 62.** Article 7(2) of the Anti-Terrorism Code (“ATC”, Law No. 3713) as amended by Law No. 6549, regulates the crime of terrorism propaganda, which is defined as justifying and instigating the violent means and methods of terrorist organisations.
- 63.** In a series of judgments passed by the ECtHR in 1999³⁹ against Turkey, the Court put down the principles to be applied when conducting an assessment about violent expressions and the exercise of the freedom of expression, which later became a part of its well-established case-law. It was submitted that a triple test would be applied with an emphasis on the personality of the person who used the said expressions and the means by which the expressions were made. In this regard, the following should be given due regard: **i. By whom, in what context and how the statement was made, ii. Whether there existed any incitement to violence in the said remark, and iii. Whether there was any actual potential of violence caused by the expression.** The Court indicated that as long as an expression is not a direct incitement to violence, **does not justify the terrorist activities to achieve a goal and cannot be perceived as instigating persons to violence based on deep and irrational hate against some people**, it cannot be defined as terrorist propaganda merely due to the fact that it stemmed from or related to a terrorist organisation.⁴⁰
- 64.** In the commentary of article 7/2 of the ATC, it was specified that it applied only to the cases where “*there existed an incitement, justification for or instigation to the violent acts of terrorist organisations*” citing the case-law of the ECtHR. Moreover, in its judgment *Zübeyde Füsün Üstel and Others*, known as the case of “Academics for Peace”, *Ayşe Çelik*, and *Sırrı Süreyya Önder*,⁴¹ the Constitutional Court held that article 7/2 of the ATC cannot be seen as a provision stipulating an endangerment crime but it must be established that the alleged criminal activities must be capable of generating a certain degree of factual danger to the public order. In addition to that, the Constitutional Court pointed out the need for a *dolus specialis*. In other words, as long as an expression is not a direct incitement to violence, does not justify the terrorist activities to achieve a goal and cannot be perceived as instigating persons to violence based on deep and irrational hate against some people, it cannot be defined as terrorist propaganda merely due to the fact that it related to a terrorist organisation.

³⁸ *Dilipak/Türkiye*, no. 29680/05, 02.05.2016, §61.

³⁹ *Erdoğan and Ince/Türkiye*, no. 25067/94, 8.7.1999, § 50; *Başkaya and Okçuoğlu/Türkiye*, no. 23536/94, 08.7.1999, § 62; *Süreç/Türkiye (no. 4)*, no. 24762/94, 08.7.1999, § 57; *Süreç/Türkiye (no.2)*, no. 24122/94, 8.7.1999, § 34; *Yalçın Küçük/Türkiye*, no. 28493/95, 5.12.2002, § 38; *Erdoğan/Türkiye*, no. 25723/94, 15.6.2000, §. 61-62.

⁴⁰ *Gözel and Özel/Türkiye*, no. 43453/04 and 31098/05, 6.07.2010, § 56.

⁴¹ *Ayşe Çelik*, no. 2017/36722, 09.05.2019; *Zübeyde Füsün Üstel ve Diğerleri* no. 2018/17635, 26.07.2019; *Sırrı Süreyya Önder*, no. 2018/38143, 03.10.2019.

65. In Kaftancıoğlu's case, it was indicated that even though the propaganda did not entail a violent nature, it still constituted the acts prohibited in article 7/2 of the TCC as the violent acts of a terrorist organisation are justified, glorified or incited. The domestic court in its analysis cited the *Sürek/Türkiye (No. 3)* judgment of the ECtHR.⁴² The Istanbul 37th Assize Court found that Kaftancıoğlu's posts about the founder and leader of an armed terrorist organisation did not fall under the protection of the freedom of expression as it justified the violent actions of the terrorist organisation. The 2nd Penal Chamber of the Istanbul District Court of Justice approved the conviction sentence without taking into consideration the relevant ECtHR case-law.
66. It can be derived from this chain of events that the Istanbul 37th Assize Court and the 2nd Penal Chamber of the Istanbul District Court of Justice ignored the principles whereby the narrow margin of appreciation granted to the state in interfering with Kaftancıoğlu's statements as a high-level politician on a current public issue could not be justified in light of the ECtHR case-law.⁴³ Although the 3rd Penal Chamber of the Court of Cassation quashed the judgments of the lower courts, it adjudicated on the case without giving due regard to the principles set down by the Court on the personality of the defendant, the context in which the statements were made, whether the expressions were susceptible to instigate or lead to violence. Moreover, it is striking that even the higher courts did not evaluate the context and circumstances under which the said tweets were posted by Kaftancıoğlu.

E. The Crime of Inciting the Public to Hatred and Hostility (Article 216 of the TCC)

67. The crime of inciting the public to hatred and hostility, enshrined in article 216 of the TCC, prohibits the acts of inciting a part of the population to hatred and hostility against another sector of the society for violent revenge. It is stipulated in the article that there must be a real and imminent threat for this crime to be considered committed. In this context, it must be established that the threat is concrete and present, as well as that harm, would be caused by the threat in case of a lack of immediate precautions. The acts of the perpetrator of this crime must be the cause of the imminent threat posed to public order. It must be demonstrated that the statements of the alleged perpetrator must be "capable of disrupting the public order". According to the case-law of the Court of Cassation, a mere rejection, renunciation of or showing of disrespect for the values cannot be considered to be severe enough for the purposes of this crime.⁴⁴ For an act to fall within the ambit of this crime, there must be a severe incitement to hatred and hostility, meaning a statement must entail hate speech or incitement to violence. The alleged perpetrator must inseminate or proliferate hate against an certain part of society. Hence, it must be established that a threat is real and present, as well as that harm, would be caused by the threat in case of a lack of immediate precautions. In its *Dicle/Türkiye* judgment concerning the conviction of the applicant under article 216 of the TCC for his critical statements on the Kurdish conflict, the ECtHR indicated that "*although certain particularly acerbic passages of*

⁴² *Sürek/Türkiye (No.3)*, 24735/94, 08.07.1999.

⁴³ *Dmitriyevskiy/Rusya*, no. 42168/06, 29.01.2018, § 95; *Castells/İspanya*, no. 11798/85, 23.04.1992, § 42; *Stomakhin/Rusya*, no. 52273/07, 09.05.2018, § 89, *İbrahim Aksoy/Türkiye*, no. 28635/95, 10.10.2000, § 59.

⁴⁴ *Yargutay CGK E:2007/244, K:2008/92, 28.04.2008.*

the article paint an extremely negative picture of the Turkish State and thus give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection and do not constitute hate speech”. The Court noted that the necessity of the interference must be assessed from this perspective. The ECtHR endorsed this approach in its later judgments of *Incal/Türkiye*⁴⁵, *Birdal/Türkiye*⁴⁶, *Ceylan/Türkiye*⁴⁷, *Gümüş and others/Türkiye*⁴⁸, *Gündüz Müslüm/Türkiye*⁴⁹ and *Yarar/Türkiye*.

- 68.** The Istanbul 37th Assize Court, in its decision, gave a rundown of Kaftancıoğlu’s said tweets but did not mention any of the above-mentioned case-law of the ECtHR, nor did it assess Kaftancıoğlu’s expressions within their context. The court ignored the ECtHR’S jurisprudence whereby the Court adjudicated that although harsh passages of an article painted an extremely negative picture of the Turkish State and thus gave the narrative a hostile tone, they did not encourage violence, armed resistance or insurrection and did not constitute hate speech and therefore could not be criminalised. Moreover, it must be noted that the court allocated some subjective meanings to Kaftancıoğlu’s tweets which she did not intend to confer or could be inferred from the texts. For the alleged crime to occur, one must explicitly target a vulnerable sector of society, and incite another group to violence and that incitement must be capable of objectively leading to such violent events. These criteria cannot be considered to be fulfilled and derived from Kaftancıoğlu’s posts. It can therefore be concluded that the court made strained comments to reach a conviction. The said tweets were critical of state violence, discrimination and unlawful interferences with rights and freedoms and fell under the scope of the exercise of the freedom of expression.
- 69.** The 3rd Penal Chamber of the Court of Cassation, in its reasoning on the crime of inciting the public to hatred and hostility, did not assess whether Kaftancıoğlu’s tweets entailed incitement to violence but rather confined its analysis to the criterion of the presence of an imminent threat. The 3rd Penal Chamber of the Court of Cassation quashed the conviction based on the fact that Kaftancıoğlu was a political opposition figure and her posts did not generate an imminent threat to public order. However, it must be noted that the fact that the legal reasoning was not based on the relevant ECtHR jurisprudence constitutes a deficiency in the judgment.

IV. Conclusion

- 70.** As explained in detail above, Kaftancıoğlu’s right to a fair trial and freedom of expression were interfered with several times throughout the whole judicial process. It must be noted from the outset that the timeline of the incrimination of Kaftancıoğlu was influenced by the political atmosphere in the country. It is undeniable that her tweets from years ago were subjected to prosecution following her election as the Head of CHP Istanbul, after being devoid of any public attention for years. Though the criminal investigation was initiated with a verbal order from the Chief Prosecutor,

⁴⁵ *Incal/Türkiye*, no. 22678/93, 9.06.1998.

⁴⁶ *Birdal/Türkiye* no. 53047/99, 2.10.2007.

⁴⁷ *Ceylan/Türkiye*, no. 23556/94, 8.07.1999.

⁴⁸ *Gümüş and others/Türkiye*, no. 40303/98, 15.03.2005.

⁴⁹ *Yarar/Türkiye*, no. 57258/00, 19.12.2006.

the said order never took a written form and entered the official records. Even though it was an investigation permit that must have been requested from the Ministry of Justice under article 299 of the TCC, a prosecution permit was requested instead. The Ministry of Justice, in its permit decision, evaluated the evidence and suggested to the prosecutor's office the applicable rules in the case, rendering its decision as an order to the judiciary. What is more, Kaftancıoğlu was not given the chance to testify regarding each crime she was indicted with and the prosecution did not collect evidence favouring the defendant. In sum, the due diligence rights and the principles of criminal procedure were violated during the investigation and prosecution processes, the bill of indictment did not entail concrete evidence and accusation against Kaftancıoğlu.

71. Throughout the prosecution process, Kaftancıoğlu's and her lawyers' defences were utterly dismissed. The newly assigned trial prosecutor who had to have very little information on the case requested that Kaftancıoğlu be convicted of all charges and presented his opinion to the court, already prepared for submission and contained in a USB device. Even though the Istanbul 37th Assize Court convicted Kaftancıoğlu for 9 years 8 months and 20 days of imprisonment on 5 charges based on her 35 social media posts, it did not provide sufficient and adequate reasoning in its decision. The court did not analyse the context in which the statements were made and the doctrine of a greater degree of acceptable criticism coming from high-level politicians, such as Kaftancıoğlu, as established by the case-law of the ECtHR and the Turkish Constitutional court. As mentioned in detail above, the Istanbul 37th Assize Court, the 2nd Penal Chamber of the Istanbul District Court of Justice and the 3rd Penal Chamber of the Court of Cassation did not apply the relevant domestic law in compliance with the standards established by the ECtHR. It must be noted that the decisions lacked reference to the relevant ECtHR jurisprudence, which constitutes a shortcoming thereof.
72. Kaftancıoğlu's judicial process was the centre of attention of the press and the public. There exists a portion of the public that advocated for Kaftancıoğlu's conviction, as well as a portion that criticised the unlawful practices adopted during the process. As a corollary of her conviction, it can be said that a prominent oppositional politician and a rights-defender who has challenged the government, was rendered to be deprived of her political capabilities.⁵⁰ Kaftancıoğlu commented on her conviction and stated that *"if a woman from the CHP is trying to be intimidated by judicial harassment, this could only mean one thing: either it is a form of politically motivated revenge move or they are scared of her or her party's politics and are only able to stop it this way"*.⁵¹
73. This trial monitoring report exemplifies the judicial harassment, censorship and silencing in Türkiye aimed at critical journalists, opposition politicians, human rights

⁵⁰ BBC, "Canan Kaftancıoğlu'na siyasi yasak getirilmesi ne anlama geliyor?", ("What does the political ban imposed on Kaftancıoğlu mean?"), 12.05.2022 <https://www.bbc.com/turkce/haberler-turkiye-61427019>.

⁵¹ Cumhuriyet, "Canan Kaftancıoğlu 'siyasi yasak' sonrası konuştu: 'Siyasi intikam alınmaktadır'", ("Kaftancıoğlu commented on her political ban: It's a politically motivated revenge move"), 23.07.2022, <https://www.cumhuriyet.com.tr/siyaset/canan-kaftancioglu-siyasi-yasak-sonrasi-konustu-siyasi-intikam-alinmaktadır-1961083>.

defenders and academics. The political implications of Kaftancıoğlu's trial are capable of going beyond the individual effects and hampering and suppressing the expression of critical voices in Türkiye. In addition to undermining the public's trust and respect for the rule of law, this phenomenon jeopardizes the core human rights and freedoms, as well as the basic principles of democracy.

1. BIBLIOGRAPHY

a. Case-law

i. The European Court of Human Rights

- *Başkaya and Okçuoğlu v. Türkiye*, no. 23536/94, 08.7.1999.
- *Sürek v. Türkiye (no.2)*, no. 24122/94, 8.7.1999.
- *Sürek v. Türkiye (No.3)*, no. 24735/94, 08.07.1999.
- *Sürek v. Türkiye (no. 4)*, no. 24762/94, 08.07.1999.
- *Yalçın Küçük v. Türkiye*, no. 28493/95, 5.12.2002.
- *Erdođdu v. Türkiye*, no. 25723/94, 15.6.2000.
- *Gözel and Özel v. Türkiye*, no.43453/04 and 31098/05, 6.07.2010.
- *Dmitriyevskiy v. Russia*, no. 42168/06, 29.01.2018.
- *Castells v. Spain*, no. 11798/85, 23.04.1992.
- *Stomakhin v. Russia*, no. 52273/07, 09.05.2018.
- *İbrahim Aksoy v. Türkiye*, no. 28635/95, 10.10.2000.
- *Janowski v. Poland*, no. 25716/94, 21.01.1999.
- *Lesnik v. Slovakia*, no. 35640/97, 11.03.2003.
- *Steur v. The Netherlands*, no. 39657/98, 28.10.2003.
- *Mustafa Erdoğan and others v. Türkiye*, no. 346/04, 39779/04, 27.05.2014.
- *Feldek v. Slovakia*, no. 29032/95, 12/7/2001.
- *Tuşalp v. Türkiye*, no. 32131/08 and no. 41617/08, 21.02.2012.
- *Lingens v. Austria*, no. 9815/82, 08.07.1986.
- *Oberschlick v. Austria*, no. 11662/85, 23.05.1991.
- *Eon v. France*, no. 26118/10, 14.03.2013.

- *Mladina D.D. Ljubljana v. Slovenia*, no. 20981/10, 17.04.2014.
- *Colombani v. France*, no. 51279/99, 25.6.2002.
- *Pakdemirli v. Türkiye*, no. 35839/97, 22.2.2005.
- *Taner Akçam v. Türkiye*, no. 27520/07, 25.10.2011.
- *Ceylan v. Türkiye*, no. 23556/94, 08.07.1999.
- *Dilipak v. Türkiye*, no. 29680/05, 02.05.2016.
- *Dicle v. Türkiye*, no. 34685/97, 10.11.2004.
- *Incal v. Türkiye*, no. 22678/93, 9.06.1998.
- *Birdal v. Türkiye* no. 53047/99, 2.10.2007.
- *Ceylan v. Türkiye*, no. 23556/94, 08.07.1999.
- *Gümüş and others v. Türkiye*, no. 40303/98, 15.03.2005.
- *Yarar v. Türkiye*, no. 57258/00, 19.12.2006.
- *Vedat Şorli v. Türkiye*, no. 42048/19, 19.10.2021.
- *Artun and Güvener v. Türkiye*, no. 75510/01, 26.6.2007.
- *Önal v. Türkiye (2)*, no. 44982/07, 02.07.2019.

ii. The Turkish Constitutional Court

- *Ayşe Çelik*, no. 2017/36722, 09.05.2019.
- *Zübeyde Füsün Üstel ve Diğerleri*, no. 2018/17635, 26.07.2019.
- *Sırrı Süreyya Önder*, no. 2018/38143, 03.10.2019.
- *Turgut Altınok*, no. 2017/36724, 29.01.2020.
- *Emin Aydın*, no. 2013/2602, 23.01.2014.
- *Bekir Çoşkun*, no. 2014/12151, 4/6/2015.
- *Ali Rıza Üçer (2)*, no. 2013/8598, 2/7/2015.
- *Nilgün Holloran*, no. 2012/1184, 16.07.2014.

iii. The Turkish Court of Cassation

- Yargıtay CGK E:2007/244, K:2008/92, 28.04.2008

b. News Articles

- Anadolu Ajansı, “Cumhurbaşkanı Erdoğan: CHP İstanbul’a bir il başkanı seçmiş ki tam facia”, 16.01.2018, <https://www.aa.com.tr/tr/turkiye/cumhurbaskani-erdogan-chp-istanbula-bir-il-baskani-secmis-ki-tam-bir-facia/1032465>.

- Gazete Duvar, “*Canan Kaftancıoğlu: Erdoğan’a çok teşekkür ederim*”, 16.01.2018, <https://www.gazeteduvar.com.tr/politika/2018/01/16/canan-kaftancioglu-erdogana-cok-tesekkur-ederim/>
- Gazete Duvar, “*Canan Kaftancıoğlu, Erdoğan’dan özür diledi*”, , 17.01.2018, <https://www.gazeteduvar.com.tr/politika/2018/01/17/canan-kaftancioglu-korkuyorlar-saldiriyorlar/>
- Sabah, “*İşte CHP İstanbul İl Başkanı Canan Kaftancıoğlu’nun skandal tweetleri!*”, 16.01.2018, <https://www.sabah.com.tr/galeri/turkiye/iste-chp-istanbul-il-baskani-canan-kaftancioglunun-skandal-tweetleri>
- Gazete Doğu, “*CHP’li Başkan’dan Skandal Tweetler*”, 15.01.2018, <http://www.gazetedogu.com/chp-li-baskan-dan-skandal-tweetler/6054/>
- Yeni Akit, “*Canan Kaftancıoğlu’nun skandalları bitmiyor*”, 17.01.2018, , <https://www.yeniakit.com.tr/haber/canan-kaftancioglunun-skandallari-bitmiyor-414730.html>.
- Yeni Şafak, “*Skandalları bitmiyor: PKK’lı teröristin ölümüne böyle ağlamış*”, 17.01.2018, <https://www.yenisafak.com/gundem/skandallari-bitmiyor-pkkli-teroristin-olumune-boyle-aglamis-3014863>.
- Milli Gazete, “*Canan Kaftancıoğlu’nun skandal tweetleri bitmiyor*”, 18.01.2018, , <https://www.milligazete.com.tr/haber/1487742/canan-kaftancioglunun-skandal-tweetleri-bitmiyor>
- Yeni Akit, “*‘Acar gelin’ Canan Kaftancıoğlu*”, 20.01.2018, <https://www.yeniakit.com.tr/yazarlar/zekeriya-say/acar-gelin-canan-kaftancioglu-22716.html>.
- Haber Popüler, “*Canan Kaftancıoğlu’ndan skandal PKK mesajı!*”, 18.01.2018, <http://www.haberpopuler.com/gundem/canan-kaftancioglundan-skandal-pkk-mesaji-h3530.html>
- Yeni Aktüel, “*Canan Hanım Bir Ulusal Güvenlik Sorunudur*”, 18.01.2018, <https://www.sabah.com.tr/yazarlar/aktuel/ersoy-dede/2018/01/18/canan-hanim-bir-ulusal-guvenlik-sorunudur>
- Sabah, “*Canan Kaftancıoğlu bir ulusal güvenlik sorunudur!*”, 18.01.2018, , <https://www.sabah.com.tr/gundem/2018/01/18/canan-kaftancioglu-bir-ulusal-guvenlik-sorunudur>
- Sabah, “*Canan Kaftancıoğlu hakkında şok iddialar*”, 19.01.2018, , <https://www.sabah.com.tr/gundem/2018/01/19/canan-kaftancioglu-hakkinda-sok-iddialar>
- T24, “*Kaftancıoğlu bu mahkemeye özel olarak düşürüldü; bu mahkeme engizisyon mahkemesi*”, 08.09.2019, <https://t24.com.tr/haber/kaftancioglu-bu-mahkemeye-ozel-olarak-dusuruldu-bu-mahkeme-engizisyon-mahkemesi,838496>.

- Evrensel, “Barolar: Adil yargılanma hakkını ihlal eden heyet değişsin”, 07.03.2019, <https://www.evrensel.net/haber/375183/barolar-adil-yargilama-hakkini-ihlal-eden-mahkeme-heyeti-degissin>
- Independent Türkçe, “Mahkeme AYM’nin Barış Akademisyenleri ile İlgili Hak İhlali Kararını Tanımadı”, <https://www.independentturkish.com/node/87781/haber/mahkeme-aym-nin-baris-akademisyenleri-ile-ilgili-hak-ihlali-kararini-tanimadi>, 02.11.2019
- Yeni Akit, “Canan Kaftancıoğlu’na verilen Ceza Tüm Dünyada Son Dakika ile Duyuruldu”, <https://www.yeniakit.com.tr/haber/canan-kaftanciogluna-verilen-ceza-tum-dunyada-son-dakika-ile-duyuruldu-918954.html>, 06.09.2019
- Sabah, “Canan Kaftancıoğlu ikiyüzlülüklerini böyle itiraf etti”, <https://www.sabah.com.tr/video/haber/canan-kaftancioglu-ikiyuzluluklerini-boyle-itaraf-etti>, 13.06.2019
- Yeni Akit, “Yine Rahat Duramadı Kaftancıoğlu’ndan Mahkemeden Çıkar Çıkmaz Hakime Hakaret”, <https://www.yeniakit.com.tr/haber/yine-rahat-durmadi-kaftancioglundan-mahkemeden-cikar-cikmaz-hakime-hakaret-848358.html>, 18.07.2019
- Sabah, “Canan Kaftancıoğlu’nun Mahkemeyi Tehdit Ettiği Şiir Dosyada”, <https://www.sabah.com.tr/gundem/2019/09/06/canan-kaftancioglundun-mahkemeyi-tehdit-ettigi-siir-dosyada>, 06.09.2019
- Yeni Akit, “Adalet Karar verdi! Peki Canan Kaftancıoğlu neden tutuklanmadı?” <https://www.yeniakit.com.tr/haber/adalet-karar-verdi-peki-canan-kaftancioglu-neden-tutuklanmadi-919133.html>, 06.09.2019
- BBC, “Canan Kaftancıoğlu’na siyasi yasak getirilmesi ne anlama geliyor?”, <https://www.bbc.com/turkce/haberler-turkiye-61427019>, 12.05.2022.
- Cumhuriyet Gazetesi, “Canan Kaftancıoğlu 'siyasi yasak' sonrası konuştu: 'Siyasi intikam alınmaktadır’”, <https://www.cumhuriyet.com.tr/siyaset/canan-kaftancioglu-siyasi-yasak-sonrasi-konustu-siyasi-intikam-alinmaktadir-1961083>, 23.07.2022
- Gazete Duvar, “Tartışmalı davaların hakimi Akın Gürlek, bakan yardımcılığına atandı”, <https://www.gazeteduvar.com.tr/tartismali-davalarin-hakimi-akin-gurlek-bakan-yardimciligina-atandi-haber-1567442>, 02.06.2022.

c. Academic Sources

- Yaman Akdeniz & Kerem Altıparmak, “TCK 299: Olmayan Hükmün Gazabı mı?”, *Güncel Hukuk*, Ekim 2015, no 10-142, 42-44