



İFADE ÖZGÜRLÜĞÜ DERNEĞİ
TRIAL MONITORING REPORT
THE CASE OF CEM ŞİMŞEK
Article 299 of the Turkish Criminal Code

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 Türkiye. In this report, İFÖD based its observations on standards set out by the European Court of Human Rights (“ECHR”) case law regarding the right to fair trial and right to freedom of expression and press as protected by articles 6 and 10 of the European Convention on Human Rights (“Convention”).
2. This monitoring report is based on the developments regarding the criminal case of insulting the president brought against Cem Şimşek, the editor-in-chief of Evrensel Newspaper, due to some cartoons he published. The developments regarding the background of the case are as follows:
3. The policy followed by Türkiye in the face of the civil war in Syria, which started in 2011, has been extensively discussed in Türkiye and the World Press. During the civil war in Syria, crimes against humanity were committed by the terrorist organization called the Islamic State of Iraq and the Levant (“ISIS”) and many people lost their lives due to these crimes. In 2015, European countries criticized the Turkish Government’s policy in the face of the increasing ISIS threat and found Türkiye’s fight against ISIS insufficient. In this context, some European states and the European press believed that Türkiye has made the fight against ISIS even more difficult, and they claimed that Türkiye is targeting the YPG, which is considered to be an extension of the PKK terrorist organization, rather than fighting against ISIS.¹ The German Government and the German press of the time also harshly criticized Türkiye.² The main subjects of the cartoons published in magazines and newspapers on the axis of the discussions reflected in the German press were the statements of President Erdogan, the air strikes carried out by Türkiye and the reaction of Germany’s politics.
4. On 01.08.2015, Cem Şimşek, the editor-in-chief of the online news website Evrensel, translated the cartoons published in the German media on President Erdoğan’s policies against ISIS and YPG into Turkish and published them. In the news published on the Evrensel Internet News website with the title “German cartoonists drew Erdogan badly”, some cartoons published in German magazines and newspapers are included, their illustrators were introduced and the speech bubbles in the cartoons were translated into Turkish.

¹ For a historical explanation of the relations between Turkey, YPG and ISIS, see BBC News, “Türkiye v Syria’s Kurds v Islamic State”, 23.08.2016, <https://www.bbc.com/news/world-middle-east-33690060>.

² For Germany’s statements on Turkey’s fight against ISIS, see DW Türkiye, “Türkiye’s reaction to Minister Leyen”, 26.07.2015, <https://www.dw.com/tr/bakan-leyene-t%C3%BCrkiye-tepkisi/a-18607556>, DW Türkiye, “Germany worried about Türkiye”, 02.08.2015, <https://www.dw.com/tr/almanyada-t%C3%BCrkiye-endi%C5%9Fesi/a-18622866>.

5. President Recep Tayyip Erdoğan, with his petition dated 10.07.2018, demanded that Cem Şimşek be punished for the crime of Insulting the President, under Article 299 of the Turkish Criminal Code (“TCC”). In the petition, it was claimed that the articles and cartoons published under the heading "German cartoonists drew Erdoğan badly" constituted an insult to the President.
6. Istanbul Bakırköy Public Prosecutor's Office filed an indictment on 08.05.2019 against Cem Şimşek, for the above-mentioned publication. The indictment issued by the public prosecutor was accepted by Bakırköy 27th Criminal Court of First Instance and registered the case as file number 2020/125. The trial was completed in the six-session, the last one was held on 08.07.2021. Bakırköy 27th Criminal Court of First Instance sentenced Cem Şimşek to 11 months and 20 days imprisonment and suspended the sentence. The defendant Cem Şimşek appealed against his conviction. The 3rd Criminal Chamber of the Istanbul Regional Court of Appeal examined the appeal application and rejected it on the merits within the scope of the file numbered 2021/966 E., 2022/63 K. Cem Şimşek once again filed a cassation appeal against the decision. As of the date of the monitoring report, the appeal is still pending before the Court of Cassation.

1. Background Information

7. İFÖD was monitoring the trial of Cem Şimşek before the Bakırköy 27th Criminal Court of First Instance with the file number 2020/125, following the acceptance of the indictment from the first hearing.
8. İFÖD's legal team followed all the hearings and made observations on the trial. However, due to the Covid-19 global epidemic as defined by the World Health Organization, and the measures taken in this respect, İFÖD's legal team could not physically attend the hearings. For monitoring the trial, İFÖD's legal team communicated with the defendants' lawyers, learned their opinion and collected the case documents.

2. Investigation Stage and Indictment

9. The investigation began with President Erdoğan's criminal petition on 10.07.2018 and President Erdoğan claimed that journalist Cem Şimşek, the editor-in-chief of the Evrensel Internet News website, committed the crime stipulated in Article 299 of the Turkish Criminal Code by publishing the impugned caricatures on the website of the Evrensel.
10. The Public Prosecutor initiated an investigation against journalist Cem Şimşek. In his statement taken by the public prosecutor, Cem Şimşek denied the accusation and stated that *"the impugned caricatures were published in Evrensel Newspaper on August 1, 2015. The names of the newspapers and magazines in which the caricatures were originally published, were cited in the article. The identities of the illustrators are also known. Thus, I do not have any criminal liability. The purpose of the caricatures was criticism, and they should be considered within the limits of freedom of the press. There are numerous sample decisions delivered by the Court of Cassation and ECHR similar to the case at hand."*
11. Prosecution for the offence of Insulting the President regulated in Article 299 of the Turkish Criminal Code is subject to the permission of the Ministry of Justice. The Public Prosecutor, therefore, sent a summary to the Ministry of Justice requesting consent to prosecute. As it is understood from the indictment, on 11.03.2019, the Ministry of Justice gave its consent for the prosecution.

12. Following the consent of the prosecution, the Public Prosecutor prepared an indictment dated 08.05.2019. In the indictment, the applicant's statement was included along with the Turkish translation of eight cartoons in the news titled "*German cartoonists drew Erdoğan badly*". The Public Prosecutor, without any further evaluation, stated that "*It is understood from the entire investigation that the suspect committed the crime of insulting the President*" and requested the journalist Cem Şimşek to be sentenced for insulting the President as stipulated in Article 299 of the Turkish Criminal Code.

3. Prosecution Stage

a) 1st Hearing Dated 05.12.2019

13. The indictment was accepted at the first hearing of the case. The court called the defendant Cem Şimşek to be present at the next hearing. It was decided to hold the second hearing on 06.07.2020.

b) 2nd Hearing Dated 06.07.2020

14. The defendant Cem Şimşek did not attend the hearing due to being out of the city. The defence counsel was present at the hearing. The defence counsel stated that his client had an excuse and could be present at the next hearing.

15. The Court accepted the excuse and gave the defendant time to be present at the next hearing. The next hearing of the case has been postponed to 27.10.2020.

c) 3rd Hearing Dated 27.10.2020

16. Due to the Covid-19 pandemic, the Court opened an ex officio hearing and decided to postpone the hearing on 19.01.2021.

d) 4th Hearing Dated 19.01.2021

17. The defendant Cem Şimşek and his defence counsel attended the fourth hearing of the trial. The interrogation of the accused was carried out within the scope of the hearing.

18. In his defence, the defendant, emphasizing the time gap between the publication of the news in 2015 and the commencement of prosecution against him in 2019 claimed that there was an intention to fabricate a crime. The defendant explained the political background in which the news was published. According to the defendant, at the time of the publication of the news, members of the ISIS terrorist organization made statements claiming that they are easily crossing the borders and, at the time, it was a state policy. The defendant, both as the editor-in-chief of www.evrensel.net and personally, stated that he could not be held responsible for cartoons drawn by others. The defendant also claimed that if he is to be prosecuted for being the editor-in-chief of www.evrensel.net, no investigation had been initiated against him within the four months that had elapsed following the publication of the news within the scope of Article 26 of the Press Law No. 5187 and therefore the statute of limitations had expired.³ In terms of being held personally responsible for the cartoons,

³ **Trial Periods**

Article 26- It is essential that cases of crimes entailing the use of printed matter or other crimes mentioned in this law should be opened within a period of two months for daily periodicals and six months for other printed matters.

the defendant repeated that he did not illustrate the caricatures subject to the case and stated that he did not even share the cartoons on his personal social media accounts. According to the defendant, the objective elements of crime did not occur about the content of the impugned news. The defendant also stated that www.evrensel.net was not the first website in Türkiye which published the impugned caricatures and that they were also published on other websites. Added that the article included a direct reference to the other websites. The defendant stated that he did not accept the accusation and requested his acquittal. The defendant refused to accept the court's decision to suspend the sentence in case the court decides to convict him of the alleged crime.

19. The defendant's counsel took the floor after the defendant, and he stated that they had submitted their written defence and repeated that the case was filed after the four-month statute of limitations stipulated in the Press Law. The defence counsel also reminded that the caricatures subject to the case were sent to the Bakırköy Chief Public Prosecutor's Office for the first time in 2015, but that no lawsuit was filed against the accused at that time and stated that the investigation within the scope of the case before the court was initiated upon the complaint of President Erdoğan. The defendant's counsel emphasized that politicians should be more tolerant of criticism, as stated in the decisions of the Court of Cassation and advocated that the news subject to the case is within the scope of freedom of the press and is like news reporting. The defence counsel requested acquittal for his client.
20. The Public Prosecutor requested time to present his opinion on the merits. The Court decided to refer the file to the prosecution for a closing statement. The next hearing of the case was scheduled for 15.04.2021.

e) 5th Hearing Dated 15.04.2021

21. Only the defence counsel attended the fifth hearing of the trial.
22. During the hearing, the Public Prosecutor presented his opinion as to the accusations. After repeating how President Erdoğan was depicted in the caricatures, the Public Prosecutor stated that *“the defendant shared these caricatures on www.evrensel.net, and the post depicting the President as a terrorist dressed in black in the caricatures would constitute the crime of Insulting the President; besides considering that the broadcast was made on the internet, the law No. 5187 cannot be applied in terms of the defendant's action; so the investigation and prosecution in this case would be carried out in accordance with the general provisions; taking into the account the complaint petition within the scope of the file, n screenshots, statements of the accused during investigation and prosecution, expert translation report and other investigation documents, it has been established that the offense of Insulting the President stipulated in Article 299 of the Turkish Criminal Code was committed, the defendant to be punished in accordance with Article 299/2 since the offence was committed publicly,”* In return, the defence counsel requested time to present their defences against the prosecutor's opinion.

This period begins with the delivery of the printed matter to the Office of the State Chief Prosecutor. If the material is not submitted, the beginning date of the above-mentioned periods is the date when the Office of the State Chief Prosecutor ascertains the action which constitutes the crime. However, these periods cannot exceed the periods stipulated by Article 102 of the Turkish Criminal Code.

23. Under the defence counsel's request, the Court granted the time until the next hearing to submit a written statement against the opinion. The next hearing of the case has been postponed to 08.07.2021.

f) 6th Hearing Dated 08.07.2021

24. The defence counsel and the counsel of the participant attended the sixth hearing of the case. The defence counsel submitted their written defence against the opinion. The defence counsel stated that the news was within the scope of freedom of the press. Added that in the article, the caricatures illustrated by German artists were published. Considering the established case law of the ECHR, it cannot be claimed that the objective elements of the crime have occurred in the case at hand. The participant's counsel took the floor and stated that their complaints are remaining still and that they request the defendant to be sentenced.
25. In the sixth hearing, the court convicted the defendant and sentenced him to 11 months and 20 days of imprisonment because the defendant publicly committed the offence of insulting the President and the Court decided to suspend the sentence.

4. Decision and Appeal Procedure

26. On 08.07.2021, Bakırköy 27th Criminal Court of First Instance decided to convict the defendant by the opinion of the Public Prosecutor. The court ruled that the offence of insulting the President aims to protect not only the personality of the President but also the political structure of the state. The court ruled that the crime was committed against the dignity of the state and that the act does not have to be connected with the President's duty arising from the law. In addition, according to the Court, the motive behind the act is not important for the offence of insulting the President.
27. The court assessed the concrete case following its principal statements regarding Article 299 of the Turkish Criminal Code. The Court explaining the Turkish translation of the expressions used in the impugned caricatures stated that by sharing these caricatures, the defendant caused damage to *"the honour and dignity of the participant"* and therefore, the legal value protected in Article 125 of the Turkish Criminal Code has been violated by the defendant. The court also stated that *"in the case at hand, the caricatures were published on the Internet and the element of publicity has occurred"*. In this regard, the court increased the sentence to 11 months and 20 days of imprisonment and suspended the sentence under Article 51 of the TCC. The defendant was subjected to one year of judicial control. Since the participant was represented by a counsel, the defendant was sentenced to pay an attorney fee of 4080 TL to the participant.
28. The defendant's counsel appealed against the judgment. 3rd Criminal Chamber of the Istanbul Regional Court of Justice dismissed the appeal on the merits with its decision number 2021/966 E., 2022/63 K. Istanbul Regional Court's 3rd Criminal Chamber stated that *"There is no contradiction to the law both on procedural and substantial grounds. There is no deficiency in the evidence. The Court properly evaluated the evidence. The characterization of the impugned act was proper and it complies with the law. Thus, the defences put forward by the defence counsel were not deemed appropriate..."*

5. In terms of the Reasoning of Judgement

29. One of the elements of the right to a fair trial, which is guaranteed by Article 36 of the Constitution of the Republic of Türkiye (“**Constitution**”) is the right to a reasoned decision.⁴ In the third paragraph of Article 141 of the Constitution, it is stated that all kinds of decisions of all courts should be written with justification, and the courts are obliged to write their decisions with justification.⁵ Exactly what elements should be included in a decision depends on the nature and circumstances of the case. If the claims and defences clearly put forward during the trial are decisive in the outcome of the case, these procedural and substantive issues that are directly related to the case should be answered by the courts with a reasonable justification.⁶ Otherwise leaving unanswered claims that have an effect on the outcome of the case will result in a violation of the right to a reasoned decision.⁷
30. On the other hand, *as the ECHR stated in the Cumhuriyet Foundation v. Turkey judgment*⁸ the obligation to make a reasoned decision has special importance when limiting freedom of expression and in this context, it should be possible to find out the reasons underlying the restriction of the freedom of expression or refusal of the objection to the restriction. In this way, the right to object will be used effectively and thus, arbitrary interference with freedom of expression will be prevented.⁹ In this context, the benefit to be protected, which outweighs the use of freedom of expression, should be included in the decision and evaluated based on concrete facts.¹⁰
31. In the case at hand, both the defendant and the defence counsel put forward their detailed opinions on the incident and the law to be applied to the incident before the court of the first instance and then at the court of appeal. However, Bakırköy 27th Criminal Court of First Instance did not make any assessment regarding the defences put forward by the accused in its reasoned decision. The decision of the Bakırköy 27th Criminal Court of First Instance summarized the content of the cartoons and made abstract evaluations in terms of the elements of the crime of insulting the President. Along with the abstract evaluations in question, the defences put forward by the accused were not applied to the concrete case. In the appeal filed against the conviction, the 3rd Penal Chamber of the Istanbul Regional Court of Justice similarly did not discuss any of the defences put forward by the accused. There is no concrete evaluation of the decision in question and the defences put forward by the accused were rejected because *"the reasons put forward by the defendant's counsel were not appropriate..."*
32. Therefore, when the aforementioned decisions are examined, it is seen that both the Bakırköy 27th Criminal Court of First Instance and the 3rd Penal Chamber of the Istanbul Regional Court of Justice did not make any concrete assessments. To sum up, Bakırköy 27th Criminal Court of First Instance did not make any assessment of the defences put forward by the accused at any stage of the proceedings as well as in its reasoned decision. Similarly, the defences of the accused were not evaluated by the 3rd Penal Chamber of the Istanbul Regional Court of Justice. For this reason, it does not seem possible to say that the

⁴ Abdullah Topçu, no. 2014/8868, 19.04.2017, para. 75.

⁵ Vedat Benli, no. 2013/307,16/5/2013; §30; Ahmet Sağlam, no. 2013/3351, 18/9/2013, para. 49

⁶ Sencer Başat and Others, para. 35.

⁷ Ruşen Melih Nebigil, no. 2014/2037, 17.07.2018, para. 24-29.

⁸ Cumhuriyet Vakfı v. Türkiye, no. 28255/07, 08.10.2013.

⁹ H v. Belgium , no. 8950/80, 30.11.1987, para. 30, 53, Georgiadis v. Greece no. 21522/93, 29/05/1997, para 41, 43, Sebahat Tuncel (2), no. 2014/1440, 26.02.2015, para. 58.

¹⁰ Mustafa Ali Balbay, no. 2012/1272, 4/12/2013, para. 114.

court decisions in question comply with the standards of the ECHR in terms of the right to a reasoned decision.

6. Article 299 of the TCC Regulating the Offense of “Insulting the President” in the Light of the European Court of Human Rights (“ECtHR”)’s Case Law

- 33.** The ECtHR has made evaluations about the crimes of insulting the President in many of its decisions.¹¹ The case-law of the ECtHR leaves no room for doubt and finds that the protection of heads of state by special criminal provisions is contrary to the Convention¹². Moreover, even in cases where the protection of the head of state may be considered by the law in view of the ECtHR the authorities with their dominant position should put a restriction to resort criminal law provisions as a legal remedy.¹³ On the other hand, heads of state have an obligation to tolerate severe criticism, as it is fixed by the established jurisprudence of the ECtHR.¹⁴ As will be explained further below in this context, there are many violation decisions against Turkey.¹⁵
- 34.** The ECtHR recently determined that the freedom of expression of the applicant, who was convicted of insulting the President, was violated in the Vedat Şorli v. Turkey judgment dated 19.10.2021. In its judgment, the ECtHR stated that the violation stemmed from Article 299 of the Turkish Criminal Code and its application. In the Court's view, the special protection of the President by a special law was incompatible with the spirit of the Convention and the benefit of protecting the personal rights of the President does not justify the granting of privileges or special protection in the face of statements directed at that person. Therefore, since the cause of the problem and violation is the wording and implementation of Article 299 of the Turkish Criminal Code, Article 46 of the Convention requires the relevant provision to be put in line with the Convention standards.¹⁶ Although the Government requested that the case be referred to the Grand Chamber, on 28.02.2022, the Panel rejected the Government’s request and the judgment became final. In the *Vedat Şorli* judgment, the ECtHR stated, by referring to Article 46 of the Convention, that the violation stemmed directly from Article 299 of the Turkish Criminal Code. According to the Court, the appropriate solution to remedy the violation was to harmonize this provision which gives a privilege to the President, with the Convention.
- 35.** In the case at hand, Bakırköy 27th Criminal Court of First Instance convicted Cem Şimşek, on 08.07.2021. In this regard, Cem Şimşek was convicted three months prior to ECtHR’s *Vedat Şorli* judgment dated 19.10.2021 and seven months prior to the date the judgment became final on 28.02.2022. Although the Bakırköy 27th Criminal Court of First Instance

¹¹ For the established case-law of the ECtHR in regards to the crime of insulting heads of state, see *Colombani and Others v. France* (no. 11798/85, 23/4/1992), *Eon v. France* (no. 26118/10, 14.03.2013), *Otegi Mondragon v. Spain*, (no. 2034/07, 15/03/2011), *Stern Taulats and Roura Capellera v. Spain* (no. 51168/15 51186/15, 13.03.2018).

¹² *Colombani v. France*, no. 51279/99, 25.6.2002, §§ 68-69; *Otegi Mondragon v. Spain*, no. 2034/07, 15.03.2011, §§ 55, 56; *Artun and Güvener v. Türkiye*, no. 75510/01, 26.6.2007, § 31; *Önal v. Türkiye (2)*, no. 44982/07, 02.07.2019, § 35; *Vedat Şorli v. Türkiye*, no. 42048/19, 19.10.2021, § 54.

¹³ *Otegi Mondragon*, § 58; *Dickinson v. Türkiye*, no. 25200/11, 02.02.2021, § 56.

¹⁴ *Lingens v. Avusturya*, no. 9815/82, 08.07.1986, *Eon v. France*, no. 26118/10, 14.03.2013, *Vedat Şorli v. Türkiye*, no. 42048/19, 19.10.2021.

¹⁵ For ECtHR judgments on the relevant provisions of the Turkish Criminal Code criminalizing insulting the President of the Republic, see *Artun and Güvener v. Türkiye*, no. 75510/01, 26.06.2007, *Önal v. Türkiye*, (no. 2), no. 44982/07, 02.07.2019, *Vedat Şorli v. Türkiye*, no. 42048/19, 19.10.2021.

¹⁶ *Vedat Şorli v. Türkiye*, no. 42048/19, 19.10.2021, § 54.

did not have the opportunity to follow similar reasoning as European Court's *Vedat Şorli v. Türkiye* judgment, it is not the first time the ECtHR ruled on Article 299 of the Turkish Criminal Code or, in general, the offence stipulating insult to the President. The ECtHR ruled violations against Türkiye on numerous occasions due to the application of the provision criminalizing insult to the President.

- 36.** In this respect, in the *Artun and Güvener* judgment¹⁷, the ECtHR decided on a sentence relying on article 158 of former Law no. 765 on the Criminal Code that stipulated the offence of insulting the President of the Republic. Because the Head of State is in a position of impartiality and represents the independence of the State, the ECtHR ruled that protecting the head of state with a special provision in a way that grants him a privilege should not be allowed. For the Court, no matter if he is impartial or not, this would be against the spirit of the Convention. In *Önal v. Türkiye (2)*,¹⁸ the ECtHR stated that the severe criticism against President Süleyman Demirel in a book published by the applicant was targeting the President as a person and not as the institution itself. In this regard, according to the Court, compared to ordinary citizens, the standards set for politicians to be open to criticism also apply to the President.¹⁹ In the judgment, the ECtHR left no room for doubt for any criminal law provision foreseeing a sentence for an insult to the President. The Court, while examining the proportionality of the interference, stated that the nature and severity of a sanction should be considered before any decision of conviction. For the Court, even in a case where the applicant was sentenced to a fine at the lowest degree and symbolic level, it will not legitimize the interference with the applicant's freedom of expression if the sentence has an incriminating nature.²⁰
- 37.** As will be seen, the case law of the ECtHR has consistently found it contrary to the Convention to provide special protection for heads of state with a special criminal law provision.²¹ Even when protection granted to heads of state may be justified, the ECtHR pointed out that heads of state have a dominant political position, therefore, the authorities should have limited opportunity to resort to the criminal law provisions.²²
- 38.** On the other hand, other bodies of the Council of Europe have previously made similar recommendations. The Committee of Ministers has called on the Turkish authorities to repeal Article 299 of the Turkish Criminal Code as part of the supervision of the execution of the judgment in the *Artun and Güvener* Group of cases.²³ Likewise, the European Commission for Democracy through Law (Venice Commission) stated in its report of March 2016 that the only solution to prevent further violations of Article 10 of the ECHR is to abolish Article 299 of the Turkish Criminal Code.²⁴
- 39.** As can be seen, Article 299 of the Turkish Criminal Code conflicts with international human rights conventions to which Türkiye is a party and the provision is implicitly

¹⁷ *Artun and Güvener v. Türkiye* (no. 75510/01, 26.06.2007).

¹⁸ *Önal v. Türkiye (2)* (no. 44982/07, 02.07.2019).

¹⁹ *Ibid* para. 36.

²⁰ *Ibid* para. 41-42.

²¹ *Colombani v. France*, no: 51279/99, 25.6.2002, para. 68-69; *Otegi Mondragon v. Spain*, no. 2034/07, 15.03.2011, para. 55, 56; *Artun and Güvener v. Türkiye*, no. 75510/01, 26.6.2007, para. 31; *Önal v. Türkiye (2)*, no. 44982/07, 02.07.2019, para. 35; *Vedat Şorli v. Türkiye*, no. 42048/19, 19.10.2021, para. 54.

²² *Otegi Mondragon*, § 58; *Dickinson v. Türkiye*, no. 25200/11, 02.02.2021, para. 56.

²³ For the interim decision of the Committee of Ministers of the Council of Europe at its 1406th meeting on 09.06.2021, see CM/ResDH (2021)110.

²⁴ For the relevant opinion of the European Commission for Democracy through Law, see Opinion on Articles 216, 299, 301 and 314 of the Turkish Criminal Code, 15.03.2016, CDL-AD (2016)002.

repealed by Article 90 of the Constitution. According to Article 90 of the Constitution, "In case of disputes arising out of differences between international treaties on fundamental rights and freedoms duly put into force and laws on the same subject, the provisions of international treaties shall prevail." According to the Constitutional Court; "Under the fifth paragraph of Article 90 of the Constitution, treaties are part of our legal system and have the feature of being implemented like laws. According to the same paragraph, in case of a conflict in practice between a provision of law and the provisions of a convention on fundamental rights and freedoms, the provisions of the convention shall prevail. This rule is a rule of implied repeal and eliminates the applicability of the provisions of the law that conflict with the provisions of the treaty on fundamental rights and freedoms".²⁵

40. Therefore, it is not possible to take a legal provision contrary to the conventions on fundamental rights and freedoms as a basis for punishment. Otherwise, the principle of legality of crimes and punishments would be violated. In this context, the Bakırköy 27th Criminal Court of First Instance disregarded the evaluations of the ECtHR and many bodies of the Council of Europe regarding Article 299 of the Turkish Criminal Code and convicted journalist Cem Şimşek. Similarly, the Bakırköy 27th Criminal Court of First Instance has not evaluated in terms of any international standards regarding the offence of insulting the Heads of States established by the ECtHR in cases such as *Colombani and others v. France*, *Eon v. France*, *Otegi Mondragon v. Spain*, *Stern Taulats and Roura Capellera v. Spain*.
41. In light of these explanations, Article 90 of the Constitution requires that Article 299 of the Turkish Criminal Code, which has been found to be in contradiction with the Convention by the ECtHR, should not be applied. Trial and conviction based on the said article violate Article 90 of the Constitution and the principle of no crime and punishment without law. On the other hand, the Bakırköy 27th Criminal Court of First Instance did not take into account the assessments made by the ECtHR and other bodies of the Council of Europe on the offence of insulting the President and thus conducted an incomplete examination in its conviction decision.

7. Considerations in Terms of Freedom of Expression

42. In cases where the freedom of the press and personal rights come into conflict, the legal order must strike a reasonable balance between the two conflicting values. In cases where personal rights protected under Article 17 of the Constitution and freedom of expression and freedom of the press protected under Articles 26 and 28 of the Constitution respectively conflict, a fair assessment must be made between the conflicting rights.²⁶
43. In this framework, by the case-law of the Constitutional Court and the ECtHR, the relevant criteria to be taken into account when examining freedom of expression vis-à-vis the right to respect privacy: a) the contribution of the writing or expression to a debate of general public interest, b) the level of recognition of the person targeted and the purpose of the writing, c) the conduct of the person concerned prior to publication, d) the method of

²⁵ For the relevant decisions of the Constitutional Court, see *Sevim Akat Ekşi*, no. 2013/2187, 19.12.2013, para. 45; *Neşe Aslanbay Akbıyık*, no. 2014/5836, 16.04.2015, para. 45; *Gülsim Genç*, no. 2013/4439, 06.03.2014, para. 41.

²⁶ *Von Hannover v. Germany(no.2)*, no. 40660/08 and 60641/08, 7/2/2012, para. 99.

obtaining the information and its accuracy, e) the content, form and consequences of the publication and f) the severity of the sanction.²⁷

44. First, the complainant President served as Prime Minister of Türkiye for 11 years between 2003 and 2014, and he was the first President elected directly by popular vote in 2014. Although President Erdoğan resigned from his party, the Justice and Development Party (“AKP”), after he was elected, he became the AKP Chairman again with the constitutional amendments adopted as a result of the 2017 Referendum. There is no doubt that President Erdoğan is an experienced politician who has wielded public power at the highest level in the last 20 years.
45. According to the case-law of the ECtHR, it is contrary to the spirit and Article 10 of the Convention in principle to provide politicians with broader protection through special provisions against insult or defamation of politicians or by imposing harsher penalties, especially if committed through the press.²⁸ In particular, such preferential protection cannot be afforded to heads of state, prime ministers, ministers or other high-level politicians.²⁹ This is because the state's interest in protecting the reputation of its Head of State could not justify conferring on the latter a privilege or special protection vis-à-vis the right to inform and express opinions to his subject.³⁰ Therefore, the President of the Republic must have a high tolerance limit for news reports about his own self and criticism directed at their own self.³¹
46. On the other hand, the case-law of the ECtHR considers expressions such as “*despicable opportunist*”, “*immoral*” and “*dishonourable*”³²; “*idiot*”³³; “*owns a fascist background*”³⁴, “*f*ck off idiot*”³⁵, etc. used against politicians, especially President and Heads of State as harsh criticism of a political nature. In *Önal/ Türkiye (2)*, the Court stated that the applicant's accusations against then President Süleyman Demirel of “*drug trafficking, running the mafia within the state, taking advantage of the war against the Kurds, trying to destroy the former President Turgut Özal and legitimizing the murders carried out by the state*” these accusations were serious but held that these statements were protected under the Convention. In the *Vedat Şorli v. Türkiye* judgment, the Court found the imposition of a fine for sharing a cartoon and a collage of pictures with highly critical content on social media to be a violation of the Convention.
47. Journalist Cem Şimşek's evrensel.net article, which consists of publishing cartoons drawn by world-famous cartoonists and published especially in the German press, seems to be a mere transfer of the criticisms made against President Erdoğan in the world press to the readers. In this context, it should be taken into account that the public would benefit from knowing how President Erdoğan's foreign policy is criticized at the international level.

²⁷ For the balancing test applied by the ECHR in cases where personal rights and the right to freedom of the press and expression are in conflict, see *Axel Springer AG v. Germany*, no. 39954/08, 7/2/2012; *Von Hannover v. Germany (no. 2)*, no. 40660/08 and 60641/08, para. 108, for Constitutional Court judgments to this effect see *İlhan Cihaner (2)*, no. 2013/5574, 30/6/2014, para. 74; *Kadir Sağdıç*, no. 2013/6617, 8/4/2015, para. 36.

²⁸ *Artun ve Güvener v. Türkiye*, para. 31; *Önal v. Türkiye (no. 2)*, para. 40; *Otegi Mondragon v. Spain*, para. 55; *Stern Taulats and Roura Capellera v. Spain, Vedat Şorli v. Türkiye*, para. 43.

²⁹ *Tuşalp v. Türkiye*, no. 32131/08, 21.2.2012, para. 48.

³⁰ *Vedat Şorli v. Türkiye*, para. 43.

³¹ *Lingens v. Austria*, para. 42; *von Hannover v. Germany*, no. 59320/00, 03.06.2004, para. 64.

³² *Lingens v. Austria*, para. 42.

³³ *Oberschlick v. Austria*, no. 11662/85, 23.05.1991.

³⁴ *Feldek v. Slovakia*, no. 29032/95, 12.07.2001, para. 86, 90.

³⁵ *Eon v. Fransa*, no. 26118/10, 14.03.2013, para. 59.

48. It is observed that the Bakırköy 27th Criminal Court of First Instance did not make any assessment in its reasoned decision as to why the expressions in the cartoons could not be accepted as criticism and in what way they "*offended the honour and dignity of the participant*" and it did not conduct a conflicting rights analysis by the criteria developed in the case-law of the ECtHR and the Constitutional Court. In this respect, it is not possible to say that the Bakırköy 27th Criminal Court of First Instance made an adequate assessment in its reasoned decision.

a) Evaluation of Cartoons as a Method of Political Criticism

49. Journalist Cem Şimşek reported the cartoons of German cartoonists containing humour and criticism on www.evrensel.net. The German cartoonists criticized Türkiye's highest political figure and his policies in the face of the actions of the ISIS terrorist organization. As is well known, caricature is a form of expression and can be used as a method of political satire. In this respect, the cartoons in Cem Şimşek's article are also a form of critical expression. As established by ECtHR's case law, the form of criticism is protected along with the content of the expression.³⁶ The ECHR has defined satire as an artistic expression and a form of social criticism that presents the underlying reality in an exaggerated and distorted form, and naturally aims to provoke and incite.³⁷ Within this framework, it has been determined that "*satirical writings, which are a type of critical writing, [are] protected by freedom of expression regardless of the subjective evaluations of individuals, even if they are considered "worthless" or "useless" by others.*"³⁸ Therefore, while satirical expressions should be evaluated carefully if a politician is criticized in a satirical manner, the politician should be much more tolerant.³⁹

50. As can be seen, the fact that satirical expressions and caricatures present reality in an exaggerated and distorted manner and aim to provoke and incite has been accepted as a situation arising from the nature of these forms of criticism. It has been determined that these forms of expression should be met with much more tolerance, especially when directed at politicians. In other words, the form of expression is protected along with the content as a part of communication.⁴⁰ Therefore, while satirical expressions should be carefully evaluated, the scope of the restrictions on freedom of expression in terms of such expressions and discussions should be interpreted very narrowly⁴¹ and very strong reasons are required to limit expressions on these issues.⁴² This interpretation of the ECHR is a particular manifestation of the ECtHR's finding, which it has consistently stated since 1986, that the limits of admissibility for criticism of politicians are much wider than for criticism of private individuals.⁴³ As a method of expression, cartoons aim to make the reader laugh by exaggerating a situation and showing it differently. In this respect, the cartoons subject to the news report should also be evaluated within the scope of the special conditions inherent to the art of caricature.

³⁶ *Tuşalp v. Türkiye*, para. 48.

³⁷ *Grebneva and Alisimchik v. Russia*, no. 8918/05, 22.11.2016, para. 59.

³⁸ Constitutional Court *Önder Balıkçı, B. No: 2014/6009, 15.02.2017*, para. 40.

³⁹ *Alves De Silva v. Portugal*, no. 41665/07, 20.10.2009, para. 27,28; *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, 25.02.2007, para.33.

⁴⁰ *Tuşalp v. Türkiye*, para. 48.

⁴¹ *Sürek v. Türkiye (1)* no. 26682/95, 08.07.1999, para 61.

⁴² *Taranenko v. Russia*, no. 19554/05, 13.10.2014, para. 77.

⁴³ *Lingens v. Austria*, no. 9815/82, 08.07.1986, para. 42.

51. When the news article subject to the lawsuit is examined, it is seen that the drawings in question are included by stating how President Erdoğan is handled in the drawings of cartoonists around the world. This should be evaluated within the scope of freedom of expression as established by the case law of the ECtHR. It is seen that the Bakırköy 27th Criminal Court of First Instance did not take into account that the cartoons are a form of criticism and did not make an evaluation in terms of the unique artistic elements of this form of criticism.

b) Principle of Individual Criminal Responsibility

52. Turkish Criminal Law has accepted the principle of individual criminal responsibility in line with universal legal principles. Indeed, according to paragraph 1 of Article 20 of the Turkish Criminal Code, "*Criminal responsibility is personal. No one can be held responsible for the actions of another*". According to Article 21 of the same law, "*The occurrence of a crime depends on the existence of intent. Intent is the knowing and willful realization of the elements in the legal definition of the crime*".

53. Article 4 of Law No. 5651 on the Internet Law regulates the responsibility of content providers. According to paragraph 2 of the said provision, "*The content provider shall not be responsible for someone else's content to which it provides a link. However, if it is clear from the format of the presentation that the content in question it links to is embraced and intended to be reachable, the content provider shall be responsible according to the general provisions.*" Therefore, for a person to be held liable for someone else's content, that person must adopt the content in question.

54. When journalist Cem Şimşek's news article is analyzed, it is seen that he does not make any value judgment about President Erdoğan. It is understood that Cem Şimşek is not the person who drew the cartoons or published them for the first time. The accused journalist has compiled and reported on the cartoons of famous cartoonists on the actions and statements of President Recep Tayyip Erdoğan, which are closely related to the agenda of the world and Turkish public opinion. All of the cartoons in question were drawn by world-renowned cartoonists and published before Cem Şimşek's news. It can be said that the average Internet user can easily access these cartoons. In this context, it cannot be said that sharing the content created by other people does not mean "*adopting*" such content. On the other hand, it is observed that journalist Cem Şimşek did not include any statement in the news article indicating that he "*embraced*" the views of the people who drew these cartoons.

55. According to the case-law of the ECtHR, service providers or news websites cannot be held liable for articles and comments.⁴⁴ The Court also considered holding the transmitter liable as an excessive measure that would undermine the transmission of information over the Internet.⁴⁵

56. Therefore, it can be said that the criminal liability of journalist Cem Şimşek for reporting on cartoons drawn by others, which can be easily accessed on the Internet and transmitted to the Turkish public is an excessive measure within the framework of the case law of the ECtHR and contradicts the principle of the individual criminal responsibility. The cartoons in the news article became an agenda in the German press. Cem Şimşek conveyed these

⁴⁴ *Magyar Tartalomszolgáltatók Egyesülete v. Hungary*, no. 22947/13, 02.02.2016, para.79; *Tamiz v. United Kingdom*, no. 3877/14, 19.09.2017, para. 83-84.

⁴⁵ *Pihl v. Sweden*, no. 74742/14, 07.02.2017, para.31.

cartoons to the Turkish public. In this context, the absence of an evaluation of journalist Cem Şimşek's responsibility in the court decision in terms of the principle of individual criminal responsibility indicates that there is an incomplete examination.

c) In terms of the Impact of the News on President Erdoğan

57. To be able to talk about an attack on personal reputation and the occurrence of the crime of defamation, the alleged attack on personal rights must reach a certain level of seriousness, intensity, and effectiveness.⁴⁶
58. In its judgment on the *Mustafa Tepeli Application*⁴⁷, the Constitutional Court explicitly stated that to be considered an insult, the expression must have a serious impact on rights and freedoms, even if the expression contains accusatory and insinuating expressions against the person claiming defamation, and more importantly, the Court sought sufficient evidence to prove that the person claiming defamation had suffered significant negative consequences. Otherwise, the allegedly defamatory statement was considered to be an acceptable cost of living in a society and the initiation of public prosecution in such a case was not justified.⁴⁸
59. In the concrete case, the news article in which Cem Şimşek translated into Turkish the cartoons published in the German media on President Erdoğan's policies against ISIS and YPG, and presented them to the readers is dated 01.08.2015. President Recep Tayyip Erdoğan filed a complaint on 10.07.2018 and demanded that Cem Şimşek be punished for the offence of insulting the President as regulated in Article 299 of the Turkish Criminal Code.
60. As can be seen, there are approximately three years between the publication of the news and the complaint. In this context, it can be said that the news article has lost its relevance in nearly three years. It cannot be said that this news article had any negative impact on President Erdoğan's private or professional life. Indeed, President Erdoğan has not submitted any evidence to the file to the contrary. Therefore, it appears that no information has been submitted to the file to show that there has been damage to the prestige or reputation of the President. It is observed that Bakırköy 27th Criminal Court of First Instance has not conducted any examination on the effect the news article had on President Erdoğan three years after it was published.

d) Considerations of the Proceeding from the Perspective of the Chilling Effect

61. According to the case-law of the ECtHR, the opening of investigations and prosecutions for acts within the scope of freedom of expression and freedom of the press constitutes an interference with freedom of expression in itself. This is because the threat of investigation and prosecution of journalists may discourage members of the press from participating in debates on matters of public interest and may result in the press refraining from reporting on matters of public interest. This situation will cause the press to refrain from fulfilling its functions guaranteed by the freedom of expression and freedom of the press, thus causing

⁴⁶ Constitutional Court, *Kadir Sağdıç*, no. 2013/6617, 8/4/2015, para. 39; *İlhan Cihaner*, no. 2013/5574, 30/6/2014, para. 45, 56; ECtHR, *Erla Hlynisdottir v. Iceland (No. 3)*, no. 54145/10, 02.06.2010, para. 60, *Mater v. Türkiye*, no: 54997/08, 16.07.2013, para.52, *Axel Springer AG v. Germany*, no. 39954/08, 07.02.2012, para. 83.

⁴⁷ Constitutional Court *Mustafa Tepeli*, no. 2014/5831, 01.03.2017.

⁴⁸ *İbid.* para. 30-31.

a chilling effect. As a matter of fact, in many of its judgements, the ECtHR has ruled that the fear of sanctions related to the exercise of freedom of expression and press, which may discourage a person from making similar statements in the future has a chilling effect and has ruled that the right to freedom of expression and press was violated.⁴⁹

62. In the case at hand, the journalist Cem Şimşek was sentenced to 11 months and 20 days of imprisonment due to publishing an article where President Erdoğan was critically depicted by German caricaturists. Although the sentence was later suspended, five years have passed since the beginning of the investigation. Since the defence counsel appealed against the decision, the case is still pending before the Court of Cassation. Therefore, the journalist Cem Şimşek is still under the threat of conviction. Thus, no matter if the sentence was suspended or not, the prosecution itself constitutes an interference with the fundamental rights and freedoms of Cem Şimşek.

Conclusion

63. İFÖD examined the ongoing trial of Cem Şimşek, the editor-in-chief of the Internet news website Evrensel, for his article entitled "*German cartoonists drew Erdoğan badly*" on 01.08.2015, under Article 299 of the Turkish Criminal Code, which regulates the crime of insulting the President, in light of the criteria set by the Constitutional Court and the ECHR.
64. First, during the trial, both the Bakırköy 27th Criminal Court of First Instance and the 3rd Criminal Chamber of the Istanbul Regional Court of Justice, which examined the appeal against the verdict, did not examine the defences put forward by the defendant in a concrete manner. Therefore, as of the current stage of the trial, it has been observed that the defendant has not sufficiently and properly benefited from the right to a reasoned decision.
65. On the other hand, although article 299 of the Turkish Criminal Code was found to violate Article 10 of the Convention by the European Court of Human Rights and Article 90 of the Constitution requires that laws which contradict human rights treaties should not be applied, Bakırköy 27th Criminal Court of First Instance and the 3rd Criminal Chamber of the Istanbul Regional Court of Appeals continued to apply Article 299 of the Turkish Criminal Code. Article 90 of the Constitution stipulated that the offence in question was essentially tacitly abolished. Conviction of journalist Cem Şimşek by the first instance court, by disregarding international standards, the decision indicates that international standards have not been sufficiently taken into account at the local level.
66. When the cartoons in the news article subject to the conviction decision are examined, it is seen that President Erdoğan and his political preferences are criticized. As established by the judgments of the ECtHR, the President of the Republic, as an experienced politician who holds the highest level of public power, has an obligation to tolerate criticism. A cartoon, on the other hand, is a tool that allows criticism to be expressed. However, the relevant courts did not emphasize that the cartoons subject to the news were drawn for criticism nor that cartoons are a tool that allows criticism on political issues.
67. Another issue not considered by the local courts is that there is a public interest in learning about the criticisms made against President Erdoğan in the foreign press. In addition, it can be said that holding journalist Cem Şimşek responsible for the criticisms and expressions in the cartoons in question, even though he was not the illustrator of the cartoons,

⁴⁹ *Lombardo and Others v. Malta*, no., 24.04.20077333/06, para. 61, *Association Ekin v. France*, no. 39288/98, 18.01.2000, *Aktan v. Türkiye*, no. 20863/02, 23.09.2008, para. 27-28.

contradicts the principle of individual criminal responsibility. Because Cem Şimşek barely transferred the cartoons criticizing the President of the Republic published in the foreign press to the Turkish press and conveyed them to the public.

68. It is also observed that the court of the first instance and the regional court did not discuss the impact of the news article on President Erdoğan. Considering that the news article was published on 01.08.2015 and the investigation started with the complaint filed by President Erdoğan dated 10.07.2018, it has been observed that no assessment has been made as to how President Erdoğan has been affected by the news article in the three years that have passed since the publication of the news article.
69. As in the concrete case, the conviction of journalist Cem Şimşek for an act consisting of publicizing the works created by artists criticizing the President should also be examined in terms of the chilling effect. A conviction for a news article written solely to convey the criticisms made by others to the public may result in journalists refraining from writing news articles to convey criticisms to the public. This situation may also prevent journalists from fulfilling their journalistic duties, especially with the assumption that those who criticize may also face criminal proceedings. Therefore, it should be noted that the conviction decision of the Bakırköy 27th Criminal Court of First Instance and the 3rd Criminal Chamber of the Istanbul Regional Court may have a chilling effect on the defendant by causing the defendant, who is a journalist, to refrain from fulfilling his press duty.

References

a. Case-Law

i. European Court of Human Rights

- *Cumhuriyet Vakfı v. Türkiye*, no. 28255/07, 08.10.2013
- *H v. Belgium*, no. 8950/80, 30.11.1987
- *Colombani and Others v. France*, no. 11798/85, 23.04.1992
- *Eon v. France*, no. 26118/10, 14.03.2013
- *Otegi Mondragon v. Spain*, no. 2034/07, 15.03.2011.
- *Stern Taulats and Roura Capellera v. Spain*, no. 51168/15 51186/15, 13.03.2018.
- *Vedat Şorli v. Türkiye*, no. 42048/19, 19.10.2021.
- *Artun ve Güvener v. Türkiye*, no. 75510/01, 26.06.2007.
- *Önal v. Türkiye (no. 2)*, no. 44982/07, 02.07.2019.
- *Altuğ Taner Akçam v. Türkiye*, no. 27520/07, 25.10.2011.
- *Dilipak v. Türkiye*, no. 29680/05, 15.09.2015.
- *Tuşalp v. Türkiye*, no. 32131/08, 21.02.2012.
- *Sürek v. Türkiye (1)*, no. 26682/95, 08.07.1999.

- *Aktan v. Türkiye*, no. 20863/02, 23.09.2008.
- *Von Hannover v. Germany*, no. 59320/00, 03.06.2004.
- *Von Hannover v. Germany (no.2) [BD]*, 40660/08 and 60641/08, 07.02.2012.
- *Axel Springer AG v. Germany, [BD]*, no. 39954/08, 07.02.2012.
- *Lingens v. Austria*, no. 9815/82, 08.07.1986.
- *Lombardo and Others v. Malta*, no. 7333/06, 24.04.2007.
- *Association Ekin v. France*, no. 39288/98, 18.01.2000.
- *Dickinson v. Türkiye*, no. 25200/11, 02.02.2021.
- *Oberschlick v. Austria*, no. 11662/85, 23.05.1991.
- *Feldek v. Slovakia*, no. 29032/95, 12.07.2001.
- *Grebneva and Alisimchik v. Russia*, no. 8918/05, 22.11.2016.
- *Alves De Silva v. Portugal*, no. 41665/07, 20.10.2009.
- *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, 25.02.2007.
- *Taranenko v. Russia*, no. 19554/05, 13.10.2014.
- *Magyar Tartalomszolgáltatók Egyesülete v. Hungary*, no. 22947/13, 02.02.2016.
- *Tamiz v. United Kingdom*, no. 3877/14, 19.09.2017.
- *Pihl v. Sweden*, no. 74742/14, 07.02.2017.
- *Erla Hlynsdottir v. Iceland (No. 3)*, no. 54145/10, 02.06.2010.
- *Mater v. Türkiye*, no. 54997/08, 16.07.2013.

ii. Constitutional Court

- *Abdullah Topçu*, (no. 2014/8868, 19.04.2017)
- *Vedat Benli* (no. 2013/307,16.05.2013)
- *Ahmet Sağlam* (no. 2013/3351, 18.09.2013)
- *Ruşen Melih Nebigil* (no. 2014/2037, 17.07.2018)
- *Sebahat Tuncel (2)* (no. 2014/1440, 26.02.2015)
- *Mustafa Ali Balbay* (no. 2012/1272, 04.12.2013)
- *Sencer Başat ve diğerleri* (no. 2013/7800, 18.06.2014)
- *Sevim Akat Ekşi* (no. 2013/2187, 19.12.2013)
- *Neşe Aslanbay Akbıyık*, (no. 2014/5836, 16.04.2015)
- *Gülsim Genç*, (no. 2013/4439, 06.03.2014)
- *İlhan Cihaner (2)*, (no. 2013/5574, 30/6/2014)
- *Kadir Sağdıç*, (no. 2013/6617, 08.04.2015)



- *Önder Balıkçı*, (no. 2014/6009, 15.02.2017)
- *Mustafa Tepeli* (no. 2014/5831, 01.03.2017)

b. News

1. BBC News, “*Türkiye v Syria's Kurds v Islamic State*”, 23.08.2016, <https://www.bbc.com/news/world-middle-east-33690060>, Access Date: 12.09.2022.
2. DW Türkiye, “*Türkiye’s reaction to Minister Leyen*”, 26.07.2015, <https://www.dw.com/tr/bakan-leyene-t%C3%BCrkiye-tepkisi/a-18607556>, Access Date: 12.09.2022.
3. DW Türkiye, “*Germany worried about Türkiye*”, 02.08.2015, <https://www.dw.com/tr/almanyada-t%C3%BCrkiye-endi%C5%9Fesi/a-18622866>, Access Date: 12.09.2022.