

İFADE ÖZGÜRLÜĞÜ DERNEĞİ
TRIAL MONITORING REPORT
ELİF ŞAFAK

Article 35 & 70 of the Law on Intellectual and Artistic Works

I. Introduction

1. This trial monitoring report has been prepared by İfade Özgürlüğü Derneği (“İFÖD” – Freedom of Expression Association) a non-profit, non-governmental organization aiming to protect and promote freedoms of opinion and expression in Türkiye. İFÖD has based its Monitoring Report on the standards set out in the case law of the European Court of Human Rights (“ECHR”) regarding freedom of artistic expression, which is a specific aspect of the freedom of expression guaranteed by Articles 26 and 27 of the Constitution and Article 10 of the European Convention on Human Rights (“Convention”).
2. **Elif Şafak**, is a well-known author and academic in Türkiye and many other countries around the world. Şafak's books have been translated into many languages and she has received many prestigious literary awards. She has been named one of the "100 most important women worldwide" by the British Broadcasting Corporation (“BBC”) for her contributions to literature and the arts.
3. **İclal Mine Kırıkkanat**, is a writer and columnist, known and followed in Turkey. Kırıkkanat started her career in journalism as the French representative of Cumhuriyet newspaper and writes columns for Cumhuriyet newspaper. Kırıkkanat has also published many books. Published in 1990, Palace of Flies (Sinek Sarayı) is the author's first novel.
4. **Doğan Egmont Yapımcılık ve Yayıncılık A.Ş.**, (“Doğan Kitap”), has been operating since 1999. In addition to publishing works of Turkish literature, the Company also publishes works of world literature translated into Turkish.
5. The case monitored by İFÖD involves allegations that Elif Şafak's novel "Bit Palas" plagiarized "Sinek Sarayı," written by İclal Mine Kırıkkanat, thereby infringing Kırıkkanat's intellectual property rights. It is claimed that from page 60 onwards, "Bit Palas" copied the plot, setting, some characters, and writing style of "Sinek Sarayı".
6. Bit Palas is Elif Şafak's fourth book, published in 2002. The book was first published by Metis Publishing House and has been published by Doğan Kitap since 2009.
7. İclal Mine Kırıkkanat filed a lawsuit against Elif Şafak and Doğan Kitap, the publisher of the book, alleging plagiarism. The plaintiff claimed that the financial and moral rights of her work had been infringed and demanded material and moral damages under Articles 35 and 70 of the Law on Intellectual and Artistic Works (“FSEK”), as well as

the publication of the judgement in three of the five newspapers with the highest circulation. At the same time, the plaintiff requested an injunction ordering the confiscation of the copies of the book subject to the lawsuit that have been released, the prohibition of the release of those that have not been released, and the prohibition of the publication of new books.

8. The lawsuit observed by İFÖD is about the plaintiff's claims for pecuniary and non-pecuniary damages under Article 70 of the FSEK due to the allegation of plagiarism in violation of Article 35 of the FSEK regulating the freedom of quotation. In this Monitoring Report, firstly, the background of the case, the claims and answers of the parties at the petitions stage, the hearings stage and the reasoned judgement will be explained. In the last part of the report, the legal process explained will be evaluated in the light of the legal framework regarding the freedom of artistic expression guaranteed under Article 26 of the Constitution and Article 10 of the European Convention on Human Rights, and the case law of the Constitutional Court and the European Court of Human Rights.

II. Litigation Process

A. General Information

9. With this case monitoring report, İFÖD, as a non-governmental organization, wishes to draw attention to the interference with the freedom of artistic expression of authors in Türkiye under intellectual property legislation, using the example of the payment of compensation for alleged plagiarism.
10. İFÖD is concerned that restrictions on authors' publications and literary activities under intellectual property legislation may have damaging effects on freedom of artistic expression. In particular, the defamation of literary and artistic figures through baseless lawsuits are serious interferences with freedom of artistic expression and there is a risk that such lawsuits may be used to intimidate dissident artists. This report aims to examine the effects on freedom of expression of an author being ordered to pay compensation for alleged plagiarism within the framework of the issues to be considered in balancing intellectual property rights and freedom of artistic expression.
11. İFÖD legal team followed the petitions phase and the hearings of the proceedings before the Istanbul Anatolian 1st Civil Court of Intellectual and Industrial Rights against Elif Şafak under Articles 35 and 70 of the FSEK and made observations on the proceedings. The case lasted five hearings and at the end of the trial, it was decided that the defendant Elif Şafak's novel Bit Palas was plagiarised from the plaintiff Mine Kırıkkanat's book Sinek Sarayı. The judgement, which therefore, awarded pecuniary and non-pecuniary damages, was given open to appeal.
12. This report of the İFÖD relates to the proceedings before the Istanbul Anatolian 1st Civil Court for Intellectual and Industrial Rights and does not contain any observations and assessments regarding the appeal phase.

B. Petitions Phase

13. The plaintiff İclal Mine Kırıkkanat claimed pecuniary and non-pecuniary damages on the grounds that the defendant's novel *Bit Palas*, first published in 2002, was plagiarised from her novel *Sinek Sarayı*, first published in 1990. The plaintiff claimed that *Bit Palas* was plagiarised from *Sinek Sarayı* after an original introduction. It was stated that both novels took place in the same neighbourhood, in apartment buildings built in the same architectural style and with the same number of floors, and that the similarities between the characters could not be considered coincidental. In the plaintiff's 18-page petition, the allegations of plagiarism are summarised through the presentation of excerpts and examples from both novels:

- i. **Alleged plagiarism of the title:** The title of the novel *Sinek Sarayı* (Palace of Flies) refers to the apartment building where marginalised tenants gather, like a flyliner collecting fly droppings. In the novel *Bit Palas*, in order to describe the apartment where marginalised people live, the word “fly-sinek” has been changed into the word “louse-bit” and the word “palace -saray” has been changed into the word “palas”.
- ii. **Allegation of plagiarism of the centre and the place of fiction:** Both novels are set in the Cihangir neighbourhood of Beyoğlu district, and the apartment buildings in which the events take place are built in similar architectural styles.
- iii. **Alleged plagiarism of thematic fiction:** Both novels are set in a fictitious apartment block, all its inhabitants are tenants and marginalised. At the same time, in both novels the last owners inherited the apartment block and the physical characteristics of the apartment block and the surrounding area are similar.
- iv. **Allegation of character plagiarism:** There are similarities between the characters in both novels in terms of their physical appearance, occupations, illnesses, the floors they live on in the apartment, and the events that happen to them in the plot.

14. The issues raised by the defendant Elif Şafak in her 30-page petition in response to the lawsuit are summarised as follows:

- i. As the lawsuit was filed 20 years after the publication of the novel *Bit Palas* in 2002, the claims for damages are time-barred under Article 72 of the Turkish Code of Obligations ("TBK").
- ii. The filing of the lawsuit is an abuse of right pursuant to Article 14 of the Constitution and Article 2 of the Turkish Civil Code (TCC) and is contrary to the principle of honesty. There have been many reviews and interviews about the novel *Bit Palas* in the international and local press. Moreover, some of these reviews and interviews were published in the publications where the

plaintiff worked. In this context, it is contrary to the ordinary course of life that the plaintiff, as a well-known author, was not aware of the novel Bit Palas published in 2002. This case, which constitutes an abuse of right, is a continuation of the plaintiff's attitude of defamation, slander and accusations concerning the defendant's private life, many social media posts of the plaintiff about the defendant are cited as an examples of this behavior.

- iii. As stated in the jurisprudence of the Court of Cassation, the basic condition for plagiarism is that the characteristics of the original author are exactly the same in the stolen work. In this context, the work should be analysed as a whole and the style, the fictionalisation of the events, the originality of the language and the literary styles should be examined. Although there may be works written on the same subject, the originality in the handling of characters, plot and basic conflicts distinguishes the works from each other. In Turkish literature, there are many novels, stories and theatre plays that deal with Istanbul-based apartment stories. The plaintiff's claims of similarity based on the apartment block, the officials in an apartment block and the marginal tenants are absurd. There is no similarity or overlap between the novel Bit Palas and Sinek Sarayı, except for ordinary similarities and anonymous uses. As a matter of fact, in the eyes of readers, critics and academics, these two books are different from each other.
- iv. The jurisprudence regarding the evaluation of works as a whole in terms of plagiarism assessment has been ignored. The plaintiff has taken the parts of the novel out of context and has shown the sentences on different pages and sections as if they were used in the same subject, character and context.
- v. Although the plaintiff claims that the first 65 pages of the novel Bit Palas are plagiarised from the rest of the book, all parts of the book have a fictional integrity. Considering the fictional integrity of the novel, there is not even inspiration between the two novels beyond plagiarism. Expert opinions expressing this point are included. **Critic Asuman Kafaoglu-Büke**, states that there is no plagiarism between the two novels in terms of main characters, fiction, plot and literary style, that there is no similarity between these two novels and that coincidental word similarities are not enough to make the two novels similar. **Writer İsmail Güzelsoy**, despite a very careful examination, he could not detect more similarities between the two works than could be seen between two random novels taken off the shelf. **Writer Gaye Borahoglu**, stated that the novel Bit Palası is unique in Turkish and world literature with its subject, original and creative style and rich use of language. **Writer Elçin Poyrazlar**, stated that there is no similarity between the two novels in terms of fiction, language, characters and form. **Mine Krause, an expert on comparative literature**, has stated that there is no similarity between the two

works in terms of narration and fiction, style, story, character description and development. **Valerie Gay Aksoy, the translator who translated the books of the plaintiff and the defendant into French**, stated that the two works are not similar in terms of fiction, protagonists, story and narration, character interaction and the way they deal with places. According to Aksoy, "To place a story in a building in Istanbul, to take this place as a story frame, means to accept to share the city and its history. And this is the truth of thousands of books". **According to academic Prof. Dr. Ülker Gökberk**, Bit Palası, as the voice of a textual carnival, has eliminated the differences between inside and outside, audience and actor. While presenting the intersection points of social history as the epistemic and historical dimension of the novel, *The Fly Palace*, as a novel told from the point of view of a character, is one-voice and one-dimensional. In these respects, the narratives of the two works are original novels "in terms of their fiction, narrative techniques, and their presentation within distinct semantic and semiotic frameworks" and there is no similarity or plagiarism between them.

- vi. The plaintiff's claim of name plagiarism is erroneous and unlawful. There are thousands of works with similar names in Turkish and world literature. In this context, apartment-orientated book names are given as examples. As a matter of fact, contrary to the plaintiff's claim, "palas" is not used in Latin languages because it means palace; the phrase "palas" is directly included in many apartment names in Istanbul.
 - vii. The plaintiff's allegation of plagiarism of the centre and fictional space is contrary to the law and the spirit of literary production. The apartment block is widely used in Turkish literature and this situation is called "anonymous uses" in the doctrine. Moreover, in the plaintiff's novel, the apartment building is used as the decor of the story, while in the defendant's novel, the apartment building is treated as a separate character. In this respect, there is no similarity between the two works in terms of the use of space and fiction.
 - viii. The plaintiff's allegations of plagiarism of thematic fiction are unlawful. The architectural structure of Istanbul in a certain historical period and the social and cultural aspects of the city are analysed in the novel *Bit Palas*, as in many other works. However, there is no similarity between the works in terms of the characters and their characteristics and the elements of fiction.
15. The defendant Elif Şafak, explaining the above-mentioned issues, requested that the lawsuit be dismissed and the compensation claims be rejected.
 16. In its 11-page reply petition, the defendant Doğan Kitap stated that, as a publishing house, it did not carry out content, appropriateness and legality control regarding the work, and that it had no fault or responsibility. Subsequently, it was stated that beyond

plagiarism, there was not even inspiration between the two works and the plaintiff's allegations of plagiarism of name, centre and fictional location, and thematic fiction were rejected on grounds parallel to those in the response of the defendant Elif Şafak.

17. The plaintiff Mine Kırıkkanat continued her allegations in her 16-page reply to the defendant publishing house's reply. She repeated the allegations of plagiarism between the novels Bit Palas and Sinek Sarayı in terms of name, centre and fictional location, thematic fictional elements and characters.

18. The plaintiff Mine Kırıkkanat continued her allegations in her 22-page reply to the defendant Elif Şafak's reply. The issues raised by the plaintiff are summarized as follows:

- i. The Plaintiff worked abroad as a foreign correspondent and columnist between 1986 and 2010. It is contrary to the ordinary course of life to expect her to be aware of the plagiarism when the novel Bit Palas was published. The plaintiff read the plagiarised novel in 2021 and realised that it was plagiarised. Therefore, the defendant Elif Şafak's statements regarding the statute of limitations and abuse of rights are untrue.
- ii. The defendant Doğan Kitap is at fault and responsible together with the author Elif Şafak.
- iii. There is a similarity between the novels Bit Palas and Sinek Sarayı that is not coincidental. The opinions of authors and critics given in the reply petition of the defendant Elif Şafak are subjective and far from scientific. In this context, they cannot be accepted as expert opinions within the scope of Article 293 of the Code of Civil Procedure.
- iv. The novel Bit Palas cannot be considered as an original and special work after its 60th page. The type of plagiarism is among the types of cloning and finding-substitution by changing keywords and sentences by using the important contents of the novel Sinek Sarayı as a basis.
- v. The apartment buildings in both novels cannot be considered as any building. In both novels, there are Art Nouveau apartment buildings of which there are only six in Beyoğlu.
- vi. In parallel with the issues in the petition, the novel Bit Palas was plagiarised from the novel Sinek Sarayı in terms of name, centre and fictional location, thematic fiction and character.

19. In its second reply petition consisting of 11 pages, the defendant Doğan Kitap stated that as a publishing house, it had no authority to supervise the work and that it had no fault or responsibility for the subject matter of the lawsuit and that it was not a party. The statements that the book subject to the lawsuit is a work that is widely known by the public and that the plaintiff's silence for 19 years and filing the lawsuit constitutes

an abuse of rights were repeated. Subsequently, the plaintiff's allegations of plagiarism were rejected in parallel with the explanations in the reply petition.

20. In her second reply petition consisting of 26 pages, the defendant Elif Şafak has included her explanations against the plagiarism allegations in her reply petition, in addition to which, the issues she had raised are summarized as follows:

- i. The claimant's allegations regarding the timeliness of the lawsuit run counter to the normal course of events. As a matter of fact, the novel Bit Palas was published in France during the period when the plaintiff stated that she was in France, it was nominated for awards and reviews and interviews were written about it. The claim that the plaintiff, who is a journalist and writer and who has made many posts about Elif Şafak, was not aware of the novel Bit Palas, which was also recognised abroad, for 19 years does not reflect the truth. Therefore, the lawsuit is against the prohibition of abuse of right and the rule of honesty.
- ii. It is not possible to accept the plagiarism allegation in respect of the novel Bit Palas. The novel is completely original and unique in terms of subject, language, style, fiction and literary framework, characters, dialogues, vocabulary and writing style.
- iii. The reports containing the assessments of experts in the field of literature in the reply brief are the result of an honest and professional review. They constitute opinions in accordance with the procedure set out in Article 293 of the Code of Civil Procedure (“HMK”).
- iv. The claim that both novels include Art Nouveau apartment buildings of which there are only six in Beyoğlu is baseless and erroneous. As reached through internet research, Istanbul is described as an "Art Nouveau paradise". Moreover, there are many novels set in apartment buildings in this architectural style.
- v. Elif Şafak's unique style, emotion and fictional language, which she has created in her works, is also found in the novel Bit Palas. In addition to being a writer, Elif Şafak is an honorary lecturer at Oxford University, one of the most prestigious universities in the world. She has also been a guest lecturer in cultural studies at the same university. The novel Bit Palas enriches the author's unique style with the reflections of her interdisciplinary academic background. This distinctive and original language and style of the author has been analysed in many reviews and academic studies.

21. In addition to the expert opinions submitted with her reply petition, the defendant Elif Şafak submitted the expert opinion of the **author Oya Baydar**. In her opinion, Baydar stated that after reading both works, she did not get the impression of inspiration, let alone plagiarism, and that the fiction, style, events and heroes were not similar to each

other. Baydar emphasized that if the similarity of the subject matter or the place where the subject matter takes place were to be considered as plagiarism, tens of thousands of works in world literature could be defamed due to plagiarism. Baydar concluded that *"...it is a loss for our literature that our writers deal with such accusations and lawsuits instead of trying to develop their own original works."*

- 22.** The plaintiff objected to the expert opinions submitted by the defendant, stating that they were not impartial and objective, and requested that they not be taken as a basis for the judgement in the proceedings. The Plaintiff submitted expert opinions to the file. The plaintiff submitted four opinions in the annex of the same declaration. **The author Ataol Behramoğlu** stated that he had reviewed the two books in their entirety and that the similarities between the main locations and protagonists in the novels were similar to the extent of plagiarism. **Prof. Dr. Haluk Şahin, an academic who lectures on media theory**, stated that the similarities between the two works fall into the plagiarism zone. **Writer and critic Ahmet Yıldız** stated that the two works have similarities that cannot be considered as coincidence and that this similarity is plagiarism. **Translator Ülker İnce stated** that there are similarities between the two works that affect the whole, and that there is plagiarism when the details and overlaps in the textual trajectory are taken into consideration.
- 23.** The defendant Elif Şafak has submitted an additional statement to the court where she discusses her literary journey, emphasizing the significant effort, dedication, and hard work put into each of her novels. She further stated that she wrote the novel Bit Palas in the house where she lived alone in Beyoğlu, Istanbul, and that she created the characters in the novel by being directly influenced by the cosmopolitan and colourful structure of the region where she lived. Şafak further explained that Bit Palas was a reflection of her life and observations through her imagination, and that the entire writing process had been documented through interviews and radio programmes. Şafak stated that she was not aware of the allegedly plagiarised book until the lawsuit was filed, but that she had to read it because of the lawsuit.

C. Hearing Phase

- 24.** The first hearing of the case was held at Istanbul Anatolian 1st Intellectual and Industrial Rights Civil Court on 11.10.2022. It was decided to send the file to a three-members expert committee, including an intellectual property rights expert, an author and an accountant.
- 25.** At the second hearing on 24.01.2023 and at the third hearing on 11.04.2023, it was decided to await the report, since the expert's report had not been received.
- 26.** According to the expert report of 11.04.2023, the novels Bit Palas and Sinek Sarayı are works of science and literature according to Article 2 of the FSEK. According to the examination made by the expert committee, the novel Bit Palas was found to contain five percent plagiarism from the work entitled Sinek Sarayı.

27. On 15.05.2023, the Defendants submitted a petition containing their objections to the expert report and to the experts. It was stated that the authors of the report did not have the academic and artistic equipment to analyse literature, did not take into account the FSEK and jurisprudence into consideration, and wrote an unfounded and inconsistent report. The report states that the assessment of plagiarism based on the common words in the two works is biased and baseless. The defendants requested the formation of a new expert panel consisting of academics with expertise, experience and impartiality from the relevant departments of literature faculties of universities.
28. At the fourth hearing on 12.09.2023, the request to send file to a new panel of experts was rejected.
29. On 14.12.2023, at the fifth hearing, a decision was rendered on the file. Istanbul Anatolian 1st Civil Court of Intellectual and Industrial Property Rights determined that the defendant party violated the intellectual property rights of the plaintiff and awarded the plaintiff pecuniary and non-pecuniary damages. At the same time, it was decided to announce the decision once in one of the three newspapers with the highest circulation in Turkey after the decision become final.

D. Reasoned Judgement

30. In the reasoned decision of the Court, although the concept of plagiarism is not explicitly defined in the FSEK, it was explained as the representation of another's work as one's own, and the taking of parts of another's work without citing the source. In this context, it is explained that the intellectual products subject to the plagiarism claim should be considered as "work" within the meaning of the FSEK, and then the infringement of financial and moral rights should be examined.
31. The Court stated that the similarity between the works will be accepted as legitimate "*if it is related to ordinary and anonymous elements such as abstract idea, subject matter, method, which can be found in works produced in the same field, and if it is only to the extent of inspiration from the previous work*". It is explained that if the similarity in the parts reflecting the characteristics of the author is made in violation of Article 35 of the FSEK, which regulates the freedom of quotation, in this case, financial and moral rights will be infringed.
32. Following the above-mentioned findings, the Court stated that the novels Bit Palas and Sinek Sarayı are "works of science and literature" within the scope of Article 2 of the FSEK. Based on the similarities in the characters, themes, the place where the events take place in the two works, the similarities in the description of the surroundings, it was determined that "the similarity of the defendant's work's name, fiction, characters, unity of place and time, plot and result, far beyond the inspiration, the name and content of the plaintiff's novel was used and this use was at the level of plagiarism". For this reason, it was found that the plaintiff's intellectual property rights had been violated and it was decided to pay material and moral compensation under Articles 54 and 70 of the FSEK.

33. The judgement was open to appeal

III. Legal Considerations

34. This monitoring report prepared by İFÖD analyses the interference with the freedom of artistic expression of an author by ordering her to pay compensation on the grounds that her novel constitutes plagiarism.
35. Freedom of artistic expression is protected under Articles 26 and 27 of the Constitution, Article 10 of the European Convention on Human Rights and Article 19 of the United Nations Covenant on Civil and Political Rights.¹ This protection guarantees that artists can freely carry out their work and disseminate their artistic works without interference.² At the same time, Article 64 of the Constitution stipulates that artists and artistic activities shall be protected and imposes positive obligations on the State in this regard.
36. The Council of Europe Manifesto on Freedom of Expression in Culture and the Arts in the Digital Age of 10 November 2020 emphasizes the protection of artistic expression and artists from coercion and censorship without undue interference. In this context, the protection of artistic expression and artists strengthens new perspectives, artistic mobility and creativity, making the arts a strategic resource for society.³ The ECtHR emphasized that freedom of artistic expression contributes to the development of knowledge and ideas and that artists are important for a democratic society and that the State has an obligation to avoid unnecessary interference with the freedom of expression of artists.⁴
37. The printing and publication of books benefit from the protection and guarantees of freedom of expression within the framework set out above.⁵ In this context, although literary works may be subject to restrictions in accordance with the regime of freedom of expression, the decisions of the courts of first instance should evaluate the content and form of the expressions as a whole; concrete justifications should be given by taking into account the characteristics, context, style and aesthetic understanding of the

¹ See ECHR, *Müller and Others v. Switzerland*, no. 41202/98, 24.05.1988; *Ulusoy and Others v. Turkey*, no. 52709/99, 31.07.2007; *Mariya Alekhina and Others v. Russia*, no: 38004/12, 17.07.2018 and United Nations General Assembly, “Research Report on Artistic Freedom of Expression”, A/HRC/44/49/Add.2, 15 June - 3 July 2020, para. 6,

² Pelin Başaran and Ulaş Karan, "Guide to Freedom of Artistic Expression, Istanbul, February 2016, https://insanhaklarimerkezi.bilgi.edu.tr/media/uploads/2016/03/23/Sanatsal_Ifade_Ozgurlugu_Kilavuzu_.pdf

³ Council of Europe Manifesto on the Freedom of Expression of Arts and Culture in the Digital Era, <https://rm.coe.int/manifesto-on-the-freedom-of-expression-of-arts-and-culture-in-the-digi/1680a056a2>.

⁴ ECtHR, *Alinak v. Turkey*, no: 40287/98, 29.03.2005, para. 42; AYM, *Mehmet Ali Gündoğdu and Mustafa Demirsoy*, B. No: 2015/8147, 08.05.2019, para. 23; *Mehmet Aksoy* [GK], B. No: 2014/5433, 11.07.2019, para. 59.

⁵ *Fatih Taş* [GK], B. No: 2013/1461, 12.11.2014, paras. 58-61, 105.

work.⁶ Otherwise, it cannot be said that the restrictions are necessary and proportionate in a democratic society.

- 38.** The case that is the subject of this report is a civil case between two private individuals. However, the horizontal effect of the constitutional principles of human rights are principles that must also be observed by the courts tasked with resolving these cases. Especially in cases where two constitutional rights are in conflict, it is imperative that the courts carry out a careful balancing process.
- 39.** This balancing also requires observance of procedural safeguards in the settlement of disputes. In this framework, it also requires observance of the principles of adversarial proceedings and equality of arms and equal rights of the parties before the court. (*Baka v. Hungary*, [BD], no. [20261/12](#), §161, 23.06.2016; *Kula v. Turkey*, no. 20233/06, § 46, 19.06.2018). ECtHR has held that the lack of effective judicial review may violate Article 10 of the Convention (*Lombardi Vallauri v. İtalia*, no. 39128/05, § 45-56, 20.10.2009; in the context of academic freedoms see *Mustafa Erdoğan and others v. Turkey*, no. [346/04](#) ve [39779/04](#), § 40, 27.05.2014). In the Court's view, the nature of the judicial scrutiny of the necessity of the measure against freedom of expression in the context of Article 10, including the issue of the exercise of discretion in this respect, is of particular importance” (*Animal Defenders International v. United Kingdom* [BD], no. [48876/08](#), 22.04.2013, § 108, ECHR 2013 (summaries)).
- 40.** Considering the aforementioned issues, it is not possible to say that the trial which resulted in the determination that Elif Şafak's novel *Bit Palas* constituted plagiarism provided sufficient procedural safeguards in terms of freedom of artistic expression. In this context, although it is stated that FSEK does not contain a concrete definition of plagiarism, it has been observed that the way plagiarism is defined and applied in the proceedings is not evaluated in a precise, predictable and consistent manner.
- 41.** The fact that the works subject to the trial are set in similar locations, the story takes place in an apartment in Beyoğlu and the similarity in themes were taken into consideration in the determination of plagiarism. However, it is not possible to say that objective and foreseeable criteria were used to determine whether these elements can be considered as "plagiarism". It is incomprehensible why many contrary opinions submitted to the file were not taken into consideration and why the request for the appointment of a new expert committee was rejected. This deficiency gains even more importance, especially when the doubts regarding the expertise of the appointed expert are taken into consideration. It cannot be said that there is a consensus according to objective legal and scientific criteria that the defendant's work contains plagiarism. Although the defendant has shown that there are many other works dealing with similar themes and set in the same place, abstract intersections on these general concepts have been considered as basis of plagiarism.

⁶ İrfan Sancı, B. No: 2014/20168, 26.10.2017, para. 57, 60; *Mehmet Aksoy* [GK], B. No: 2014/5433, 11.07.2019, para. 69.

- 42.** It cannot be said that the judgement of the local court made a concrete assessment in the context of the defendant's style and original use of language and her creative universe. It has been observed that this deficiency in the decision reveals the lack of an adequate examination in the absence of guarantees regarding freedom of expression. In this respect, the decision did not evaluate and discuss the case law of the Court of Cassation in order to eliminate the uncertainty under the FSEK. These issues not only have a limiting effect on the freedom of expression of the author against whom compensation is awarded, but also lead to an unpredictable and uncertain interpretation of legal concepts by the judicial authorities. After this judgement, if an author writes a story about people living in an apartment in Beyoğlu, Istanbul, the risk of facing plagiarism allegations will remain ever-present, even decades after the publication of the work. Therefore, the judgement has had a deterrent effect on the writing and creative process of Elif Şafak, and essentially all writers in general.
- 43.** As stated by the ECtHR, the artist not only expresses his/her personal vision through his/her work, but also holds up a mirror to society. In this way, he/she becomes the expression of society and moulds it.⁷ If the apartment blocks of Beyoğlu are no longer written about, the stories of those living in those blocks may never be included in the stories of those living in apartment blocks in other neighbourhoods of Istanbul, other provinces of Turkey, or even other parts of the world.

IV. CONCLUSION

- 44.** As explained in the report, it is clear that the judgement awarding compensation against Elif Şafak constitutes an interference with freedom of artistic expression.
- 45.** The unpredictable and inconsistent interpretation of the concept of plagiarism in intellectual property legislation calls into question the legitimacy of the interference with the freedom of artistic expression. In this context, it should be noted that the judgement in the concrete case may have a deterrent effect on the literary activities of Elif Şafak and other authors. In this respect, it has been concluded that the judgement does not provide the basic procedural safeguards for the freedom of expression of artists producing in the field of literature, and that the judgement, which is not based on objective criteria, may violate the freedom of expression.

⁷ *Otto-Preminger Institut/Austuria*, no. 13470/87, 14.01.1993.

SOURCES

Judgements

- **European Court of Human Rights**

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- **Constitutional Court**

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