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Meeting: 1406th meeting (June 2021) (DH)

Communication from an NGO (İfade Özgürlüğü Derneği (İFÖD - Freedom of Expression Association)) (03/05/2021) in the Oner and Turk, Nedim Sener, Altug Taner Akcam and Artun and Guvener groups of cases of v. Turkey (Applications No. 51962/12, 38270/11, 27520/07, 75510/01) and reply from the authorities (20/05/2021) (appendices in Turkish are available at the Secretariat upon request).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1406^e réunion (juin 2021) (DH)

Communication d'une ONG (İfade Özgürlüğü Derneği (İFÖD - Freedom of Expression Association)) (03/05/2021) dans les groupes d'affaires Oner et Turk, Nedim Sener, Altug Taner Akcam et Artun et Guvener c. Turquie (requêtes n° 51962/12, 38270/11, 27520/07, 75510/01) et réponse des autorités (20/05/2021) (des annexes en turc sont disponibles auprès du Secrétariat sur demande) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



DGI

03 MAI 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

RULE 9.2 COMMUNICATION

in the Öner and Türk Group of Cases (no. 51962/12); Akçam Group of Cases (no. 27520/07); Şener Group of Cases (no. 38270/11) and Artun and Güvener Group of Cases (no. 75510/01) v. Turkey

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

03 May, 2021

An independent non-governmental organization specialized in defending and promoting freedom of expression



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03.05.2021

Rule 9.2 Communication from Freedom of Expression Association (İFÖD) (in the Öner and Türk Group of Cases (no. 51962/12); Akçam Group of Cases (no. 27520/07); Şener Group of Cases (no. 38270/11) and Artun and Güvener Group of Cases (no. 75510/01) v. Turkey

1. The aim of this submission is to update the Committee of Ministers concerning the **persistent failure** of Turkish authorities in **full and effective implementation** of **general measures** in the *Öner and Türk* Group of Cases (no. 51962/12);¹ *Akçam* Group of Cases (no. 27520/07);² *Şener* Group of Cases (no. 38270/11)³ and *Artun and Güvener* Group of Cases (no. 75510/01)⁴ v. Turkey. The submission is prepared by İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association), a non-profit and non-governmental organization aims to protect and foster the right to freedom of opinion and expression in Turkey.

Background and İFÖD’s Rule 9.2 Submission of January 2020

2. The group of cases subject to the present submission mainly concerns **unjustified interference** to the applicants’ **freedom of expression**. The legal basis for the criminal proceedings involves the Turkish Criminal Code, Turkish Criminal Procedure Law and the Anti-Terrorism Law. As the Committee of Ministers noted with reference to the Court’s findings, the relevant provisions of the law do not meet the “quality of law” requirements.

¹ The *Öner and Türk* group of cases comprise **41 cases** involving unjustified interferences with freedom of expression, in particular through criminal proceedings, and the consequent chilling effect. This group mainly concerns convictions pursuant to Article 6 § 2 and Article 7 § 2 of Law No. 3713, namely, **disseminating propaganda in favour of an illegal organization**, and Article 215 of the Turkish Criminal Code, namely, **praising an offence or an offender**.

² The *Altuğ Taner Akçam* group is composed of seven cases. The cases deal with prosecutions under Article 301 of the Criminal Code, namely, publicly denigrating the Turkish Nation or the organs and institutions of the State, including the judiciary and the army.

³ The *Nedim Şener* group of cases contain five cases. This group focuses on the pre-trial detention of journalists on serious charges, such as **aiding and abetting a criminal organisation, being member of a terrorist organisation, attempting to overthrow the constitutional order**, without relevant and sufficient reasons. The legal basis for the charges involve articles 309, 312, 314 and 220 § 7 of the Turkish Criminal Code.

⁴ The *Artun and Güvener* group is composed of seven cases and these concern unjustified interferences with the applicants’ right to freedom of expression on account of their criminal convictions for **insulting public officials and the president** subject to articles 125(3)(a) and 299 of the Turkish Criminal Code.



3. İFÖD made a Rule 9.2 submission on **22.01.2020**⁵ and explained to the Committee with statistics and examples that the present legal framework fails to protect Article 10 of the Convention concerning the full and effective implementation of Öner and Türk; Şener and Akçam group of cases. İFÖD stressed that the legislative amendments that the Government introduced have not produced the results claimed by the Government. İFÖD also urged that since the provisions are not foreseeable and contrary to the democratic society standards, the legislative amendments in the Turkish Criminal Code and Anti-Terror Law do not meet the requirement of both the Court's case law and the Committee's expectations. Thus, İFÖD presented with examples that the legislative amendments and the information provided by the Government were misleading.
4. On 28.01.2020, the Government responded to the İFÖD's submission⁶ and also made a subsequent submission on 25.02.2020.⁷ Without providing further details or addressing İFÖD's concerns, the Government reiterated its statements on legal amendments and claimed that the **official statistics** presented by İFÖD were **speculative**. The Government did not submit any statistics in its submissions to substantiate its claims.

The Committee of Ministers 1369th Meeting, 3-5 March 2020 (DH) - Conclusions

5. The Committee of Ministers in its 1369th meeting, noted that “the problem of the disproportionate use of the criminal law in Turkey to punish journalists and other persons who express critical or unpopular opinions has been pending before the Committee in relation to various judgments for over 20 years” and noted further that the lower courts did not ensure respect for freedom of expression⁸ and mentioned the similar cases pending before the European Court.⁹ In this regard, the Committee requested **concrete signs of progress** and **demand**ed from the authorities to provide **clearer statistical** information including the **official figures for the total number of prosecutions and convictions**.¹⁰ The Committee also requested information from the Government on the number of **journalists prosecuted, convicted** and held in pre-trial and post-conviction detention, with **details of the allegations** involved. According to the Committee, this information is essential to allow the Committee to assess the real situation.
6. The Committee also decided to transfer the Artun and Güvener group of cases that stipulates the crime of insulting public officials and the President of Turkey to the enhanced procedure and continue its supervision of the general measures under the indicator of “complex problem”.¹¹ The assessment of the Artun and Güvener group of cases will be part of the other group of cases mentioned in this submission.

⁵ DH-DD(2020)92, 22.01.2020.

⁶ DH-DD(2020)92, 30.01.2020.

⁷ DH-DD(2020)180, 25.02.2020.

⁸ 1369th meeting (DH) March 2020, Decisions § 6.

⁹ 1369th meeting (DH) March 2020, Decisions, § 11.

¹⁰ 1369th meeting (DH) March 2020, Decisions, § 7.

¹¹ 1369th meeting (DH) March 2020, Decisions, § 10.



The Turkish Authorities' Action Plan of April 2021

7. On **07.04.2021**,¹² the Authorities submitted a new action plan. The Government's submission of 07.04.2021 is far too late and this **hinders** the submission of meaningful submissions by civil society organisations such as İFÖD by the 03.05.2021 deadline set by the Committee. In any case, the Government did **not provide the necessary and requested information** by the Committee of Ministers.
8. In its 87 page submission, the Government provides some updates on individual measures and repeats the legislative amendments already brought to the attention of the Committee with the previous action plans. In its action plan, the Government, with some examples from domestic courts claimed that the judgements of the domestic courts (including from the Court of Cassation and the Constitutional Court) are in line with the relevant case-law of the European Court with regards to pre-trial detention. The authorities also claimed that as a result of the legal and constitutional changes, the European standards are duly adopted at the domestic level, and there is no need for further supervision of the execution of judgements.
9. The Government also claims that further improvements will be provided with training, and awareness-raising activities and the execution of the principles laid down in the Judicial Reform Strategy 2019 as well as in the new Human Rights Action Plan of 02.03.2021.

İFÖD's Observations

10. İFÖD's submission aims to update the Committee of Ministers concerning the information provided by the Government's submission issued on 07.04.2021. The submission will also include information about legislative and executive developments involving deficiencies on full and effective implementation of general measures in the *Öner and Türk* Group of Cases; *Akçam* Group of Cases; *Şener* Group of Cases and *Artun and Güvener* Group of Cases.¹³ İFÖD is of the opinion that the complex and - structural problems observed by the European Court as well as by the Committee of Ministers in these groups of cases are still continuing for the following reasons.

I. Öner And Türk Group of Cases

11. In its Action Plan of 07.04.2021, the Government repeated its previous submissions and stated once again that the amendments made in the relevant provisions (Articles 6/2, 7/2 of the Anti-Terrorism Act and Article 215 of TCC) brought them in line with the Convention standards. However, the Committee of Ministers already stated that "legislative amendments are insufficient to bring about such a change of culture" even though the Committee welcomed the amendments made in October 2019 to Article 7 of the Anti-Terrorism Law.¹⁴
12. In terms of the related **judicial practice**, the Government presented several examples from the Constitutional Court and the Court of Cassation's case-law.¹⁵ However, the case-law presented

¹² DH-DD(2021)379, 07.04.2021.

¹³ 1369th meeting (DH) March 2020, Decisions § 10.

¹⁴ CM/Notes/1369/H46-33, 05.03.2020

¹⁵ DH-DD(2021)379, 07.04.2021, §§ 355, 365, 368, 380.



by the Government **does not reflect** the ongoing deficiencies concerning the right to freedom of expression and press. Among others, **more recent proceedings** before the domestic courts including but not limited to **former HDP member of the Parliament** Ömer Faruk Gergerlioğlu, and **journalist** Melis Alphan¹⁶ are clear examples of the structural problems arising out of Article 7/2 of the Anti-Terrorism Law as will be argued below.

13. The Government, in its Action Plan, presents the newly introduced right to appeal to the Court of Cassation against the decisions of the Regional Court of Appeals as a new guarantee to protect freedom of expression. However, it is considered that this new right, rather than providing a new remedy to challenge unlawful interference with freedom of expression, delays victims' application to the Strasbourg Court further as the so-called **new process halts and resets** the individual application process to the Constitutional Court. It is considered that some recent decisions of the Court of Cassation, summarised below, support this claim.
14. Selahattin Demirtaş and Sırrı Süreyya Önder, two former members of the Parliament, were prosecuted on the ground that their speeches made in Newroz celebrations on 17.03.2013 constituted propaganda in favour of a terrorist organization under Article 7/2 of the Anti-Terrorism Law. Both politicians were convicted by the İstanbul 26th Criminal Assize Court on 07.09.2018. Demirtaş was sentenced to 4 years and 8 months imprisonment and Önder was sentenced to 3 years and 6 months imprisonment by the same court judgment. Judgment of the İstanbul 26th Assize Court was approved by the 2nd Criminal Chamber of the İstanbul Regional Court of Appeal on 04.12.2018 and became final.
15. Both, Demirtaş and Önder lodged separate individual applications to the Constitutional Court on 31.12.2018.¹⁷ With regards to the application of Önder, the Constitutional Court ruled that the right to freedom of expression of Sırrı Süreyya Önder had been violated on 03.10.2019. Following this decision, the proceedings before the İstanbul 26th Criminal Assize Court was reopened. On 04.10.2019, the Assize Court ordered the acquittal of Sırrı Süreyya Önder in accordance with the judgement of the Constitutional Court.
16. However, Demirtaş' individual application to the Constitutional Court was handled separately then that of Önder's and the Constitutional Court found his application inadmissible ruling that the applicant should have exhausted the new remedy introduced with Law No. 7188, after the application was submitted.
17. Demirtaş, following the decision of the Constitutional Court appealed to the Court of Cassation against the decision of 2nd Criminal Chamber of the İstanbul Regional Court of Appeal. However, on 26.04.2021, the Court of Cassation approved the regional court's decision on his imprisonment. Despite the Constitutional Court's decision in the Sırrı Süreyya Önder case, which was about another speech made on the same date, the Court of Cassation did not follow the same legal reasoning with respect to the appeal of Selahattin Demirtaş.
18. Whilst the Constitutional Court held that 3 years 6 months imprisonment of Mr. Önder was in violation of the Constitution, the Court of Cassation concluded that 4 years 8 months

¹⁶ In 2015, Melis Alphan posted a picture on her Twitter account which showed Newroz celebrations in Diyarbakır and commented "I have posted this picture on Instagram and Instagram has removed it due to the reports. This is our level of tolerance!". Melis Alphan is accused of committing a crime pursuant to Article 7/2 of the Anti-Terrorism Law. The case is still pending and will be decided during May 2021.

¹⁷ Sırrı Süreyya Önder, Application No: 2018/38143, 03.10.2019.



- imprisonment of Mr. Demirtaş, one of the harshest penalty ever decided under this provision, was proportional. It is quite difficult to predict why and how those courts have reached such different conclusions as both speeches were delivered under the same conditions and had similar content. At the least, this contradiction proves the inconsistency in the implementation of Article 7(2) of the Anti-Terror Law. As already observed by the Committee of Ministers, legislative amendments are insufficient to bring about such a change of culture.
19. Moreover, the newly introduced right to appeal against decisions of the Regional Court of Appeals does not strengthen the protection of freedom of expression. On the contrary, it delays individuals' right to obtain a decision from the Constitutional Court. Indeed, the Constitutional Court delivered its decision in the Önder case on 03.10.2019, more than one and a half years ago. Mr. Demirtaş will wait at least another 3-5 years before the judgment of the Constitutional Court for a penalty imposed for an act that took place at the same day. In other words, Mr. Demirtaş has lost up to 6 years due to introduction of a new remedy by Law No. 7188. İFÖD firmly believes that the Government's arguments relying on Law No. 7188 should be rejected for this reason.
20. The Committee should also be informed about the case of the former MP for HDP and a human rights defender, Mr. Ömer Faruk Gergerlioğlu's prosecution under Article 7/2 of the Anti-Terror Law. This is yet another example of how the authorities rely on the persecution of the members of the parliament by relying on the terror propaganda charges. Gergerlioğlu was prosecuted because he shared an online news from a popular news website with the headline "PKK: If the state takes a step, peace will come in 1 month" at <https://t24.com.tr/haber/pkk-devlet-adim-atarsa-baris-1-ayda-gelir,356032> which included a PKK statement that indicated how the Government should take a step. Sharing this article with its headline and URL address, Gergerlioğlu stated that "This call should be evaluated thoroughly." Neither the reporter of the news and the editor of the website, nor others who shared it have been prosecuted. Surprisingly, no blocking decision was ordered either and the article remains accessible as of today. The only person who was prosecuted for this was Mr. Gergerlioğlu who was chosen due to his political identity.
21. At the time of his prosecution, Mr. Gergerlioğlu was yet to be elected as an MP and the Kocaeli 2nd Criminal Assize Court convicted Gergerlioğlu and sentenced him to 2 years and 6 months imprisonment on 21.02.2018. The 3rd Criminal Chamber of İstanbul Regional Court of Appeal approved his conviction and as in the case of Demirtaş, Mr. Gergerlioğlu also used the newly introduced remedy by Law No. 7188 to challenge the decision of the Regional Court. Following the appeal, on 28.01.2021, 16th Criminal Chamber of the Court of Cassation upheld the decision. Neither of the courts have applied Strasbourg standards whilst approving the conviction of Mr. Gergerlioğlu. He was imprisoned on 02.04.2021 to serve the criminal sentence.¹⁸
22. Thus, contrary to the Government's arguments, the case law is not in line with Convention standards. İFÖD is still of the opinion that Articles 215 and 216 of the TCC and Articles 6/2, 7/2 of the Anti-Terrorism Act lack foreseeability and precision as stipulated by the Convention and the Court's case-law.

¹⁸ An application is currently pending with the Constitutional Court.



23. Finally, in the latest action plan, the Government did not provide any official statistics.

II. Nedim Şener Group of Cases

24. Şener Group of cases particularly focus on the pre-trial detention of journalists on serious charges, such as aiding and abetting a criminal organisation or attempting to overthrow the constitutional order, without relevant and sufficient reasons. In its April 2021 submission, the Government neither provided any statistical information nor presented examples from the domestic court judgements. Instead, the Government referred to its 30.03.2021 dated *Işıkırık* Group of Cases submission¹⁹ for which İFÖD is making a separate submission.
25. While the Government did not provide any statistical data as requested by the Committee, İFÖD would like to remind and update the statistics submitted in its first Rule 9 submission by taking into consideration the publication of the official statistics for 2019 during 2020. There has been a total of **1.543.258 criminal investigations** involving **Article 314** involving the crimes of establishing, managing or being a member to an “armed organisation” between the years **2010-2019** according to the Judicial Statistics of the Ministry of Justice (**See Annex I**). In fact, over 1 million individuals (**1.367.733**) were subjected to an Article 314 related criminal investigation between **2016-2019**. Over 600.000 prosecutions are either continuing or pending while the 2020 statistical data is not available yet.
26. Finally, although requested by the Committee, the Government did not provide any current statistics and make an assessment related to the status of imprisoned journalists. Generally, journalists but particularly the Kurdish media continued to face convictions, criminal trials related to terrorism offences since İFÖD’s first submission to the Committee in January 2020. In İFÖD’s first submission, it was mentioned that 38 Editors-in-Chief on Watch for Özgür Gündem who acted in solidarity with the staff of Özgür Gündem have been facing charges of terror propaganda and publishing and spreading statements of terrorist organisation pursuant to Articles 7/2 of the Anti-Terror Law. Istanbul 23th Assize Court gave its decision in March 2021 and Kemal Sancılı who is the grant holder of the newspaper, İnan Kızılkaya who was the managing editor, Zana Kaya who was the editor in chief, and Eren Keskin who was the editor in chief on watch were sentenced to **21 years imprisonment in total**. An appeal against the decision is pending before the Regional Court of Appeal.

III. Altuğ Taner Akçam Group of Cases

27. Altuğ Taner Akçam Group comprises structural and complex problems concerning violations of the right to liberty and right to freedom of expression on account of prosecutions/convictions or the real risk of prosecution under Article 301 of TCC (Article 159 of former TCC). In *Altuğ Taner Akçam v. Turkey*,²⁰ the Court concluded that Article 301 lacked the “**quality of law**” requirement in view of its “**unacceptably broad terms**” which “**still resulted in a lack of foreseeability as to its effects**”.
28. The Committee, in its 1369th meeting, invited the Government to consider further legislative amendments and urged the Government, in view of the Committee’s previous decisions and

¹⁹ DH-DD(2021)379, 08 April 2021, §§ 383-385.

²⁰ *Altuğ Taner Akçam v. Turkey*, no. 27520/07, 25.10.2011, § 95.



the clear case-law of the European Court, to revise Article 301 of the Criminal Code without further delay.²¹ No legal amendment and/or results-oriented measures were informed by the Government in its last Action Plan dated 08.04.2021.

29. Moreover, the Committee indicated in its 1369th meeting that the percentage of cases authorised for prosecution has increased (from 8% as indicated in the Altuğ Taner Akçam judgment (§ 77) to 30% and 20% of cases in 2018 and 2019 respectively). The Government **did not provide any new statistics** but provided some **convenient** sample cases. Authorities selected only examples of vulgar and abusive statements among thousands of investigations and criminal proceedings in its latest Action Report. Contrary to Government's statements, İFÖD is of the opinion that Article 301 of TCC is abused to punish those who criticize the state and its organs. The examples below, show this approach clearly.
30. **Mahir Başarır** who is a member of the main opposition party, CHP was subjected to a criminal investigation under Article 301 of the TCC during 2020 because of his statements criticizing the sale of a tank factory to Qatar. Başarır evaluated the sale of the factory as the sale of the army to Qatar. The spokesman of the Presidency and the Minister of Defence targeted Başarır's statements and the Ankara Public Prosecutor's Office published a statement that an investigation was initiated.²² Moreover, **an ordinary citizen** who expressed his criticism to AKP's Deputy Chairman Mahir Ünal at the exit of a Friday prayer by stating that "*I don't recognize the Turkish Grand National Assembly, I don't recognize the state,*" was immediately arrested by the police. An investigation was initiated under Article 301.²³ Finally, **a German dentist** was detained in Turkey because of his statements during a discussion at a Turkish airport. While he was waiting for his luggage, a discussion broke out and he said "*You Turks are like this, Turkey is not a democratic country anyway*". He was taken into custody and an investigation was initiated under Article 301 of the TCC.²⁴
31. There is no doubt that unlike what the Government argues, prosecutors have invoked Article 301 more than ever to silence critiques against the Government and state institutions increasingly since 2014. İFÖD would like to remind and update the statistics submitted in its first Rule 9 submission by taking into consideration the publication of the official statistics for 2019 during 2020 in relation to Article 301. Compared to 2018 (9.555 criminal investigations initiated), during 2019 the public prosecutors initiated **13.574 criminal investigations** involving Article 301, a **42% rise** compared to 2018 (see **Annex II**). Since the Akçam case was decided in 2011, a total of **43.269** Article 301 criminal investigations were initiated, and only in **18.802** investigations "non-prosecution" decisions were issued. Furthermore, while only **207** prosecutions took place in 2014, **1610** prosecutions took place in 2019, almost **eight times** in 5 years. Conviction rates have also increased significantly. In 2014, only **16** people

²¹ 1369th meeting, CM/Del/Dec(2020)1369/H46-33, 3-5 March 2020.

²² Sputnik News, "An Investigation was initiated against Başarır, member of CHP", <https://tr.sputniknews.com/turkiye/202011291043311314-chpli-basarir-hakkinda-sorusturma-baslatildi/>

²³ Bianet, "Young Man who said that 'I don't recognise the State' was detained under Article 301", <https://m.bianet.org/bianet/siyaset/239223-devleti-tanimiyor-diyen-genc-301-den-gozaltina-alindi>

²⁴ Cumhuriyet, "Criminal case against German Dentist under Article 301: He cannot return to his country", <https://www.cumhuriyet.com.tr/haber/alman-dis-hekimine-tck-301den-dava-ulkesine-donemiyor-1795234>



were convicted whilst the conviction of **22** others was suspended (“HAGB”). In 2019, **342** people were convicted, and **370** other convictions were suspended (“HAGB”).

32. The Committee should insist on the Government submitting up-to-date and detailed statistical data involving criminal investigations and prosecutions and also to comment on such data.

IV. Artun and Güvener Group of Cases

33. Artun and Güvener Group particularly concerns unjustified interferences with the applicants’ right to freedom of expression on account of applicants’ criminal convictions for insulting the President of Turkey (Article 299 of the TCC) or the public officials (Article 125/3 of the TCC).
34. The Government informed the Committee of Ministers that legislative amendments and practice of the domestic courts are in line with the Convention standards. The Government mentioned some samples of case law delivered by the Court of Cassation and local courts considering that the statements in those cases were protected under the scope of freedom of expression and the elements of the crime did not occur referring to the European Court decisions.
35. İFÖD recently on 14.12.2020 submitted a Rule 9.2 communication on the Pakdemirli and Artun and Güvener Group of Cases.²⁵ In its submission, İFÖD stated that the selective references which the Government mentioned was not enough to assess thoroughly the jurisprudence of the Court of Cassation and the local courts. İFÖD also observed that the Government has not provided relevant statistical data about the number of criminal defamation complaints by the President, Prime Minister, or other politicians and related criminal investigations, prosecutions and convictions within the past five years. İFÖD, by relying on limited available official statistical data, submitted data related to Article 125/3 of the TCC stating that this provision has been widely and systematically used by members of the ruling party.²⁶ It was also determined that the decrease in the number of Article 125/3 prosecutions could be linked to the sharp increase in the number of criminal investigations and prosecutions involving the crime of insulting the President of Turkey under Article 299 of the TCC since Mr. Erdoğan became the President of Turkey in August 2014.
36. It is stated in the Government’ action report of 07.04.2021²⁷ that the Minister of Justice’s permission mechanism provides a legal safeguard, and the permission for prosecution is granted only for the remarks containing clear defamation. However, İFÖD submits that the domestic courts do not only convict individuals when there are clear and seriously insulting expressions as argued in the Government’s Action Plan. Article 299 of the TCC is abused to punish and silence criticism in a wide range; against journalists, academics, artists, politicians, and ordinary citizens resulting in a widespread chilling effect.
37. For example, Eren Keskin and Reyhan Çapan were sentenced to a 28.000 TL of judicial fine in three different criminal cases pursuant to Article 299 as a result of publication of several political news and articles published in Özgür Gündem that included information and

²⁵ DH-DD(2020)1162, 14.12.2020.

²⁶ *Ibid*, § 18-21.

²⁷ DH-DD(2021)379, 07.04.2021.



- comments relating to the President Erdoğan²⁸. The appeal against this decision was rejected. Moreover, Gaziantep Regional Court of Appeal overruled an acquittal decision related to a Facebook post which contained “*Serial killer without a diploma*” with the President’s photo.²⁹
38. The convictions are not limited to social media posts and news. For instance, an attorney Özgür Urfa was sentenced to 10 months in prison pursuant to Article 299 of the TCC because of his legal petition for appeal for a client who was also convicted under the same provision on 07.07.2020. The İstanbul 4th Assize Court refused to suspend the sentence on the grounds that Mr. Urfa did not show remorse during the proceedings.³⁰
39. Article 299 of the TCC has also been used to punish and silence artists who are critical opponents of the Government. For example, Genco Erkal who is a best-known actor is facing a criminal investigation under Article 299 of the TCC at the age of 83 because of his social media posts.³¹ Similarly, an investigation was initiated against actors Metin Akpınar and Müjdat Gezen because of their statements on a TV show. They emphasized that the only remedy against polarisation and coup was democracy. Following these statements, pro-government media outlets as well as politicians of the ruling party targeted them. President Erdoğan criticised them in the following way: “These are fake artists. We cannot leave such deeds without consequence. What’s necessary will be done in judiciary, they will pay the price of this.” Following Erdoğan’s statements the Istanbul Public Prosecutor’s Office initiated an investigation under Article 299.³² Both actors were prosecuted and acquitted by the Anadolu 8th Criminal Court but public prosecutor and lawyer of the President appealed against acquittal decision and the case is pending before İstanbul Regional Court of Appeal.
40. The Government’s Action Plan does not provide statistics on the number of requests for permission from the Minister of Justice and the success rate of these requests and this information is not publicly available. A written question about this specific issue at the Parliament has not been answered at the time of writing³³ and a freedom of information case is ongoing to obtain such statistical data at the time of this submission.³⁴
41. According to the data that İFÖD collected official statistics, **131.008** criminal investigations were initiated between the years 2010 and 2019 under Article 299 of the TCC. **128.872** investigations were initiated in the era of Mr. Erdoğan between the years 2014-2019. **31.296**

²⁸ Bianet, Medya Gözlem Veritabanı, “Özgür Gündem gazete yetkilisi Reyhan Çapan’a ‘Cumhurbaşkanı’na hakaretten’ verilen cezaya onama”, <https://medyagozlemveritabanı.org/ozgur-gundem-gazete-yetkilileri-eren-keskin-ve-reyhan-capan-hakkinda-cumhurbaskanina-hakaretten-3-dosyada-verilen-toplam-28-bin-tl-adli-para-cezasi-onandi/>

²⁹ Gaziantep Regional Court of Appeal 18th Criminal Chamber, E.2018/62, K. 2019/342, 04.03.2019.

³⁰ Expression Interrupted, Freedom of Expression and the Press in Turkey, <https://www.expressioninterrupted.com/freedom-of-expression-and-the-press-in-turkey-250/>

³¹ Gazete Duvar, “*Legendary Turkish Actor Genco Erkal Probed for ‘insulting president’ with Social Media Posts*”, <https://www.duvarenglish.com/legendary-turkish-actor-genco-erkal-probed-for-insulting-president-with-social-media-posts-news-57142>

³² Evrensel Daily, “Metin Akpınar and Müjdat Gezen released on judicial control terms”, 25.12.2018, <https://www.evrensel.net/daily/369279/metin-akpinar-and-mujdat-gezen-released-on-judicial-control-terms>

³³ See further information about the written question, https://www.tbmm.gov.tr/develop/owa/yazili_sozlu_soru_sd.onerge_bilgileri?kanunlar_sira_no=292916

³⁴ See the written question, <https://www2.tbmm.gov.tr/d27/7/7-44312s.pdf>



prosecutions took place as of the end of 2019 and **30.780** of them during Mr. Erdoğan's term (see **Annex III**). This data shows two important aspects. Firstly, the Minister of Justice permission mechanism is not working as a legal safeguard. Permissions are automatically given without examination regarding the content and/or context of statements. The number of not guilty decisions is only **4.461**. Consequently, the implementation of Article 299 starts with the automatic permission procedure by the Minister of Justice and the prosecutors issue non-prosecution decisions only in a very small percentage of the investigation dossiers while majority result with convictions and/or suspended sentences. This process clearly lacks any safeguards and permission of the Minister of Justice has a political effect that prevents the non-prosecution and/or decision of acquittal in ongoing proceedings. Recently the Ombudsman Institution ruled that the Presidency should provide statistical data concerning Article 299 of the TCC, in an application brought pursuant to Law No. 4982 on the Right to Information. The decision was ignored and not complied by the Ministry of Justice. As a result administrative legal action was taken by a law professor (see **Annexes IVA & IVB**).

Conclusions and Recommendations

42. There has been **no progress achieved** with regard to the provision of an adequate legislative framework that enables the protection of Article 10 and full and effective implementation of Öner and Türk; Şener; Akçam and Artun and Güvener group of cases.
43. As noted above, since the last meeting in which the current groups of cases were reviewed by the Committee of Ministers, no noticeable amendment has been made in relevant provisions. Previous amendments introduced **have not produced the results suggested by the Government** either. İFÖD considers that structural problems observed by the Court and the Committee of Ministers remain and has not been properly addressed by the Turkish authorities.
44. Recent amendments made in the Turkish Criminal Code and Anti-Terror Law **do not meet the Committee of Ministers' requirement** of fully aligning with the Court's case law in terms of foreseeability and necessity in a democratic society standard.
45. The Government **should be asked to provide detailed data** about the implementation of relevant provisions of the Criminal Code and Anti-Terror Law. As the government arbitrarily changes the methodology of collecting statistics in each and every action plan, it becomes impossible to detect the real effect of measures. It should also be noted that **the Ministry of Justice stopped publishing detailed statistics involving speech related crimes** in this submission through its Judicial Statistics since 2017. It is considered, therefore, that the Committee of Ministers **should request regular updates and detailed data** on the judicial practice of freedom of expression-based investigations, prosecutions and convictions.
46. The **government should also be asked to provide examples** where persons have been convicted under the relevant provisions. The government provides some examples of best practice whilst in thousands of other examples peaceful expression of ideas are sanctioned. Without a comparative analysis, examples of best practice could be misleading.
47. The Öner and Türk; Şener; Akçam and Artun and Güvener group of cases **should remain under enhanced procedure** and given the close connection between freedom of expression and media as foundational pillars of a democratic society, the Committee of Ministers should



review the Öner and Türk; Şener; Akçam and Artun and Güvener group of cases in frequent and regular intervals concerning the legislative general measures.

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 to protect and foster the right to freedom of opinion and expression. The Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.

Annex I

Statistics*

TCC 314					
Year	Public Prosecution	Conviction	Acquittal	Suspension of the pronouncement of the judgement	Others
2014	5362	1641	1118	123	17110
2015	13409	3336	2437	162	4945
2016	34595	4049	3036	338	6798
2017	133505	36927	6096	692	24471
2018	85888	108412	23970	4455	43165
2019	56302	70848	26175	7550	41383
Total	329061	225213	62832	13320	137872

TCC 314		
Year	Investigation	Non-prosecution
2010	16532	2298
2011	17869	2065
2012	28513	6140
2013	21128	5953
2014	55058	7081
2015	36425	7443
2016	155014	15531
2017	457423	65308
2018	444342	145419
2019	310954	116948
Total	1543258	374186

*These statistics were obtained from Judicial Statistics of the Ministry of Justice

Annex II

Statistics*

TCC 301					
Year	Public Prosecution	Conviction	Acquittal	Suspension of the Pronouncement of the judgement	Others
2014	207	16	45	22	55
2015	317	28	26	32	47
2016	561	91	59	73	70
2017	834	166	79	139	179
2018	915	216	138	256	214
2019	1610	342	202	370	312
Total	4444	859	549	892	877

TCC 301		
Year	Investigation	Non-prosecution
2010	1110	575
2011	714	382
2012	1459	894
2013	1256	578
2014	1983	924
2015	2210	1085
2016	7106	2562
2017	6126	2198
2018	9555	3764
2019	13574	6797
Total	45093	19759

* These statistics were obtained from Judicial Statistics of the Ministry of Justice

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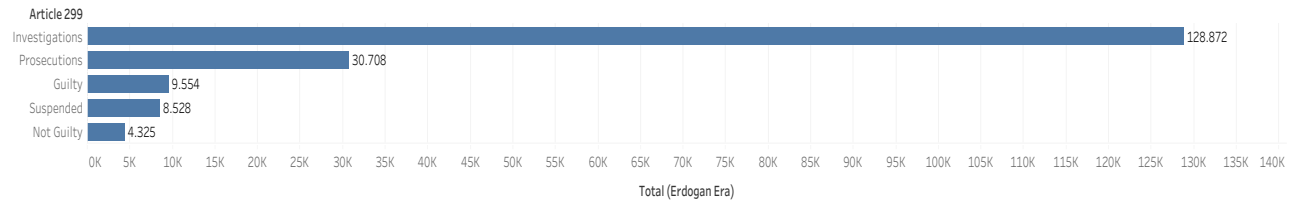
SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Annex III

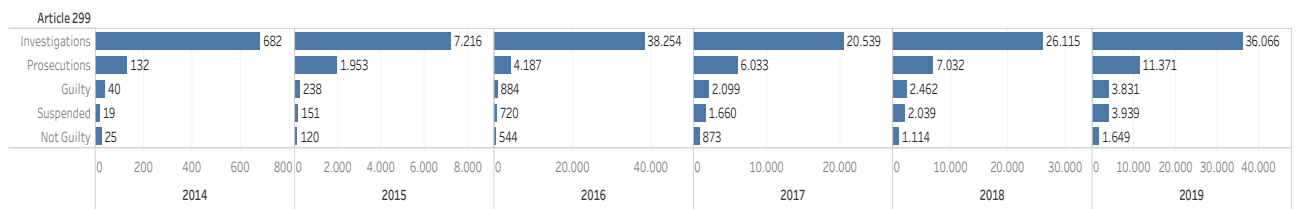
Statistics*

TCC 299

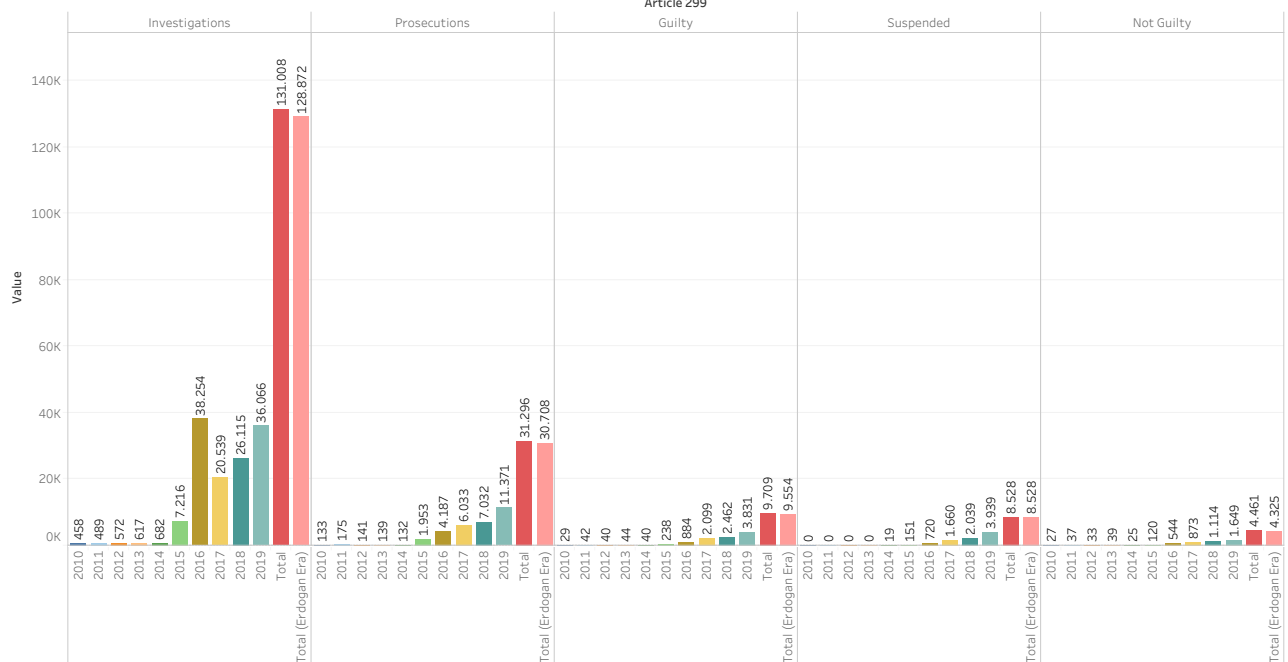
Article 299: Erdoğan's Era (2014-2019)



Article 299: Erdoğan's Era (2014-2019)



Article 299: 2010-2019



* These statistics were obtained from Judicial Statistics of the Ministry of Justice