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Date: 17/06/2022

DH-DD(2022)657

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Meeting: 1436th meeting (June 2022) (DH)

Communication from an NGO (İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association)) (09/06/2022) in the case of ARTUN AND GUVENER v. Turkey (Application No. 75510/01).

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 : 1436^e réunion (juin 2022) (DH)

Communication d'une ONG (İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association)) (09/06/2022) relative à l'affaire ARTUN ET GUVENER c. Turquie (requête n° 75510/01) **[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

09 JUIN 2022

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

RULE 9.2 COMMUNICATION

in the Artun and Güvener Group of Cases (no. 75510/01) v. Turkey

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

09 June 2022

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



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09.06.2022

Rule 9.2 Communication from İfade Özgürlüğü Derneği (“İFÖD”) in the Artun and Güvener Group of Cases (no. 75510/01) v. Turkey

1. This submission is prepared by **İfade Özgürlüğü Derneği** (“İFÖD” – Freedom of Expression Association), a non-profit and non-governmental organization which aims to protect and foster the right to freedom of opinion and expression in Turkey. İFÖD has been informing the Committee of Ministers on the recent developments concerning the persistent failure of Turkish authorities in full and effective implementation of general measures in the *Artun and Güvener* Group of Cases (no. 75510/01) v. Turkey.
2. İFÖD submitted in relation to this group of cases a recent Rule 9.2 communication on 19.01.2022.¹ In that submission, İFÖD provided several examples related to the application of article 299 of the Turkish Criminal Code (“TCC”). İFÖD further explained the failure of the domestic courts to comply with the standards set out by the European Court’s recent *Vedat Şorli v. Turkey* (no. 42048/19, 19.10.2021) judgement.
3. The aim of this submission is to inform the Committee of Ministers with regard to the recent application of article 299. In this respect, İFÖD will discuss the problems arising from and in relation to the failure of the Turkish Authorities to abolish article 299 of the TCC.

Background

4. *Artun and Güvener Group* concerns 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).
5. On 07.01.2022, the Government submitted an Action Plan for the Committee’s 1428th meeting.² In the Action Plan, the Government reiterated its previous arguments concerning the legislative amendments, reform strategies, and training activities that are already discussed in the Committee’s 1406th meeting. The Government further **presented a single decision related to the application of article 299 of TCC.**
6. In response to the Government’s claims, on 19.01.2022, İFÖD presented a Rule 9.2 submission to the Committee. In its submission, İFÖD questioned whether the sample decision presented by the Government was “final” or whether there was a further appeal procedure before the

¹ See DH-DD(2022)120

² See DH-DD(2022)34.



decision becomes final. In addition, İFÖD argued that the sample decision **did not reflect upon the problems** associated with the widespread use of article 299 of the TCC in Turkey or that a single decision resolved all the problems associated with article 299. In support of this argument, İFÖD presented several examples in which article 299 was applied to silence dissent and political criticism aimed towards the President of Turkey. İFÖD further explained the failure of the domestic courts to comply with the *Vedat Şorli v. Turkey* (no. 42048/19, 19.10.2021) judgment of the European Court even though article 299 of TCC should no longer be applied by the criminal courts.

Detention and Conviction of Journalist Sedef Kabaş

7. Following İFÖD's January 2022 submission, a well-known journalist Dr. Sedef Kabaş was arrested for insulting the President, remained in custody for 49 days, and was only released in the court hearing in which she was convicted to 2 years and 4 months imprisonment.
8. Dr. Kabaş was one of the hosts of a political commentary program called "The Arena of Democracy" broadcasted live on the national TV channel, TELE1. On 14.01.2022, the participants, including Dr. Kabaş, expressed their opinions on the current politics of the AKP administration. The anchor asserted that the politics of the AKP administration was discriminatory. Dr. Kabaş was invited to comment on the subject.³ Whilst expressing her views on the subject, she referred to a Circassian proverb and stated that "There is a very famous saying that the crowned head will become wiser. But we see that it is not the case. Or there is another saying with the opposite meaning. Let me not tell you the exact wording. When cattle enter a palace, it does not become a king. That palace becomes a barn".
9. Although the program was watched by a very wide audience, no one complained about it for a week. However, a week after the speech, a pro-government newspaper claimed that Sedef Kabaş had insulted the President and initiated a smear campaign against her. Due to the ceaseless smear campaign against her, on 21.01.2022, Sedef Kabaş posted the same proverb on her Twitter account.⁴ Subsequently, various high-level state officials, government spokespersons, politicians from AKP and MHP, and several deputies including the Justice Minister (former and current) participated in this campaign and started to make public statements and post comments on the social media platforms.⁵

³ The Radio and Television Supreme Council (RTÜK) imposed a fine on TELE1 on the ground that the statements of Sedef Kabaş incited the people into animosity and hatred. TELE1 will pay %5 of its total revenue for 2021, equal to 38.460,00 Turkish Lira as an administrative fine. RTÜK also suspended the TV program for five consecutive broadcasts. For the decision see <https://www.rtuk.gov.tr/UstKurulKarar/Detay/17265>.

⁴ For more information about Sedef Kabaş's statement and her arrest see <https://m.bianet.org/english/print/256640-detained-in-midnight-raid-journalist-sedef-kabas-arrested-for-insulting-erdogan>

⁵ Among others, Abdülhamit Gül, the former Minister of Justice tweeted that "I curse the ugly and impudent words that target our president, who was elected by the votes of our nation. These presuming and unlawful expressions arising from jealousy and hatred will find the response they deserve in the conscience of the nation and before justice." See Bianet, "Arrested journalist Sedef Kabaş files criminal complaint against justice minister," 28.01.2022, at <https://bianet.org/5/147/256929-arrested-journalist-sedef-kabas-files-criminal-complaint-against-justice-minister>. The Government Spokesperson Ömer Çelik also posted "So-called journalist Sedef Kabaş' despicable words on television targeting the Presidency is vulgar and immoral. We condemn this immorality."



10. A criminal investigation was launched by the Istanbul Criminal Prosecutor's Office following this campaign. On 22.01.2022, Sedef Kabaş was taken into police custody at 2 a.m. On the same day, she was placed in pre-trial detention with a decision of the Istanbul 10th Criminal Judgeship of Peace on the grounds that there was "strong suspicion" that she had committed a crime and a high risk of "absconding". The judge was of the opinion that other judicial control mechanisms would have been insufficient. In this regard, he neither provided any justification on what ground he considered there existed the danger of absconding nor did he explain why other judicial control mechanisms such as international travel ban and home confinement would have been insufficient to prevent Sedef Kabaş from absconding.
11. On 11.02.2022, the Istanbul Public Prosecutor's Office issued an indictment against Sedef Kabaş. In the indictment, the prosecutor requested Sedef Kabaş to be sentenced for using defamatory statements toward the President Erdoğan subject to article 299 of the TCC, and two ministers, namely, the Minister of Interior Süleyman Soylu, and the Minister of Transportation and Infrastructure Adil Karaismailoğlu subject to article 125/3 of the TCC which criminalizes insult against public officers. The indictment was accepted by the Istanbul 36th Criminal Court of First Instance.
12. In the first hearing, although Sedef Kabaş was acquitted for her statements toward the ministers subject to article 125/3, she was convicted to 2 years and 4 months imprisonment on the ground that her statements made in the TV program constituted an insult to the President. She was released on the same day. The attorneys of Sedef Kabaş appealed against the decision and the appeal is still pending before the Istanbul Regional Criminal Court of Appeal.
13. Sedef Kabaş was deprived of her liberty for 49 days until the first hearing that took place on 11.03.2022. Although the appeals requesting her release were brought to the judicial authorities long before the first hearing, the Court denied them all. In this regard, the attorneys of Sedef Kabaş lodged individual applications with the Constitutional Court and with the European Court of Human Rights and requested an interim resolution to ensure her release from both high courts. The detention of Sedef Kabaş also drew the attention of international NGOs. 36 NGOs published a press release calling for the release of Sedef Kabaş.⁶ More importantly, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism jointly sent a communication to the Turkish authorities and expressed their "serious concern in relation to the continued invocation of articles 125 and 299 of the Penal Code against journalists for expressing critical views of public figures" and recalled "the report of the former Special Rapporteur on the right to freedom of opinion and expression following his country visit to Turkey, in which he recommended the repeal of both articles due to their incompatibility with international law standards."⁷

Addressing the head of state with this ugly attitude is an insult to the nation. We are convicting this immorality. We will fight with this despicable behaviour by all legal and political means possible."

⁶ For the NGO campaign initiated for the release of Sedef Kabaş see <https://www.article19.org/resources/turkey-press-freedom-groups-and-journalists-call-for-release-of-sedef-kabas/>

⁷ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27140>



14. Notwithstanding, as will be further explained further below, other individuals were also taken into police custody and subjected to pre-trial detention merely for re-posting the above-mentioned statement of Sedef Kabaş as well as her tweet on their social media accounts.
15. As will be explained further, İFÖD would like to note that the case of Sedef Kabaş was not an isolated incident. Along with Sedef Kabaş, other individuals were taken into police custody and subjected to pre-trial detention because of sharing social media posts in which they referred to the Circassian proverb referred by Sedef Kabaş.
16. In this submission, İFÖD will further provide examples from the recent judicial practice related to the application of article 299 of the TCC since its last submission.

İFÖD's Observations

17. The case of Sedef Kabaş is yet another example of the widespread use of article 299 of the TCC to punish and silence criticism and dissent in Turkey. In this regard, İFÖD would like to draw the Committee's attention to investigations that were initiated based on posting the above-mentioned statement of Sedef Kabaş on social media platforms.
18. First, a 70 years old citizen, A.Y., who has heart disease and high blood pressure was among the citizens who were arrested and subjected to pre-trial detention for merely retweeting Sedef Kabaş' tweet involving the Circassian proverb. On the news covered by media, following Sedef Kabaş' release on 11.03.2022, A.Y. retweeted Sedef Kabaş' post and commented "*Get well soon. Yes, the Circassian proverb, when cattle enter a palace, it does not become a king. That palace becomes a barn.*" A.Y. was arrested, interrogated, and released pending trial.⁸ However, the prosecutor appealed against his release. On 14.03.2022, Küçükçekmece 1st Criminal Judgeship of Peace decided to detain A.Y. on the grounds that the other judicial control provisions may not be sufficient and added that the pre-trial detention order is proportionate to the anticipated punishment.
19. Similarly, A.E., a student at the Istanbul Bilgi University History Department and a member of the youth branch of İYİ Party (opposition political party) was also detained for posting the above-mentioned Circassian proverb on his Twitter account.⁹ It is reported that after A.E. shared the post, he instantly erased it, however, on 16.04.2022, he was detained and stayed for 12 days in detention before released pending trial.
20. The problems arising from the application of article 299 are not limited to the recent incidents related to the Circassian proverb. During February 2022, subsequent to the announcement that both President Erdoğan and his wife Emine Erdoğan tested positive for the Omicron variant of COVID-19 and had mild symptoms, the President tweeted that "We are on duty. We will

⁸ DW Türkçe, "Shared the Statement of Kabaş, Send to Prison", 19.03.2022, Available at <https://www.dw.com/tr/sedef-kabaşın-sözlerini-paylaştı-cezaevine-gönderildi/a-61183967>

⁹ Birgün Newspaper, "İYİ Party member who had written and erased the Circassian proverb stated by Sedef Kabaş arrested", 16.04.2022, Available at <https://www.birgun.net/haber/sedef-kabas-in-soyledigi-cerkes-atasozunu-yazip-silen-iyi-partili-tutuklandi-384495>



continue to work at home. We look forward to your prayers.”¹⁰ Many wished and prayed for him “to get well soon” through social media platforms, but not all. Some choose not to pray for the president’s health. Among others, a former Turkish Olympic swimmer Derya Büyükuncu tweeted that “*He has COVID-19 and wants prayers. We’re praying, don’t worry. I’ve started making 20 pots of halva. I’ll give some to the entire neighborhood when the time comes*”.¹¹ The irony of this tweet was that “halva” is a well-known Anatolian specialty, a type of sweet which is part of various celebrations including funerals in Turkey. However, the tweet was not taken lightly and Büyükuncu was immediately subject to a criminal investigation involving insulting the President of Turkey. The Chief Public Prosecutor’s Office in Istanbul stated that the tweet was regarded as criminal because Büyükuncu had indirectly wished for the president’s death by claiming to make “halva for the neighborhood”. According to media reports, at least 36 investigations have been initiated in 12 separate cities in relation to 64 separate social media posts about the President’s health. Four people have been arrested and arrest warrants have been issued for four more, including Derya Büyükuncu. He has also been permanently suspended from the Swimming Federation of Turkey.

21. Moreover, on 17.03.2022, a citizen, V.Y., was arrested for statements made during a street interview. In an interview made with another person, that person referred to ex-prime minister Adnan Menderes who was executed by the military after the military coup in 1960.¹² In response to this individual, V.Y. stated that “*Erdoğan will be hanged too. He will be prosecuted*”. For this statement, V.Y. was subjected to pre-trial detention for allegedly insulting the president along with committing the crime of provoking the public to hatred.¹³
22. One of the other incidents occurred in a high school. It is reported that, two 16 years old high school students, were arrested in their school for allegedly insulting the President of Turkey.¹⁴ According to the news, the students participated in the demonstration named Feminist Night Stroll that took place on the 8th of March, International Woman’s Day. The attorney of the students argued in a live broadcast that “*there is a case file in which the students are charged*

¹⁰ The Guardian, “*Turkish president Recep Tayyip Erdoğan tests positive for Covid*” 05.02.2022, at <https://www.theguardian.com/world/2022/feb/05/turkish-president-recep-tayyip-erdogan-tests-positive-for-covid>

¹¹ DW, “*Turkey marshals law to defend Recep Tayyip Erdogan’s honor*” 12.02.2022, at <https://www.dw.com/en/turkey-marshals-law-to-defend-recep-tayyip-erdogans-honor/a-60733191> See further Akdeniz, Y., COVID-19, social media and freedom of expression in Turkey, Article 19 Blog, 08.04.2022, at <https://www.article19.org/resources/pandemic-social-media-freedom-of-expression-turkey/>.

¹² Adnan Menderes was elected prime minister from conservative religious Democratic Party. He served as a prime minister from 1950 until the military coup that took place on 27.05.1960. Subsequently, among other politicians from Democratic Party, Adnan Menderes was tried and sentenced to death by the military junta. Adnan Menderes was hanged on 17.09.1961. For further information see, the Daily Sabah, “*1960 coup, which paved the way for others in Turkey, remembered*”, 26.03.2022, Available at <https://www.dailysabah.com/turkey/1960-coup-which-paved-the-way-for-others-in-turkey-remembered/news>

¹³ Gazete Duvar, “*Spoke in a street interview, arrested for ‘insulting the President’*”, 24.03.2022, at <https://www.gazeteduvar.com.tr/sokak-roportajinda-konustu-cumhurbaskanina-hakaretten-tutuklandi-haber-1557857>. For the street interview, see <https://www.youtube.com/shorts/BO2iGjUlgdY>.

¹⁴ Cumhuriyet Newspaper, “*In Istanbul, Two high school students were arrested in their schools for “insulting the president”*”, 17.05.2022, Available at <https://www.cumhuriyet.com.tr/siyaset/istanbulda-iki-liseli-cumhurbaskanina-hakaret-iddiasıyla-okullarından-gozaltına-alindi-1936907>



for insulting the president on the ground that they chanted “Run Tayyip¹⁵ Run Woman are coming,” “Jump jump the one who doesn’t jump is Tayyip” during the Feminist Night Stroll”. The attorney further pointed out neither the prosecutor nor the judge ordered an arrest warrant.

23. Moreover, it is the submission of İFÖD that even higher courts continue to disregard the well-established case-law of the European Court. The case of Canan Kaftancıoğlu is another clear example of the failure of the domestic courts to comply with the principles set out in relation to Article 10 of the Convention.
24. Canan Kaftancıoğlu is the Istanbul Provincial Head of the main opposition Republican People’s Party (“CHP”). Since 14.01.2018, Kaftancıoğlu is subjected to criminal proceedings due to her tweets which were posted between 2012-2017. On 03.09.2019, Istanbul 37th Assize Court sentenced Canan Kaftancıoğlu to a total of 9 years 8 months 20 days of imprisonment for committing five separate crimes. In terms of the article 299 charges, the Court considered calling President Erdoğan a “thief”, “a primary school graduate schizophrenic lunatic” and implying that he had lost his mental health was enough for sentencing Kaftancıoğlu to 2 years 4 months of imprisonment. Kaftancıoğlu appealed against the decision, however, the 2nd Chamber of Istanbul Regional Court upheld it. Subsequently, Kaftancıoğlu challenged the decision before the Court of Cassation.
25. On 12.05.2022, the 3rd Chamber of the Court of Cassation Court partially upheld the decision and sentenced Canan Kaftancıoğlu to 4 years 11 months, and 20 days of imprisonment.¹⁶ Although the Court reduced the overall sentence, Kaftancıoğlu was sentenced to 1 year and 9 months of imprisonment for insulting the President.
26. The case of Kaftancıoğlu clearly illustrates the misuse of article 299 of TCC. Even after the European Court’s findings in *Vedat Şorli v. Turkey* (no. 42048/19, 19.10.2021) decision, the Court of Cassation refuses to comply with the European standards by ignoring the *Vedat Şorli* decision. From the investigation stage to the Court of Cassation, article 299 continues to be used as a tool to silence dissent and political criticism brought against the President of Turkey.
27. İFÖD believes the cases of Sedef Kabaş and Canan Kaftancıoğlu illustrate the unwillingness of the judicial bodies to implement European Court’s case-law in relation to article 299 of the TCC. The judicial bodies base their decision on political motives rather than the rule of law. İFÖD is of the opinion that the application of article 299 by judicial bodies is retrogressive and it threatens the fundamental rights and liberties protected by the Convention. In addition, İFÖD would like to point out that the judicial practice is far from providing effective legal safeguards in the application of article 299 of TCC. İFÖD invites the Committee to call The Turkish authorities to take action with regards to the Article 46 ruling in the *Vedat Şorli* judgment.

¹⁵ Full name of the President is Recep Tayyip Erdoğan

¹⁶ BBC News, “Political ban imposed to Canan Kaftancıoğlu, her prison sentence upheld” 12.05.2022, Available at <https://www.bbc.com/turkce/haberler-turkiye-61426730>



Conclusions and Recommendations

28. 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 the *Artun and Güvener* group of cases.
29. The Turkish Authorities deliberately disregard **the structural problems** observed by the Court and the Committee of Ministers arising from the application of article 299 of TCC.
30. The Committee should **request** the Turkish Authorities **to abolish article 299** of TCC in the light of the Court's *Vedat Şorli* judgment and ask the Authorities **to comply with the Court's Article 46 decision**.
31. The *Artun and Güvener* group of cases **should remain under the enhanced procedure** and the Committee of Ministers should review the *Artun and Güvener* group of cases at frequent and regular intervals concerning the legislative general measures in the light of the Court's recent judgment in *Vedat Şorli*.

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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.