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COUNCIL OF EUROPE
1949 - 2024
CONSEIL DE L'EUROPE

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Date: 14/03/2024

DH-DD(2024)305

Meeting: 1492nd meeting (March 2024) (DH)

Communication from an NGO (İfade Özgürlüğü Derneği (İFÖD)) (06/03/2024) concerning the Altug Taner Akcam, Nedim Sener, Isikirik, Oner and Turk and Artun and Guvener groups v. Turkey (Applications No. 27520/07, 38270/11, 41226/09, 51962/12, 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 : 1492e réunion (mars 2024) (DH)

Communication d'une ONG (İfade Özgürlüğü Derneği (İFÖD)) (06/032024) relative aux groupes d'affaires Altug Taner Akcam, Nedim Sener, Isikirik, Oner et Turk et Artun et Guvener c. Turquie (requêtes n° 27520/07, 38270/11, 41226/09, 51962/12, 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.

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

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), Artun and Güvener Group of Cases (no. 75510/01) and Işıkırık Group of Cases (no. 41226/09) v. Turkey

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

06 March 2024

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

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

DGI Directorate General of Human Rights and Rule of Law

Department for the Execution of Judgments of the ECtHR

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FRANCE

06.03.2024

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), Artun and Güvener Group of Cases (no. 75510/01) and Işıkırık Group of Cases (no. 41226/09) 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]; *Artun and Güvener* Group of Cases (no. 75510/01)[4] and *Işıkırık* Group of Cases (no. 41226/09)[5] v. Turkey. The submission is prepared by İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association), a non-profit and non-governmental organisation aims to protect and foster the right to freedom of opinion and expression in Türkiye.

2. The present submission is dedicated to the critical analysis of the methodology for statistical information provided by the government in its submissions to the Committee. Although this submission's focus is going to be on the most recent Action Plan[6] submitted by the Government

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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 under Article 6 § 2 and Article 7 § 2 of Law No. 3713, namely, disseminating propaganda in favour of an illegal organisation, 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 contains five cases. This group focuses on the pre-trial detention of journalists on serious charges, such as aiding and abetting a criminal organisation, being a member of a terrorist organisation, attempting to overthrow the constitutional order, without relevant and sufficient reasons. The legal basis for the charges involves 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.

5 The *Işıkırık* group concerns violations of the applicants' right to freedom of peaceful assembly and/or freedom of expression pursuant to Article 220 §§ 6 and 7 of the Turkish Criminal Code (TCC), which provides that anyone who commits a crime on behalf of an illegal organisation or who knowingly and willingly aids and abets an illegal organisation shall be sentenced as a member of that organisation.

6 DH-DD(2024)39.

on **11.01.2024** in the above-mentioned groups of cases, it was deemed crucial by İFÖD to inform the Committee on this aspect in a separate submission.

3. The reason thereof is **two-fold**: **Firstly**, the Turkish authorities always adopt the same methodology for statistical data in all its recent submissions to the Committee. İFÖD has always been pointing out the misleading, incomplete and unsatisfactory nature of the statistical data that the Government presents in its submissions to the CM. As mentioned above, it was therefore deemed necessary to assess in detail the Government's methodology for providing statistical data to the CM before making a separate assessment of the 11.01.2024 Action Plan. **Secondly**, by submitting a 135-page Action Plan in January 2024 to be examined in the CM Meeting to be held between 12-14 March, 2024, the Government rendered it impossible for İFÖD and other CSOs to prepare a detailed analysis of the substance of the Action Plan. The Action Plan, due to the extent of the rights violations found by the Court, covers the developments concerning the most crucial and grave violations of freedom of expression in Türkiye. In addition to the high number of cases covered in the Plan, it is methodologically flawed and incomplete that it requires a lot of fact-checking and extensive qualitative and quantitative research on İFÖD's side. As a direct corollary of the methodology concerning statistical data adopted by the Government, it falls on İFÖD to inform the Committee on the real situation in Türkiye regarding freedom of expression related violations. As İFÖD has extensive know-how and experience on the subject the substantive arguments and analysis on the recent Action Plan will be communicated to the Committee shortly. In the meantime, İFÖD respectfully asks the Committee to continue its supervision in the above-mentioned groups of cases and refer to İFÖD's previous Rule 9.2. submissions.

I. Background and İFÖD's Rule 9.2 Submissions

4. 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.

5. İFÖD made previous Rule 9.2 submissions on **22.01.2020**[7] in the *Öner and Türk*, *Şener* and *Akçam* groups of cases and two submissions on **19.01.2022**[8] and **09.06.2022**[9] in the *Artun and Güvener* group of cases. Finally, on **18.01.2022**[10] İFÖD submitted its third Rule 9.2. submission in the *Işıkırık* group of cases.

6. In its previous submissions, İFÖD explained to the Committee with statistics and examples that the present legal framework fails to provide the protection required by Article 10 of the Convention concerning the full and effective implementation of the present groups of cases. İFÖD stressed that the legislative amendments that the Government introduced have not

[7] DH-DD(2020)92.
[8] DH-DD(2022)120.
[9] DH-DD(2022)657.
[10] DH-DD(2022)127.

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 Penal Code and Anti-Terrorism Law do not meet the requirement of both the Court's case law and the Committee's expectations and recommendations. Thus, İFÖD presented with examples that the legislative amendments and the information provided by the Government were misleading.

II. The Committee of Ministers' 1459th Meeting, 7-9 March 2022 (DH) - Decisions

7. The Committee of Ministers in its 1459th meeting, noted that "these groups mainly concern unjustified and disproportionate interferences with the applicants' freedom of expression and right to liberty on account of criminal proceedings for having expressed opinions that did not incite hatred or violence, **and the consequent chilling effect on society as a whole**".[11]

8. In this regard, the Committee requested **concrete signs of progress** and **demanded** from the authorities to provide **detailed statistical information, in particular on the application of paragraphs 6 and 7 of Article 220 and Articles 6 and 7 of the Anti-Terrorism Law, with details on the type of conduct concerned**.[12]

9. The Committee also urged, again, the authorities to consider further legislative amendments to the Criminal Code and the Anti-Terrorism Law, such as extending the 2019 amendment of Article 7(2) of the Anti-Terrorism Law to other provisions, to clarify that the exercise of the right of freedom of expression does not constitute an offence and to take concrete measures towards limiting the application of the criminal provisions strictly to cases of incitement to violence. The Committee noted with regret that the Constitutional Court's pilot judgment in the case of *Hamit Yakut* has not been executed although more than one and half years passed since the judgment was transmitted to the Parliament to remedy the violation; and strongly urged the authorities, once again, to adopt the necessary legislative solutions with respect to Article 220 §§ 6 and 7 of the Criminal Code to comply with the findings of the Constitutional Court and the European Court without further delay.

10. Most importantly, the Committee, given the Court's findings and of the worrying numbers of prosecutions and convictions, strongly urged the authorities, once again, to consider amending articles 125 and 301 **and repealing article 299 of the Criminal Code subject to the Court's case-law.**

11. Finally, the Ministers invited the authorities to submit **an updated and consolidated action plan** on all of the outstanding questions in these groups of cases.

III. The Turkish Authorities' Action Plan of January 2024

12. On **11.01.2024**,[13] the Authorities submitted a new action plan. In the Action Plan, the Government did **not provide the necessary information requested** by the Committee.

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11 CM/Del/Dec(2023)1459/H46-28, Decisions, § 1.

12 *Ibid*, Decisions, § 5.

13 DH-DD(2024)39.

13. In its 135-page submission, the Government provides a number of updates on individual measures and repeats the legislative amendments already brought to the attention of the Committee with the previous action plans. In its January 2024 Action Plan, the Government, by providing some examples from domestic courts, claims 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. 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 the judgments within the relevant groups of cases. Therefore, the Government asked the CM to close the supervision of 32 cases, arguing that the necessary individual measures were adopted.

14. As mentioned above, İFÖD will in due time submit Rule 9.2. submissions regarding the substantive claims in the Action Plan. It must be reiterated here that there exist significant shortcomings, repetitions as well as disguised and misleading facts in the Plan. İFÖD therefore asks the Committee to reject the Government's request to close the supervision of the 32 cases.

IV. İFÖD's Observations

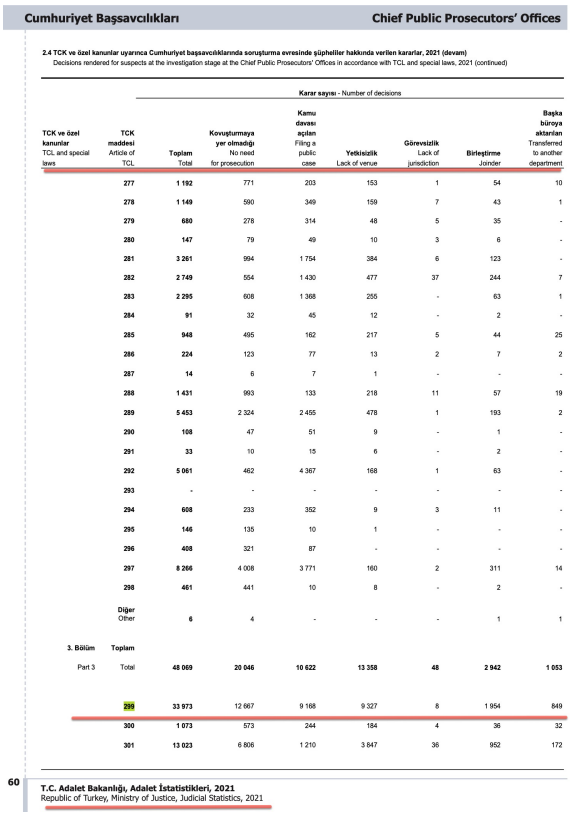
15. This submission, focusing on the 11.01.2024 Action Plan of the Government, will highlight **two major problems** in the methodology of the Turkish Government's submissions to the Committee. **The first** and arguably the most striking problem with the Action Plan is the fact that **it relies on the official statistical information which entails fundamental problems with regard to the classification**. The statistical information provided by the government is not only problematic in terms of classification, it is also much more limited than previous statistics, making it impossible to track the actual consequences of the measures allegedly taken. The manner in which the statistics are held and shared with the public is so problematic that it constitutes a violation of the right to receive and obtain government-held information. This issue will be further elaborated below. **The second problem** is the extremely selective choice of cases by the Government. The examples provided within the Action Plan fail to provide the full extent of the failure of the domestic courts to implement the principles and the jurisprudence of the Court in the present groups of cases.

V. Assessment of the statistical information

16. As mentioned above, the Committee demanded from the authorities **detailed statistical information, in particular on the application of paragraphs 6 and 7 of Article 220 and Articles 6 and 7 of the Anti-Terrorism Law, with details on the type of conduct concerned.** It must be noted from the outset that the Action Plan **does not contain such information**. This **approach is far from being specific to the Action Plan at hand** as will be explained below.

17. The "**Statistics on the offences relating to the freedom of expression**" is to be found in the Action Plan between pages **105-107**. As pointed out by the Government, the statistics originate from the Judicial Statistics ("*Adalet İstatistikleri*") which are published by the General Directorate of Judicial Record and Statistics under the Ministry of Justice. Therefore, İFÖD will first analyse the method by which the judicial statistics are collected and shared with the public.

18. The Judicial Statistics at question are not kept in a transparent manner that allows civil society organisations such as İFÖD to analyse and construe meaningful outputs through research. In that regard, the Committee must be reminded that up until 2022, the statistics had separate categories for each article of the Turkish Penal Code ("the TPC") and other laws concerning criminal law, such as Anti-Terror Law. In other words, statistical information such as how many investigations, how many prosecutions, how many sentences, how many acquittals, how many dismissals were decided for each offense were provided separately, e.g. for the crime of insulting the president and denigrating the Turkish Republic. To that end, even though the authenticity of the numbers could not be verified by civil society, it was relatively easier to have a clear picture of the fluctuations over the years. By way of example, a comparison of Judicial Statistics for 2021 and 2022 are provided here with regards to the statistical data for the crime of insulting the President of Türkiye (article 299, Turkish Criminal Code).



Cumhuriyet Başsavcılıkları — Chief Public Prosecutors' Offices

2.4 TCK ve özel kanunlar uyarınca Cumhuriyet başsavcılıklarında soruşturma evresinde şüpheliler hakkında verilen kararlar, 2021 (devamı)
Decisions rendered for suspects at the investigation stage at the Chief Public Prosecutors' Offices in accordance with TCL and special laws, 2021 (continued)

TCK ve özel kanunlar TCL and special laws	TCK maddesi Article of TCL	Karar sayısı - Number of decisions Toplam Total	Kovuşturmaya yer olmadığı No need for prosecution	Kamu davası açılan Filing a public case	Yetkisizlik Lack of venue	Görevsizlik Lack of jurisdiction	Birleştirme Joinder	Başka büroya aktarılan Transferred to another department
	277	1 192	771	203	153	1	54	10
	278	1 149	590	349	159	7	43	1
	279	680	278	314	48	5	35	-
	280	147	79	49	10	3	6	-
	281	3 261	994	1 754	384	6	123	-
	282	2 749	554	1 430	477	37	244	7
	283	2 295	608	1 368	255	-	63	1
	284	91	32	45	12	-	2	-
	285	948	495	162	217	5	44	25
	286	224	123	77	13	2	7	2
	287	14	6	7	1	-	-	-
	288	1 431	993	133	218	11	57	19
	289	5 453	2 324	2 455	478	1	193	2
	290	108	47	51	9	-	1	-
	291	33	10	15	6	-	2	-
	292	5 061	462	4 367	168	1	63	-
	293	-	-	-	-	-	-	-
	294	608	233	352	9	3	11	-
	295	146	135	10	1	-	-	-
	296	408	321	87	-	-	-	-
	297	8 266	4 008	3 771	160	2	311	14
	298	461	441	10	8	-	2	-
	Diğer Other	6	4	-	-	-	1	1
3. Bölüm Part 3	Toplam Total	48 069	20 046	10 622	13 358	48	2 942	1 053
	299	33 973	12 667	9 168	9 327	8	1 954	849
	300	1 073	573	244	184	4	36	32
	301	13 023	6 806	1 210	3 847	36	952	172

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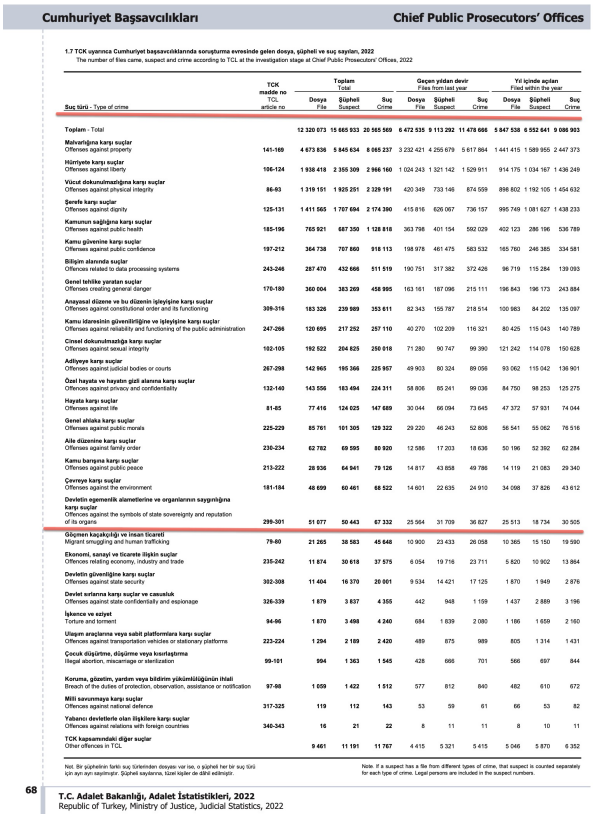
T.C. Adalet Bakanlığı, Adalet İstatistikleri, 2021
Republic of Turkey, Ministry of Justice, Judicial Statistics, 2021



Cumhuriyet Başsavcılıkları — Chief Public Prosecutors' Offices

1.7 TCK uyarınca Cumhuriyet başsavcılıklarında soruşturma evresinde gelen dosya, şüpheli ve suç sayıları, 2022
The number of files came, suspect and crime according to TCL at the investigation stage at Chief Public Prosecutors' Offices, 2022

Suç türü - Type of crime	TCK madde no TCL article no	Toplam Total Dosya File	Toplam Total Şüpheli Suspect	Toplam Total Suç Crime	Geçen yıldan devir Files from last year Dosya File	Geçen yıldan devir Files from last year Şüpheli Suspect	Geçen yıldan devir Files from last year Suç Crime	Yıl içinde açılan Filed within the year Dosya File	Yıl içinde açılan Filed within the year Şüpheli Suspect	Yıl içinde açılan Filed within the year Suç Crime
Toplam - Total		**12 320 073**	**15 665 933**	**20 565 569**	**6 472 535**	**9 113 292**	**11 478 666**	**5 847 538**	**6 552 641**	**9 086 903**
Malvarlığına karşı suçlar Offenses against property	141-169	**4 673 836**	**5 845 634**	**8 065 237**	3 232 421	4 255 679	5 617 864	1 441 415	1 589 955	2 447 373
Hürriyete karşı suçlar Offenses against liberty	106-124	**1 938 418**	**2 355 309**	**2 966 160**	1 024 243	1 321 142	1 529 911	914 175	1 034 167	1 436 249
Vücut dokunulmazlığına karşı suçlar Offenses against physical integrity	86-93	**1 319 151**	**1 925 251**	**2 329 191**	420 349	733 146	874 559	898 802	1 192 105	1 454 632
Şerefe karşı suçlar Offenses against dignity	125-131	**1 411 565**	**1 707 694**	**2 174 390**	415 816	626 067	736 157	995 749	1 081 627	1 438 233
Kamunun sağlığına karşı suçlar Offenses against public health	185-196	**765 921**	**687 350**	**1 128 818**	363 798	401 154	592 029	402 123	286 196	536 789
Kamu güvenine karşı suçlar Offenses against public confidence	197-212	**364 738**	**707 860**	**918 113**	198 978	461 475	583 532	165 760	246 385	334 581
Bilişim alanında suçlar Offences related to data processing systems	243-246	**287 470**	**432 666**	**511 519**	190 751	317 382	372 426	96 719	115 284	139 093
Genel tehlike yaratan suçlar Offenses creating general danger	170-180	**360 004**	**383 269**	**458 995**	163 161	187 096	215 111	196 843	196 173	243 884
Anayasal düzene ve bu düzenin işleyişine karşı suçlar Offenses against constitutional order and its functioning	309-316	**183 326**	**239 989**	**353 611**	82 343	155 787	218 514	100 983	84 202	135 097
Kamu idaresinin güvenilirliğine ve işleyişine karşı suçlar Offenses against reliability and functioning of the public administration	247-266	**120 695**	**217 252**	**257 110**	40 270	102 209	116 321	80 425	115 043	140 789
Cinsel dokunulmazlığa karşı suçlar Offenses against sexual integrity	102-105	**192 522**	**204 825**	**250 018**	71 280	90 747	99 390	121 242	114 078	150 628
Adliyeye karşı suçlar Offenses against judicial bodies or courts	267-298	**142 965**	**195 366**	**225 957**	49 903	80 324	89 056	93 062	115 042	136 901
Özel hayata ve hayatın gizli alanına karşı suçlar Offences against privacy and confidentiality	132-140	**143 556**	**183 494**	**224 311**	58 806	85 241	99 036	84 750	98 253	125 275
Hayata karşı suçlar Offenses against life	81-85	**77 416**	**124 025**	**147 689**	30 044	66 094	73 645	47 372	57 931	74 044
Genel ahlaka karşı suçlar Offenses against public morals	225-229	**85 761**	**101 305**	**129 322**	29 220	46 243	52 808	56 541	55 062	76 516
Aile düzenine karşı suçlar Offenses against family order	230-234	**62 782**	**69 595**	**80 920**	12 586	17 203	18 636	50 196	52 392	62 284
Kamu barışına karşı suçlar Offenses against public peace	213-222	**28 936**	**64 941**	**79 126**	14 817	43 858	49 786	14 119	21 083	29 340
Çevreye karşı suçlar Offenses against the environment	181-184	**48 699**	**60 461**	**68 522**	14 601	22 635	24 910	34 098	37 826	43 612
Devletin egemenlik alametlerine ve organlarının saygınlığına karşı suçlar Offences against the symbols of state sovereignty and reputation of its organs	299-301	**51 077**	**50 443**	**67 332**	25 564	31 709	36 827	25 513	18 734	30 505
Göçmen kaçakçılığı ve insan ticareti Migrant smuggling and human trafficking	79-80	**21 265**	**38 583**	**45 648**	10 900	23 433	26 058	10 365	15 150	19 590
Ekonomi, sanayi ve ticarete ilişkin suçlar Offences relating economy, industry and trade	235-242	**11 874**	**30 618**	**37 575**	6 054	19 716	23 711	5 820	10 902	13 864
Devletin güvenliğine karşı suçlar Offenses against state security	302-308	**11 404**	**16 370**	**20 001**	9 534	14 421	17 125	1 870	1 949	2 876
Devlet sırlarına karşı suçlar ve casusluk Offenses against state confidentiality and espionage	326-339	**1 879**	**3 837**	**4 355**	442	948	1 159	1 437	2 889	3 196
İşkence ve eziyet Torture and torment	94-96	**1 870**	**3 498**	**4 240**	684	1 639	2 080	1 186	1 659	2 160
Ulaşım araçlarına veya sabit platformlara karşı suçlar Offences against transportation vehicles or stationary platforms	223-224	**1 294**	**2 189**	**2 420**	489	875	989	805	1 314	1 431
Çocuk düşürtme, düşürme veya kısırlaştırma Illegal abortion, miscarriage or sterilization	99-101	**994**	**1 363**	**1 545**	428	666	701	566	697	844
Koruma, gözetim, yardım veya bildirim yükümlülüğünün ihlali Breach of the duties of protection, observation, assistance or notification	97-98	**1 059**	**1 422**	**1 512**	577	812	840	482	610	672
Milli savunmaya karşı suçlar Offences against national defence	317-325	**119**	**112**	**143**	53	59	61	66	53	82
Yabancı devletlerle olan ilişkilere karşı suçlar Offences against relations with foreign countries	340-343	**16**	**21**	**22**	8	11	11	8	10	11
TCK kapsamındaki diğer suçlar Other offences in TCL		**9 461**	**11 191**	**11 767**	4 415	5 321	5 415	5 046	5 870	6 352

Not. Bir şüphelinin farklı suç türlerinden dosyası var ise, o şüpheli her bir suç türü için ayrı ayrı sayılmıştır. Şüpheli sayılarına, tüzel kişiler de dâhil edilmiştir.
Note. If a suspect has a file from different types of crime, that suspect is counted separately for each type of crime. Legal persons are included in the suspect numbers.

68
T.C. Adalet Bakanlığı, Adalet İstatistikleri, 2022
Republic of Turkey, Ministry of Justice, Judicial Statistics, 2022

Comparison of 2021-2022 Judicial Statistics

19. As can be seen above, while the Judicial Statistics provided not only more details but more importantly also reported for specific crimes individually. In other words, while İFÖD can obtain the total number of criminal investigations for the crimes provided within articles 299, 300 and 301 of the Criminal Code separately, since 2022 no separate statistical data is provided for these crimes. They are now grouped into the articles 299-301 category. This "**new method**" has been adopted throughout the 2022 report, making it impossible to separate statistical data or continue with historical data analysis. Therefore, the number of criminal investigations,

prosecutions, guilty verdicts, postponement of announcing a judgement ("*HAGB*"), not guilty verdicts or number of persons imprisoned cannot be extracted from these group statistics.

20. Therefore, previously, the statistical data categorised according to each criminal provision enabled a historical comparison, and the rise and decline in the statistics helped better understand the situation throughout the years. It made it possible to compare, for instance, the numbers of investigations and prosecutions in different presidential eras in comparison to President Erdoğan's office years as well as assisting to track the extent of the systemic problems identified by the European Court in its *Vedat Şorli* judgement.[14] It should be recalled that, the Court held, pursuant to Article 46 of the Convention, that bringing the relevant domestic law in line with Article 10 of the Convention would constitute an appropriate form of redress making it possible to put an end to the violation stemming from the application of article 299 of TCC. In the absence of separately categorised statistical data, it becomes impossible to track, assess and report on this particular crime or any other "grouped crimes" including but not limited to statistics subject to anti-terrorism legislation.

21. On the contrary, the Ministry of Justice, in the 2022 Judicial Statistics report has not explained why this change was necessary. The report, however, stated that "**the scope of the data has been expanded since 2022** and all data has been started to be compiled from the Judicial Data Bank" and that subject to this **revision policy**, "all the statistical data of the previous years in the publications of 2022 have been updated and the indicators providing international comparability and detailed statistics on the number of files, crimes, lawsuits and parties are included in the publication". The revised statistical data is provided **only for certain crimes** and it remains unclear what was exactly revised in the absence of checking and assessing the previous reports. Therefore, historical data and revision for the crimes of insulting the President of Türkiye or anti-terror provisions have not been provided in the 2022 report. Similarly, the government's submission to the CoE does not explain why this methodology was deemed necessary in 2022. Certainly, the unexplained changes in methodology **leads to more secrecy rather than transparency** and **hinders CSOs capacity to scrutinize** the judicial statistics. Therefore, the Government **should be requested to explain** the change in methodology and shift in policy and should be **asked to provide detailed statistics** with regards to specific crimes such as article 299 of the Criminal Code and other crimes mentioned in the Government's January 2024 Action Plan.

22. Within this context, it is also important to mention that the Action Plan refers to a permission procedure for initiating criminal investigations subject to article 301 of the TCC and similarly a permission procedure for initiating criminal prosecutions subject to article 299 of the TCC. Historically, the "permission procedure" through the Ministry of Justice were created to provide a filtering mechanism to protect freedom of expression and to avoid unnecessary investigations and prosecutions. However, the annual Judicial Statistics reports do not include statistical data in relation to this permission procedure. Moreover, the Ministry of Justice does

[14] *Vedat Şorli v. Turkey,* no. 42048/19, 19.10.2021, § 54.

not publish such statistics separately. Therefore, it is not possible to assess whether this mechanism actually acts as a filter.

23. Moreover, the Ministry of Justice does not even provide the statistics with regards to the permission procedure involving articles 299 and 301 of the TCC subject to freedom of information requests. Adding insult to injury, the Ministry of Justice does not even comply with judicial decisions requiring the Ministry to provide such statistical information. Therefore, in an effort to analyse the effects of the impugned articles of 299 and 301 on freedom of expression and whether the permission procedures indeed created a filtering system, Prof. Yaman Akdeniz, a co-founder of İFÖD, lodged a right-to-information application to the Ministry of Justice on 17.12.2019. In its application, Akdeniz requested statistical information with regards to the permission procedure involving articles 299 and 301 of the TCC for the years 2014-2018.

24. The Ministry of Justice General Directorate of Criminal Affairs rejected the application. Upon the rejection of the application, the applicant applied to the Ombudsman. The Ombudsman stated that "…the statistical data requested by the applicant from the administration are among the information/documents that can be obtained within the scope of Law No. 4982; and it has been concluded and decided that the Ministry of Justice should be advised to take the necessary administrative and technical measures in order to conclude the application for obtaining information effectively, expeditiously and accurately, and to re-evaluate the request as a result of the relevant research."[15]

25. As the Ministry of Justice did not comply with the Ombudsman's decision, Akdeniz took legal action through the administrative courts. The Ankara 23rd Administrative Court rejected the case but the Court of Appeal ("*Bölge İdare Mahkemesi*") quashed and reversed the decision.[16] Despite the final decision of the appellate court, the Ministry of Justice refused to provide the statistical data. Finally, in January 2022, Prof. Akdeniz applied to the Constitutional Court and the case is still pending.[17]

26. The above-presented chain of events demonstrates the unwillingness of the Turkish government to maintain even the most primitive sort of data with regard to the application of the highly-criticised articles of the TPC. Bearing in mind the strong condemnation of article 299 by the European Court and the CM[18], in the form of encouragement for its repeal, the importance of the preservation and publication of the statistical data is of utmost urgency. However, even when the domestic courts order for transparency on this matter, the executive fails to comply with the orders. Finally, it must be highlighted that it has been almost four years since the Ombudsman suggested that infrastructure must be built to collect and provide the

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15 Ombudsman's decision numbered 2020/3990, 24.08.2020.

16 Ankara 23rd Administrative Court, Docket no. 2020/1938 E., Decision no. 2021/695 K., 14.04.2021.

17 Turkish Constitutional Court, App. No: 2022/4380.

18 *Vedat Şorli v. Turkey,* no. 42048/19, 19.10.2021; Third Party Intervention in the Case of *Vedat Şorli v. Turkey* (no. 42048/19) by İfade Özgürlüğü Derneği (İFÖD), see https://ifade.org.tr/reports/IFOD_ECtHR_Vedat_Sorli_Third_Party_Intervention.pdf.

data in question in response to Prof. Akdeniz' application, however, there exists no indication that any efforts for such a system are undergoing within the Ministry, which simply does not want to reveal such data.

27. There exist other major problems with the statistical method employed in the Action Plan, not less important than the above-mentioned ones. For instance, in the Action Plan, the Government presents the number of investigations and prosecutions undertaken pursuant to articles 125-131 of the TCC. It is admitted by the authorities that these offences do not only concern defamation against public officials but also concern defamation against private individuals. It must be noted that because insulting a public officer is regulated in subparagraph 3-a of article 125 on defamation instead of a separate article, it had never been possible to identify the scope of the effects of article 125/3-a ("insulting public officials") on freedom of expression as the Judicial Statistics do not provide separate data for this crime since 2017. It is without question that the data relating to defamation against public officials pertain to a completely different issue than defamation against private individuals when assessed from the perspective of the status of political freedom of expression in Türkiye. It is therefore imperative that the data for this aggravated type of the crime of defamation be collected and shared separately. Similarly, the Judicial Statistics stopped providing separate and detailed statistics for terror propaganda subject to article 7(2) of the Anti-Terror Law and article 220(7) of the TCC since 2017. This is despite the fact that the **Committee asked for information on specific articles of the Anti-Terrorism Code**. Even if the application of certain types of offences in the law is indeed in line with Convention case-law, it is impossible to determine this when the statistics are presented in a bundle rather than separately. In other words, the government's method of presenting the statistics makes it impossible to identify positive developments as well as negative ones.

VI. The sample decisions

28. Another major problem with the Government's approach with the provision of information to the Committee lies with the extremely selective choice of cases by the Government. The examples provided fail to provide the extent to which the domestic courts fail to implement the principles and the jurisprudence of the Court in the relevant groups of cases.

29. The Government, with reference to several court decisions from differing instances, argues that the domestic court decisions meet the standards set down by the ECtHR's jurisprudence. There are several issues arising from this method. First of all, as in many countries on the continent, the Turkish legal system is not built upon the premise of precedence of court decisions. Therefore, any first-instance court decision, even ones that arguably meet the Court's standards, cannot be generalised. **Secondly**, even in the event that such decisions can be relied upon by individuals in a similar position as having soft power, the first and second-instance court decisions are not published and, therefore, accessible for full assessment. **Thirdly**, these decisions are subject to appeals, which renders it impossible to ascertain whether the Court of Cassation (or the Constitutional Court for that matter) upholds the said decisions or not. Even the published Court of Cassation decisions do not entail the details of the first and second-instance courts, which makes it infeasible to confirm whether such

decisions are endorsed by the Court of Cassation chambers. Finally, although obvious, it is deemed important by İFÖD to mention here that the Government exclusively refers to decisions with positive outcomes in its submissions to the Committee rather than referring to any cases resulting with convictions.

30. Without prejudice to the above-mentioned shortcomings of the method of sampling, the biggest discrepancy in the Government submission is the vast gap between the statistical information provided and the sample decisions. The Government, with reference to isolated and exceptional decisions, argues that the national courts take into consideration the case-law of the ECtHR. However, **thousands of convictions suggest that the provided sample decisions are far from being representative of the situation.** The disparity between the Government's arguments and the actual situation in Türkiye is evident even when the numbers in official statistics are considered.

31. In its previous 9.2 submissions, İFÖD have shown that, contrary to the government's claim, there are a large number of judgments ignoring the Strasbourg jurisprudence. As stated above, İFÖD will also provide other samples in its submissions on this group of cases that national courts blatantly ignore the case-law of the ECtHR. In the meantime, the Committee should not rely on this selective and arbitrary reporting mechanism.

Conclusions and Recommendations

32. 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 present groups of cases.

33. 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 laws. 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 have not been properly addressed by the Turkish authorities.

34. 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 assess the real effect of the measures taken.

35. The Committee of Ministers **should request regular updates and detailed statistical data** on the judicial practice of freedom of expression-based investigations, prosecutions and convictions. In other words, statistical data should be requested for specific crimes separately rather than bundled into groups.

36. 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.

37. The present groups 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 groups 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.