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Date: 27/09/2023

DH-DD(2023)1137

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Meeting: 1483rd meeting (December 2023) (DH)

Communication from an NGO (Ifade Ozgurlugu Dernegi (IFOD – Freedom of Expression Association)) (13/09/2023) in the case of ASAN v. Turkey (Application No. 28582/02) (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 : 1483e réunion (décembre 2023) (DH)

Communication d'une ONG (Ifade Ozgurlugu Dernegi (IFOD – Freedom of Expression Association)) (13/09/2023) dans l'affaire ASAN c. Turquie (requête n° 28582/02) (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.

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

RULE 9.2 COMMUNICATION

in the *Asan* (no. 28582/02) Group of Cases v. Türkiye

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

13 September 2023

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

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13.09.2023

Rule 9.2 Communication from İfade Özgürlüğü Derneği ("İFÖD") in the *Asan* (no. 28582/02) Group of Cases v. Türkiye

I. Introduction

1. This submission is prepared by **İfade Özgürlüğü Derneği** ("İFÖD" – Freedom of Expression Association), a non-profit and non-governmental organisation which aims to protect and foster the right to freedom of opinion and expression in Türkiye. The aim of this submission is to update the Committee of Ministers ("the CoM" or "the Committee") with regard to the execution of the general measures stemming from ***Asan* (no. 28582/02) Group of Cases v. Türkiye.**

2. The aim of this submission is to inform the Committee concerning the execution of the ***Asan* (no. 28582/02) and *Deryan* (no. 41721/04) Groups of Cases v. Türkiye.** As the findings of the Court in these groups of cases relate to the lack of reasoning in judicial decisions, İFÖD deemed it appropriate to ask for the statistics in which the lack of reasoning in civil and criminal court decisions led to a negative assessment in the promotion decisions taken and disciplinary sanctions imposed by the Council of Judges and Prosecutors. To that end, a copy of this Rule 9.2. submission was also sent to the Committee with respect to ***Deryan* (no. 41721/04) Group of Cases v. Türkiye.**

3. The *Asan* group of cases concerns a violation of the right to freedom of expression on account of the lack of reasoning and assessment of the proportionality of an interference in judicial decisions. In the *Asan* case, the European Court found that the seizure of a publication based on historical, cultural, ethnographic and linguistic research with no political intent, applied to its second edition, was not necessary in a democratic society. In the case of Güler and Zarakolu, the Court stressed that the domestic courts disregarded the content of the seized books without making an assessment of whether they could contribute to a public debate on questions of general interest. In the Hatice Çoban case, the European Court reiterated that the fairness of proceedings and the procedural guarantees afforded were factors to be taken into account when assessing the proportionality of an interference with freedom of expression and found that the national courts had not addressed the relevant arguments raised by the applicant to challenge the reliability and accuracy of the main item of evidence used in support of her conviction.

4. In order to supervise the implementation of the ECtHR judgments in *Asan v. Türkiye* (no. 28582/02, 27/11/2007), *Güler and Zarakolu v. Türkiye* (no. 38767/09, 29/06/2021) and *Hatice Çoban v. Türkiye* (no. 36226/11, 24/02/2020), the Committee of Ministers established the *Asan v. Türkiye* group of cases. On 23.08.2012,[1] the Turkish Government submitted its first Action Report regarding the case of *Asan v. Türkiye*. The Government submitted its last revised action report in respect of this group of cases on 21.06.2018.[2]

[1] DH-DD(2012)763.
[2] DH-DD(2018)664.

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5. The authorities provided information on the legislative framework and in particular on the Press Law no. 5187 which entered into force on 26.06.2004 and regulates the seizure of printed material. The law was amended in 2012 so as to provide that seizure orders issued before 31.12.2011 would be void *ex officio* within six months unless the competent domestic courts order otherwise. The authorities submitted sample decisions of domestic courts and the Constitutional Court, indicating that the courts now apply the Convention criteria while examining seizure requests. In addition, it was also reminded that it is possible to lodge a complaint before the Constitutional Court.

6. The Committee of Ministers decided to ask authorities to submit **statistical information on the number of seizure decisions ordered by domestic courts within the past five years and sample decisions ordering the seizure of printed material.**

7. Regarding the supervision of the implementation of the ECtHR's judgment *Deryan v. Turkey*, the *Deryan v. Turkey* case group was established, and it was decided to carry out the monitoring of the implementation of the judgments on similar issues together. This group of cases on the violation of the right to a reasoned judgment in civil cases is related to the monitoring of the following judgments:

Application number	Case	Date of the judgment	Final on
41721/04	Deryan	21/07/2015	21/10/2015
13196/07	Uncuoğlu	05/09/2017	05/09/2017
10375/08	S.S. Yeniköy Konut Yapı Kooperatifi	10/10/2017	10/10/2017
26437/08+	Uğurlu ve diğerleri	14/11/2017	14/11/2017
40865/05	Murat Akın	09/10/2018	09/01/2019

8. The *Deryan* group includes cases where the main source of the violation was the lack of adequate reasoning in judicial decisions concerning civil proceedings. However, the Committee noted that the problem identified is cross-cutting in the sense that it arises as a further issue in a number of cases pending execution which are examined in different groups mainly focussed on other types of Convention violations. The CM highlighted that an analysis of all the relevant, pending cases reveals that the problem of lack of adequate reasoning can be found at all levels of Turkish jurisdiction, including criminal and administrative proceedings and detention orders.

9. The Government submitted Action Reports on 26 January 2016,[3] 6 December 2018[4] and 30 March 2022[5] regarding the *Deryan* group of cases.

10. The Committee of Ministers, in its 1436th meeting held on 8-10 June 2022, adopted a decision regarding the supervision of the execution of the *Deryan* group of cases and invited the authorities to consider adopting guidelines or checklists on the elements inherent to judicial decisions, to ensure effective implementation of the rules on disciplinary sanctions and promotion of judges in

[3] DH-DD(2016)115.
[4] DH-DD(2018)1228.
[5] DH-DD(2022)383.

accordance with their performance on drafting high-quality decisions, and **to collect statistical data in this respect.**

11. Finally, the Government submitted an Action Report on 3 August 2023, which is under the Committee's assessment.[6]

12. As explained in the Action Reports, the Circular on the Promotion Principles of Judges and Prosecutors ("the Circular"), as amended on 15 January 2020, requires the Council of Judges and Prosecutors to take into account in the promotion of judges and prosecutors their compliance with judgments of the Constitutional Court and the European Court. The Circular was amended finally on 7 September 2021, published in the Official Gazette no. 31591. In its current version, Article 6/1-k stipulates that the requirement of reasoned judicial decisions is also taken into account in the promotion of judges and prosecutors. Appeal courts conduct an additional assessment of the quality of decisions delivered by first-instance courts, which is also taken into account in the promotion of the judges and prosecutors.

13. As regards disciplinary liability, Article 5 of the "Regulation on the Arrangement of the Legal Remedy Evaluation Forms" ("the Regulation"), as amended in December 2021, requires the appeal courts to notify the Council of Judges and Prosecutors ("the CJP") when a judicial decision does not contain sufficient reasoning, depending on the nature and gravity of the failure.

14. The aim of this submission is to inform the Committee concerning the outcome of İFÖD's right to information request made to the Council of Judges and Prosecutors regarding the application of the aforementioned Circular and Regulation. In an effort to assess the effects of the recently introduced rules regarding the obligation of providing reasoned judicial decisions, İFÖD demanded statistical information regarding the promotion and demotion decisions that pertained to the judges' and prosecutors' incompliance with the obligation of delivering reasoned decisions. In addition to that, İFÖD asked for statistical information regarding the disciplinary measures about the members of the judiciary, taken with respect to the lack of reasoning in judicial decisions pursuant to Article 5 of the Regulation on the Arrangement of the Legal Remedy Evaluation Forms.

II. İFÖD's Right to Information Request

15. İFÖD submitted its right to information request to the Council of Judges and Prosecutors on 16.08.2023.

16. In its request, İFÖD asked from the Council;

a. A copy of statistical data kept pursuant to decision no. 5 adopted by the Committee of Ministers of the Council of Europe at its 1436th meeting held on 8-10 June 2022 in the *Deryan* group of cases,

b. The number of judges whose promotion was suspended due to violation of the obligation to give reasoned decisions as a result of the legal remedy evaluation forms issued at the end of the legal remedy examinations,

c. For the purpose of disciplinary sanctions, the number of judges and prosecutors about whom the Council of Judges and Prosecutors has been notified due to a judicial decision not containing sufficient justification within the scope of Article 5 of the Regulation on the Regulation on the Arrangement of Legal Remedies Assessment Forms

in the context of civil lawsuits and criminal investigations and prosecutions concerning the right to freedom of expression **(Annex-1)**.

[6] DH-DD(2022)928.

17. In its request, İFÖD provided detailed information on its monitoring activities and Rule 9.2. submissions. İFÖD explained the background of the *Asan* and *Deryan* groups of cases and made clear its intentions to use the demanded statistical information for its prospective Rule 9.2. submissions. It is deemed imperative to highlight once again that İFÖD asked only for statistical information that had no power to compromise any personal and sensitive information.

18. İFÖD received the refusal decision of the Council of Judges and Prosecutors on 31.08.2023 **(Annex-2).** In its reply dated 29.08.2023, the CJP, citing Articles 7/2 and 21 of Law No. 4982 on Right to Information, stated that our request was rejected "because the information requested is of a nature that can be generated as a result of a separate and special operation, research, examination and analysis, and also because the requested decisions also include other judges and prosecutors that have entered the phase of being promoted".

19. There is an appeal procedure envisaged in article 13 of Law no. 4982, in which the Access to Information Review Board ("the Board") examines the legality of the decisions. İFÖD appealed the decision on xx.09.2023.

20. In its appeal, İFÖD stated, *inter alia*, that the Council of Judges and Prosecutors did not grasp the essence of its request. The refusal is unlawful due to many reasons, the fundamental one being the fact that İFÖD did not ask for any decisions, but rather for statistical information. Furthermore, İFÖD argued that the demanded information must be possessed by the CJP as it is bestowed upon with the duty to assess the compliance with the promotion requirements of all members of the judiciary extensively and consistently. With regard to the privacy reasons put forth by the CJP, İFÖD challenged the perception that the decisions of the CJP could be considered as falling under the protection of the right to privacy as the judicial decisions are delivered in judges' and prosecutors' capacity as a public official and should be made available for public discussion and critique. In any event, İFÖD noted once again that it asked for quantitative data which cannot compromise the privacy of the members of the judiciary. İFÖD further examined the rejection in light of the case-law of the Turkish Constitutional Court and the ECtHR. Finally, İFÖD drew attention to the unfortunate yet expected lack of reasoning in the rejection decision of the CJP.

III. Conclusions

1. İFÖD considers that structural problems observed by the Court persist and have not been properly addressed by the Turkish authorities. İFÖD argues that the legislative amendments are far from bringing material change as the problem is embedded in the judicial practices of Türkiye.
2. The Government should be asked to provide detailed data about the implementation of relevant provisions of the Circular and Regulation. İFÖD would like to kindly ask the Committee to provide it with the statistics once they are obtained by the Committee to use them in its future submissions.
3. Finally, considering the importance of reasoned decisions with respect to freedom of expression, the Committee should adopt a decision to supervise the implementation of the *Asan* (no. 28582/02) in an enhanced procedure, as well.

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İfade Özgürlüğü Derneği ("İFÖD") has been set up formally in August 2017 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.