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Date: 03/08/2022

DH-DD(2022)821

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Meeting: 1443rd meeting (September 2021) (DH)

Communication from an NGO (İfade Özgürlüğü Derneği (IFÖD – Freedom of Expression Association)) (25/07/2022) in the case of Avci v. Turkey (Application No. 18377/11) (Bayar and Gurbuz group, 37569/06) (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 : 1443e réunion (septembre 2022) (DH)

Communication d'une ONG (İfade Özgürlüğü Derneği (IFÖD – Freedom of Expression Association)) (25/07/2022) dans l'affaire Avci c. Turquie (requête n° 18377/11) (groupe Bayar et Gurbuz, 37569/06) (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 Case of Avcı v. Türkiye (no. 18377/11)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

25.07.2022

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

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

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25.07.2022

Rule 9.2 Communication from İfade Özgürlüğü Derneği ("İFÖD") in the Case of *Avcı v. Türkiye* (no. 18377/11)

1. The submission is prepared by **İfade Özgürlüğü Derneği** ("İFÖD" – Freedom of Expression Association), a non-profit and non-governmental organization that aims to protect and foster the right to freedom of opinion and expression in Türkiye.

2. The aim of this submission is to update the Committee of Ministers concerning the failure of the Turkish authorities to fully and effectively implement the required general measures deriving from the case of ***Avcı v. Türkiye***[1] as well as to address the failure of judicial practice in fully aligning the domestic legal framework concerning the right to freedom of expression with the European Court's case law.

Background

3. The case of *Avcı v. Türkiye* concerns a violation of the right to freedom of expression on account of referring to the imprisoned leader of the PKK, a terrorist organization, as "sayın", meaning esteemed during a press declaration. At the time of the events, the applicant was the chairman of the Siirt Branch of the Democratic Society Party ("DTP"), which was a pro-Kurdish leftist political party, subsequently dissolved by a decision of the Constitutional Court in 2009. On 21.02.2008, Diyarbakır 6th Criminal Assize Court convicted the applicant to five months of imprisonment for praising an offense and offender, a crime stipulated in article 215 of the Turkish Criminal Code ("TCC"), by calling the imprisoned leader of PKK, Abdullah Öcalan, "esteemed". The decision became final on 11.10.2010, the applicant lodged an application with the European Court on 21.02.2011.

4. Almost 10 years later, on 27.04.2021, the European Court, sitting as a Committee found the conviction of the applicant in violation of Article 10 of the Convention by reference to an earlier complaint the Court examined (see *Yalçınkaya and others v. Türkiye*, nos. 25764/09 and 18 others, 01.10.2013, §§ 26-38). The Court did not assess the case further.

5. As the Court noted, the applicant's conviction is similar to the convictions in the case of *Yalçınkaya and others v. Türkiye*. In 2008, 19 applicants were convicted for sending letters to the State Prosecutor in which they had used the term "sayın" to refer to Abdullah Öcalan whereby they had sought to denounce the incrimination caused by use of this word. The applicants were convicted under article 215 of the TCC for allegedly praising the leader of a

[1] *Avcı v. Türkiye,* no. 18377/11, 27.04.2021.

terrorist organisation. The Government argued that the applicants' letter constituted part of a large campaign organized by the PKK and aimed to legitimize the activities of the latter by praising its leader. The applicants rejected this allegation and submitted that their conviction amounted to a violation of their right to freedom of expression. The Court first reiterated that "the freedom of expression constitutes one of the essential foundations of a democratic society" and is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb". While assessing necessity, the Court noted that the interference must answer to a pressing social need and that it is its duty to determine whether the measure in question was "proportionate to the legitimate aims pursued" and whether the reasons given by the national authorities to justify it appear "relevant and sufficient".

6. The Court then observed that the applicants' conviction appeared to be based solely on their use of the expression "sayın Abdullah Öcalan", which was interpreted by the domestic courts as a mark of respect and a praise for the PKK leader and the terrorist activities carried out by him. The Court further pointed out that **the applicants did not appear to have expressed any support for the acts committed by Abdullah Öcalan or the PKK** nor any approval in this respect. The Court further noted that the criminal court had considered that the relevant letters contained neither incitement to violence or terror nor propaganda for a terrorist organization.

7. Finally, in the Court's view, nothing indicated in the case-file that **there existed a clear and imminent danger capable of justifying the impugned interference**. Therefore, the Court concluded that the reasons given by the domestic courts to justify the applicants' conviction **were not sufficient to interfere with the right to freedom of expression** and thus the interference in question was not necessary in a democratic society.

8. Although the Committee decided to end its examination of *Yalçınkaya and others v. Türkiye* (nos. 25764/09) on 05.12.2019,[2] the problem arising from the interpretation of article 215 of the TCC in cases which the defendants are accused for using the word "esteemed" for addressing convicted persons continues. Subject to this provision, domestic courts continue to convict politicians for simply addressing the imprisoned leader of the PKK as "sayın Abdullah Öcalan". In this regard, domestic courts ignore the European Court's decision in *Yalçınkaya and others* and do not assess whether the use of the word "esteemed" contained incitement to violence or terror or propaganda for a terrorist organization and resulted with a clear and imminent danger capable of justifying the impugned interference.

9. İFÖD therefore strongly believes that the case of *Avcı v. Türkiye* is not an isolated one.

The Action Report of the Government

10. On 06.04.2022, the Turkish Government submitted an Action Report regarding the case of *Avcı v. Türkiye.*[3] With regard to the individual measures, the Government noted that the criminal proceedings in the *Avcı* case were reopened following the European Court's judgment

[2] See CM/ResDH (2019)330.
[3] See DH-DD (2022)407.

became final and the hearings at the Diyarbakır 6th Criminal Assize Court are ongoing as of May 2022 after two hearings.

11. In addition, the Government claimed that according to the recent case law, referring to the convicted persons as "esteemed" is not considered a crime within the scope of article 215 of the TCC. The Government further argued that it had already taken measures to prevent similar violations to occur and referred to its prior submissions presented to the *Bayar and Gurbuz* (7569/06) and *Yalçınkaya* (25764/09) group of cases. In this regard, the Government relied on the Committee's final resolution of these groups.[4] The Committee considered in its resolution concerning the *Yalçınkaya* group of cases that the general measures taken by the Government was sufficient and decided to conclude its examination. The Government, relying on this finding of the Committee, claimed that it had complied with its obligations stemming from Article 46 (1) of the Convention.

İFÖD's Observations

12. Firstly, the Murat Avcı re-trial is still ongoing at the Diyarbakır 6th Criminal Assize Court after almost a year of the Court's violation decision and the re-opening of the criminal proceedings alone is not enough to comply with the individual measures.

13. Secondly, İFÖD submits that contrary to the Government's arguments, the judicial authorities continue to convict individuals under article 215 of the TCC solely for the use of expression "esteemed Abdullah Öcalan". Therefore, the practice is not buried into the history books yet.

14. In this regard, the criminal charge recently brought against Leyla Güven is an example illustrating the Turkish authorities' inconsistent approach to the use of expression "esteemed" for Abdullah Öcalan. Leyla Güven is a well-known politician, who represented pro-Kurdish leftist parties. From 2004 to 2014, she was the mayor of Küçükdikil and Viranşehir municipalities respectively. Leyla Güven was elected as the Peoples' Democratic Party deputy for the 25th and 27th terms of the Grand National Assembly of Türkiye. On 26.03.2016, she was elected as the co-chair of the Democratic Society Congress.

15. On 17.12.2020, Leyla Güven made a speech at the event organized by the Şırnak branch of the Peoples' Democratic Party. In her speech, Leyla Güven stated in Kurdish that *"There is an isolation over Kurdish people and esteemed Abdullah Öcalan for 22 years."* The public prosecutor of Şırnak ordered a translation of her speech into Turkish. Subsequently, more than a year later, on 08.01.2021, the prosecutor prepared an indictment in which Leyla Güven's conviction was requested for praising an offender under article 215 of TCC **(see Appendix-I).** According to the prosecutor, using the expression "esteemed Abdullah Öcalan" in public, would mean glorifying an offender and showing the convicted offender as a decent person. The prosecutor further stated that this speech cannot be seen within the scope of the right to freedom of expression. The prosecutor also referred to a decision of the 8th Criminal Chamber of the Court of Cassation in which the Court of Cassation quashed the acquittal of a defendant

4 *Ibid* para. 9, 14.

who had been convicted for using the expression "esteemed Abdullah Öcalan"[5] on the ground that referring "esteemed" to the leader of a terrorist organization who is still executing his prison sentence would mean explicit praise for the offender, therefore, it cannot be considered within the scope of freedom of expression. The more recent Court of Cassation decisions seem to be in line with the European Court's approach even though **they do not refer to the Court's *Yalçınkaya* judgment**.[6]

16. However, the public prosecutor in the Leyla Güven indictment completely disregarded the criteria set out by the European Court in the *Yalçınkaya* (25764/09) group of cases.[7] In addition, İFÖD would like to draw the Committee's attention to the fact that the public prosecutor based its decision on a judgment of the Court of Cassation dated 26.01.2011. In this regard, İFÖD submits that the public prosecutor overlooked the more recent jurisprudence of the European Court, despite Article 90 of the Constitution which stipulates that the human rights treaties must prevail over national laws. Thus, the case law relevant to the application of article 215 of TCC is neither well-established nor in compliance with the European standards.

17. The above-mentioned Leyla Güven case is also not an isolated one. Leyla Güven is also facing criminal charges for another press release she issued on 15.02.2020. In her speech, Leyla Güven stated that *"A call for peace of Esteemed Öcalan is very important. End the isolation. Ensure his health and safety. Bring peace to the Middle East*". Based on this speech, Leyla Güven was charged with "making propaganda of an armed terrorist organization," "praising an offense and offender" and "provoking the public to hatred, hostility or degrading". According to the news, the Hakkari 2nd Criminal Court of First Instance sentenced Leyla Güven to five years of imprisonment for making terrorist propaganda.[8]

18. Subsequently, Leyla Güven appealed against the decision. The Regional Court quashed the decision and the case was sent back to the Hakkari 2nd Criminal Court of First instance with the docket number 2021/23. **(Appendix-II)** In the 5th hearing of the retrial, among other charges, the prosecutor requested Leyla Güven to be convicted for praising the leader of PKK/KCK this time in her speech made on 16.09.2020. During that speech, although Leyla Güven repeatedly referred to Abdullah Öcalan as "esteemed" she stressed the necessity of peace between the Turkish Government and the Kurdish people.[9] However, the prosecutor did not comment on Leyla Güven's call for peace in his opinion for conviction.

19. The case of Ferhat Encü is another example of convictions based on using the word "esteemed" for referring to the offenders. Similar to Leyla Güven, Ferhat Encü was an MP for the Peoples'

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5 8th Criminal Chamber of the Court of Cassation, dossier no. 2008/17971, decision no. 2011/36, 26.01.2011.

6 See for example, 8th Criminal Chamber of the Court of Cassation, dossier no. 2017/12669, decision no. 2018/5877, 24.05.2018.

7 See *Yalçınkaya and others v. Türkiye*, nos. 25764/09, 25773/09, 25786/09, 25793/09, 25804/09, 25811/09, 25815/09, 25928/09, 25936/09, 25944/09, 26233/09, 26242/09, 26245/09, 26249/09, 26252/09, 26254/09, 26719/09, 26726/09 et 27222/09, 01.10.2013, para. 36.

8 Gazete Duvar, *"Leyla Güven sentenced to 5 years in prison"*, 27.10.2021, Available at https://www.gazeteduvar.com.tr/leyla-guvene-5-yil-hapis-cezasi-verildi-haber-1543360.

9 For the 16.09.2020 dated speech see https://www.youtube.com/watch?v=5bBhqmX_4hc&t=351s.

Democratic Party for the 25th and 26th terms of the Grand National Assembly of Türkiye. Ferhat Encü was stripped of his parliamentary duties on 06.02.2018 following his conviction for making propaganda of a terrorist organization became final.

20. On 05.09.2016, Ferhat Encü participated in hunger strikes launched for the prison conditions of Abdullah Öcalan. On the second day of the hunger strike, a television channel named Med-Nuçe interviewed Ferhat Encü. In the course of the interview, Ferhat Encü shared his opinions on the hunger strike and referred to Abdullah Öcalan as "esteemed". Based on this interview, on 14.09.2020, Ferhat Encü, among other charges, was convicted for *praising an offense and offender* under article 215 of the Turkish Criminal Code **(Appendix-III).** The 2nd Chamber of the Diyarbakır Regional Court upheld the decision of the first instance court without indicating the grounds **(Appendix-IV).**

21. İFÖD is of the opinion that the **Committee should ask the Government to provide more information about these cases**. The Government should also inform the Committee whether there exist any other criminal proceedings launched for the use of the expression "esteemed Abdullah Öcalan" and **provide detailed statistics** involving article 215 of the Criminal Code with regards to sayın/esteemed prosecutions.

22. Moreover, the Constitutional Court's approach with regards to convictions involving "sayın Abdullah Öcalan" as well as similar expressions such as "Biji Serok Apo" ("Yaşasın Başkan Apo" - Long live President Apo) is not clear as illustrated by the Court's decision in **Hanifi Biçimli** (Application No: 2013/6909, 24.02.2021). First of all, it took the Court almost seven and a half years to decide an application involving allegations of violation of freedom of expression for the use of the words "sayın Abdullah Öcalan" as well as "Biji Serok Apo". The Court, in a majority decision, while finding a violation of freedom of expression for the "sayın Abdullah Öcalan" expression, did not find a violation for the "Biji Serok Apo" expression. While the Court referred to the *Yalçınkaya and others v. Türkiye* decision of the European Court and its decision is consistent with that of the European Court so far as the "sayın Abdullah Öcalan" expression is concerned,[10] the Court decided that there was a pressing social need for convicting the applicant for the "Biji Serok Apo" expression because the Court argued that the applicant expressed those words at a demonstration which turned into support for the terrorist organization and legitimization of its activities.[11] The dissenting judges argued that the majority decision did not establish whether the applicant incited violence, legitimized any terrorist activities or contributed to the escalation of violence with his participation to the demonstration. İFÖD is therefore of the opinion that inconsistencies remain between the European Court's approach and that of the Constitutional Court.

23. İFÖD points out that although the Committee concluded its supervision in the case of *Yalçınkaya and others v. Türkiye* (nos. 25764/09*)* on 05.12.2019, the sample decisions hereby presented to the Committee as well as the inconsistent Constitutional Court decision clearly illustrate that the domestic courts continue to convict people solely for referring to Abdullah

[10] *Hanifi Biçimli*, no. 2013/6909, 24.02.2021, para. 64-72.
[11] *Ibid*, para.73-75

Öcalan as "esteemed". In this regard, the domestic courts fail to consider whether (i) the speech incited violence and (ii) there was a threat of imminent danger.

24. İFÖD also notes that pro-Kurdish politicians are the primary subject of the target of article 215 investigations and prosecutions. Thus, the judicial practice shows that article 215 is persistently used to punish and silence pro-Kurdish politicians. İFÖD is of the opinion that the article 215 prosecutions for merely referring to Abdullah Öcalan as "esteemed" creates a chilling effect on the pro-Kurdish citizens and politicians.

Conclusions and Recommendations

25. İFÖD considers that problems observed by the European Court in *Yalçınkaya and Others* and *Avcı* judgments remain and they have not been properly addressed by the Turkish authorities.

26. The judicial authorities' interpretation of article 215 of the TCC in cases where the defendants are charged for referring to Abdullah Öcalan as "esteemed" has been inconsistent. As this submission shows, even in high profile political cases, some courts and prosecutors continue to ignore the jurisprudence of the Strasbourg Court. It is also submitted that the Constitutional Court's approach is not necessarily in line with that of the European Court and the matter remains politically sensitive rather than resolved. That is why further information is required to conclude that the general measures have been adopted to meet the requirements of the judgments of the Court.

27. In the light of the foregoing, İFÖD **recommends** the Committee to **ask** the Government **to provide** further information and other examples from recent judicial practice as well as statistical information involving article 215 prosecutions with regards to "sayın Abdullah Öcalan" cases in order to assess whether the domestic courts comply with the standards set out by the European Court.

28. İFÖD further **recommends** the Committee **continue to supervise** the implementation of the judgment of the European Court of Human Rights in the case of *Avcı v. Türkiye.*

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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 the freedom of opinion and expression and the right to access and disseminate information and knowledge.