RULE 9.2 COMMUNICATION

in the case of Durukan and Birol (no. 14879/20 and 13440/21) v. Türkiye
by

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

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Rule 9.2 Communication from Freedom of Expression Association (İFÖD) (in the Durukan and Birol v. Türkiye (Application No. 14879/20 and 13440/21)

1. This submission is prepared by **İfade Özgürlüğü Derneği** ("İFÖD" – Freedom of Expression Association), a non-profit and non-governmental organization dedicated to protecting and promoting the right to freedom of opinion and expression in Türkiye.
2. The purpose of this submission is to update the Committee of Ministers on the general measures concerning the case of *Durukan and Birol v. Türkiye* (nos. 14879/20 & 13440/21, 03.10.2023). In this context, İFÖD will address issues arising from the implementation of decisions by Turkish judicial authorities, particularly with respect to the suspension of the pronouncement of the judgment, which as it relates to the *Durukan* and *Birol* case.

Background

3. The applications concern the criminal convictions of the applicants, Durukan and Birol, who received suspended sentences of imprisonment, for propaganda for a terrorist organisation and insulting the President of the Republic, respectively. The applicants argued that these convictions violated their right to freedom of expression under Article 10 of the Convention. Additionally, their criminal convictions were accompanied by a measure suspending the pronouncement of the judgment. The applicants complained that these measures collectively constituted a violation of Article 10 of the Convention.
4. In this case, the Court noted that it was undisputed between the parties that the applicants' criminal convictions had had a legal basis,—namely, Article 7(2) of Law No. 3713 and Article 299 of the Criminal Code. The Court further observed that Article 231 of the Code of Criminal Procedure provided the legal basis for the suspension of the pronouncement of the judgment imposed on the applicants, which constituted an interference in the case.
5. Furthermore, the Court referred to the Constitutional Court's findings in the *Atilla Yazar and Others* decision of 05.07.2022. In this decision, the Constitutional Court concluded, first, that the provision stipulating the suspension of the pronouncement of the judgment did not meet the requirement of legality due to the breaches of fair trial guarantees in its application. Secondly, the Constitutional Court identified structural problems in the legal provisions in question, which were likely to result in recurring violations of freedom of expression. Lastly, the Court held that a legislative amendment was necessary to prevent the recurrence of such violations.
6. The Constitutional Court found that decisions to suspend the pronouncement of the judgment were inadequately and insufficiently justified, with domestic courts failing to consider the arguments presented in the defence and dismissing requests for the collection and examination of evidence without relevant reasons. The Court also noted that plaintiffs

were often denied the assistance of a lawyer and lacked the time and facilities necessary to adequately prepare their defence.

7. Moreover, the appeal to the assize court—**the only avenue of appeal** available in cases involving the suspension of the pronouncement of the judgment—was **deemed ineffective**. The courts frequently relied on **stereotyped and insufficient reasoning**, conducting only a **superficial review** of the file without weighing the interests at stake. The Constitutional Court further criticised the practice of requiring an accused person to consent to the suspension of the pronouncement of the judgment at the very beginning of the criminal proceedings, stating that this practice could exert undue pressure on the individual and lead judges to perceive the accused as guilty, a perception that could not be offset by any fair trial guarantees (§ 64).

8. The European Court concurred with the Constitutional Court's conclusion that the existing legal framework, and the decisions of criminal courts, lacked sufficient procedural safeguards to prevent arbitrary interference with the applicants' rights. It further agreed that the absence of adequate legal safeguards in the implementation of suspension of the pronouncement of the judgments failed to meet the standards of protection required by the Convention.

9. Consequently, the Court concluded that the measures in question did not meet the clarity and foreseeability requirements under Article 10(2) of the Convention. It determined that the interference with the applicants' freedom of expression was not "prescribed by law" in accordance with the Convention, leading to a finding of a violation of Article 10.

10. As a result, the Court therefore did not proceed to examine the applicants' allegations of violations on the merits.

The Government's Action Plan

11. The Government's action plan included individual measures addressing the applicants in the *Durukan and Birol* judgment but failed to provide any explanation regarding the general measures adopted. Although the relevant provisions of the Code of Criminal Procedure were amended following the Constitutional Court's *Atilla Yazar* judgment, the Government merely stated that it would inform the Committee of Ministers in due course about the general measures taken or envisaged to prevent similar violations. (§ 8)

İFÖD's Observations

12. Following the *Atilla Yazar* judgment, the Constitutional Court issued decisions in numerous other applications, finding that the decision to suspend the pronouncement of the judgment violated the principle of legality. The Court also annulled Article 231 of the Code of Criminal Procedure for the same reason. IFÖD will keep the Committee of Ministers informed about domestic developments regarding the implementation of these Constitutional Court judgments.

13. In its decision involving *Atilla Yazar and others* (No: 2016/1635, 05.07.2022), the Constitutional Court conducted a comprehensive examination to assess whether the measure of suspension of the pronouncement of the judgment - considered to have a deterrent effect on fundamental rights and freedoms - satisfied the criterion of legality (see Atilla Yazar and others, §§ 100-173).

14. In its assessment, the Constitutional Court concluded that the legislation underpinning the suspension of the pronouncement of the judgment contained structural deficiencies that resulted in ongoing violation of fundamental rights and freedoms, particularly the freedom of expression. The Court determined that these systemic issues could not be resolved through judicial interpretation alone and emphasized the need for legislative amendments to address the problems.

15. Upon reviewing the practices of the lower courts, the Constitutional Court observed that asking defendants at an early stage of the proceedings whether they wished to suspend the pronouncement of the judgment, coupled with the lack of substantial review of the judgment's core issues, led to procedural shortcomings. Judges, often under significant workload pressure, tended to disregard procedural safeguards during the trial process. This practice frequently resulted in a preference for conviction over acquittal when the option to suspend the pronouncement of the judgment was available. Judicial statistics demonstrated that the introduction of the suspension system correlated with a decrease in acquittal rates (see § 110).

16. The Constitutional Court also noted numerous decisions finding violations in cases involving suspension of the pronouncement of the judgment, particularly where it interfered with freedom of expression. These decisions showed that, in trials leading to suspension of the pronouncement of judgments, lower courts often failed to adequately justify the necessity of the interference with freedom of expression in a democratic society. This pattern indicated that the suspension of the pronouncement of the judgment decisions were frequently unconvincing in their justification and appeared arbitrary (*Atilla Yazar and Others*, § 167).

17. In its decision of 29.03.2023, in the case of *Abbas Yalçın and others (*No: 2014/8146), the Constitutional Court referred to its previous judgment in *Atilla Yazar and others* and concluded that the applicants' freedom of expression and freedom of assembly had been violated due to the application of the rule concerning the suspension of the pronouncement of the judgment. (§15)

18. On 01.06.2023, the Constitutional Court annulled paragraphs (5), (6), (7), (8), (9), (10), (11), (12), (13) and (14) of article 231 of the Code of Criminal Procedure, concluding that the provisions were incompatible with the Constitution (No: 2022/120, 2023/107). In its reasoning for the annulment, the Court observed that the legislator had failed to make the necessary amendments regarding the suspension of the pronouncement of the judgment, as required by the *Atilla Yazar* judgment. The Court emphasized that the suspension of the pronouncement of the judgment was inadequate to prevent arbitrary practices by public authorities and had a chilling effect on fundamental rights and freedoms, particularly freedom of expression and the right to assembly.

19. Following the annulment decision by the Constitutional Court, a new provision was introduced on 02.03.2024 to replace the annulled paragraphs of article 231 of the Code of Criminal Procedure. Notably, instead of the objection procedure that served as the basis for the Constitutional Court's annulment decision, the new provision established the right to appeal (see the amended version of article 231(12)) to the regional courts of appeal regarding the suspension of the pronouncement of the judgments. This amendment, included in the 8th Judicial Package and effective as of **01.06.2024**, also removed from the

text of article 231(6) of the Code of Criminal Procedure the phrase: *"If the **accused does not consent**, the suspension of the pronouncement of the judgment shall not be decided."*

20. Going back to the Constitutional Court review, the Court has not assessed the merits of the complaint in any of the individual applications concerning the suspension of the pronouncement of the judgment.

21. Most of the Constitutional Court's judgments related to the suspension of the pronouncement of the judgment involved offences connected to freedom of expression, such as insulting a public official (article 125/3-a of the Penal Code), insulting the President (article 299 of the Penal Code), insulting the Turkish nation, the Republic of Türkiye, and its institutions (article 301 of the Penal Code), or terrorist propaganda under Article 7(2) of Law No. 3713.

22. However, the Constitutional Court's judgments on the suspension of the pronouncement of judgments fall short of addressing the systemic problems arising from these legal provisions, which the ECtHR had previously identified as problematic.

23. In the case of *Vedat Şorli v. Turkey* (no. 42048/19, 19.10.2021), involving a conviction for insulting the President of Türkiye, the European Court addressed the necessity of the intervention. The Court observed that the national courts had based their conviction on article 299 of the Turkish Criminal Code, which grants the President greater protection than other individuals under the general defamation provisions of article 125. The Court noted that article 299 imposes harsher penalties for insulting the President compared to any other individual. In this context, the Court emphasized that enhanced protection for defamation through a special law for defamation, in principle, was inconsistent with the spirit of the Convention (§ 46).[1]

24. Similarly, the European Court has found a violation of Article 10 of the European Convention in several cases involving applicants convicted under article 7(2) of Law No. 3713. In *Özer v. Türkiye (3)* (no. 69270/12, 11.02.2020), the European Court provided a summary of its extensive case law on that matter.

25. The main issue highlighted by these and similar judgments is that courts in Türkiye fail to consider the criteria developed by the European Court in its decisions concerning articles 125, 299 and 301 of the Turkish Penal Code and article 7 (2) of Law No 3713. This shortcoming is not limited to decisions regarding the suspension of the pronouncement of the judgment. Turkish judiciary, including the Constitutional Court, systematically disregards the standards established by the European Court in freedom of expression cases. The Constitutional Court's judgments, which focus solely on procedural issues related to the suspension of the pronouncement of judgments without examining the merits of the cases, do not resolve these systemic problems but merely defer addressing them.

26. The retrial of criminal cases referred back to the courts of first instance following the Constitutional Court's *Attila Yazar* judgment further supports this conclusion. After the annulment of the provision concerning the suspension of the pronouncement of the judgment, courts in retrial cases continue to impose new sentences without addressing the structural problems inherent in the relevant legal norms.

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[1] See İFÖD' Third Party Intervention in the Case of *Vedat Şorli v. Turkey* at https://ifade.org.tr/reports/IFOD_ECtHR_Vedat_Sorli_Third_Party_Intervention.pdf

27. Pursuant to Article 50 of Law No. 6216, cases in which the Constitutional Court finds a violation are sent to the courts of first instance for retrial. However, these courts that conducting the retrial **continue to disregard the criteria** developed by the European Court concerning the relevant criminal provisions and, **in some instances**, **impose even harsher sentences** than those issued in the initial trial. Consequently, individuals who applied to the Constitutional Court regarding the application of the suspension of the pronouncement of the judgment and were found to have suffered a violation of their rights are **effectively penalized for exercising their right to seek redress from the Constitutional Court**.

28. For example, in a retrial case following the Constitutional Court's violation decision in *Abbas Yalçın and Others* case (file no. 2023/820, decision no. 2024/528 , 12.06.2024), the Gölbaşı 2nd Criminal Court of First Instance imposed **a judicial fine** on a defendant, who was charged with insulting a public officer, as a result of the retrial. Similarly, in the case before the Çorlu 5th Criminal Court of First Instance (file no. 2024/63, decision no. 2024/554, 26.09.2024), the **same defendant** in the Gölbaşı case was sentenced to **a judicial fine** after the retrial. In both cases, the sentences imposed had more severe consequences than the original suspension of the pronouncement of the judgment decisions. These rulings, which contradict the Constitutional Court's annulment decision aimed at protecting freedom of expression, raise significant concerns about the outcomes of other retrials.

29. The **same defendant** in both Gölbaşı and Çorlu retrials faced yet another retrial, this time concerning an accusation of insulting the President under article 299 of the Criminal Code. The Gölbaşı 1st Criminal Court of First Instance (file no. 2023/774, decision no. 2024/685, dated 01.11.2024), upheld the previous decision issued before the annulment of the suspension of the pronouncement of the judgment, without conducting any assessment of the nature of the crime. Disregarding the European Court's findings concerning article 299 of the Criminal Code in the *Vedat Şorli* judgment, the Gölbaşı 1st Criminal Court once again suspended the pronouncement of the judgment against the defendant**.**

30. This particular defendant **could have faced imprisonment** if the outcomes of these three retrials had been different and even harsher.

31. Finally, in another retrial case (file no. 2023/282, decision no. 2024/182, 05.06.2024), following the Constitutional Court's ruling, the Istanbul 35th Criminal Assize Court issued a suspension of the pronouncement of the judgment for a defendant accused of making terrorist propaganda, without applying the three-part test prescribed by the European Court in the initial proceedings. Moreover, the Criminal Assize Court's decision suggests that the timeline for the suspension was treated as having started anew, rather than accounting for the period that had already elapsed.

32. Therefore, had the defendant not petitioned the Constitutional Court regarding the suspension of the pronouncement of the judgment, he would likely have been in a more favourable position. Despite the suspension period being nearly complete, the Criminal Assize Court's decision **effectively reset the timeline**, disregarding the time already served under the original suspension. In essence, the Criminal Assize Court's decision appears to penalize the applicant for exercising his right to seek redress from the Constitutional Court.

33. As illustrated by these examples, in some cases brought to the Constitutional Court regarding the suspension of the pronouncement of the judgment, defendants either receive harsher sentences in the retrial following the violation judgment or face an extended period

of supervision under the suspended judgment. This constitutes an interference with the individual's right to file an individual application. Specifically, while a retrial is mandatory following a violation ruling by the Constitutional Court, judgments issued during these retrials often impose more severe penalties on the applicants than the original decision to suspend the pronouncement of the judgment.

34. A similar outcome is likely to occur after a ruling by the European Court of Human Rights. This situation risks deterring applicants who have received a violation ruling from the European Court from seeking a retrial in domestic courts, as it undermines their confidence in obtaining meaningful redress.

35. To prevent this absurd outcome, it should be explicitly stipulated that in retrials following a violation decision by the Constitutional Court or the European Court, the sentence imposed cannot be more severe than that in the initial trial.

36. More importantly, it is essential to ensure that provisions such as article 299 of the Turkish Criminal Code, which the European Court has found to lack the quality of law, are not applied in retrials. To achieve this, İFÖD suggests that the monitoring of the implementation of the *Birol and Durukan* judgment should be carried out within the framework of other freedom of expression judgment groups, namely *Artun and Güvener*, *Akçam*, *Nedim Şener*, and *Öner and Türk*.

37. Following the Constitutional Court's *Atilla Yazar* judgment, it is imperative for the Government to provide the Committee of Ministers with **detailed statistics on the outcomes of retrials**. These statistics should include the number of applicants acquitted, those who received harsher sentences, and those whose supervision periods were restarted as a result of retrial. Such **comprehensive data** will offer valuable insights into the practical implications of the judgment and the effectiveness of the measures implemented.

38. Freedom of expression is increasingly under threat in Türkiye, with individuals becoming increasingly hesitant to voice their opinions. In this context, it is crucial to monitor whether courts, in retrials following the annulment of suspension of the pronouncement of judgments, prioritize freedom of expression in their decisions. As evidenced by the cases cited above, courts have issued rulings that disregard freedom of expression, thereby jeopardizing the fundamental rights and freedoms safeguarded by the European Convention. Accordingly, monitoring the implementation of the *Durukan & Birol* judgment is essential for the protection of freedom of expression in Türkiye.

Conclusion and Recommendations

39. İFÖD believes that the issues identified by the European Court in the *Durukan & Birol v. Türkiye* case are likely to persist during the retrial process unless measures are taken to prevent more severe consequences.

40. Given that the offenses in question are directly related to freedom of expression under article 7(2) of Law No. 3713 or article 299 of the Turkish Criminal Code, it is essential to closely monitor cases undergoing retrial following the suspension of the pronouncement of judgments. Specifically, such monitoring should assess whether the case law of the European Court is being appropriately implemented.

41. In light of the foregoing, İFÖD recommends the following actions to the Committee of Ministers:

i. **Monitor this judgment alongside other freedom of expression judgments.** This approach will allow for an assessment of the extent to which the European Court's jurisprudence is followed after the Constitutional Court's ruling. Monitoring implementation collectively will provide insights into systemic changes or persistent issues in Türkiye's judiciary regarding freedom of expression.

ii. **Request detailed statistics from the Government on retrials following the Constitutional Court's decision.** The Government should provide data on the outcomes of retrials, including how many individuals were acquitted, how many were convicted, and how many had their probationary periods extended. This information is critical to understand the practical implications of the Constitutional Court's decision and the systemic application of the relevant legal provisions.

iii. **Demand a formal declaration from the Government that laws deemed by the European Court to lack the quality of law (such as article 299 of the Criminal Code) are no longer being applied.** Such a declaration would provide clarity and assurance that legislative provisions identified as problematic by the European Court are no longer in force in a manner that violates the Convention. Ensuring compliance with this principle is essential for upholding freedom of expression standards in line with the European Court's jurisprudence.

42. İFÖD further recommends that the Committee continue to supervise the implementation of the European Court' judgment in *Durukan and Birol v. Türkiye*, to ensure compliance with international standards and to protect freedom of expression effectively.

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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.