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Meeting: 1406th meeting (June 2021) (DH)

Communication from an NGO (İfade Özgürlüğü Derneği (İFÖD - Freedom of Expression Association)) (03/05/2021) in the case of Isikirik v. Turkey (Application No. 41226/09) and reply from the authorities (18/05/2021).

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Réunion : 1406^e réunion (juin 2021) (DH)

Communication d'une ONG (İfade Özgürlüğü Derneği (İFÖD - Freedom of Expression Association)) (03/05/2021) dans l'affaire Isikirik c. Turquie (requête n° 41226/09) et réponse des autorités (18/05/2021)
[anglais uniquement]

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



DGI

03 MAI 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

RULE 9.2 COMMUNICATION

in the Işıkkırık Group of Cases v. Turkey (Application No. 41226/09)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

03 May, 2021

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



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03.05.2021

Rule 9.2 Communication from Freedom of Expression Association (İFÖD) (in the Işıkırık group of Cases v. Turkey (Application No. 41226/09))

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 **Işıkırık group of cases** with respect to changes in legislation (Articles 220/6 and 220/7 of the Turkish Criminal Code) and judicial practice in fully aligning the domestic legal framework concerning the right to assembly and freedom of expression with the European Court's case law. The submission is prepared by İfade Özgürlüğü Derneği (İFÖD – Freedom of Expression Association), a non-profit and non-governmental organization aims to protect and foster the right to freedom of opinion and expression in Turkey.

Background

2. Işıkırık group of cases comprise of seventeen judgements concerning violations of the applicants' right to freedom of peaceful assembly and/or freedom of expression.¹ In these 17

¹ *Işıkırık* (no. 41226/09), *Kervancı* (no. 76960/11), *Ilyas Gündüz* (no. 64607/11), *Seyfettin Demir* (no. 45540/09), *Zülküf Murat Kahraman* (no. 65808/10), *Kerçin* (no. 55038/11) cases concern a violation of the right to freedom of assembly on account of the applicants' conviction of committing an offence on behalf of an illegal organization and membership of an illegal organization under Articles 220 § 6 and 314 of the Turkish Criminal Code ("TCC") as a result of having peacefully taken part in demonstrations (Article 11). *Mustafa Çelik* (no. 46127/11), *Bozan* (no. 56816/10), *Celal Altun* (no. 25119/11), *Ramazan Taş* (no. 42153/11) cases concern violation of the right to freedom of expression on account of the applicants' conviction of committing an offence on behalf of an illegal organization and membership of an illegal organization under Articles 220 § 6 and 314 § 2 of TCC as a result of having peacefully taken part in demonstrations (Article 10). *Ayata Civelek and Others* (no. 17606/11) case concerns violation of the right to freedom of assembly on account of the applicants' conviction of aiding and abetting an illegal organization under Article 169 of the former Criminal Code as a result of having peacefully taken part and organized of demonstrations, meetings, concerts, press conferences, and distributed leaflets, shouted slogans during demonstrations. Applicants' sentences were reduced on taking into consideration a legislative amendment introduced into Article 220 § 7 of the TCC (Article 11). *Bakır and Others* (no. 46713/10) and *Imret* (2) (no. 57316/10) cases concern a violation of the right to freedom of assembly on account of the applicants' conviction of aiding and abetting an illegal organization under Article 220 § 7 and 314 § 3 as a result of having peacefully taken part of demonstrations (Article 11). *Ali Abbas Yılmaz* (no. 41551/11) case concerns a violation of the right to freedom of expression on account of aiding and abetting an illegal organization under Article 220 § 7 of TCC as a result of having peacefully taken part in demonstrations, encouraged people to be taken part of these



cases the European Court of Human Rights (“**the Court**”) found that Articles 220 § 6 and 220 § 7 of TCC were not “foreseeable” considering the extensive interpretation of these provisions by the Turkish domestic courts and decided that the interferences were not prescribed by law. The *Işıkırık* group of cases underline structural problems with respect to the full and effective enjoyment of freedom of assembly and freedom of expression as a result of extensive and unforeseeable interpretation and implementation of criminal provisions. The common feature of these cases was the **authorities’ failure to show** a certain degree of tolerance towards peaceful gatherings and critical expressions.

İFÖD’s Rule 9.2 Submission of January 2020

3. İFÖD made a Rule 9.2 submission on 21.01.2020 which evaluated the failure of the Turkish authorities in full and effective implementation of general measures in the *Işıkırık* group of cases.² İFÖD concluded that structural problems stemming from the content and application of relevant provisions continued including unforeseeable nature of rule and there has been no progress achieved with regard to the provision of an adequate legislative framework that enables the protection of Articles 10 and 11 and full and effective implementation of *Işıkırık* Group cases. What is more, the legislative framework has become more arbitrary and punitive.
4. İFÖD also concluded that **recent legal amendments do not meet** the Committee of Ministers’ requirement of fully aligning with the Court’s case law in terms of foreseeability and necessity in a democratic society standards. Recent amendments brought to the attention of the Committee by the Government change nothing to the enjoyment of the right to assembly and freedom of expression. In fact, they become even more unforeseeable and more significantly, arbitrary and selective.

The Committee of Ministers 1369th Meeting, 3-5 March 2020 (DH) - Conclusions

5. The Committee “while noting the legislative amendments adopted in 2013, stressed that these **do not remedy** the fundamental problem with Article 220 §§ 6 and 7 of the Criminal Code as identified by the Court, and therefore invited the authorities to consider more extensive legislative solutions, and to inform the Committee of these **before 31 December 2020**”. The Committee also invited the Government “to **provide statistical information** on the number of persons charged and sentenced under Article 220 §§ 6 and 7 over the last five years and the types of conduct involved”.

demonstrations and distributed leaflets (Article 10). *Buluş and Others* (no. 417/09) case concerns violation of the right to freedom of expression on account of the applicants’ conviction of aiding and abetting an illegal organization under Article 220 § 7 and 314 as a result of having found several articles, audio-visual elements, other documents and objects in applicants’ homes by considering to be used to publish information in favour of terrorist organization PKK (Article 10). *Daş* (no. 36909/07) case concerns violation of freedom of expression on account of the applicant’s conviction of aiding and abetting an illegal organization under Articles 220 § 7 and 314 of the Criminal Code because of the draft petitions regarding with prison conditions of Öcalan seized during a search in the premises of an association (Article 10).

² See https://ifade.org.tr/reports/rule9/IFOD_Rule9_Isikirik_Group_Submission.pdf



The Turkish Authorities' Action Plan of April 2021

6. The Turkish Government submitted an Action Plan regarding the *Işıkırık* group of cases on **31.03.2021**.³ First of all, the Committee of Ministers required the Government to submit the required information before 31.12.2020. The Government's submission of 01.04.2021 is **far too late** and this **hinders** the submission of meaningful submissions by civil society organisations such as İFÖD. In any case, the Government does not provide the necessary and requested information by the Committee of Ministers. In its 35 page submission, the Government provides some updates on individual measures and repeats the legislative amendments already brought to the attention of the Committee with the Action Plan of 15.01.2020.⁴ The Government, with some examples from the Court of Cassation and the Constitutional Court, **claims** that as a result of the amended law similar violations stemming from Article 220 § 6 have been prevented. The Government also claims that further improvements will be provided with training, and awareness-raising activities and the execution of the principles laid down in the Judicial Reform Strategy 2019 as well as in the new Human Rights Action Plan of 02.03.2021.

İFÖD's Observations

7. İFÖD is in the belief that **the complex and structural problems** observed in the *Işıkırık* group cases are **still continuing** for the following reasons.
8. So far as the **judicial practice** is concerned, the Government presented case-law examples and claimed that the Constitutional Court has adopted a parallel approach to the European Court. However, İFÖD is of the opinion that this claim **does not** reflect the current situation. In recent judgments, the Court has found a chance to examine the jurisprudence of the Constitutional Court.⁵ In all those cases, the Court has held that Article 10 of the ECHR had been violated. Thus, unlike what the Government argues, it is considered that the Constitutional Court has not adopted a consistent jurisprudence in line with the Strasbourg jurisprudence.
9. The Constitutional Court in its *Ahmet Şık* decision,⁶ found the application inadmissible, whereas in *Atilla Taş*,⁷ *Ahmet Altan*⁸ and *Sabuncu and Others*,⁹ although the applications were found admissible, the Constitutional Court decided that the applicants' rights to freedom of expression and press **had not been violated** on the ground that there had been reasonable suspicion to justify the applicants' detention. The Constitutional Court also held in those cases

³ See DH-DD(2021)360.

⁴ See DH-DD(2020)38.

⁵ *Sabuncu and Others v. Turkey*, no.23199/17, 10.11.2020; *Şık v. Turkey (No. 2)*, no. 36493/17, 24.11.2020; *Atilla Taş v. Turkey*, no. 72/17, 19.01. 2021; *Ahmet Hüseyin Altan v. Turkey*, no. 13252/17, 13.04.2021; *Murat Aksoy v. Turkey*, no. 80/17, 13.04.2021.

⁶ App. No. 2017/5375, 02.05.2019

⁷ App. No.2016/30220, 29.05.2019.

⁸ App. No. 2016/23668, 3.05.2019.

⁹ App. No. 2016/50969, 2.05.2019.



that the detention of the applicants was proportionate.¹⁰ Only in *Murat Aksoy*,¹¹ the Constitutional Court found a violation of the right to freedom of expression and press.

10. In the abovementioned cases, the Constitutional Court did not examine whether the interference was prescribed by law, despite the Court's ruling in *Işıkırık* and related cases. Although the Constitutional Court found a violation of the right to freedom of expression and press in the *Murat Aksoy*,¹² its reasoning does not meet the Convention standards as the judgment **did not contain an assessment about the legality** of Article 220(7) of the TCC which did not meet the quality of law standards according to the European Court. In fact, on 13.04.2021, the European Court published its decision in *Murat Aksoy v. Turkey*¹³ and the Court finding a violation of Article 10 clearly stated that the interference with the applicant's rights and freedoms under Article 10 § 1 of the Convention cannot be justified under Article 10 § 2 since **it was not prescribed by law**.¹⁴ The European Court's approach in *Murat Aksoy* is **not unique** and the Court has persistently reiterated the same legal reasoning¹⁵ in recent judgements where the Court found a violation of Article 10.
11. During the last six months, the Court delivered five separate judgments finding violations of Article 5 and 10 in relation to the detention of journalists on account of charges involving Article 220 § 7 of the Turkish Criminal Code.¹⁶ In all those cases, either the applicants were detained on the charges of aiding and abetting a terrorist organisation, or the trial courts or the Court of Cassation convicted them for the crime of aiding and abetting a terrorist organisation involving Article 220 § 7. If the Turkish judicial organs including the Constitutional Court and the Court of Cassation had applied the European Court's jurisprudence, none of those journalists would have been detained and prosecuted, or the Constitutional Court would have found violations of the applicants' rights. Nevertheless, the Court of Cassation upheld the conviction of *Murat Aksoy*, even though both the Constitutional Court and more recently the European Court found violation of his rights.
12. Adding insult to injury, the Constitutional Court did not find a violation of the right to freedom of expression and press in the judgment of *İhsan Yaşar ve Mehmet Ali Çelebi* relying on the same reasoning used in *Murat Aksoy*.¹⁷ The Constitutional Court did not refer to the judgments of the European Court delivered three months prior to the *İhsan Yaşar* and *Mehmet Ali Çelebi*

¹⁰ Altan, App. No. 2016/23668, 03.05.2019, § 154, Sabuncu, App. No. 2016/50969, 02.05.2019, § 95, Taş, App. No. 2016/30220, 29.05.2019, § 123.

¹¹ App. No: 2016/30112, 02.05.2019.

¹² App. No: 2016/30112, 02.05.2019

¹³ *Murat Aksoy v. Turkey*, no. 80/17, 13.04.2021.

¹⁴ *Murat Aksoy v. Turkey*, no. 80/17, 13.04.2021, § 163.

¹⁵ *Ahmet Hüseyin Altan v. Turkey*, no. 13252/17, 13.04.2021, § 226, *Atilla Taş v. Turkey*, no. 72/17, 19.01.2021, §§ 190-192, *Şık v. Turkey* (No. 2), no. 36493/17, 24.11.2020 § 185, *Sabuncu and Others v. Turkey*, no. 23199/17, 10.11.2020, § 228-231.

¹⁶ *Sabuncu and Others v. Turkey*, no. 23199/17, 10.11.2020; *Şık v. Turkey* (No. 2), no. 36493/17, 24.11.2020; *Atilla Taş v. Turkey*, no. 72/17, 19.01.2021; *Ahmet Hüseyin Altan v. Turkey*, no. 13252/17, 13.04.2021; *Murat Aksoy v. Turkey*, no. 80/17, 13.04.2021.

¹⁷ *İhsan Yaşar and Mehmet Ali Çelebi*, App. No: 2019/19137, 28.01.2021 § 82.



judgment such as *Sabuncu and Others*¹⁸ and *Şık (2)*¹⁹ İFÖD is of the opinion that the Constitutional Court deliberately ignored the European Court's recent judgements.

13. So, on the contrary to the Government's arguments, **there is no judicial improvement** with regards to the application of Article 220 § 7 of the Turkish Criminal Code.
14. As it is stipulated above, none of the major problems underlined in the *Işıkırık* group of cases has been resolved. Turkish domestic courts including the Constitutional Court did not implement the principles set out by the case law of the European Court. The decisions of the Constitutional Court which lack relevant and sufficient examination lead to new violations before the European Court.
15. Moreover, in the **absence of meaningful statistical data**, it is **not possible to assess further** the claims made by the Government in its Action Plan dated 31.03.2021. The Government, simply, ignored the Committee's request "to **provide statistical information** on the number of persons charged and sentenced under Article 220 §§ 6 and 7 over the last five years and the types of conduct involved". Within this context, the submission of a few positive selective decisions of the lower courts are hardly the sign of improvement while the higher courts continue to ignore the European Court's jurisprudence.

Conclusions and Recommendations

16. There has been **no progress achieved with regard to the provision of an adequate legislative framework** that enables the protection of Article 10 and 11 and full and effective implementation of *Işıkırık* Group cases. What is more, the **legislative framework has become more arbitrary and punitive**.
17. Although the Committee decided, in its 1369th meeting, that legislative amendments adopted in 2013 do not remedy the fundamental problem with Article 220 §§ 6 and 7 of the Criminal Code as identified by the Court and invited the authorities to consider more extensive legislative solutions, and to inform the Committee of these before 31.12.2020, the authorities failed to provide any legislative solution in this regard in their last Action Plan dated 01.04.2021. Therefore, İFÖD kindly invites the Committee to reiterate its position in this regard.
18. The Committee, in its 1369th meeting, also invited authorities to provide statistical information on the number of persons charged and sentenced under Article 220 §§ 6 and 7 over the last five years and the types of conduct involved. Nevertheless, the Government also failed in this regard as well.
19. İFÖD kindly invites the Committee to continue its supervision in this group.

¹⁸ *Sabuncu and Others v. Turkey*, no. 23199/17, 10.11.2020

¹⁹ *Şık v. Turkey* (No. 2), no. 36493/17, 24.11.2020.



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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.