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Meeting: 1390<sup>th</sup> meeting (December 2020) (DH)

Communication from an NGO (İfade Özgürlüğü Derneği (İFÖD - Freedom of Expression Association) (08/10/2020) concerning the groups of cases PAKDEMIRLI and ARTUN AND GUVENER v. Turkey (Applications No. 35839/97, 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 : 1390<sup>e</sup> réunion (décembre 2020) (DH)

Communication d'une ONG (İfade Özgürlüğü Derneği (İFÖD - Freedom of Expression Association) (08/10/2020) concernant les groupes d'affaires PAKDEMIRLI et ARTUN ET GUVENER c. Turquie (Requêtes n° 35839/97, 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.

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DGI

08 OCT. 2020

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

## **RULE 9.2 COMMUNICATION**

**in the Pakdemirli Group of Cases v. Turkey (Application No. 35839/97), and  
Artun and Güvener Group of Cases v. Turkey (Application No: 75510/01)**

**by**

**İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)**

**08 October 2020**

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



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FRANCE

08.10.2020

**Rule 9.2 Communication from Freedom of Expression Association (İFÖD) (in the Pakdemirli group of cases v. Turkey (Application No. 35839/97) and Artun and Güvener Group of Cases v. Turkey (Application No: 75510/01))**

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 **Pakdemirli group and Artun and Güvener group of cases** with respect to changes in judicial practice in fully aligning the domestic legal framework concerning the right to 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. **Pakdemirli group of cases** comprise 14 cases in total all of which concern unjustified interference with the applicants' right to freedom of expression in violation of Article 10 of the European Convention as a result of civil defamation proceedings (article 49 of the Code of Obligations, and articles 24-25 of the Civil Code) against them resulting with:
  - a. disproportionate amount of compensation imposed on the applicants (Pakdemirli and Öztürk Cihan),
  - b. lack of distinction in interpretation of defamation provisions between value judgments and statement of facts, in cases involving public figures or politicians (Ayhan Erdoğan, Turhan and Öztürk Cihan) or in cases related to academic freedom (Sorguç), and
  - c. impossibility (for the applicants) to prove their good faith or invoke public interest in the context of civil defamation proceedings (Saygılı and others).
3. On the other hand, **Artun and Güvener group of cases** comprises three cases which concern violation of applicants' right to freedom of expression under Article 10 of the Convention on account of the applicants' criminal convictions for insulting the President (pursuant to Article 299 of the Turkish Criminal Code) or the public officials (pursuant to Article 125 of the TCC). This submission principally deals with the Pakdemirli group of cases. However, because of the close relationship between the civil and criminal defamation cases, some general information and statistics about criminal defamation cases will also be included in this submission considering the fact that the Committee asked from the authorities to submit statistical data on the number of criminal conviction decisions delivered by the first instance courts. Therefore, the information provided in this submission is also related to Artun and Güvener group of



cases. It should be noted that İFÖD will also submit a separate Rule 9.2 communication on the Artun and Güvener group of cases before the June 2021 meeting of the Committee.

4. As regards to general measures the Committee of Ministers asked from the authorities to provide information on the measures envisaged to prevent future similar violations as well as:
  - sample judgments of first instance courts on civil and criminal defamation cases, which indicate that they align their assessment of proportionality and balance with the Convention standards,
  - statistical data displaying the number of civil and criminal defamation cases introduced within the past five years, in particular by the President, Prime Minister or other politicians, and their outcome,
  - statistical data displaying the amount of compensation awarded and other types of restitutions/decisions, if any, concluded instead of compensation in civil defamation cases,
  - statistical data on the number of criminal conviction decisions delivered by the first instance courts.
5. The Turkish Government submitted three separate action reports regarding this group in **2015** [DH-DD(2015)670], in **2018** [DH-DD(2018)670] and in **2019** [DH-DD(2019)1276]. In the last action report the Turkish authorities mentioned some samples of case-law delivered by the Court of Cassation and local courts involving civil defamation cases mostly without mentioning the parties to the cases and the expressions which were the subject matter of the cases. Even in cases which the parties are mentioned, the precise role of them were left unclear. Selective references to cases in which the plaintiffs are “members of the Provincial General Assembly” (para. 17), “the parties are predecessor and successor mayors” (para. 18), “political personalities” (para. 18), “members of the parliament” (para. 24), is simply not enough to assess thoroughly the jurisprudence of the Court of Cassation and local courts and to claim that the case-law now addresses concerns raised by the Pakdemirli group of cases.
6. Moreover, the subject of the selective cases provided by the government is also unclear. To understand whether the Turkish judicial authorities meet ECHR standards, the subject of the cases as well as in which context the allegedly defamatory content become the subject matter of legal dispute should also be known. Similarly, in few cases the identity of the plaintiffs is clear. For instance, the Government’s action report refers to the cases brought by the Mayor of Ankara (see paras 30-31). The former Mayor of Ankara is well known for civil defamation cases he brought against those who allegedly insulted him. He successfully sued thousands of citizens for many years until he was forced to resign by the President.<sup>1</sup> Once he lost the President’s credit, he started to lose all cases at all levels and ceded to file new cases. In fact, even his former lawyer took legal action against the former Mayor with regards to unpaid legal services. Therefore, such cases involving the former Mayor of Ankara does not necessarily set the legal standards for other politically motivated civil lawsuits initiated especially by the politicians and government officials.

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<sup>1</sup> It was alleged that he initiated 3000 cases. CoE Human Rights Commissioner, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para. 57.



7. Most of the decisions mentioned by the authorities were delivered in 2015 or 2016 just before membership of all the members of the Court of Cassation were terminated by a law and only some of them were reappointed. More importantly none of those decision were related to the cases initiated by the President or former prime ministers although it is beyond dispute that considerable number of civil defamation cases were initiated by the President against opposition party leaders or critical journalists. No doubt, the government has access to all cases initiated by the President, ministers and other high level politicians. However, the submitted action report does not provide information about cases initiated by these actors, even about those decided by the Constitutional Court and rather presents a beautiful but misleading potpourri.
8. As will be shown below, main problem relating to Pakdemirli type of cases in Turkey is the unequal treatment of parties according to their political affiliation. While, defamation claims filed against the President and other government members are rejected with strong freedom of expression arguments by the courts in favour of the statements made by the President and other government members, the cases initiated by the President and other government members against opposition members of the parliament and critical voices usually are decided in favour of the President and other government members rejecting freedom of expression arguments. Therefore, it is considered that the selective and limited information provided by the government does not shed light on the problem envisaged by İFÖD.
9. The Turkish Government mentioned in its latest communication (DH-DD(2020)452, dated 22 May 2020) to the Committee that it had taken a number of measures aiming at preventing similar violations in the future. Such measures include, in particular, the development in the case-law of the Court of Cassation in the light of the ECtHR's case-law, training and awareness-raising activities, the Action Plan on the Prevention of Human Rights Violations, the individual application right before the Constitutional Court and the publication and dissemination of the Court's judgments.
10. The Turkish authorities also submitted some statistical information about civil actions brought before the courts and number of decisions rendered by the Turkish courts. According to the information provided by the Government the number of cases and decision within the last five years are as follows:

Year	Civil Actions	Decisions	Accepted	Dismissed	Other
2015	1065	1154	502	567	85
2016	648	887	351	457	79
2017	655	743	305	321	117
2018	597	675	301	302	72
2019	775	679	321	299	59

11. The Turkish government argued that as a result of training and awareness-raising activities and projects provided in the Revised Action Report dated October 2019 the Turkish judicial practice in place complies with the principles and the case-law laid down in the judgments of the ECtHR. The Turkish government invited the Committee of Ministers to close their examination in the Pakdemirli group of cases arguing that all necessary individual and general measures have been properly taken.



## İFÖD's OBSERVATIONS

12. Firstly, İFÖD observes that the Turkish government has not provided relevant statistical data about the number of civil and criminal defamation cases introduced by the President, Prime Minister or other politicians within the past five years, and their outcome, statistical data displaying the amount of compensation awarded in civil defamation cases, and statistical data on the number of criminal conviction decisions delivered by the first instance courts. The government provided only general figures displaying the total number of civil defamation cases and the number of judgments delivered by the courts. However, the provided figures only represent the number of compensation proceedings brought against any individual all across Turkey. Therefore, the Government did not present statistical data regarding the number of proceedings filed in respect of political figures.
13. Secondly, the authorities argued that the compensation proceedings in defamation cases before the civil courts are initiated by individuals within the scope of exercising their right to access to court and therefore, the authorities could not be held responsible for the number of defamation cases before the civil courts. İFÖD would like to remind that the government **has not provided a detailed statistical data on the number of civil defamation cases brought by the President or other high-ranking officials or politicians**. Moreover, the government did not provide statistical data about the number of criminal defamation cases initiated by the President (Article 299 of the Turkish Criminal Code) or other high-ranking officials (Article 125/3 of the TCC). As will be seen below, the magnitude of such cases also indicates a high number of civil law proceedings involving political figures. Even though the civil defamation actions brought by the President and other high-ranking officials are private lawsuits in nature, considering their obligation to display a greater degree of tolerance for the criticism under the case-law of the ECtHR, the public authorities cannot escape responsibility of high number of such lawsuits.
14. In the Turkish legal system, all cases are lodged with citizens' identity number and all case files are electronically stored in the government's UYAP - National Judiciary Informatics System. As a result, the government can easily collect the cases lodged with by the President and other politicians as well as the outcome of those cases. In this way, if desired, the government can easily provide the number and success rate of cases initiated by politicians. Therefore, the government's arguments about the accessibility of case files is not persuasive. Furthermore, considering that judgments of courts are open to public, there is no reasonable explanation on why the government fails to provide information concerning defamation cases filed by politicians. Failure to provide such data has a detrimental impact upon the proper assessment of Pakdemirli group of cases and whether the government has taken the measures it claims.

## Civil Defamation Cases

15. The exact number of civil lawsuits involving defamation initiated by President is unknown in the absence of official statistics. However, President Erdoğan filed considerable number of lawsuits against the leader of main opposition party (CHP) Kemal Kılıçdaroğlu for his political criticisms. Some recent examples of such civil actions brought by the President can be found in media news coverage. For example,





according to the news report of Euronews<sup>2</sup> on 16.07.2020, Istanbul Anadolu 20<sup>th</sup> Civil Court of First Instance, in a retrial after the Regional Court of Appeal quashed its decision ruled that Kemal Kılıçdaroğlu should pay damages for the amount of 359.000 TRY to the President and his relatives as a compensation for non-pecuniary damages for a speech he made in his party group in the Parliament in 2017. In his speech, Kılıçdaroğlu alleged that some relatives of the President Erdoğan had companies in the Isle of Man and funds were transferred to those companies. Similarly, Istanbul Anadolu 5<sup>th</sup> Civil Court of First Instance also ruled in another case involving the same speech that Mr. Kılıçdaroğlu should pay damages for the amount of 197.000 TRY to the President.

16. Another recent example involves President Erdoğan filing a lawsuit against Kılıçdaroğlu demanding 2.000.000 TRY for his allegations that the President's family has wealth abroad.<sup>3</sup> In another example the President sued Kılıçdaroğlu for 500.000 TRY for his parliamentary speech over FETÖ claims.<sup>4</sup> In a further example, the President sued Kılıçdaroğlu for 100.000 TRY in 2015 over his allegations of the presence of water closets made of gold in the presidential palace bathrooms.<sup>5</sup> There are numerous similar news coverage involving civil lawsuits of defamation initiated by the President in the media.<sup>6</sup> While President Erdoğan has not lost a single case brought against him, he has won in total 822.000 TRY (approx. 92.450 EUR) in fifteen different defamation cases he brought against Mr. Kemal Kılıçdaroğlu in the last ten years.<sup>7</sup> All statements made by Mr. Kılıçdaroğlu have been part of public debate in which he criticised the government's position on several issues. The recent news also shows that the amount of compensation demanded by the president and awarded by the courts also very high. In a recent case the President demanded 2.000.000 TL as a compensation for breach of his personality rights. This amount is equal to 860 minimum wage in Turkey (net minimum wage in Turkey is 2.324,70 TL). As indicated above in a recent case a first instance court rewarded 359.000 TL compensation for the president and his relatives. Although this decision is not final yet, it still shows that local courts does not align with the case-law of the ECtHR in defamation cases involving political figures.

<sup>2</sup> Euronews, <https://tr.euronews.com/2020/07/16/k-l-cdaroglu-man-adas-ile-ilgili-erdogan-ve-yak-nlar-na-359-bin-tl-tazminat-odeyecek>, 16.07.2020, at <https://tr.euronews.com/2020/07/16/k-l-cdaroglu-man-adas-ile-ilgili-erdogan-ve-yak-nlar-na-359-bin-tl-tazminat-odeyecek>; TurkishMinute, "Kılıçdaroğlu fined another \$52,000 over offshore money transfer allegations involving Erdoğan," 16.07.2020, at <https://www.turkishminute.com/2020/07/16/kilicdaroglu-fined-another-52000-over-offshore-money-transfer-allegations-involving-erdogan/>

<sup>3</sup> See <https://www.duvarenglish.com/politics/2020/08/18/erdogan-sues-chp-chair-kilicdaroglu-for-2-million-liras-over-comments-on-family-wealth/>

<sup>4</sup> See <https://www.hurriyetdailynews.com/erdogan-sues-kilicdaroglu-for-500-000-liras-over-feto-claims-152024>

<sup>5</sup> See <https://www.aa.com.tr/en/turkey/erdogan-sues-kilicdaroglu-over-golden-toilet-spat/40839>

<sup>6</sup> See for example <https://www.reuters.com/article/us-turkey-president/erdogan-sues-turkeys-main-opposition-leader-over-dictator-remark-idUSKCN0UW1FR>; <https://stockholmcf.org/turkeys-erdogan-sues-chp-leader-this-time-for-tl-500000-in-non-pecuniary-damages/>; <https://www.cumhuriyet.com.tr/haber/erdogandan-kilicdarogluna-250-bin-tlik-tazminat-davasi-1080513>

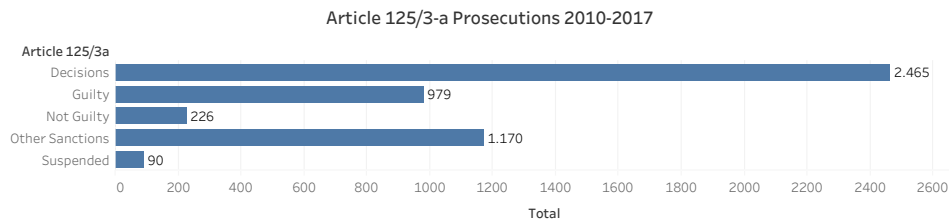
<sup>7</sup> See <http://www.cumhuriyet.com.tr/haber/turkiye/1030394/kilicdarogluna-8-senede-822-bin-tl-ceza.html>



17. The President's civil defamation lawsuits targeted not only the leader of main opposition party but other politicians<sup>8</sup> and journalists as well.<sup>9</sup> These news reports show that President Erdoğan and other AKP politicians do not hesitate to file civil lawsuits as well as criminal complaints involving defamation against their critics. For instance, former Mayor of Ankara announced on Twitter that he initiated 3.000 defamation cases against his critics.<sup>10</sup>

### Criminal Defamation Cases

18. Article 125/3-a of the Turkish Criminal Code incriminates defamation of public officials including politicians such as ministers, prime minister and mayors. This provision has been widely and systematically used by the members of the ruling party. Official statistics are not detailed and only available until 2017 and show that 2465 decisions were issued between 2010-2017 under article 125/3-a and 979 people were found guilty, 90 persons received suspended sentences and 1170 people received other sanctions. The official statistics do not provide details on who were the “public servants” defamed and whether and how many of these involved the prime minister for example. More importantly, the government stopped publishing detailed statistics with regards to article 125/3-a since 2017, so the more recent yearly statistics for 2018 and 2019 are not available for evaluation. Therefore, the number of on-going cases as well as criminal investigations involving article 125/3-a remains unknown.



19. Although the most recent statistics are not known, Journalists and other individuals have been charged and convicted in numerous cases for insulting the former prime ministers Ahmet Davutoğlu,<sup>11</sup> Binali Yıldırım and Recep Tayyip Erdoğan<sup>12</sup> and other former and current ministers.<sup>13</sup>

<sup>8</sup> See <https://www.aa.com.tr/tr/turkiye/cumhurbaskani-erdogandan-chpli-ozkoca-1-milyon-liralik-tazminat-davasi/1755167>

<sup>9</sup> According to a news report, until 2018, President Erdoğan won 418.000 Turkish liras compensation from the lawsuits he filed against other politicians and journalists including Kemal Kılıçdaroğlu 147.000 TRY, Devlet Bahçeli 44. 500 TRY, Cem Uzan 40.000 TRY, Memduh Bayraktaroğlu 25.000 TRY, Haluk Koç 20.000 TRY, Ali Topuz 15.000 TRY, Deniz Baykal 10.000 TRY, Müjdat Gezen 10.000 TRY Deniz Bölükbaşı 10.000 TRY, Necati Doğru 10.000 TRY, Özdal Üçer 10.000 TRY, Ahmet Ersin 10.000 TRY, Zeki Sezer 10.000 TRY, Evrensel newspaper 10.000 TRY, Erkan Mumcu 7.000 TRY, Yılmaz Özdiş 7.000 TRY, Aydınlık newspaper 5.000 TRY, Erbil Tuşalp 5.000 TRY, Journalist Cüneyt Arcayürek 5.000 TRY, Journalist Merdan Yanardağ 5.000 TRY, Journalist Perihan Mağden 5.000 TRY, Oktay Vural 4.000 TRY, Journalist Kemal Baytaş 3.000 TRY. <https://onedio.com/haber/cumhurbaskani-erdogan-bugune-kadar-actigi-tazminat-davalarindan-ne-kadar-kazandi-832833>

<sup>10</sup> See CoE Human Rights Commissioner, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para. 57.

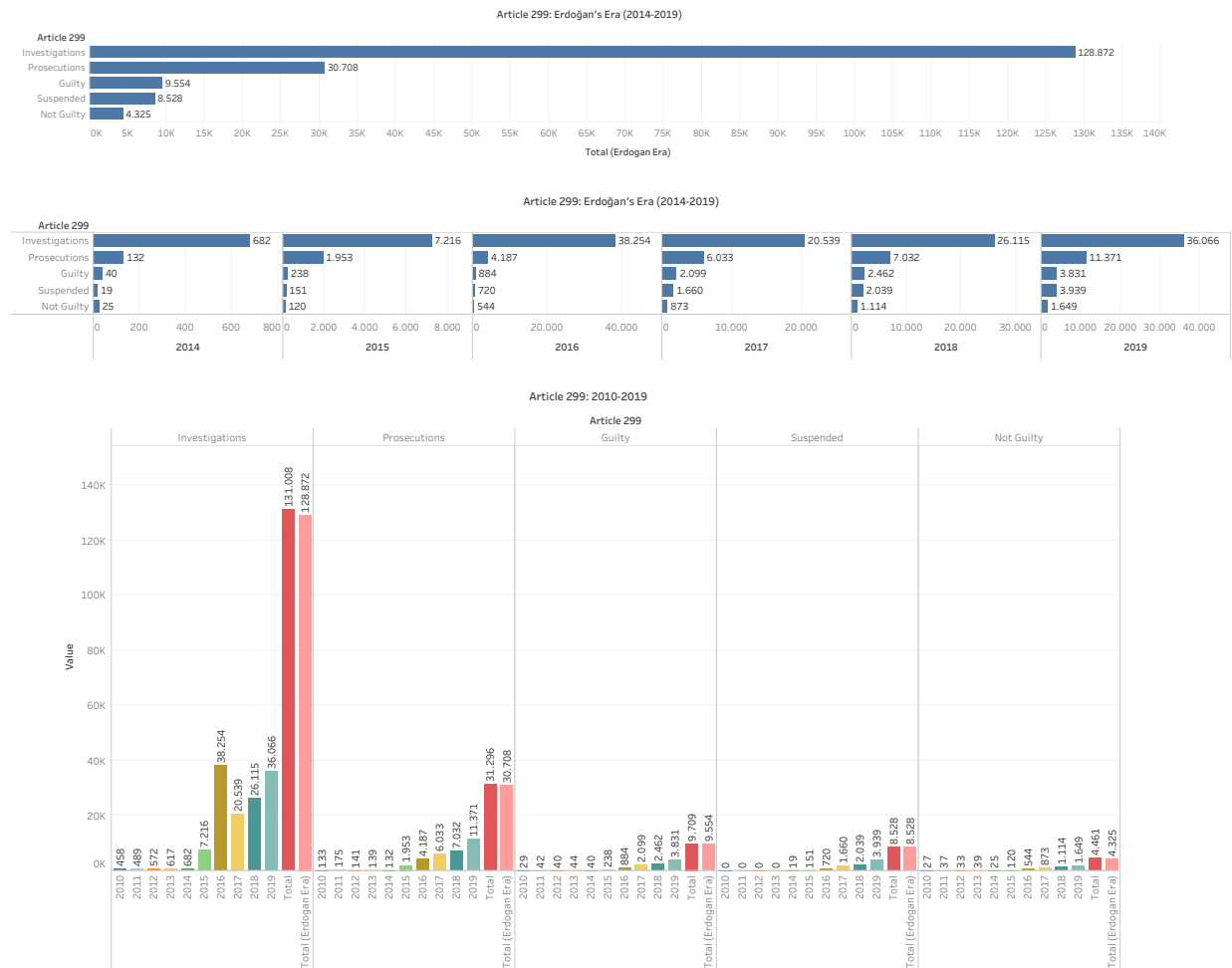
<sup>11</sup> Bülent Keneş Case, Ankara 37. Asliye Ceza Mahkemesi, 2015/977E, 2016/78K; Sevgi Akarçesme and Others case, Ankara 32. Asliye Ceza Mahkemesi, 2015/350 E, 2015/865K

<sup>12</sup> İbrahim Öztürk Case, Kütahya Asliye Ceza Mahkemesi, 2015/828E , 16.02.2016; Bülent Keneş Case, Ankara 14. Asliye Ceza Mahkemesi, 2014/780E 2015/466K; Canan Kaftancıoğlu Case, İstanbul 37. Ağır Ceza





20. The decrease in the number of article 125/3-a prosecutions could be linked to the sharp increase in the number of criminal investigations and prosecutions involving the crime of defaming the President of Turkey subject to article 299 of the Criminal Code since Erdoğan become the President of Turkey in August 2014. As will be seen from the graphics and statistical data below, 128.872 criminal investigation and 30.708 criminal prosecutions took place as of end of 2019 since Erdoğan become the president of Turkey.



21. It should also be noted that the Court of Cassation systematically ignored the case-law of the European Court when dealing with the cases related to defamation of the President of Turkey subject to article 299 of the Criminal Code. An examination of 460 decisions of the Court of Cassation between April 2015 and June 2017 revealed that 388 of these were delivered by the 16<sup>th</sup> Criminal Chamber and there were only two references to the judgments of the European Court of Human Right and only in

Mahkemesi, E. 2019/171, K. 2019/322. See also news reports available at: <http://bianet.org/bianet/medya/174342-erdogan-ve-hakaret-tck-299-125-in-uc-ayi>; <https://t24.com.tr/haber/son-3-aylik-medya-gozlem-raporu-sansur-yayin-yasagi-tehdit-sorusturma-gozalti-tutuklama-olum,352456>

<sup>13</sup> Ankara 29. Asliye Ceza Mahkemesi, 2015/13 E, 2015/1311K. In this case the defendant was convicted for insulting to Erdoğan, Davutoğlu, Arınç and Bozdağ. He received 5 years and 9 months imprisonment in total.



the dissenting opinions.<sup>14</sup> Nevertheless, the same Chamber regularly made references systematically in its decisions to the ECtHR judgments in the cases related to the terrorist propaganda subject to Article 7/2 of the Antiterror Law (The Law no 3713)<sup>15</sup>.

### **The Turkish Constitutional Court's Jurisprudence in Defamation Cases**

22. The government argued that the introduction of individual application to the Constitutional Court constituted a general measure to prevent similar violations in the future. Although the Constitutional Court produced some jurisprudence parallel to that of the European Court in the area of freedom of expression, **İFÖD observes that there is some inconsistency between the jurisprudence of the Constitutional Court and the European Court in relation to defamation cases.** For example, the Constitutional Court did not discuss the proportionality of criminal sanctions where it did not find a violation of freedom of expression in defamation cases. Indeed, in both *Ömür Çağdaş Ersoy*<sup>16</sup> and *Umut Kılıç*<sup>17</sup> applications, where the applicants were convicted for insulting the former Prime Minister Erdoğan and the President respectively, the proportionality of prison sentences in defamation cases were not evaluated by the Constitutional Court. Both cases were deemed inadmissible by the Constitutional Court.
23. Furthermore, both articles 125/3-a and 299 of the TCC were brought before the Constitutional Court under contention of constitutionality process. The local court that brought the challenge in relation to article 125/3-a claimed that the punishment envisaged under article 125/3-a was disproportional and should be annulled. The Plenary Assembly of the Constitutional Court unanimously concluded that the lawmaker had discretion under its crime policy to decide which acts should be criminalised and rejected the request for annulment.<sup>18</sup> The Constitutional Court did not take into account the position of elected politicians such as ministers, prime minister and mayors in terms of obligation to tolerate criticism.
24. Article 299 of the TCC was also brought before the Constitutional Court under contention of constitutionality process. Two domestic courts bringing this claim to the Constitutional Court relying on the jurisprudence of the ECtHR argued that privileged position provided to the President under this provision violates the equality principle of the Constitution. However, the Constitutional Court deliberately ignored the well-established case law of the Strasbourg Court and rejected the request<sup>19</sup>.
25. As the figures above shows 128.872 persons were subjected to a criminal investigation and 30.708 persons were prosecuted as of end of 2019 subject to article 299 of the TCC. Considering the high number of prosecutions and guilty verdicts, the number of individual applications decided by the Constitutional Court is strikingly low since 2014 when Erdoğan become the President of Turkey. The Constitutional Court has decided only in one case so far. In the Umut Kılıç application, the Constitutional Court

<sup>14</sup> See decisions of 16th Criminal Chamber, E: 2016/1780, K: 2016/3567, T: 24.05.2016; E: 2016/1783, K: 2016/4413, T: 22.06.2016

<sup>15</sup> See for example E:2016/6853, K:2017/1107, T:23.02.2017

<sup>16</sup> *Ömür Çağdaş Ersoy* Application, no. 2015/11715, 12/12/2018. Application pending at the European Court of Human Rights, no. 19165/19, communicated on 06.09.2019.

<sup>17</sup> *Umut Kılıç* Application, no. 2015/16643, 4.4.2018.

<sup>18</sup> See E. 2012/78, K. 2012/111, 12.9.2012.

<sup>19</sup> See E.2016/25, K.2016/186, 14/12/2016



ignored the ECtHR's jurisprudence relating to insult to heads of states and found the application inadmissible.<sup>20</sup> In *Ömür Çağdaş Ersoy* application, where the applicant was convicted for defaming the Prime Minister (Erdoğan), the applicant also relied on the Strasbourg jurisprudence. However, unlike conflicting rights cases decided by the Constitutional Court, standards developed under the Strasbourg jurisprudence was not applied and the sanction imposed on the applicant was found proportionate.<sup>21</sup> Considering that more than 9.000 persons have been convicted for insulting the President, an explanation is needed on how the Constitutional Court could not find a single violation in those cases in the last six years.

26. The Constitutional Court's position relating to civil defamation cases in which the President is a party is also not in compliance with the Strasbourg jurisprudence. In the *Kemal Kılıçdaroğlu* application, the applicant who is the leader of the opposition party was sanctioned to pay compensation to Mr. Erdoğan for a speech he had made at the Parliament. The Constitutional Court not only did decide that this speech is not protected by the parliamentary immunity of the applicant but also found that the decision of the local court had not breached the Constitution.<sup>22</sup> While deciding against the applicant, the Constitutional Court disregarded the context in which the speech was made.
27. The Constitutional Court has implemented the Axel Springer test in cases where there is a conflict between the right to protection of reputation and the freedom of expression<sup>23</sup> and the Axel Springer test has been successfully utilised by the Constitutional Court in many of its decisions.<sup>24</sup> Nevertheless, in cases to which Mr. Erdoğan is a party, Axel Springer test is not applied and in fact ignored. This was also the case in the *Neşe Özgen* application in which the applicant claimed that she had been defamed by the President's speech.<sup>25</sup> The case was found manifestly ill-founded without assessing the applicant's allegations.
28. In *Mustafa Akaydın*<sup>26</sup> case where the applicant was an opposition politician and mayor of Antalya metropolitan city, the local court decided him to pay 6.000 TRY to the Prime Minister Erdoğan as a compensation for nonpecuniary damages as a result of a speech made by the applicant. The decision was upheld by the Court of Cassation and the applicant filed an individual application with the Constitutional Court. The Court found the application inadmissible on the ground that the applicant failed to prove that his freedom of expression was violated.
29. It is considered, therefore, that the Constitutional Court as other domestic courts have constantly failed to apply the Strasbourg standards in cases to which Mr. Erdoğan is a party. It is important to add that, so far, the Constitutional Court did not find a violation of freedom of expression and freedom of the press in cases involving Erdoğan as the alleged victim, or defendant in civil court cases of defamation or even

<sup>20</sup> Umut Kılıç Application, no. 2015/16643, 4.4.2018.

<sup>21</sup> Ömür Çağdaş Ersoy Application, no. 2015/11715, 12.12.2018.

<sup>22</sup> Kemal Kılıçdaroğlu Application, no. 2014/1577, 25.10.2017.

<sup>23</sup> Emin Aydın Application, no. 2013/2602, 23/1/2014, § 57.

<sup>24</sup> See for example, *İsa Gök*, App. No: 2015/805, 12/9/2018; *Abbas Karabulut*, App. No: 2015/12317, 20/9/2018; *Kemal Kılıçdaroğlu (3)*, App. No: 2015/1220, 18/7/2018; *Mehmet Doğan [GK]*, App. No: 2014/8875, 7/6/2018

<sup>25</sup> Neşe Özgen Application, no. 2018/23127, 1.4.2019.

<sup>26</sup> Mustafa Akaydın Application, no. 2015/14800, 8/1/2020.



in relation to Internet blocking cases for which the president of Turkey requested the blocking orders.

## Conclusions and İFÖD's Recommendations

30. Systematic problems continue with regard to judicial practice on civil and criminal defamation cases, in terms of courts aligning their assessment of proportionality and balance with the Convention standards.
31. The whole judicial system including the Constitutional Court constantly fails to apply Strasbourg jurisprudence strictly in civil and criminal defamation cases especially if the President or other high ranking officials are parties to such cases.
32. İFÖD kindly invites the Committee of Ministers **not to close Pakdemirli** Group of cases and **transfer to examine these groups under enhanced procedure**, because the problem is persistent and requires close scrutiny.
33. İFÖD also kindly invites the Committee of Ministers **not to close Artun and Güvener** Group of cases and continue to **examine these groups under enhanced procedure**, because the problem is persistent and requires close scrutiny.
34. The Committee of Ministers should ask the government to provide sample judgements of first instance courts and high courts displaying that they applied Strasbourg standards in civil and criminal defamation cases where the President and other high-ranking officials were party to the cases.
35. The Committee of Ministers should ask the government to provide precise information about the number and result of civil cases initiated by the president and other high-ranking officials against opposition politicians and journalists and vice versa, and outcome of those cases and the amount of compensations rewarded by the courts.
36. The Committee of Ministers finally should ask the government to provide detailed statistical data about the criminal defamation cases, especially the number of investigations and prosecution under articles 125/3-a and 299 of the TCC and results of those cases.

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