

The Diyarbakır Bar Association Committee of Ministers Rules of Procedure is a supplementary observation to Rule 9.2 on the implementation of the decision of Vedat Şorli v. Turkey (Application no. 42048/19)

#### LOGIN

1) For the implementation of the decision of the Diyarbakır Bar Association, Vedat Şorli v. Turkey (Application no. 42048/19) supervised by the Committee of Ministers, 9(2) of the “Regulation of the Committee of Ministers on the supervision of the execution of decisions and friendly settlement conditions” regarding the legislative and judicial situation in Turkey. presents its observations and recommendations under Rule No.

2) Bar Associations in Turkey were established within the scope of the Law No. 1136 on Advocacy and are a professional organization in the nature of a public institution, all members of which are lawyers. In addition to the duties imposed on them by the law as a professional organization, they are the institutional organization of lawyers as a part of the judicial system and contribute to the development of law. Bar associations, in Article 76 of the Law on Advocacy No. 1136, "to develop the profession of attorney, to ensure honesty and trust in the relations of professional members with each other and with business owners, to defend and protect the professional order, morality, dignity, rule of law, human rights, and to meet the common needs of lawyers. It is defined as a professional organization in the nature of a public institution that carries out all the works for the purpose, has a legal personality and continues its activities according to democratic principles. Article 95 of the same Law states that the Board of Directors of the Bar Association is responsible for 'defending and protecting the rule of law and human rights and making these concepts work'.

3) Diyarbakır Bar Association is a bar that continues its monitoring and reporting activities in the field with the centers it has established for legal support due to the fact that it is in a region where violations of rights are very intense. Diyarbakır Bar Association was established in 1927.

4) Diyarbakır Bar Association conducts research on legal problems and rights violations faced by individuals and groups of individuals due to national or international authorities, aims to develop "human rights and freedoms", uses all national and international legal remedies in the most effective way, It is an independent non-governmental non-governmental organization that fights against human rights violations, documents, reports, and advocates in national and international mechanisms.

#### **BACKGROUND**

According to Article 299 of the Turkish Penal Code, “(1) Any person who insults the President is sentenced to imprisonment from one year to four years. (2) In case the crime is committed publicly, the penalty to be imposed is increased by one sixth.” According to Article 125, which regulates the offense of insult in general, it is stated that “(1) A person who attributes a concrete act or fact to a person that may offend his honor, honor and dignity, or who attacks the honor, honor and dignity of a person by cursing, is liable for a period of three months to two years.

shall be punished with imprisonment of up to In order for the insult to be punished in the absence of the victim, the act must be committed with at least three people.”

Vedat Şorli v. In the Turkish application, the Court decided that the applicant was sentenced to 11 months and 20 days in prison for insulting the President for two posts he made on his Facebook account in 2014 and 2016, and the announcement of the verdict was deferred for five years.

In the decision of the ECtHR Vedat Şorli v. Turkey, the European Court not only found a violation of Article 10 of the Convention, but also decided to apply Article 46 of the Convention, since cases of defamation of the President in Turkey constitute a systemic problem. The Court decided that the violation of the applicant's right guaranteed by Article 10 of the Convention stemmed from the text and application of that provision. In this connection, the Court held that, pursuant to Article 46 of the Convention, bringing the relevant domestic law into line with Article 10 of the Convention would constitute an appropriate form of reparation that would enable to put an end to the violation resulting from the application of Article 299 of the TPC. (Vedat Şorli v. Turkey, No. 42048/19, 19.10.2021, § 54).

It is an obligation that cannot be postponed to adapt a provision of law that the ECtHR finds contrary to the Convention to the understanding and interpretation of the Court. Although the ECtHR's determination of the contrary practice by the member state of the ECHR does not result in the annulment of the domestic law provision, the legislative, executive and judicial organs of the member state are obliged to act in accordance with the provisions of the Convention, and in case a violation of one of the provisions of the ECHR is determined by the ECHR. It is a requirement of the Convention for the respondent State to amend the relevant law and even the constitutional provision.

Referring to the Venice Commission's opinion on Article 299 of the TPC, he states that enhanced protection by a special criminal law is not in principle compatible with the spirit of the Convention and that there is a privilege or special distinction between a state's interest in protecting the reputation of its head of state and the right to give information and express opinions about the head of state. underlined that it could not justify the granting of a protection.<sup>1</sup>

The Court stated that even the symbolic fines to be imposed would constitute an interference with the freedom of expression, and that such an intervention would firstly have a deterrent effect for those arrested and sentenced to imprisonment, like the applicant; He emphasized that the way in which Article 299 of the TPC was arranged and implemented was contrary to the spirit of the Convention. According to the Court, such a violation can only be remedied by changing the text of the article. For this reason, in line with the Court's decision, Article 299 of the Turkish Penal Code should be rearranged in accordance with the case-law of the ECHR in accordance with Article 46 of the Convention.

In the Vedat Şorli decision of the European Court, the contradiction between Article 299 of the TPC and Article 10 of the Convention was clearly expressed. In Article 90 of the Constitution of the Republic of Turkey, “...The provisions of international agreements shall be taken as basis in disputes that may arise due to the fact that international agreements regarding fundamental rights and freedoms duly put into effect and laws contain different provisions on the same

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Opinion of the Venice Commission on Articles 216, 299, 301 and 314 of the TPC, 11-12.03.2016, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e)

subject". In this context, given the clear findings of the European Court that Article 299 of the TPC is inconsistent with the Convention, the relevant provision should no longer be enforced by criminal courts. However, in domestic practice, Article 299 of the TPC is still applied as a judicial threat, and individuals continue to be tried with threats of arrest, detention, arrest and punishment by making them suspects. This situation clearly reveals the threat from the judiciary and makes it necessary to amend Article 299 of the TPC with the criteria determined by the structural ECtHR decision. Otherwise, the right to freedom of thought and expression and personal freedom and security will continue to be violated in a widespread and systematic manner.

When the Turkish Penal Code No. 5237 is examined, three months to two years' imprisonment or a judicial fine (Article 125 of the TCK) is imposed for the crime of "insulting" against the citizens, while the crime of "Insulting the President" is sentenced to imprisonment from 1 to 4 years (Article 299 of the TCK). We can see that it has been edited. Such an arrangement is clearly and unequivocally considered a violation in the ECtHR's decisions. The ECtHR, as a rule, does not comply with the spirit of the Convention to provide more protection with a special legal regulation on defamation; states that the existence of a special law to protect the president or other state officials creates an "over-protection" as a result of the violation of freedom of thought and expression. (Colombani and Others v. France; Pakdemirli v. Turkey; Artun and Güvener v. Turkey Judgments)

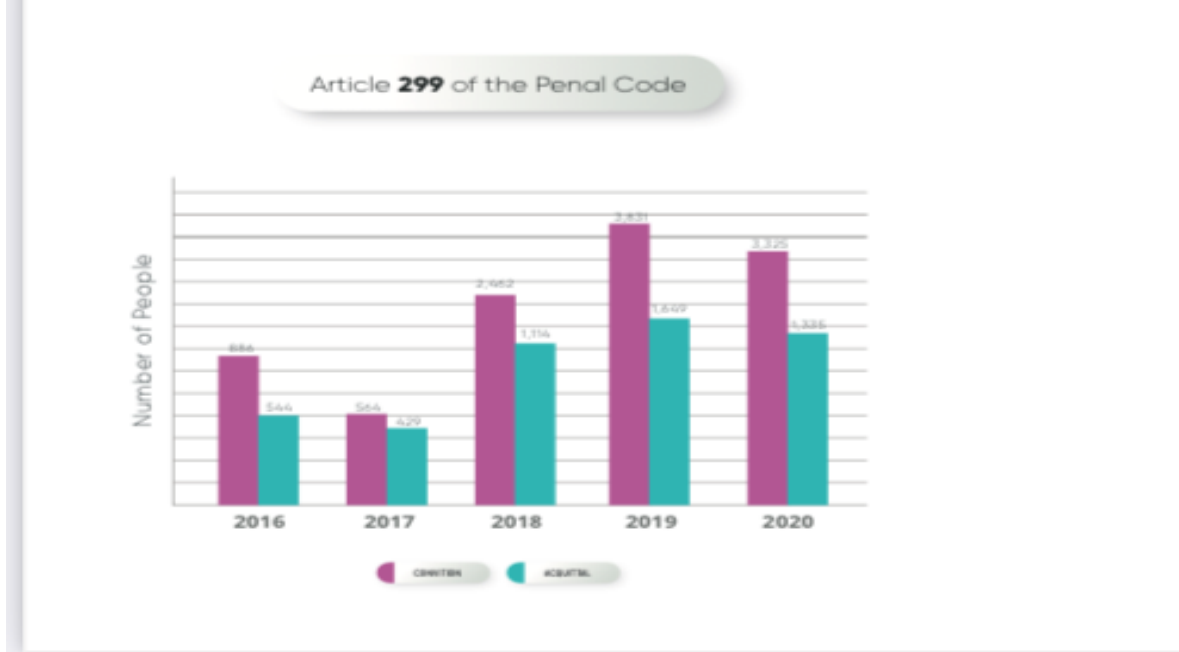
In the decisions of the ECtHR and in the recommendations of the Committee of Ministers of the Council of Europe, it is considered as a "violation" that the crime of "insulting the President or other state officials" is punishable by imprisonment, and that this issue is included in the criminal justice system. In this respect, the State of Turkey should abolish the prison sentence stipulated for offenses of insulting the president or other state officials and keep the issue only within "private law". The level of democracy of a state can be measured by its ability to secure all kinds of discussion, including the most extreme ideas and thoughts, for the development of the state, society and its individuals. Freedom of expression can really be talked about when all citizens of a state can express their opinions without worrying about going to jail or being tried in criminal courts.

It is seen that the fair trial guarantees and legal procedures of the Turkish judicial practice are ignored, the citizens are exposed to the judicial threat by arbitrary and violating the right to legal security with the overly broadly defined provisions of the legislation, and the acts that are under protection in accordance with the international human rights law are violated with different non-legal motives.

The deepening of the human rights crisis, along with the erosion of the rule of law and democracy, is also demonstrated in Human Rights Watch's 2020 World Report. Regarding Turkey, the report states that "executive control and political influence over the judiciary cause courts to systematically accept bogus indictments and to issue arrests and convictions of individuals and groups the government deems political opponents without convincing evidence that they have committed crimes".

It is observed that the judiciary is used for the purpose of pressure and liquidation against individuals and groups that are determined to be oppositional or anti-system. Political issues are subject to accusations within the scope of judicial activity, the political space is narrowed by violating the freedom of political discussion, and it is seen that the judiciary is tried to become the political decision maker. In this respect, the criticisms of individuals who have

dissenting opinions within the scope of the crime of insulting the president turn into an arbitrary judicial threat with the excessive interpretation of the law, and have a deterrent effect on the use of freedom of expression.



The number of convictions and acquittals between 2016-2020 within the scope of Article 299 of the TCK is given in the table. In this context, the total number of convictions in a 5-year period was 11,068; The number of acquittals is 5,071.<sup>2</sup>

Until the end of 2020, investigations were opened against 160,169 people within the scope of Article 299. In addition, 38,498 people were prosecuted, 12,881 people were sentenced and 11,913 people were deferred from the announcement of the verdict. 3,625 people were sentenced to prison. 5,660 people were acquitted. As of the end of 2020, according to Justice Statistics, 106 of the people who were convicted were under the age of 18 and 24 were between the ages of 12-14.<sup>3</sup>

Structural problems identified within the scope of violation by the European Court of Human Rights still continue in Turkey. Article 299 of the TPC creates a climate of self-censorship and also threatens to be arrested and prosecuted.

## CONCLUSION AND RECOMMENDATIONS

The Diyarbakır Bar Association considers that the structural problems regarding freedom of expression identified by the Court and the Committee of Ministers continue and an effective solution has not been produced by the authorities.

It is observed that judicial practice and domestic legislation cause violations of fundamental rights and freedoms of a structural nature.

Article 299 of the Turkish Penal Code does not meet the requirement of the Committee of Ministers to fully comply with the case-law of the Court in terms of standards of predictability

<sup>2</sup> Ministry of Justice Crime Statistics(2016-2020)

<sup>3</sup> Justice Statistics2020, s. 60,

[https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1692021162011adalet\\_ist-2020.pdf](https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1692021162011adalet_ist-2020.pdf).

and necessity in a democratic society. Accordingly, within the scope of the ECtHR's *Şorli v. Turkey* decision, Article 299 of the TPC should be repealed in accordance with the provision of Article 46 of the Convention.

The Government should be requested to submit detailed data on the application of Article 299 of the Criminal Code, including decisions on investigation, arrest, non-prosecution, conviction and acquittal.

The *Şorli v. Turkey* decision should be included in the scope of qualified monitoring and freedom of expression as the basic elements of a democratic society should be reviewed more frequently and regularly by the Committee of Ministers in terms of legislative measures.

Diyarbakır Bar Association