MONITORING OF THE IMPLEMENTATION OF THE JUDGEMENTS OF THE ECtHR

EUROPEAN COURT OF HUMAN RIGHTS

JUDGMENT IN THE CASE OF ARTUN AND GÜVENER V. TURKEY

(Application no. 75510/01, 26/06/2007)

MONITORING REPORT

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December 2016

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Artun &Güvener/Turkey Judgment

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I. FINDINGS REGARDING THE JUDGMENT

A. CIRCUMSTANCES OF THE CASE

On 20 August, 1999 and 24 August, 1999 Milliyet newspaper published two articles titled 'Who is primarily responsible for the wreckage?' and 'The 7.4 earthquake will not affect Demirel' respectively, by Meral Tamer Artun in which the author criticised President Süleyman Demirel in particular, and public authorities in general, for failing to take the necessary measures prior to and after the 17 August, 1999 earthquake. According to the indictment issued on 16 November, 1999 by the Bakırköy Chief Public Prosecutor's Office, Meral Tamer Artun, journalist at Milliyet newspaper, and Eren Güvener, Editor in Chief of Milliyet, were charged with defaming the President via the press under Article 158 of the former Turkish Penal Code. By decision of the Bakırköy 15th Criminal Court of First Instance, dated 27 September 2000, Artun and Güvener were sentenced to one year and four months prison on grounds that the articles had given rise to the offence set forth under Article 158 of the Turkish Penal Code. Artun's sentence was deferred yet Güvener's sentence was converted to a fine of 970,000,000 TRY. In the reasoning of the decision, the Bakırköy 15th Criminal Court of First Instance stated that although some sections of the articles mentioned the likely responsibility of the authorities for failing to take the necessary measures about the earthquake, other sections directly targeted the personality of the President and exceeded permissible limits of criticism. The decision of the Bakırköy 15th Criminal Court of First Instance was upheld and finalised by the judgment of the Court of Cassation on 2 April, 2001.

B. APPLICATION NO. 75510/01

After exhausting domestic remedies, Artun and Güvener launched an application with the European Court of Human Rights on 20 September, 2001. The applicants alleged that their right to a fair trial as safeguarded under Article 6 of the ECHR had been violated due to insufficient reasoning in the decisions of the domestic courts and that their right to freedom of expression under Article 10 of the ECHR had been violated due to the punishments they were imposed for having published the said articles. Although the government argued that the applicants had not previously alleged that their right to freedom expression had been violated before domestic courts, the ECtHR noted that the applicants had clearly alleged that their right to freedom of expression had been violated in their appeals to the Court of Cassation. Thus, since it is necessary to establish that the complaints submitted to the ECtHR must first be submitted to domestic courts, the Court decided that the allegations of the applicants were not manifestly ill-founded and found the application admissible.

C. THE JUDGMENT OF THE ECTHR

The ECtHR noted that it would be appropriate to start with a reference to the *'Declaration on Freedom of Political Debate in the Media'* adopted by the Council of Europe Committee of Ministers on 12 February 2004. The Court also noted that in its Resolution 1297 (2002) regarding the *Implementation of Decisions of the European Court of Human Rights by Turkey*, the Parliamentary Assembly of the Council of Europe had also stated that the implementation of the Turkish Penal Code and Anti-Terror Law brought excessive interventions to freedom of expression. Furthermore, Resolution 1380 (2004) titled *Honouring of obligations and commitments by Turkey*, the Parliamentary Assembly noted '*the Assembly still awaits progress on the offences of defaming or insulting the principal organs of state, which should no longer be liable to imprisonment*'.

According to the ECtHR's assessment on the substance of the case, the dispute regarding the sentence issued by the domestic court centres on whether the interference was 'necessary in a democratic society'. Although the government argued that the said newspaper articles were of a defamatory nature against the President and that the interference was necessary in a democratic society, the ECtHR had found in many of its judgments

that the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual. Hence, exceptions to freedom of expression to protect the reputation of a politician should be interpreted narrowly.[1]

The newspaper articles in question are about the protection of the environment and public health and the failure of the authorities to take the necessary measures prior to and after the 17 August 1999 earthquake. The articles, which focused on particularly important issues of public interest levelled harsh criticism against the President of the time, who was held accountable for the poor governance of the country. The ECtHR found that the articles contained no elements that exceeded the limits of acceptable criticism or that would amount to an attack against the personality of the President, which was under protection.

In its assessment of Article 158 of the Turkish Penal Code, which was the grounds for the decision of the domestic court, the ECtHR noted that the provisions afforded greater protection to presidents against the expression of information and opinions about them compared to other people and also foresaw a higher punishment for the authors who made defamatory statements against heads of state. The implementation of Article 158 of the Turkish Penal Code was found to be contrary to both the general principles of the established case-law of the Court with regard to the implementation of the punishments against members of the press as well as its case-law on political speech.

In its judgment in the case of *Colombani and Others v. France*[2] about foreign heads of state, the ECtHR found that the protection afforded by law to foreign Heads of State in France on account of their function or status was incompatible with modern practices and political conceptions. If a foreign Head of State alleged that he had been defamed, he may resort to the standard procedure available to everyone but should not receive privileged protection.[3] The Court is of the opinion that the judgments concerning foreign heads of state are more relevant in cases concerning the interest of a State to protect the reputation of its own leaders. Such an interest does not justify the granting of privileges or special protection to a Head of State against people's right to impart information and express opinions about them.

In the judgment of the ECtHR in the case of *Colombani and Others v. France,* such a privilege afforded to foreign heads of state was found to be in violation of the right to freedom of expression safeguarded under Article 10 of the Convention.[4] Within the context of the said judgment, the ECtHR has noted that a country's own Head of State cannot have privileges protecting them against the right to freedom of expression of others to impart information or opinions about them. According to the ECtHR, affording special protection to heads of state is incompatible with modern political practices and conceptions.

Furthermore, according to the ECtHR's case-law on the press, freedom of expression of journalists can only be restricted and prison sentences imposed only in exceptional circumstances when there are serious attacks on other fundamental rights, such as in the case of hate speech or incitement to violence. However, since the articles giving rise to the current case do not fall under such exceptional circumstances, the decision of the domestic court constitutes an intervention going beyond what would have been a "necessary" restriction against freedom of expression.

The Court is of the opinion that none of the conditions necessary under the ECtHR's case-law were met in the current case. Despite this determination, the applicants were imposed a one year four month sentence of imprisonment based on Article 158 of the Turkish Penal Code in contradiction to the Court's relevant case-law. Although the applicant Artun's sentence was deferred and Güvener's sentence was converted to a fine, the said punishments have created a deterring effect on the applicants. Such punishments create long-term, lasting and

1 See especially, *Oberschlick v. Austria* (no. 2), Judgment dated 1 July 1997, Selected Judgments 1997-IV, *Lingens v. Austria*, Judgment of 8 July 1986, Pakdemirli v. Turkey, no. 35839/97, 22 February 2005

2 no. 51279/99, 25/6/2002.

3 *Colombani and Others v. France*, no. 51279/99, 25/6/2002, para. 68-69.

4 *Ibid*.

discouraging effects in the professional lives of journalists and the deferral or conversion of sentences to fines does not eliminate such negative effects. Consequently, the Court found that the domestic courts had, in this case, gone beyond what would have been a "necessary" restriction on the applicants' freedom of expression based on Article 158 of the Turkish Penal Code, which is contrary to the Court's case-law and concluded that there had therefore been a violation of Article 10 of the Convention.

As regards the applicants' allegation that their conviction was not sufficiently reasoned, the Court considered that the finding of a violation which it had reached in respect of Article 10 of the Convention covered also that complaint which, therefore, does not call for any separate examination under Article 6/1 of the Convention.

The Court considered that the persons concerned may be regarded as having been somewhat distressed by the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, the Court awarded the applicants jointly EUR 6,000 in compensation for non-pecuniary damages.

Other than the payment of the non-pecuniary damage, no other special individual measures were foreseen in the judgment. However, on 27 May 2008, the lawyers of Artun and Güvener applied to the Bakırköy 15th Criminal Court of First Instance requesting a retrial. On 18 May 2010, the Bakırköy 15th Criminal Court of First Instance found that the newspaper articles leading to the sentencing of Artun and Güvener were within the acceptable limits of freedom of press and expression and hence issued a decision of acquittal.

D. OTHER ECTHR JUDGMENTS ON DEFAMATION OF THE PRESIDENT

Since Article 299 of the new Turkish Penal Code has been invoked repeatedly particularly in the last two years, there have been many cases brought before the ECtHR which have been finalised. The judgment in the case of Pakdemirli v. Turkey, which had been issued prior to the judgment of Artun and Güvener was the first judgment in which Turkey was found to be in violation in a case concerning the defamation of the President.[5] The principles drawn by the ECtHR with regard to this civil lawsuit where the applicant had been ordered to pay compensation for having defamed President Demirel, are also relevant to criminal cases. The ECtHR expressed its concern over and found arbitrary the following statements which aimed to protect not only the President but also the State in his person:

> "Even if virulent remarks between politicians can be accepted as a necessity of politics, since Mr. Demirel who is in the office of the President of the Republic no longer has the title of politician and now bears the title of statesman, acts which constitute an offence against him can not be regarded as reasonable. (...) He is the representative of our state, both inside and outside the state borders. Insults made against him not only undermine the moral personality of the office of the Head of State, but also undermine the reputation of the Turkish Republic which he represents. The Republic was founded with the blood, sweat, martyrs and veterans of the Turkish nation and entrusted to it by the venerable founder Atatürk. It is the duty of everyone to protect the Turkish Republic entrusted to us. Under the circumstances, the gravity of the defendant's insult is flagrant. While there are internal and external forces which seek to destroy the unity of the country, the slighting of the status of the President of the Republic will only serve to encourage such parties."[6]

In its judgment in the case of *Pakdemirli v. Turkey*, the Court reiterated the finding in its earlier judgment of *Colombani and Others v. France* stating that provisions which conferred privileges to foreign Heads of State in the protection of their honour and reputation were contrary to the spirit of the Convention and concluded that

5 The *Pakdemirli v. Turkey* judgment is the pilot case in a separate group of cases. The common theme across all judgments in this group is not defamation of the President but the disproportionate decisions for compensation and the failure to make a distinction between facts and value judgments in expressions against politicians. *Pakdemirli v. Turkey*, no. 35839/97, 22/2/2005.

6 *Pakdemirli v. Turkey*, no. 35839/97, 22/2/2005, para. 51.

the same principle was, *a fortiori*, valid in the interpretation of a law by a judge.[7] In other words, a head of state cannot be granted any further legal protection than those granted to an ordinary person either by the law or through the interpretation of that law by a judge.

Hasan Celal Güzel had applied to the ECtHR challenging the deferred sentence for defaming the president in addition to other sentences. With regard to Güzel's application, the Court ruled that Article 10 of the Convention had been violated without going into the details of the offence of defaming the President.[8]

E. THE PROCESS BEFORE THE COMMITTEE OF MINISTERS

The judgment in the case of Artun and Güvener is subject to standard supervision by the Committee of Ministers. The standard supervision process was continued since no further significant developments took place with respect to the ECtHR. The Committee of Ministers' Department for the Execution of Judgments of the European Court of Human Rights states on its website that further information on the general measures was provided on 18/03/2010 by the authorities and that this information is being assessed.[9] In the most recent information submitted to the Committee of Ministers, the Government has stated that the sentence imposed for the said offence under Article 299 of the Turkish Penal Code had been decreased, and submitted two judgments of the Court of Cassation General Criminal Assembly. The judgments, which are about defamation of political figures, state that the decision was reached with reference to the case-law of the ECtHR. The Committee of Ministers welcomed these positive developments but referred to the case-law indicating that a sentence of imprisonment against a journalist on grounds of a press-related offence could be acceptable only under exceptional conditions and requested further information on the general measures. No additional evaluation has been undertaken by the Committee based on the information submitted by Turkey on 18/03/2010.

Although the Committee decided to resume consideration of the item at its 1108th meeting in March 2011, no further developments have taken place about the judgment since that date.

The judgment in the case of Pakdemirli v. Turkey is the pilot case in another group of cases concerning decisions of compensation. This group of cases is also under standard supervision and still open.[10] The cases in the group are monitored with regard to three factors:

- The disproportionality of compensation amounts,[11]
- Failure to make a distinction between the facts and value judgments in court decisions concerning statements which are the subject of defamation cases involving public actors and politicians,[12]
- Lack of opportunity for applicants to prove their good faith and present arguments for public interest in compensation cases filed on grounds of defamation.[13]

In its Action Report[14] submitted on 22 February 2015, the Government referred to two separate judgments issued by the 4th Chamber of Civil Cases of the Court of Cassation. In one of the judgments, the claimant is former Prime Minister Recep Tayyip Erdoğan and the respondent is the leader of an opposition party of the

7 *Colombani and Others v. France*, no. 51279/99, 25/6/2002.

8 *Güzel v. Turkey*, no. 6586/05, 24/7/2007.

9 http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=artun&StateCode=&SectionCode=

10 http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=pakdemirli&StateCode=&SectionCode=

11 *Pakdemirli* and *Öztürk Cihan v. Turkey*, (no. 17095/03, 9/7/2009) judgments.

12 *Erdoğan Ayhan v. Turkey*, no. 39656/03, 13/1/2009; *Turhan v. Turkey*, no. 48176/99, 19/5/2005; *Cihan Öztürkv. Turkey*, no. 17095/03, 09/06/2009.

13 *Saygılı and Others v. Turkey*, no. 19353/03, 08/01/2008.

14 https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2770336&SecMode=1&DocId=2283876&Usage=2

time. Although the Government referred to this decision in its Action Plan to show that the standards in the Pakdemirli judgment had been followed, the said decisions only follow the principle of proportionality but fail to take into account the other two factors of the ECtHR's judgments.

As discussed below, all three factors remain a problem in cases concerning the defamation of the President.

II. OTHER COUNCIL OF EUROPE DOCUMENTS

A. THE OPINION OF THE VENICE COMMISSION

The subject of defaming the President had not received attention until recently in Turkey's problematic legislation in terms of freedom of expression. Thus, the judgment in the case of Artun and Güvener is still an isolated decision. However, the fact that the subject has limited presence in the case-law of the ECtHR should not lead to its significance being disregarded.

Indeed, after the Artun and Güvener judgment, the use of Article 299 of the new Turkish Penal Code increased significantly during the term of office of President Abdullah Gül. Together with the Presidency of Recep Tayyip Erdoğan, the use of Article 299 peaked and the provision became one under which thousands of people were indicted. The issue was also noticed by other bodies of the Council of Europe.

Upon the request made by the Council of Europe Parliamentary Assembly, a delegation from the Venice Commission visited Ankara between 13-14 January 2016 and examined articles 216, 299, 301 and 314 of the Turkish Penal Code. The opinion issued following the visit was adopted at the 106th session of the Commission on 11-12 March 2016 in Venice and made publicly available on 15 March 2016.[15]

In its Report, the commission notes that the Article fails to take into account the European consensus which indicates that States should either decriminalise defamation of the Head of State or limit this offence to the most serious forms of verbal attacks against them. The Commission considers that the only solution to prevent further violations of Article 10 of the ECHR is the complete abrogation of Article 299.

The Commission notes that this will still leave the possibility to protect the Head of State from extreme forms of defamation by using the civil and criminal law procedures that are meant to protect any citizen taking into account specifically established principles of freedom of expression with regard to public figures and political matters. It also notes that the principle of proportionality and the need to restrict the range of sanctions to those not involving imprisonment also apply in this latter case.

In response to the criticism that, contrary to the general consensus in Europe, the offence is criminalised in Turkey and requires a sentence of four years imprisonment and that numerous people are tried and kept in pre-trial detention, government authorities, let alone repealing the Article, have stated that the prosecutions were due to the increase in intensity and number of verbal attacks against the President of the Republic who has been elected directly by the people. According to authorities, as shown by examples of insults containing profanity against the President and his family, it is not possible to consider these cases as being within the scope of freedom of expression.

However, the Commission was not satisfied with the statements of the government. Firstly, contrary to the claims of the Government, cases of defamation against the President are not limited to speech that includes swear words. Article 299 was invoked in instances of direct public interest such as the December 2013 graft investigations, the Syrian refugee crisis and the statements of the leader of the opposition party criticising the methods used to fight terrorism.

The Commission is aware that in many instances the issue is not one of swearing but of censorship. The Commission considers that statements such as 'thief', 'murderer' and 'dictator', which are regarded by the

15 Venice Commission, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, No. 831/2015, Strasbourg, 15 March, 2016.

government as insults should be evaluated within the public debate context. There is little scope under Article 10(2) of the ECHR for restricting political speech or debate on matters of public interest, broadly defined. Besides, the use of vulgar phrases in itself is not decisive as it may simply serve stylistic, including sarcastic purposes, which are protected as freedom of expression.

Secondly, the Commission considers that sanctions in the form of arrests and imprisonment even in the case of expressions that are swear words which cannot be regarded as criticism are unacceptable. It is of the opinion that the minimum sanction of one-year imprisonment in Article 299 appears completely disproportionate.

Thirdly, the Commission underlines that a distinction should be made between "value judgments" and "statement of facts" under Article 299 when evaluating statements by journalists in their writings regarding the President and his family. There can be no requirement in defamation proceedings that the defendant prove the truth of a value judgment. With respect to a statement of facts, on the other hand, although journalists may be asked to prove the truth of the factual statements made in order to protect the rights and reputation of others, the defendant should first be given the opportunity to prove the truth of his/her factual statements in defamation proceedings and should not be expected to act like a public prosecutor in proving the truth of a statement.

The Commission considers that the only solution to prevent these problems is the complete abrogation of Article 299.

III. EVALUATION

As explained above, the judgment in the case of *Artun and Güvener v. Turkey* should be evaluated within the scope of all other developments in the Council of Europe. The Venice Commission has concluded, as the ECtHR, that a solution is only possible through the complete abrogation of the provision. However, in order to understand the consequences of the said article in terms of freedom of expression in Turkey, it is obvious that the following factors should be considered in the light of the judgments of the ECtHR, the Monitoring Reports of the Committee of Ministers and the reports of the Venice Commission:

a. The proportionality of the punishments in cases of defamation involving the President,
b. Whether or not the investigations and prosecutions launched for defamation involve harsh swear words and insults as alleged by the government,
c. Whether the investigations and prosecutions make a distinction between statement of facts and value judgments,
d. Whether the defendants in defamation cases concerning the President are given an opportunity to prove their good faith and present their arguments for public interest.

A. THE LEGISLATIVE

According to Article 158 of the former Turkish Penal Code No. 765, which was the subject matter of the *Artun and Güvener v. Turkey* judgment, the acts of insulting and swearing to the President could be committed in three ways, namely, in the presence of the President, in the absence of the President and through publications. According to this provision, any person who committed the act of insulting the president or swearing in his presence could be sentenced to heavy imprisonment for not less than three years, any person who committed the act of insulting the president or swearing in his absence could be sentenced to imprisonment between one to three years. If the act was committed in a publication or broadcast, the sentence could be increased by one third to half the period of imprisonment. According to Article 160 of the Turkish Penal Code 765, prosecutions under this article required the permission of the Ministry of Justice.

Article 158 of the former Turkish Penal Code No 765 was repealed when the new Turkish Penal Code 5237 was put into effect on 01/06/2005. The act of insulting the President in Turkish Penal Code 5237 is set forth as an offence regulated under Part III entitled "Offences against the Symbols of the State Sovereignty and the Reputation of its Organs" of Chapter IV- "Offences against Nation and State and Final Provisions" under Article 299. The Article titled "Insulting the President" is still in force. The provision reads as follows:

(1) A person who insults the President shall be sentenced to one to four years of imprisonment.

(2) (Amended: 29/6/2005 – article 5377/35.) If the offence s committed in public, the sentence shall be increased by one sixth.

(3) The initiation of a prosecution for such offence shall be subject to the authorization of the Minister of Justice.

This special defamation offence is among "Offences Committed Against Honour". Hence, there is a distinct difference between **Article 125** of the Penal Code, which sets forth the offence of defamation and **Article 299**. Article 125 protects the personal rights of all persons whereas **Article 299 protects the Presidency as an institution**. All offences under Chapter IV Part III regulating defamation of the President protect the symbols of sovereignty such as the flag, the National Anthem, the Grand National Assembly and judicial bodies. Therefore, **in order for an act to be considered an offence within the scope of Article 299, it must be demonstrated that the act in question is defamation of an institutional value**. However, as observed in the explanation made by the Ministry of Justice to the Venice Commission, Article 125 of the Penal Code, which sets forth defamation in general, is taken as a measure when determining whether or not there is an instance of defamation.[16]

As discussed below, the only difference in implementation is that a heavier sentence is imposed under Article 299. Other than that, there has never been an instance where the President as a person and the Presidency as an institution have been evaluated separately, where article 299 was invoked for defaming the Presidency as an institution and Article 125 was invoked for insulting the President as a person.

This aspect of the issue makes it difficult to apply the four stage standard developed from the ECtHR case-law and the reports of the Venice Commission. There are no safeguards in the provision that warrant the judge to consider the context and make a distinction between value judgments and statement of facts. Yet, even if its implementation is problematic, various provisions in the Penal Code set forth that criticism cannot be regarded as an offence. For example, Article 218, which is a joint provision about offences against public peace sets forth that "statements that do not exceed the limits of imparting information and that are made for the purpose of criticism shall not constitute an offence". Article 301, which regulates the offence of defaming the Turkish Nation, the Turkish State and the institutions and organs of the State, sets forth in paragraph 3 that "Stating opinions for the purpose of criticism shall not constitute an offence". Article 299, on the other hand, does not envisage such a limit as regards what constitutes an offence. In fact, in reading the law in its entirety, one can well reach the conclusion that an act may constitute an offence under Article 299 even in cases where the purpose was criticism. Therefore, there is no rule which forces the judge to determine whether the context in which the act is committed involves a matter of public interest or to make a distinction between facts and value judgments.

According to the new provision, a person who defames the President shall be sentenced to between one to four years of imprisonment. The initial version of Article 299/2 stipulated that the sentence could be increased by one sixths if the offence was committed in public and by one thirds if it was committed via the press. Paragraph 2 of Article 299 of the Penal code was amended by Article 35 of Law 5377 entering into force on 29 June 2005. The paragraph now sets forth that the sentence could be increased by one sixths if committed publicly. In addition, according to paragraph 3, prosecution on grounds of the Article is subject to the authorization of the Minister for Justice.

16 Venice Commission Report, para. 50.

With the replacement of Article 158 of former Penal code No 765 by Article 299 of the Turkish Penal Code No 5237, **the distinction between the commission of the offence in the President's presence and his absence was lifted.** According to Article 158 of the former Turkish Penal Code 765, the acts of insulting the President and swearing against him in his presence were punishable with a sentence of not less than three years. The lifting of this distinction allows for a punishment of one to four years imprisonment under Article 299 regardless of whether the insult was made in his presence. Although this amendment is a negative one in that the ceiling for the prison sentence was raised from three years to four years, it may be regarded as a positive change in that it allows for a sentence of less than three years for acts of insulting the President in his presence. However in practice, it is almost never the case that the offence is committed in the President's presence. With regard to the commission of the offence in public, the entry into force of Article 299 has been a positive development since both the former version of Article 299/2 and its current version after the amendment foresee a shorter prison sentence than former Article 158 if the offence is committed in public. Furthermore, together with the amendment made to Article 299/2 of the Penal Code by Article 35 of Law No 5377 on 29 June 2005, the distinction between committing the offence in public and committing it through the press has been lifted and a provision introduced setting forth that the sentence shall be increased by one sixths if the act is committed publicly. Since the increase in the sentence was higher in the previous version of Article 299/2 when the offence was committed in public, the said amendment is a positive one.

However, it is clear that both the punishment specified in the new version and its implementation are severely contrary to the principle of proportionality foreseen in the case-law of the ECtHR. In the case of *Eon v. France*, the ECtHR found that a fine of 30 Euros imposed on the applicant in criminal proceedings for having insulted the French Head of State was likely to have a chilling effect.[17] According to the Court, a sentence of imprisonment inflicted in a classical case of insult would be disproportionate in any event **even if it is not executed**.[18] In this sense, since a sentence of imprisonment on grounds of insult will inevitably cause a chilling effect, it is disproportionate.[19] In its judgment in the case of *Azedova v. Portugal*, the ECtHR found that a prison sentence of 66 days in case of failure to pay 10 Euros per day in a classic case of defamation was disproportionate.[20]

Yet, the sentence foreseen in the Turkish Penal Code is a minimum of one year imprisonment, which can go up to four years. When the prison sentences are converted to fines, the figures tend to exceed 10,000 TRY; since the President is represented by a lawyer, attorney fees and court expenses are paid by the defendants and amount to nearly 20,000 TRY for each case. This amount is a serious burden even if there is a single case filed against a defendant. In instances where more than one case is in question, there is an obvious chilling effect. Furthermore, although the conditions for pre-trial detention are non-existent in any of the defamation cases involving the president, the accused have been placed in pre-trial detention in more than ten cases after Recep Tayyip Erdoğan became president. The reason why prosecutors easily demand an order for pre-trial detention and why judges of criminal courts of peace readily issue them is Article 100/4 of the Criminal Procedures Code No. 5271. According to this provision, "*A decision of pre-trial detention shall not be issued for offences which are punishable by a fine or for which the ceiling for imprisonment is not more than two years*". Therefore, while it is not possible for courts to issue a decision of pre-trial detention for the offence of defamation set forth under Article 125, the offence of defamation under Article 299 allows for this. The peculiarity of this situation is that while a statement about Recep Tayyip Erdoğan made in July 2014 before he was elected President does not warrant pre-trial detention, the same statement made in September 2014, after he was elected, results in the same person being taken into custody. This situation shows that the inequality of treatment noted by the ECtHR in the case of Artun and Güvener with respect to criminal sanctions is also observed in the implementation of judicial measures.

17 *Eon v. France*, no. 26118/10, 14/03/2013.

18 *Cumpănă and Mazăre v. Romania*, [BD], no. 33348/96, 17/12/2004, para. 115 and 116.

19 *Marchenko v. Ukraine*, no. 4063/04, 19/2/2009, para. 52; *Mariapori v. Finland*, no. 37751/07, 06/07/2010, para. 68

20 *Azevedo v. Portugal*, no. 20620/04, 27/3/2008, para. 33.

Furthermore, prosecutions in cases involving defamation of the President were subject to the permission of the Ministry of Justice according to Article 160 of the former Turkish Penal Code No 765. However according to Article 299/3 of the current Turkish Penal Code 5237, authorization for prosecution is granted by the Minister for Justice.

There have been no amendments or improvements made in the said provision in light of the final judgment in the case of *Artun and Güvener v. Turkey* issued by the ECtHR. On the contrary, as shown by the statistics given below, the said provision has been invoked to prosecute thousands of people in the last two years whereas it had formerly been rarely used.

B. THE EXECUTIVE

With respect to Article 299 (Insulting the President) of the Turkish Penal Code No 5237, a Circular was issued (No. 18/1 Dated 09/05/2008) by the Ministry of Justice Directorate General for Criminal Affairs with the title *"Offences requiring the authorization of the Minister for Justice prior to the launch of an investigation or prosecution under Articles 299 and 301 of the Turkish Penal Code".* The purpose of the Circular is to address the concerns regarding the administrative processes to be completed in relation to investigations and prosecutions under Articles 299 and 301 of the Turkish Penal code subject to the permission of the Minister for Justice; at the same time the Circular makes reference to the judgments of the ECtHR and emphasizes that the 'freedom to express thoughts', which is a fundamental right and freedom, is an indispensable foundation of a democratic society and one of the vital conditions for the progress of society and the confidence of each individual.

With regard to offences involving 'Insulting the President', requiring prior authorization of the Minister for Justice before prosecution under Article 299 of the Penal Code, the Circular states the following:

"1- The investigation shall not be left to law enforcement authorities and officials but be conducted directly by a public prosecutor to be assigned by the Chief Public Prosecutor,

2- Following the investigation stage, if the evidence collected raises sufficient suspicion that the offence has been committed and requires a public criminal case, the documents gathered and the reasoned opinion should be processed as an official summary and sent to the Directorate General for Criminal Affairs of the Ministry of Justice via the Chief Public Prosecutor for Felonies; if no such suspicion is raised, the due legal process should be performed on site,

3- The summary should include clear information as to which of the suspects alleged to have committed the offence requiring authorization for prosecution are in pre-trial detention; in addition, the upper right hand corner of the summary should bear a notice stating 'Suspect on pre-trial detention – Case',

4- The summary should include clear information about the alleged offence, how the offence was committed and which words were used,

5- The investigation file must include the identity information of the perpetrator as well as any medical reports attesting to a mental illness or intellectual disability,

6- In cases where there are multiple offences subject to authorization for prosecution, authorization must be requested for all offences concerned,

7- In cases where a public case is launched without the prior authorization and the procedure is suspended by the court on grounds that the file is unauthorized, and a decision is made to send the file to the Directorate General for Criminal Affairs, there should be clear information about which particular offence authorization is sought for. Even in this instance the documents must be processed as a summary case by the public prosecutor and a reasoned opinion must be included."

Yet, considering that in the last two years, the Ministry of Justice has granted authorization in numerous cases without any examination or reasoning, the Circular, which may initially be found positive has no practical meaning.

The rationale of Article 299 does not provide an explanation as to why the offence is subject to authorization by the Minister for Justice prior to prosecution. This requirement was still not explained in 2008, when Article 301 of the Penal code was being amended to include the prerequisite of authorization from the Minister of Justice for prosecution. In the draft version of Law No 5759, which amended the said article, the power to issue such authorization was first given to the President on grounds that he was impartial. However, the Justice Commission of the Parliament changed the draft to grant such authority to the Minister for Justice.[21] The granting of such authority to a Minister was challenged as being against the Constitution in that the Executive would be assuming the function of the Judiciary. The Şişli Second Criminal Court of First Instance argued that the authorization process was unconstitutional with the following statement: "*If a public prosecutor chooses not to launch a criminal case in the event that the Minister for Justice has granted authorization for prosecution under Article 301/4 of the Turkish Penal Code, he/she will have stood against the Ministry of Justice, which is responsible for the personnel affairs of prosecutors, as well as the board of inspection, which is directly connected to the Ministry of Justice*". On the other hand, according to the Constitutional Court, "*the rule in question, which is being challenged, requires authorization to be issued by the Minister for Justice in order for an investigation to be launched on grounds of the offence set forth in the article, in view of the political interests of the country. Rather than being a judicial function, the authority vested in the Minister for Justice is one which allows for discretion to be exercised in the interest of the State and the society*."[22]

Hence, the authorization procedure set forth under Articles 299 and 301 is evaluated based not on procedural law but on substantive law.[23] For this reason, although it is said to be set forth as discretionary power granted in the interest of the State and the public, a determination on whether or not an act constitutes an offence is made based on an assessment. In addition to this obscurity, the general problems regarding the independence of the judiciary in Turkey make the subject of authorization from the Minister for Justice even more problematic. [24] In an environment where 3500 judges and prosecutors have been dismissed from office in the absence of even an administrative investigation, and where 2300 or so members of the judiciary are in pre-trial detention, it is clearly difficult to think of a prosecutor not filing a case arguing that the President was not insulted despite authorization from the Minister for Justice to proceed with the case. Indeed, there isn't a single example where a prosecutor has issued a decision of non-prosecution following authorization from the Minister.

As far as Article 299 is concerned, as observed in the statistics given below, it is evident that the authorization process by the Minister of Justice does not serve as a filter. Although official statistics are not disclosed and petitions under the right to information receive negative responses[25] the Minister of Justice, in fact, functions as a prosecutor by approving all requests sent to him. This authority has resulted in a situation where the judicial function is transferred to the executive power.

In the context of Article 301, the evaluations of the bodies of the Council of Europe also show the inadequacy of the authorization system. In his 2011 report, the Commissioner for Human Rights Thomas Hammerberg, has noted that the system of prior authorization by the Ministry of Justice in each individual case, is not a lasting solution which can replace the integration of the relevant ECHR standards into the Turkish legal system and practice.[26] Similarly, in its judgment in the case of Taner Akçam v. Turkey, the ECtHR considered that the system

21 Grand National Assembly 23rd Term Legislative Year: 2, No: 215.

22 AYM, E. 2009/38, K. 2009/70, K.t. 3.6.2009

23 Yargıtay 9. CD, E. 2008/10995, K. 2010/4198, kt. 12.4.2010 tarih; K. 6883/1703, 15.3.2011 k.t.

24 The Çankırı First Criminal Court of First Instance has brought the matter before the Constitutional Court with these claims. However, on account of the rule which stipulates that a law already challenged before the Constitutional Court for annulment may not be re-examined by the Constitutional Court before ten years have elapsed, the appeal was rejected by the Court on procedural grounds. See, AYM, E. 2013/99, K. 2014/61, k.t. 27.3.2014.

25 The petitions for information filed with the Ministry of Justice are rejected under Article 7/2 of the Law on Right to Information 4982 by the Ministry of Justice on grounds that the information requested 'require a separate or special study, research, examination and analysis'.

26 Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe Following his visit to Turkey, from 27 to 29 April 2011, CommDH(2011)25, para. 17.

of prior control in criminal investigations is not a statutory safeguard and that even though the provision has not been applied in this particular type of case for a considerable time, it may be applied again in such cases at any time in the future, if for example there is a change of political will by the government.[27]

The accuracy of this deliberation is proven by the high rise in the number of cases filed under Article 299 after Recep Tayyip Erdoğan became president. During this period, doubts as to the independence of the judiciary in Turkey have increased drastically and almost no negative comments can be made against the President. All requests for authorization to launch an investigation against persons speaking against the President, who is frequently criticised for being biased, are approved by the Ministry of Justice. While only four prosecutions were conducted under the Article in 2000, 1953 people have been prosecuted in 2015.

In addition to criminal proceedings, it is also known that thousands of lawsuits are brought before Civil Courts by President Erdoğan. President Erdoğan made a statement after the attempted military coup of 15 July, 2016 indicating that he had withdrawn some civil lawsuits as well as his complaints in some criminal cases.[28] According to the report by the Anatolian Agency (Anadolu Ajansı) based on the information given by Erdoğan's lawyers, the number of cases requested to be withdrawn was nearly four thousand.[29]

Although this act of the President as the head of the Executive may at first glance seem to be in favour of freedom of expression, it is understood from the letter of renunciation that the initiative is not one which aims to protect freedom of expression in principle. Firstly, the President states that the cases and complaints are being withdrawn **on this occasion only**. Secondly, the President has not withdrawn his complaints for the sake of protection of freedom of expression. He is still of the opinion that the statements made against him are insults and deserve punishment. In fact the renunciation reads "*for this time only I am forgiving those who have ben disrespectful to me and insulted me and I am withdrawing my complaints*". According to the statement made by the President's lawyer, "*It is clear that comments claiming that the President is attempting to silence or repress dissent are not uttered in good faith and are not realistic since the President is exercising his legal rights against the insults and defamation directed against him*". As seen by these remarks, the President believes that the thousands of civil lawsuits and criminal cases do not violate freedom of expression and that they are proportionate interventions in the rights of those concerned. Thirdly, the statement made by the President and his renunciation do not affect criminal proceedings since the offence of insulting the President is not dependant on complaint. Cases brought before courts under Article 299 are public criminal cases that do not require a complaint by the President himself. These cases cannot be automatically dismissed and the proceedings are ongoing.

Similarly, this statement and renunciation also has no affect on the outcome of the cases brought before the Court of Cassation. Fourthly, the President has not treated all citizens equally with respect to his statement and renunciation. For example, while he withdrew his complaints against members of other opposition parties, he did not take this initiative for cases against members of the People's Democratic Party (HDP). In his words, he did not 'forgive' HDP politicians. Fifthly, nothing has been done about the numerous 'blocking decisions' issued for websites under Article 9 of Law 5651. Lastly, after this statement and renunciation, which was made on 29 July 2016, new investigations were launched and arrest warrants were issued under Article 299.[30] Thus, the statement and renunciation of the President after 15 July 2016 has no meaning beyond being a symbolic gesture.

27 Taner Akçam v. Turkey, no. 27520/07, 25/10/2011, para. 78.

28 Hürriyet, "Cumhurbaşkanı, HDP hariç, davalarını geri çekti," 01 August, 2016, http://www.hurriyet.com.tr/cumhurbaskani-hdp-haric-davalarini-geri-cekiyor-40177663

29 Sabah, "Dört bin dava geri çekiliyor," 1 August, 2016, http://www.sabah.com.tr/gundem/2016/08/01/dort-bin-dava-geri-cekiliyor

30 Birgün, "Cumhurbaşkanına hakaretten tutuklandı," 06 August, 2016, http://www.birgun.net/haber-detay/cumhurbaskanina-hakaret-ten-tutuklandi-123230.html; İMCTV, "İzmir'de 'Cumhurbaşkanına hakaret'ten bir kişi tutuklandı," 27 August, 2016, http://imc-tv.net/sosyal-medyada-cumhurbaskanina-hakaret-ettigi-iddiasiyla-bir-kisi-tutuklandi/; Bianet, "Nasuh Mahruki Adli Kontrol Şartıyla Serbest," 24 October, 2016, http://bianet.org/bianet/hukuk/179919-nasuh-mahruki-adli-kontrol-sartiyla-serbest

C. THE JUDICIARY

In addition to the offence of defamation set forth under Article 125 of the Turkish Penal Code, the President is protected under a separate article of the law and a criminal sanction is imposed if the offence is proven to have been committed. Yet, because the last paragraph of Article 90 of the Constitution stipulates that *"International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail",* domestic courts have an obligation to interpret the provisions under Article 299 in accordance with the case-law of the Convention considering that Article 299 has clearly been found by the ECtHR to be contrary to the Convention. Therefore, it has been argued that the provisions on 'Insulting/Defaming the President', which have been found to be against the Convention in the judgments of *Colombani v. France*, *Pakdemirli v. Turkey*, *Artun and Güvener v. Turkey*, *Otegi Mondragon v. Spain,* have been implicitly repealed without need for further recourse to the Constitutional Court and should therefore not be applied by domestic courts.[31] When the above-mentioned judgments of the ECtHR on Article 299 of the Turkish Penal Code No. 5237 are examined (Repealed Article 158 of former Penal Code No 765), it will be clearly seen that insulting the President cannot be foreseen as a separate offence and that the offence as it stands is against the Convention.

Despite this fact, it is observed that although Turkish courts frequently make references to the ECHR and the case-law of the ECtHR in cases concerning freedom of expression, they still issue sentences under the article. The use of Article 299 has shown an increase which is legally difficult to account for. Since the article was invoked in limited cases in previous years, it is relatively difficult to find examples of how the Court of Cassation interprets the article. In the limited number of examples that can be found, it is observed that there are inconsistencies in the interpretation of the ECtHR's case-law.

1. The Court of Cassation

Despite the limited number of judgments, the Court of Cassation has evaluated Article 299 of the Turkish Penal Code. For example, in a judgment passed by the General Assembly of Criminal Chambers of the Court[32], it is stated that freedom of expression, which is the sine qua non of democracy, is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; however, it is also stated that expressions which amount to slander, swearing, words and statements attacking a person's honour and reputation, obscene words, writings, pictures and statements, incitement to war, expressions aiming to change the legal system through violence, or aiming to incite hatred, discrimination and violence cannot be considered within the limits of freedom of expression or enjoy legal protection, that, on the contrary, they shall be regarded as offences and subject to criminal sanctions. In its judgment in a case involving a newspaper article titled "He can now apply henna on his butt", the Court of Cassation General Criminal Assembly stated that expressions in the article such as "*The Guy in Cankaya is pioneering unbelievable policies which are dynamite to the social peace in Turkey*" were unnecessary, could not be regarded as expression of ideas and amounted to the offence stated in the charges by means of the use of words and expressions that humiliated the President in public and undermined his honour and respectability.

The President of the General Assembly and Members who gave a dissenting opinion stated as follows: "*Although the words used can be regarded as being crude and harsh criticism, they cannot be regarded as swear words or insults. The article, which was written with a disturbing style, may be offensive and disturbing but it should be considered within the limits of freedom of expression. Since true criticism is not praise, it is only natural for it to be harsh, offensive and scathing*".

31 Yaman Akdeniz & Kerem Altıparmak, "TCK 299: Olmayan Hükmün Gazabı mı?" Güncel Hukuk, Sayı 10-142, Ekim 2015, pp 42-44.

32 2009/190E., 2009/253K., 03.11.2009.

In the said judgment, the attitude in both the majority and minority votes points to a problem in the use of ECtHR judgments in the Turkish judiciary. Despite having made reference to the Convention and case-law arising from it, judges arrive at their decision based on what they subjectively consider to be an insult. As observed in the above example, the element that separates the minority opinion from the majority is not a discussion of whether the expression used is a value judgment or if it contributes to public debate. Even if so, it has not been explicitly stated. The majority of members have engaged in a purely subjective evaluation ultimately reaching the conclusion that 'this is an insult' whereas the minority have engaged in the same subjective evaluation to conclude that 'it is not'.

More recently, the Court of Cassation 16th Criminal Chamber reviewed an acquittal decision in a case involving defamation of President Erdoğan in which the defendant shared an image on Facebook showing President Erdoğan as a woman together with US President Obama. In the image, President Obama is shown saying to President Erdoğan "*The people are asleep, let's go to our room*" and President Erdoğan replies to President Obama "*Will you give me the title deed to Syria?*". In its decision, the court of Cassation reversed the acquittal decision of the Uşak 3rd Criminal Court of First Instance by a majority of votes stating that the expressions were "*not necessary, exceeded the limits of criticism and freedom of expression, they were offensive, humiliating and were of a nature that undermined the respectability of the subjects in society*."[33] The dissenting opinions noted that "*the criticism levelled at foreign policy were crude and tactless but were in the form of satire written for purposes of humour, that the aim was not to damage the honour and dignity of the President but to underline the mistakes of his policies*". As also observed in this example, the criteria for an expression being 'unnecessary' is entirely ambiguous.

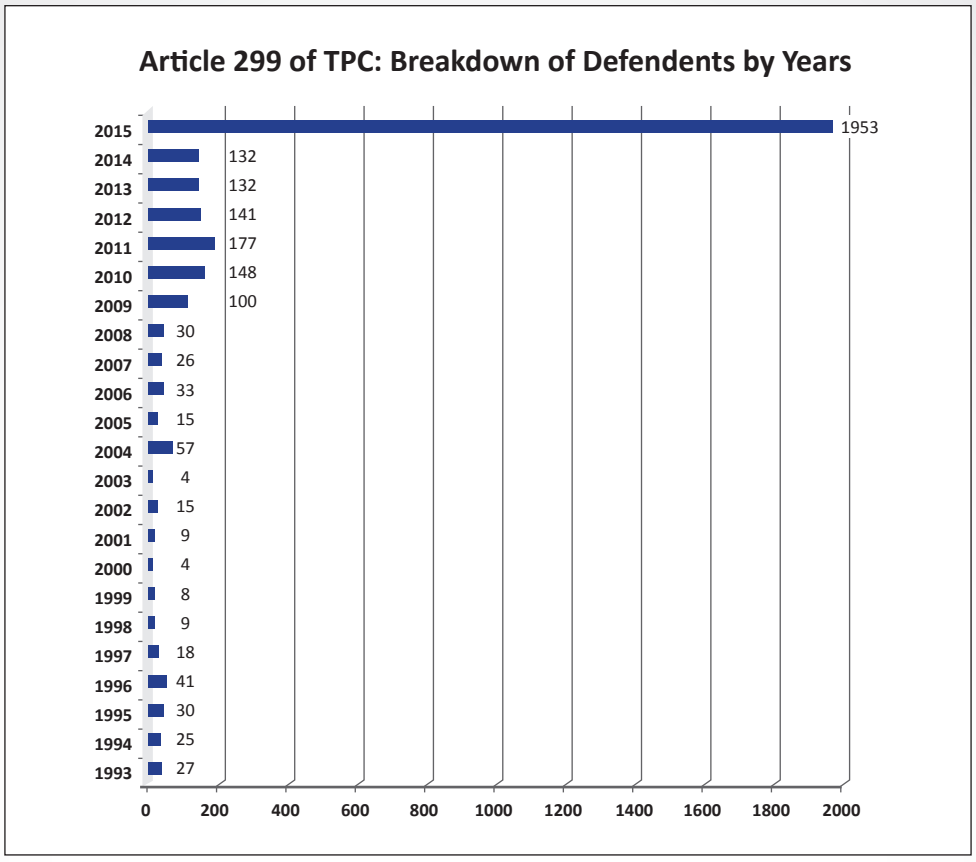
Indeed, there are also judgments of the Court of Cassation defending an opposite position. For example, in a decision issued by the 16th Criminal Chamber[34], the Chamber reversed a conviction arguing that when the anonymous article *"The Opinion of the People: It is you who are guilty"* published in a newspaper together with the articles titled *"This is also the Opinion of the People: You will be held accountable*" and *"Ergenekon Was Named After This Murder"* were evaluated together, it was found that there had been a failure on the part of the first instance court to deliberate the case within the framework of freedom of expression under Article 26 of the Constitution and Article 10 of the ECHR with respect to the function of the press to inform the public, criticise and make interpretations thus unlawfully leading to the sentencing of the defendants instead of deciding for their acquittal. However, it is obvious that the said decision is not of a nature that would shed light on the decisions of first instance courts.

2. Courts of First Instance

The question of whether the developments mentioned above regarding defamation of the President have yielded any results can only be answered by understanding how the rules are interpreted in practice. Since 28 August 2014, when Recep Tayyip Erdoğan took office as President, the use of Article 299 regulating the offence of defaming the President, has increased at an alarming rate. While a total of 3134 people were subject to criminal charges for defaming the President from 1993 to 2015, 62% of this figure, amounting to 1953 prosecutions, are prosecutions launched in 2015 during the term of President Erdoğan. A comparison across terms of presidency show that the number of prosecutions during the seven year office held by Süleyman Demirel (16 May 1993 - 16 Mayıs 2000) was only 162 while this figure was 159 during the term of Ahmet Necdet Sezer (16 May 2000 - 28 August 2007) was and 860 during the term of Abdullah Gül (28 August 2007 - 28 August 2014).

33 Court of Cassation 16th Criminal Chamber, 2016/1783E., 2016/4413K., 22.06.2016.

34 2015/2252E., 2015/3718K., 04.11.2015.



When the last six-year period is observed in detail, the table below shows that a total of 2673 prosecutions took place under Article 299 in the period covering the beginning of 2010 to the end of 2015. 73% of these prosecutions corresponding to 1953 cases were launched in 2015 during the term of Recep Tayyip Erdoğan.

TCK 299	2010	2011	2012	2013	2014	2015	Toplam
Launched	133	175	141	139	132	1953	2673
Decision	108	183	192	203	141	678	1505
Prosecution	28	41	40	44	40	238	431
Acquittal	26	37	33	39	25	120	280
Deferment of the Announcement of the Verdict	0	0	0	0	19	151	170
Other	54	105	119	120	57	169	624

As seen in the table above, numerous cases were concluded under Article 299 in recent years. In the period 2010-2015, 1505 of a total of 2673 prosecutions were finalized while only 280 resulted in an acquittal.

It is observed that the content subject to investigation and prosecution during President Erdoğan's term includes newspaper headlines and articles, comic strips, numerous social media posts, press statements made or slogans chanted during public meetings.

a. Decisions of Acquittal

A number of decisions for acquittal have been evaluated below. For example, in the events that lead to the decision of the **Izmir 24th Criminal Court of First Instance** (Decision No 2015/353 E., 2015/227 K., dated 20/0472015) the suspects were arrested by the police as they were hanging up posters on the bridge piles of the Turan Bridge on Anadolu Street. The incident involved 5 posters (with dimensions 70x100cm) bearing the slogan *"Come out and play, come out and play, come out and play at Çankaya... People's Communist Party of Turkey*" *(*a parody of a children's rhyme*)* and 10 posters (70x100cm) bearing the slogan *#ResistTurkey People's Communist Party of Turkey* with a picture of President Recep Tayyip Erdoğan in the image of Nazi leader Hitler.

Upon the indictment filed by the Izmir Chief Public Prosecutor's Office stating that the suspects should be sentenced under Article 299/1 of the Turkish Penal Code on grounds of public defamation of the President through the posters in question, the Izmir 24th Criminal Court of First Instance commenced the trial. In its decision of 20/04/2015, the court decided for the acquittal of the defendants stating that *"...it is understood that there are no elements of defamation since a caricature of the President does not undermine his honour, dignity and respectability; similarly the #ResistTurkey slogan does not bear words that would undermine the President's honour, dignity and respectability..."*.

In the events leading to the decision of the **Sinop 2nd Criminal Court of Peace** (Decision No. 2015/340 E., 2015/473 K. dated 20/1072015), the defendants had organized a memorial on the anniversary of the mine explosion of 13/05/2015 to commemorate the 301 miners who had lost their lives. The suspects were alleged to have chanted the slogans *"Do Not Forget Soma, Do Not Allow It To Be Forgotten", "Not an Accident But a Massacre, Our Heart Is With Soma", "June Comes Booming", "Not an Accident But a Massacre, Thief Murderer Erdoğan"*. The Sinop Chief Prosecutor's Office launched an indictment claiming that the suspect had, through their slogans, *"...used words and made allegations that publicly humiliated President Recep Tayyip Erdoğan and damaged his honour and respectability..."* and asked the court to deliver a sentence under Article 299/1. The Sinop 2nd Criminal Court of First Instance started the proceedings and in its decision of 20/10/2015 noted that *"...as the ECtHR has determined that the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual, politicians are expected to be more tolerant of criticism."* The court went on to note that*"...the resort to criminal sanctions by public authorities is nor proportionate to the aim sought and not necessary in a democratic society..."* and issued an acquittal by making a reference to Article 90/5 of the Constitution setting forth that *"In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".*

In the events leading to the decision of the **Çanakkale 2nd Criminal Court of First Instance,** (Decision No. 2015/247 E., 2015/538 K., dated 04/11/2015), a group of 50 people composed of representatives from the Community Centres Association (Halkevleri), the Turkish Communist Party and the Education Union had gathered at the Central Town Square of Çanakkale on 15/02/2015 under the organization of the United June Movement to protest the arrests of Onur Kılıç and Kadir Yavaş, who had previously been taken into custody in another province for allegedly insulting President Recep Tayyip Erdoğan. The group dispersed after making a press statement. The suspect Gülenay Çinpolat who was present during the press statement and in the group after the statement, chanted the slogans *"Thief, Murderer, Erdoğan"* and *"Resist the Dictator, Organize under the June Movement"* using a megaphone, holding the President responsible for the deaths in the Soma mine explosion and the Gezi Park protests. The Çanakkale Chief Public Prosecutor prepared an indictment because of these statements and asked for the suspect to be sentenced under Article 299/1, upon which the Çanakkale 2nd Criminal Court of First Instance commenced proceedings.

In its decision of 04/11/2015, the court stated that the slogans were chanted by the group which included the suspect *"...at a time when the President was Prime Minister and the leader of the Justice and Development Party, which was in government at the time and that the slogans were chanted to criticise and protest the above-*

mentioned arrests which the group believed to have arisen from the practices of the aggrieved and the ruling party over which he presided..." The court noted, in light of the established case-law of the ECtHR, that so long as it did not incite the public to violence, aggressive and harsh discourse against those with political identities was considered to fall within the limits of freedom of expression. Furthermore, as the court emphasized in line with ECtHR case-law, *"...individuals such as the aggrieved in this case, who are public figures or hold a political identity should be tolerant towards this type of criticism..."* In this context, the court underlined that the words uttered by the group to criticise the practices of the aggrieved and the ruling party of which he was the leader, *"...were within the permissible limits of the freedom to express and disseminate views and opinions, and that there was no element of violence or attempt to incite people to hostility and hatred at the meeting on that date..."* The court also took into account that *"...some acts and words of the aggrieved corresponding to the time after which he became President created the perception among some circles of the public that he had not severed his ties with his former party and that he still bore a political identity...."*. The court went on to say that the aggrieved *"...had been the subject of protests similar to the one in the current case, and that not taking action against the other people who had chanted slogans with the defendant and who had participated in the meeting is against the principle of equality under the Constitution and laws..."* and decided for the acquittal of the defendant.

In the events leading to the decision of the **Tunceli Criminal Court of First Instance,** (Decision No. 2015/265 E., 2015/699 K., dated 24/11/2015), the suspects had put up billboard advertisements and posters on some walls at Tunceli city centre on 29/08/2014 in line with the political activities conducted by the headquarters of the People's Communist Party of Turkey following the Presidential elections. Upon the indictment prepared by the Tunceli Chief Public Prosecutor on grounds that the suspects had insulted the President through the posters, and should be tried under Article 299/1 of the Turkish Penal Code, the Tunceli Criminal Court of First Instance started proceedings. In its decision of 24/11/2015, in response to the allegations that there was an insult to the President *"...because the defendants had added a moustache to a picture of the President to create an image of him resembling a dictator..."* the court decided on an acquittal on grounds that the act in question did not constitute an offence and that *"...the acts of the defendants were within the permissible limits of freedom of expression and opinion and the freedom to disseminate ideas..."*.

In the events leading to the decision of the **Aliağa 2nd Criminal Court of First Instance**, (Decision No. 2015/804 E., 2016/194 K., dated 05/02/2016) the defendant Mehmet Bektaş, who was the head of the Aliağa Branch of the Turkish Communist Party, along with party members Turan Serin and Deniz Tütmez had handed out bulletins titled The Country Needs a New Democracy on 28/08/2014 in the Aliağa democracy square. The bulletin read: *"The graft and theft allegations against him are still valid. Can one act as head of state if he openly says he will change the regime? He wants to be the president, he will change the constitution and found a dictatorship in the name of presidency. Do you expect one who envies a sultan to represent the Republic? He will appoint as prime minister and minister of foreign affairs people who have supplied weapons to religious terrorist groups like ISIS and AL NUSRA."* Because of these expressions, the Aliağa Chief Public Prosecutor prepared an indictment against the suspects on grounds of Article 299/1 and the Aliağa 2nd Criminal Court of First Instance commenced proceedings. In its decision of 05/02/2016, the court noted that *"...although the expressions used by the defendant are disturbing, they should be regarded within the context of 'freedom of expression' which holds a special place in the Constitution, the ECHR and the case-law of the ECtHR..."*. The court went on to say, *"...the statements do not constitute a substantial act and are not allegations of facts, but rather criticism that does not undermine the honour, dignity and respectability of the subject..."* and decided for the acquittal of the defendants on grounds that the legal elements of an offence under Article 299 had not been found.

In the events leading to the decision of the **Istanbul 2nd Criminal Court of First Instance,** (Decision No. 2015/49 E., 2016/216 K., dated 01/07/2016) a column was published in Evrensel newspaper on 29/11/2014 by the suspect Ender İmrek with the title "Can You Hide Corruption, Theft and Bribery?". An indictment was prepared about Ender İmrek on grounds that he had insulted the President, who was the complainant under Article

299/1-2 of the Turkish Penal Code. The Istanbul 2nd Criminal Court of First Instance commenced proceedings. In its decision of 01/07/2016, the court first noted that it was permissible for writers to reflect their perspective on the world in current events which they cover in their columns. According to the court, the article authored by the defendant criticised the court decision ordering the investigation on the 17-25 December graft allegations to be kept confidential; the author expressed his views that theft and similar acts cannot be kept hidden and made reference to information made public. The court also noted that, according to the case-law of the ECtHR, in order to determine whether a statement in each individual case is a statement of facts or a value judgment, one must consider the popularity of the person against which the statement was made, the popularity of the context in which the statement was made and whether or not the statement was used in a context of public debate. In line with the assessment carried out by the court in the light of these criteria, it found that in the current case, *"...when an evaluation is made of the defence and the words uttered by the defendant, their length in the article, the article's characteristics and style and the article in its entirety, it is understood that the suspect has no intention of insulting the President directly and the statements used against the claimant do not reach a level that would constitute an offence. Having concluded that the act in question does not constitute an offence..."* the court ruled for the acquittal of the defendant.

In the events leading to the decision of the **Tekirdağ 3rd Criminal Court of First Instance,** (Decision No. 2015/223 E., 2016/499 K., dated 18/10/2016) a press statement was made by the United June Movement Tekirdağ Council, of which the defendant Hüseyin Yılmaz was a member, to protest a coalition government with the AKP (Justice and Development Party). The following slogans were included in the press statement read by the defendant, *"There will come a day when the AKP is held accountable by the public.", "This is the beginning, Onward with our struggle", "We will unite to win", "Together against fascism".* In addition the statement read *"With the united struggle of the people, we will bring down this dirty and dark order of Erdoğan which has suffocated the people, and we will found a Turkey of June, a country of sunlight, bread, life and freedom."* Based on these statements, an indictment was prepared by the Tekirdağ Chief Public Prosecutor demanding that the suspect be sanctioned under Article 299/1, upon which proceedings were initiated by the Tekirdağ 3rd Criminal Court of First Instance. In the reasoning of the decision issued by the court on 18/10/2016, a determination was made based on Article 26 of the Constitution, Article 10 of the ECHR and the judgment of the ECtHR in the case of *Lingens v. Austria*. In conclusion, the court found that the statements made by the defendant should be considered within the scope of freedom of expression. The court ruled for an acquittal stating that the act in question did not constitute the offence of defaming the President.

b. Convictions and Deferment of the Announcement of the Verdict

In the recent period, numerous cases under Article 299 of the Turkish Penal Code have been concluded. Out of 2673 prosecutions launched between 2010 and 2015, 1505 have been concluded resulting in 431 convictions. 170 cases were finalised with a decision of deferment of the announcement of the verdict. For example, three students, Hasret Akbıyık, Çağdaş Yurtseven and Mert Özay, who were members of a group named 'Youth Opposition' at Eskişehir Anadolu University, had carried banners bearing the slogan "Dictators are toppled on the streets", for which they were sentenced to 11 months 20 days of imprisonment under Article 299 by the Eskişehir Criminal Court of First Instance on 26/06/2015. However, the court deferred the announcement of the verdict.[35]

In another case, attorney Umut Kılıç, who was a member of the Afyon Bar Association was on a visit to Ankara to take part in an interview within the scope of the Examination for Placement of Judges and Prosecutors after the initial written examination stage. Kılıç criticised the members of the interview committee for being colluders of the existing system and the footmen of the fascist AKP government. When the committee told him that they would call the police for these words, he went on to say he was told that "*This is what you are. You*

35 Radikal, "Diktatörler Sokakta Devrilir Pankartına 11 Ay 20 Gün Hapis Cezası", 5 July, 2015, http://www.radikal.com.tr/turkiye/diktatorler-sokakta-devrilir-pankartina-11-ay-20-gun-hapis-cezasi-1391519/

shut us up with the police. I will not shut up. You are co-conspirators with the government, you are thieves of the people's labour." The police was called to the room and Kılıç was taken outside. Based on allegations that, as he was being taken outside by the police, he chanted the slogan "*Thief, murderer Recep Tayyip Erdoğan*", he was arrested and sent to the Sincan Closed Prison. On 14/07/2015 the Ankara 32nd Criminal Court of First Instance sentenced him to one year 10 months imprisonment for insulting the President and 10 months 15 days imprisonment for insulting public officials in a committee. The court decided to defer the announcement of the verdict.[36]

Journalist Aytekin Gezici was charged for "insulting the President" and "publicly insulting a public official" at the Ankara 29th Criminal Court of First Instance when he posted a tweet under a photo of President Erdoğan together with Minister for Justice Bekir Bozdağ on Twitter. In its decision of 17/09/2015, the court sentenced Gezici to 3 years and 9 months imprisonment for his post about Erdoğan and Bozdağ and to 2 years imprisonment for another tweet he shared under Erdoğan's photo, totalling 5 years and 9 months imprisonment.[37]

In another case involving Mehmet Inam, the editor of the School and Country magazine published by the *Communist High School Students,* a picture of President Recep Tayyip Erdoğan and Fethullah Gülen was featured on the cover of the magazine issue of January 2015 where the faces of the two men were merged to make a single face. The heading under the photo read: "We will not choose between two regressives; Go after the thief, the murderer and the bigot." These words and an article in the magazine were taken as proof for the indictment and Mehmet İnam was sentenced to 11 months 20 days imprisonment for "insulting the President" by decision of the Istanbul Anadolu 2nd Criminal Court of First Instance on 26/11/2015. The court then deferred the sentence.[38]

In a case against BirGün Newspaper Editorial Consultant, Barış İnce, for having insulted President Erdoğan and his son Bilal Erdoğan in the news report titled "They built double roads in their pockets" concerning the graft allegations of 17-25 December, the suspect used acrostics in his defence. The first letters of the lines in his defence spelled out the words "Thief Erdoğan". İnce was sentenced to 21 months imprisonment by the Istanbul 2nd Criminal Court of First Instance on 08/03/2016 for insulting the President for the second time.[39]

On 15/10/2015, Behçet Ertaş and HDP (People's Democratic Party) candidate from Rize province, Turgay Köse, were arrested on grounds that they had chanted the slogan "Thief, Murderer Erdoğan" in the Pazar district of Rize at the funeral of Osman Turan Bozacı, who had lost his life in the suicide bombing in Ankara in October 2015. They were released on 21/10/2015. In its decision of 11/05/2016, the Pazar Criminal Court of First Instance sentenced each of the suspects to 11 months and 20 days imprisonment and the execution was postponed for five years.[40]

36 İMCTV, "Avukata Erdoğan'a Hakaretten Ceza", 14 July, 2015, http://imc-tv.net/avukata-erdogana-hakaretten-ceza/; OdaTV, 27 April, 2015, "Erdoğan Umut Kılıç Hakkında Şikayetçi Oldu", http://odatv.com/erdogan-umut-kilic-hakkinda-sikayetci-oldu-2704151200.html

37 Birgün, "Gazeteci Aytekin Gezici'ye Erdoğan'a Hakaretten 6 Yıl Hapis, 17 September, 2015, http://www.birgun.net/haber-detay/gazeteci-aytekin-gezici-ye-erdogan-a-hakaretten-6-yil-hapis-89779.html

38 Yarın Haber, "Komünist Parti MK'sına Cumhurbaşkanına Hakaret Gerekçei ile Hapis Cezası", 26 November, 2015, http://yarinhaber.net/guncel/28980/komunist-parti-mksina-cumhurbaskanina-hakaret-gerekcesi-ile-hapis-cezasi; Diken, "Erdoğan'a Hakaret'te Bugün (2): Komünist Parti Yöneticisine Dergi Kapağından Ceza, 26 Kasım, 2015, http://www.diken.com.tr/erdogana-hakarette-bugun-2-komunist-parti-yoneticisine-dergi-kapagindan-hapis-cezasi/

39 Birgün, "Barış İnce'ye Hapis Cezası", 8 March, 2016, http://www.birgun.net/haber-detay/baris-ince-ye-hapis-cezasi-105765.html; Bianet, "Gazeteci Barış İnce'ye Akrostişli Savunmadan Hapis Cezası" , 8 Mart, 2016, http://bianet.org/bianet/insan-haklari/172816-gazeteci-baris-ince-ye-akrostisli-savunmadan-hapis-cezasi

40 Diken, "Erdoğan'a Hakarette Bugün: Ankara Katliamı Sonrası Cenazede Slogana 11 Ay Hapis", 11 May, 2016, http://www.diken.com.tr/erdogana-hakarette-bugun-ankara-katliami-sonrasi-cenazede-slogana-11-ay-hapis/; Cumhuriyet, "Cumhurbaşkanına Hakarete 11 Ay 20 Gün Hapis", 12 May, 2016, http://www.hurriyet.com.tr/cumhurbaskanina-hakarete-11-ay-20-gun-hapis-37278793

In the case of 23 year-old Gizem Y., studying at Bursa Uludağ University, Faculty of Fine Arts, the suspect was sentenced to four years and eight months imprisonment by decision of the Bursa 2nd Assize Court on 13/05/2016 for insulting President Erdoğan and disseminating 'terrorist propaganda' through her social media posts saying "*I wrote a dictionary of curses to Tayyip, I stand to pray 5 times a day: May God damn tyrants*" and "*Anyone who makes close contact with Erdoğan dies of a hear attack. The ignoble soul sucker…*".[41]

In the case against journalist Mustafa Hoş, the author was fined 10 thousand 500 TRY by the Istanbul 2nd Criminal Court of First Instance in its decision of 09/06/2016 for insulting the President in his book "Big Boss". [42]

In a case against ABC newspaper chief editor, Merdan Yanardağ, the Istanbul 2nd Criminal Court of First Instance sentenced the accused to 11 months and 20 days imprisonment in its decision dated 14/06/2016 for 'insulting the President' in his articles titled "Erdoğan's blood-stained plan" and "The CHP (Republican People's Party) is not aware of the plan". [43]

c. An Evaluation of Ongoing Cases

As observed in the statistics above, the number of people prosecuted for insulting the President in 2015 alone was 1953 and 678 of these cases were concluded. The remaining cases and numerous prosecutions launched in 2016 are still ongoing. Although it is not possible to gather information on all of these cases, a large majority of them have arisen from newspaper headlines and columns, cartoons published in newspapers and humour magazines, dissident social media posts by politicians, authors and artists, press statements or slogans at public meetings. Some of the ongoing cases have been evaluated below.

After the September 2015 issue of Nokta magazine was pulled off the shelves, one of its writers, Perihan Mağden, was interviewed by the News Editor of the Diken News Portal, Tunca Öğreten. During the interview, Mağden made an allegory using the words "*Like a wild animal trapped in a corner, like a wild tiger*" upon which an investigation was launched against her by the Istanbul Public Prosecutor. Proceedings were initiated by the Istanbul 2nd Criminal Court of First Instance. Within the scope of this case, the former editors of the Yurt newspaper are also being tried for having published excerpts from the interview with Mağden conducted by Öğreten. [44]

BirGün newspaper reporter Onur Erem published a report in which he said that when one typed in the words "Thief, murderer", the Google search engine's autocomplete function came up with the result "Thief, murderer AKP" and when one typed in "Thief and murderer" it automatically completed the phrase to spell "Thief and murderer Erdoğan". An investigation was launched against Erem for insulting the President. The indictment prepared by the Istanbul Chief Public Prosecutor demands a sentence of imprisonment between one to four years and for the sentence to be increased by one thirds since the offence was committed through the press. The case is still ongoing at the Istanbul 2nd Criminal court of First Instance.[45]

41 Diken, "Erdoğan'a Hakarette Bugün: Facebookta Erdoğan ve YPG Paylaşımlarına Hapis Cezası", 13 May, 2016, http://www.diken.com.tr/erdogana-hakarette-bugun-facebookta-erdogan-ve-ypg-paylasimlarina-hapis-cezasi/; Bianet, "Üniversite Öğrencisine 35 Soruda Tutuklama", 29 February, 2016, http://bianet.org/bianet/ifade-ozgurlugu/172556-universite-ogrencisine-35-soruda-tutuklama?bia_source=rss; Hürriyet, "Üniversiteli Kıza Cumhurbaşkanına Hakaret Suçundan Hapis", 13 May, 2016, http://www.hurriyet.com.tr/universiteli-kiza-cumhurbaskanina-hakaret-sucundan-hapis-37279341

42 Cumhuriyet, "Gazeteci Mustafa Hoş'a Hapis Cezası" 9 June, 2016, http://www.cumhuriyet.com.tr/haber/turkiye/548269/Gazeteci_Mustafa_Hos_a_hapis_cezasi.html

43 Cumhuriyet, "Merdan Yanardağ'a Cumhurbaşkanına Hakaretten Hapis Cezası", 14 Haziran, 2016 http://www.cumhuriyet.com.tr/haber/siyaset/551315/Gazeteci_Merdan_Yanardag_a__Cumhurbaskani_na_hakaret_ten_hapis_cezasi.html

44 T24, "Perihan Mağden Cumhurbaşkanına Hakaretten Hakim Karşısına Çıktı" 14 Haziran, 2016, http://t24.com.tr/haber/perihan-magden-cumhurbaskanina-hakaretten-hakim-karsisina-cikti,340182

45 Birgün, "Birgün Muhabiri Erem'e RTE'ye Hakaret Kastı Davası", 15 Eylül, .2015, http://www.birgun.net/haber-detay/birgun-muhabiri-erem-e-rte-ye-hakaret-kasti-davasi-89477.html

Journalist and author Hasan Cemal is currently under prosecution with a demand for a term of imprisonment between 14 months to 4 years and 8 months within the scope of Article 299 for two cases involving his articles titled "How can you be President and... " published on 4 October 2015 and "A Tayyip Erdoğan who commits a constitutional crime every single day" published on 4 January 2016. The trial set for 27 October 2016 by The Ankara 5th Criminal Court of First Instance and the second case to be deliberated by the 33rd Criminal Court of First Instance have been postponed to 20 December 2016. ..[46]

Onur Soylu, member of the Thought Club Federation and student at Uşak University appeared before the Uşak 3rd Criminal Court of First Instance for the first trial on 28/06/2016 in a case launched for insulting the President by sharing a photo of Erdoğan with Gollum and for his statement 'The murderer causes turmoil everywhere he goes' posted under a photo of Erdoğan at a study visit in Equator. The case is ongoing.[47]

D. AN EVALUATION OF CASES CONCERNING THE DEFAMATION OF THE PRESIDENT

An evaluation of the acquittals and sentences as well as the ongoing cases given in detail above should take into account the four criteria mentioned earlier and be carried out with reference to the judgments of the ECtHR, the Monitoring Reports of the Committee of Ministers and the recent Venice Commission Report.

1. The proportionality of the sentences issued in cases of defamation involving the President

The disproportionality of the sentences and measures in defamation cases involving the President, which have increased significantly in the past two years, is observed at three different levels.

Firstly, suspects are placed in pre-trial detention in a considerable number of cases. Pre-trial detention is a judicial policing measure and, as a rule, should be resorted to only if there is suspicion that the person will flee or spoil evidence. In cases concerning defamation of the President, pre-trial detention is used as a measure to intimidate without consideration of whether these conditions exist. Thus, it is clear that pre-trial detention is used as a form of punishment rather a measure. It is evident that in an offence of this nature, pre-trial detention cannot be regarded as proportionate under any circumstances.

Secondly, in many of the cases resulting in a sentencing, there is imprisonment; and a demand for imprisonment is made by prosecutors in many ongoing cases. As noted above, according to the ECtHR, imprisonment in a classical case of defamation will be disproportionate "**even if the sentence is not executed**".[48] Furthermore, the ECtHR has found it problematic, in many cases concerning freedom of the press, that journalists are obliged to work under the threat of imprisonment and are placed in pre-trial detention due to their journalistic activities.[49]According to the ECtHR, a prison sentence can be permissible only when there is a grave attack on other fundamental rights and freedoms, for example in cases of incitement to violence or the dissemination of hate speech or animosity.[50] This established case-law is not taken into account whatsoever by domestic courts.

46 T24, "Hasan Cemal'e Cumhurbaşkanına Hakaret İddiasıyla Açılan İki Dava Da 20 Aralık'a Ertelendi", 27 Ekim, 2016, http://t24.com.tr/haber/hasan-cemale-cumhurbaskanina-hakaret-iddiasiyla-acilan-iki-dava-da-20-aralika-ertelendi,367360

47 İlerihaber, "Yine Gollum Yine Erdoğan'a Hakaret Davası", 28 Haziran, 2016, http://ilerihaber.org/icerik/yine-gollum-yine-erdogana-hakaret-davasi-55365.html

48 *Cumpănă and Mazăre v. Romania*, [BD], no. 33348/96, 17/12/2004, para. 115 and 116.

49 *Nedim Şener v. Turkey,* no. 38270/11, 8/7/2014; *Ahmet Şık v. Turkey*, no. 53413/11, 8/7/2014.

50 *Feridun Yazarv. Turkey,* no. 42713/98, 23/9/2004, § 27; *Sürek and Özdemir v. Turkey* [BD], nos. 23927/94 and 24277/94, 8/7/1999, § 63.

Thirdly, it is observed that a fine is issued by courts in some cases. However, the fines in question amount to considerable sums and it is possible for the fine to be converted into a prison sentence if they are not paid. In the case of *Eon v. France* even a fine of 30 Euros was found to be deterrent by the ECtHR. The cases examined show that the fines amount to tens of thousands of Liras.

Lastly, the sensitivity of all state institutions regarding Article 299 of the Penal Code has resulted in wide-scale self-censorship throughout the country. This censorship is valid for both individuals and editors.

2. The question of whether the investigations and prosecutions under Article 299 involve only harsh swear words and defamation

First and foremost, as noted by the Venice Commission and illustrated in this report, defamation cases involving the President are not only about statements that contain swear words. As a matter of fact, none of files examined contain expressions amounting to swear words. Article 299 was applied in the case of newspaper articles, statements of criticism and social media posts about issues of public interest such as the December 2013 graft allegations and the Syrian refugee crisis and has been used against politicians and MPs criticising President Erdoğan. Cases were launched against 38 CHP (Republican People's Party) and 30 HDP (People's Democratic Party) for defaming the President. Following the lifting of immunities, MPs throughout Turkey were forced to be questioned within the scope of these investigations. Therefore, many prosecutions were launched and continue to be launched not because of statements containing swear words but because of political speech and criticism. It is impossible for even the most senior politicians to make critical statements about the President. The scope of insulting the President is so wide for judicial authorities that even the most unimaginable statements can be the subject of an investigation.

According to the Commission, statements such as "thief", "murderer", "dictator", which are considered to be insults by the government should be considered within the scope of public debate. In this regard, Article 10/2 of the ECHR provides very limited means to restrict political expression. Even crude remarks used for sarcasm, are relevant to the style used by the individuals and are afforded to protection under the right to freedom of expression. They cannot be regarded as defamation for merely being crude. Furthermore, as explained below, the use of such statements cannot be examined by taking them out of their context. Yet, in a majority of cases, no examination is made as to the context in which the statements were made, hence leading to an automatic decision that the statement is an insult. As shown in this report, first instance court decisions to the contrary are very limited.

3. The question of whether a distinction is made between statements of fact and value judgments in the investigations and prosecutions

The Venice Commission underlines that when evaluating the statements of journalists about the President under Article 299, a distinction ought to be made between factual statements and value judgments. In is frequently noted in both ECtHR and Constitutional Court case-law that a statement cannot be evaluated in vacuo out of its context. In this framework, when evaluating whether a statement is an insult, **the statement should first be evaluated in its entirety without being severed from its** context.[51]

With regard to **statements in a publication, a distinction should be made between statements of fact and value judgments**. In its judgment in the case of *Tuşalp v. Turkey*, the ECtHR notes that while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to

51 AYM, B.No:2014/12151, 04.06.2015, para. 63; B.No:2012/1184, 16.07.2014, para. 52; B.No: 2013/2602, 23.01.2014; *Dink v. Turkey*, no. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, 14.09.2010; *Gözel and Özer v. Turkey*, no.43453/04, 31098/05, 06.07.2010.

prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of freedom of expression.[52]

In its judgment in the case of *Scharsach and News Verlagsgesellschaft mbH v. Austria*, the ECtHR notes that the assessment of whether a certain statement constitutes a value judgment or a statement of fact might in many cases be difficult. However, since under the Court's case-law **a value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10**, their difference finally lies in the degree of factual proof which has to be established.[53]

In is judgment in the case of *Feldek v. Slovakyia*, the ECtHR noted that **the necessity of a link between a value judgment and its supporting facts and hence the question of whether a statement is a value judgment or a fact, may vary from case to case according to the specific circumstances**.[54] In this evaluation, the ECtHR took into account whether the person about whom the statement was made was known by the general public, if the events creating the context in which the statement was made were publicly known and whether the statement was used in the context of public debate, and concluded that **statements which might at first seem to be factual, can be considered as value judgments when the person and events about which the statement was made are known by the public and in cases where the statement is used in the context of public debate**. In conclusion, the Court considered that the term "*fascist past*", used to describe the Slovak Republic's Minister for Culture and Education with reference to his past membership to a pro-Nazi organisation called The Hlinka Youth was a value judgment and found that the decision of the Slovakia court of cassation that a value judgment can only be considered as such if it is accompanied by the facts on which that judgment is based, was unacceptable. The ECtHR **was satisfied that the value judgment made by the applicant was based on sufficient factual information** which was already known to the general public, both because the Minister's political life was known, and because information about his past was disclosed, by him in his book, and in publications by the press which preceded the statement by the applicant. The ECtHR ruled that the intervention to the applicant's freedom of expression was a violation of Article 10 of the Convention.[55] In the case of *Karsai v. Hungary*, the ECtHR considered that **statements based on facts, no matter how indirect the reference, should be considered as value-laden statements**.[56]

Based on these criteria, it can be observed that all of the cases concerning defamation of the President involve expressions of value judgments rather than facts. The use of descriptive terms such as 'thief' to recall the graft allegations as well as the use of the word 'murderer' to recall the deaths that have occurred through use of state force will be value-laden expressions based on events. Just as an individual cannot be expected to prove such value judgments, it is clear that they cannot be charged with defamation because of this kind of speech which is important in terms of public debate.

However, it is obvious that none of the decisions examined **show any signs of context analysis or a distinction between factual statements and value judgments**. Moreover, the examination of single words by judges, **as if they have been uttered in vacuo, without consideration of their context**, whether its a slogan, a tweet, or a column article, will result in erroneous decisions in terms of applying the principles under Articles 13 and 26 of the Constitution and in making an acceptable evaluation of the facts.[57] Thus, for example, "the idea that an expression of an opinion constitutes a threat to "*national security*" when taken out of the context in which it

52 *Tuşalp v. Turkey*, no. 32131/08 ve 41617/08, 21/02/2012 para. 43.

53 *Scharsach and News Verlagsgesellschaft mbH v. Austria*, no. 39394/98, 13/11/2003, para. 40; *Jerusalem v. Austria*, no. 26958/95, 27/2/2001, § 43.

54 *Feldek v. Slovakia*, no. 29032/95, 12/07/2001, para. 86.

55 *Feldek v. Slovakia,* para 86, 90.

56 *Karsai v. Hungary*, no. 5380/07, 01/12/2009, para 33.

57 *Fatih Taş*, B. No: 2013/1461, 12.11.2014, para 99.

was uttered, does not alone justify an intervention to the statement".[58] Within this scope, statements which are the subject of a prosecution should be evaluated without being taken out of their context in view of the entirety of events[59] and **without being attributed meanings other than the meaning attributed by the person who uttered them**.[60]

4. The question of whether defendants in cases concerning defamation of the President have the opportunity to prove their good faith and their arguments regarding the public interest

Failure to carry out an examination of the context inevitably makes it impossible to examine the case with respect to whether the statement in question involves a matter of public interest. Yet, as the ECtHR repeatedly emphasizes in its case-law, in cases concerning political speech, since the public interest is of utmost significance, restrictions should not be imposed on such statements in the absence of pressing need and the scope of the restriction should be interpreted narrowly.[61]

The thousands of investigations launched for defamation of the President discourage journalists in their efforts to contribute to public debates concerning issues affecting society and make it impossible for a segment of society to use their right to legitimate protest. For the same reasons, this sort of sanction also prevents the press from performing its function in imparting information and being a public watch-dog.[62]

However, when the offence is being investigated, the President's person is taken as a basis and the political characteristics of the speech is ignored. In cases where it is considered, the courts do not explain why they have opted to protect the personal rights of the President rather than freedom of political speech, which is afforded very wide protection.

Furthermore, in none of the proceedings involving the defamation of the President are defendants given the opportunity to prove their good faith and their arguments that their statements involve matters of public interest. In the few cases resulting in an acquittal, the courts have conducted an examination as to whether the statements concern a matter of public interest and have concluded that the speech of the defendants were within the permissible limits of political criticism and that they had no intention of levelling insults. Although all of the decisions for acquittal given as examples in this report should be regarded as positive judicial decisions with respect to Article 299, the number of such decisions in practice is extremely limited as observed in the statistics provided above. Moreover, decisions of acquittal are not considered final and subsequently brought before the Court of Cassation through appeals. As long as Article 299 is continued to be used by courts to punish political speech without consideration of the ECtHR judgments and the criteria on freedom of expression and freedom of the press, convictions will continue and many will fall victim in transgression of the principles of the rule of law and equality. Therefore, even if there are positive court decisions and developments, since they afford no fundamental solution, violations continue to occur and the sporadic positive decisions are insufficient in addressing the issue.

58 *Ibid*.

59 *Nilgün Halloran*, B. No: 2012/1184, 16/7/2014, § 52.

60 *Ali Suat Ertosun,* B. No: 2013/1047, 15.04.2015, para. 60, Similarly, *Bekir Coşkun*, B. No: 2014/12151, 06.06.2015, para. 63.

61 *Feldek v. Slovakia*, no. 29032/95, 12/7/2001, para. 83, *Sürek v. Turkey* (1) no. 26682/95, para 61.

62 *Lingens v. Austria*, no. 9815/82, 08.07.1986.

E. ALLEGATIONS CONCERNING THE UNCONSTITUTIONALITY OF ARTICLE 299 OF THE TURKISH PENAL CODE AND THE PROCESS BEFORE THE CONSTITUTIONAL COURT

1. Arguments by First Instance Courts Regarding Unconstitutionality

In 2016, two courts of first instance applied to the Constitutional Court asking for the abrogation of Article 299. The first such application to the Constitutional Court came from the Karşıyaka 7th Criminal Court of First Instance within the scope of Case No. 2015/679 E. involving allegations of defamation of the President through images shared via the Internet. The first instance court argued that Article 299 of the Turkish Penal Code was contrary to the "Principle of the Rule of Law" under Article 2, "The Principle of Equality" under Article 10 and "The Right to Prove an Allegation" under Article 39 of the Constitution. The second application was made by the Istanbul 43rd Criminal Court of First Instance within the scope of Case No 2015/442 E. involving charges against a number of people for insulting the president by means of chanting the slogan "Thief, Murderer Erdoğan". The application was made on grounds that Article 299 of the Turkish Penal Code is against the above-mentioned Articles 10 and 2 of the Constitution. By decision of the General Assembly of 7 April 2016, the Constitutional Court decided to deliberate these applications as a joint case under File No 2016/25.

In the first application made by the Karşıyaka 7th Criminal Court of First Instance, the court argued that in the event that the offence is committed against the President, there is no requirement for it to be committed in connection with his function or services. The court noted that the punishment for insulting the President is twice as severe as a punishment imposed on persons who have insulted any other public official (for example, the prime minister), and that such a difference in cases concerning the President is against the principle of the rule of law, as well as the reflection of this principle in criminal law and the determination of crime and punishment, and thus was contrary to Article 2 of the Constitution.

In addition, the court stated that Article 299 was not a general article setting forth defamation and that there was no reference to Article 125 and ensuing articles. Hence it was controversial in terms of whether the general principles pertaining to the offence of defamation under article 125 were also applicable for Article 299, such as the requirement of the offence being committed in 'association with others', the provisions regarding the 'immunity of accusations and defence' under article 128 and the provisions under article 129.

The court went on to say that according to Article 10 of the Constitution titled 'Equality Before the Law', everyone was equal before the law and that no one could have privileges. The purpose of the principle of equality is to ensure that people under the same circumstances are subject to the same treatment and to prevent discrimination and privileges. The court then referred to Article 125/3 of the Turkish Penal Code and stated that the article already set forth the offence of insulting a public official. Thus, when any public official, whether elected or appointed, including the prime minister, members of the cabinet, deputies, and people in public administration and judicial bodies, is the victim of the offence set forth in this article, and if the offence is committed in connection to the performance of their public duty, the punishment to be imposed would be that set forth under Article 125/3. Therefore, it should be discussed whether it is in line with the principle of equality set forth in the Constitution to make a distinction between the President and the prime minister, members of the cabinet, deputies, public officials in administrative and judicial bodies, and afford the President protection under a separate norm.

Moreover the court also took into account the deliberations of the European Court of Human Rights with respect to the question of whether public officials and state representatives can be subject to separate treatment in cases of freedom of expression and defamation compared to other citizens. The court made reference to the judgment of the ECtHR in the case of *Colombani v. France* where it stated that if a foreign head of state claims

to have been insulted, he can resort to the usual remedies available for everyone but cannot benefit from a separate privileged protection. In its evaluation, the court also made reference to the ECtHR's judgments in the cases *Artun and Güvener v. Turkey, Pakdemirli v. Turkey* and *Otegi Mondragon v. Spain*, which have been examined in this report.

Thus, the Karşıyaka 7th Criminal Court of First Instance noted that, as understood from the case-law of the ECtHR, especially in republican regimes and in monarchies party to the Convention, no privilege is afforded for the protection of public officials with respect to the offence of defamation. The court went on to say that the granting of special privileges for the protection of Presidents, heads of state, the king in monarchies against offences involving defamation, compared to the protection afforded to other public officials, and the imposition of higher criminal sanctions for offences committed against these persons was against the principles of equality enshrined in the Convention as well as the spirit of the Convention.

The Karşıyaka 7th Criminal Court of First Instance noted that under Article 299 of the Turkish Penal Code, the offence of defamation committed against the President required higher punishment compared to cases in which the offence was committed against other public officials. It went on to say that if the offence set forth under Article 299 were found to be unconstitutional and hence repealed, the offence of defaming the President would not go without punishment and that it would be possible to invoke Article 125/3a of the Turkish Penal Code setting forth the offence of insulting public officials. If the article were to be repealed, the President would no longer benefit from special protection compared to other public officials (for example the prime minister). The court thus presented its reasoning in support of the view that Article 299 of the Turkish Penal Code was against Article 10 of the Constitution.

Lastly, the Karşıyaka 7th Criminal Court of First Instance noted that with regard to the offence of insulting the President, Article 299 was against Article 39 of the Constitution since it did not set forth the 'right to prove allegations', which was accepted in the Constitution without exception.

A similar application for the annulment of Article 299 was made by the Istanbul 43rd Criminal Court of First Instance claiming that the article was against Articles 2 and 10 of the Constitution. According to the Istanbul 43rd Criminal Court of First Instance, Article 299 brought a separate legal regulation with higher sanctions and greater protection. Moreover the lawmaker set forth the same sanctions against insulting the President regardless of whether the offence of defamation was committed 'in connection with his duties' or 'outside his duties'.

2. The Ruling of the Constitutional Court

Immediately after the completion of the present report, the Constitutional Court examined the application for the annulment of Article 299 of the Turkish Penal Code and rejected it.[63] What is more interesting than the decision of the Constitutional Court is the methodology it used in reaching the decision.

As explained above, the Karşıyaka 7th Criminal Court of First Instance and the Istanbul 43rd Criminal Court of First Instance, who applied to the Constitutional Court asking for the annulment of the article on grounds of its unconstitutionality had made extensive reference to the case-law of the ECtHR in their reasoning. The Constitutional Court, on the other hand, only mentioned the ECtHR when giving a summary of the arguments of these courts but made no reference whatsoever to the ECHR or the ECtHR case-law covered in the present report in its own deliberation. Although this situation may seemingly be explained by the fact that cases of appeal/annulment are reviewed with respect to their conformity with the Constitution, this explanation is far from being satisfying. Firstly, the Constitutional Court has made reference to the ECtHR case-law in numerous

63 AYM, E. 2016/25, K. 2016/186, k.t. 14/12/2016. (Hereinafter, 'Decision on Article 299')

annulment cases.[64] Moreover, it is clear that the reasoning of the ECtHR would also be valid in terms of the Constitution. The ECtHR has found that the head of state is a part of the concept of 'everyone' and could therefore be afforded no privileges. There is a need to explain why the concept of 'everyone' as it stands in the Constitution with respect to the protection of 'everyone's' personal inviolability (Constitution, Article 17) and 'everyone's' freedom of expression (Constitution, Article 26) should bear a different meaning than that used in the Convention.

The Constitutional Court has avoided explaining this difference by refraining from making any reference to the ECtHR case-law. Instead, the it **has devoted the entirety of its reasoning to explain why the President should benefit from higher protection**. According to the Constitutional Court, the President deserves higher protection than all other citizens because words uttered against him "*are not only against his person but against the values and functions represented by the President. For this reason and in view of the foregoing, the law-maker has adopted the point of departure that any acts against the President's person should also be regarded among offences committed against the State and has set forth this particular offence as separate from offences of defamation against public officials even if the offence is committed against the President's personality*".[65] The Constitutional Court does not consider it problematic that a statement against a person is subject to separate treatment to prevent and punish attacks against the reputation of the State. According to the Constitutional Court, the prison sentence of up to four years with the possibility to increase to up to 1/6 of the sentence is also proportional.[66]

Lastly, according to the Court, it is not problematic that Article 299 foresees a higher punishment than Article 125/3 setting forth the offence of insulting public officials, since -as distinct from the offence of insulting public officials- Article 299 aims to protect the reputation of the State together with the personality of the President.[67]

It is observed that the last section of the Constitutional Court's ruling is devoted to the freedom of expression. However, the evaluation employs an exceptionally superficial argument which reads as follows: "*even if uttered against public officials, criticism must not be of a defamatory nature undermining the honour and dignity of people. The requirement for public officials to be more tolerant compared to others does not mean that their 'reputation and rights' are not to be protected. Freedom of expression does not give people the right to defame because an act of defamation is an attack on the reputation and dignity of others*". [68]

According to the Constitutional Court, the requirement to obtain authorization from the Minister for Justice prior to prosecution is a safeguard for those who are alleged to have committed the offence.[69] Yet, it is known that in practice, the Minister for Justice approves all demands for prosecution under the Article.

The ruling of the Constitutional Court is both inconsistent and clearly against the ECtHR case-law. On the one hand, the Constitutional Court argues that Article 299 aims to protect the reputation of the State and then states that a personal insult to the President would constitute an offence. The first argument is a determination regarding an institution. In other words, the offence may only be committed against the Presidency as an institution. **Almost none of the prosecutions launched under Article 299 in Turkey involve statements against the Presidency as an institution**. **The prosecutions are for the protection of the personality of the President as a person.** As observed in the judgment of Otegi Mondragon, depicting a person as 'flawless, absolute and a symbol of the state even through his deeds in his private life' is unacceptable even in modern monarchies

64 For example, in its review of Law No. 6287 on Amendments to the Laws on Primary Education and Education and Some Other Laws, the Constitutional court has taken into account the ECtHR judgments in the cases *Lautsi v. Italy and Hasan and Eylem Zengin v. Turkey*. See, AYM, E. 2012/65, K. 2012/128, k.t. 20/9/2012.

65 Decision on Article 299, para. 13.

66 Decision on Article 299, para. 15.

67 Decision on Article 299, para. 16.

68 Decision on Article 299, para. 19.

69 Decision on Article 299, para. 21.

and on no consideration can be acceptable in a Republic respecting human rights and the rule of law. While the ECtHR has found that it is against the spirit of the Convention to afford special protection to the King of Spain, who has only symbolic functions and the sole function of representing the State, the Constitutional Court considers it legitimate to afford privileges to an elected President who bears numerous functions under the Constitution and many more in practice whereas this would be seen illegitimate under any European law.

We are of the opinion that **this decision of the Constitutional Court has given rise to a problem with respect to the Convention, which that cannot be undone through any individual application**. Needless to say, a person convicted under Article 299 can apply to the Constitutional Court claiming that his freedom of expression has been violated. However, **a person prosecuted under this article is at risk of being imposed a longer prison sentence and being placed in pre-trial detention whereas the same statement made against someone else would have resulted in a lower punishment**. In other words, there are potentially two separate punishments imposed for the same statement. It is obvious that this situation would discourage people from speaking about the President. As explained in detail in the present report, in view of the situation in Turkey, this risk is not a theoretical possibility. Therefore, after the ruling of the Constitutional Court, it is possible to argue that everyone being investigated under Article 299 is a potential victim under the Convention.[70]

F. CONCLUSION AND RECOMMENDATIONS

In its judgment in the case of *Artun and Güvener v. Turkey*, the ECtHR has evaluated Article 158 of Turkish Penal Code No. 765 on 'Insulting the President' with respect to the freedom of expression. The ECtHR concluded that the head of state of a country could not be afforded special protection with regard to statements made against him/her and that freedom of expression should be given wider protection in the context of statements made against political figures. The Court found that former Article 158 of the Turkish Penal Code was contrary to its established case-law.

In the opinion of the Venice Commission of the Council of Europe, adopted in its session of 11-12 March 2016, it is noted that due to the increased and excessive use of Article 299 of Turkish Penal Code No. 5237 titled 'Insulting the President', and the deterrent effect of the article on individuals, the provision should be completely abrogated.

The annulment of Article 158 of the former Turkish Penal Code No. 765, which was examined by the ECtHR in the case of *Artun and Güvener v. Turkey,* and its replacement with Article 299 of the new Penal Code No. 5237 even in view of the subsequent amendments to Article 299/2, are not sufficient developments. In fact, the provision in the article as it stands today sets forth serious imprisonment terms and its use has increased significantly since 28 August 2014 when Recep Tayyip Erdoğan took office as President. As mentioned above, only in 2015 alone, 1953 prosecutions were launched under Article 299. These cases are concluded at a pace never before witnessed in other types of offences. Indeed, in 2015, 238 people were convicted of the offence and 151 cases were closed with a deferment of the announcement of the verdict.

Thus, in the process of harmonization with the ECtHR's case-law, in order to conform to the European consensus that the act of insulting the President should be decriminalised or that this offence should be limited to only the gravest verbal attacks without resorting to a prison sentence, Article 299 of the Turkish Penal Code setting forth the offence of 'insulting the President' should be completely abrogated.

1. To The Government

In light of the ECtHR's relevant case-law and the opinion of the Venice Commission, the judgment in the case of *Artun and Güvener* can only be executed if Article 299 of the Turkish Penal Code No. 5237 is completely

70 *Mutatis mutandis*, Taner Akçam v. Turkey, no. 27520/07, 25/10/2011, para. 78

abrogated. After the Artun and Güvener judgment became final, the Constitution of Turkey was amended and the President is now elected by the people. Moreover, the first elected President Recep Tayyip Erdoğan states in his own speeches that the political system of Turkey has effectively been changed. Both the national and international public are of the opinion that the President is no longer impartial. Therefore, it is seriously against the spirit of the Convention, as noted by the ECtHR, for a person to be to be immune to all sorts of criticism despite being actively engaged in politics, by subjecting people to the threat of heavy imprisonment. That is to say, both the Constitution and the ECHR are built on a pluralistic democracy. A pluralistic democracy requires that political actors express their opinions freely and that the rules of the game are applied equally to everyone. Yet, the immunity afforded to the most active actor in the political sphere against all kinds of criticism through hundreds of cases, results in an absurd situation where he enjoys greater protection than all other actors. While it is possible for this actor to speak as he wishes against anyone, nothing can be said against him despite the executive position he occupies. It is clear that this situation is against the spirit and essence of the Constitution and the Convention.

Moreover, the Turkish government also accepts the ECHR case-law with respect to freedom of political speech. As a mater of fact, in the case of *Perinçek v. Switzerland* finalised by the ECtHR Grand Chamber on 15 October 2015, the government of Turkey argued that "*opinions could not be interfered with simply because the public authorities saw them as unfounded, emotional, worthless of dangerous*".[71] In this regard, the government stated that "*Freedom of expression encompassed a degree of provocation. It applied to ideas that shocked and offended and to the form in which they were conveyed, even when it included a virulent style*".[72]

Under the circumstances, Article 299 of the Turkish Penal Code (former Article 158), which was clearly found by the ECtHR to be against the Convention, has no applicability in Turkey, since according to Article 90 of the Constitution and the case-law of the Constitutional Court, provisions found to be openly against the Convention and the case-law of the ECtHR have no applicability. In the words of the Constitutional Court, such provisions "have been implicitly repealed".[73] Thus, it is our recommendation that despite the recent ruling of the Constitutional Court, Article 299 of the Turkish Penal Code should be completely abolished to prevent further violations of the Convention.

2. To The Committee of Ministers

In the period covering more than nine years since the judgment in the case of *Artun and Güvener v. Turkey*, not only has Turkey failed to meet the requirements of the judgment, but there has also been a dramatic increase in the number of people against whom prosecutions were launched by authorization under Article 299 of the Turkish Penal Code titled "Insulting the President".

Considering that the steps required to bring an end to the violation determined by the ECtHR in the case of *Artun and Güvener* have not been taken and because violations are constantly increasing under the current conditions, it is our recommendation that the Committee of Ministers remove the case from the standard supervision track and place it under enhanced supervision.

Furthermore, we recommend that the Committee of Ministers continue their supervision activities regarding the *Artun and Güvener v. Turkey*, in which no progress has been made since March 2011, and to call on the Turkish government to submit an action plan with respect to the existing situation.

71 *Perinçek v. Switzerland*, Grand Chamber, no: 27510/08, 15/10/2015, para. 107.

72 *Perinçek v. Switzerland*, Grand Chamber, no: 27510/08, 15/10/2015, para.175.

73 B. No. 2013/2187, 19/12/2013, para. 45-46; Application No. 2013/4439, 6/3/2014.