Challenges and Opportunities in Implementing the ECtHR Judgments on Articles 10, 11 and 18 in Turkey

Att. Benan Molu

In 2020, Netherlands Helsinki Committee (NHC), together with the European Implementation Network (EIN), started a project to improve the implementation of judgments of the European Court of Human Rights (the Court/the ECtHR) in Azerbaijan, Russia, Ukraine and Turkey, and to improve compliance with the European Convention on Human Rights (the Convention/the ECHR) system.

It is observed that the States party to the Convention, especially the above-mentioned states, successfully pay compensations determined by the Court; but refrain from taking steps such as making the necessary legal amendments and/or arrangements, and from taking structural and political measures to redress the violation judgment and its consequences beyond compensations.

Although the judgments of the ECtHR are binding, statistics published by the Council of Europe bodies indicates that the above-mentioned states resist the implementation of violation judgments handed down under the freedom of expression guaranteed under Article 10 of the Convention, the freedom of assembly and association guaranteed under Article 11 of the Convention, and the limitation on use of restrictions on rights regulated in Article 18 of the Convention, which the above-mentioned states particularly use to suppress, silence and punish dissidents.

Indeed, according to the statistics of the Committee of Ministers of the Council of Europe, which supervises the implementation of the ECtHR judgments; countries such as Russia, Turkey and Ukraine are the states that do not implement the ECtHR judgments the most. This problem has become increasingly important in Turkey in recent years, especially due to the lack of implementation of the ECtHR's violation judgments regarding the businessperson and human rights defender Osman Kavala and the opposition politician Selahattin Demirtaş.

For this reason, trainings were organized on different dates by NHC and EIN in order to increase the awareness of lawyers and non-governmental organisations in Turkey and to share their experiences on this subject. Finally, on 29 September 2021, a meeting was held with representatives of non-governmental organisations participating in these trainings, where George Stafford, Prof. Işıl Karakaş, Assoc. Dr. Ulaş Karan and attorneys Zelal Pelin Doğan, Esma Yaşar, Alara Sert and Benan Molu attended as speakers. The general statistics on the implementation of the ECtHR judgments in Turkey, the systematic problems encountered in domestic law on this issue and the difficulties experienced and the achievements obtained during the implementation of Articles 10, 11 and 18 judgments were discussed.

This report, by compiling the topics discussed during this meeting, aims to present concrete recommendations for the necessary reforms to be made by the Turkish authorities and relevant local courts against the clearly inadequate steps taken so far in order to implement violation judgments.

Binding Nature of the ECtHR Judgments

Article 1 of the Convention, titled as "obligation to respect human rights", begins by recalling that the states parties are obliged to ensure that everyone within their jurisdiction enjoy their rights and freedoms. As a result of this obligation to cooperate and respect, the member states of the Council of Europe and the states party to the Convention undertake to abide by the final judgments of the Court in accordance with Article 46/1 of the Convention.

When the ECtHR decides that rights and freedoms set forth in the Convention and its additional protocols have been violated, the next step is to enforce this binding judgment in national law. The body that supervises whether the ECtHR's violation judgments are fulfilled is the Committee of Ministers of the Council of Europe. The Committee of Ministers may monitor the case under standard supervision or under enhanced supervision, where it will actively help the concerned State to decide what action to take. The cases to be followed up under enhanced monitoring are usually cases involving structural and/or complex problems that require urgent individual measures to be taken.

Depending on the outcome of the ECtHR judgment, individual measures are measures that concern the applicant, such as the payment of compensation to the applicant, the release of the applicant, their retrial and, in the case of a violation of Article 18, the elimination of all negative consequences arising from the violation. General measures, on the other hand, are measures to be taken in order not to repeat the violation found by the ECtHR and to hinder and prevent the occurrence of similar violations in the future. The most common of these measures are to amend the Constitution and legislation, to prepare a judicial reform/action plan, to change the case-law of domestic courts, to translate the violation judgment into the official language of the relevant state and to distribute it to the administrative or judicial institutions, to organize trainings, and in case of the violation of Article 18, to take steps to ensure the independence of the judiciary.

The steady increase in the number of applications submitted to the ECtHR and in the number of violation judgments delivered by the ECtHR give rise to the need to quickly eliminate the problems underlying the alleged violations in these applications.

Various steps have been taken over the years to implement the ECtHR judgments and thus to ensure the long-term effectiveness of the Convention system. Conferences were held in Interlaken, Izmir, Brighton and Brussels; and the Copenhagen Declaration was adopted to strengthen the dialogue between local authorities and the Court.

However, these steps were not enough. While the number of cases pending before the Committee of Ministers has decreased, two problems attract attention upon a closer look at past reports prepared.[1] The first problem is the multiplicity of repetitive cases and the length of the implementation period of the ECtHR judgments. The second is direct attacks from states parties against the jurisdiction of the Court.

[1] Nils Muiznieks, "Non-implementation of the Court's judgments: our shared responsibility", 23.08.2016, https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility.

According to the 2020 report, 883 of the 983 new cases brought before the Committee of Ministers in 2020 fell into the category of repetitive cases.[2] According to the report, as of the end of 2020, 323 of the leading cases pending before the Committee of Ministers were pending to be implemented for less than two years, 301 of them for between two years and five years, and 634 of them for more than five years.[3]

As a matter of fact, the Parliamentary Assembly of the Council of Europe also expressed their concern about the length of the non-implementation period of cases pending before the Committee of Ministers. According to the report prepared by the Parliamentary Assembly, nearly 10,000 cases resulting in the violations of the right to life, the prohibition of torture and the right to liberty and security, almost half of which are subject to the enhanced review procedure, have been waiting to be implemented for more than five years.[4] The Parliamentary Assembly also emphasizes that Russia, Turkey, Ukraine, Romania, Hungary, Italy, Greece, Moldova, Azerbaijan and Bulgaria are states that implement the ECtHR's judgments the least, and that the structural violations in these countries have not been remedied for more than ten years.[5]

Undoubtedly, the reason why these states have not implemented these judgments against them for more than ten years, is not that implementing the said violation judgments are too complicated or difficult. As stated by the former Secretary General of the Council of Europe Thorbjørn Jagland, the former Council of Europe's Commissioner for Human Rights Nils Muiznieks and the former President of the ECtHR Guido Raimondi, there has been a "resistance" and "attack" against the ECtHR in recent years.[6]

As it will be explained below, the ECtHR and the Committee of Ministers have to resort to means available to them, such as initiating infringement proceedings under Article 46/4 of the Convention, in order to both protect themselves and the effectiveness of the Convention system against such an uprising.

Turkey's Score on the Non-Implementation of the Judgments of the ECtHR

Between 1959-2021, 3820 of the 24,511 judgments of the ECtHR were given against Turkey, and 3,385 of these judgments resulted in violations.[7] Thus, among 47 member states of the Council of Europe; Turkey became the state, against which the highest number of judgments

---

[2] Council Of Europe Committee of Ministers, Supervision of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2020, https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8, p. 38.
[3] Ibid, p. 58.
[4] Parliamentary Assembly of the Council of Europe, The implementation of judgments of the European Court of Human Rights, 15.07.2020, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28658&lang=en
[5] Ibid.
[6] Jagland, Russia's New Law on The Constitutional Court,: "A Solution Should Be Possible", 15.12.2015, http://www.coe.int/en/web/portal/-/russia-s-new-law-on-the-constitutional-court-jagland-a-solution-should-be-possible-; Muiznieks, "Non-implementation of the Court's judgments: our shared responsibility", 23.08.2016, https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility; Annual Press Conference of the ECtHR, 2016, https://vodmanager.coe.int/cedh/webcast/cedh/2016-01-28-1/lang
[7] European Court of Human Rights, Violations by article and by state 1959-2021, https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf

were given, and which had violated the Convention the most. One of the most important reasons for these numbers is the fact that measures foreseen in previous violation judgments delivered by the ECtHR are not fulfilled, and therefore, violations are and continue to be repeated.

As a matter of fact, Turkey is one of the states with the worst record in implementing the judgments of the ECtHR. According to the 2020 report of the Committee of Ministers, as of 2020; there are 5,233 cases, pending implementation by state parties.[8]

1,789 of these cases belong to Russia. Turkey is the second most non-implementing state with 624 judgments pending to be implemented.[9] The average pending time for leading judgments against Turkey is 8 years and 2 months.

These cases include ill-treatment by police and security forces, the lack of an effective investigation of ill-treatment[10], discrimination faced by Alevis[11], violence against women[12], the right to conscientious objection[13], the inability to review life imprisonment sentences[14], and the initiation of investigations and lawsuits, disciplinary actions, decisions of arrest and imprisonment against individuals for using their freedom of expression and assembly[15]. Turkey is expected to fulfil the requirements set forth by these violation judgments by taking individual and/or general measures.

Most of these judgments were rendered in the early 2000s and still await full implementation. The lack of will to implement the judgments leads to a vicious circle, resulting in an increase in the number of new violation judgments and repetitive cases every year.

It is impossible to include all these judgments in this report due to the high number of unimplemented judgments and the diversity of topics. For this reason, in line with the topics discussed at the session on 21 September 2021, the scope of the report will be limited to the ECtHR judgments and the Committee of Ministers decisions delivered under Articles 10, 11 and 18 of the Convention and not implemented.

Article 10

As many news agencies, television and radio channels, newspapers and magazines were closed with decrees in law issued during the state of emergency, the developments in Turkey, especially after the coup attempt on 15 July 2016 and the numerous applications for rights violations submitted to the ECtHR in the aftermath of the coup have rendered the freedom of expression and press even more significant in recent years.

---

[8] Council of Europe Committee of Ministers, Supervision Of The Execution of Judgments And Decisions Of The European Court Of Human Rights 2020, p. 37.
[9] Ibid.,p. 47.
[10] Batı and others v. Turkey group of cases: https://hudoc.exec.coe.int/eng?i=004-37206; Erdoğan and others v. Turkey group of cases: https://hudoc.exec.coe.int/eng?i=004-37076;
[11] Zengin v. Turkey group of cases: https://hudoc.exec.coe.int/eng?i=004-37090; https://hudoc.exec.coe.int/eng?i=004-37258 and https://hudoc.exec.coe.int/eng?i=004-37402
[12] Opuz v. Turkey group of cases: https://hudoc.exec.coe.int/eng?i=004-37222
[13] Ülke v. Turkey group of cases: https://hudoc.exec.coe.int/eng?i=004-37268
[14] Gurban v. Turkey group of cases: https://hudoc.exec.coe.int/eng?i=004-36750
[15] To be further discussed below.

Turkey, which has been deemed "Europe's largest prison for journalists" by international institutions for many years, ranks 153rd among 180 countries on the list of press freedom, according to the 2021 report of Reporters Without Borders.[16] Human rights organisations including Human Rights Watch and Amnesty International, as well as international organizations including the Council of Europe, the United Nations, the European Union, have delivered numerous statements and reports stating that the freedom of expression and press deteriorate day by day in Turkey; that people systematically face investigations, prosecutions, heavy prison sentences and judicial harassment for their dissent; and that criminal laws are used to silence and punish the dissidents.[17]

For many years, Turkey's legislation and practices in the field of freedom of expression and press have been brought before the ECtHR as one of Turkey's most important problems. According to the statistics of the ECtHR, Turkey was the country with the highest number of violations of freedom of expression in 2021, just as it was in 2017, 2018, 2019 and 2020. Turkey is also the country with the highest number of violations of freedom of expression among the member states of the Council of Europe, with a total of 418 decisions on violations of freedom of expression between 1959-2021.[18]

These violation judgments are based on a wide range of issues, ranging from the seizure of magazines and books to the freedom of expression of football players, members of the judiciary and public officials; from insulting the memory of Atatürk to lifting the immunity of deputies; from blocking access to websites to the right to the Internet in prison and to the arrest of dissidents, including journalists, human rights defenders and politicians for their statements, articles and news, and being tried on charges of insulting to the President or state organs.

For this reason, the content of the report is limited with the following articles of law, which are most frequently mentioned in the reports prepared by the international institutions such as the Committee of Ministers, the Venice Commission and the Council of Europe Commissioner for Human Rights, which are considered to be an obstacle to the use of freedom of expression, and

---

[16] Reporters Without Borders, 2021 World Press Freedom Index, https://rsf.org/fr/classement

[17] From among many reports: The report prepared by Thomas Hammarberg, the Commissioner for Human Rights of the Council of Europe, following his visit to Turkey between 10-14 October 2011, https://rm.coe. int/16806db733; Report on Freedom of Expression and Press in Turkey dated 12 July 2011, prepared after the visit of the Council of Europe Commissioner for Human Rights, Thomas Hammamberg on 27-29 April 2011, https://rm.coe. int/16806db7522011; Opinion of the Venice Commission on Articles 216, 299, 301 and 314 of the Turkish Penal Code, 11- 12.03.2016, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e; Council of Europe Commissioner for Human Rights, Nils Muiznieks, Memorandum on the Human Rights Effects of the Measures Taken Under the State of Emergency in Turkey, 07.10.2016, https://rm.coe.int/ref/ CommDH(2016)35; Preliminary conclusions and observations on the visit of the United Nations Special Rapporteur on Freedom of Thought and Expression to Turkey on 14-18 November 2016, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=20891; Council of Europe Commissioner for Human Rights, Nils Muiznieks, Memorandum on Freedom of Expression and Press in Turkey, 15.02.2017, https://rm.coe.int/turkiye-de-ifade-ozgurlugu-ve-medya-ozgurlugune-iliskinmemorandum/16808b7281; Parliamentary Assembly of the Council of Europe, Report on the Functioning of Democratic Institutions in Turkey, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23665&lang=en; Council of Europe Commissioner for Human Rights, third party submission of journalists in Turkey on their applications before the ECtHR, https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f

[18] European Court of Human Rights, Violations by article and by state 1959-2021, https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf

which are the subject of the most lawsuits and convictions in the judicial statistics published by the Ministry of Justice: the offence of insulting and insulting to the President regulated in Articles 125 and 299 of the Turkish Penal Code, the offence of degrading the Turkish nation, the state of the Republic of Turkey, the state institutions and organs regulated in Article 301 of Turkish Penal Code, the offence of being a member of a criminal organisation regulated in Article 314 of Turkish Penal Code, and the offence of making propaganda for an criminal organisation regulated in Articles 6 and 7/2 of the Anti-Terror Law.[19]

The judgments regarding the violations of these articles have been examined before the Committee of Ministers under the leading cases of Artun and Güvener v. Turkey [20], Altuğ Taner Akçam v. Turkey[21], Nedim Şener v. Turkey[22] and Öner and Türk v. Turkey[23], respectively.

While the Human Rights Action Plan, prepared to strengthen the freedom of expression, and the release of Ahmet Altan, who has been detained since 2016, by the Court of Cassation following the ECtHR's judgment dated 13 April 2021, were welcomed developments, the lack of any tangible progress in these cases for over 20 years prompted the Committee of Ministers to take action.

By taking into account the data of the OSCE Representative for Freedom of the Press, Reporters without Borders, the Platform for Strengthening the Security of Journalists and the Protection of Journalism of the Council of Europe and the European Parliament, by recalling that Turkey ranks 153rd among 180 countries in the freedom of press ranking, that 91 journalists are still in prison, that the freedom of expression has gone even worse with lawsuits filed and sentences given to silence dissident voices, the Committee of Ministers took an interim decision in its

[19] For the report in which the aforementioned articles and the ECtHR judgments given under the paragraphs 220/6-7 of the Turkish Penal Code, accompanied by the evaluations of the Committee of Ministers, the Venice Commission and the Council of Europe Human Rights Commissioner, are explained; see: Benan Molu, Freedom of Expression and Turkey: Implementation of ECtHR Judgments, 2020, https://expressioninterrupted.com/tr/uploader/uploader/rapor-aihm-kararlarinin-uygulanmasi-pdf

[20] For Artun and Güvener v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers, see: https://hudoc.exec.coe.int/eng?i=004-37417. The first judgment of the ECtHR regarding the offense of insulting the President, which is regulated under Article 299 of Turkish Penal Code, is Şorli v. Turkey. (No: 42048/19, 19.10.2021) The Court decided that Article 299 of the Turkish Penal Code did not meet the requirement of being prescribed by law and requested for the said article to be amended in accordance with the case-law of the ECtHR under Article 46 of the Convention.

[21] For Altug Taner Akçam v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37188

[22] For Nedim Sener v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37297. The Grand Chamber of the ECtHR, in Selahattin Demirtaş v. Turkey (no. 2) judgment, decided for the first time that the crime of being a member of an organisation regulated in Article 314 of the Turkish Penal Code was interpreted in a very broad and ambiguous manner by the domestic courts; and therefore, the said article violated the requirement that an interference with the freedom of expression should be prescribed by law. (No. 4305/17, 22.12.2020) The Committee of Ministers, at its session dated 30 November-2 December 2021, stated that Article 314 of the Turkish Penal Code required to be amended to provide adequate protection against arbitrary interventions and the practice regarding detention without reasonable doubt required to be changed; and it decided to examine the decision, rendered under Article 314, together with Nedim Şener group cases. https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1419/H46-39E

[23] Öner and Türk v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-36806

session dated 7-9 June 2021 regarding these judgments, which have been waiting to be implemented for many years.[24]

The Committee of Ministers stated that several violation judgments addressing the problem of the disproportionate use of the criminal laws to silence individuals with critical or displeasing views, had been pending before the Committee for more than 20 years. Despite the large number of similar judgments given by the ECtHR and the Committee's concerns on this issue, the authorities had not provided the comprehensive information requested by the Committee. The statistical information on the number of investigations and prosecutions carried out under the aforementioned articles of law and initiated especially against journalists, which was vital for the Committee to evaluate the real situation, was not submitted to the Committee. Despite the exemplary decisions of the higher courts, especially the Constitutional Court, the prosecutors and lower courts continued to apply to the criminal laws without taking into account the freedom of expression, and authorities refrained from giving political messages in order to protect freedom of expression.

The Committee emphasized that despite the clear case-law of the ECtHR stating that Article 301 of Turkish Penal Code was regulated in such a way that its consequences could not be foreseen, and despite the insistent calls of the Venice Commission and the Committee of Ministers for an immediate change in the article, the authorities did not make a legal amendment in Article 301 in line with the Convention standards. The Committee further underlined that Turkey did not take measures to eliminate the violations arising from the application of Articles 125 and 299 of the Turkish Penal Code, which regulated insulting the public officials and the President; and that as stated in the opinions of the Human Rights Commissioner and the Venice Commission, Article 299 of Turkish Penal Code was interpreted and applied in an unprecedented manner, compared to the similar articles in other Council of Europe member states.

In reaching this conclusion, the Committee had taken into account the ECtHR's case-law stating that "affording increased protection by means of a special law on insult would not, as a rule, be in keeping with the spirit of the Convention, and that a State’s interest in protecting the reputation of its head of State could not serve as justification for affording the head of State privileged status or special protection”[25] and the views of international institutions such as the Commissioner for Human Rights, the Venice Commission and the United Nations Human Rights Committee, including the European consensus on decriminalizing of insulting heads of state.

In the interim decision, the Committee of Ministers called on the Government to urgently provide detailed statistical information on the number of journalists specifically investigated, prosecuted, sentenced, detained or convicted, including details on the number of investigations and prosecutions and convictions and the charges brought in the past five years regarding the

[24] Interim Resolution CM/ResDH(2021)110, Execution of the judgments of the European Court of Human Rights, 09.06.2021, https://search.coe.int/cm/pages/result_details.aspx?ObjectId=0900001680a2c296
[25] See, Şorli v. Turkey, paras. 16-19, 42, 54.

offences in the aforementioned cases; to amend Article 301 of the Turkish Penal Code in light of the clearly established case-law of the ECtHR and to make legal amendments in the Turkish Penal Code and the Anti-Terror Law in a way that would exclude the use of freedom of expression from the scope of the offence; to give political messages that supported the good practices of the high courts, to emphasize that the freedom of expression was given importance in Turkish society and that criminal laws could not be used as a tool to limit the freedom of expression; to continue the training of judges and prosecutors; to amend Article 125 of Turkish Penal Code; and to repeal Article 299 of Turkish Penal Code in accordance with the European consensus, aiming at decriminalizing insult to the heads of state, and the established case-law of the ECtHR.

On 7 January 2022, the Government submitted a new action plan[26] and at its session on 8-10 March 2022, the Committee of Ministers repeated its calls once again for Turkey to introduce legislative amendments in these group of cases in accordance with the Court's case-law[27]. The Committee decided to continue the supervision of these groups at the latest at its March 2023 meeting.

Article 11

Article 11 of the ECHR regulates everyone's right to peaceful assembly, to form associations, to form and join trade unions. Freedom of assembly and association, which is a manifestation of the freedom of expression, is one of the most violated rights and freedoms in Turkey, just like the freedom of expression. Statistics published by the ECtHR reveal that Turkey is the state that violated Article 11 of the Convention the most, with a total of 111 violation judgments between 1959-2021.[28]

These violation judgments have been brought before the Committee of Ministers. The Committee of Ministers has been examining many case groups on the issues such as ill-treatment by security forces while attempting to exercise freedom of peaceful assembly and demonstration[29]; filing lawsuits for the persons who exercise their freedom of assembly and demonstration, punishing these persons with imprisonment[30]; dissolution of the association due to imprisonment of association members and managers[31]; imposing prison sentences, fines and disciplinary penalties such as warning, reprimand, reassignment or dismissal of public officials for participating in demonstrations or union activities[32]; denial of the right to form unions and

[26] Government's action plan, 07.01.2022, https://hudoc.exec.coe.int/eng?i=DH-DD(2022)52E
[27] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5c3c2
[28] European Court of Human Rights, Violations by article and by state 1959-2021, https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf
[29] To be further discussed below.
[30] To be further discussed below.
[31] Çetinkaya v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37419
[32] Kaya and Seyhan v. Turkey, Karaçay v. Turkey, Müslüm Çiftçi v. Turkey, Urcan and others v. Turkey, Enerji Yapı Yol-Sen v. Turkey and Tek Gıda İş-Sen v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37234

collective bargaining[33]; not allowing the establishment of foundations to support a particular ethnic group or religious community[34]; confiscating the assets of political parties[35], closing them and banning deputies from politics[36].

Some of these case groups were closed, as individual and general measures were implemented. Bearing in mind the limited scope of the report, this section will be limited to the cases under the Ataman and Işıkırık groups concerning the restriction of the freedom of assembly and demonstration, which are currently pending before the Committee and are followed under enhanced monitoring by the Committee and non-governmental organisations.

Ataman Group Cases:

Ataman Group cases are cases regarding the use of disproportionate force by the security forces, including the use of tear gas, during the prevention of the right to peaceful assembly and demonstration and the dispersal of this demonstration.[37] This group of cases also includes cases, where alleged violations are made under Articles 5, 3 and 13 of the Convention due to the detention of demonstrators, the failure to investigate complaints of ill-treatment and/or the lack of an effective remedy against alleged violations. The ECtHR delivered an Article 46 judgment in four of these cases, stating that similar applications were on the rise and that the frequent use of disproportionate force, the use of tear gas created the risk of death and injury, and that this had a deterrent effect on the exercise of freedom of assembly in general.[38]

Non-governmental organisations are of the opinion that the basic legal legislation regulating the right to peaceful assembly and demonstration, the Law No. 2911, and especially regulations such as venue bans, the notification obligation, demonstrations deemed "unlawful", or peaceful demonstrations easily becoming "illegal" because they do not meet the local form requirements, the dispersal of unlawful demonstrations; fines, arrest warrants and imprisonment sentences based on these regulations; legal regulations regarding the unlawful use of force and tear gas by security forces during meetings and demonstrations are incompatible with the Article 11 case-law of the ECtHR.

The Government, on the other hand, does not propose any amendments concerning the Law No. 2911. The Government further claims that there is no restriction on the exercise of this right, stating that the use of tear gas in closed areas is prohibited with the Directive of the Ministry of Interior on the Procedures and Principles of Action of Personnel Assigned in Public

---

[33] Demir and Baykara v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-5500

[34] Özbek and others v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37224

[35] Cumhuriyet Halk Partisi v. Turkey, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37118

[36] HADEP and Demir v. Turkey, Türkiye Birleşik Komünist Partisi v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37156

[37] Ataman v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-37415

[38] Abdullah Yaşa and Others v. Turkey, no. 44827/08, 16.072013; İzci v. Turkey, no. 42606/05, 23.07.2013; Ataykaya v. Turkey, no. 50275/08, 22.07.2014; and Süleyman Çelebi and Others v. Turkey, no. 37273/10, 24.08.2016.

Incidents, which was amended in 2020. According to the Government, objectives such as reviewing the "relevant legislation and practice" in order to protect the right to peaceful assembly and demonstration by taking into account international standards, and reviewing the secondary legislation regarding the intervention in the same way were added to the Human Rights Action Plan dated March 2021. Moreover, after 2016 (after issuing the Circular referred in the Ataman Group Case), the rate of intervention in peaceful meetings and demonstrations decreased from 2% to 0.7% and 0.8%; and for example, 268 interventions took place in 2020 with an intervention rate of 0.8%.

The last meeting of the Committee of Ministers on Ataman group cases was held on 14-16 September 2021[39] and there were 20 cases pending at this date. By taking into account the opinions of the non-governmental organisations, the Committee reiterated its call for an amendment in the Law No. 2911 in consideration of the case-law of the ECtHR, as it has done for the last 14 years. According to the Committee, while the judgments of the Constitutional Court and the Human Rights Action Plan are positive developments, they are not the alternatives that meet the need for legislative amendments.

According to the Committee, the circular dated 2016 on tear gas should be revised as the relevant Circular does not cover the use of tear gas in closed areas or include any requirement to make medical care available in the vicinity in case of tear gas use. Support of experts from the Council of Europe was offered to make such revisions. A detailed analysis was requested on the minutes or reports written by law enforcement units after the intervention in accordance with this Circular, on how these reports are followed up and whether there are any inquiries into law enforcement units or superiors who ordered the intervention, what steps were taken to ensure accountability, and the existence of independent, impartial and effective procedures in the context of the intervention in peaceful assemblies and demonstrations and the dispersal of the demonstrations.

Although the statistics on the meetings and demonstrations intervened since 2015 have been presented by the Government, according to the Association for Monitoring Equal Rights, this data does not allow for a sound analysis since they are disaggregated and not comparable. According to the data of the Association, at least 552 interventions took place in 2020 alone. For this reason, the Committee requested disaggregated data on peaceful meetings and demonstrations intervened in the last five years, the subject and purpose of these demonstrations, the equipment used during the intervention and dispersal, the number of persons subjected to criminal and administrative proceedings due to the violation of the Law No. 2911, with the demonstrations intervened based on the allegation of the opposition to the Law No. 2911.

The Government was given time until June 2022 the latest to submit this information to the Committee. The Committee decided to continue the examination of the Ataman Group cases in March 2023 and announced that it will take an interim decision in the next review, unless the law is amended by this date.

[39] Decision taken at the session on 14-16 September 2021, https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1411/H46-38E

***Işıkırık Group**:*

Işıkırık Group cases, on the other hand, are cases regarding the punishment of people who have participated in peaceful meetings and demonstrations as members of a criminal organisation or as individuals who commit crimes on behalf of the organisation knowingly and willingly, although they are not members of the organisation, pursuant to Articles 220/6 and 220/7 of Turkish Penal Code[40]. Due to the unpredictable application of the relevant articles of the law by local courts in these cases, the ECtHR held that, the requirement that interferences with the right to assembly and demonstration should be prescribed by law, was violated.[41]

Although non-governmental organisations and the Committee of Ministers have noted that no progress has been made in establishing an adequate legal framework to remedy the violation, and on the contrary, the legislation is being implemented more and more arbitrarily and vaguely to punish individuals, the Government in its responses has simply argued that the amendments in 2013 are sufficient, that no further changes are necessary and that judicial practices continue to be in line with the Convention.

The Committee of Ministers, in its session on 7-9 June 2021[42], stated that the main problems identified by the ECtHR regarding the Işıkırık group and regarding Articles 220/6 and 220/7 of Turkish Penal Code could not be resolved with new legal amendments, and that the decisions given by the local courts were not sufficient to solve this problem. Therefore, the Committee stressed the need for local authorities and courts to find a more comprehensive legislative solution without further delay.

The Committee requested statistics or information from authorities on how many individuals had been investigated, prosecuted and sentenced under Articles 220/6 and 220/7 of Turkish Penal Code in the last five years, and welcomed the Human Rights Action Plan dated March 2021. It called on the authorities to take more concrete steps to meet the findings of the ECtHR and to present an up-to-date action plan. By taking into account the similarity between the cases in this group and the cases of Öner and Türk group, it announced that it would continue to examine these two groups of cases together in the March 2022 session.

It was learned from this meeting of the Committee that the Constitutional Court would operate the pilot judgment procedure in an application filed under Article 220/6 of Turkish Penal Code. The Constitutional Court published the said pilot judgment on 3 August 2021.[43] The applicant had received a prison sentence for 3 years and 9 months under Article 220/6 of the Turkish

---

[40] Işıkırık v. Turkey group of cases, the opinions of the Government and non-governmental organisations and the decisions of the Committee of Ministers; see: https://hudoc.exec.coe.int/eng?i=004-49517

[41] Among these judgments see Işıkırık v. Turkey, no. 41226/09, 14.11.2017; İmret v. Turkey (no. 2), no. 57316/10, 10.07.2018; Bakır and others v. Turkey, no. 46713/10, 10.07.2018.

[42] Decision taken at the session on 7-9 June 2021, https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1406/H46-34E

[43] Hamit Yakut application, no. 2014/6548, 10.06.2021.

Penal Code for attending the meeting held in front of the political party building. The Constitutional Court adopted the interpretation of the ECtHR and stated that the phrase "crime on behalf of an organisation" was vague and unpredictable and decided that the wording of the article did not meet the condition of “being prescribed by the law”. The Constitutional Court stated that the violation was due to the broad interpretation of this article by the local courts and that the violations would continue as long as there was no amendment in the provisions of this law. The Constitutional Court decided to postpone the examination of applications of the same nature submitted to the Court until 3 August 2021 when the judgment was published in the Official Gazette, held that the examination of new applications that would be submitted after this date would also be postponed for one year from 3 August 2021 and that these structural problems shall be reported to the legislative organ.[44]

By updating the information presented in the previous action plans and adding the Hamut Yakut judgment; the Government submitted a new action plan on 3 January 2022 and claimed that necessary changes were made in the legislation and practice.[45]

Işıkırık group cases were discussed again at the Committee of Ministers session on 8-10 March 2022.[46] The Committee noted with great concern that the statistics and information provided by the Government were inconsistent with the figures provided by other relevant sources and the number of violations found by the Court. The Committee urged the Government to make legislative amendments required in the framework of the implementation of the Human Rights Action Plan of 2021 with regard to all of the above for the execution of this judgment group. The Government was invited to submit an updated and consolidated action plan on all of the outstanding questions in these groups of cases until the March 2023 meeting.

Article 18

In the aftermath of the Second World War, the ECHR was designed by states, including those governed by totalitarian regimes, to protect the democratic and pluralistic political structure and strengthen the values such as human rights, rule of law and democracy. Article 18 was included in the Convention with a view to prohibit the restriction of the rights and freedoms, guaranteed under the Convention, for any purpose other than those envisaged by the Convention.

Europe has been experiencing the biggest and most serious crisis since the Cold War era as leaders, who adopt a radical rhetoric that endanger pluralist democracy in Europe; consider the justice system, the press and the opposition as “enemy of the people”; weaken or worse, destroy checks and balances mechanisms by controlling the opposition, media outlets and the judiciary that should be independent; and subject dissidents, especially politicians, journalists, academics, non-governmental organisations and human rights defenders to "judicial harassment".[47] These developments have led to an increase in applications raising issues under Article 18 of the Convention and has led the Court to find further violations under this article.

[44] Hamit Yakut application, para. 131-134.
[45] Government’s action plan, 03.01.2022, https://hudoc.exec.coe.int/eng?i=DH-DD(2022)34E
[46] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5c3c2
[47] Secretary General Thorbjørn Jagland: “Europe in biggest human rights crisis since Cold War”, 16.04.2014, https://www.coe.int/en/web/secretary-general/news-2014/-/asset_publisher/EYlBJNjXtA5U/content/selon-le-

The number of applications, which have found a violation of Article 18 so far, is 21. Among these applications, two judgments under Article 18 have been delivered against Turkey: Osman Kavala v. Turkey[48] and Selahattin Demirtaş v. Turkey (no. 2 – Grand Chamber) judgments.

In the Osman Kavala v. Turkey judgment, the ECtHR stated that the pre-trial detention of businessperson and human rights defender Osman Kavala due to his legitimate human rights activities violated the right to liberty and security and that this detention was aimed at silencing and punishing human rights defenders. In the application regarding the detention of Selahattin Demirtaş, the former co-chairperson of the People's Democratic Party (HDP), the applicant was detained under Article 314 of Turkish Penal Code, after his parliamentary immunity was lifted in violation of the Constitution, for his actions and statements which fell within the scope of freedom of political expression as an opposition deputy, hence the legality requirement for his detention was not met. The ECtHR decided that Demirtaş's right to liberty and security, freedom of expression and right to free election were violated, and concluded that this detention aimed to stifle the political debate and pluralism in Turkey.

In the Demirtaş judgment, the Grand Chamber also made important observations regarding the crisis in the independence of the judiciary and the rule of law in Turkey. The Grand Chamber noted its findings on the independence of the judicial system in Turkey, in particular with regard to the Council of Judges and Prosecutors. The Grand Chamber stated as follows: "the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters.".[49]

In both cases, the ECtHR requested the immediate release of the applicants under Article 46 of the Convention. Kavala and Demirtaş have not been released at the time of the writing of this report and similar tactics were deployed by the Government to prevent the implementation of both these judgments. While both applicants were to be released, they were detained for the second time, based on the same facts and evidence as the subject matter of the ECtHR judgment, but under different criminal charges. In addition, the Kavala case was merged with another unrelated case. In other cases, under which Demirtaş was tried, prison sentences were given, which could prevent him from being a member of the parliament again. Thus, not only were the cases brought against the applicants rendered more complicated, but it was also made impossible for the applicants to be released.

In order to prevent the applicants from being released and to remove the judgments of the ECtHR from the monitoring of the Committee of Ministers, the Government claimed that Kavala and Demirtaş were released in the cases subject to the ECtHR judgment, that there was

---

secretaire-general-thorbj-rn-jagland-les-droits-de-l-homme-en-europe-connaissent-une-crise-sans-precedent-depuis-la-guerre-froide; Commissioner for Human Rights Nils Muižnieks, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, 15.02.2017, https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-turkey/16806f1ae2, para. 65; Guido Raimondi, "Solemn hearing for the opening of the judicial year of the European Court of Human Rights: Opening speech by President Guido Raimondi", 25.01.2019, https://www.echr.coe.int/Documents/Speech_20190125_Raimondi_JY_ENG.pdf, p. 5.

[48] Kavala v. Turkey, no. 28749/18, 10.12.2019.

[49] Selahattin Demirtaş v. Turkey (no. 2), GC, para. 434.

no ECtHR judgment regarding the files under which they were currently detained, that they were tried based on different evidence and accusations in these cases, and that therefore, the ECtHR judgments had been implemented.

Taking into account the Rule 9.1 and 9.2 submissions made by applicants and non-governmental organisations, the Committee of Ministers did not find these arguments of the Government convincing. The Committee stated that the second detentions of Kavala and Demirtaş were continuations of their first detention and that this was intended to deprive the applicants of their freedom for political reasons (and for Demirtaş, to also remove him from the political scene). It reiterated its call for the immediate release of Kavala and Demirtaş.

The Committee also requested that the individual applications for the second detention of Kavala and Demirtaş be resolved promptly by the Constitutional Court in accordance with Article 5/4 of the Convention and in line with the case-law of the ECtHR.

On 29 December 2020, despite the final and binding judgment of the ECtHR and the public calls of the Committee of Ministers, the Constitutional Court decided -with a majority of 8 votes to 7- that the right to liberty and security of Kavala guaranteed under Article 19 of the Constitution was not violated.[50] The ECtHR's criticisms towards the Constitutional Court in the Kavala judgment were also not taken into account by the Constitutional Court in this new judgment. The Constitutional Court examined Osman Kavala's application for his first detention on 22 May 2019, announced the relevant judgment on 23 May 2019, and published its reasoned judgment in the Official Gazette on 28 June 2019. The ECtHR decided that the Constitutional Court did not examine the application speedily under Article 5/4 of the Convention, and implicated the ground for the judgment to be published in one month and five days after the judgment.[51] Notwithstanding, the Constitutional Court issued its judgment on Kavala's second detention on 29 December 2020, and published its reasoned judgment on 23 March 2021, almost three months after the judgment.

No judgment has been made since 7 November 2019 regarding Demirtaş's application regarding his second detention.

In terms of general measures, the Committee invited the authorities to provide information on future action plans, drawn up by the relevant Council of Europe standards, regarding measures envisaged to strengthen the Turkish judiciary against any interference and to ensure its full independence. The Government stated that the Court did not identify any systemic or structural problems regarding the independence of the judiciary and that the steps regarding judicial reform had been taken in the action plan, in particular the Eleventh Development Plan and the Third Judicial Reform Strategy.

However, the Committee found these action plans insufficient to address the systemic problems identified by the ECtHR regarding the protection of the judiciary from the undue influence of the executive organ; and encouraged the Government to take steps in order to ensure the independence of the judiciary, particularly from the executive organ, inspired by the relevant

[50] Mehmet Osman Kavala application (no. 2), GA, no.2020/13893, 29.12.2020.
[51] Kavala v. Turkey, para. 185.

Council of Europe standards, especially regarding the structural independence of the Council of Judges and Prosecutors, and in order to strengthen the freedom of political debate.

As the changes made in the action plan were not sufficient, this call was left unanswered and Kavala and Demirtaş continued to be targeted by senior state officials as "murderer", "terrorist", "supporter of Soros".

As the applicants' insistence on their release was not met, the Committee decided to initiate an infringement procedure against Turkey in Osman Kavala's case on 2 February 2022 in accordance with Article 46/4 of the Convention.[52]

The Committee made an official warning to Turkey on this matter on 2 December 2021 and gave a deadline for Kavala's release until 19 January 2022. Kavala's continued detention was regularly followed up by the Committee on a weekly basis, state parties were asked to keep this issue on the agenda and to call on Turkish authorities. Turkey was warned each time that all necessary steps would be taken to ensure the implementation of the ECtHR judgment. Despite eight decisions and two interim decisions taken by the Committee, Kavala was not released. Neither were other individual and/or general measures taken to remedy the violation in line with the ECtHR judgment. This resulted in the Committee "complaining" about Turkey to the ECtHR.

Thus, after Azerbaijan, Turkey became the second Council of Europe member state that was referred to the ECtHR for not implementing its judgments. The ECtHR, with its brief press statement on 23 February 2022, announced that the case would be handled by the Grand Chamber of the ECtHR and that the Committee of Ministers, the Government and the applicant were given time until 19 April 2022 to submit their written observations.[53]

The Ilgar Mammadov v. Azerbaijan case was when infringement proceedings were carried out for the first time in the history of the Council of Europe. Mammadov had been arrested on 4 February 2013 and the first ECtHR judgment about Mammadov was given on 22 May 2014.[54] Due to the non-implementation of this judgment, infringement proceedings were initiated against Azerbaijan on 11 December 2017, and Mammadov was released on 13 August 2018. On 29 May 2019, the ECtHR decided that there had been a violation of Article 46/4 of the Convention.[55] It can be observed that more than six years had passed since Mammadov had been placed in unlawful detention for political reasons, and it took approximately 1.5 years for the ECtHR to deliver its judgment.

Since Ilgar Mammadov's case was a first for the Council of Europe and the ECtHR in every sense, the principles regarding the application of Article 46/4 had to be determined, hence the reason the judgment took a long time. However, now that the Court has established the relevant

[52] Committee of Ministers, Interim Resolution CM/ResDH(2022)21, Execution of the judgment of the European Court of Human Rights Kavala against Turkey, 02.02.2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a56447
[53] European Court of Human Rights, Infringement procedure to be applied by Court in case of Kavala v. Turkey, 23.02.2022, https://t.co/tDx8EU8mkt
[54] Ilgar Mammadov v. Azerbaijan, no. 15172/13, 22.05.2014.
[55] Ilgar Mammadov v. Azerbaijan, (46/4), no. 15172/13, 29.05.2019.

principles, it is vital that Osman Kavala's case is decided immediately so that this unlawful situation does not linger on any further.

If the ECtHR decides that its judgment regarding Osman Kavala has not been implemented and that there has been a violation of Article 46/4 of the Convention, the case will again be brought before the Committee of Ministers. This will mean that there will be two cases pending before the Committee of Ministers: the first judgment of the Court on the initial violation and the new judgment concerning the non-execution of first violation judgment.

If Turkey fulfils the requirements of the first violation judgment, it is expected that the Committee of Ministers will close its examination of the case. If Osman Kavala is not released, the Committee of Ministers will be able to take a series of sanctions under Article 8 of the Statute of the Council of Europe, from suspending Turkey's right to vote to the expulsion of Turkey from the Council of Europe.

The ECtHR and the Committee are of the opinion that the state has been determined to have acted in bad faith with the judgment of violation of Article 18, for this reason, the release of the applicant alone will not be sufficient. In order to ensure *restitutio in integrum*, in accordance with the "results and spirit of the judgment"[56], it is necessary to eliminate all other negative consequences that the applicant has been subjected to, such as arrest, imprisonment, the registration of the sentences in the criminal record, travel bans, confiscation of bank accounts, the prohibition of standing as a parliamentary candidate in elections and the inability to register to the bar association as a lawyer. In addition, remedies such as amnesty or retrial must be applied and the applicant must be acquitted.

The decision to initiate infringement proceedings is a decision with serious legal and political consequences. It is also an indication that Turkey has clearly moved away from the Council of Europe values such as the protection of human rights, the rule of law and democracy. It is essential to put an end to ongoing violations, to end judicial harassment of dissidents through criminal law, and to re-establish the independence of the judiciary and the rule of law so that similar violations are not repeated in the future.

Conclusion

The implementation of judgments is primarily the responsibility of the relevant state. The more willing the state is to implement the judgment, the shorter and easier the process will be, and similar violations will be prevented from occurring in the future.

Unfortunately, there is a very challenging environment for the implementation of the ECtHR judgments in Turkey. As a result, an important task falls on the applicants and non-governmental organisations.

Although lawyers and non-governmental organisations in Turkey are very knowledgeable and experienced in individual applications to the ECtHR, there has been less interest in the implementation phase of judgments. The facts that applicants find it sufficient that the ECtHR has issued a judgment, that the submissions to the Committee must be in English and/or French;

[56] Ilgar Mammadov v. Azerbaijan, (46/4), para. 149, 153, 195.

that this process will take years and is often followed by counsels free of charge, and reasons such as the lack of knowledge and experience in the submission procedure to the Committee of Ministers, the workload of lawyers and non-governmental organisations and the lack of human resources, have all prevented the involvement in the process before the Committee.

Submissions submitted by lawyers and non-governmental organisations prevent the Committee from adopting decisions based solely on the data provided by the Government and thereby closing the case, and enables a more qualified and faster examination of cases.

However, with high-level state officials calling on the judiciary not to implement the Constitutional Court and ECtHR judgments, and the resistance against the implementation of the ECtHR judgments finding that Kavala and Demirtaş were detained for political reasons and that holding that they must be immediately released, have led lawyers and non-governmental organisations to participate more actively in this process. Thus, it has been understood that ensuring the implementation of the judgment is at least as important and necessary as taking a violation judgment from the Court.

At this point, attitudes of the local courts and the Government should also be taken into account alongside lawyers and non-governmental organisations. As explained above, many judicial packages and action plans were introduced by the Government in order to implement the ECtHR judgments and the legislation was amended many times. However, these changes were generally not favourable to solve the problem, and judges and prosecutors continued to deliver decisions contrary to the case-law of the ECtHR.

It is useful to mention the Constitutional Court in particular. Although the Committee of Ministers welcomed the judgments delivered by the Constitutional Court regarding the above-mentioned case groups, the Constitutional Court is also a part of the crisis of non-implementation of the ECtHR judgments.

In this context, the most important problem is that the growing gap between the Constitutional Court and the ECtHR case-law. Especially since the coup attempt in Turkey, dissidents have been subjected to judicial harassment by the judiciary under the influence of the political climate. The investigation, prosecution and punishment of dissidents for political reasons have been and continue to be brought before the Constitutional Court. However, it takes a long time for judgments to be delivered in these applications, although they must be examined primarily and speedily.

Moreover, many applications have been brought before the Constitutional Court, where the applicants had been detained pursuant to unpredictable articles of law, due to their professional and political activities such as news articles, press statements, interviews which fell within the scope of the freedom of expression and association, and on the basis of evidence that do not constitute evidence "capable of raising a reasonable suspicion that the person might have committed a crime". The applicants claimed that their right to liberty and security and/or freedom of expression and association have been violated. The Constitutional Court either found these applications inadmissible for being manifestly ill-founded or found that there has been no violation of rights. In contrast, the ECtHR evaluated these as serious violations by the

ECtHR. With regard to at least 30 applications rejected this way by the Constitutional Court[57], a violation judgment was given by the ECtHR and this disparity was heavily criticized[58] by the Council of Europe Commissioner for Human Rights.

While the Constitutional Court has the power and the ability to identify the political reasons behind these interventions which aim to silence and punish dissidents, it refrains from examining these complaints. Contrary to the ECtHR, it has made no examination under Article 18 of the Convention so far.

While the Constitutional Court rightfully reacts strongly when its own judgments are not implemented, when the ECtHR judgments regarding politically motivated detentions are not implemented, it takes up a position that feeds into this rule of law crisis. For example, in the Yıldırım Turan decision, the Constitutional Court stated that the Turkish courts were in a much better position than the ECtHR in the interpretation of the provisions of the law in Turkish legal system and for the first time, it clearly stated that it might not implement the ECtHR judgments.[59] This decision was also criticized by Robert Spano, the President of the ECtHR.[60] This attitude of the Constitutional Court continued in the ECtHR judgments of Osman Kavala and Selahattin Demirtaş, which were not implemented. Despite the clear and binding ECtHR judgments and the Committee of Ministers decisions, the Constitutional Court did not find any violation of rights in Osman Kavala's application, and it has still not decided on Selahattin Demirtaş's application.

The pilot judgment procedure, which detects that there is a structural and systematic problem, is also applied in a way that reinforces these problems, not eliminate them. Not only in the abovementioned Hamit Yakut application, but also in other applications chosen as pilot judgments, the Constitutional Court has preferred to postpone the examination of the applications that have come or will come before it for a period of one year and has referred the problem to the Parliament. The Constitutional Court could instead deliver judgments finding a violation and ordering compensation in these applications and could ensure that the violations are eliminated with retrials, thereby preventing the accumulation of these applications before the Constitutional Court.

These decisions and legislative changes may lead to some changes in practice, but these steps will not be sufficient for a fundamental change without harmonizing the Constitutional Court's case-law with that of the ECtHR, ensuring the independence of the judiciary and a fundamental change in the approach of the legislative, executive and judiciary powers towards human rights violations.

---

[57] see Mehmet Altan v. Turkey, Şahin Alpay v. Turkey, Osman Kavala v. Turkey, Selahattin Demirtaş v. Turkey (no. 2), Sabuncu and others v. Turkey (Except Kadri Gürsel and Turhan Güney), Ahmet Şık v. Turkey (no. 2), Atilla Taş v. Turkey, Ahmet Hüsrev Altan v. Turkey, Murat Aksoy v. Turkey, Öğreten ve Kanaat v. Turkey, Bulaç v. Turkey, Akgün v. Turkey.

[58] https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e, p. 24-27.

[59] Yıldırım Turan application, no. 2017/10536, 04.06.2020, para. 117.

[60] Robert Spano, Human Rights Lecture at the Justice Academy of Turkey "Judicial Independence - The Cornerstone of the Rule of Law", 03.09.2020, https://echr.coe.int/Documents/Speech_20200903_Spano_Justice_Academy_Ankara_ENG.pdf

Due to the above-mentioned reasons:

The Government of the Republic of Turkey: Steps must be taken to ensure the rule of law and the independence of the judiciary, judicial harassment must be ended.

Judgments of the Constitutional Court and the ECtHR must be implemented undisputedly and promptly, any negative consequences caused by the judgments should be eliminated, and the calls for non-implementation of the judgments must be stopped.

Legislation and practice must be aligned with the international legal standards in line with the case-law of the ECtHR and the decisions of institutions such as the Committee of Ministers, the Venice Commission and the Human Rights Commissioner.

Statistics of human rights violations must be kept and these data should be shared with the public and with relevant institutions.

Competent authorities, especially security forces, public prosecutors and judges, must receive trainings regarding the judgments of the Constitutional Court and the ECtHR. A disciplinary investigation must be initiated against public prosecutors and judges, who do not implement the judgments of the Constitutional Court and the ECtHR. With regard to judgments awarding a compensation, the State should have recourse against prosecutors and judges.

Public prosecutors and judges: Decisions should be delivered in line with the judgments of the ECtHR and the Committee of Ministers. Judicial or administrative harassment that will have a deterrent effect, such as initiating an investigation, filing a lawsuit, imposing a sanction that deprives individuals of their liberty, adjourning prison sentences or deferring the pronouncement of the verdict, due to an expression or action based solely on the expression of thought, should be avoided (as long as it does not incite violence and does not contain hate speech).

Constitutional Court: Especially in applications related to the right to liberty and security and the freedom of expression, the case-law should be aligned with the case-law of the ECtHR and applications must be decided on speedily. By making a change in the pilot judgment procedure, judgments must be delivered automatically in applications that have been or will be brought before the Constitutional Court, without waiting for the Parliament to make a legal amendment on the issue.

ECtHR and the Committee of Ministers: The applications of individuals subjected to judicial harassment with the abuse of criminal laws should be examined as a priority. The judgment should clearly state the options to remedy the consequences of the violation. The case regarding the infringement proceedings, initiated due to the non-implementation of the ECtHR judgment, should be decided on immediately; and the unlawfulness, which continues for political reasons, must be ended. The Committee of Ministers should increase its pressure on Turkey to implement the binding judgments of the ECtHR and, if necessary, initiate infringement proceedings.

Applicants and Lawyers: By taking into account the possibilities that may be encountered in the event of a violation judgment, requests should be made from the moment the application is

made to the ECtHR to ensure that the final judgment of the Court indicates individual and/or general measures, which may be requested before the Committee of Ministers. For example, the ECtHR's failure to explicitly state in its decision that the applicant should be released, may lead to a discussion between the Government and the Committee of Ministers about the consequences of the decision.

In order for individual and especially general measures to be implemented, an effective and persistent follow-up should be made, and the developments should be reported to the Committee of Ministers quickly and regularly within the period of time. The judgments and decisions of the ECtHR and the Committee of Ministers should be submitted to the relevant local courts and the competent authorities, and it should be requested for the necessary actions to be taken.

It is necessary to act in cooperation with non-governmental organisations that will make Rule 9.2 submissions and especially maintain contact with international human rights organisations.

National and international non-governmental organisations and human rights organisations: Increasing cases of oppression and judicial harassment should be followed. Human rights violations should be reported in a way that analyzes local court decisions, including the decisions of the Constitutional Court, provides statistical data, and reveals structural and systematic problems and general pattern.

Trainings should be organized on reporting to the Committee of Ministers and following the process in a qualified manner. The applications before the Committee of Ministers must be submitted with Rule 9.2 notifications/submissions, in cooperation with the lawyers.