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Research Article

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# The Impacts of the Turkish Constitutional Court's Individual Application Judgments about the Right to Fair Trial on Criminal Proceedings

## *Türkiye Cumhuriyeti Anayasa Mahkemesinin Adil Yargılanma Hakkına İlişkin Bireysel Başvuru Kararlarının Ceza Yargılamaları Üzerindeki Etkisi*

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**ABSTRACT**

This paper pursues the purpose of giving insight to researchers and jurists, especially non-Turkish ones, about the progress of the individual application to the Turkish Constitutional Court. The individual application was introduced into the Turkish legal system by the 2010 constitutional amendments, and it started to function on 23 September 2012. Article 148 of the Constitution states that everyone may apply to the Turkish Constitutional Court on the grounds that one of the fundamental rights and freedoms under joint protection of the Constitution and the European Convention on Human Rights has been violated by public authorities, after having exhausted ordinary legal remedies. With the amendments, a new era started in the Turkish law system. First, the official statistics of individual applications published by the Turkish Constitutional Court will be analyzed. Later, Turkish Constitutional Court's individual application judgments about the right to a fair trial, which carries great importance due to having the largest number of judgments of violation given by the Turkish Constitutional Court, will be evaluated. Lastly, views about the impacts of the Turkish Constitutional Court's judgments about the violations of rights on the criminal procedure will be examined.

**Keywords:** Individual application, Turkish Constitutional Court, fair trial, criminal procedure

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## 1. Introduction

The right to Individual Application to the Turkish Constitutional Court entered into the Turkish judicial system with legislation no. 5982 dated 12 September 2010 through the amendments made in articles 148 and 149 of the Turkish Constitution. With the amendments, a new era started in the Turkish law system. Following these amendments, according to the provisions of article 149 of the Constitution, a new law entitled "Code on Establishment and Rules of Procedures of the Turkish Constitutional Court" ("Code No. 6216") was enacted on 30 March 2011.[1]

With the possibility of Individual Application to the Turkish Constitutional Court, constitutional judicial control against the violations of rights caused by individuals and institutions who use public force began on 23 September 2012. Since then, everyone can apply individually to the Turkish Constitutional Court with allegations of violations made by public force on any fundamental rights and freedoms protected with the Turkish Constitution covered by the European Convention on Human Rights. Article 148 of the Constitution states that everyone may apply to the Turkish Constitutional Court on the grounds that one of the fundamental rights and freedoms under joint protection of the Constitution and the European Convention on Human Rights has been violated by public authorities, after having exhausted ordinary legal remedies.[2]

Individual Application to the Turkish Constitutional Court regulated in the Constitution of the Republic of Turkey was modeled on the Individual Application to European Court of Human Rights.

The European Court of Human Rights was signed on 4 November 1950 in order to protect and improve fundamental rights and freedom. The Grand National Assembly of Turkey approved it through Code no. 6366 dated 10 March 1954 and it became valid in the context of Turkey after the certificate of ratification was submitted to the Secretary-General of the Council of Europe on 18 May 1954. The resolution of the Council of Ministers no:87/11439 with the date 22 January 1987 introduced the right to submit an individual application to the European Commission on Human Rights and with resolution number 89/14563 dated 25 September 1989, Turkey recognized

1 Tolga Şirin, *Anayasa Mahkemesi Kararları Işığında Bireysel Başvuru Hakkı,* (On İki Levha Yayıncılık, İstanbul, 2015) 11.

2 Ferhat Uslu, *Anayasa Yargısı*, (2. Ed., Adalet Yayınevi, Ankara, 2018) 98.

the compulsory juridical power of the European Court of Human Rights. Therefore, Turkey accepted the responsibility to ensure the security of fundamental rights of the individuals under its juridical power to submit an application to an international tribunal that has the power to render legally binding judgments if found a violation.[3]

The protection of the fundamental rights and freedoms secured with the convention is possible with the proper execution of the judgments of the violation rendered by the European Court of Human Rights in domestic law. Failing the proper execution of the European Court of Human Rights' violation judgments in domestic law indicates that the fundamental rights and freedoms protected by the convention could not be protected in practice efficiently. In this respect, a judgment of violation given by the European Court of Human Rights is accepted, with the Turkish Code of Criminal Procedure, as a valid reason to holding a retrial to ensure effective protection of the fundamental rights and freedoms both in theory and in practice.[4]

It is the duty of the Turkish Constitutional Court to analyze the allegations of a violation of the fundamental rights and freedoms protected with the Turkish Constitution listed in the Convention, which has the power of examine through an individual application. Any acceptance towards the contrary would not be compatible with the objective of the Constitution which projects effective protection through the procedure of individual application mechanism of the fundamental rights and freedoms protected with both the Constitution and the Convention. For this reason, whether a violation judgment given by the European Court of Human Rights was properly executed or not must be examined by the Turkish Constitutional Court. Nevertheless, this kind of examination made by the Turkish Constitutional Court will not include a re-examination of the events but will be limited to the question of whether the judgment of violation rendered by the European Court of Human Rights has been properly executed.[5]

As a necessity of the complementary element of the individual application procedure, interpretation and implementation of the legislation are the duty of the inferior courts; nonetheless, it is only natural for the Turkish Constitutional Court to have juridical power to assess if the influence of this interpretation and practices are consequent with

3 Şeref Gözübüyük / Feyyaz Gölcüklü, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması: Avrupa İnsan Hakları Mahkemesi İnceleme ve Yargılama Yöntemi*, (11. Ed., Turhan Kitabevi, 2016) 300.

4 Yeşim Çelik, *Türk Hukukunda Bireysel Başvuru ve Anayasa Mahkemesi Uygulaması,* (Adalet Yayınevi, Ankara, 2016) 117.

5 Kemal Gözler, *Türk Anayasa Hukuku*, (3. Ed., Ekin Yayınevi, Bursa, 2019) 1042.

the fundamental rights and freedoms protected by the Constitution and the Convention together.[6]

Judgments of the Turkish Constitutional Court are final. No law can be in conflict with the Turkish Constitution. The Turkish Constitutional Court is given the power to interpret the Constitution and to invalidate the laws which are contrary to the Constitution. The decisions of the Court bind legislative, executive and judicial organs, administrative authorities and persons and corporate bodies.[7]

In individual application cases, the Turkish Constitutional Court decides whether the fundamental rights of the applicant have been violated or not. If it finds violation, it may also decide what should be done in order to redress the violation and its consequences.[8]

In case the violation has been caused by a court decision, the Turkish Constitutional Court sends the file to the competent court for retrial in order to restore the fundamental rights of the applicant. If the Turkish Constitutional Court deems that a retrial will be of no use , then it may decide on compensation for the applicant or it may ask the applicant to file a case before the competent first instance court to seek compensation for the damages s/he suffered.[9]

This paper pursues the purpose of giving insight to researchers and jurists, especially non-Turkish ones, about the progress of the individual application to the Turkish Constitutional Court.

First, the official statistics of individual applications published by the Turkish Constitutional Court will be analyzed. Later, Turkish Constitutional Court's individual application judgments about the right to a fair trial, which carries great importance due to having the largest number of judgments of violation given by the Turkish Constitutional Court, will be evaluated. Lastly, views about the impacts of the Turkish Constitutional Court's judgments about the violations of rights on the criminal procedure will be examined.

6 Philip Kunig, "Hukuk Düzeninin Gelişiminde Aktör Olarak Anayasa Mahkemeleri – Almanya Deneyimleri", In Philip Kunig & Adem Sözüer (Eds.), *Alman Anayasa Mahkemesinin Bireysel Başvuruya İlişkin Temel Kararlarının Tercümesi Projesi,* (Çiğdem Vardar tr, On İki Levha Yayıncılık, İstanbul, 2020) 8; Seyithan Kaya, *Anayasa Yargısı ve Bireysel Başvuru*, (Adalet Yayınevi, Ankara, 2018) 116.

7 Korkut Kanadoğlu, *Anayasa Mahkemesi'ne Bireysel Başvuru,* (On İki Levha Yayıncılık, İstanbul, 2015) 264.

8 Ramazan Gümüşay, *Anayasa Mahkemesi'ne Bireysel Başvuru Yolunda İhlal Kararlarının İcrası,* (Adalet Yayınevi, Ankara, 2019) 64.

9 Özcan Özbey, *Türk Hukukunda Anayasa Mahkemesi'ne Bireysel Başvuru Hakkı,* (2. Ed., Adalet Yayınevi, Ankara, 2013) 328.

## 2. Statistics

According to the latest statistics published by the Turkish Constitutional Court, since the legislations concerning the individual application came into force between 23 September 2012 and 31 March 2021, 308,672 individual applications have been made. 85.9% of these applications have been brought to conclusion.[10]

Between the years 2012-2021, only 5.4% of the concluded 265,300 applications, that is 14,204 were concluded with violation of at least one human right. 9,103 of these 14,204 were judgments of the violation, 62.9% of which were the judgments of violation of fair trial. 2,379 of these 9,103 judgments of violation were about the right to a trial within a reasonable time.[11]

2,791 of the applications concluded by the Turkish Constitutional Court with the judgment of violation were concluded with the violation of the right of property, 611 of them concluded with the violation of freedom of speech, 463 of them concluded with the violation of the privacy of private life, 415 of them concluded with the violation of the prohibition of ill-treatment, 249 of them concluded with the violation of freedom and security of individuals, 22 of them concluded with the violation of the presumption of innocence, 14 of them concluded with the violation of the legality of crime and punishment.

## 3. Right to Trial within Reasonable Time

Right to trial within reasonable time is under the protection of article 36 of the Constitution as an implicit part of a fair trial. Within the number of judgments of violations in relation to the judgments of individual application, the majority belongs to the right to a fair trial. The majority of the judgments about the violation of the right to a fair trial are related to violation of the right to trial within reasonable time.

While determining the criminal procedure's duration, the notification of the perpetration allegations by the competent authorities or the date of applicant substantially affected by the measures taken in the context of criminal investigation or proceedings is used as the starting date. The date of final judgment about criminal charges or for the on-going trials, the date of the Turkish Constitutional Court's judgment on the complaint about reasonable time are accepted as the end date.[12]

10 < https://www.anayasa.gov.tr/media/7410/bb_istatistik_2021-1.pdf > accessed 10 May 2021.

11 Violation of more than one right or freedom can be concluded with a single application.

12 Ebru Karaman, *Karşılaştırmalı Anayasa Yargısında Bireysel Başvuru Yolu*, (On İki Levha Yayıncılık, İstanbul, 2013) 35.

During the evaluation of reasonability of the criminal procedure's duration the complexity and the levels of the proceedings, the stance of parties and concerned authorities during the proceedings and the quality of the applicant's interest in the speedy conclusion of the proceedings will be taken into consideration.[13]

In the case of *Yusuf Karakuş*, operations against the terrorist organization Hezbollah by the Istanbul Security Directorate took place on 17 January 2000. During the operation carried out in a house by the officers, the leader of the organization was captured dead and many hard disks which contained information about the organization were obtained. The applicants were captured on 6 May 2000 within the scope of the investigation initiated upon information in the operation. The applicants were sentenced to imprisonment by virtue of the judgment of Ankara State Security Court No.2 (*Ankara 2 Numaralı Devlet Güvenlik Mahkemesi*) on 7 January 2002. Two of the applicants, Mehmet Şahin and Yusuf Karakuş were sentenced for their membership of an armed gang aiming to change the constitutional order by force of arms. The other applicant, named Hasan Kılıç, was sentenced for the leadership and having authority over the armed group. Said decision and the decision dated 28 July 2005 made public by Ankara 11th Assize Court (*Ankara 11. Ağır Ceza Mahkemesi*) to continue to handle the trial were rendered by the 9th Criminal Chamber of the Court of Cassation (*Yargıtay 9. Ceza Dairesi*). The conviction decision of 17 January 2013 relied on the confessions and assertions of the applicants accusing each other during the stage of the investigation and was upheld by the judgment dated 31 March 2014 of 9th Criminal Chamber of the Court of Cassation (Yargıtay 9. Ceza Dairesi).[14]

In regards to this application, according to the judgment given by the Turkish Constitutional Court, it was not reasonable to have these proceedings last for 13 years 10 months and 25 days in the present case. As a result, the Turkish Constitutional Court concluded that there was a violation of the right to trial within reasonable time guaranteed in article 36 of the Constitution.[15]

In the case of *Dilan Öğüz Canan*; the applicant was a twenty-year-old student at Istanbul University Faculty of Law at the time. An opening ceremony was held at Istanbul Technical University Cultural Centre with the participation of the Prime

13 Berkan Hamdemir, *Anayasa Mahkemesi'ne Bireysel Başvuru*, (Seçkin Yayıncılık, İstanbul, 2018) 241.

14 *Yusuf Karakuş* App no 2014/12002 (AYM, 8 December 2016) paras 7-61.

15 *Yusuf Karakuş* paras 89-90.

Minister and some politicians on 12 September 2008, which was the date of the anniversary of the coup d'etat of 12 September 1980. Including the applicant, a group of students stood in front of the center holding banners and chanting slogans. With the police officers' warning, the group dissolved. After a while, a second group gathered which allegedly did not abide by the warning coming from the police officers and which resulted in the intervention of the officers. The intervention came without any warning according to the applicant, who claimed she was in the second group. A criminal case was opened against eighteen people including the applicant, for organizing and participating in an illegal demonstration march. The criminal case against the applicant was suspended at the end of relevant proceedings, and the applicant was notified of the decision on 28 November 2014. The applicant submitted an individual application to the Turkish Constitutional Court on 29 December 2014.[16]

The Turkish Constitutional Court considered the length of the proceedings in the case that lasted for nearly 6 years and 3 months unreasonable.[17]

It is observed that in the judgments regarding the violation of the right to trial within reasonable time, no decision was made for a retrial.

## 4. The Right to Be Tried by an Independent and Impartial Tribunal

Even though there is no explicit reference to the independence and impartiality of tribunals in article 36 of the Constitution, according to the judicial opinion of the Turkish Constitutional Court, it is a constructive element of the right to a fair trial. In the preamble for adding the notion "the right to a fair trial" to article 36 of the Constitution, it is emphasized that the right to a fair trial, which was protected under the European Convention on Human Rights that Turkey became a party of, has been incorporated into the article 36 of the Constitution. Hence, the right to be tried by an impartial tribunal is set forth by article 6 of the European Convention on Human Rights in plain terms, as an essential element in the right to a fair trial.[18]

When the impartiality and independence of tribunals, being two elements completing each other, were taken into account, due to the principle of constitutional holism, also

16 *Dilan Öğüz Canan* App no 2014/20411 (AYM, 30 November 2017) paras 9-15.

17 *Dilan Öğüz Canan* paras 62-63.

18 Muharrem Özen, "Yargı Bağımsızlığını Zedeleyen Düzenleme, Uygulamalar ve Bağımsızlığı Sağlamaya Yönelik Çözüm Önerileri", *Ankara Barosu Dergisi*, I. 68, 2010 36.

the articles 138, 139 and 140 must be taken into account while qualifying the right to be tried by an independent and impartial tribunal.[19]

While deciding if the tribunal is independent, the way in which a member is assigned and their duration of duty, the security of tenure afforded to judges and their appearance of independence carry importance. Impartiality means lack of bias, prejudice and interest which can influence the settlement of the dispute, in addition to lack of opinion or interest *vis-à-vis,* in favor or against the parties of the case. Impartiality has two aspects, objective and subjective. In this context, both the personal impartiality of the judge and the impression given by the court, as an institution, on an individual must be considered.[20]

The European Court of Human Rights took the status of the military judge on duty and in the office of the State Security Courts (*Devlet Güvenlik Mahkemeleri*) into consideration and gave the judgment of lack of independence and impartiality of these courts. In the following case, *Incal v. Turkey,* the European Court of Human Rights concluded the violation of the right to be tried by an independent and impartial tribunal of the case and other several cases involving the alleged lack of independence and impartiality of the courts. After the judgments, the judgment allowing the military judges to be on duty and in the office of the State Security Court was terminated and the State Security Courts were abolished.[21]

In the case of *Abdullah Altun*, the State Security Court sentenced the applicant to life imprisonment and his sentence became definite with the appellate review given by the Court of Cassation. The applicant lodged an application with the European Court of Human Rights, claiming that he did not receive a trial by an independent and impartial tribunal because of a military judge being on duty. After finding a violation of the right to be tried by an independent impartial court, the indication of a retrial by the European Court of Human Rights was in order to redress the violation, if requested by the applicant. The request for a retrial was made by the applicant, relying on the judgment of violation given by the European Court of Human Rights. However, the request was dismissed by the incumbent assize court with the reason that the necessary legal conditions for a retrial were not met. The applicant objected against the dismissal

19 Hüseyin Turan, "Adil Yargılanma Hakkının İnsan Hakları Avrupa Sözleşmesi'ndeki Yeri ve Önemi", *Türkiye Barolar Birliği Dergisi*, I. 84, 2009 221.

20 Abdullah Çelik, *Adil Yargılanma Hakkı Rehberi*, (Anayasa Mahkemesi Yayınları, Ankara, 2014) 12.

21 *Incal v. Turkey* App no 22678/93, (ECHR, 9 June 1998) para 72.

of his retrial request with the violation judgment of the right to be tried by an independent and impartial tribunal by the European Court of Human Rights. The applicant submitted an individual application to the Turkish Constitutional Court upon the dismissal of his appellate request.[22]

According to the Turkish Constitutional Court in the case of *Abdullah Altun*, the matter which must be discussed by the Court is the allegations made by the applicant requested the conduct of a retrial by the inferior court pursuing the violation judgment of the European Court of Human Rights, within the scope of the right to be tried by an independent and impartial tribunal were analyzed effectively and sufficiently, and if the judgment of violation given by the European Court of Human Rights was properly executed. In brief, it carries great importance that whether the inferior courts resolved the violation which the European Court of Human Rights found in its judgment both as to the applicant's case and the consequence of it. In the case concerning the judgment of violation of the European Court of Human Rights, it is understood that the case was heard by the State Security Court's jury which had a military judge. The only way to redress the case of the applicant in which the European Court of Human Rights found the violation, was the conduction of a retrial by a court that consists of no military judge on duty. But the request of the applicant was denied by the incumbent inferior court with the grounds that the military judge being on duty was appropriate to the procedure. Yet, the European Court of Human Rights indicated in its judgment that the military judge's presence on the trial bench is indeed a reason for the violation, regardless of the conclusion. It was stated that if the applicant requested, in order to redress the violation retrial conduction would be appropriate.[23]

In this sense, it can be seen that the judgment of violation given by the European Court of Human Rights has a bearing on the soundness of the final decision in domestic law and thus forms a noteworthy reason for a retrial conduct. However, inferior court's comment on the related legal provision of the Turkish Code of Criminal Procedure did not correspond with the judgment of the European Court of Human Rights and did not involve an examination to the extent, and with due diligence, as required by article 36 of the Constitution; that the European Court of Human Rights' judgment was not fully executed; and that the violation of the right to be tried by an independent and impartial tribunal could not be redressed. In conclusion, the Court found a violation

22 *Abdullah Altun* App no 2014/2894 (AYM, 17 July 2018) paras 8-26.

23 *Abdullah Altun* paras 43-44.

of the right to be tried by an independent and impartial tribunal because of the failure to execute of the European Court of Human Rights' judgment of the violation, which was contrary to the assurances integral to the said rights.[24]

In the case of *Abdullah Altun*, a violation of the right to be tried by an independent and impartial tribunal was found by the Court. It is understood that the violation was born from the judgment of the Court. Regarding the situation, a legal interest in the conduction of a new trial with the aim of remedying the results of the violation of the right to be tried by an independent and impartial tribunal. The new trial must be conducted with the aim of remedying the violation and its consequences following article 50/2 of Code no:6212 on the Establishment and Rules of Procedure of the Turkish Constitutional Court. Within this scope, first of all, the impugned judgment must be revoked by the inferior courts leading to the violation and finally disclose a new judgment in accordance with the judgment which found a violation. A copy of the judgment must be sent to the relevant court in order to start the new trial afterward.[25]

## 5. The Right of Access to a Court

Article 36 of the Turkish Constitution stipulates that *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."* Within this framework, the practices which make it extremely difficult or impossible to access a court can violate the right to access to a court. Yet the Turkish Constitutional Court has already concluded that, related to the deadlines of bringing an action or applying for legal remedies, these deadlines are a necessity of the principle of legal certainty and do not violate the right to access to the Turkish Constitutional Court unless they are limited to the point that they make it impossible to bring an action. However, because of the improper execution of the deadlines' conditions set forth in the extent of the violation of the law; in case of not being able to use the right to apply for the legal remedies, it violates the right of access to the court.[26]

24 *Abdullah Altun* paras 45-46.

25 *Abdullah Altun* paras 56-57.

26 Ahmet Ekinci, "Anayasa Mahkemesi'nin Bireysel Başvuru Kararlarında Mahkemeye Erişim Hakkı", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi,* V. XVIII, V. 3, 2014 844.; Mesut Aydın, "Anayasa Mahkemesi Kararlarında Hak Arama Özgürlüğü", *Ankara Üniversitesi Siyasal Bilimler Fakültesi Dergisi*, V. LXI, I. 3, 2006 6.

In the case of *Ali Kızıl*, the judgment dated 20 March 2014 of the dismissal of the request for a retrial by the court of first instance (*ilk derece mahkemesi)* can be subjected to an appeal to the criminal court of general (*asliye ceza mahkemesi)* jurisdiction within judicial locality pursuant to the subsection of articles 319 and 321 of the Turkish Code of the Criminal Procedure. However, as a consequence of saying *"appeal pending as a legal remedy"* in the judgment, the applicant was directed to an improper legal remedy. And because of that, the applicant applied for appeal according to the judgment of the court of first instance.[27]

According to the Turkish Constitutional Court evaluation of the application, despite articles 319 and 321 of the Turkish Code of the Criminal Procedure, the applicant assuming that the correct legal remedy is *"application of appeal"* must be considered acceptable within the conditions of the event. During the evaluation of the applicant's request for a retrial, the fact that the applicant was not represented by a lawyer supports the said evaluation. On the other hand, Chief Public Prosecutor's Office of the Supreme Court (*Yargıtay Cumhuriyet Başsavcısı)* accepted the objection to the Chief Public Prosecutor's office of the Supreme Court which stipulated in article 308 in the Turkish Code of the Criminal Procedure with notifying that applicant's letter of the petition was written in order to amend the court's judgment through the new evidence after the evaluation from Supreme Court. The applicant was notified that the legal remedy of objection cannot be applied due to the necessary conditions not being present. In the face of the rejection judgment of a retrial being subjected to the objection to the high court, Chief Public Prosecutor's Office of the Supreme Court could send the applicant's letter of petition to the relevant criminal court of first instance in accordance with the explicit regulation in article 264 of the Turkish Code of the Criminal Procedure. With this, the applicant was forced to endure the consequences of the misdirection in the judgment of the court of first instance and was deprived of the right to access to the criminal court of first instance in order to provide an examination of the rejection of the request for a new trial through objection legal remedy. With the said reasons, it must be decided whether the right to access to the court protected by the article 36 of the Turkish Constitution of the applicant who got deprived of the opportunity to an inspection of the legality of the rejection of a retrial request was violated. The applicant requested a return of the fee they paid for the punishment they were sentenced to and a retrial. The detected violation was born from the judgment of the court of first

27 *Ali Kızıl* App no 2014/9295 (AYM, 25 March 2015) para 38.

instance, the legal interest of the removal of the violation and its consequences, and therefore the judgment of submitting the judgment to the court of first instance in order to do a retrial must be given.[28]

## 6. Right to a Fair Hearing

The judgments of violation in the scope of the right to a fair hearing is the leading judgment of violation among the judgments of violation of fair trial. Turkish Constitutional Court carries out an examination about the sub-elements of the right to a fair hearing, which are the equality of arms, adversarial jurisdiction principle, fundamental rules regarding evidence, the accused defending themselves by participating in the trial or the right to be tried with the help of the defense counsel, right to a reasoned decision and presumption of innocence. In the case of the presence of detected violation, when the use of the impugned items of evidence render a trial as a whole unfair, the Turkish Constitutional Court decides to submit the case to the court of first instance in order to hold a retrial.[29]

In the case of *Yaşar Yılmaz*, the applicant claimed that the search carried out in his residence was not carried out pursuant to the procedure indicated in legal provisions, during the search he, as well as two members of the community council or neighbors, were not present. Hence, according to article 119 of the Turkish Code of Criminal Procedure, if private dwellings, workplaces or properties that are not open to the public are to be searched without the public prosecutor being present, two members of the community council in that district or two neighbors shall be required to be present. The applicant also expressed that his right to a fair trial and the principle of not using the evidence obtained illegally regulated in article 38 of the Constitution was violated and requested the detection and elimination of the violations.[30]

According to the Turkish Constitutional Court, in the present event, usage of the evidence obtained during the execution of the search judgment which was carried out illegally as the sole and determinant evidence damaged the fairness of the trial as a whole. The unlawfulness of the execution of the search judgment violates the trial as a whole in terms of the right to a fair trial. For these reasons, it must be decided whether the right to a fair trial protected by article 36 in the Constitution of the applicant was

28 *Ali Kızıl* paras 39-43.

29 Köroğlu Kaya, *Cezai Konularda Anayasa Mahkemesine Bireysel Başvuru*, (3. Ed., Seçkin Yayıncılık, İstanbul, 2017) 154.

30 *Yaşar Yılmaz* App no 2013/6183 (AYM, 19 November 2014) para 28.

violated. In order to eliminate the violation and its consequences due to a retrial, a copy of the judgment must be sent to the relevant court of first instance.[31]

In the case of *Baran Karadağ*, it was stated by the applicant that he had requested an interpreter from the relevant Court to make his defense in Kurdish. The only evidence against the crimes he was accused with were anonymous witness statements, but his request was not granted, and he claimed the violation of his right to a fair trial defined in the Constitution's article 36 was in order and requested the determination of the violation, pecuniary and non-pecuniary damages to be paid.[32]

According to the Turkish Constitutional Court, to conduct a just trial, under the light of the principle of equality of arms and the principle of the adversarial trial, providing the parties with proper opportunities to state other claims is mandatory. Providing the parties with proper opportunities regarding the presentation of their evidence and having them under examination and including evidence of a witness is a necessity. In this sense, claims of imbalance and unfairness concerning the evidence have to be evaluated under the light of the entirety of the trial. During the criminal procedure, article 6 (3) (d) of the Convention which guarantees the right of the defendant to interrogate the witness against them or have them interrogated and make a request of summoning and hearing the witnesses who are in favor of the defendant as well as the ones against the defendant under the same conditions. Therefore, the claim of the witnesses not being heard made by the applicant must be considered under the light of article 36 of the Constitution and article 6 (3) (d) of the Convention.[33]

Article 6 (3) (d) of the Convention guarantees the criminally charged person with two rights: The right to adversely question the witnesses, which is also known as cross-examining the witnesses against the defendant, the other right is the right to their witnesses being summoned and heard within the same conditions in which the claimant's witnesses were summoned and heard under to ensure the equality of arms. In cases where the identity of the witness is known to the defendant, the witness and their relations may be in danger because of the situation. The witness may have rightful reasons to be afraid of retaliation. Additionally, the confidentiality of the witness' identity must not be considered unimportant. It must be required to take certain measures in the presence of the increase in organized crime. Because of this, it must be considered

31 *Yaşar Yılmaz* para 59.

32 *Baran Karadağ* App no 2014/12906 (AYM, 7 May 2015) para 1.

33 *Baran Karadağ* paras 51-52.

that in case of the confidentiality of the witness, difficulties that are present under normal circumstances during criminal proceedings may be faced.[34]

In the present case, the statements were given by the anonymous witness to the Public Prosecutor and the court during the investigation and prosecution processes, and without notifying the applicant, the court heard the anonymous witness in between the sessions. However, on 5 April 2012 in the third session of the trial at a stage, before the witness was heard, the applicant and his advocate were given seven days for the submission of the matter they wanted to ask to the anonymous witness by the court of first instance. In addition to that on 3 July 2012 when the fifth session took place the statements given by the anonymous witness were read aloud by the court. It was reported by the defendant of the application that the applicant refused the statements of the anonymous witness while the statements of the applicant were seized as: *"It was seen that he spoke in Kurdish; which was not understood."*[35]

In the application, related to the event where an explosion in an electric transformer center and in a tea house took place and a bomb attack blew out the windows of a vehicle of the municipality, it was seen that the judgment was essentially based on the recital of the anonymous witness and the judgment was given with the official records and the statements of the anonymous witness is based on. In other words, it can be understood that it was the statement of the anonymous witness which was the decisive evidence concerning the events. The reason for that is no charges were made on the applicant or another individual until the anonymous witness had made their statement. By considering the statement of the anonymous witness, a connection between the material incidents that occurred, and the applicant has been identified. After the statement of the anonymous witness was established as the decisive evidence, it must be settled whether a procedure that provides balancing assurances has been pursued or not. When it was inspected if the balancing factors were present in the tangible incident or not, it was seen that the trying court gave the accused and his defendant seven days in order to give them time to report the matters they wanted to ask the anonymous witness in order to protect the defendant party's rights, and on 3 July 2012 in the fifth session of the trial, the statements of an anonymous witness were recited in the presence of the parties. All members of the bench were able to observe the reactions of the witness directly since the witness was heard by all of them.[36]

34 *Baran Karadağ* paras 54-57.

35 *Baran Karadağ* para 70.

36 *Baran Karadağ* paras 71-72.

However, because of the absence of both the applicant and its counsel during the determination of the statements of the anonymous witness, they could not have first-hand impressions of their responses to the questions asked to the witnesses. For this reason, the court's attention could not be drawn to the conflicts between the witness' statements. That is to say, the credibility of the anonymous witness could not be tested by the defense through interrogation. The relevant statements of the witness were later read aloud at the hearing at the court of first instance in front the accused (the applicant) and his counsel, and even though what the applicant would say against the statements of the witness was asked of him, this situation can't be considered as an appropriate opportunity to show any objection to the statements of the witness. Even though during the investigation the witness stated that they overheard the applicant perpetrating the related incidents while they were talking to each other, they stated that they heard the accusations from someone else, which means the anonymous witness changed their statements in the prosecution phase. It failed to redress the conflict between the two statements. Since the statements of the witness are not known in advance, asking the defense to report their questions to the court beforehand to test the credibility of the witness is not sufficient to remedy the conflicts.[37]

As a result, it was seen that there was no justification for why the witness' identity was concealed, the judgment was based on the statement of the anonymous witness to a decisive extent, and when the guarantees received in favor of the accused (the applicant) were observed, the interests of the witness and the rights of the defendant within the fair trial criteria were not fairly balanced.[38]

For these reasons, it should be decided that the applicant's right to question the witness who made a statement against them, which is guaranteed in article 36 of the Constitution, has been violated. The applicant requested that the decision be sent to the relevant court in order to eliminate the violation and its consequences, as it resulted from a court decision. The detected violation arises from a court decision and since there is a legal interest in terms of eliminating the violation and its consequences, it should be decided to send the file to the relevant court for retrial.[39]

In the case of *Yılmaz Çelik,* in 2008, the incumbent chief public prosecutor's office charged the applicant for being a member of an armed terrorist organization (Hizb-ut

37 *Baran Karadağ* paras 73-74.

38 *Baran Karadağ* para 75.

39 *Baran Karadağ* paras 78-79.

Tahrir) and making terrorist propaganda. The assize court convicted the applicant for being a member of and making propaganda for the terrorist organization. This decision was appealed before the Court of Cassation which upheld the first instance decision in terms of his membership to the terrorist organization but quashed it in terms of the latter offence. Thereafter, the applicant lodged an individual application. A criminal case was filed against the applicant, by the chief public prosecutor's office also in 2009, for establishing or managing an armed terrorist organization. The relevant court convicted him for his membership of the terrorist organization. This decision, which had been appealed, was upheld by the Court of Cassation. Thereafter, the applicant lodged an individual application. The applicant's two individual applications were joined. The applicant maintained that he had been sentenced for his membership to Hizb-ut Tahrir, which could not be regarded as a terrorist organization for not promoting violence; and that his substantial requests and arguments had not been taken into consideration during the criminal proceedings. He therefore alleged that his right to a fair trial had been violated.[40]

The Turkish Constitutional Court found a violation of the right to a reasoned decision under the right to a fair trial which is safeguarded by Article 36 of the Turkish Constitution. It is the Constitutional Court's duty to examine whether the inferior courts assessed, to a reasonable extent, the applicant's allegations which were likely to change the outcome of the proceedings. In cases concerning terrorist organizations, the primary issue required to be taken into consideration is not the ideas adopted by them but the question whether they have resorted to any means of violence with a view to attaining their aims. The Turkish Constitutional Court expects the inferior courts to make an assessment, in a convincing manner, as to the existence of terrorist organization or relationships between the accused and organization. The applicant complaining of the assize courts' failure to discuss whether Hizb-ut Tahrir was an armed organization, or a terrorist organization maintained that opinions and ideas supported by this organization, which had not involved in any violent acts, did not constitute an offence. However, both the inferior court and the Court of Cassation confined themselves, in their decisions, to accepting that Hizb-ut Tahrir was a terrorist organization and did not make an assessment as to the applicant's defence submissions. On the other hand, given the definition "a policy involving force and/or violence" attributed to terror and terrorism by international documents, comparative law, doctrine

40 *Yılmaz Çelik* App no 2014/13117 (AYM, 19 July 2018) paras 1-29.

and judgments of the Court of Cassation, the inferior courts did not specify in their decisions for which reasons the Hizb-ut Tahrir was regarded as a terrorist organization. As a requirement of the right to a reasoned decision, the applicant may request that legal considerations he raised before the inferior courts be taken into account, which is an aspect of the right to a fair trial. In the present case, it was observed that the applicant's allegations likely to change the outcome of the proceedings were neither taken into consideration nor assessed properly. Therefore, the applicant's right to a reasoned decision had been violated.[41]

## 7. Bindingness and Fulfillment of the Turkish Constitutional Court's Decisions

### 7. 1. General Principles

According to the third section of article 148 of the Constitution and the first section of article 45 of Code no. 6216, everyone can apply to the Turkish Constitutional Court with allegations of violation of the fundamental rights and freedoms protected under the Constitution which are also guaranteed under the European Convention on Human Rights and the protocols that Turkey is a party to by the public authorities. In the first paragraph of article 148 of the Constitution, the Turkish Constitutional Court is given the authority and duty to decide on these applications.[42]

Pursuant to paragraph (6) of article 49 of Code No. 6216, the examination of the Turkish Constitutional Court on individual applications is limited to *"whether a fundamental right has been violated"* and *"determination of how to remedy such a violation"*[43]

According to article 148 of the Constitution and article 49 of Code no. 6216, the issues to be considered in appellate review cannot be examined in individual applications. According to article 50 of the latter, where a violation judgment is rendered, a substantive review cannot be made while deciding on the actions to be taken in order to redress the violation and its consequences.[44]

41 *Yaşar Yılmaz* para 45-62.

42 Sibel İnceoğlu, *Anayasa Mahkemesi'ne Bireysel Başvuru Türkiye ve Latin Modelleri*, (On İki Levha Yayıncılık, İstanbul, 2017) 237.

43 Bülent Algan, "Bireysel Başvurularda Açıkça Dayanaktan Yoksunluk Kriterinin Anayasa Mahkemesi Tarafından Yorumu ve Uygulanması", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, V. LXIII, I. 2, 2014 254.

44 Metin Baykan, *Anayasa Mahkemesi'ne Yapılan Bireysel Başvuruların Ön İncelemesi ve Kabul Edilebilirliği*, (Seçkin Yayıncılık, İstanbul, 2020) 26.

These provisions should be evaluated together with the power and duty of the Turkish Constitutional Court to decide on individual applications, which is regulated in the first and third paragraphs of article 148 of the Constitution. Within the scope of this duty, the Turkish Constitutional Court is obliged to examine and decide on individual applications made alleging violations of fundamental rights and freedoms in the joint protection of the Constitution and the Convention. The Turkish Constitutional Court conducts this examination in accordance with the guarantees stipulated in the Constitution regarding fundamental rights and freedoms.[45]

Therefore, it cannot be considered that the area in which the Constitution and the Code prohibit examination in the individual application is related to the guarantees envisaged in the Constitution regarding fundamental rights and freedoms. This area is related to allegations of illegality outside the scope of individual application. In this context, as stated in many decisions of the Turkish Constitutional Court, as long as there is no interference with fundamental rights and freedoms, the application and interpretation of the rules of law and the discretion and evaluation of the evidence belong to the courts of instance. However, in cases where there is an interference with fundamental rights and freedoms, the authority that will ultimately evaluate the effect of the judgment and evaluation of the courts for instance on the guarantees in the Constitution is the Turkish Constitutional Court. In this respect, any examination to be made, by taking into account the safeguards provided in the Constitution, as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated or not can be regarded as *"an assessment of an issue to be considered in appellate review"* or *"a substantive review"*[46]

In the Code, a wide margin of appreciation has been given to the Turkish Constitutional Court in determining how the violation and its consequences will be redressed. The only limit to this is the regulation at the end of paragraph (1) of article 50 of Code no. 6216 that the Turkish Constitutional Court cannot decide as an administrative act or transaction. Accordingly, the said limit states that the Turkish Constitutional Court cannot take the place of the administration and take action when deciding how to remedy the violation and its consequences. Considering the nature of the individual application, this limitation is valid not only for the administration but also for the

45 Ahmet Dindar / Ergin Cinmen, *Anayasa Mahkemesi Bireysel Başvuru Kararları, Notlu-Konu Esaslı Sistematik Derleme*, (Legal Yayınevi, İstanbul, 2015) 29.

46 Semih Batur Kaya, *Anayasa Mahkemesi Karar Gerekçelerinin Bağlayıcılığı Sorunu*, (On İki Levha Yayıncılık, İstanbul, 2017) 155.

legislative and judicial organs. The court decides how the violation and its consequences will be remedied and send the decision to the relevant authorities for the necessary action to be taken.[47]

In this context, the Turkish Constitutional Court, as a rule, leaves the relevant authorities with discretion as to how and by what means the violation and its consequences will be redressed. The relevant authority takes the nature of the violation decision into account and takes the necessary steps to eliminate this violation and its consequences. In some cases, the Turkish Constitutional Court may determine the principles of how and by what means the violation and its consequences will be eliminated, taking the characteristics of the concrete case into account. In such a case, the relevant authorities should act in line with the aforementioned principles. In exceptional cases, the nature of the violation detected may leave a single option before the relevant authorities in terms of eliminating the consequences of the violation. In this case, the Turkish Constitutional Court clearly indicates the measure to be taken to eliminate the violation and its consequences, and the relevant authority takes this measure.[48]

According to article 2 of the Constitution, the Republic of Turkey is a state of law. In a state of law, court decisions regarding the settlement of disputes cannot be considered to be non-binding. As a matter of fact, in the last paragraph of article 138 of the Constitution, it is stated that the legislative and executive organs and the administration are obliged to comply with court decisions.[49]

It is clear that the failure to fulfill the decisions of the Turkish Constitutional Court regarding the violation of fundamental rights and freedoms within the scope of individual application will make the violation of the rule of law more serious in the context of the right to access to the court. Indeed, the individual application is the last-resort remedy for individuals who claim that their fundamental rights and freedoms have been violated when they cannot obtain results by using ordinary legal remedies. Failure to fulfill the decisions made in such a way of seeking remedies damages the faith of individuals and society in the rule of law.[50]

47 Osman Doğru, *Anayasa Mahkemesine Bireysel Başvuru Rehberi*, (Legal Yayınevi, İstanbul, 2012) 110.

48 Muharrem İlhan Koç, "Bireysel Başvuru Kararlarının İcrasına İlişkin Düzenlemeler ve Kurumsal Yapılanma İhtiyacı", *Anayasa Yargısı,* V. 33, 2016 137.

49 İbrahim Kaboğlu, *Anayasa Hukuku Dersleri*, (15. Ed., Legal Yayınevi, İstanbul, 2020) 384.

50 Mustafa Ermayası, *Anayasa Mahkemesi'ne Yapılan Bireysel Başvuruların Kabul Edilebilirlik Bakımından İncelenmesi*, (Adalet Yayınevi, Ankara, 2018) 24.

The constitutional-maker specifically regulated the binding force of the Turkish Constitutional Court decisions. In the sixth paragraph of article 153 of the Constitution, it is stipulated that the decisions of the Turkish Constitutional Court will bind the legislative, executive and judicial organs, administrative authorities, real and legal persons. The same provision is included in paragraph (1) of article 66 of Code no. 6216. In the aforementioned provisions, it is stated that unlike article 138 of the Constitution, the decisions of the Turkish Constitutional Court are also binding in terms of judicial bodies. Therefore, there is no hesitation concerning the bindingness of the Turkish Constitutional Court decisions, including those regarding the individual application. As a matter of fact, considering the decisions of the Supreme Court (*Yargıtay)* and the Council of State (*Danıştay)* that the decisions of the Turkish Constitutional Court on the individual application are binding, it is seen that there is no implementation problem in Turkish law.[51]

In this context, when the Turkish Constitutional Court decides that a fundamental right and freedom has been violated through an individual application, no authority has the power to examine and audit whether this decision is in conformity with the Constitution. Accepting the contrary is incompatible with the provision stated in the second sentence of the third paragraph of article 6 of the Constitution, *"No person or agency shall exercise any state authority which does not emanate from the Constitution"*[52]

The execution of this decision after the Turkish Constitutional Court decides that a fundamental right and freedom has been violated is an obligatory consequence of giving the Turkish Constitutional Court the power and duty to decide on individual applications. When the grounds of the relevant amendments to the Constitution considered it is understood that one of the aims of clearing the way to the individual application to the Turkish Constitutional Court is to create an effective way in domestic law concerning the allegations of the violation of fundamental rights and freedoms and thus reducing the applications to European Court of Human Rights against Turkey. It cannot be said that a judicial remedy that cannot be final and binding is effective.[53]

51 Halil İbrahim Dursun, *Türk Anayasa Mahkemesine Bireysel Başvuruda Esasa İlişkin Kabul Edilmezlik Sebepleri,* (Seçkin Yayıncılık, İstanbul, 2018) 36.

52 Ece Göztepe Çelebi, "Bireysel Başvuru Kararlarının Bağlayıcılığı ve İcrası Sorunu ile Kurumsallaşma İhtiyacı", *Anayasa Yargısı Dergisi,* V. 33, Ankara, 2016 96.

53 Coşkun Özbudak, "Anayasa Mahkemesinin Bireysel Başvuru Yargılamasında Bir Tazmin Biçimi Olarak Adli Tatmin", *Ankara Barosu Dergisi*, I. 3, 2014 466.

While the Turkish Constitutional Court was given the authority and duty to decide on individual applications with the Constitutional amendment made in 2010 regarding individual application decisions, there was no regulation that these decisions should be published in the Official Gazette in order to have legal consequences. However, in the fifth paragraph added to article 153 of the Constitution with the aforementioned amendment, it is stated that the procedures and principles regarding the individual application will be regulated by law. After the constitutional amendment, it is stated in paragraph (3) of article 50 of Code no. 6216, which regulates the working procedures and principles of the Turkish Constitutional Court, that the decisions on the merits of individual application will be notified to the relevant persons and the Ministry and will be published on the website of the Turkish Constitutional Court. It is subsequently set forth that *"Issues pertaining to which of such judgments are to be published in the Official Gazette shall be indicated in the Internal Regulation"*. In paragraph number (5) of article 81 of the Rules of Procedure, it is stated which decisions will be published in the Official Gazette, depending on the discretion. Accordingly, it is understood that, for the individual application judgments to bear a legal consequence, the legislator takes as a basis, by virtue of its power vested by the Constitution, not the publishing of the judgments in the Official Gazette but their notification.[54][55]

### 7.2. The Case of Şahin Alpay (2)

The issue of the binding decisions of the Turkish Constitutional Court was the subject of debate regarding the judicial proceedings for the first time concerning the case of *Şahin Alpay (2)* that was conducted in Turkey in 2018.[56]

In the case regarding this application, the applicant was arrested after the coup attempt on the night of 15 July 2016 for membership of an armed terrorist organization as part of an investigation into the media organization of the Fetullahist Terrorist Organization/ Parallel State Structure (FETÖ/PDY), which is stated to be the structure behind this attempt.[57]

54 Ulaş Karan, *Öğretide ve Uygulamada Anayasa Mahkemesi Kararlarının Bağlayıcılığı ve İcrası*, (On İki Levha Yayıncılık, İstanbul, 2018) 131.

55 The two decisions examined in this section will be discussed under separate subheadings due to their importance and length.

56 *Şahin Alpay (2)* App no 2018/3007 (AYM, 15 March 2018)

57 *Şahin Alpay (2)* para 10.

In the first individual application lodged by the applicant, the Plenary of the Turkish Constitutional Court found on 11 January 2018 a violation of the applicant's right to personal liberty and security, as well as his freedoms of expression and press.

Regarding the applicant's claim that detention was unlawful, the Turkish Constitutional Court evaluated whether there was a strong indication that the crime, which is a precondition for detention in accordance with article 19 of the Constitution, was committed, and concluded that the *"strong indication"* that a crime was committed in the present case was not sufficiently revealed by the investigating authorities. In finding that the applicant's freedom of expression and press was violated, the court basically relied on their findings in the scope of the alleged unlawful detention.[58]

The applicant's requests for release and their appeals on this matter were dismissed by the domestic courts. In their decisions, the courts mainly relied on the assessments *"that the Turkish Constitutional Court cannot assess the evidence or the merits of the case or the issues to be considered in the appellate review, nor can it make a substantive review, that making an examination as to the merits of the case results in "usurpation of power", that the violation judgment delivered by overstepping legal mandate cannot be considered to be final nor binding, and consequently, it would not result in the applicant's release if otherwise, it would contradict the legal principles concerning the courts' independence and mandating that no order or instruction could be given to the courts".*[59]

The applicant requested his release following the Turkish Constitutional Court's decision. However, his request was denied. Therefore, another individual application was filed on 1 February 2018.

According to the Turkish Constitutional Court, which evaluated this application, the Turkish Constitutional Court, in its previous decision, stated that the right to freedom and security of the person guaranteed in article 19 of the Constitution and the freedom of expression and the press guaranteed in articles 26 and 28 were violated and in order to eliminate the violation and its consequences the Court decided to send the sample to the Court.

In his previous individual application, the applicant had maintained that they were detained without any strong indication that they had committed a crime in violation of article 19 of the Constitution.

58 *Şahin Alpay (2)* paras 13-14.

59 *Şahin Alpay (2)* paras 17-20.

The right to liberty and security of a person is guaranteed in articles 19 of the Constitution and article 5 of the Convention. One of the issues that fall within the scope of article 19 of the Constitution is the arrest warrant. As a matter of fact, the arrest warrant is clearly regulated in the third paragraph of the aforementioned article. Therefore, there is no hesitation that an individual application can be made to the Turkish Constitutional Court with the claim that the right to liberty and security of the person has been violated due to the detention measure and that the Court will examine and decide on the applications within this scope. The Turkish Constitutional Court inspected the allegation that was mentioned above under article 19 of the Constitution in its previous judgment. This article exhibits the safeguards, which are the measures for detention within the scope of the right to personal security and liberty. There, it is clearly shown that *"a strong indication of guilt"* is one of the constitutional assurance against detention by the line "*Individuals against whom there is strong evidence of having committed an offense may be arrested…*".[60]

Consequently, concerning detentions subject to individual applications claiming violation of the right to personal security and liberty, it is constitutionally obligated for the Turkish Constitutional Court to inspect if there actually is *"a strong indication of guilt"*. It is not expected from the Turkish Constitutional Court to make an inspection within the scope of fundamental rights and freedoms by overlooking a safeguard very clearly enshrined in the Constitution. It would not be possible to inspect individual applications claiming a violation of fundamental rights and freedoms within the framework of the criteria prescribed in the Constitution if that were the case. In fact, in every concrete case, the evaluation of whether there is a strong indication that the crime was committed - which is a prerequisite for detention - belongs primarily to the judicial authorities implementing the aforementioned measure. The reason for this is because the judicial authorities that are in direct contact with the parties and the evidence on this issue are in a better position compared to the Turkish Constitutional Court. However, the evaluation of those authorities on the specified issues is subject to the supervision of the Turkish Constitutional Court. The supervision of the Turkish Constitutional Court on this issue is carried out by taking into account the circumstances of the concrete case, especially the process of arrest and the grounds of the arrest warrant.[61]

60 *Şahin Alpay (2)* paras 73-74.

61 *Şahin Alpay (2)* paras 75-76.

In addition, it is a constitutional requirement for the courts that decide on detention to present a strong indication that a crime has been committed, which is a prerequisite for the implementation of a detention order, on the basis of concrete facts, in accordance with article 19 of the Constitution. It is not possible to accept this as a prior statement of opinion on the merits of the case the judge is facing. In this respect, the fulfillment of a constitutional obligation cannot be avoided on the grounds of the prohibition of such premature statements. Moreover, in article 101 of the Turkish Criminal Procedure Code, it is stated that the evidence indicating a strong suspicion of crime should be justified by concrete facts in the decisions regarding the detention.[62]

The Turkish Constitutional Court, in its previous decision on the applicant, made an examination in line with the scope and method stated above and concluded that the "strong indication" that a crime was committed, which is a precondition for arrest in accordance with article 19 of the Constitution, was not sufficiently revealed by the investigation authorities. Therefore, in the aforementioned decision, an examination was made regarding a safeguard explicitly enshrined in article 19 of the Constitution in terms of the right to liberty and security, one of the fundamental rights and freedoms within the scope of individual application. It is not possible to qualify this as "the assessment of the issues to be considered in appellate review" or "a substantive review". In addition, as stated in the previous decision, the review of the Turkish Constitutional Court here is limited to the investigation and prosecution of the applicant and the evaluation of the legality of the detention independent of the possible consequences of the trial. In this respect, it cannot be said that the aforementioned violation decision includes an evaluation of the merits of the criminal case against the applicant.[63]

On the other hand, the Turkish Constitutional Court decided that the judgment be remitted in the incumbent court where the applicant was tried in order to eliminate the violation and its consequences found in the previous decision. There is no doubt that the violation decision of the Turkish Constitutional Court on the applicant is final and binding. Violation decisions of the Turkish Constitutional Court cannot be audited by any other authority in terms of compliance with the Constitution or the Code. The contrary evaluations of the inferior courts of instance decide on the applicant's requests for release. It has no constitutional or legal basis. In addition, in order for the violation decision made concerning the applicant to have a legal consequence, it is not necessary

62 *Şahin Alpay (2)* para 77.

63 *Şahin Alpay (2)* para 78.

to be published in the Official Gazette, but its notification (or sending) to the relevant authority is sufficient.[64]

In cases where the Turkish Constitutional Court decides to redress the violation and its consequences, the relevant authorities are obliged to act in a way to redress the violation and its consequences, taking into account the nature of the violation decision. Accordingly, the task of the inferior courts of instance in the concrete case is not to evaluate the scope of the duties and powers of the Turkish Constitutional Court, but to eliminate the violation and its consequences determined by the Court. This obligation is not the fulfillment of an order or order given to the courts within the meaning of article 138 of the Constitution, but the materialization of the right of access to the court in a state of law. As a matter of fact, as explained above, it is stated in article 153 of the Constitution that, unlike article 138, the decisions of the Turkish Constitutional Court are also binding on the judicial organs. The Turkish Constitutional Court found that the *"strong indication"* that the crime was committed as a precondition for arrest in article 19 of the Constitution was not sufficiently revealed by the investigating authorities in the violation decision on the applicant.[65]

Following the Turkish Constitutional Court's violation decisions of this nature, the inferior courts must end the detention that has been found to have no precondition. Otherwise, the violation and its consequences will not be eliminated. However, it can be accepted that the requirements of the violation decision have been fulfilled in extremely exceptional cases where a *"strong indication"* that a crime has been committed can be put forward with new facts that were not previously shown as a reason for arrest and therefore were not considered in the violation decision of the Turkish Constitutional Court. However, the margin of appreciation of the courts of instance in this matter is quite limited compared to the first arrest. In such a case, the final assessment as to whether the *"strong indication of guilt"* has been demonstrated or not with new facts belongs to the Turkish Constitutional Court.[66]

In the present case, the applicant's detention was not terminated by the courts of instance after the violation decision of the Turkish Constitutional Court, and the existence of the exceptional situation mentioned above was not revealed. Therefore, it is understood that the violation detected by the Turkish Constitutional Court in the

64 *Şahin Alpay (2)* para 79.
65 *Şahin Alpay (2)* paras 80-81.
66 *Şahin Alpay (2)* para 82.

decision on the applicant and its consequences have not been eliminated by the inferior courts. In this respect, the fact that the applicant's detention was not terminated despite the violation decision given due to the absence of *"strong indications"* that he had committed a crime is contrary to the safeguards in article 19 of the Constitution. As a result, it should be decided that the right to liberty and security of the person has been violated due to the non-implementation of the violation decision of the Turkish Constitutional Court on detention, which is incompatible with the safeguards provided by the right to access the court. On the other hand, considering the fact that the essence of the application is that his detention was not terminated despite the violation decision given due to the absence of a strong indication that a crime was committed, the allegations of the applicant's violation of some of his other fundamental rights and freedoms - by continuing his detention - were not examined separately. The applicant's detention is still pending. Considering the nature of the violation found in the application examined, it was considered that there was no possibility other than ending the detention of the applicant in order to eliminate this violation and its consequences. Therefore, the judgment must be sent to the relevant court in order to eliminate the violation and its consequences by ending the applicant's detention.[67]

It was decided that a copy of the judgment be remitted to the Istanbul 13th Assize Court (*İstanbul 13. Ağır Ceza Mahkemesi*) in order to eliminate the violation and its consequences by ending the applicant's detention. Upon this decision of the Turkish Constitutional Court, the applicant was released by the court of the first instance.

However, these *"a substantive review"* discussions were brought to the agenda again in 2020 with the judicial process on the case of *Kadri Enis Berberoğlu (2)*.[68]

### 7.3. The Case of Kadri Enis Berberoğlu (2)

An investigation was launched against the applicant, who was a member of parliament at the material time, for disclosing certain information which was subsequently reported in a newspaper. A motion (*fezleke)* was prepared in order to lift the applicant's parliamentary immunity, and shortly afterwards, a law was adopted by the General Assembly of the Grand National Assembly of Turkey whereby provisional article 20 was added to the Turkish Constitution. The relevant article rendered the parliamentary immunity inapplicable for the investigations and prosecutions pending against members

67 *Şahin Alpay (2)* paras 83-89.

68 *Kadri Enis Berberoğlu (2)* App no 2018/30030 (AYM, 17 September 2020)

of parliament by its adoption date. Following the lifting of the applicant's parliamentary immunity, the Istanbul Chief Public Prosecutor's Office indicted the applicant for various offences. At the end of the proceedings before the Istanbul 14th Assize Court (*İstanbul 14. Ağır Ceza Mahkemesi*) and the regional court of appeal, the applicant was sentenced to 5 years and 10 months' imprisonment for collecting and disclosing confidential information relating to the security of the State. While the applicant was detained pending trial, he was re-elected as a member of parliament. Thereupon, he applied to the Court of Cassation for his release, stating that he was entitled to parliamentary immunity again. The Court of Cassation, in the first place, held that the applicant was not entitled to parliamentary immunity, and thus dismissed his request for a stay of proceedings. Afterwards, the Court of Cassation upheld the decision of the regional court of appeal. The applicant lost his status as a member of parliament after his sentence had been read out at the General Assembly of the Grand National Assembly of Turkey on 4 June 2020. On 17 September 2020, the Plenary of the Turkish Constitutional Court unanimously held that the applicant's right to personal liberty and security as well as his right to be elected and engage in political activities had been violated. In addition, it was decided to send a copy of the decision to Istanbul 14th Assize Court for a retrial in order to eliminate the consequences of the violation.[69]

The most important point in this decision is in the points of detections which is in the section titled "Application of article 50 of Code no. 6216 ". Article 50 of Code No. 6216 imposes a duty on the Turkish Constitutional Court to guide the relevant institutions regarding the measures that need to be established in order to eliminate the violation and its consequences. In its decision dated 17 September 2020, the Turkish Constitutional Court stated that, as a requirement of this legal duty and obligation, the first thing to be done by the Istanbul 14th Assize Court under this heading is to order the trial against the applicant to be suspended after the decision of retrial.[70]

However, these findings of the Turkish Constitutional Court were evaluated as "a substantive review" by the Istanbul 14th High Criminal Court and the decision of the Turkish Constitutional Court was not implemented.

Upon this situation, the applicant had to apply to the Turkish Constitutional Court again and the Turkish Constitutional Court gave a decision of violation again in a very

69 *Kadri Enis Berberoğlu (2)* para 125.

70 *Kadri Enis Berberoğlu (2)* para 140.

short time. After the Istanbul 14th Assize Court being intensely criticized by academics in Turkey regarding this decision, The Istanbul 14th Assize Court delivered a decision in line with the violation of the Turkish Constitutional Court.[71]

## 8. Conclusion

Individual Application to the Turkish Constitutional Court regulated in the Constitution of the Republic of Turkey is modeled on the Individual Application to the European Court of Human Rights. The way of individual application to the Turkish Constitutional Court is a relatively new legal way. Nevertheless, it can be seen that these judgments are mostly in line with ECHR case law and are decisions that aim to protect human rights and freedoms effectively without any unlawful factors or pressure.

The decisions of the Turkish Constitutional Court bind legislative, executive and judicial organs, administrative authorities and persons and corporate bodies. In individual application cases, the Turkish Constitutional Court decides whether the fundamental rights of the applicant have been violated or not. If it finds violation, it may also decide what should be done in order to redress the violation and its consequences.

In case the violation has been caused by a court decision, the Turkish Constitutional Court sends the file to the competent court for retrial in order to restore the fundamental rights of the applicant. If the Turkish Constitutional Court deems that a retrial will be of no use , then it may decide on compensation for the applicant or it may ask the applicant to file a case before the relevant court of first instance to seek compensation for the damages s/he suffered.

Unfortunately, it is noted that some of the courts of first instance, from time to time, have resisted fulfilling the decisions made by the Turkish Constitutional Court with excuses like *"a substantive review was made by the Turkish Constitutional Court"*.

The relevant court of first instance, including an assessment of an issue to be considered in appellate review or a substantive review was made by the Turkish Constitutional Court, for no reason whatsoever, cannot avoid making a decision for a retrial. The court of first instance, which learns of the Turkish Constitutional Court's infringement decision, can of course criticize the Turkish Constitutional Court's decision. Even a criticism can be written that the Turkish Constitutional Court has made a substantive review, or an examination is made on issues that need to be observed in a legal way.

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However, for no reason whatsoever, the implementation of the Turkish Constitutional Court decisions cannot be avoided.

Pursuant to article 49 of Code No. 6216, the Turkish Constitutional Court's examination of the individual applications is limited to whether a fundamental right is violated or not and to the determination of how to remedy such a violation. According to article 148 of the Turkish Constitution and article 49 of Code No. 6216, the issues to be considered in appellate review cannot be examined in individual applications. According to article 50 of Code No. 6216, where a violation judgment is rendered, a substantive review cannot be made while deciding on the actions to be taken in order to redress the violation and its consequences.

These provisions must be assessed together with the Turkish Constitutional Court's power and duty to adjudicate individual applications, which is regulated in article 148 of the Turkish Constitution. Within the scope of this duty, the Turkish Constitutional Court is obliged to examine and adjudicate the individual applications lodged with the alleged violation of fundamental rights and freedoms falling into the common protection area of the Constitution and the Convention. The Constitutional Court makes this examination in accordance with the safeguards provided by the Constitution regarding fundamental rights and freedoms.

Accordingly, the area the examination of which is prohibited in terms of individual application, as set forth in the Turkish Constitution and the Code No. 6216, cannot be considered to be related to the safeguards provided in the Turkish Constitution concerning fundamental rights and freedoms. This area relates to the allegations of unlawfulness falling outside the scope of individual applications. In this respect, as also stated in many judgments of the Turkish Constitutional Court, unless there is an interference with fundamental rights and freedoms, it falls upon the inferior courts to implement and interpret the legal rules and assess the evidence. However, in cases where there is an interference with the fundamental rights and freedoms, it is the Turkish Constitutional Court that will give the final judgment on the effect of the inferior courts' decisions and assessments on the safeguards provided in the Turkish Constitution. In this respect, any examination to be made, by taking into account the safeguards provided in the Turkish Constitution, as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated or not cannot be regarded as an assessment of an issue to be considered in appellate review or a substantive review.

Otherwise, the Turkish Constitutional Court's power and duty to adjudicate individual applications would not be functional, and this would not comply with the consideration that the individual application is an effective remedy. Considering an examination to be carried out within the scope of the guarantees pertaining to fundamental rights and freedoms enshrined in the Turkish Constitution as an appellate review will result in the Turkish Constitutional Court's failure to examine and adjudicate the individual applications.

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