

Domestic Implementation of the Judgments of the European Court of Human Rights at the National Level: Turkey

■ by *Ece Yılmaz**

“(...) The point that we have not seen as natural and reacted to with surprise and regret is that Turkey was not invited to the establishment of the Council (...) Therefore, we cannot restrain ourselves from openly expressing the indignation we feel that emerged from this forgetfulness that demonstrated [the existence of] negligence and indifference to our country [in Europe] (...)”¹

These lines were written by a journalist, Hüseyin Yalçın, on 8 May 1949 in order to express his deep sadness for the exclusion of Turkey from the establishment of the Council of Europe. Fortunately, a few months afterwards, on 9 August 1949, Turkey became the 13th Member State of the Council of Europe and ratified the European Convention on Human Rights on 18 May 1954. However, the Strasbourg Court gained its real popularity with the Turkish Parliament, government, and public when Turkey declared its recognition of the individual application procedure on 28 January 1987.²

Although 59 years have passed, there is still a widespread impression in Turkey that the European Court has been manipulated by some countries as a political springboard due to some highly politicized, biased, and anti-Turkey decisions. In order to express their discontent with such decisions, even some Turkish lawyers, politicians, and bureaucrats make witty comments that Strasbourg judges are sitting with their one hand raised.³

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¹ Yalçın, H., “Avrupa Birliği Müessesleri ve Türkiye,” *Ulus*, 8 May 1949; See also Çalış, S., “Turkey’s Integration with Europe: Initial Phases Reconsidered,” pp.5-6, available at <http://www.sam.gov.tr/perceptions/Volume5/June-August2000>.

² See Council of Europe website at <http://www.coe.int>.

³ It refers to the motion used by the judges to express their vote for the existence of a violation in a case – the judges raise their hand. Essentially the joke is that the judges seem predisposed to find a violation on the part of the Republic

On the other hand, in light of a recent survey, 20,141 applications were lodged against Turkey from 1998 to 2006. Turkey is the second country, following Italy, in the number of judgments against it, with 1097 judgments. As of 1 January 2007, 10% (9,000) of the total number of cases (89,900) pending before the European Court are directed against Turkey.⁴ At first glance, it might seem surprising that so many people have come to assume that a court based in a French town will be their only hope for justice but these numbers become more significant when one considers the bill that Turkey is urged to pay.

Bearing the above in mind, Turkey's implementation of the European Court's judgments in several fields has attracted the special attention of the Committee of Ministers and other members of the Council of Europe many times. This article will touch on the main issues that have been discussed during the implementation process in Turkey.

I. The Implementation Process in Turkey

Article 2 of the Constitution of Turkey defines the Republic as a "democratic, secular, and social state governed by the rule of law (...) respecting human rights."⁵ In connection with the European Union (hereinafter "the EU") accession process, in May 2004, an amendment was adopted to Article 90, which provides that international agreements that have been ratified become an internal part of the national legal system and can be directly enforced. Furthermore, it states that "in the case of a conflict between international treaties in the area of fundamental rights and freedoms duly put into effect and the domestic laws, (...), the provisions of international agreements shall prevail."⁶

By virtue of the new amendment, the supremacy of Turkey's international obligations in the field of human rights over domestic law is clear. This constitutional principle has a great influence on the direct effect of the European Convention on the Turkish legal system. Turkey has removed most of the substantial reservations and declarations with respect to the European Convention and its protocols, however, it is necessary to underline that several key articles still have been interpreted in the light of Turkish national law.

II. Some Problems Concerning Fundamental Freedoms

II. A. Prohibition of torture and inhuman or degrading treatment or punishment and the right to a fair trial, especially the independence and impartiality of the judiciary

Turkey was invited to introduce effective domestic mechanisms and procedures for the rapid implementation of the judgments of the European Court concerning problems regarding torture and inhuman or degrading treatment or punishment.

of Turkey.

4 European Court of Human Rights, Survey of Activities 2006, Strasbourg, 2007.

5 Article 2 (Characteristics of the Republic) of the Constitution of the Republic of Turkey.

6 Article 90 (Ratification of International Treaties) of the Constitution of the Republic of Turkey.

Measures were brought into force to ensure the independence and impartiality of the state security courts, a concern based on the presence of military judges in these courts. In fact, they were abolished in 2004 along with the abrogation of Article 143 of the Constitution.⁷

In addition, new safeguards have been put into place to prevent the security forces from participating in “unlawful killings, disappearances, acts of torture and ill-treatment and the destruction of moveable and immovable property, such as houses, villages, and crops.”⁸ Furthermore, Turkey has been particularly encouraged to take appropriate action concerning the excessive length⁹ and ineffectiveness of domestic proceedings brought following ill treatment inflicted by members of the security forces, due to the structural problems related to events in the past.¹⁰ The zero tolerance policy of the authorities is also a positive step in the fight against impunity in order to prosecute officials charged with torture or inhuman or degrading treatment.

Since March 2004, a Judicial Modernization and Penal Reform program in Turkey has been drafted in cooperation with the Council of Europe.¹¹ Major steps have been taken and are still being taken in order to increase the knowledge of the Strasbourg case law among judges, prosecutors, judicial inspectors, governors, high-ranking police and gendarmerie officers, and lawyers. The judgments of the European Court concerning Turkey are systematically translated and re-published in Turkey.¹²

Moreover, the adoption of laws amending the Turkish Penal Code, the Law on Penal Procedures against Civil Servants, and the Law on the Fight against Organized Crime are aimed at harmonizing Turkish legislation with the common standards laid down by the Council of Europe.¹³

Abolishing the death penalty, the adoption of longer prescription periods, improvements in the conditions of police custody, reforming the prison system, enhancing the rights of the defense and entitlement to a medical examination are some of the examples of the considerable progress that have been welcomed by the European Committee for the Prevention of Torture (CPT).¹⁴ In response to CPT comments and the recommendations of the Parliamentary Assembly, Turkey was stimulated to remain vigilant throughout the whole country to implement these reforms.

7 Resolution 1380 (2004), Honouring of obligations and commitments by Turkey, para. 9. See e.g., *Hulki Günes v. Turkey* (App. No. 28490/95), judgment of June 19, 2003, *Ağaoğlu v. Turkey* (App. No. 27310/95), judgment of December 06, 2005 and *Yılmaz Yildız v. Turkey* (App. No. 66689/01), judgment of October 11, 2005.

8 Doc. 10111, 17 March 2004, Honouring of obligations and commitments by Turkey, paras. 148-157.

9 Cases pending for supervision of execution as appearing in the Annotated Agendas of the Committee of Ministers' Human Rights meetings and decisions taken (sections 2, 3, 4 and 5), 06 December 2006, p.180.

10 *Ibid.* p.186. See e.g. *Bati and Others v. Turkey* (App. No. 33097/96), judgment of June 03, 2004. See also Doc. 10111, 17 March 2004, Honouring of obligations and commitments by Turkey, paras. 148-157.

11 Speech by the Deputy Secretary General, Judicial Modernization and Penal Reform in Turkey, Ankara, 24 April 2007. 12 *Id.*

13 Resolution 1256 (2001) [1], Honouring of obligations and commitments by Turkey, para. 10.

14 Greer, S., *The European Convention on Human Rights, Achievements, Problems and Prospects*, Cambridge University Press, p.101. See also Resolution 1380 (2004), Honouring of obligations and commitments by Turkey, para. 8. and Doc. 10111, 17 March 2004, Honouring of obligations and commitments by Turkey.

II.B. Right to respect for private and family life and right to protection of property

With regard to the right to respect for private and family life, the Court has reproached Turkey many times. In the judgment of *Akdivar and Others*,¹⁵ the Court held that the Turkish authorities were responsible for the burning of the applicants' houses and their moving elsewhere in relation to the right to have one's home protected from attacks by the State and its agents.¹⁶

A similar result was reached in the case of *Okyay Ahmet and Others*,¹⁷ wherein Turkey had failed in its obligation to guarantee the applicant's right to their private and family life due to the non-enforcement of the Court decisions in cases of environmental protection.¹⁸ In spite of the progress made in this case, currently there are more than 1500 other applications lodged with the European Court alleging violations on the same grounds.

Regarding the judgment of *Oneryildiz*,¹⁹ the Court found that national authorities had failed to carry out their obligations to implement the decision. In particular, the compensation had not been paid to the applicant for the death of his relatives and for the destruction of the property in a methane explosion at a rubbish pile in 1993.²⁰

Similarly, concerning the judgment of *Unal Tekeli*,²¹ the applicant was refused to have only her maiden name registered after her marriage. Turkey was encouraged to provide specific measures on the traditional grounds of family unity,²² in particular women's rights.

II.C. Freedom of thought, conscience, and religion

In connection with Turkey's specific situation, Turkey has struggled to find an appropriate balance between religion and secularism in a Muslim majority country. On this point, the judgment of *Leyla Sahin*²³ is an important example. Ms. Sahin was banned from medical school based on the prohibition of wearing a headscarf at the university. However, the Grand Chamber of the European Court held that the ban was justified to protect the secular status of the State where there were "extremist political

15 *Akdivar and Others v. Turkey* (App.No 99/1995/605/693), judgment of 16 Sep.1996.

16 Kilkelly, U., A Guide to the Implementation of Article 8 of the European Convention on Human Rights: The Right to Respect for Private and Family Life, Human Rights Handbooks, No. 1, 2003, p. 59.

17 *Okyay Ahmet and Others v. Turkey* (App.No36220/97), judgment of July 12, 2005.

18 *Taşkan and Others v. Turkey* (App. No. 46117/99), judgment of November 10, 2004, *Okyay Ahmet and Others v. Turkey* (App. No. 36220/97), judgment of July 12, 2005.

19 *Oner Yildiz v. Turkey* (App. No.48939/99), judgment of November 30, 2004.

20 Cases pending for supervision of execution as appearing in the Annotated Agendas of the Committee of Ministers' Human Rights meetings and decisions taken (sections 2, 3, 4 And 5), 06 December 2006, pp.182-183.

21 *Unal Tekeli v. Turkey* (App. No. 29865/96), judgment of November 16, 2004.

22 *Ibid.* pp.181-182 "Turkish Civil Code which obliged married women to bear their husband's name throughout their married life. This provision was amended in 1997 to allow married women to put their maiden name in front of their husband's surname. The new Civil Code, enacted in November 2001, maintained this rule (new Article 187)." "(...) The Ministry of Justice is preparing a draft law which is destined to amend Article 187 of the Civil Code in order to ensure that future violations of the same kind will be avoided. On 11 April 2006 the Turkish authorities informed the Secretariat that the issue of an identity card for the applicant with her maiden name on it constituted a good example of the direct effect given by the executive authorities to the Convention and to the case-law of the European Court notwithstanding the impugned legislation."

23 *Leyla Sahin v. Turkey* (App. No. 44774/98), judgment of November 10, 2005.

movements.”²⁴

Likewise, in the judgment of *Hasan Zengin*²⁵, the applicant alleges that the way of teaching religious culture and ethics in Turkey infringes his daughter’s right to freedom of religion in conformity with their religious convictions, namely Alevism.

II.D. Freedom of assembly and association

The provisions regarding the permitted activities of associations and organizations are scattered in a number of laws and regulations in Turkey. In particular, Article 33 of the Constitution, despite amendments in 2001, permits the restrictions “on the grounds of protecting national security and public order, or prevention of crime commitment, or protecting public morals, public health.”

In accordance with the newly revised Law on Assemblies, Meetings and Demonstrations, governors are not authorized to ban demonstrations. In addition, Article 33 of the Constitution has been amended to state that “associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law.” The latter provision at least reduces the possibility for government interference in the activities of associations by requiring a judge to make the appropriate finding, not a government official. Further, restrictions on the registration and functioning of NGOs were mainly removed with a revision of the 1983 Associations Act.²⁶

In terms of dissolution of political parties, since the beginning of modern Turkey, more than twenty “Islamist” or “separatist” parties have been dissolved.²⁷ Despite the right of the democratic countries to defend themselves against extremist parties, it is important to note that the dissolution of political parties should be an exceptional remedy used only in cases where the party in question violates or threatens “civil peace and the democratic constitutional order of the country.”²⁸ In relation to the same resolution: “Democracy does not benefit from this cat and mouse game” and further, it tarnishes Turkey’s image abroad.

A further factor is the reopening of domestic proceedings of political parties and conviction of the members of those parties. Reference may

²⁴ *Id.*

²⁵ *Hasan Zengin v. Turkey*, (App. No. 1448/04). The European Court has not pronounced a judgment on the case yet.

²⁶ Article 33(4) of the Constitution of Republic of Turkey. “Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law.” See also Doc. 10111, 17 March 2004, Honouring of obligations and commitments by Turkey, para.17. “Only the courts may refuse to register associations’ statutes or dissolve or suspend their activities.”

²⁷ Greer, S., *The European Convention on Human Rights, Achievements, Problems and Prospects*, Cambridge University Press, p.98. See also *Dicle for the Democratic Party (DEP) v. Turkey* (App. No. 25141/94), judgment of December 10, 2002, *Freedom and Democracy Party (ÖZDEP)* (App. No. 23885/94), judgment of December 8, 1999, *United Communist Party of Turkey and Others* (App. No. 133/1996/752/951), judgment of January 30, 1998, *Socialist Party and Others* (App. No. 20/1997/804/1007), judgment of May 25, 1998, *Yazar, Karataş, Aksoy and le Parti du travail du peuple (HEP)* (App. Nos. 22723/93, 22724/93 and 22725/93), judgment of April 9, 2002.

²⁸ Doc. 10111, 17 March 2004, Honouring of obligations and commitments by Turkey, paras.90-98. “(...) Under Article 69 of the Constitution as amended, “A political party shall be deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly (...)”. The new Article 69 also provides for an alternative to dissolution, namely total or partial deprivation of state aid. In addition, under the newly amended article 149 of the Constitution, dissolution of a political party now requires a 3/5 majority of the Constitutional Court rather than a qualified majority. Further Sections 101, 102 and 103 of the Political Parties Act no. 4748 have been amended by Act of 26 March 2002. However, section 96 of the Act, which prohibits the use of the term Communist in the title of a political movement, has not been amended.”

be made, by way of example, to the judgment of *Sadak and Others*,²⁹ in which Turkey was urged to adopt measures necessary to “reopen the proceedings impugned by the Court, or other *ad hoc* measures erasing the consequences for the applicants of the violations found.”³⁰ However, in accordance with the Turkish Code of Criminal Procedure, the applicant can only obtain the reopening of proceedings concerning the Court’s judgments, which became final before 04 February 2003 or judgments rendered in applications lodged with the Court after 04 February 2003.³¹

III. The Main Causes of Shortcomings

The problems of implementation confronting Turkey may take various forms. To gain a complete and comprehensive picture of the effect of the European Court’s case law on the protection of human rights and fundamental freedoms in Turkey, one should take into account the fact that Turkey is one of the countries suffering the longest from ongoing terrorism – more than twenty years. Inasmuch as Turkey has been beset with enemies and potential enemies throughout its history, she strictly adheres to her commitment to preserve the unity, sovereignty, and territorial integrity of the country.

Besides, the case of *Cyprus*,³² and the recently resolved *Loizidou*,³³ have been perfect illustrations of Turkey’s continued refusal to respect the Court’s judgments on account of “political reasons.”³⁴

A serious economic crisis in 2001, the consequences of massive earthquakes and early elections due to political uncertainty led to the Turkish authorities, based on “budgetary reasons” to belatedly address these questions. This category might also be said to include the excessive length of implementation proceedings.³⁵

Moreover, the consequences of some judgments end at the border of a number of sensitive topics. Alongside the arena of legal and political reforms, there is a danger zone where many people face unjustified interference. Risky areas include the conflict in southeastern Turkey and the question of minority rights, and the nature of the state. The forces and actors in politics also remains an essential point, although it should be noted that the formation of the Turkish identity due to its strategic location has brought it to the brink of making tough decisions on finding a balance between religion and secularism.³⁶

29 *Sadak and Others v. Turkey* (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96), judgment of July 17, 2001.

30 Hunt, M., “State Obligations Following from a Judgment of the European Court of Human Rights,” in Christou, T.A. & Raymond, J. P., *European Court of Human Rights: Remedies and Execution of Judgments*, BIICL, p.39 (2005).

31 Cases pending for supervision of execution as appearing in the Annotated Agendas of the Committee of Ministers’ Human Rights meetings and decisions taken (sections 2, 3, 4 and 5), 06/12/2006, p 167-168. See also pp.188-191. “(...) in this respect, the case presents similarities with cases concerning the independence and impartiality of state security courts (...)”. For instance, *Halki Gunes v. Turkey* (App. No.28490/95), judgment of June 19, 2003, see also *Ocalan v. Turkey* (App.No. 46221/99), judgment of May 12, 2005.

32 *Cyprus v. Turkey*, (App. No. 25781/94), judgment of May 10, 2001.

33 *Loizidou v. Turkey* (App. No. 15318/89), judgment of December 18, 1996.

34 Doc. 8808, 12 July 2000, Execution of judgments of the European Court of Human Rights, para. 8.

35 *Id.* For instance *Ormanci and Others* (App. No. 43647/98), judgment of December 21, 2004, (final on March 21, 2005).

36 Bates, E., “Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers,” in Christou, T.A. & Raymond, J. P., *European Court of Human Rights: Remedies and Execution of Judgments*, BIICL, p.89 (2005). “(...) By March 2004 the monitoring Committee of the

IV. Proposals for Improvement

One should admit the fact that such human rights infringements as Turkey has been accused of should not exist in a country adhering to the rule of law. Every problem we encounter does not stem from unluckiness, prejudice, or injustice. Therefore, Turkey, as a country seeking accession to the European Union, should make more amendments to reform or repeal laws or regulations in order to obtain rapid and full execution of judgments of the Strasbourg Court.

On this occasion, Turkey is called upon to introduce a decision-making body at the highest political level so as to coordinate all aspects of the domestic implementation process and to increase the effectiveness of the implementation of the judgments of the European Court.³⁷ A further factor to be taken into consideration are the possible introduction of, or reforms to, viable remedies in individual cases at the national level after a finding of a violation by the Court. For instance, pardon or sentence reduction,³⁸ revising the legislation on the re-examination or reopening of proceedings, and improving payment procedures.

National authorities should also take necessary action with regard to the creation of a national ombudsman institution to develop a dialogue with NGOs and to strengthen NGOs' freedom of action, ratify the required conventions, broaden the training of judges and prosecutors as well as police and gendarmerie (at all hierarchic levels) throughout the country, to improve the right to minorities, to continue progress towards female illiteracy and all forms of violence against women.³⁹

Additionally, implementation of the existing laws and regulations already in force is also equally important for the full and effective implementation of the European Convention.⁴⁰

Overall, Turkey should give up superficial improvements and assiduously get to the root of the problems. Throwing more money into a bottomless pit is not the right answer to the implementation question. It is not only to improve the quality of existing law or to introduce systemic changes, but also to enhance the awareness and sensitivity of public authorities and to bring about a change in mentality throughout the country. If there is no change in mentality, a better system for implementing judgments of the Court would be difficult to achieve. Although there is still a considerable way to go before this is achieved, as Terence said, "There is nothing so easy, but that it becomes difficult when you do it reluctantly."

Parliamentary Assembly recommended that Turkey be removed from the monitoring procedure commenced eight years previously. The Committee made it clear that a number of outstanding issues remained, but stated that Turkey had achieved more reforms in a little over two years (up to March 2004) than in the previous ten." *Id.*

37 Resolution 1516 (2006), Implementation of judgments of the European Court of Human Rights, para. 22.

38 Barkhuysen, T. & Van Emmerik, M., "A Comparative View on the Execution of Judgments of the European Court of Human Rights" *in* Christou, T. & Raymond, J.P., *European Court of Human Rights: Remedies and Execution of Judgments*, BIICL, London, p.5 (2005).

39 Resolution 1380 (2004), Honouring of obligations and commitments by Turkey.

40 Resolution 1516 (2006), Implementation of Judgments of the European Court of Human Rights, para. 22.