

**REPUBLIC OF TURKEY  
COURT OF CASSATION  
3RD CRIMINAL CHAMBER**

**ON BEHALF OF THE TURKISH NATION  
DECISION OF THE COURT OF CASSATION**

**Case Number:** 2023/12611

**Decision Number:** 2023/

The letter dated 30.10.2023 from the Istanbul 13th Assize Court with the decision number 2021/178 concerning Şerafettin Can Atalay, and the related letter from the Constitutional Court dated 27.10.2023 with the decision number 2023/53898 and the accompanying decision of the Constitutional Court dated 25.10.2023 with the same case number, as well as the additional ruling of the Istanbul 13th Assize Court dated 01.11.2023 made collectively on the file with decision number 2021/178, **have been reviewed.**

Upon the individual application numbered 2023/53898 made by Şerafettin Can Atalay to the Constitutional Court on 20.07.2023, a rights violation decision was issued by the Constitutional Court on 25.10.2023. This decision was published in the Official Gazette on 27.10.2023 with the number 32352, and upon review of the case file content;

According to the decision of the Istanbul 13th Assize Court dated 25.04.2022 with the decision number 2021/178 E. 2022/178 K., Şerafettin Can Atalay, who is currently a convict, was sentenced to 18 years in prison for aiding the attempted overthrow of the government of the Republic of Turkey under Articles 312 and 39 of the Turkish Criminal Code (Law No. 5237). An appeal was filed against this sentence. The 3rd Criminal Chamber of the Istanbul Regional Court of Appeal, in its decision dated 28.12.2022 with decision number 2022/1270 E. and 2022/1463 K., rejected the appeal on its merits.

Due to the appeal against this decision, the file was sent to the General Prosecution Office of the Court of Cassation for the preparation of a notification. While the file was at the General Prosecution Office, Şerafettin Can Atalay was elected as a Parliament Member for Hatay in the general parliamentary elections held on 14.05.2023. On 07.07.2023, the notification prepared by the General Prosecution Office was sent to our Chamber, and subsequently, due to Atalay's election as a Parliament Member, a request was made to our Chamber for a stay of proceedings and his release based on the parliamentary immunity he gained under Article 83 of the Constitution.

With our Chamber's decision dated 13.07.2023 and numbered 2023/12611 E. 2023/112 K., this request was rejected with a reasoned decision. The objection made by Şerafettin Can Atalay against this decision was also reviewed and definitively rejected by the 4th Criminal Chamber of the Court of Cassation on 17.07.2023. Following this, on 20.07.2023, Şerafettin Can Atalay applied to the Constitutional Court, claiming that his *'rights to stand for election and engage in political activities were violated due to the rejection of the request for a stay of proceedings despite*

*gaining parliamentary immunity, and that [his] right to personal liberty and security was violated due to the denial of his release'.*

While this individual application was under review, our Chamber, on 28.09.2023 (decision number 2023/12611 E. 2023/6359 K.), decided to uphold the conviction against Şerafettin Can Atalay, solidifying his status as a convict.

On 25.10.2023, the Constitutional Court, regarding the application numbered 2023/53898, issued a ruling that there had been violations of the rights to stand for election, engage in political activities, and the right to personal liberty and security. It was decided that these violations should be rectified by starting a retrial for the applicant, Şerafettin Can Atalay, suspending the execution of his conviction, ensuring his release from the penal institution, and issuing a stay of proceedings during the new trial. A copy of this violation decision was sent to the Istanbul 13th Assize Court for the implementation of these steps.

Following this, the Istanbul 13th Assize Court, citing Article 50 of the Law No. 6216 on the Establishment and Rules of Procedure of the Constitutional Court dated 30.03.2011, stated that *'the violation decision by the Constitutional Court does not pertain to the decision of our Court but rather to the rejection of the release request by the relevant Criminal Chamber of the Court of Cassation. The applicant was elected as a member of parliament while the file was pending before the Chamber, and the violation in question stems from that Chamber's decision. Furthermore, after the individual application was made, the relevant Criminal Chamber reviewed and finalised the case on its merits, creating a new legal situation requiring reassessment by the 3rd Criminal Chamber of the Court of Cassation.'*

As a result, the file was sent to our Chamber for a ruling on the Constitutional Court's violation decision, and our Chamber sent the file to the General Prosecution Office of the Court of Cassation on 03.11.2023, for its opinion. In its opinion dated 03.11.2023, the General Prosecution Office stated:

*'...It is understood that the core issue to be resolved revolves around whether Article 14 of the Constitution covers actions committed against state security, and whether the legislative regulation foreseen in its third paragraph needs to be enacted by the Turkish Grand National Assembly (TBMM).*

...

*In fact, due to the absence of a current constitutional provision, it has been determined that the applicant's fundamental right to be elected and engage in political activities has been violated. The judicial activities carried out by the criminal courts by applying the provisions of the Turkish Criminal Code and Law No. 3713 were deemed entirely invalid, and their appropriateness has been reviewed.*

*However, there is no doubt that the crimes outlined in Articles 302 to 308 of the Turkish Criminal Code (Law No. 5237) as "Crimes Against State Security" and in Articles 309 to 316 as "Crimes Against the Constitutional Order and Its Functioning" fall within the scope of Article 14 of the Constitution of the Republic of Turkey.*

*Specifically, the Legislator, leaving no gap in such an important matter, defined terrorism in Article 1 of Law No. 3713 as "any kind of criminal act committed by one or more persons belonging to an organization with the aim of changing the political, legal, social, secular, or economic order stated in the Constitution, undermining the indivisible unity of the state with its territory and nation, endangering the existence of the Turkish state and the Republic, weakening, destroying, or seizing state authority, eliminating fundamental rights and freedoms, or disrupting state security, public order, or public health by using force and violence, through methods of pressure, intimidation, coercion, or threats."*

*In Article 3, it further states: "The crimes listed in Articles 302, 307, 309, 311, 312, 313, 314, 315, and 320 of the Turkish Criminal Code No. 5237, as well as the crime in the first paragraph of Article 310, are considered terrorism offenses."*

*At this point, the Turkish Criminal Code No. 5237, which contains detailed provisions, differs from the Law on Fight Against Terrorism No. 3713. The importance of interpreting Article 14 of the Constitution, which is broadly scoped and open-ended, through extensive constitutional judicial review becomes even more significant. The Constitutional Court holds such an effective position in determining the content of abstract constitutional rules that it must avoid interpretations conflicting with the true intent of the constitution's framers. When interpreting, the Court must issue decisions that define the content of the constitution. Otherwise, the foundational legitimacy and binding effect of the interpretation are undermined.*

*A consistent theory of interpretation must be developed, grounded in the principle of "constitutional integrity," which emphasises causal links and the hierarchy between constitutional principles. This theory should be based on scientific, objective criteria and transparent, verifiable standards. The Constitutional Court's authority in the field of constitutional review is limited to "legal oversight."*

*In a constitutional democratic regime, the only area where it is legitimate for the Constitutional Court to be active is in the field of personal and political rights. The most crucial aspect that secures the Court's constitutional democratic legitimacy is its role in protecting fundamental rights and freedoms through constitutional review.*

*The Court produces concrete legal outcomes from abstract legal rules, evaluating whether the rules presented to it are consistent with the constitution. However, this task presents its own challenges and can lead to violations of the principle of separation of powers. In this context, ensuring the consistency of constitutional norms is a challenging task. One of the difficulties is that many provisions in constitutions are general, abstract, unclear, and in need of interpretation. Interpretation is a mental activity undertaken by humans to determine the meaning of texts or concepts that can potentially have multiple meanings. In order to properly apply legal norms to concrete cases, efforts must be made to clarify the meanings of relevant legal rules through interpretation. Interpretation activities also shape the law. When the Court invalidates a rule made by the legislator or finds it unconstitutional, it brings forth a new approach to the subject matter being reviewed.*

*First and foremost, the Constitutional Court must clearly define the limits of its "legal oversight" within the scope of constitutional review. The legal oversight conducted by*

*the judges of the Court is limited to reviewing whether the actions of the legislature and executive have been carried out within the constitutional bounds of their authority and, in the judicial field, determining whether the right subject to an individual application has been violated. When conducting constitutional review, the judiciary responsible for assessing constitutionality must refrain from exercising powers belonging to other branches.*

*If an issue falls within the legislative, executive, judicial, or administrative fields according to constitutional provisions, the Court cannot invalidate or nullify the actions of these bodies as long as they are not unconstitutional. This is because the principle of separation of powers dictates that the authority and boundaries of the legislature, executive, and judiciary are outlined in the Constitution. No authority, including constitutional courts, can prevent the legislature, executive, or judiciary from exercising their powers within their constitutional domains.*

*The Constitutional Court, conducting constitutional review limited to "legal oversight," cannot establish new legal norms while fulfilling its duty. The Court judge, in this capacity, only renders decisions that interpret existing constitutional norms. When tasked with interpreting an abstract constitutional norm, the judge cannot arbitrarily prioritise one of the potential meanings over others. Courts conducting constitutional review should act as referees, determining whether established rules have been followed, not as entities rewriting the rules of the game. Any deviation from this would violate the principle of separation of powers: the legislative branch enacts the rules, the executive implements them, and the judiciary ensures compliance.*

*According to Özbudun, another factor that reinforces the democratic legitimacy of constitutional review is the court's self-restraint, particularly in areas involving fundamental political preferences and value judgements, rather than adopting an activist stance. Constitutional judges, in their decisions, are inevitably influenced by their own value judgements, and it is unrealistic to think of constitutional review and interpretation as entirely value-neutral. However, judges of the Constitutional Court also consider the legitimacy that the majority of society attributes to their decisions, leading them to think strategically. This can prompt them to exercise self-restraint. Therefore, by limiting themselves and avoiding an activist approach, the AYM judges strengthen the democratic legitimacy of constitutional review (See: Özbudun, Ergun, "Yargının Demokratik Sistemlerde Konumu" [The Position of the Judiciary in Democratic Systems], Demokrasi ve Yargı Sempozyumu [Democracy and Judiciary Symposium], January 4-6, 2005, Ankara, Turkish Bar Association, Ankara, 2005).*

*According to Yusuf Şevki Hakyemez, judicial activism occurs when courts, during the process of constitutional review, adopt an active approach aimed at achieving a particular outcome. This involves interpreting constitutional provisions in a way that stretches or sometimes completely reverses their original meaning, ultimately leading to new practices that even the political will behind the legislative actions did not intend. Within the judicial system, rather than establishing supremacy of one branch over another, it is essential to adhere to the principle of judicial restraint, consistent with the separation of powers and the democratic process (See: Hakyemez, Yusuf Şevki, "Anayasa Mahkemelerinin Geleneksel İşlevi Bağlamında Günümüzde Ortaya Çıkan İki Sorun: Yerindelik Denetimi Tartışmaları ve Ulusalüstü Örgüte Üye Devletlerdeki Anayasa Yargısının Konu Bakımından Sınırlandırılması" [Two Current*

*Issues Arising in the Context of the Traditional Role of Constitutional Courts: Discussions on Appropriateness Review and the Limitation of Constitutional Jurisdiction in Member States of International Organizations]* *Anayasa Yargısı D. [Constitutional Judiciary Journal]*, Vol. 24, 2007).

*At this point, it should be noted that Article 14 of the Constitution of the Republic of Turkey defines the essential elements for the independence and democracy of the Republic of Turkey – elements that are indispensable for its existence. Indeed, no state would accept granting immunity to a person accused of committing a crime against its existence. Such acceptance would not only contradict the principles of justice and fairness, as well as the rule of equality, but also undermine public trust in justice and disturb the public conscience.*

*Nevertheless, ensuring the clarity of legal rules cannot be achieved solely through legislative regulations. Furthermore, unlike other countries, the United Kingdom does not have a single constitutional document. The British Constitution is a combination of laws and principles that shape its political structure. A significant part of the British Constitution has evolved through written and unwritten rules such as laws, court decisions, and treaties. The United States of America, the country where the first constitutional work was carried out, has a history of 250 years, having been a colony of the United Kingdom and then declaring its independence.*

*In the present case, since the investigation and prosecution of Şerafettin Can Atalay began long before his election as a member of parliament, for the crime he committed in 2013, and it was understood that the articles applied as the basis for his conviction relate to the crime falling under Article 312 of the Turkish Criminal Code, a member of parliament who committed a crime under this article before the election cannot benefit from parliamentary immunity as stipulated in Article 83/2 of the Turkish Constitution.*

*The fact that the crimes falling within the scope of Article 14 of the Constitution are not exhaustively listed is a deliberate choice by the legislature. The crimes and actions for which the defendant was convicted are among those committed against state security, and it is not conceivable that they would fall outside the scope of this article.*

*With the 3rd Criminal Chamber of the Court of Cassation's decision of 28.09.2023 (number 2023/12611 E., 2023/6359 K.), which upheld the appeal regarding Şerafettin Can Atalay, the judgement has been finalised and is now subject to enforcement. After the approval decision, the defendant is now in the status of a convicted person, and the High Chamber has sent its decision to the Turkish Grand National Assembly. At this stage, since the High Chamber also assessed the matter of release during the appeal review, the discretion to approve or reject the release request rests with the High Chamber.'*

*After firstly determining the scope and conditions of the individual application made to the Constitutional Court, our Chamber will evaluate the rulings and consequences of the Constitutional Court's violation decisions related to individual applications. Following that, assessments will be made regarding the situations listed as*

exceptions to parliamentary immunity in Article 14 of the Constitution, and finally, evaluate the retrial and release status of convicted Şerafettin Can Atalay.

## **I- INDIVIDUAL APPLICATION TO THE CONSTITUTIONAL COURT**

With the amendments made to Articles 148 and 149 of the Constitution by Law No. 5982, which was adopted through a referendum on 12 September 2010, the mechanism for individual applications to the Constitutional Court was introduced into our legal system (*Selin Kandemir, "The Criterion for Exhaustion of Ordinary Legal Remedies in Individual Application to the Constitutional Court," Master's Thesis, Galatasaray University Graduate School of Social Sciences, Istanbul, 2023, p. 5).*

Article 148, paragraph 3 of the Constitution states: *"Everyone may apply to the Constitutional Court on the grounds that one of their fundamental rights and freedoms, guaranteed by the Constitution and within the scope of the European Convention on Human Rights, has been violated by a public authority."* In the fourth and fifth paragraphs of the same article, this new procedure is referred to as an individual application. Similarly, the term "individual application" is used in the relevant articles of Law No. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court and the Constitutional Court's Internal Regulations.

In this context, the individual application to the Constitutional Court was not introduced as a legal remedy similar to an appeal aimed at having a court decision reviewed by the same or a higher court. The individual application seeks to determine whether a fundamental right or freedom has been violated, and it cannot be considered as a continuation of the previous trial. Therefore, it is not possible to characterise individual application as an "extraordinary legal remedy." The individual application is a sui generis legal path. In this scope, individual application to the Constitutional Court can be defined as an exceptional and unique, secondary constitutional right-seeking path for individuals whose fundamental rights and freedoms have been violated by the actions, decisions, or omissions of public authorities after they have exhausted other legal remedies (*Özcan Özbey, "Türk Anayasa Hukukunda Bireysel Başvuru" [Individual Application in Turkish Constitutional Law], Adalet Yayınevi, 2nd Edition, Ankara, 2013, p. 76-78).*

### **1- Fundamental Rights and Freedoms Within the Jurisdiction of the Constitutional Court**

Although the Constitution specifies that fundamental rights and freedoms covered by the European Convention on Human Rights (ECHR) can be the subject of individual applications, no explicit regulation is provided for the rights under the additional protocols. This issue, which is not outlined in the Constitution, was clarified by Law No. 6216. Article 45 of this law regulates that the fundamental rights covered by the additional protocols to the ECHR, to which Turkey is a party, may also be subject to individual applications. Accordingly, an individual application can be made to the Constitutional Court based on claims of violations of fundamental rights and freedoms within the scope of the ECHR and the additional protocols to which Turkey is a party (*Mustafa Seven, "Legal Results of the Individual Application to the Constitutional Court," Master's Thesis, Istanbul University Institute of Social Sciences, Istanbul, 2022, p. 21-23).*

## **2- The Scope of the Constitutional Court's Review Following an Individual Application**

As a result of the individual application to the Constitutional Court, there is a rule that no examination can be made on the issues to be considered in the legal remedy. This rule was introduced for the Constitutional Court and with the acceptance of the individual application (*Article 148, paragraph 4 of the 1982 Constitution*).

In the individual application review conducted by the Constitutional Court, the examination will be limited to fundamental rights and freedoms, and no review will be made regarding the evaluations of evidence or material facts conducted by courts of first instance or appellate courts (*Esra Bahar, The Nature of the Right to a Fair Trial in the Context of the Individual Application Decisions of the Turkish Constitutional Court, Ph.D. Dissertation, Hacettepe University Graduate School of Social Sciences, Ankara, 2023, p. 84*). Accordingly, the Constitutional Court is tasked only with determining whether the right in question has been violated during the individual application review. This rule was established specifically to prevent the Constitutional Court from positioning itself as a supervisory authority over high courts, or in other words, becoming a "super appellate court."

Due to the nature of individual applications, as a general rule, all administrative and judicial remedies prescribed by law must be exhausted before an individual application can be made (*Article 45/2 of Law No. 6216*). In this case, the procedure or action in question must have been subject to review by the courts of first instance and must be tied to a final court decision (*Zübeyr Bayram Sevim, Exhaustion of the Remedies from the Admissibility Criteria in Individual Applications to the Constitutional Court, Master's Thesis, Atılım University Institute of Social Sciences, Ankara, 2022, pp. 53-54*).

Therefore, the vast majority of individual applications are made against court decisions. However, these applications should not be interpreted as the Constitutional Court having hierarchical superiority over the Court of Cassation and the Council of the State, which are also high courts, or as establishing a subordination relationship among high judicial bodies equal under the Constitution. The Constitutional Court, in its review of individual applications, examines whether fundamental rights and freedoms under the ECHR and its additional protocols to which Turkey is a party have been violated. It does not have the authority to intervene in the matters of appeal review that fall within the jurisdiction and duties of the Court of Cassation and the Council of the State, and should be considered a high court performing a filtering role within its authority and responsibilities, as a domestic legal remedy to be exhausted before individual applications to the European Court of Human Rights.

The Constitution and Law No. 6216 establish the principles that the Constitutional Court must adhere to during the substantive examination of individual applications. Just as direct individual applications cannot be made against legislative actions and regulatory administrative actions, decisions of the Constitutional Court and actions excluded from judicial review by the Constitution cannot be the subject of individual applications (*Article 45/3 of Law No. 6216*).

Accordingly, the examination must be limited to determining whether a fundamental right has been violated in the public action subject to the application and, if so, how this violation can be remedied (Özlem Öztürk Atalar, *The Condition of Exhaustion of Ordinary Legal Remedies in Individual Application to the Constitutional Court, Master's Thesis, Hacettepe University Graduate School of Social Sciences, Ankara, 2022, pp. 20-21*). According to the Constitution, it is not possible for the Constitutional Court to review matters related to legal remedies outside this limitation. In accordance with this determination, Article 148/4 of the Constitution states: "*In individual applications, examination of issues related to legal remedies cannot be conducted*", and Article 49/6 of Law No. 6216 states: "*Examinations by the Sections regarding individual applications against a court decision are limited to determining whether a fundamental right has been violated and how this violation can be remedied. Sections cannot conduct examinations related to issues of legal remedies.*"

The 4th paragraph of the Preamble of the Constitution, published on 9 November 1982, in the Official Gazette No. 17863, states: "*The separation of powers does not mean a hierarchy among state organs; it is merely a civil division and cooperation, limited to the use of specific state powers and duties, with supremacy only found in the Constitution and laws.*" The 5th paragraph further states: "*No activity contrary to the principle of the integrity of the state and its territory shall be protected.*"

Additionally, Article 6 of the Constitution, titled "Sovereignty", states: "*...No person or organ can exercise state authority that does not derive from the Constitution.*" Paragraph 1 of Article 11, titled "Binding Nature and Supremacy of the Constitution," suggests: "*The provisions of the Constitution are fundamental legal rules binding on the legislative, executive, and judicial organs, administrative authorities, and other institutions and individuals.*" In this regard, the 1982 Constitution contains no provision suggesting that the Constitution is not binding on the Constitutional Court.

While there may be differences in legal interpretation, such differences, though they may enrich the legal field, cannot render any provision of the Constitution inapplicable simply because of interpretational disagreements.

The Constitutional Court's role in individual applications is to determine whether other courts have respected the protections outlined in the Constitution while assessing whether the interventions in individuals' constitutional rights are lawful (*Fatih Şahbaz, The Transforming Effect of Individual Application on the Turkish Constitutional Jurisdiction and its Contribution to Legal Order, Doctoral Thesis, Istanbul Medeniyet University Institute of Social Sciences, Istanbul, 2022, pp. 98-99*). In this regard, individual application is neither a continuation of cases in other courts nor an appeal aimed at correcting decisions made by other courts.

An individual application is a sui generis legal remedy used to detect violations of fundamental rights and freedoms, which are different in subject and parties from those of other court proceedings. The Constitutional Court acts as the first and last instance in this regard. Individual application is not a new means of appeal or review, and the Constitutional Court is not a super-appeal body that reviews all forms of legal error in other court decisions. The Constitutional Court is responsible for assessing

whether a fundamental right protected by the Constitution and the ECHR and its additional protocols has been violated in the context of specific cases handled by other courts. If a violation is found, the Court will rule on the necessary measures to remedy it within its powers and jurisdiction. The Constitutional Court cannot substitute for other courts or make decisions by replacing them (*Şermin Birtane, As an Effective Judicial Remedy Individual Application, Doctoral Thesis, Gazi University Graduate School of Social Sciences, Ankara, 2019, pp. 160-161*).

In this context, the Constitutional Court does not review the interpretation made by the courts of first instance and appellate courts when applying statutory provisions to the factual situation. Instead, it assesses whether the reasoning of the court's decision provides a balance consistent with the standards set by the ECHR and its additional protocols, as well as the Constitution, regarding the relevant fundamental rights. It checks whether the guarantees of fundamental rights and freedoms have been adhered to.

During its review, the Constitutional Court cannot evaluate the determination of the material facts that constitute the basis of the judicial decision or the rule to be applied to the case, nor can it assess the discretion exercised by the court that rendered the decision.

In accordance with this understanding, the Constitutional Court has indicated in some of its decisions that, as a general rule, individual applications will not be subject to review concerning the proof of facts in the case, the interpretation and application of legal rules, the admissibility and evaluation of evidence during the trial, and whether the solutions provided by courts of first instance and appellate courts to a personal dispute are fair in substance. This means that the Constitutional Court will not assess these aspects or determine whether they were handled fairly by the courts of first instance and appellate courts in individual applications (*Necati Gündüz and Recep Gündüz, B. No: 2012/1027, 12.02.2013; Yüksel Haçer, B. No: 2013/2116, 23.01.2014*).

As long as the fundamental rights and freedoms outlined in the Constitution are not violated, the decisions of courts of first instance and appellate courts cannot be reviewed in individual applications. In this context, according to the relevant legislation and its binding decisions, the Constitutional Court cannot intervene in the discretion of courts of first instance and appellate courts regarding:

- a) The proof of facts and material circumstances in the case,
- b) The interpretation and application of legal rules,
- c) The admissibility and evaluation of evidence during the trial,
- d) Whether the solutions provided by courts of first instance and appellate courts to a dispute concerning civil rights and obligations are fair in substance (*Sencer Başat and others [Plenary], B. No: 2013/7800, 18.06.2014, § 89-90*).

In its relations with other branches of the judiciary, the Constitutional Court is expected to have a tendency to self-limit to avoid usurping functions. However, in some of its decisions, it is seen to have explicitly exceeded its authority in a manner inconsistent with the law. For instance, in the Erdem Gül and Can Dündar case, the Constitutional Court faced severe and legitimate criticism for the reasoning it

provided, and it was noted that the court clearly overstepped its review powers (*Erdem Gül and Can Dündar, B. No: 2015/18567, 25.02.2016*).

The journalists, who are the applicants in this decision, were arrested for their separate news reports on the MIT trucks on charges of knowingly and willingly aiding an armed terrorist organisation without being a member, obtaining confidential State information for political or military espionage purposes, and disclosing confidential State information for espionage purposes. They argued in their individual application that their arrest violated their right to personal freedom and security, as well as their freedom of expression and press.

While the Constitutional Court acknowledged that the interpretation of the law concerning detention and its application to the specific case fell within the discretion of the courts of first instance and appellate courts, it also stated that when an individual application challenges the legality of detention, it is its duty to review whether the conditions specified in Article 19 of the Constitution were stated in the detention decisions and whether the principle of proportionality in Article 13 of the Constitution was adhered to.

In this decision, the fundamental reasoning for the Constitutional Court's violation ruling was that the essential basis for the applicants' detention was the publication of two articles in the Cumhuriyet Newspaper about the stopped and searched trucks, with no concrete evidence mentioned beyond these articles. However, the interpretation and application of the decision to detain individuals based on state secrets being disclosed in newspaper articles fall within the jurisdiction of the courts of first instance and appellate courts. By arbitrarily expanding the principle of proportionality and intervening in the discretion and determination powers of other courts, the Constitutional Court clearly exceeded its review authority in this individual application.

Indeed, the decision was severely criticised by legal circles for overstepping the court's boundaries. Although the Istanbul 14th Assize Court complied with the violation decision, decided to release the defendants even though it did not legally support the aforementioned judgement by stating that the judgements of the Constitutional Court are binding. As can be seen from this case, despite lacking a legal basis, the Constitutional Court relies on the objective effect of its decisions when making such determinations.

### **3- Scope and Consequences of the Violation Decision by the Constitutional Court Following the Individual Application Review**

According to Article 154 of the Constitution: *"The Court of Cassation is the final court of review for decisions and judgements given by the courts of first instance, unless the law assigns another judicial authority."*

According to Article 155 of the Constitution: *"The Council of the State is the final court of review for decisions and judgements given by administrative courts, unless the law assigns another administrative judicial authority."*

In the review of an individual application, if the Constitutional Court determines that the act, action, or omission in question has violated the applicant's fundamental rights and freedoms guaranteed by the Constitution and protected under the ECHR and its additional protocols, a violation decision will be issued. The decision of a violation creates a new legal situation, and the Constitutional Court has the authority to decide on the measures required to remedy the consequences of the violation (*Murat*

Güven, "Detention Measure within the Scope of the Right to Individual Application," *Master's Thesis, Ankara University Graduate School of Social Sciences, Ankara, 2021, p. 100-101*).

Article 50 of Law No. 6216, titled "Decisions", states:

(1) At the end of the principal review, a decision is made on whether the applicant's right has been violated or not. If a violation decision is made, the necessary measures to eliminate the violation and its consequences are determined. However, the review of the appropriateness of the decision cannot be conducted, and decisions cannot be made regarding administrative actions and transactions.

(2) If the identified violation arises from a court decision, the case file is sent to the relevant court for a retrial to eliminate the violation and its consequences. In cases where there is no legal benefit to conducting a retrial, compensation may be awarded to the applicant or the applicant may be directed to file a lawsuit in the general courts. The court responsible for the retrial must make a decision based on the case file, aiming to eliminate the violation and its consequences as explained in the Constitutional Court's violation decision.

(3) The decisions of the sections, along with their justifications, are communicated to the relevant parties and the Ministry of Justice, and published on the Court's website. The rules regarding which decisions are to be published in the Official Gazette are specified in the by-laws.

(4) Differences in jurisprudence among the commissions are decided by the sections to which they belong; differences in jurisprudence among sections are decided by the General Assembly. Other related matters are regulated by the by-laws.

(5) In cases of waiver of the lawsuit, a decision of dismissal is issued.

The majority of individual applications are related to applications concerning court decisions.

If the violation originates from court decisions, according to paragraph 2 of Article 50 of the Law, the case file is sent to the relevant court for retrial to eliminate the violation and its consequences. However, in cases where there is no legal benefit in conducting a retrial, compensation may be awarded to the applicant or the applicant may be directed to file a lawsuit in the general courts. The court responsible for the retrial must make a decision based on the case file, aiming to eliminate the violation and its consequences as explained in the Constitutional Court's violation decision. According to this article, if the Constitutional Court determines that a violation of a right originates from a court decision, it may issue one of three types of decisions based on the nature of the violation:

a) Ordering a retrial,

b) Ordering for compensation if there is no legal benefit in conducting a retrial,

c) If determining the amount of compensation requires a more detailed examination, directing the applicant to file a lawsuit in the general courts (*Muhammed Tikici, The Individual Application Constitution Court in Context of Criminal Law, Master's Thesis, Istanbul Commerce University Institute of Social Sciences, Istanbul, 2021, pp. 25-28*).

The decisions of the Constitutional Court must be consistent with the violation decisions, and in cases where there is no impact on the outcome, retrial should not

be ordered, taking into account the lack of legal value. In this regard, the Constitutional Court should not view itself as a superior appellate authority over higher courts. It should not, under the guise of retrial, delve into the merits of the case and overturn decisions made by the Court of Cassation and the Council of the State – both of which are high courts – exceeding its own legal mandate and authority.

## **II- SITUATIONS MENTIONED IN ARTICLE 14 OF THE CONSTITUTION AS EXCEPTIONS TO LEGISLATIVE IMMUNITY**

Due to its relevance to the situation of the convicted Şerafettin Can Atalay, this section will examine the exceptions to legislative immunity as outlined in Article 14 of the Constitution, as well as the institution of the loss of parliamentary immunity.

According to the Constitution, except for cases of serious offences committed in the act, the situations mentioned in Article 14 of the Constitution constitute exceptions to legislative immunity. Article 14 of the Constitution, which is organised under the heading "Prohibition of the Abuse of Fundamental Rights and Freedoms," states: *"None of the rights and freedoms enshrined in the Constitution can be used in a manner that aims to undermine the integrity of the State with its territory and nation or to abolish the democratic and secular Republic based on human rights.*

*No provision of the Constitution may be interpreted in a way that would allow for activities aiming at the destruction of fundamental rights and freedoms recognised by the Constitution or at restricting them more broadly than specified in the Constitution.*

*Penalties for activities contrary to these provisions are regulated by law."*

It is not explicitly stated which types of crimes are included among the situations listed in Article 14 of the Constitution; this matter is left to the discretion of the investigation and prosecution authorities (*Enes Öner, The Problem of Parliamentary Inviolability in 1982 Constitution and Judgments, Master's Thesis, Bahçeşehir University Graduate School of Social Sciences, Istanbul, 2021, p. 65*). The fact that no crime is defined in Article 14 of the Constitution and that it is described in abstract terms is a deliberate choice by the constitutional legislator. This article allows the investigation authorities, and courts of first instance and appellate courts to assess the severity of the crime attributed to the relevant member of parliament in each specific case. If it is determined as a result of this legal assessment that the act in question falls within the scope of Article 14 of the Constitution, legislative immunity will be lifted, and this situation will be reported to the Turkish Grand National Assembly.

The fact that a constitutional or legal provision is not regulated in a detailed, exhaustive manner does not mean that it violates the principle of legal certainty or is unpredictable. Moreover, from the manner in which the relevant constitutional provision is formulated, it is clear even to those with a basic understanding of law that the choice was not to provide a concrete list of crimes.

In order for the situations listed in Article 14 to be excluded from the scope of legislative immunity, "an investigation must have been initiated before the election." Additionally, according to the second paragraph of Article 83 of the Constitution, in cases that are exceptions to legislative immunity, "the competent authority must immediately and directly notify the Turkish Grand National Assembly." Although it is not explicitly stated in the Constitution or its rationale, it is also expressed that the purpose of this immediate notification requirement is to enable the Turkish Grand

National Assembly (TBMM) to exercise its authority to postpone prosecution (*Murat Sevinç, Türkiye'de Milletvekillerinin Dokunulmazlıkları [Parliamentary Immunity in Turkey], Kirlangıç Yayınları, 1st Edition, Ankara, 2004, p. 151*). Furthermore, once the TBMM is informed on the matter, legislative immunity is automatically lifted; therefore, this act of notification is not a request for the TBMM to lift legislative immunity (Nurhan Atalay, Freedom from arrest in Turkey, Master's Thesis, Kocaeli University Institute of Social Sciences, Kocaeli, 2008).

It is important to emphasise once again that Article 14 of the Constitution does not define a crime, nor is it expected to. The content of this article will be filled by the investigation authorities, as well as the courts of first instance and appellate courts through the evaluation of jurisprudence on this matter. There is no doubt that the primary terrorist offences regulated by Articles 302, 307, 309, 311, 312, 313, 314, 315, and 320 of the Turkish Criminal Code, along with the crime specified in the first paragraph of Article 310, should be considered within the scope of Article 14, especially when the Preamble of the Constitution is taken into account. It is beyond dispute that sanctions against national security violations have been determined by the legislature in relation to the aforementioned crimes in the Turkish Criminal Code and the Law on Fight Against Terrorism. Any argument to the contrary holds no legal merit.

Indeed, a member of parliament who commits a crime within the scope of this article before the election will not be able to benefit from the parliamentary immunity stipulated in Article 83/2 of the Constitution. In this respect, although the Constitution does not explicitly define which crimes fall under the scope of Article 14, apart from the primary terrorist offences listed above and accepted as within this scope, the responsibility to determine the scope of other criminal acts has been left, particularly to the discretion of the investigative authorities, as well as the courts of first instance and appellate courts.

Although there is no doubt that crimes such as undermining the unity of the state and territorial integrity, or committing crimes against the constitutional order and its functioning fall within the scope of Article 14 of the Constitution, whether the crime of making propaganda for an armed terrorist organization formed for the purpose of committing these crimes should be evaluated within the scope of Article 14 is open to debate. The presence of such debates for certain types of crimes does not imply that Article 14 of the Constitution cannot be applied in any way. With the amendment made to this article in 2001, the provision that rights and freedoms in the Constitution cannot be used "with the purpose of undermining" these rights and freedoms was replaced with the provision that they cannot be used for "activities aiming" to undermine these rights and freedoms. The essence of the problem lies in whether the term "activity" mentioned in the amended article refers only to actions or also includes statements of opinion. In such cases, whether the situations specified in Article 14 of the Constitution are present will be assessed based on the gravity and nature of the act in question in each specific case.

For instance, the Kocaeli 2nd Assize Court convicted Ömer Faruk Gergerlioğlu, a member of parliament during the 27th legislative period, on 21 February 2018, for making propaganda for an armed terrorist organization due to statements made before his election. The now defunct 16th Criminal Chamber of Court of Cassation upheld this decision on 28 January 2021, considering that the activity included a statement of opinion and took into account the gravity of the act. Despite his election

and certification as a member of parliament after the decision of the court of first instance, the prosecution process continued, as the offense was considered within the scope of Article 14 of the Constitution due to the gravity of the act.

The courts of first instance continued the trial on the grounds that the rights and powers provided by parliamentary immunity were being abused and that the crime in question fell within the exceptions listed in Article 83/2 of the Constitution. The Court of Cassation upheld the prison sentence imposed by the court of first instance. Following this, Ömer Faruk Gergerlioğlu's parliamentary status was revoked. His application to the Constitutional Court to annul the revocation of his parliamentary status was rejected, as there is no provision allowing for an appeal to the Constitutional Court under Article 84/2 of the Constitution, and the Constitutional Court does not have jurisdiction on this matter (Constitutional Court, Decision No. 2021/33 E, 2021/23 K, dated: 31.03.2021).

In cases where it is determined that a situation falls outside the scope of parliamentary immunity, the relevant member of parliament does not have immunity. As a result, the trial will continue, and depending on the nature and character of the crime, even detention measures may be applied.

### **The Relationship Between the Removal of Parliamentary Immunity and the Revocation of Parliamentary Status:**

Although the revocation of parliamentary status may bring to mind the procedure for the removal of parliamentary immunity, it is a separate constitutional institution. Just as with the removal of parliamentary immunity, different rules apply to the revocation of parliamentary status. The institution of revoking parliamentary status in Turkish law was given its final form with an amendment made to the 1982 Constitution in 1995. According to Article 84(2) of the Constitution, the reasons for the revocation of parliamentary status are: resignation, conviction and legal incapacity, continuing an office incompatible with parliamentary duties, and absenteeism. Among these, "final conviction or legal incapacity" is listed in Article 84(2) as a reason for the revocation of parliamentary status, and a conviction for offenses incompatible with being a parliament member, as listed in Article 76 of the Constitution, will result in the loss of parliamentary status (*Erdal Onar, 1982 Anayasasında Milletvekilliğinin Düşmesi [The Revocation of Parliamentary Status in the 1982 Constitution], Anayasa Yargısı Dergisi [Journal of Constitutional Justice], Vol. 14, 1997, pp. 437-438; Hamit Esen, Parlamento Hukukunda Milletvekilliğinin Sona Ermesi [Termination of Parliamentary Status in Parliamentary Law], Yasama Dergisi [Journal of Legislative Studies], Issue 19, 2011, p. 50).*

When a conviction is reported to the Turkish Grand National Assembly, the parliamentary status of the member is revoked, and as a result, the protection of parliamentary immunity is also removed. Therefore, in order to benefit from the immunity preventing or delaying execution, under Article 83(3) of the Constitution, the conviction must be for crimes other than those that prevent a person from being elected as a member of parliament (*Mehmet Tunç, Legislation Immunity in 1982 Constitution Act and its implementation, Master's Thesis, Gazi University Graduate School of Social Sciences, Ankara, 2011, p. 32).*

Crimes that prevent a person from being elected as a parliament member are listed in Article 76 of the Constitution. According to this provision, the crimes in question include those sentenced to imprisonment for one year or more – excluding negligent

offences – and shameful crimes such as embezzlement, misappropriation, bribery, theft, fraud, forgery, abuse of trust, fraudulent bankruptcy, and crimes such as smuggling, tampering with official bids and procurement, disclosing state secrets, participation in terrorist activities, and inciting or encouraging such acts. Convictions for these listed crimes, even if not executed due to amnesty, prevent a person from being elected as a parliament member, and under Article 84(2) of the Constitution, they will also result in the revocation of their current parliamentary status (*Murat Saltuk Bilgili, According to the Constitution of 1982 Parliamentary Immunity, Master's Thesis, Erzincan University Graduate School of Social Sciences, Erzincan, 2018, p. 106-107*).

### **III - THE SITUATION OF ŞERAFETTİN CAN ATALAY, WHO WAS ELECTED AS A MEMBER OF PARLIAMENT BEFORE THE CONVICTION BECAME FINAL AND WHO ACQUIRED CONVICT STATUS FOLLOWING OUR CHAMBER'S APPROVAL DECISION, REGARDING RETRIAL AND RELEASE**

It has been determined that the investigation began before the election for the charge of aiding an attempt to overthrow or partially or completely obstruct the functioning of the Government of the Republic of Turkey. Şerafettin Can Atalay was convicted under Article 312(1) and Article 39 of the Turkish Criminal Code and was ordered to be detained. Following the approval of the conviction by our Chamber, he gained the status of a convict. Since it has been understood that Şerafettin Can Atalay was elected as a member of parliament in the general parliamentary elections on 14 May 2023, prior to the final ruling of our Chamber, his legal status regarding parliamentary immunity in relation to Articles 83 and 14 of the Constitution must be evaluated, considering the nature of the alleged crime.

Article 83 of the Constitution, titled "Parliamentary Immunity", states:

*'Members of the Turkish Grand National Assembly cannot be held responsible for their votes, statements and opinions expressed during the Assembly's activities, and for repeating or revealing these outside the Assembly, unless the Assembly decides otherwise based on a proposal by the Chairmanship Council.*

*A member of parliament accused of committing a crime before or after the election cannot be detained, interrogated, arrested, or tried without the Assembly's decision. However, in cases requiring severe punishment and in situations outlined in Article 14 of the Constitution, where an investigation was initiated before the election, this provision does not apply. In such cases, the competent authority must immediately and directly notify the Turkish Grand National Assembly.*

*The enforcement of a sentence imposed on a member of parliament, whether before or after their election, is deferred until the end of their parliamentary term, and the statute of limitations does not apply during the term.*

*For a re-elected member of parliament, any investigation or prosecution is subject to the Assembly's renewal of the removal of their immunity.*

*No political party group within the Turkish Grand National Assembly may hold discussions or make decisions regarding parliamentary immunity.'*

Additionally, the regulation in Article 14 of the Constitution, titled "Prohibition of the Abuse of Fundamental Rights and Freedoms", has been included in Section II of our decision above.

Parliamentary immunity is a constitutional legal principle that ensures members of the legislative body can perform their duties without fear. It is aimed at allowing parliament members to exercise their freedom of thought and speech fully and freely. This principle means that no investigation can be initiated against parliament members for actions that do not fall under legislative unaccountability and constitute criminal acts, unless there is a decision by the Assembly.

While the first paragraph of Article 83 of the Constitution refers to legislative unaccountability, the second paragraph of the same article regulates parliamentary immunity, which provides parliament members with relative and temporary protection. Except for situations outlined in Article 14 of the Constitution – such as in cases of serious offences committed in flagrante delicto or where an investigation had already started before the election – parliament members cannot be detained, interrogated, arrested, or tried for any crime committed before or after the election, without a decision from the Turkish Grand National Assembly.

As seen, the second paragraph of Article 83 introduces two exceptions to legislative immunity:

The first of these exceptions is the case of being caught in flagrante delicto for a crime that requires severe punishment. Parliament members cannot benefit from parliamentary immunity if they are caught in the act of committing a serious crime. According to Article 2, paragraph 1(j) of the Turkish Criminal Procedure Code, "flagrante delicto" refers to the commission of a crime in progress; or being caught committing a crime just after it has been committed, either by law enforcement, the victim of the crime, or others pursuing the suspect; or being caught with evidence or items indicating the crime was committed moments before. Crimes that fall under the jurisdiction of the courts of cassation are regulated in Article 12 of Law No. 5235.

The second exception to parliamentary immunity, which is currently applied to convicted Şerafettin Can Atalay, concerns cases where the investigation started before the election, as outlined in Article 14 of the Constitution. A revision was made to Article 14 on 3.10.2001, through Law No. 4709 to align with Article 17 of the European Convention on Human Rights. The scope of the article was narrowed, making it more understandable. The conditions under which the situations outlined in Article 14 of the Constitution fall outside the scope of parliamentary immunity are specified in paragraph 2 of Article 83 of the Constitution. Accordingly, the crime in question must be related to the situations mentioned in Article 14, the investigation must have begun before the election, and the competent authority must immediately and directly notify the Turkish Grand National Assembly of the situation. Article 14 of the Constitution does not directly define an offence or establish specific types of offences; it rather outlines general concepts, principles, and activities.

In Article 14 of the Constitution, titled "Prohibition of Abuse of Fundamental Rights and Freedoms", activities considered as abuse include: undermining the integrity of the state with its territory and nation, engaging in activities aimed at abolishing the democratic and secular Republic based on human rights, and undertaking actions that would lead to the destruction or broader restriction of the fundamental rights and freedoms recognised by the Constitution.

The Constitution did not specify which crimes fall under the scope of Article 14, deliberately leaving the determination of its scope to the investigative and prosecutorial authorities. Therefore, the intent of the Constitution is to ensure that if

activities aimed at destroying the existence of the Republic of Turkey and its executive branch are undertaken, the parliament member should no longer benefit from immunity. This understanding is beyond dispute.

Although the Constitutional Court, in its decisions on Ömer Faruk Gergerlioğlu and Leyla Güven, has determined that *'the text of the first paragraph of Article 14 of the Constitution is not suitable for meaningful determination of crimes excluded from parliamentary immunity solely by decisions of the judiciary organs and thus for ensuring certainty and predictability,'* considering Article 148 of the Constitution and Articles 45 and following of Law No. 6216; the Constitutional Court's primary function is norm control. Its authority to review and supervise a constitutional provision is limited to formal review, and it cannot invalidate or make the application of a constitutional provision impossible through individual applications.

Given that the Constitutional Court does not have the authority to annul a currently valid constitutional norm based on its merits, and it can only review and supervise constitutional amendments from a formal perspective, it is legally impossible for the Constitutional Court to make a decision that would remove or render ineffective the application of a currently valid constitutional norm through individual applications. Thus, with regard to the activities stipulated in the mentioned article, and taking into account the principles of continuity and stability in jurisprudence proportional to the threat against the integrity of the state and the democratic and secular Republic based on human rights, it is a requirement of the rule of law to fill the gap left deliberately by the Constitution in Article 14 with judicial decisions to determine it specifically and to protect the validity and function of the relevant constitutional norm. The principle of certainty not only refers to legal certainty but also to broader legal clarity. Therefore, ensuring the certainty of legal rules cannot be limited to legal regulations alone. Legal certainty can also be achieved through court precedents, provided that they are based on norms and possess the qualities of being accessible, known, and predictable. Hence, the legal issue to be resolved concerns which crimes are to be evaluated under the scope of the situations described in Article 14 of the Constitution.

According to Article 1 of Law on Fight Against Terrorism No.3713, titled "Definition of Terrorism," terrorism is defined as acts committed using coercion and violence through methods such as intimidation, threats, or other means, with the intent to change the characteristics of the Republic as specified in the Constitution, alter the political, legal, social, secular, or economic order, disrupt the indivisible integrity of the State with its territory and nation, endanger the existence of the Turkish State and the Republic, weaken or destroy or seize state authority, eliminate fundamental rights and freedoms, or disrupt internal and external security, public order, or public health.

Article 3 of the same Law, titled "Terrorist Offences", defines certain offenses listed in Articles 302, 307, 309, 311, 312, 313, 314, 315, and 320 of the Turkish Criminal Code, as well as Article 310/1, as absolute and principal terrorist offenses.

Article 309 of the Turkish Criminal Code, titled "Violation of the Constitution", stipulates that those who attempt to overthrow the order prescribed by the Constitution of the Republic of Turkey or to establish a different order in its place, or to prevent the effective implementation of this order, shall be sentenced to imprisonment.

The justification for the relevant article of the law states: *'The principles that must govern the establishment and functioning of political power are explicitly outlined in the Preamble of the Constitution: "The absolute supremacy of the will of the nation; that sovereignty belongs unconditionally to the Turkish Nation, and no person or institution authorised to exercise this sovereignty on behalf of the nation can step outside the freedom-centred democracy defined in this Constitution and its requirements; No activity will be protected against the principles of national interests, the indivisibility of the State with its territory and nation, the historical and spiritual values of Turkishness, Atatürk's nationalism, principles, and reforms, and civilization, and the principle of secularism mandates that sacred religious feelings shall not be involved in State affairs and politics." The whole of these rules, which encompass the principles governing the establishment and functioning of political power, constitutes the Constitutional order. The legal interest intended to be protected by this article is the principles that dominate the constitutional order. Considering the nature of the legal interest to be protected, the phrase "the order prescribed by the Constitution of the Republic of Turkey" has been used, thus clarifying the legal interest intended to be protected.'*

Similarly, Article 312 of the Turkish Criminal Code, titled "Offences against Government", provides that those who attempt to overthrow the Government of the Republic of Turkey or to obstruct its functions partially or completely through the use of force and violence will be punished with imprisonment. The rationale for the relevant article of this Law states: *'In the text of the article, the attempt to overthrow the Government, which represents the executive power among the three elements of sovereignty of the Republic of Turkey, or to obstruct its functions partially or completely, is defined as a separate crime. In this definition, the acts of committing this crime, aimed at overthrowing the Government, which is one of the fundamental organs of the constitutional order, or obstructing its functions, are punished as complete offences. For other matters related to the application of the article, one should refer to the justifications for the articles concerning the violation of the Constitution and crimes against the legislative body.'*

In Article 14 of the Constitution, activities framed as "disturbing the indivisible integrity of the State with its territory and nation" and "engaging in activities aimed at overthrowing the democratic and secular Republic based on human rights" are emphasised. Similarly, in Law No. 3713, which defines terrorism and terrorist offences, the same concepts and institutions are highlighted. When considering the elements of the crime of violating the Constitution as regulated in the Turkish Criminal Code and the justification of the article, particularly the reference to the introductory provisions of the Constitution and the protected legal interest:

It is concluded that it is incorrect to say that Article 14 of the Constitution is not suitable for interpretation that would ensure certainty and predictability through judicial decisions. Instead, it is clear that the crimes listed in Articles 302, 307, 309, 311, 312, 313, 314, 315, and 320, as well as the first paragraph of Article 310 of the Turkish Criminal Code, should be evaluated within the scope of Article 14 of the Constitution.

Otherwise, this would lead to individuals who threaten the indivisible integrity of the Republic of Turkey with its state and nation – such as Fethullah Gülen, Şerif Ali Tekalan, Recep Uzunallı, Adil Öksüz, Ekrem Dumanlı, Cemil Bayık, Murat Karayılan, Duran Kalkan, Sabri Ok, and Ali Ekber Doğan, who are still sought with red notices

and are associated with numerous bloody terrorist acts and against whom investigations or prosecutions for the absolute terrorism offenses mentioned above exist – to be elected as members of parliament, take their oath of office, and enter the Turkish Grand National Assembly, and it would be impossible to argue that this situation is legally correct.

In essence, although the Constitution did not explicitly define which crimes fall within the scope of Article 14, they left the determination of scope among crimes, especially those determined to be absolute terrorist offenses, to the discretion of investigative authorities, and courts of first instance and appellate courts. In line with these determinations, the European Court of Human Rights also examines in its established case law whether the restriction on fundamental rights and freedoms complies with the legality standard and whether the rule is accessible, predictable, and definite. However, the complexity or abstract nature of a rule and the fact that the meanings of the concepts used emerge through legal interpretation are not necessarily considered contrary to the principle of legal predictability. In its precedents, The Court has noted that many laws inevitably contain some degree of vagueness, and interpreting and applying these vague laws is an issue of implementation (*Lindon, Otchakovsky-Laurens and July v. France*, no. 21279/02 and 36448/02, 22/10/2007, § 41). The Court has accepted in its precedents that judicial interpretation is an inevitable element in any legal system, including criminal law, no matter how clearly a legal provision is written (*Kafkaris v. Cyprus*, no. 21906/04, 12/2/2008, § 141). Even though exceptional, the Court has even noted in its precedents that in certain cases, principles of common law or international law may also provide a legal basis for intervention, despite the absence of specific domestic legal provisions (*The Sunday Times v. UK*, no. 6538/74, 26 April 1979, § 49; *Groppera Radio AG and others v. Switzerland*, 28 March 1990; *Autronic AG v. Switzerland*, 22 May 1990).

Parliamentary immunity, which serves as an obstacle to prosecution, will automatically cease in the presence of either the situation described in Article 83, paragraph 2 of the Constitution – namely, cases involving serious offences committed in flagrante delicto or situations where an investigation was initiated before the election – or circumstances outlined in Article 14 of the Constitution. There is no question of classifying activities that are not typically defined as crimes under criminal law as falling within the scope of "situations described in Article 14 of the Constitution" through judicial interpretation. On the contrary, judicial authorities assess which activities defined as crimes under criminal law fall within the scope of Article 14 of the Constitution, taking into account the text, spirit, and overall intent of the Constitution.

In this context, the Court of Cassation has consistently ruled in its precedents, which have gained continuity over time, that crimes aimed at undermining the unity of the state and territorial integrity or altering the political order prescribed by the Constitution fall within the scope of Article 14 of the Constitution. Accordingly, in its decision dated 28 January 2019, and numbered 2018/4803 E., 2019/647 K., the (defunct) 16th Criminal Chamber of the Court of Cassation stated: '*...The prohibition on the abuse of rights and freedoms is addressed in Articles 14 of the 1982 Constitution and 17 of the European Convention on Human Rights. Article 14/1 of our Constitution establishes the fundamental principle: "None of the rights and freedoms defined in the Constitution can be used in a way that undermines the indivisible*

*integrity of the state with its territory and nation or aims to abolish the democratic and secular Republic based on human rights." Following this fundamental principle, the legislation specifies penalties for contrary behaviours. Indeed, a member of parliament who commits a crime under this article before the election will not benefit from parliamentary immunity as described in Article 83/2 of the Constitution. The legislator did not enumerate which crimes fall within this article's scope in a restrictive manner. The task of determining the scope belongs to the implementer. There is no doubt that crimes against the unity of the state and territorial integrity and against the constitutional order and its functioning fall within this scope...'*

As a reflection and adaptation of the Arab Spring in our country, the protests, known as the Gezi Park events, began on 27.05.2013, under the pretext of relocating some trees from Taksim Gezi Park as part of the Taksim Pedestrianisation Project. These protests escalated into nationwide actions aimed at the overthrow of the legitimate and elected government, involving violence and coercion. As a result of these protests, 746 demonstrations were held across 78 provinces, causing damage to 280 workplaces, 259 vehicles, 103 police cars, one residential building, one police station, and five public buildings. Damage also occurred at a Republican People's Party (CHP) building and 11 Justice and Development Party (AKP) building. Additionally, many surveillance cameras, signalling systems, street lights, bus stops, billboards, traffic signs, park and landscaping arrangements, trash containers, and police stations were damaged. According to open-source information, eight of our citizens and two police officers lost their lives, 9,063 people were injured, and the total public damage was determined to be 140 million TL as of that date.

Convicted Şerafettin Can Atalay was involved in the organization and management of the uprising movement, including initiating the protests and deepening them across the country. During the Gezi Park protests, he made statements and calls for action that contributed to the escalation of violence. He was identified as one of the key figures managing and directing the Taksim Solidarity. The actions detailed in the case file were found to fall under the crime of attempting to overthrow the government of the Republic of Turkey. Given that this crime falls under Article 14 of the Constitution and the investigation had started before the election, it was concluded that he could not benefit from parliamentary immunity under Article 83, paragraph 2 of the Constitution. The trial continued according to general procedural rules, and requests for the suspension and release of Şerafettin Can Atalay were denied. Following the appeal review, the conviction was upheld, and Şerafettin Can Atalay acquired the status of a convicted person.

As a **result** of the detailed explanations and evaluations provided above:

On 25.10.2023, the Constitutional Court issued a violation decision regarding the individual application of the convicted Şerafettin Can Atalay. In paragraph D of the ruling, the court decided to initiate proceedings for the retrial of the applicant, suspend the execution of the conviction sentence, and ensure his release from the penal institution. However, despite the fact that Şerafettin Can Atalay acquired the status of a convicted person following the upholding of his conviction, the Constitutional Court disregarded our court's decision on this matter.

Moreover, Article 84 of the Constitution provides for the loss of parliamentary status due to a "final judgement or restriction" and it is understood that a conviction for crimes incompatible with parliamentary status under Article 76 of the Constitution will lead to the loss of parliamentary status. Therefore, it was necessary for the Assembly

Speaker's Office to promptly initiate the process for withdrawing the parliamentary status of Şerafettin Can Atalay on the date our court's decision reached the Assembly. However, despite the Constitutional Court's decision of violation was issued approximately one month after our Chamber's decision of approval, it is evident that the procedures for the withdrawal of convicted Şerafettin Can Atalay's parliamentary status were not completed by the Turkish Grand National Assembly during this period, despite the clear provision of the Constitution.

Regarding the absolute terrorist offence of attempting to overthrow the government of the Republic of Turkey, which falls under the scope of the situations listed in Article 14 of the Constitution, convicted Şerafettin Can Atalay, who cannot benefit from the legislative immunity outlined in Article 83/2 of the Constitution, has had his appeal process completed. Despite the fact that an individual application is not a new form of appeal or cassation, and the Constitutional Court is not a supreme cassation authority capable of reviewing decisions of a high court like the Court of Cassation on all grounds of legal violations, it is understood that the Constitutional Court, in this case, exceeded its legal authority by treating the file as if it were reopening the trial, interfering with the substance of the case, and almost overturning our Chamber's decision without legal basis.

Moreover, it has been determined that the Constitutional Court conducted its review without considering the enforceable and finalised decision of our Chamber, dated 28.09.2023 and numbered 2023/12611 E. 2023/6359 K. In addition, when the final conviction was reported to the Turkish Grand National Assembly, a decision to immediately revoke the parliamentary status of Şerafettin Can Atalay should have been made by presenting the matter to the General Assembly. Although no decision has been made by the Turkish Grand National Assembly on this matter, the Constitutional Court does not have the authority to review this issue under Article 84/2 of the Constitution, nor is there any provision allowing an appeal to the Constitutional Court in this regard.

Additionally, in the decision on the rights violation concerning Şerafettin Can Atalay, the Constitutional Court, unlike its previous decisions on Ömer Faruk Gergerlioğlu and Leyla Güven, emphasised that determining which crimes are covered under Article 14 of the Constitution through judicial interpretation, rather than through constitutional or legal regulation, would lead to serious problems. The fact that the Constitutional Court cited a previous judgement of its own, which it had made as a result of judicial activism and which is known in the public opinion as the ban on headscarves in universities and which we do not agree with, was found remarkable by us and was regarded as an irony.

In its ruling, the Constitutional Court stated that it would not be appropriate for judicial bodies to interpret which crimes fall under Article 14 of the Constitution, stressing the necessity of a constitutional or legal regulation. However, until now, in both its rulings on the review of norms (*such as issuing a stay of execution or invalidating certain provisions on the grounds that the suspension of the pronouncement of the judgement was not properly applied*) and in individual application rulings, which were later assigned to the Court as a secondary task, the Constitutional Court has, despite having no constitutional or legal authority, continually expanded and misused its powers through judicial precedents. This unchecked expansion of authority has led to criticism that the Court, once accused of acting as a supervisory body over the legislative branch in its norm review function, has now extended this influence to all

levels of the judiciary, including the highest courts, following the granting of authority over individual applications.

In fact, at the current stage, the Constitutional Court, in its ruling on the violation concerning convicted Şerafettin Can Atalay, has gone so far as to threaten the members of the 3rd Criminal Chamber of the Court of Cassation, stating that they "*committed the crime of negligence*" and citing the "*objective function of Constitutional Court rulings*", despite the lack of legal basis for this and the fact that the issue remains a matter of debate even in legal doctrine.

It is both regrettable and noteworthy that the members of our Chamber, who have often been threatened in the past by various terrorist organisations or their members, either through social media, the press, or during the first instance trials or appeals processes, are now being threatened in this manner by the Constitutional Court itself.

In our country, the Constitutional Court does not only interfere with the legislative branch by annulling laws but sometimes acts like a legislator itself, positioning itself as a supervisory authority over the high courts, which are not hierarchically subordinate to it under the Constitution, and functioning as a super appellate court.

The separation of powers between the legislative, executive, and judicial branches is merely a division of duties. The judiciary's role is distinct from the other two branches. When the judiciary acts in an activist manner, it loses its legitimacy and starts to be questioned. What is expected from the judiciary is to make decisions in accordance with the legislation, the Constitution, and most importantly, law.

By engaging in judicial activism in this manner, the Constitutional Court has made decisions that are unconstitutional, such as "*rendering unenforceable the constitutional provisions that it cannot formally review, accepting individual applications without exhausting all administrative and judicial remedies provided by law, intervening in investigations, and making prosecutions impossible.*" By seeing its duties and powers as superior to the Constitution and laws, the Court has, in effect, rendered the Constitution unenforceable, leading to its own legitimacy being questioned.

It is evident that when individuals who hold the state's coercive power and public authority continuously use this power in violation of the Constitution, it facilitates the commission of acts that breach the Constitution.

#### **IT IS DECREED THAT:**

**1-** For the reasons explained above, since no legal value or validity can be attributed to the Constitutional Court's ruling dated 25.10.2023 and numbered 2023/53898, regarding Şerafettin Can Atalay's individual application, and there is no ruling to be applied under Article 153 of the Constitution; likewise, given that there is a final and enforceable judgement against Şerafettin Can Atalay, affirmed by our Chamber's decision on 28.09.2023, numbered 2023/12611 E. 2023/6359 K., following an appellate review of his conviction, it was decided **NOT TO COMPLY** with the aforementioned decision of the Constitutional Court.

**2-** Considering that Şerafettin Can Atalay acquired the status of a convict with the affirmation of his conviction by our Chamber on 28.09.2023, and that one of the reasons for the dismissal from parliamentary membership under Article 84/2 of the Constitution is "conviction by final judgment or a state of disqualification", and that a conviction for crimes incompatible with parliamentary membership under Article 76 of

the Constitution would result in the dismissal of parliamentary membership, and that there is no opportunity for the Constitutional Court to review this matter under Article 84/2 of the Constitution, nor does the Constitutional Court have the authority to examine this issue; it was decided to **SEND A COPY** of the decision to the National Assembly of Turkey Speaker's Office to initiate the procedures for the withdrawal of Şerafettin Can Atalay's parliamentary membership.

**3-** It was decided to **FILE A CRIMINAL COMPLAINT** with the General Prosecution Office of the Court of Cassation regarding the relevant members of the Constitutional Court, who violated the provisions of the Constitution and unlawfully exceeded their authority by voting in favour of recognising a rights violation.

Following an examination of the case file, it was decided to **SUBMIT** the file to the General Prosecution Office of the Court of Cassation to be sent to the Istanbul 13th Assize Court in accordance with the opinion.

This decision was unanimously made on 08.11.2023.

President  
Muhsin Şentürk

Member  
Hakan Yüksel

Member  
Mustafa Doğru

Member  
Şerafettin Saka

Member  
Mustafa Karayıldız