REPUBLIC OF TURKEY
COURT OF CASSATION
3rd CRIMINAL CHAMBER

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

Case No: 2023/12611
Decision No: 2024/1

Upon the individual application numbered 2023/99744 filed by the convict Şerafettin Can Atalay with the Constitutional Court on 24.11.2023, the Constitutional Court issued a decision of rights violation on 21.12.2023. This decision was published in the Official Gazette dated 27.12.2023, numbered 32412. The Istanbul 13th Heavy Penal Court, which had received the file from the Constitutional Court, issued an additional decision on 27.12.2023 regarding the file numbered 2021/178. The case file associated with this decision and the petition containing the request for rejection dated 02.01.2024 from Şerafettin Can Atalay's attorneys have been submitted to our Chamber;

I - EVALUATION OF THE PRELIMINARY ISSUE REGARDING THE REQUEST FOR REJECTION

In their petition dated 02.01.2024, the attorneys for the convict Şerafettin Can Atalay summarized that they had requested the recusal and rejection of the president and members who participated in our Chamber's decision dated 08.11.2023. They claimed that, due to the opinions expressed in the previous decision, these individuals could not act impartially.

The procedures concerning requests for rejection are regulated by Article 39 of Law No. 2797 on the Court of Cassation and Articles 24 and following of Law No. 5271 on the Criminal Procedure Code.

As accepted in legal doctrine and explained in the consistent and established decisions of the Court of Cassation: "A request for rejection can be made during the process of judicial activity, that is, before a final judgment has been rendered" (Nurullah Kunter / Feridun Yenisey / Ayşe Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 17. Baskı, Beta Yayınları, İstanbul, 2009, s. 205).

Our Chamber's decision regarding the non-compliance with the Constitutional Court's decision on rights violations is aimed at determining the current status, as the appellate review for the convict Şerafettin Can Atalay has been completed and has become a final judgment.

In this context, the file under review does not involve ongoing judicial proceedings but concerns a decision issued as a result of a legal assessment of the current status based on the file. With our Chamber’s decision dated 28.09.2023 and numbered 2023/12611, 2023/6359, it has been established that Şerafettin Can Atalay acquired the status of a convict upon the approval of the conviction judgment. Therefore, at this stage, it is not possible to request a recusal.

For the reasons stated, the petition dated 02.01.2024 from the attorneys of the convict Şerafettin Can Atalay, which includes the request for recusal and rejection of the president and members who participated in our Chamber's decision dated 08.11.2023, has been decided not to be processed.

II - UPON EXAMINATION OF THE FILE CONTENT:

A - FACTS

On 25.04.2022, the Istanbul 13th Heavy Penal Court issued a decision (Case No. 2021/178, Decision No. 2022/178) sentencing Şerafettin Can Atalay, who is currently convicted, to 18 years of imprisonment for aiding in the attempt to overthrow the Government of the Republic of Türkiye, as defined under Articles 312 and 39 of the Turkish Penal Code No. 5237. An appeal was filed against this decision. The Istanbul Regional Court of Appeal 3rd Criminal Chamber issued its decision on 28.12.2022 (Case No. 2022/1270, Decision No. 2022/1463), rejecting the appeal on its merits. Following this decision, the case was sent to the Court of Cassation's Chief Public Prosecutor's Office for preparation of an opinion. While the case was with the Chief Public Prosecutor's Office for this purpose, Şerafettin Can Atalay was elected as a Member of Parliament for Hatay in the general elections held on 14.05.2023. On 07.07.2023, the opinion prepared by the Chief Public Prosecutor's Office was sent to our Chamber. Subsequently, due to Atalay's election as a Member of Parliament and the presence of parliamentary immunity, a request was made to our Chamber for a stay of proceedings under Article 83 of the Constitution and for his release. Our Chamber, by its decision dated 13.07.2023 (Case No. 2023/12611, Additional Case No. 2023/112), rejected this request with a reasoned decision. An appeal against this decision was also reviewed and definitively rejected by the 4th Criminal Chamber of the Court of Cassation on 17.07.2023. Consequently, Şerafettin Can Atalay filed an individual application with the Constitutional Court on 20.07.2023, claiming that the denial of a stay of proceedings due to his parliamentary immunity violated his rights to be elected and engage in political activities, as well as his right to personal freedom and security. While this individual application was under review, our Chamber, by its decision dated 28.09.2023 (Case No. 2023/12611, Decision No. 2023/6359), upheld the conviction against Şerafettin Can Atalay, confirming his status as a convict.

Following this, despite our Chamber's final judgment, the Constitutional Court, on 25.10.2023, issued a ruling finding a violation of the rights to be elected and engage in political activities, as well as the right to personal freedom and security, in relation to Şerafettin Can Atalay's individual application (Application No. 2023/53898). The ruling ordered the cessation of the violation of rights by initiating a retrial for the applicant, halting the enforcement of the conviction, ensuring the applicant's release from the penal institution, and issuing a stay of proceedings in the new trial. A copy of this violation decision was sent to the Istanbul 13th Heavy Penal Court. Subsequently, the Istanbul13th Heavy Penal Court, relying on Article 50 of the Law No. 6216 on the Establishment and Procedures of the Constitutional Court dated 30.03.2011, stated that "the Constitutional Court's individual application violation decision does not pertain to our court's decision but rather to the decision of the relevant Criminal Chamber of the Court of Cassation regarding the rejection of the release request. The applicant was elected as a Member of Parliament while the file was under review by the relevant Chamber, and the violation subject to the individual application stemmed from this Chamber's decision. Additionally, after the individual application was filed, the relevant Criminal Chamber examined and decided on the file on the merits. Therefore, in light of the new legal situation, it is necessary for the 3rd Criminal

Chamber of the Court of Cassation to make a new assessment." Consequently, the file and decision were sent back to our Chamber for a ruling on the Constitutional Court's violation decision. By its decision dated 08.11.2023 (Case No. 2023/144), our Chamber ruled that "the Constitutional Court's violation decision dated 25.10.2023 regarding the individual application of Şerafettin Can Atalay (Application No. 2023/53898) cannot be deemed legally valid or applicable, as there is no decision required to be implemented under Article 153 of the Constitution. Furthermore, in the presence of a finalized and enforceable judgment, which was upheld by our decision dated 28.09.2023 (Case No. 2023/12611, Decision No. 2023/6359) after an appeal of the conviction decision against Şerafettin Can Atalay, non-compliance with the Constitutional Court's decision was ruled." Despite this, on 24.11.2023, Şerafettin Can Atalay filed another individual application with the Constitutional Court, which on 21.12.2023 ruled that "the rights to be elected and engage in political activities, the right to personal freedom and security, and the right to individual application were violated." The case was once again sent to the Istanbul 13th Heavy Penal Court for rectifying the identified violations by initiating a retrial, halting the enforcement of the conviction, ensuring the applicant's release from the penal institution, and issuing a stay of proceedings in the new trial. On 27.12.2023, the Istanbul 13th Heavy Penal Court stated that "in paragraphs 51-54 of its assessment, the Constitutional Court had specified that the authority to determine the relevant court was directly within the jurisdiction of the Constitutional Court. Although the relevant court was indicated as the Istanbul 13th Heavy Penal Court, during the preliminary stage of the trial, the applicant Şerafettin Can Atalay was not present as a Member of Parliament, and the trial was concluded according to general provisions. Considering these arrangements, the Constitutional Court’s individual application violation decision does not pertain to our court’s decision but rather to the decision of the relevant Criminal Chamber of the Court of Cassation regarding the rejection of the release request. The applicant was elected as a Member of Parliament while the file was under review by the relevant Chamber, and the violation subject to the individual application stemmed from this Chamber’s decision. Additionally, after the individual application was filed, the relevant Criminal Chamber examined and decided on the file on the merits. Therefore, in light of the new legal situation, it is necessary for the 3rd Criminal Chamber of the Court of Cassation to make a new assessment and issue a decision on the individual application. An individual application was made to the Constitutional Court once again based on this decision, and following the Constitutional Court's evaluation, the relevant decision was sent back to our court. It is understood that the case was sent back to our Chamber for a new evaluation of the legal situation in light of the Constitutional Court’s decision, given that the decision pertains to the ruling made by the 3rd Criminal Chamber of the Court of Cassation."

On 29.12.2023, the file was sent to the Chief Public Prosecutor's Office of the Court of Cassation for an opinion. In its opinion dated 02.01.2024, the Chief Public Prosecutor's Office stated: "In Chapter Five of the Turkish Penal Code No. 5237, titled 'Crimes Against the Constitutional Order and the Functioning of This Order,' Article 312, 'Crimes Against the Government,' provides: 'Anyone who attempts to overthrow the Government of the Republic of Türkiye by using force and violence or to prevent it from performing its duties, either partially or entirely, shall be punished with aggravated life imprisonment.' The aforementioned crime must be regarded as a terrorist offense in light of the provisions in Articles 1 and 3 of the Law No. 3713 on Combating Terrorism."

Since the introduction of the individual application procedure with the 2010 constitutional referendum, the binding nature of the decisions resulting from individual applications, particularly those that have been finalized after passing through the Court of Cassation, has been a subject of debate. According to the last paragraph of Article 153 of our Constitution,

the decisions of the Constitutional Court must be published in the Official Gazette (T.C. Resmi Gazete). Additionally, Article 148, paragraph five, states that the procedures and principles concerning individual applications will be regulated by law. Although Article 66, paragraph eight of Law No. 6216 on the Establishment and Rules of Procedure of the Constitutional Court specifies that decisions made as a result of annulments and objections will be published in the Official Gazette, there is no provision for decisions resulting from individual applications. Furthermore, Article 50, paragraph one of the same Law clearly stipulates that decisions made on individual applications cannot be subject to a review of appropriateness and cannot be classified as administrative acts or processes.

Therefore, as detailed in our opinion dated 03.11.2023 on the same subject, it is evaluated that the crime specified in Article 312 of Law No. 5237, which led to the conviction and detention of Şerafettin Can Atalay, does not fall under the legislative immunity described in the second paragraph of Articles 14 and 83 of the Constitution of the Republic of Türkiye.

The Constitutional Court's decision, dated 21.12.2023, concerning the individual application of Şerafettin Can Atalay (3), included the following summary:

The Istanbul 13th Heavy Penal Court, in its decision dated 01.11.2023, to send the file to the 3rd Criminal Chamber of the Court of Cassation, did not specify any legal remedy concerning its decision. Additionally, the opinion presented by the Chief Public Prosecutor's Office at the Court of Cassation on 03.11.2023 was not communicated to the applicant. The Constitutional Court has broad discretion in determining how to remedy identified rights violations and their consequences. If the Constitutional Court decides that a retrial should be conducted to remedy the violation and its consequences, the relevant court must begin the retrial proceedings without waiting for applications from the parties. Courts receiving the retrial decision have no discretion regarding the existence of the reason for the retrial. Unlike the procedural law institution of trial renewal, there is no admissibility review phase in cases requiring retrial. The lower court or other public authorities do not have discretion regarding the appropriateness or necessity of the required actions if the Constitutional Court's decision mandates specific actions to remedy the violation and its consequences.

If the Constitutional Court specifies the measures or methods to be taken to remedy the violation and its consequences, the relevant authorities are required to comply with these requirements. The court receiving the Constitutional Court's decision is not entitled to question the appropriateness or suitability of the decision but must start judicial actions within the framework of procedural law to address the results of the violation. In cases where a retrial is ordered to remedy the violation, the file must be sent to the relevant court, not the court that caused the violation.

As with norm control, the Constitutional Court has the exclusive authority to interpret constitutional provisions finally and bindingly in individual applications. Non-compliance with the Constitutional Court's decision results in a situation that conflicts with Article 153/6 of the Constitution. The 3rd Criminal Chamber of the Court of Cassation issued a decision of 'non-compliance with the Constitutional Court's decision,' which is not found in Turkish law. The Constitutional Court designated the Istanbul 13th Heavy Penal Court as the relevant court; therefore, the Court of Cassation does not have the authority or duty to conduct a retrial under Law No. 6216. The decision rendered by a court without jurisdiction and authority for retrial violates Article 142 of the Constitution and the principle of natural judge in Article 37 of the Constitution.

Failure to enforce the Constitutional Court's decision as determined in the violation decision constitutes a serious infringement of the individual right of effective application, undermining the individual application process and, ultimately, the rule of law. This non-compliance with Constitutional Court decisions compromises the trust in and respect for the legal system and undermines the fundamental constitutional order.

The Constitutional Court's decisions are not recommendations or wishes but have binding force as specifically regulated in the Constitution. There is no doubt about the binding nature of Constitutional Court decisions, including those on individual applications. If the Constitutional Court determines that a fundamental right or freedom has been violated through an individual application, no authority has the power to review or assess the conformity of this decision with the Constitution or law. Judicial bodies and other public authorities cannot avoid implementing or complying with the Constitutional Court's decisions under any pretext. Arbitrary decisions by courts and public authorities that result in continued violations of fundamental rights and freedoms are unacceptable in any legal system. Therefore, non-compliance with constitutional provisions leads to legal, administrative, and penal responsibilities. The refusal to apply the Constitutional Court's decision and failure to remedy the violation as mandated by the Constitution constitutes a clear contradiction with the text of Article 153 and the Constitutional intent.

The Constitutional Court found that the process, which began with the Istanbul 13th Heavy Penal Court sending a case within its jurisdiction to the 3rd Criminal Chamber of the Court of Cassation, and which was shaped by the Chamber’s decision that ignored constitutional provisions, clearly violated the Constitution. As a result, this led to the arbitrary deprivation of the applicant’s freedom. The Court concluded that the failure to implement the Constitutional Court’s violation decision resulted in the infringement of the applicant’s right to individual application, political participation, and personal freedom and security.

In summary, the second decision on the violation of the Constitutional Court is based on the following reasons:

a- Under Article 153/6 of the Constitution of the Republic of Türkiye, decisions of the Constitutional Court are binding on the legislative, executive, and judicial bodies, administrative authorities, as well as real and legal persons,

b- According to Articles 148/3-4-5 of the Constitution of the Republic of Türkiye, everyone has the right to individual application to the Constitutional Court if any of their fundamental rights and freedoms guaranteed by the Constitution are alleged to have been violated by public authority within the scope of the European Convention on Human Rights. In individual applications within this scope, if the source of the violation is based on a Constitutional article, the Constitutional Court’s exclusive right to interpret the Constitution is established, and this interpretation must be accepted unconditionally by everyone.

c- According to Articles 48 and 50 of Law No. 6216, if a decision of the Constitutional Court regarding a violation of rights is based on a court decision, the authority to determine which court the decision will be sent to for the purpose of remedying the violation is absolute. In this context, the 3rd Criminal Chamber of the Court of Cassation does not have the authority to make decisions regarding the outcomes of the violation of rights.

In this context, our Chamber will first determine its jurisdiction regarding the violation decisions issued by the Constitutional Court concerning the convict Şerafettin Can Atalay.

Following this, the issues of the right to interpret the Constitution and the binding nature of the Constitutional Court's decisions will be assessed. Subsequently, the issues related to the notification of the opinion of the Chief Public Prosecutor of the Court of Cassation to the parties will be examined. Finally, the legislative immunity under Article 14 and Article 83(2) of the Constitution, as well as the situation regarding the retrial and release of the convict Şerafettin Can Atalay, will be evaluated.

In this regard, our Chamber has provided explanations below regarding the legal issues identified in the mentioned violation decision.

B- EVALUATION OF THE CONSTITUTIONAL COURT'S JUDGMENT/DECISIONS ON VIOLATIONS OF RIGHTS

1- The Issue of Whether Our Chamber is Competent Regarding the Constitutional Court's Judgment of Violation Concerning Convict Şerafettin Can Atalay

On 08.11.2023, regarding the Constitutional Court, our Chamber determined that, despite not having the authority or mandate to render the application of constitutional provisions ineffective or to interpret them, and by ignoring the provisions of Articles 5, 6, 11, 14, 83, 154, and 155 of the Constitution, the Constitutional Court acted as a super appellate authority with powers not granted to it by the Constitution. Although it is explicitly stipulated that individual applications can only be made after exhausting ordinary legal remedies and that no review can be conducted on matters to be considered in the examination of legal remedies in individual applications, given this explicit regulation, no legal value or validity can be attributed to the Constitutional Court's judgment of violation regarding convict Şerafettin Can Atalay. Consequently, since there is no decision that needs to be complied with under Article 153 of the Constitution, our Chamber, on 08.11.2023, issued a miscellaneous decision regarding non-compliance with the Constitutional Court's violation decision dated 25.10.2023.

Our Chamber's aforementioned decision does not constitute a judgment within the meaning of Article 223 of the Criminal Procedure Code No. 5271. However, this decision, which was rendered as a miscellaneous decision intended to determine the current status of the case file that had previously undergone appellate review, is of a definitive nature.
When examining the legal regulations related to miscellaneous decisions, Article 39 of the Regulation on the Execution of Administrative and Clerical Services of Regional Courts of Appeal, First Instance Judicial Courts, and Public Prosecutor's Offices mentions the registration of miscellaneous matters. However, this article does not provide an exhaustive list of miscellaneous decisions nor does it specify the content of such decisions. Similarly, the Constitutional Court can also render miscellaneous decisions on certain requests brought before it. For example, in its decision dated 13.04.2023, with case number 2023/4 (Miscellaneous Matters) and decision number 2023/1, the Constitutional Court issued a miscellaneous decision regarding the request to "temporarily suspend the use of the term 'Millet' in the name of the Millet Party as an alliance name by the Republican People's Party, the İYİ Party, the Democratic Party, the Future Party, the Democracy and Progress Party, and the Felicity Party, and to prohibit the use of this name." The court decided that "since it was understood that the alliance name 'Millet' currently used by the Nation Alliance does not violate Article 96 of Law No. 2820, the request to temporarily suspend the use of the term 'Millet' as an alliance name and to prohibit its use is rejected."

In this context, courts of first instance and appellate courts, which are described as high courts in the Constitution, can issue miscellaneous decisions that do not constitute judgments under the existing case file number regarding requests and applications before them, as seen in the decisions to refer the case to the Court of Cassation by the İstanbul 13th Heavy Penal Court concerning the Constitutional Court's violation of rights decisions dated 25.10.2023 and 21.12.2023. There is no requirement in the legislation for every miscellaneous decision or for determinations that may be made at the request of a court to be explicitly regulated in advance concerning what subject, in what manner, or how they should be made. Likewise, as explicitly explained in our Chamber's miscellaneous decision dated 08.11.2023, with case number 2023/144, where it was determined that the Constitutional Court violated the provisions of the Constitution, the nature of a determination-type miscellaneous decision issued by the Court of Cassation under Article 154 of the Constitution regarding a violation of rights decision by the Constitutional Court, whose legitimacy has become a matter of public debate, cannot be determined by the Constitutional Court itself. Furthermore, as justified above, there is no obligation for the content of every miscellaneous decision to be explicitly defined in the legislation.

In this context, miscellaneous decisions made by courts of first instance that are not subject to appeal are examined by appellate courts along with the main case file. Similarly, as the highest judicial authority, the Court of Cassation, acting as an appellate court, can issue a definitive miscellaneous decision that does not constitute a judgment based on the case file number under Article 154 of the Constitution, as it serves as the final review authority for judicial decisions and judgments. This is because, following a violation of rights decision by the Constitutional Court, the appellate court may either uphold its previous decision without introducing new facts or make a decision in a manner that does not eliminate the violation and its consequences as outlined in the Constitutional Court’s violation decision (Ramazan Gümüşay, *Bireysel Başvuruda İhlalin Ortadan Kaldırılmasının Bir Aracı Olarak "Yeniden Yargılama" Kararı ve İcrası*, Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi, C. 22, S. 1-2, 2018, s. 112).

Article 50, Paragraph 2 of the Law No. 6216 on the Establishment and Procedures of the Constitutional Court states: "If the identified violation originates from a court decision, the file is sent to the relevant court for re-trial to eliminate the violation and its consequences. In cases where there is no legal benefit in conducting a re-trial, compensation may be awarded in favor of the applicant, or the applicant may be directed to file a lawsuit in general courts. The court responsible for conducting the re-trial must, if possible, make a decision on the file in a manner that eliminates the violation and its consequences as explained in the Constitutional Court's violation decision."

Article 138, Paragraph 2 of the Constitution states: "No organ, authority, body, or individual may issue orders or instructions to courts and judges in the exercise of judicial authority; send circulars; or make recommendations or suggestions."

The majority of individual applications consist of those challenging court decisions. If the violation originates from court decisions, according to Article 50, Paragraph 2 of Law No. 6216, the file is sent to the relevant court that caused the violation for re-trial to eliminate the violation and its consequences. According to this provision, if the Constitutional Court determines that a violation of a right originates from a court decision, depending on the nature of the violation:

a) Ordering a re-trial,

b) If there is no legal benefit in conducting a re-trial, awarding compensation,
c) If determining the amount of compensation requires a more detailed examination, directing the applicant to file a lawsuit in general courts.

(Muhammed Tikici, Ceza Hukuku Bağlamında Anayasa Mahkemesi'ne Bireysel Başvuru, Yüksek Lisans Tezi, İstanbul Ticaret Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul, 2021, s. 25-28)

Article 50, Paragraph 2 of Law No. 6216 stipulates that re-trial should be conducted "if possible, based on the file," while Article 79, Paragraph 1(a) of the Constitutional Court's Rules of Procedure states that re-trial should be conducted "if possible, urgently based on the file." Thus, it is aimed to avoid extending the process with hearings and, if possible, to make decisions based on the file without a hearing. Therefore, conducting re-trial based on the file is the rule, while holding hearings is an exception (Ebru Karaman, *Karşılaştırmalı Anayasa Yargısında Bireysel Başvuru Yolu*, 1st Edition, XII Levha Yayınları, Istanbul, 2013, p. 305). In this context, since conducting a re-trial with hearings is an exception, if the Constitutional Court's decision on a rights violation necessitates a re-trial, it is possible for the Court of Cassation to make a decision on re-trial based on the file. It is not acceptable to presume that re-trial must absolutely be conducted with hearings by the first-instance court; rather, if the legal assessment made during the re-trial process deems the Constitutional Court's decision on the rights violation to be lawful, the Court of Cassation may also send the case back to the first-instance court by way of file review. Additionally, since the violation decision issued by the Constitutional Court is essentially a determination, it does not have the power to automatically nullify the decision causing the violation issued by the first-instance and appellate courts (Osman Doğru, *Anayasa Mahkemesine Bireysel Başvuru Rehberi*, 1st Edition, Legal Yayınevi, Istanbul, 2012, p. 92).

Additionally, according to Article 50, Paragraph 1 of Law No. 6216, the Constitutional Court must adhere to two limitations while exercising this authority: it should not conduct a "merits review" and should not issue decisions of an "administrative action and process" nature (Ramazan Gümüşay, Bireysel Başvuruda İhlalin Ortadan Kaldırılmasının Bir Aracı Olarak "Yeniden Yargılama" Kararı ve İcrası, p. 98).

Nevertheless, it is noteworthy that in the violation of rights decisions regarding the convict Şerafettin Can Atalay, the Constitutional Court, emboldened by the lack of oversight, has issued decisions that exceed its authority defined in Article 50 of Law No. 6216, and contravened Article 138/2 of the Constitution. The Court has issued decisions that go beyond merely guiding the first-instance court, such as "conduct a re-trial, issue a stay order, and release the relevant convict," which are essentially directives and instructions.

In addition, the Constitutional Court, in its ruling on the Şerafettin Can Atalay (2) application dated October 25, 2023, did not clarify from which legal regulation it derived its authority and competence in addressing legislative immunity. Consequently, it has acted contrary to the letter and spirit of the Constitution. The findings of the Constitutional Court are as follows: "In the present case, the 3rd Criminal Chamber of the Court of Cassation did not perform the minimum evaluations expected of it, as demonstrated in the Gergerlioğlu decision, due to the lack of a law providing protective safeguards against arbitrary actions of public authorities.

As established in the Constitutional Court’s case law, it is necessary to evaluate whether the accusation is serious enough to prevent the deputy from benefiting from legislative immunity,

whether the accusation is an unnecessary charge that impedes the deputy's ability to fully perform their duties, and whether the accusations leading to the determination of the absence of legislative immunity were made solely for political purposes. It is also essential to ascertain if the real aim of the accusations is to unfairly interfere with a deputy and to threaten their freedom and independence while carrying out their duties.

In this regard, the Court must determine whether a proper investigation has been conducted to substantiate the accusations and whether the alleged conduct falls within the scope of fundamental rights and freedoms protected by the Constitution. Additionally, it must assess the reasons why the conduct was deemed a threat to the democratic system and an abuse of rights.

According to the amendment to Article 14 of the Constitution in 2001, which prohibits the use of rights and freedoms to destroy those rights and freedoms, the Court should determine whether the actions and dissemination of thoughts related to the alleged crimes pose a direct and imminent threat to democratic life, cause actual harm, and whether the applicant's aim is to undermine others' rights.

Furthermore, if legislative immunity is found to be absent, the Court should consider the likelihood of changes in the legal qualifications of the accusations and whether potential new qualifications will fall under the provisions of Article 14 of the Constitution.

The Constitutional Court accepted that these issues were not investigated by our chamber and disregarded the constitutional provision under Article 154, which designates the Court of Cassation as the final review authority for decisions and judgments given by criminal courts, as no other judicial body is designated by law for this purpose.

It is evident that Şerafettin Can Atalay, convicted as a result of the Gezi Park protests—a movement that began in mid-2011 as a reflection and adaptation of the Arab Spring—was involved in activities related to an insurrectionist movement. His actions during the protests, including his statements and calls to action, were part of this movement, and he was found to be a joint perpetrator of the alleged crime. The 3rd Criminal Chamber of the Court of Cassation accepted that these actions fell within the scope 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 began before the election, it was concluded that he could not benefit from legislative immunity under Article 83, paragraph 2, of the Constitution. Consequently, his requests for a suspension of the trial and release were denied, and the case was reviewed. The initial court's decision was upheld, and Şerafettin Can Atalay was confirmed as a convicted individual.

Nevertheless, although the Constitutional Court has the authority to determine how to remedy the violation and its consequences following an individual application, it is bound by the Constitution's provisions. According to Article 154 of the Constitution, which governs the use of constitutional authority, our chamber's decision dated 28/09/2023, with case number 2023/12611 and decision number 2023/6359, accepted that the Gezi Park protests constituted a coup attempt aimed at overthrowing the legitimate and elected government. However, in its violation decision dated 25/10/2023, the Constitutional Court did not explain the basis for its decision regarding whether the accusations against Şerafettin Can Atalay were unnecessary or politically motivated. It also failed to address whether an appropriate investigation was conducted, whether these actions posed a direct and imminent threat to the democratic system, whether they caused actual harm, whether their purpose was to

undermine others' rights, or whether there was a high likelihood of changes in the legal qualification of the accusations.

The Constitutional Court's findings are as follows: “In the present case, the 3rd Criminal Chamber of the Court of Cassation did not perform the necessary minimum evaluations because there is no law providing protective safeguards against arbitrary actions of public authorities. The Constitutional Court has not clarified which legal regulation it relied on to determine its powers and authority regarding legislative immunity, and it did not act as a super-appeal authority regarding the merits of the case.”

By acting as a super-appeal authority, the Constitutional Court disregarded our chamber's determination that the Gezi Park protests constituted crimes aimed at overthrowing the legitimate and elected government. It concluded that these serious actions should be regarded as falling within the scope of the right to assemble and demonstrate, thereby evaluating evidence and the nature of the crime in a manner that exceeded its constitutional and legal authority.

In this context, the Constitutional Court, in its ruling regarding Şerafettin Can Atalay's application concerning legislative immunity, exceeded its legal authority by making determinations after the ruling against the applicant had become final, despite the fact that the file was still under appellate review and had not yet been finalized. Even if the Constitutional Court had made the above determinations while the file was still under appellate review, the decision would still have lacked legal value as it would have constituted a violation of legal authority by treating the file as if it were under the objective effect of a super-appeal. The Constitutional Court’s annulment of the decisions of first-instance and appellate courts, and its substitution of those decisions with its own, is not possible under the current legal framework (Ulaş Karan, "Bireysel Başvuru Kararlarının İcrası: Eski Alışkanlıklar, Yeni Sorunlar" [The Execution of Individual Application Decisions: Old Habits, New Problems], in Anayasa Mahkemesi’ne Bireysel Başvuru Usulünün İlk Dört Yılına Dair Bir Değerlendirme, Anayasa Mahkemesi Kararlarının İzlenmesi Yoluyla Bireysel Başvuru Usulünün Güçlendirilmesi Projesi, İstanbul Bilgi Üniversitesi İnsan Hakları Hukuku Uygulama ve Araştırma Merkezi Yayını, İstanbul, 2017, p. 30). Unless such problematic practices are addressed through findings by the Court of Cassation, another high court like the Constitutional Court, to remind the Constitutional Court of the limits of its duties and powers, it is understood that the next step of the Constitutional Court would be to render a decision on the merits of the case. This would involve evaluating the material and moral elements of the offense, thus leading to a usurpation of authority by issuing a ruling beyond its jurisdiction.

Additionally, the court of first instance or the appellate court, which will evaluate the Constitutional Court's violation decision, is not obligated in all cases to issue a ruling contrary to its initial decision. The court, responsible for addressing the violation, retains discretion based on the specifics of the case and may, following a retrial, issue the same or a similar ruling, or it may rule contrary to its initial decision (Gümüşay, *Bireysel Başvuruda İhlalin Ortadan Kaldırılmasının Bir Aracı Olarak "Yeniden Yargılama" Kararı ve İcrası*, s. 109-110). If the opposite were to be accepted—that is, if the court of first instance or the appellate court were obliged to issue a ruling contrary to its initial decision following the Constitutional Court's violation ruling—then there would be no need for a retrial, and the Constitutional Court itself would have to issue the final ruling on the merits of the case (Gümüşay, *Bireysel Başvuruda İhlalin Ortadan Kaldırılmasının Bir Aracı Olarak "Yeniden Yargılama" Kararı ve İcrası*, s. 110). Therefore, in accordance with Article 154 of the Constitution and in order to

protect its jurisdiction and authority as a high court and court of appeals, the Court of Cassation may question whether to comply with the Constitutional Court's violation decision, which exceeds its constitutional and legal authority and lacks legal value. Indeed, in one of its rulings, the Constitutional Court stated: "It has been concluded that the applicant's right to freedom of expression was violated. This violation ruling should not be interpreted as meaning that the documents in question must be provided to the applicant. The relevant courts must conduct a retrial in accordance with the criteria and methods established in the Constitutional Court's ruling, and, based on the outcome of the trial, decide whether or not the publications in question should be provided to the applicant" (Bejdar Ro Amed (2) Başvurusu, 30/11/2017 tarih, 2014/10257 Başvuru Numaralı, § 58). In doing so, the Constitutional Court also emphasized that the discretion regarding the measures to be taken to eliminate the violation and its consequences belongs to the relevant court.

In the specific case, Şerafettin Can Atalay acquired the status of a convict with the approval decision given by our chamber on 28/09/2023. Therefore, despite the judgment being under appellate review, the Constitutional Court should have rendered a decision regarding the individual application made concerning the legislative immunity. However, by exceeding its legal authority and imbuing excessive meaning into the situation, the Constitutional Court overlooked the new circumstances that arose after the judgment was finalized. The decision dated 25/10/2023, deemed legally void, and the violation decision dated 21/12/2023, which was based on this decision, were issued despite the fact that the 13th Heavy Penal Court in Istanbul had essentially issued decisions of lack of jurisdiction and sent the case to our chamber for a decision on the Constitutional Court's violation findings. In this context, it is understood that Şerafettin Can Atalay was elected as a member of parliament in the general elections held on 14/05/2023, and the notification prepared by the Chief Public Prosecutor of the Court of Cassation on 07/07/2023 was sent to our chamber, which issued a decision on 28/09/2023, considering it materially final. Given that Şerafettin Can Atalay’s election as a member of parliament resulted in legislative immunity, our chamber should have been requested to issue a suspension decision in accordance with Article 83 of the Constitution and to release him. Due to the justified findings of our chamber that legislative immunity did not apply in the context of the crime attributed to Şerafettin Can Atalay, it is understood that the alleged violations identified in the legally void violation decision of the Constitutional Court dated 25/10/2023 and 21/12/2023 stemmed from the decisions of our chamber, which functions as a court of appeal in this matter. Consequently, the court responsible for evaluating the Constitutional Court's violation decisions is deemed to be our chamber, in accordance with Article 50/2 of Law No. 6216. Similarly, our chamber’s decision dated 08/11/2023, which is of a confirmatory nature, is a result of this acceptance. A divergence in interpretation cannot render the Constitution’s provisions inapplicable by citing an authority not derived from the Constitution, as done by the Constitutional Court. Indeed, in this case, the Constitutional Court has attempted to render Articles 14 and 83/2 of the Constitution inoperative, and our chamber has made findings regarding the legal void and exceeding of legal authority in this application.

Thus, the risk of other provisions of the Constitution being rendered inapplicable through interpretative discrepancies, based on the Constitutional Court’s authority to examine only the formal aspects of constitutional provisions, has been sought to be mitigated.

Otherwise, there is a risk that other provisions of the Constitution, including the first four articles, which protect the fundamental characteristics of the Republic of Turkey, could be rendered de facto inapplicable through such interpretive means. This is because the

regulation in Article 14 of the Constitution has a protective nature, particularly concerning the provisions in the first four articles of the Constitution.

There is no provision in Law No. 6216 regarding how the relevant court should be determined. However, there are supportive views in the doctrine indicating that our chamber is responsible for evaluating the Constitutional Court's violation decisions. According to one view in the doctrine, a decision by the Constitutional Court concluding that the Constitution has been violated is, in fact, a decision by a higher court that did not bring the first-instance court's decision into conformity with the Constitution. Therefore, the Constitutional Court's decision should be sent to the court that issued the final decision, which allowed the applicant to exhaust all avenues of appeal. This way, the court that issued the final decision will formally learn how the Constitution was violated and will be able to make an assessment on this matter (Doğru, Anayasa Mahkemesine Bireysel Başvuru Rehberi, pp. 94-95). Another view in the doctrine suggests that the file should be sent to the court from which the violation decision originated. Accordingly, if the decision causing the violation originates from a first-instance court decision, the file should be sent to the first-instance court; if it originates from a court of appeal decision, the file should be sent to the court of appeal. If the violation arises from both the first-instance and the court of appeal decisions, the file should be sent to the first-instance court (Berkan Hamdemir, Anayasa Mahkemesi'ne Bireysel Başvuru, 1st Edition, Seçkin Yayınevi, Ankara, 2015, p. 353).

According to these views, it is appropriate for the violation decision issued by the Constitutional Court regarding the application of Şerafettin Can Atalay, who is currently convicted, to be sent to our chamber for evaluation by the Istanbul 13th Heavy Penal Court. Additionally, as a high court, the Court of Cassation is authorized and responsible for assessing whether there has been an interference with its jurisdiction and authority as a court of appeal. In this context, it can also determine whether the violation decision issued by the Constitutional Court lacks legal value. This determination stems from the fact that, according to Article 154 of the Constitution, the Court of Cassation is the final review authority for decisions and judgments issued by lower courts that are not delegated to any other judicial body by law. Thus, the Court of Cassation can protect its own jurisdiction and authority against other high courts, as stipulated by Article 154 of the Constitution.

The Constitutional Court should not issue arbitrary decisions by accepting that there is no authority to oversee it. The violation decisions it issues regarding fundamental rights and freedoms should be consistent with the current situation, and in cases where there would be no impact on the outcome, the court should consider the lack of legal value and refrain from ruling on a retrial. In this regard, the Constitutional Court should not view itself as a super appellate authority over high courts. It should not exceed its legal authority and impose undue interpretations by overturning decisions from appellate courts, which, like itself, hold the status of high courts, under the guise of retrial. If the Constitutional Court opts for decisions that lack legal value and exceed its legal authority, as in this case, the Court of Cassation, which is considered competent and is a court of appeal like the Constitutional Court, and between which there is no hierarchical relationship, can assess whether the violation decision is legally valueless and whether the Constitutional Court exceeded its legal authority. According to Articles 153, 154, and 155 of the Constitution, the Court of Cassation and the Council of State, which are appellate courts and high courts, can evaluate whether to comply with violation decisions resulting from individual applications, which are expected to have a subjective impact, when such decisions come before them and they are deemed competent according to the views stated in the legal doctrine mentioned above. In this respect, the Constitutional Court, despite its approach of often making inconsistent

evaluations based on its own precedents rather than addressing any doctrinal views, has interpreted the law in a manner contrary to its text and essence. As is known, the perspectives of legal scholars and legislators are different concepts. The Constitutional Court's attempt to address legal issues with an approach that suggests only it can interpret the Constitution and legislation, and that its decisions must be strictly followed, has led it to make decisions that contradict itself and exceed its legal authority.

Although Article 158, paragraph 3 of the Constitution titled "Conflict of Jurisdiction" stipulates that "In disputes of jurisdiction between other courts and the Constitutional Court, the decision of the Constitutional Court is taken as the basis," as explained above, there is no jurisdictional dispute between the Constitutional Court and the Court of Cassation. Moreover, since there are no conflicting provisions under Articles 24 and 25 of Law No. 2247 on the Establishment and Functioning of the Court of Jurisdictional Disputes, there is no provision conflict between the Constitutional Court and the Court of Cassation. The current problem arises from the Constitutional Court's application of the Constitution in a way that renders it unenforceable, exploiting the legal void granted by the lack of oversight. For all these reasons, it has been pointed out that our Chamber, which operates under the laws and general principles of law and has become a target of terrorist organizations, has been unjustly criticized by the Constitutional Court in its decision dated 21/12/2023 concerning the individual application of Şerafettin Can Atalay (3), which states that our Chamber violated "the imperative provision of Article 142 of the Constitution and the principle of a natural judge as stipulated in Article 37 of the Constitution." Additionally, the decision's portrayal of our Chamber as a newly established court, disregarding its role as a supreme appellate court reviewing the decisions of lower courts, aligns with the rhetoric of terrorist organizations (Therefore, the decision of the Constitutional Court dated 25/10/2023, numbered 2023/53898, regarding Şerafettin Can Atalay's individual application, cannot be attributed any legal value or validity, and accordingly, no decision within the scope of Article 153 of the Constitution is applicable. Furthermore, there is a final and executable judgment from the Court of Cassation issued on 28/09/2023, which was confirmed through the appellate review of the conviction decision concerning Şerafettin Can Atalay. The decision from the court of different case types dated 08/11/2023 also outlines these issues.)

2- The Problem of the Binding Nature of Constitutional Court Decisions (In the Context of Articles 148 and 153 of the Constitution, Article 66, Paragraph 8 of Law No. 6216, and Article 58, Paragraph 2 of the Internal Regulations of the Constitutional Court)

With the adoption of Law No. 5982 on 12 September 2010 through a public referendum, the individual application route was introduced into our legal system through the amendments made to Articles 148 and 149 of the Constitution (Selin Kandemir, Anayasa Mahkemesine Bireysel Başvuru Yolunda Olağan Kanun Yollarının Tüketilmesi Kriteri, Yüksek Lisans Tezi, Galatasaray Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul, 2023, p. 5). The new procedure is referred to as individual application in the third, fourth, and fifth paragraphs of Article 148 of the Constitution. Similarly, the term "individual application" is used in the relevant provisions of Law No. 6216 and the Rules of Procedure of the Constitutional Court. In this context, the individual application route to the Constitutional Court was not introduced as a legal remedy aimed at re-examining a court decision in the same or a higher court. Instead, the individual application route examines whether a fundamental right or freedom has been violated; it cannot be considered a continuation of the previous litigation. Therefore, it is not possible to classify individual application as an "extraordinary legal remedy." Individual application is a sui generis legal route. In this context, an individual application to the Constitutional Court can be defined as an exceptional and unique, secondary constitutional right to seek justice

for individuals whose fundamental rights and freedoms have been violated due to acts, actions, or omissions of public power, after exhausting other avenues of appeal. In cases brought before the Constitutional Court as a result of individual applications, no examination can be conducted regarding issues that should be considered in legal remedy reviews (Constitution, Art. 148/4).

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, there is no explicit provision concerning the rights under additional protocols. This issue, not foreseen in the Constitution, has been clarified by Law No. 6216. Article 45 of this Law provides that fundamental rights covered by the additional protocols to the ECHR to which Turkey is a party can also be the subject of individual applications. Accordingly, individual applications can be made to the Constitutional Court alleging violations of fundamental rights and freedoms under the ECHR and the additional protocols to which Turkey is a party (Mustafa Seven, Anayasa Mahkemesine Bireysel Başvurunun Hukuki Sonuçları, Yüksek Lisans Tezi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul, 2022, p. 21-23).

If the Constitutional Court, in the cases brought before it as a result of individual applications, acts as a super appellate court and interferes with the constitutional authority and jurisdiction of high courts such as the Court of Cassation and the Council of State, there will be a decision rendered that is devoid of legal value and exceeds legal authority. Therefore, after evaluating the nature of the violation decision, the decision of the Constitutional Court, which violates the Constitution, will not be complied with.

Recently, the Constitutional Court itself has rendered the provisions of the Constitution practically unimplementable, leading to a de facto annulment. While being in clear conflict with the Constitution, the Constitutional Court does not have the option of seeking refuge in Article 153 of the Constitution. By acting as a super appellate court, the Constitutional Court has both deviated from the purpose of the individual application system and rendered itself incapable of functioning effectively, facing an overwhelming workload. Therefore, since the decision on the violation of rights in the individual application of Şerafettin Can Atalay (2) cannot be attributed legal value and thus is not complied with, it is not the Court of Cassation that violates the right to individual application as provided in Article 148 of the Constitution, but rather the Constitutional Court itself, which, by exceeding its legal authority and acting as a kind of super appellate court in individual applications, has faced a constant increase in workload and become unable to perform its duties.

To address the issue of the binding nature of decisions made by the Constitutional Court on individual applications as well as on annulment and appeal applications, it is useful to examine the legal regulations and historical developments:

Article 153, Paragraph 6 of the Constitution: "Decisions of the Constitutional Court are published immediately in the Official Gazette and bind the legislative, executive, and judicial organs, administrative authorities, and natural and legal persons." This provision was established in the original version of the Constitution and came into force with its publication in the Official Gazette on 09/11/1982.

Articles 148, Paragraphs 3, 4, and 5 of the Constitution: "Everyone can apply to the Constitutional Court claiming that any of the fundamental rights and freedoms guaranteed by

the Constitution, including those under the European Convention on Human Rights, have been violated by public authorities. To apply, all ordinary legal remedies must be exhausted.

In individual applications, issues that should be considered in the course of the legal process cannot be reviewed.

Procedures and principles regarding individual applications are regulated by law." These paragraphs were added to the Constitution by Law No. 5982, which was accepted in the referendum held on 12/09/2010, thus introducing the individual application route into our legal system.

Article 66, Paragraph 8 of Law No. 6216: "Reasoned decisions issued as a result of annulment and appeal applications are published immediately in the Official Gazette." This provision was enacted with its publication in the Official Gazette on 03/04/2011.

Article 58, Paragraph 2 of the Rules of Procedure of the Constitutional Court: "Reasoned decisions on the merits of annulment and appeal applications are published in the Official Gazette. The Presidency decides which other decisions will be published in the Official Gazette. Examples of decisions to be published in the Official Gazette bear the signatures of the President and the Deputy Secretary-General responsible for judicial affairs." This provision was enacted with its publication in the Official Gazette on 12/07/2012.

However, according to Article 76 of Law No. 6216, which addresses the entry into force, the individual application route to the Constitutional Court for violations of rights caused by individuals and institutions using public power began to be practically implemented as of 23/09/2012. In this context, it was anticipated that reasoned decisions of the Constitutional Court made as a result of annulment and appeal applications under Articles 153/6 of the Constitution and 66/8 of Law No. 6216 would be published in the Official Gazette. However, the relevant provisions did not include regulations regarding the publication of reasoned decisions of the Constitutional Court related to individual applications, which were introduced by the referendum on 12/09/2010 and practically implemented as of 23/09/2012. Since the individual application route was not yet accepted at the time of the entry into force of Article 153, Paragraph 6 of the Constitution, it is understood that this provision pertains to decisions of the Constitutional Court made as a result of annulment and appeal applications. While there is no regulation in the Constitution or Law No. 6216 regarding the publication of reasoned decisions resulting from individual applications, Article 58/2 of the Rules of Procedure of the Constitutional Court vaguely regulates that the Presidency will decide which of the other decisions will be published in the Official Gazette. Despite the emphasis placed by the Constitutional Court on clarity and predictability in many matters, the issue of publishing individual applications in the Official Gazette is not explicitly addressed even in the Rules of Procedure; instead, such applications are referred to as other decisions without even using the term "individual application," which has been noted as significant by our Court. Rules of Procedure generally govern the internal workings of institutions and organizations and bind these structures by default. Therefore, it is not possible to achieve objective impact on individual applications through a Rules of Procedure provision.

Considering the aforementioned constitutional and legal regulations, it can be said that the intention of the Constitution and the legislator is for the reasoned decisions of the Constitutional Court in annulment and appeal cases to be published in the Official Gazette and be binding on everyone in order to ensure their objective effect. However, the Constitutional Court’s internal regulations use the vague term “other decisions” and do not

specify which individual application decisions and for what purposes should be published in the Official Gazette. Moreover, the Constitutional Court, as a high court, is supposed to act within its jurisdiction to examine whether fundamental rights and freedoms under the ECHR and additional protocols are violated and to act as a filter before individual applications to the ECtHR, without intervening in the matters to be considered by the Court of Cassation and the Council of State in their appellate review. Therefore, there is no obligation to publish the decisions given by the Constitutional Court in individual applications, which are expected to produce subjective results, in the Official Gazette. Despite this lack of obligation, some decisions given by the Constitutional Court in individual applications, which exceed legal authority and lack legal value, are published in the Official Gazette, providing a shield for the objective effect of Constitutional Court decisions. This situation leads to these decisions being unexamined, resulting in the Constitutional Court becoming a super-appeal body with powers not granted by the Constitution. Our Chamber has also highlighted this issue with the decision on a different case regarding the convicted Şerafettin Can Atalay dated 08.11.2023, drawing attention to the issue of arbitrary decisions and the legal vacuum in supervising such arbitrariness.

Moreover, the first decision not to comply with a violation decision resulting from an individual application by the Constitutional Court is not our Chamber's decision dated 08.11.2023. Due to a legal void regarding the enforcement of violation decisions made by the Constitutional Court, there have been similar instances in the past where some of the Constitutional Court's retrial decisions were not implemented by lower courts, with different justifications provided. For example, in the case of "Aligül Alkaya and Others, decision dated 27.10.2015, application number 2013/1138," the Constitutional Court found violations of the right to legal aid and the right to a fair trial. Similarly, in the case of "Delil İldan, decision dated 12.07.2016, application number 2014/2498," the right to a fair trial was found to be violated, and in the case of "Saniye Çolakoğlu, decision dated 12.07.2016, application number 2014/5702," the right to a fair trial was also found to be violated. The Constitutional Court sent copies of these decisions to the relevant courts for retrial to remedy the violations. However, in all three cases, the lower courts did not comply with the Constitutional Court's retrial decisions, citing that there was sufficient evidence for the defendants to be convicted. Similarly, in the case of "Sami Özbil, decision dated 15.10.2014, application number 2012/543," although the Constitutional Court decided that the right to a fair trial was violated and sent the case to the relevant court for retrial to remedy the violation, the lower court accepted the applicant's request for retrial, requested written submissions without holding a hearing, and subsequently rejected the retrial request on the grounds that there would be no change in the judgment. These practices of non-compliance with the Constitutional Court's violation decisions stem from the fact that the rights violation decisions resulting from individual applications do not have the same objective effect as the reasoned decisions given by the Constitutional Court in annulment and objection applications that are published in the Official Gazette.

Furthermore, if the legal acceptance and reasoning in the Constitutional Court's decisions on rights violations concerning Ömer Faruk Gergerlioğlu and Şerafettin Can Atalay are accepted, severe consequences may arise. Specifically:

In these rights violation decisions, the Constitutional Court asserts that if the determination of whether there is a rights violation in the administrative actions and decisions of public authorities or judicial decisions stems from the interpretation of a constitutional article, then the authority to interpret the Constitution solely belongs to itself. It maintains that this

authority is absolute and that everyone must adhere to this decision faithfully. However, such an acceptance is highly problematic.

As previously mentioned, there is a risk that the fundamental characteristics of the Republic of Türkiye, such as being a democratic, secular, and social state governed by the rule of law as highlighted in Articles 2 and 3 of the Constitution, and the provisions safeguarding the state's indivisible integrity with its territory and nation, could be de facto rendered unapplicable through such interpretation. Accepting the Constitutional Court's decisions as binding under Article 153/6 of the Constitution in such a situation would lead to severe consequences (e.g., rendering the principle of secularism inapplicable, challenging the republican form of the state, interpreting the country's indivisible integrity differently). In this context, the provision in Article 14 of the Constitution has a protective nature for the provisions in the first four articles of the Constitution.

Additionally, if this interpretation approach by the Constitutional Court is accepted, considering that decisions of the Council of State, a high court under Article 155 of the Constitution, which has reviewed and finalized decisions in administrative jurisdiction, including those related to appointment and assignment decisions affecting family life, are also relevant; if an upper-level public administrator subject to the Presidential Decree on Appointment Procedures for Senior Executive Officials and Public Institutions is removed from office or reassigned under the pretext of a disciplinary investigation or other reasons, and the applicant claims in an individual application that the President was not duly elected according to Articles 79 and 101 of the Constitution and does not have the authority to appoint or remove them from office; then, considering the interpretation of the Constitutional Court’s decisions in cases like Şerafettin Can Atalay, it is understood that the Constitutional Court could accept the applicant’s claim, interpret Article 101 of the Constitution according to its own interpretation, and even, despite lacking constitutional authority, challenge the legitimacy of the democratically elected President according to legal principles established by the High Election Board under Article 79 of the Constitution.

3- The Issue of Notifying the Parties of the Opinion of the Chief Public Prosecutor of the Court of Cassation in Decisions Made on the Case

In the decision on the individual application of Şerafettin Can Atalay (3) dated 21/12/2023 by the Constitutional Court, paragraph 16 states: "The Chief Public Prosecutor of the Court of Cassation provided an opinion to the 3rd Criminal Chamber of the Court of Cassation on 03/11/2023, indicating that the crime attributed to the applicant falls within the exceptions specified in Article 83 of the Constitution, and therefore the applicant cannot benefit from parliamentary immunity. This opinion was not served on the applicant."

In criminal proceedings where the material truth is sought, the legislator has required the Chief Public Prosecutor of the Court of Cassation to provide an opinion on the merits of the case through a written opinion to enable the Court of Cassation to make as accurate a decision as possible. If the written opinion prepared by the Chief Public Prosecutor of the Court of Cassation includes views that could result in a negative outcome for the defendant or may be appealed, it is served on the defendant or their lawyer, and on the victim or their representatives by the relevant chamber. According to Article 297/3 of the Criminal Procedure Code (CMK), the parties may respond to the written opinion in writing within one week from the date of service. It is necessary to assess the consequences of failing to serve such a written opinion, which includes views on a request that does not increase the penalty or seeks affirmation, on the concerned parties. Although the Constitutional Court

acknowledges that the parties have the right to be informed of any opinion that could affect their chance of success in the judicial proceedings and that not providing the opportunity for written responses to such opinions violates the principles of equality of arms and adversarial trial, Article 48/2 of Law No. 6216 stipulates that individual applications of constitutional significance that do not cause significant harm to the applicant may be rejected without examining the merits.

Additionally, in its decision dated 20.09.2017 on the individual application numbered 2014/16751, the Constitutional Court ruled that if the written opinion does not contain substantial assessments or additional explanations unknown to the applicant and if the written opinion requests the affirmation of the judgment on the grounds that it is in compliance with the procedure and law, the individual application may be deemed inadmissible due to a lack of constitutional and personal significance without examining other admissibility criteria, if the written opinion has not been served. It should be noted that Article 297/3 of the Criminal Procedure Code (CMK) regulates the service of written opinions primarily. In addition to the written opinion obtained obligatorily from the Chief Public Prosecutor of the Court of Cassation before the examination of the case by the Court of Cassation's criminal chambers, there are also opinions obtained on other decisions. However, there is no legal provision requiring the service of these opinions to the parties. Therefore, the failure to serve a written opinion that does not worsen the current situation of Şerafettin Can Atalay and contains views similar to his previous situation, as in the decision of our Court dated 08.11.2023 regarding non-compliance with the Constitutional Court decision, does not result in any loss of rights. Moreover, since the written opinion can also be accessed via the UYAP system, the failure to serve such an opinion that does not include additional explanations unknown to Şerafettin Can Atalay and his defense team does not violate the principles of equality of arms and adversarial trial. In this context, since a decision on the merits was made on 28.09.2023 based on the previously obtained written opinion and the appeal examination was completed, no further adjudication was carried out by our Court on 08.11.2023. Thus, a written opinion lacking the characteristics of a written opinion from the Chief Public Prosecutor of the Court of Cassation was received, and a decision of a different nature was made.

4 - The Scope of Article 14 and Paragraph 2 of Article 83 of the Constitution

The findings in our Chamber’s decision dated 08/11/2023, numbered as miscellaneous work, which is in the nature of a determination regarding the non-compliance with the Constitutional Court's violation decision dated 25/10/2023, remain valid. It was determined that the investigation had started before the election for the crime of aiding in attempting to overthrow the government of the Republic of Türkiye or to partially or completely prevent it from performing its duties. Şerafettin Can Atalay, who was convicted and sentenced to imprisonment under Article 312, paragraph 1, and Article 39 of the Turkish Penal Code (TCK), was found to have been elected as a member of parliament in the general elections on 14/05/2023, prior to the final judgment of our Chamber. Therefore, considering the nature of the alleged crime, it is necessary to evaluate the legal status of his parliamentary immunity under Article 14 and paragraph 2 of Article 83 of the Constitution.

Article 14 of the Constitution, titled "Prohibition of Abuse of Fundamental Rights and Freedoms," states:

"None of the rights and freedoms enshrined in the Constitution may be used in a manner that aims to destroy the indivisible integrity of the State with its territory and nation or to abolish the democratic and secular Republic based on human rights.

None of the provisions of the Constitution may be interpreted in a way that permits activities aimed at destroying the fundamental rights and freedoms recognized by the Constitution or restricting them beyond the limits specified in the Constitution.

Sanctions applicable to those engaging in activities contrary to these provisions shall be regulated by law."

Paragraph 2 of Article 83 of the Constitution, titled "Parliamentary Immunity," states: "A Member of Parliament who is alleged to have committed a crime before or after the election cannot be detained, questioned, arrested, or prosecuted without the decision of the Assembly. However, situations specified in Article 14 of the Constitution, such as cases requiring severe penalties and investigations started before the election, are exempt from this provision. In such cases, the competent authority must immediately and directly inform the Grand National Assembly of Türkiye."

Parliamentary immunity is a constitutional legal rule that ensures members of the legislative body can perform their duties without fear. Its purpose is to allow members of Parliament to fully and freely exercise their freedom of thought and speech. It means that, for actions that are criminal but do not fall under legislative irresponsibility, prosecution cannot be initiated without a decision from the Assembly.

Article 83, paragraph 1 of the Constitution expresses legislative irresponsibility, while paragraph 2 of the same article regulates parliamentary immunity, which provides members of Parliament with relative and temporary protection. Due to actions that fall within the scope of immunity, members of Parliament cannot be detained, questioned, arrested, or prosecuted for alleged crimes committed before or after the election without a decision from the Grand National Assembly of Türkiye (TBMM), except for cases of serious crimes committed in flagrante delicto and situations specified in Article 14 of the Constitution, provided that the investigation had started before the election. However, paragraph 2 of Article 83 of the Constitution introduces two exceptions to parliamentary immunity. The first exception is for cases of serious crimes committed in flagrante delicto. The second exception pertains to situations under Article 14 of the Constitution that apply to Şerafettin Can Atalay, who is currently convicted and for whom the investigation had started before the election. Article 14 of the Constitution was amended by Law No. 4709 dated 03/10/2001 to align with Article 17 of the European Convention on Human Rights, narrowing the scope of the article and making it more comprehensible. The conditions that must be met for situations listed in Article 14 to fall outside the scope of parliamentary immunity are specified in paragraph 2 of Article 83 of the Constitution. Accordingly, the alleged crime must be related to the situations listed in Article 14, the investigation must have begun before the election, and the competent authority must immediately and directly inform the TBMM. Article 14 of the Constitution does not provide a direct definition of a crime, does not create a new crime, and does not enumerate specific types of crimes. Instead, it addresses concepts, principles, and activities within a general framework.

In Article 14 of the Constitution, titled "Prohibition of Abuse of Fundamental Rights and Freedoms," activities deemed as abuse are regulated as: actions that undermine the indivisible integrity of the State with its territory and nation, activities aimed at abolishing the

democratic and secular Republic based on human rights, and interpretations that enable actions aimed at destroying or restricting beyond what is specified in the Constitution the fundamental rights and freedoms recognized by the Constitution. The Constitution-maker has not provided a concrete definition of which crimes fall within the scope of Article 14 of the Constitution and has deliberately left the determination of its scope to investigative and prosecutorial authorities. Likewise, there is no discussion, nor should there be, about whether crimes that are of an absolute terrorist nature fall within the scope of Article 14 of the Constitution. In this regard, it is clear that the will of the Constitution-maker is that if an activity is aimed at destroying the existence of the Republic of Türkiye and, in this vein, the executive branch, the member of Parliament should not continue to benefit from parliamentary immunity.

Although the Constitutional Court has previously stated in the Ömer Faruk Gergerlioğlu and Leyla Güven decisions that "the text of the first paragraph of Article 14 of the Constitution, and thus the crimes excluded from parliamentary immunity due to falling under the scope of the first paragraph of Article 14, is not suitable for being meaningfully determined by the decisions of the judiciary alone, and thus for being interpreted in a way that provides clarity and foreseeability," it must be considered that under Article 148 of the Constitution and Articles 45 and following of Law No. 6216, the Constitutional Court's primary function is norm control, and its authority to review and supervise a constitutional provision is limited to formal review. The Constitutional Court cannot annul a constitutional provision or make its application impossible through individual applications, and it cannot fundamentally invalidate an existing constitutional norm or render it ineffective through such applications. Therefore, considering the need for consistency and stability in judicial interpretation in proportion to the severity of the threat to the indivisible 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 intentionally left by the Constitution-maker in Article 14 through judicial decisions to ensure the continuity and effectiveness of the constitutional norm. The principle of clarity not only refers to legal certainty but also to broader legal certainty. Thus, ensuring legal clarity cannot be achieved solely through statutory regulations; it can also be achieved through judicial precedents, provided that the norms are accessible, known, and foreseeable. Therefore, the legal issue to be resolved is which crimes are to be assessed within the scope of the situations listed in Article 14 of the Constitution.

According to Article 1 of Law No. 3713 on Combating Terrorism, titled "Definition of Terrorism," terrorism is defined as actions that use force and violence to change the characteristics of the Republic specified in the Constitution, alter the political, legal, social, secular, and 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 the internal and external security, public order, or general health of the State, carried out by an individual or individuals belonging to an organization using methods of coercion, intimidation, harassment, oppression, or threats. Article 3 of the same Law, titled "Terrorist Crimes," defines the crimes listed in Articles 302, 307, 309, 311, 312, 313, 314, 315, and 320 of the Turkish Penal Code, and Article 310, paragraph 1, as absolute and primary terrorist crimes. Therefore, the sanctions to be applied to those who engage in activities contrary to Article 14 of the Constitution, due to the fact that they are essentially absolute terrorist crimes, are also in compliance with the requirement that these be regulated by law.

Article 312 of the Turkish Penal Code, titled "Crime against the Government," stipulates that those who attempt to overthrow the Government of the Republic of Türkiye or obstruct its

duties partially or entirely using force and violence shall be sentenced to imprisonment. The justification for the relevant article of the Turkish Penal Code states: "In the text of the article, the act of overthrowing the Government, which represents the executive power among the three elements of sovereignty of the State of the Republic of Türkiye, or attempting to obstruct its functions partially or entirely, even if it does not result in its removal, is defined as a separate crime. In this crime definition, attempts to overthrow the Government, one of the fundamental organs of the Constitutional order, or to obstruct its duties are punished as a full crime. For other issues related to the application of the article, reference should be made to the justifications for the articles on violation of the Constitution and crimes against the legislative body."

Although the Constitutional Court's decision on the violation of rights in the Şerafettin Can Atalay (3) application dated 21.12.2023 cites some ECtHR decisions in paragraphs 29, 30, and 31 that are not directly related to the applicant, the activities framed in Article 14 of the Constitution as "undermining the indivisible integrity of the State with its territory and nation" and "engaging in activities aimed at abolishing the democratic and secular Republic based on human rights" are emphasized in the definitions of terrorism and terrorist crimes in Law No. 3713. Considering the elements of the crime of violating the Constitution regulated in the Turkish Penal Code (TCK) and the reference it makes to the introductory provisions of the Constitution, as well as the protected legal interests, it has been concluded that it is inaccurate to say that Article 14 of the Constitution is not suitable for interpretation in a way that provides clarity and foreseeability through judicial decisions. It is clearly concluded that the crimes listed in Articles 302, 307, 309, 311, 312, 313, 314, 315, and 320 of the TCK and Article 310, paragraph 1, should be assessed within the scope of Article 14 of the Constitution. Otherwise, individuals 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 connected to numerous bloody terrorist acts and are subject to investigation or prosecution for the absolute terrorist crimes mentioned above, and those involved in the coup attempt of 15.07.2016, whose conviction judgments are not yet finalized, if they were to be elected as members of Parliament, take office by swearing in, and enter the TBMM, or if they continue to be members of Parliament in subsequent elections, would find themselves in a situation where even if their immunity were lifted, the penalties imposed on them could not be enforced. It is not possible to argue that such a situation is legally sound. No legal system supports the abuse of a right in this manner.

In this regard, although the Constitution-maker has not specifically defined which crimes fall under Article 14 of the Constitution, the determination of the scope has been left, particularly to the discretion of the investigative authorities and the courts of first instance and appeal, among acts regulated as crimes other than the absolute terrorist crimes listed above that are accepted within this scope. Correspondingly, the ECtHR examines the accessibility, foreseeability, and certainty of the rule when reviewing whether the rule on the limitation of fundamental rights and freedoms meets the requirement of legality. However, the complexity of a rule or its degree of abstraction, and the fact that the meanings of the terms used become clear through legal interpretation, does not alone constitute a violation of the principle of legal foreseeability. The ECtHR has also stated in its case law that many laws inevitably contain some degree of vagueness, and that the interpretation and application of these laws with vagueness are a matter of application (Lindon, Otchakovsky-Laurens and July v. France, no. 21279/02 and 36448/02, 22/10/2007, § 41). The ECtHR has acknowledged that, regardless of how clearly a legal provision is drafted, judicial interpretation is an inevitable element in any legal system, including criminal law (Kafkaris v. Cyprus, no. 21906/04, 12/2/2008, § 141). Furthermore, the ECtHR has stated that, although

it is exceptional, common law rules or principles of international law could also provide a legal basis for intervention in certain circumstances, even in the absence of domestic regulation on the matter (The Sunday Times v. UK, no. 6538/74, April 26, 1979, § 49; Groppera Radio AG and others v. Switzerland, March 28, 1990; Autronic AG v. Switzerland, May 22, 1990).

The procedural immunity provided by legislative immunity will automatically cease in the presence of two exceptions specified in Article 83, paragraph 2 of the Constitution: the state of flagrante delicto for crimes requiring severe penalties and situations covered by Article 14 of the Constitution, provided that an investigation had begun before the elections. Judicial authorities will not classify activities not typified as crimes in the penal codes as falling under the situations specified in Article 14. Instead, judicial authorities evaluate which activities defined as crimes in penal codes fall under Article 14 of the Constitution, considering the letter, spirit, and entirety of the Constitution. In this context, according to the precedent set by the Court of Cassation, crimes against the unity of the state and territorial integrity or crimes aimed at changing the political order prescribed by the Constitution are accepted as falling within the scope of Article 14. Consistent with this determination, the (Abolished) 16th Criminal Chamber of the Court of Cassation, in its decision dated 28/01/2019 and numbered 2018/4803 E. and 2019/647 K., stated: "The prohibition of the abuse of rights and freedoms is included in Article 14 of the 1982 Constitution and Article 17 of the European Convention on Human Rights. Article 14/1 of our Constitution establishes the fundamental principle that 'None of the rights and freedoms specified in the Constitution can be used in a manner that disrupts the integrity of the State with its territory and nation and aims to abolish the democratic and secular Republic based on human rights.' Following this, penalties for contrary behaviors are provided in the legislation. Indeed, a parliament member who commits a crime under this article before the election will not benefit from the legislative immunity provided in Article 83/2 of the Constitution. The legislator did not specifically enumerate which crimes fall within this article; determining the scope is the responsibility of the enforcers. There is no doubt that crimes against the unity of the state and the constitutional order and its functioning fall within this scope…"

Although the Constitutional Court emphasized the binding nature and supremacy of the Constitution in paragraphs 57, 58, 59, 60, 61, 62, and 63 of the decision regarding the violation of rights in the application of Şerafettin Can Atalay (3) dated 21/12/2023, the protests, which started on 27/05/2013 under the pretext of relocating some trees in Taksim Gezi Park as part of the Istanbul Taksim Area Pedestrianization Project, and were termed as the Gezi Park events, evolved into nationwide acts involving violence aimed at overthrowing the legitimate and elected government. As a result of these insurgent actions, 746 demonstrations were held across 78 provinces, causing damage to 280 workplaces, 259 vehicles, 103 police cars, 1 residential building, 1 police station, and 5 public buildings. Additionally, 12 party offices, including 1 belonging to the Republican People's Party and 11 to the Justice and Development Party, were damaged. Numerous other facilities, including surveillance cameras, traffic signal systems, streetlights, bus stops, advertising boards, traffic signs, park and landscaping arrangements, waste containers, and police points, were also damaged. According to open source information, 8 citizens and 2 police officers lost their lives, 9,063 people were injured, and the total public damage at that time was determined to be 140 million TL.

It has been understood that Şerafettin Can Atalay, who is a convicted individual, was involved in the initiation and deepening of the insurrectionary movement conducted within a plan and even a loose organization, and that he was one of the people managing and

directing the Taksim Solidarity, which caused the escalation of violence with his posts and calls for action during the Gezi Park protests. It was concluded that the actions in question fall within the scope of the crime of attempting to overthrow the government of the Republic of Türkiye. Considering that this crime falls under Article 14 of the Constitution and that the investigation was started before the election, it was decided that he could not benefit from parliamentary immunity according to the second sentence of the second paragraph of Article 83 of the Constitution. The trial was continued according to general procedural rules, and Şerafettin Can Atalay's requests for suspension of the trial and release were rejected. Following the review, the conviction of Şerafettin Can Atalay was upheld. In this context, since the Constitutional Court, by ignoring the provisions of the Constitution's preamble and Articles 5, 6, 11, 14, 83, 154, and 155, acted as if it had an authority not recognized by the Constitution and issued violation decisions concerning Şerafettin Can Atalay based on different motives, these decisions cannot be given legal value or validity. Moreover, since the Constitutional Court itself is the authority that would render the provisions of the Constitution unenforceable and does not accept the supremacy of the Constitution, the violation decisions made by exceeding legal powers and lacking legal value concerning Şerafettin Can Atalay were not complied with.

Additionally, although the Constitutional Court, in its decision regarding the violation of rights in the Şerafettin Can Atalay (3) application dated 21/12/2023, cited paragraphs 25 and 26 to reference our Court’s decisions numbered 2023/3102, 2023/966 dated 04/04/2023; 2023/27, 2023/5120 dated 11/07/2023; 2022/1232, 2022/8359 dated 22/11/2022; 2022/7608, 2022/6526 dated 11/10/2022; 2022/23755, 2022/6527 dated 11/10/2022; 2021/7929, 2021/9940 dated 04/11/2021; and 2021/7930, 2021/9758 dated 25/10/2021, it attempted to base its violation decisions on our precedents in a manner beyond its legal authority and lacking legal value. The Constitutional Court suggested that our Court’s precedents were not consistent and irrelevant. However, these referenced decisions were related to cases where the judgments had become final without appeal or review, and primarily involved evaluations related to crimes such as propaganda for a terrorist organization and violations of Law No. 2911 on Meetings and Demonstrations. No contradictory evaluation was found regarding absolute terrorist crimes such as membership in a terrorist organization, disrupting the unity of the state and territorial integrity, violation of the Constitution, crimes against the legislative body, and crimes against the government, which are clearly outside the scope of parliamentary immunity. In fact, among the decisions mentioned, our Court’s decision dated 22/11/2022 and numbered 2022/1232, 2022/8359 explicitly stated that crimes such as not being a member of a terrorist organization but committing crimes on behalf of the organization, aiding a terrorist organization, and membership in a terrorist organization were undoubtedly considered as misuse of fundamental rights and freedoms as specified in Article 83/2 and Article 14 of the Constitution, thus falling within the exceptions to parliamentary immunity. Nonetheless, it was determined that the Constitutional Court’s findings contradicted this and irrelevant references were made to our Court’s precedents.

5. Legal Evaluation and Conclusion

At this point, it is evident that the Constitutional Court has overstepped the boundaries of its duties and powers delineated by the Constitution and laws, and has imposed an indefinite and limitless mission upon itself by issuing unlawful decisions. The Court has concealed behind the concept of "loyalty," which is not present in the Constitution, laws, or legal literature, to justify compliance with its unlawful decisions. It has ignored the universally accepted legal principle of res judicata. In this context, the Court has reviewed and re-evaluated the merits of decisions that had become final after passing through ordinary

appeal channels, behaving as if it were a trial court, a criminal court of first instance, an appeal court, and even the Court of Cassation in some of its decisions, without having the authority to do so. It has been understood that the Constitutional Court's practices threaten legal certainty and create chaos.

In this context, despite not having a duty or authority to render constitutional provisions ineffective, the Constitutional Court has acted as though it possesses powers not granted by the Constitution, by ignoring the Constitution's preamble and provisions in Articles 5, 6, 11, 14, 83, 154, and 155. By assuming a role similar to a super appeal court, it has issued decisions on rights violations concerning Şerafettin Can Atalay that cannot be given legal value or validity. Therefore, since there is no decision to comply with under Article 153 of the Constitution, the 08/11/2023 decision by the Court of Appeals regarding non-compliance with the 25/10/2023 decision on rights violations by the Constitutional Court is of a dispositive nature. This decision, although not a ruling under Article 223 of the Criminal Procedure Code (CMK), is a dispositive and definitive ruling concerning the state of the file previously reviewed on appeal. In this regard, appellate and cassation courts may issue dispositive decisions on requests and applications based on the existing file number, similar to the referral decisions by the İstanbul 13th Heavy Penal Court concerning the Constitutional Court's decisions on rights violations dated 25/10/2023 and 21/12/2023. There is no requirement in the legislation for how or on what issues dispositive decisions or determination orders should be made. Furthermore, as clearly stated in the 08/11/2023 decision numbered 2023/144, since the Constitutional Court has been determined to have violated constitutional provisions, the nature of a determination decision by the Court of Cassation under Article 154 of the Constitution, regarding a decision on rights violations by the Constitutional Court, cannot be judged by the Constitutional Court. The content of each dispositive decision does not need to be explicitly defined in the legislation. Therefore, dispositive decisions by lower courts, which are not subject to appeal, are reviewed by the appellate courts along with the essence of the case. Similarly, as a higher court, the Court of Cassation may issue dispositive decisions without being subject to appeal, based on the essence of the case, according to Article 154 of the Constitution. This is because, following a rights violation decision by the Constitutional Court, the appellate court may persist in its previous decision or issue a decision that does not address the violation and its consequences as stated by the Constitutional Court.

The Constitutional Court's assertion that judicial organs' interpretation of which crimes fall under Article 14 of the Constitution is unlawful and that a constitutional or legal regulation is necessary has led to criticism. The Court has been criticized for increasingly expanding and misusing its constitutional authority through judicial interpretations, despite not having a constitutional or legal mandate. This has resulted in the Court being perceived as a supervisory body over the legislative branch, a critique that has persisted from its earlier role in norm control to its later role in individual applications. The Court's role as a super appeal body has distorted the purpose of the individual application system and overwhelmed the Court with a heavy workload, rendering it ineffective. Therefore, it is crucial for the Constitutional Court to avoid acting as a super appeal body (Bülent Algan, "Açıkça Dayanaktan Yoksunluk Kriterinin Anayasa Mahkemesi Tarafından Yorumu ve Uygulanması," Ankara Üniversitesi Hukuk Fakültesi Dergisi, C. 63, S. 2, 2014, s. 271). For example, the German Constitutional Court also operates within this framework by limiting itself to "reviewing whether the scope and limits of fundamental rights and freedoms are properly considered in the interpretation of norms" and does not assume the authority to review the correct application of these norms to disputes (Quoted in Ece Göztepe Çelebi, "Türkiye'de

Anayasa Şikayeti Kabul Edilmeli midir?" in: Anayasa Şikayeti, Çiğdem Kırca/Aynur Yongalık (Editör), Ankara Üniversitesi Yayınları No: 267, 2010 s. 24).

Our Court has not disregarded all decisions of the Constitutional Court, nor has it evaluated decisions that do not render constitutional provisions inapplicable. Instead, it has identified issues with some of the unconstitutional practices found in the individual application decisions, specifically regarding the violation decisions dated 25/10/2023 and 21/12/2023. According to Article 11 of the Constitution, constitutional provisions are fundamental legal rules binding on the legislative, executive, and judicial organs, administrative authorities, and other institutions and individuals (Özgür Duman, "Avrupa İnsan Hakları Mahkemesi ve Karşılaştırmalı Hukuk Penceresinden 'Dördüncü Derece Olmama Doktrini' ve Yansımaları," Anayasa Yargısı Dergisi, C. 39, S. 1, 2022, s. 77). In accordance with the principle of proportionality, all courts, including the Constitutional Court, must make decisions in compliance with constitutional provisions and legislation. Moreover, within the framework of the fourth instance doctrine, and as indicated by the negative expression in its wording, the Constitutional Court should be in the process of defining its scope of authority and self-restraint in individual applications (Duman, "Avrupa İnsan Hakları Mahkemesi ve Karşılaştırmalı Hukuk Penceresinden 'Dördüncü Derece Olmama Doktrini' ve Yansımaları," s. 85). If the Constitutional Court does not adhere to this self-limitation and scope definition, the Supreme Court, which is also a high court organized under the title of high courts in the Constitution like the Constitutional Court, will remind and continue to remind it of its limits of duty and authority as per Article 154 of the Constitution.

The Constitutional Court has disregarded the constitutional arrangement that, according to Article 154 of the Constitution, the last court of appeal for judgments and decisions made by judicial authorities and not delegated to another judicial authority is the Court of Cassation. As such, in the context of the Gezi Park protests, which were seen as a reflection and adaptation of the Arab Spring in our country, it was accepted by our Court that Şerafettin Can Atalay, who is convicted, was involved in the initiation and escalation of a subversive movement within a plan, even if loosely organized, which spread across the country, and was among those directing and managing the Taksim Solidarity responsible for causing violent incidents through his posts and calls for action during the Gezi Park protests. The Court accepted that his actions fell 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 began before the election, it was concluded that he could not benefit from parliamentary immunity according to Article 83/2 of the Constitution, and it was decided to continue the trial under general procedural rules, rejecting his requests for suspension of the trial and release. The conviction handed down by the first-instance court was upheld, and Şerafettin Can Atalay became a convict. However, despite this, the Constitutional Court, exercising its constitutional authority under Article 154, accepted the ruling of the Court of Cassation dated 28.09.2023 and numbered 2023/12611 and 2023/6359, which recognized the Gezi Park protests as an attempt to overthrow the legitimate and elected government. Yet, in its violation decisions, the Constitutional Court questioned whether the charges against Şerafettin Can Atalay were unnecessary, politically motivated, whether a proper investigation was conducted, whether the actions posed a threat to the democratic system, whether they created direct and imminent danger to democratic life, whether the actions aimed to infringe on the rights of others, and whether the legal qualifications of the charges might change, without clarifying the purpose and reasons for these considerations. By acting as a super-court of appeal and disregarding our Court’s recognition that the Gezi Park protests were an attempt to overthrow the government, the Constitutional Court improperly extended its legal authority beyond constitutional and legal provisions and failed to act in

accordance with the essence and letter of the Constitution. In this context, the Constitutional Court has exceeded its legal authority by making determinations on Şerafettin Can Atalay's parliamentary immunity issue after the judgment had already been finalized and while the case was still under legal review.

Moreover, if the Constitutional Court's violation decision had acknowledged the existence of a legal gap and if the Constitution's drafters had intended to include specific crimes in Article 14 related to national security, then an amendment to the Constitution would have been required to encompass the crimes listed in the new Turkish Penal Code (TCK) numbered 5237, as opposed to those in the previous Turkish Penal Code numbered 765, given that the crimes were redefined under different names in the new TCK. By not amending the provision and merely outlining its framework, it is clear that the Constitution's drafters consciously chose to maintain the status quo.

There is no provision in Law No. 6216 regarding how to determine the court responsible for remedying a violation of rights. However, there are supportive views in the doctrine indicating that our court is responsible for evaluating the Constitutional Court's violation decision. According to one view in the doctrine, a decision by the Constitutional Court declaring a violation of the Constitution is a decision of a higher court that does not bring the first-instance court's decision into conformity with the Constitution. Therefore, the Constitutional Court's decision should be sent to the court that issued the final decision which allowed the applicant to exhaust all legal remedies. This way, the court that issued the final decision will officially learn the aspects in which the Constitution was violated and will be able to make an evaluation regarding it (Doğru, Individual Application to the Constitutional Court Guide, pp. 94-95). Additionally, another view in the doctrine suggests that the file should be sent to the court from which the violation decision originated. Accordingly, if the decision causing the violation originates from the first-instance court's decision, it should be sent to the first-instance court; if it originates from the appeal court's decision, it should be sent to the appeal court. If the violation originates from both the first-instance court's and the appeal court's decisions, the file should be sent to the first-instance court (Hamdemir, Individual Application to the Constitutional Court, p. 353).

According to these views, it would be appropriate for the Constitutional Court's violation decision regarding the application of Şerafettin Can Atalay, who is currently a convict, to be sent to our court by the Istanbul 13th High Criminal Court for evaluation. Additionally, as a higher court, the Court of Cassation (Yargıtay) is also authorized and responsible for evaluating whether the Constitutional Court's aforementioned violation decision lacks legal value. In this context, since the retrial is an exception and not mandatory to be conducted with hearings, if the Court of Cassation is responsible due to the decision causing the violation by the Constitutional Court, it is possible for the Court of Cassation, as the appellate court, to make a decision on retrial based on the evaluation of the file. It is not appropriate to accept that the retrial must absolutely and exclusively be conducted by the first-instance court; if, as a result of the legal evaluation in the retrial process, the Constitutional Court's violation decision is deemed lawful, the Court of Cassation can also send the file back to the first-instance court by overturning the decision. However, despite this, it is noteworthy that the Constitutional Court, in its violation decisions concerning the convict Şerafettin Can Atalay, has issued decisions that go far beyond merely guiding the first-instance court, and has, with the boldness resulting from the lack of oversight, made decisions in a manner that almost resembles giving orders and instructions, such as "conduct a retrial, issue a stay order, and release the convict," which is contrary to Article 138/2 of the Constitution and outside its authority regulated by Article 50 of Law No. 6216.

Under Article 153/6 of the Constitution and Article 66/8 of Law No. 6216, it is anticipated that the reasoned decisions of the Constitutional Court issued as a result of annulment and objection applications will be published in the Official Gazette. However, the provisions regarding reasoned decisions of the Constitutional Court concerning individual applications, which were accepted through a public referendum on 12.09.2010 and started to be implemented on 23.09.2012, are not regulated to be published in the Official Gazette. Since individual application routes were not accepted at the time of the enactment of Article 153, it is understood that this article pertains to decisions given by the Constitutional Court as a result of annulment and objection applications. Although there is no regulation in the Constitution or Law No. 6216 regarding the publication of reasoned decisions of the Constitutional Court resulting from individual applications, Article 58/2 of the Constitutional Court's Internal Regulation ambiguously stipulates that the President will decide which decisions will be published in the Official Gazette. Despite the Constitutional Court's emphasis on clarity and predictability in many areas, the absence of explicit regulation in the Internal Regulation regarding the publication of individual applications in the Official Gazette and the reference to these applications merely as "other decisions" without mentioning individual applications specifically is notable. Internal Regulations are a set of rules that govern the internal operations of institutions and organizations and, as a rule, bind these structures. Therefore, it is not possible to provide objective impact on individual applications through an Internal Regulation.

Furthermore, while the Constitutional Court has many important applications pending, it is also noteworthy to our Chamber that Şerafettin Can Atalay, who has been convicted with a final 18-year prison sentence for the crime of attempting to overthrow the government of the Republic of Türkiye, and who has acquired the status of a convict, has had his second application regarding legislative immunity and non-compliance with the violation decision examined ahead of many important cases.

Decisions made by the Constitutional Court in individual applications, which should have subjective outcomes, are not required to be published in the Official Gazette. Despite the lack of such a requirement, some decisions resulting from individual applications that the Constitutional Court has issued beyond its legal authority and without legal value are published in the Official Gazette, thereby relying on the objective effect of Constitutional Court decisions. This situation leads to these decisions being unchecked and allows the Constitutional Court to become a super-appeal authority over judicial institutions, exercising powers not granted by the Constitution. Our Chamber has highlighted this issue in its ruling dated 08.11.2023 regarding Şerafettin Can Atalay, pointing out the arbitrary nature of decisions that render Constitutional provisions impractical and the legal vacuum in monitoring such arbitrariness. The assertion that decisions which render Constitutional provisions ineffective cannot be reviewed, and the granting of unlimited powers, carries significant risks. For example, in 2022, the opposition in Pakistan, which had gained a majority in the Parliament, conducted a no-confidence vote to remove the elected and legitimate Prime Minister Imran Khan. In response, as a result of efforts to reshape politics, the Pakistan Constitutional Court annulled the dissolution of the Parliament and the early election decision taken by Imran Khan, thus allowing the no-confidence vote to proceed. This decision led to Imran Khan becoming the first Prime Minister removed from office in Pakistan. Hence, the no-confidence vote conducted by the opposition, facilitated by the Constitutional Court's decision, resulted in the removal of Imran Khan from office.

Additionally, accepting the legal reasoning and logic in the Constitutional Court's decisions on the violations of rights involving Ömer Faruk Gergerlioğlu and Şerafettin Can Atalay could

lead to severe consequences. Specifically, in these decisions, the Constitutional Court asserts that if a violation of rights arises from administrative actions and procedures by public bodies or decisions made by judicial authorities, the authority to interpret the Constitution is exclusively held by the Court and this authority is absolute, requiring everyone to adhere to this decision faithfully. However, such an acceptance is fraught with significant risks.

As mentioned above, there is a risk of the fundamental characteristics of the Republic of Türkiye, such as its democratic, secular, and social rule of law state, which are safeguarded under Article 2 and 3 of the Constitution and are not subject to amendment, becoming de facto unapplicable through the interpretation of Article 14 of the Constitution, which has been rendered ineffective through individual applications. In such a scenario, if the decisions of the Constitutional Court are accepted as binding under Article 153/6 of the Constitution, it could lead to severe consequences (e.g., the secularism principle becoming inapplicable, the form of the state as a Republic being questioned, or the indivisible integrity of the country being interpreted differently). In this context, the regulation in Article 14 of the Constitution is intended to protect the provisions in the first four articles of the Constitution.

Furthermore, if this interpretation style by the Constitutional Court is accepted, considering that the Council of State, which is a high court under Article 155 of the Constitution and has made decisions related to the right to respect for family life regarding appointment and assignment decisions it has previously reviewed in administrative jurisdiction; if a senior public manager, subject to the Presidential Decree on Procedures for Senior Executive Personnel and Public Institutions and Organizations, is removed from their position or has their position changed under the pretext of a disciplinary investigation or other reasons, and this is the subject of an individual application, and if the applicant argues that the President was not elected in accordance with the procedures set forth in Articles 79 and 101 of the Constitution and that the President does not have the authority to appoint or dismiss them; it can be inferred from the Constitutional Court's decisions on Şerafettin Can Atalay and similar individuals that the Court might accept the applicant's claim and interpret Article 101 of the Constitution in its own way. Moreover, despite not having a constitutional authority, the Court might even challenge the legitimacy of the democratically elected President, who was elected according to the legal principles established by the High Election Board under Article 79 of the Constitution.

Additionally, the decision of our Chamber dated 08.11.2023 is not the first decision to not comply with the Constitutional Court's ruling on an individual application. There is a legal gap regarding the enforcement of violation decisions issued by the Constitutional Court in individual applications, which has led to similar instances in the past where some of the Court's retrial decisions were not enforced by lower courts for various reasons. For example, in the case of "Aligül Alkaya and Others, dated 27.10.2015, application number 2013/1138," the Constitutional Court determined violations of the right to legal assistance and the right to a fair trial. Similarly, in "Delil İldan, dated 12.07.2016, application number 2014/2498," the Court found a violation of the right to a fair trial, and in "Saniye Çolakoğlu, dated 12.07.2016, application number 2014/5702," it identified a violation of the right to a fair trial. Despite these findings, the lower courts in these three cases did not implement the Court's retrial decisions, arguing that there was sufficient evidence for the defendants to be convicted. Additionally, in the case of "Sami Özbil, dated 15.10.2014, application number 2012/543," despite a decision by the Constitutional Court that the right to a fair trial had been violated and that a retrial should be conducted, the lower court accepted the applicant's request for retrial but, without holding a hearing, requested written defense and then rejected the retrial request, citing that there would be no change in the judgment. These practices of non-compliance with the

Constitutional Court's violation decisions highlight that subjective violation decisions resulting from individual applications lack the same objective effect as the reasoned decisions of the Constitutional Court issued as a result of annulment and objection applications and published in the Official Gazette.

In our decision dated 08.11.2023 regarding non-compliance with the Constitutional Court's decision, the failure to notify the concerned parties of the opinion that does not worsen Şerafettin Can Atalay's current situation and that is consistent with his previous status does not result in any loss of rights, as this opinion is accessible through the UYAP system. Therefore, the lack of notification of such an opinion does not lead to a violation of the principles of equality of arms and adversarial trial.

The activities outlined in Article 14 of the Constitution, such as "disrupting the integrity of the State with its territory and nation" and "engaging in activities aimed at abolishing the democratic and secular Republic based on human rights," are echoed in the definition of terrorism and terrorist crimes under Law No. 3713. Additionally, when considering the elements of the crime of violating the Constitution under the Turkish Penal Code (TCK) and its justification, which specifically refers to the initial provisions of the Constitution and the protected legal interests, it is incorrect to say that Article 14 of the Constitution is not suitable for interpretation in a way that ensures clarity and predictability through judicial decisions. It is concluded that crimes specified in Articles 302, 307, 309, 311, 312, 313, 314, 315, 320 of the TCK and Article 310/1 should be assessed within the scope of Article 14 of the Constitution. Otherwise, it would not be legally justifiable to support the notion that individuals connected with numerous bloody terrorist actions, 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, or those who participated in the coup attempt on 15.07.2016 and whose convictions are not yet final, could become members of Parliament, swear into office, and continue serving as deputies in subsequent elections. Even if their immunity were lifted, it would open the door to the possibility that any sentences given could not be enforced. This scenario cannot be legally justified, as no legal system would support the misuse of rights in this manner.

In this context, it has been determined that the actions of the convicted Şerafettin Can Atalay fall under the crime of attempting to overthrow the government of the Republic of Türkiye. Given that this crime is covered by Article 14 of the Constitution and that the investigation was initiated before the election, it has been concluded that Şerafettin Can Atalay cannot benefit from legislative immunity under Article 83/2 of the Constitution. Therefore, the trial should proceed according to general procedural rules, and Şerafettin Can Atalay's requests for suspension of the trial and release have been denied. The judgment of the first-instance court has been upheld, and Şerafettin Can Atalay has acquired the status of a convicted person. Consequently, since Şerafettin Can Atalay, who does not have legislative immunity and has gained convicted status due to the final judgment, will have his parliamentary membership annulled, a decision has been made to send a copy of the decision to the Grand National Assembly of Türkiye for the purpose of carrying out the necessary actions due to constitutional obligations. No new evaluation has been made on this matter considering that a criminal complaint with the relevant justifications was already filed in the previous decision dated 08.11.2023.

IT IS DECREED THAT:

1- For the reasons explained above, the decisions of the Constitutional Court regarding Şerafettin Can Atalay's individual applications dated 25.10.2023 and 21.12.2023 cannot be attributed legal value and validity; therefore, there is no decision that needs to be implemented under Article 153 of the Constitution in this context. Additionally, considering that there is an enforceable judgment that was finalized with the decision of our Court dated 28.09.2023 with case number 2023/12611 and decision number 2023/6359, following the appeal of the conviction decision regarding Şerafettin Can Atalay, THERE IS NO NEED TO COMPLY WITH THE MENTIONED DECISIONS OF THE CONSTITUTIONAL COURT.

2- Since Şerafettin Can Atalay acquired the status of a convict with the decision of our Court dated 28.09.2023, and since Article 84/2 of the Constitution stipulates "being convicted by a final judgment or being subject to a restriction" as one of the reasons for the loss of parliamentary seat, and the conviction for crimes listed in Article 76 of the Constitution that are incompatible with parliamentary duties will result in the loss of the parliamentary seat, and considering that there is no possibility to apply to the Constitutional Court regarding Article 84/2 of the Constitution and that the Constitutional Court does not have jurisdiction to review this matter; it is DECIDED, as a constitutional obligation, to RE-SEND a copy of this decision concerning the convicted Şerafettin Can Atalay to the Presidency of the Grand National Assembly of Turkey for the necessary action and enforcement.

3- The case file is to be REMANDED to the Office of the Chief Public Prosecutor of the Court of Cassation for forwarding to the Istanbul 13th Heavy Penal Court.

Following the review of the case file, a decision was unanimously made on 03.01.2024 in accordance with the opinion of the Office of the Chief Public Prosecutor of the Court of Cassation, and the decision is final.