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A NEVER ENDING DEBATE:
THE TURKISH-TYPE PRESIDENTIAL SYSTEM AND ITS IMPACT ON THE PROTECTION OF HUMAN RIGHTS

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ABBREVIATIONS

Approximately: app.

Cilt (Volume): C

Council of Europe: CE

Council of Judges and Prosecutors: HSK

Criminal Procedure Code: CMK

European Convention on Human Rights: ECHR

European Court of Human Rights: ECtHR

Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi: MUHF- HAD

Middle East Technical University: ODTÜ

Paragraph: §

Sayfa (Page): s

Sayı (No): S

Turkish Constitutional Court: AYM

Turkish Criminal Code: TCK

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Introduction

The Turkish presidential system was proposed as a panacea to the instability which arises from the parliamentary system with its ever-shifting coalitions. The power of the coalitions to obstruct the workings of the political system and the bureaucratic slowness that comes with it, have been considered as "not what Turkey needed for this new era". The long debate over whether to adopt presidential or semi-presidential system or to retain the parliamentary system in Turkey continued unabated for 50 years. These debates, somehow, were not grounded theoretically or scientifically, but rather was guided by the country's rival and volatile political agendas.

The debate over systems of government, including presidential systems, has not yet started at the societal level despite being long on the national political agenda. Despite some lively debate at the intellectual level, there is no social interest, opinion or general public demand for a debate on systems of government[1]. It would not be incorrect to determine that it is the political reality rather than a discussion of "What's best for Turkey?"

Historically, the implementation of democracy in Turkey has been interrupted by coups[2] and it followed the entry into force of new Constitution. The consequences of these military interventions, that nearly all generations living in Turkish soil have witnessed, once or more, were powerful. The struggle for democracy was reduced to a fight for individual survival for the recognition of the most basic human rights, like freedom of expression.

Although the nation has been operating under the same Constitution since 1982, 21 amendments have been made to the basic document. One cannot hide the reality that the 1982 Constitution itself, is no longer effective either in its words of spirit. In this context, the necessity for a new Constitution, complying with the needs of the citizens and governmental institutions has become increasingly apparent under the Presidential system.

Thoughtful critics of the Turkish presidential system have raised the fear that as currently applied, that system will result in an authoritarian system as in many Latin American countries. Nevertheless, their fear was not shared by the average Turkish citizen. The use of Latin America countries as an example has been unrequited. The perception created by the government ruling the country for more then ten years and the coup of 15th July 2016 has created alienation to the parliamentary system.

Considering all these circumstances, the presidential system in Turkey is neither a monstrosity nor a miracle in its replacement of the parliamentary system. Like all changes relating the society, the demand should come from the citizens, not from the sovereign governing body. History has shown us, that changes must be (1) popularly grounded and (2) include an effective mechanism (e.g. an independent judiciary) to limit government excesses and guarantee respect for human rights.

In this study we will try to show the clear relationship between the system change and increasing human rights violation issues in Turkey. The reader should bear in mind that, though the presidential system has shown unhealthy tendencies, increased citizen participation in elections should lead to a happier conclusion.

This Article aims to take an overview of the important topics related to human rights violations since the abolition of the Parliamentary system. The study will focus on violations of freedom of

[1] İYİMAYA, AHMET. "Turkey's Proposed Presidential System: An Assessment of Context and Criticisms. *Insight Turkey*, vol. 18, no. 4, 2016, p.32. *JSTOR*, www.jstor.org/stable/26300449. Accessed 11 July 2021.

[2] Turkey's first constitution is been adopted in 1876 (Kanuni Esasi in Ottoman Empire era). The country has adopted multi-party system since 1945. In these 76 years the country witnessed four coup (including the post-modern coup)

expression and the excessive limitation of liberty and security right of some of the professions which promote free expression, the diminution of the Rules of Law principle, and the step backward from the international protection of women rights. Considering that each of these subjects is worthy of more intensive specific study, we will try to trace the framework of these matters, rather than the details which we invite for future study. The main cornerstone of the study will be the jurisprudences of the European Court of Human Rights (ECtHR) and the Turkish Constitutional Court (AYM).

A) How did we get where we are?

1. Step by step to the Turkish Presidential System

On June 16th, 2017 the Turkish people decided to change their polity[3] by approving amendments to 18 articles of the Turkish Constitution. Some of these amendments have entered into force as a result of the general election on 24th June 2018[4].

Main highlighted points of the referendum package were:

a) *Within the scope of the practice of the National Assembly:*

- The replacement of the parliamentary system by the presidential system,
- The abolition of the prime ministry institution,
- Increase on the number of the deputies in the Assembly which from 550 to 600,
- Scheduling general parliamentary elections every five years on the same day of the election of the President,
- Lowering the age to be elected as deputy to 18 from 25,
- The abolition of the authority of the Assembly to supervise ministers and the government and granting the Council of Ministers the right to issue decrees on certain specific issues,
- The adoption of the law vetoed by the President with the majority of the total number of members (301) of the Parliament,
- The president was given the power to declare a state of emergency and the parliament the power to approve, extend or abolish it.

b) *Within the scope of the accountability of the President in the exercise of its duties:*

- It was stipulated that three-fifths of the total number of deputies in the parliament must approve by their vote in order for the President to be investigated for a crime.
- It was decided to provide two-thirds of the total number for the president to go to the Supreme Court.
- The president's power to adopt decrees during the state of emergency is limited by the Constitution. No application can to be made to the Constitutional Court to review these decrees.

[3] Statistics from the Turkish Statistical Institute demonstrates that the participation to the referendum was %85,43, (58.291.898). Citizens saying yes to the amendments constitutes %51,41 (25.157.463) of the valid votes, which are %98,27 (48.936.604).

[4] The general elections were to be made on 3th November 2018 but an early general election decision had been prosed by the MHP (Nationalist Movement Party) and the President accepted its proposition.

c) *Within the scope of merit inquiry*

- The president had the right to determine the procedures and principles regarding the nomination and the appointment of the senior public officials.
- The president obtained, within the scope of the central administration, the right to regulate the establishment, duties, powers and the responsibilities of public institutions and organizations.

d) *Within the judiciary*

- Abolition of Military Courts except the disciplinary courts.
- Modification of the composition of the High Council of Judges and The Prosecutors (the Council name's has changed to Council of Judges and Prosecutors (HSK). A total of 13 (thirteen) members are chosen; by Minister of Justice 1 (one), by Vice- Minister of justice 1 (one), by the General Council of the National Assembly 7 (even), by the President 4 (four).

2. Continuous painful transition

The amendment proposal was subjected to strong reactions from opposition parties and non-governmental organizations, especially on the grounds that the principle of separation of powers, the voice of the government and the accountability of the parliament were removed. The protests and demonstrations went on simultaneously until the election and after. The election created a significant clash between the opposition and the ruling party sympathizers.

The opposition's criticisms, as stated before, were largely left unanswered and the debates went on, not about the outcomes of the new system but regarding the candidates' personalities and on their impact on the citizens. 51% of Turkish citizens decided on the Presidency of the ruling party's leader, who happened to be the President of the country, in the Parliamentary system as well.

It would not be a mistake to determine that, since the passage to the presidential system the country's tension is aggravated.

The referendum of 16 April 2017 has been interpreted as the voters' preference for the presidential system[5]. The clash between the sympathizers of the ruling party and the opposition grew with the rejection of all objections of the opposition parties about the referendum. All ambiguities and irregularities related to the referendum were smoothed out by passing laws; like unsealed voting envelopes could be accepted as valid, creating alliances among parties in the Parliament was made possible. These law amendments caused heated verbal and physical disputes among deputies in the Assembly.

International institutions that Turkey is a member of, like the Council of Europe, European Parliament and OSCE expressed their concerns regarding the election process. There was strong criticism regarding the proceedings against opposition to the new system such as journalists, politicians, and academicians and against the State power and privileges that the President and the Ruling party have during the state of emergency.

The perception created during the state of emergency endured with the pressure on the opposition continuing, while the balance between security and freedoms collapsed.

[5] 51,41 Yes, 48,59 No.

Meanwhile, the media became a monopoly. The biggest media institution, which includes Hürriyet, Posta, Fanatik newpapers, Kanal D, CNNTurk television channels and Doğan News Agency, (and all that belongs to Doğan Holding such as buildings and printing house) was sold to Demirören Holding, which is known to be close to the government. The impact of this transaction was big, regarding the citizens' right to reach objective information.

The recent number of detained journalists is being published by the Committee to Protect Journalists[6] (CJP). Regarding his latest statistics that there are 274 detained journalists around the world and 37 of them are in Turkey[7]. This number is relatively good regarding year 2016 when, after the failed coup, there were 86 imprisoned journalists. This number was 74 on 2017, 68 in 2018 and 49 in 2019[8].

Another significant document is the report prepared by Journalists' Union of Turkey (TGS) that surveys incidents that took place between April 1, 2020 and April 1, 2021. The highlighted points of this report are worthy of attention. It determines that:

- "There are 23.306 journalists in Turkey and some 57 of them spent a collective 144 days in police detention in 2020.
- There have been investigations launched into 101 journalists. A total of 204 journalists were tried in 128 different cases in Turkish courts.
- Access bans were issued for 62 news outlets for 1,411 different pieces news content, while prosecution ruled for 13 news stories to be removed from the Internet.
- Turkey's Radio and Television Supreme Council (RTÜK) issued a total of 7,488,851 Turkish Liras in monetary fines, and ruled for 41 broadcast arrests.
- Turkish prosecution cancelled 892 press cards in 2019, and some 322 in 2020. Meanwhile, 15,104 journalists hold a Presidential Press Card, the Communications Directorate reported to TGS.
- Turkey's Press Advertisement Agency (BİK) blocked media outlets' advertisement revenue for a total of 212 days: 90 days for Cumhuriyet daily, 63 days for Evrensel, 39 for BirGün and 20 for Sözcü and Korkusuz"[9].

These statistics of the year 2020, shows us that what started, as a twinge of transition did not disappeared, a contrary it got deep.

It is not only the journalists who suffered from this intensified intolerant administration, which is against the freedom of expression, a cornerstone of the democracy. Academicians and students lived the anguish as well. The protests that started on 4th of January 2021, following the nomination of the Rector of Boğaziçi University[10], by the President, with a presidential decree[11] still continues. On 14th July 2021, the Rector has removed from its duties with a presidential

[6] The Committee to Protect Journalists is an independent, non-profit organization that promotes press freedom worldwide.
www.cpj.org Accessed 2 August 2021

[7] Turkey is the on the second rank after China who has 47 journalists imprisoned.
https://cpj.org/data/imprisoned/2020/?status=Imprisoned&start_year=2020&end_year=2020&group_by=location
Accessed 3 August 2021

[8] https://cpj.org/europe/turkey/ Accessed 3 August 2021

[9] https://tgs.org.tr/tgs-press-freedom-report-2020-2021/ Accessed 3 August 2021

[10] Boğaziçi University is a State University and the leading institution of higher education in Turkey.

[11] Presidential Decree No:2021/16, 1 January 2021. Publication on the Official Gazette: 2 January 2021

decree[12], by the President. The protests were tried to be supressed violently by the police from its day one and the protests expanded in different places in Istanbul and other cities.

The aims of the protests can be array as; the resignation of the Rector, determination of the rectors by university election, protection of academic freedom and scientific autonomy. Although the rector did not resigned and it's the President who unseated the rector, the protest still continues. Academicians claim that neither the nomination nor the removal of the Rector is acceptable; Universities should have the autonomy in their administration, their election and their sciences. That is reason why the protest will go on even after the nomination of the new Rector.

In parliamentary system, the election of the Rectors of the universities was one of the two, single-handed[13] competence of the President of the Republic. In practice, the University used to make an election and the list was presented to the President, who duly used to appoint the first runner up.

On 29 October 2016, during the State of Emergency, Article 85 of the Decree No: 676 changed the article 13 of the Higher Education Code.

In state universities, the President appoints the Rector, among three candidates, who have served as professors for at least three years, to be proposed by the Council of Higher Education. If one of the suggested candidates is not appointed within a month and the Higher Education Council does not nominate new candidates within two weeks, the President is directly appointed.

As the President obtained the power to nominate and to appoint the higher senior officials, there are no limits in the ordinary course of things. One should wonder to witness the protests in Boğaziçi University in coming days.

3. Turkish Presidential System, Parliamentary System and their relation with Democracy

In democratic countries, simple or hybrid, all systems of government, including the presidential system, are definitely intra-democratic structures. The presidential system was originally initiated to prevent British despotism in particular and render untouchable the sphere of fundamental rights by means of hard separation of powers[14].

The rationale for the principle of separation of powers is to avoid the gathering of all state powers in one person or group and the core idea of the principle is to prevent this[15]. Today, the objectives of the separation of powers principle are; ensuring the participation of the masses in the legislative activity as much as possible and the establishment and maintenance of a neutral and independent judiciary and legal process, to prevent the sovereign from the abuse of executive power and to provide the kind of checks and balances which will make sure that the administration complies with the laws[16].

This separation of powers principle is essential in parliamentary systems, as it is in democracies. "In order for a democratic system, consisting of legislative, executive and judicial powers, to function properly, these institutions should be accountable in their operations and actions and

[12] Presidential Decree No: 2021/360, 14 July 2021.
[13] The other one was to grant a personal amnesty for elderly or sick prisoners.
[14] İYİMAYA, AHMET. *Ibid.* p.33.
[15] KARAMAN, EBRU; Türk İdari Yargısının Anayasal Temeli,,(trad. The Constitutional Basis of the Turkish Administrative Jurisdiction, On İki Levha Yayıncılık, Yayın No. 392, İstanbul, Ekim 2013, s. 14.
[16] KARAMAN, EBRU, *ibid*, s.18.

should not interfere with each other's sphere. The pressure of one of these forces on the other can be considered as a behavior that will undermine democracy[17]".

Because the Presidential system almost invariably invites the expansion of presidential power, it is impracticable to assume the Presidential system can function in the public interest without the existence of an effective parliament and an independent and impartial judiciary.

In the broadest outline, the distinction between the presidential and parliamentary systems is that the latter requires at the least, the limited collaboration of the executive and legislative power. At the same time, the executive and the legislative power are strictly separated from each other, thereby requiring cooperation for the government to function.

Like many other Constitutions the Turkish Constitution divides governmental powers among three branches, the legislative, executive and judicial, each with distinct competencies. During the Parliamentary system, when the accountability was always an unsolved problem, the collaboration between the executive and legislative were operable with decrees of the Council of Ministers. With the passage to the presidential system, as the President elect remained as the leader of a political party, which has the majority in the Assembly, all constituent powers of the presidential system are gathered in the executive, demolishing the separation of powers which were supposed to be the core of the presidential system.

From this point of view, what started out as an attempt to resolve the parliamentary system's deficiencies and lack of stability by modification resulted in the creation of a radically different and unprecedented presidential system which created a new set of problems[18].

After the election, the functional benchmarks of governing power became the scheme below:

During the Parliamentary System	**Presidential System**
President	President
Council of Ministers	President
Prime Minister	President
Minister	President
Councilor	Minister
Vice councilor	Vice- Minister

The scheme is reminiscent of what Montesquieu feared *in The Spirit of the Laws*, a " When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty".

4. Chaos in Terminology: Democracy, Human Rights, Fundamental Rights, Parliamentary system, Presidential system

The Turkish popular mind is confused by the true meaning of these theoretical concepts when they compare the high sounding terms to the reality of their day-to-day lives under the Presidential

[17] ÜLGEN, CELAL, *Hukukun Üstünlüğü ve Kuvvetler Ayrılığı* (tra. Rule of law and Separation of Powers-Symposium)**,** 30 Nisan 2010, Panel Notları, İstanbul Barosu Yayınları, 2010, s.7.
[18] As said several times by the President "Turkish type presidential system".

system. This perplexity serves to strengthen the sovereign, knowing that in chaotic times, people are afraid of leaving their comfort zone. The fact that the system has changed radically, but the ruling sovereign remains the same has provided a false sense of continuity, which obscures the simultaneous evisceration of the protections of basic human rights.

Democracy should be about real equality and respectful and fair civil order. It is not only about the equality on the right to vote although when we diminish democracy to the equality at the ballot box, all other basic, universal human rights that attend democracy, like freedom of expression and freedom of assembly are devitalized. Democracy is not as simple as majority rule; it comprehends pluralism, understanding and the culture of living together.

Considering that all individual citizens are weak before the great power of the sovereign government, human rights recognition create a floor below which the citizen's rights cannot fall. In democracies, citizens have the right to speak their mind, assemble and express their ideas and their beliefs in a peaceful way. One must start with the determination that human rights can only sprout in democracies.

Human rights are dedicated to providing protection in a universal perspective so that atrocities suffered by all people all around the world are not repeated. Like societies, they are always open to change and progress for their enhancement. Fundamental rights on the other hand, are the rights that States have included in their Constitution to limit the power of the sovereign governments. After the Second World War, it is unacceptable for a fundamental human right to be protected in one country and not in another; irrespective of its governing model. Where a centralized sovereign monopolizes state power, however, it becomes difficult to recognize the connection between the system, which symbolizes the functioning of the State, and the human rights which limit it

The main point of this bond is not being able to oppose wrong steps taken by the sovereign established system. Throughout history, constitutions, legally binding or not binding international declarations, conventions, agreements have been established to limit the power of the sovereign and to protect the freedoms of the people. With these functional documents, the sovereign is informed that if s/he does not comply with these s/he will be held accountable.

With the adoption of above-mentioned constitutional amendments which created and enabled the new Turkish-type presidential system, the National Assembly, which represents the will of all Turkish citizens, was nullified as a limiting force by concentrating all real power in the hands of the executive.

B) The impact of the Presidential System on Human Rights

In this section we will be studying the impact of the presidential system on two of our main subjects: Freedom of expression and the Rule of law.

1. Freedom of expression

Freedom of expression is a subject that can be studied in a very broad and comprehensive way. It may find new definitions and political or sociological dimensions, in its relation to religion, race, sexual orientation or the tool chosen to express it. In this study, however, we will only be focusing

the general view of the ECTHR on freedom of expression and it's impact in Turkey.

a) *Freedom of Expression in Turkey before the ECtHR*

Looking at the ECtHR statistics between 1959 and 2020, it is determined that there were 3742 violations determined against Turkey and 387 of these were violations of Article 10 of the European Convention on Human Rights (ECHR), which protects freedom of expression. The total number of the ECtHR's decisions on Article 10 for all member states, for the same dates is 925[19]. Bearing in mind the total number for all member states, violations against Turkey on this specific subject constitutes app. 41,8 % of the violations. In line with this information, while there were 97 violations against Turkey in year 2020 alone, 31 of these violations consist of freedom of expression[20].

b) *General consideration on Article 10 in the ECtHR's case-law*

Unimaginable without democracy, freedom of expression is enshrined in a number of national, European, international and regional instruments, which promote this political system, recognized as the only one capable of guaranteeing the protection of human rights. In its interpretation of Article 10 of the Convention, the Court has held that "freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man" (*Handyside v. the United Kingdom*, § 49)[21]. The Court has emphasized on several occasions the importance of this Article, which is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (*Handyside v. the United Kingdom*, § 49; *Observer and Guardian v. the United Kingdom*, § 59)[22].

The Court, in its examination of alleged violations of social and political rights like, freedom of expression, freedom of thoughts and beliefs, freedom of assembly and right to a private life applies three- steps test. First, the Court determines whether there was an interference with the exercise of the freedom of expression; second, it analyses whether the interference was "prescribed by law" and whether it "pursued one of the legitimate aims" within the meaning of Article 10 § 2, and third whether the interference was "necessary in a democratic society". In most of the cases the Court issues a violation because it finds that the interference was/ is not necessary in a democratic society, reiterating the definition of the European "democratic society, [as one] which consists of pluralism, tolerance and broadmindedness"[23]. By going further, the Court has emphasized on several occasions the importance of this Article, which is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that

[19] https://www.echr.coe.int/Pages/home.aspx?p=reports&c=
Violations by Article ans by State 1959-2020. Accessed 9 July 2021.
[20] https://www.echr.coe.int/Pages/home.aspx?p=reports&c=
Violations by Article ans by State 2020. Accessed 9 July 2021.
[21] ECHR, Guide on Article 10 of the ECtHR, Freedom of Expression, Council of Europe/ ECHR, 2021, p. 11, §8.
https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#
Accessed 6 July 2021.
[22] *İbid.*
[23] Among many; ECHR, Case of Şahin ALPAY, App. No: 16538/17, 20/3/2018.

pluralism, tolerance and broadmindedness without which there is no "democratic society" (*Handyside v. the United Kingdom*, § 49; *Observer and Guardian v. the United Kingdom*, § 59)[24]. Similarly, the Court has stated the freedom of expression is an essential foundation of democratic society and one of the conditions of its progress. (Lingens v. Austria, s 41).

c) Impact of the Violations Found Against Turkey

We categorize the subjects of the violations against Turkey in order to measure their impact.

i. Defamation of the President of Republic

In the first year that Recep Tayyip Erdoğan became the 12th Turkish President, at least 18 people, including a 13 years old student, were arrested for insulting the President[25]. Another data from a deputy says, "From 2014 to the end of 2019, 63.041 person were prosecuted for Article 299 of the TCK"[26][27]. The numbers exposed by lawyers, deputies, journalists and commissioner of CE demands a detailed analyze on the subject.

Regarding article 299 of the Turkish Criminal Code (TCK), defamation of the President of Republic constitutes a crime:

Article 299: 1) Anyone who insults the President is punished with imprisonment from one year to four years.

2) If the crime is committed publicly, the penalty to be imposed is increased by one sixth.

3) Prosecution for this offense is subject to the permission of the Minister of Justice.

Having put forward the vision of the ECtHR on freedom of expression, it is important to underline its ideas on the defamation on public figures. Firstly, the fact that this crime is regulated under a title other than general insult is contrary to the ECtHR dispositions. The application of similar provisions is unprecedented in any of the other 46 member states of the Council of Europe. There are, in some member states of the Council of Europe, countries where the defamation of the President is an offence requiring compensation, which can be found proportionate to the action.

The use of this provision seems to have become a tool for stifling any criticism of the President, and by extension of any policy that he supports, and used indiscriminately and at an unparalleled level against all categories of persons, notably journalists, caricaturists, academics, celebrities, students and pupils, including many minors. The impugned acts include, in many cases, statements shared through the social media, including re-posts or re-tweets[28]. In its conclusion the Commissioner says that use made of this provision is profoundly incompatible with the ECHR and amounts to judicial harassment, especially considering that the ECtHR holds that conferring a privilege or special protection to Heads of State, shielding them from criticism solely on account

[24] ECHR, Guide on Article 10 of the ECtHR, *ibid.* §9.

[25] KOLBÜKEN, BİLAL, *"Cumhurbaşkanına Hakaret Suçu üzerine bir deneme",* Ankara Barosu Dergisi, 2015/3, s.45.

[26] https://www.sozcu.com.tr/2020/gundem/erdogana-hakaretten-63-bin-41-kisiye-dava-acildi-6123830/ Accessed on 10 July 2021.

[27] There are no official national statistics on this specific crime in the web site of Turkish Statistical Institution.

[28] Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, CommDH(2017)5, 15 February 2017, p.10, §54.

of their function or status cannot be reconciled with modern practice and political conceptions[29].

The ECtHR case-law on the crime of insult stipulates that heads of state cannot be held more privileged than other people in terms of insult. It is stated that Article 299 of the TCK, which has been clearly found to be contrary to the ECHR by the ECHR, cannot be taken as a basis against Article 10 of the ECHR in accordance with Article 90 of the Constitution, that this article has been tacitly abolished and that Article 299 of the TCK should be null and void[30].

Starting with the existence of such a crime, there are other points that need clarifications to demonstrate the violation to the ECTHR jurisprudence.

We should think about the paragraph 3 of Article 299 of TCK as well. The permission of investigation for this offense is given to the Minister of Justice, who is appointed by the president, himself[31]. There are at this point some logical, yet unanswered questions.

The Minister of Justice is a "politician" and that, as a member of the government, he will not always share the same views as the President; In fact, since it is always possible to confront the President, who has the power to veto laws, why is the President's honor left to the Minister of Justice? What objective and unequal criteria does the Minister of Justice take as a measure of whether or not to allow this crime to be prosecuted? How will the judicial review of the Minister of Justice be carried out on "whether or not to authorize a prosecution"?[32] One should create the causality between the accountability that democratic society demands and this provision.

Another point is the detention of the suspect of the crime. The provision of detention under the Turkish Criminal Procedure Code (CMK) is written as one of the best in Europe, yet its exercise is one of the worst. Article 100 of CMK stipulates;

Article 100: Grounds for arrest with a warrant

1) If there are concrete evidences that tend to show the existence of a strong suspicion of a crime and an existing "ground for arrest", an arrest warrant against the suspect or accused may be rendered. There shall be no arrest warrant rendered if arrest is not proportionate to the importance of the case, expected punishment or security measure.

2) At the below mentioned instances, a "ground for arrest" may be deemed as existing:

a) If the suspect or accused had fled, eluded or if there are specific facts which justify the suspicion that he is going to flee.

b) If the conduct of the suspect or the accused tend to show the existence of a strong suspicion that he is going to attempt;

1. To destroy, hide or change the evidence,

2. To put an unlawful pressure on witnesses, the victims or other individuals.

3) If concrete evidences for suspicion are present, that the below mentioned crimes have been committed, then "the ground for arrest with a warrant" may be deemed as existing:

a) Following crimes as defined in the Turkish Penal Code dated 26.9.2004 and No. 5237:

1. Genocide and crimes against humanity (Arts. 76, 77, 78),
2. Immigrant smuggling and human trafficking (Arts. 79, 80),
3. Killing with intent (Arts. 81, 82, 83),

[29] *opcit,* §55.
[30] AKDENİZ YAMAN/ALTIPARMAK KEREM, Güncel Hukuk, No.142, Ekim 2015.
[31] See. p.6.
[32] KOLBÜKEN, BİLAL, *opcit,* p.47.

4. Intended wounding committed by a gun (Art. 86/3-e) and intended wounding which has been aggravated by its result (Art. 87)
5. Torture (Arts. 94, 95),
6. Sexual assault (Art. 102, except for subparagraph 1),
7. Sexual abuse of children (Art. 103),
8. Theft (Arts. 141, 142), and aggravated theft (Arts. 148, 149)
9. Producing and trading with narcotic or stimulating substances (Art. 188), 10. Forming an organization in order to commit crimes (Art. 220, except for subparagraphs 2, 7 and 8),
11. Crimes against the security of the state (Arts. 302, 303, 304, 307, 308),
12. Crimes against the Constitutional order and crimes against the functioning of this system (Arts. 309, 310, 311, 312, 313, 314, 315).

b) Smuggling with guns, as defined in Act on Guns and Knifes and other Tools, dated 10.7.1953, No. 6136, (Art. 12),

c) The crime of embezzlement as defined in Act on Banks, dated 18.6.1999, No. 4389, Art. 22, subparagraphs (3) and (4),

d) Crimes defined in Combating Smuggling Act, dated 10.7.2003, No. 4926, and carry imprisonment as punishment,

e) Crimes defined in Act on Protection of Cultural and Natural Substances, dated 21.7.1983, No. 2863, Arts. 68 and 74,

f) Crime of intentionally starting a fire in forests, as defined in Act on Forests, dated 31.8.1956, No. 6831, Art. 110, subsections 4 and 5.

g) Crimes defined in Article 33 of the Meetings and Demonstrations Code dated 6.10.1983, No. 2911.

h) Crimes defined in Article 7, subparagraphs (3) of the Combatting Terror Act, dated 14.4.1991, No.3713.

4) In cases where the committed crime is punishable with judicial fine, or for crimes with a maximum prison sentence of no more than two years, except for those committed intentionally against bodily immunity, an arrest warrant cannot be issued.

As it is shown it would be hard for the suspect facing the defamation of president charge to fulfill the dispositions of the Article. It is because of the punishment ordered in the parag.1 of the article 299 of TCK, that the detentions are issued. The ECtHR's jurisprudence on detention forbids arbitrary deprivation of liberty. Although the detentions are "presumably" based on a legal ground, it is clear that from the proportionality point, of view, detention of a person for sharing his ideas, emotional or exciting explanations are not acceptable in a democratic society, where pluralism, criticism and tolerance should prevail.

It will be proper to conclude this paragraph with a recent ECtHR judgment to concretize that the violations are sprouting from the same intolerant understanding.

The ECtHR decided in Ömür Çağdaş Ersoy's judgment's[33], that there has been a violation of Article 10 of the ECHR. The decision consists of a suspended criminal sentence of a student for his harsh political criticism of the Prime Minister during a rally. In 2012 the prime minister had instigated the police attack on the students in ODTÜ (Middle East Technical University). The applicant had been slapped during this rally. A demonstration had been organized against the use

[33] ECtHR Affaire Ömür Çağdaş Ersoy c. Turquie, App. No: 19165, 15 June 2021.

of force of police officers and the detention of his friends, four days after the rally, in front of Ankara Tribunal. The applicant used the insulting phrase "like a mad dog" for the prime minister.

Ankara public prosecutor charged the applicant with the offense of insulting a public official on account of his office for the content of the speech in question. The applicant conceded that he had made the disputed remarks, in the context of the intervention, according to him brutal, of the police in the demonstration organized by the students on the campus of the ODTÜ on December 18, 2012 and because of the statements, to his aggressive and provocative eyes, which the Prime Minister had made towards the students who took part in this demonstration, in particular by qualifying them as terrorists and by congratulating the police forces for their intervention. On April 8, 2015, the Ankara Correctional Court found the applicant guilty of the alleged offense and sentenced him to a judicial fine of 7,080 Turkish liras, in application of article 125 § 3 a) of the penal code, before suspending the pronouncement of the judgment.

The applicant applied to the AYM. According to the high court, the applicant's comments, which they considered rude, humiliating, degrading, exaggerated, and constituting a personal attack, exceeded the acceptable limits and could not be considered as an opinion expressed in the context of a political debate.

The ECtHR considered that, in the context in which they were made, the applicant's remarks were essentially aimed at formulating a political criticism intended, inter alia, at the Turkish Prime Minister for the latter's statements aimed at the students who demonstrated on the 18th. December 2012 to protest his coming to the university campus and for his position as the ultimate hierarchical superior of the police having intervened at the demonstration in question.

It further found that offensive remarks may fall outside the scope of the protection of freedom of expression when they amount to disparaging gratuitously, for example if the insult is their only goal, and that, on the other hand, the use of formulas vulgar is not in itself decisive in the assessment of an offensive statement, because it may very well have a strictly stylistic aim

In the present case, the Court ruled that, having regard to the subject of the applicant's speech, the context in which it was delivered and its factual basis the style and content provocative, inciting to the agitation and somewhat offensive of these remarks cannot be regarded as gratuitously insulting within the framework of the public debate in which they took place[34].

ii. <u>The detention of journalists</u>

Freedom of expression comprehends the media by nature. Effectively, there will be no expression if there is no free access to information and the information will come from the independent journalists. To ensure freedom of expression States had to have the positive obligation to protect the flow of information of all journalists. These positive obligation implies, among other things, that the States are required to establish an effective mechanism for the protection of authors and journalists in order to create a favorable environment for participation in public debate, enabling

[34] Recent violations against Turkey on freedom of expression; defamation of the prime minister, CASE OF KILIÇDAROĞLU v. TURKEY, App. No. 16558/18, 27/10/2020; Cancellation of the labor contract of the applicant who is a contractual employee of the Ministry of National Education, for "like" mentions added to third-party Facebook content, without the right to compensation, AFFAIRE MELİKE c. TURQUIE, App. No. 35786/19, 15/6/2021; Expressions on the twitter account of a famous singer, ATİLLA TAŞ c. TURQUİE, App No: 72/17, 19/1/2021; Disciplinary sanctions imposed on applicant who served as judicial officer, for different statements made, highly defective decision-making process without indispensable safeguards for judicial professions and for the chair of an association of judges and prosecutors, CASE OF EMİNAĞAOĞLU v. TURKEY, App. No. 76521/12, 9/3/2021;

them to express their opinions and ideas without fear even if they run counter to those propounded by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter (*Dink v. Turkey*, § 137; *Khadija Ismayilova v. Azerbaijan*, § 158).

In the past two decades, Turkey has imprisoned more journalists than any other country. Some unfortunate statements came from the head of the state, "exposing" detainee journalists as terrorists, during the *Ergenekon* and *Balyoz (sledgedhammer)* trials and also after the coup attempt on 15th July 2016[35]. Continuity of the existence of dispositions of Article 100 of CMK, have to be taken very seriously to avoid all violations of the Article 5 of the ECHR on arbitrary deprivation of liberty and length of detention.

2. Rule of Law

The Rule of Law is a legal and a moral value to limit and control the governments. Democracy becomes endangered if only conceived as majority rule cause this can degenerate into the tyrannical rule of despots who ruthlessly destroy rights, enact oppressive laws and causally manipulate the rule of law to suit their whims[36].

This principal is covered in the preamble of the ECHR[37] and it is applicable to all rights and freedoms in the Convention. It means a state that respects human rights, considers itself responsible to establish and maintain a legal system that protects these rights, complies with the law and the Constitution in all its activities, and whose actions and actions are subject to the control of an independent judiciary.

The rule of law cannot be sensibly detached from the wider normative context of a community's history, politics, morality, ethics and culture. The grounding of the rule of law in concrete existential contexts thus broaches the following caveat of caution: for the rule of law to have any force or value at all, there must be a shared commitment from both government and governed to uphold the dictates of the law; such a commitment is based on common respect for the foundational values deemed essential to a just society, and in the absence of which the rule of law is not likely to command a powerful following[38].

a) *Hierarchy of norms redefined*

The hierarchy of norms refers to the idea that in a legal system there will be a vertical ordering of legal acts, with those in the lower rungs of the hierarchy being subject to legal acts of a higher

[35] Recent violations against Turkey on freedom of expression on journalists; CASE OF SABUNCU AND OTHERS v. TURKEY, App. No: 23199/17, 10/11/2020; CASE OF AHMET HÜSREV ALTAN v. TURKEY, App. No: 13252/17, 13/4/2021; AFFAIRE MURAT AKSOY c. TURQUIE, App. No. 80/17, 13/04/2021; AFFAIRE BULAÇ c. TURQUIE, App. No. 25939/17, 8/6/2021; AFFAIRES ÖĞRETEN ET KANAAT c. TURQUIE, App. Nos: 42201/17, 42213/17, 18/5/2021; AFFAİRE DICKINSON c. TURQUIE, App. No: 25200/11, 2/2/2021;

[36] IUTİSONE, SALEVAO, *"The Rule of Law: Principles, Issues and Challenges." Rule of Law, Legitimate Governance & Development in the Pacific*, by, ANU Press, Canberra, 2005, p. 1, *JSTOR*, www.jstor.org/stable/j.ctt2jbhxk.6. Accessed 17 July 2021.

[37] (…) Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.

[38] IUTİSONE, SALEVAO, *ibid*, p.3.

status[39]. In Turkey the hierarchy of norms has been redefined with the amendment made to paragraph 5 of Article 90.

The original version of the paragraph reads as:

International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regards to these agreements, on the grounds that they are unconstitutional.

This old provision used to create problems, when a conflict arises, between international agreements and domestic laws. In order to partially resolve the problem the Turkish Assembly inserted, in 2004, a "supremacy clause" to paragraph 5 of the Article 90 as;

In case of contradiction between international agreements regarding basic human rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provisions of international agreements shall be considered.

This provision made it clear that international human rights agreements have priority over conflicting national laws thereby putting to an end the controversy over the place of international agreements, although only for human rights[40]. Yet, the term "basic human rights" is so general as to be ambiguous. This lack of specificity raised questions like: if rights embedded in the Universal Declaration on Human Rights, known as a non-binding document, would be privileged to conflicting terms in the the Constitution or does this supremacy cover only the provisions of binding documents like International Human Rights Convention duly put into the effect or Is there a list of basic human rights that a State must acknowledge and prefer?

In most democratic countries there is a usually an agreed and specific list of fundamental human rights embedded or amended in their Constitution contained in *numerous and separate clauses*. Considering the innovative nature of human rights, all international human rights agreements and all international agreements with provision(s) concerning human rights, which the State duly put into the effect, should be incorporated into the list of basic human rights. When it is believed that human rights will always evolve for the better, there will be no need for an enumeration. Because, it is essential to believe that, there is generally no hierarchy among the expressed rights and freedoms[41].

b) *Executive authority over the hierarchy of norms*

With the adoption of the presidential system in Turkey, there has been a fundamental change in the hierarchy of norms. The main changes are that status are abolished and the decree laws are replaced by the presidential decrees. Domestic sources of law in hierarchical order are;

[39] CRAİG, PAUL, DE BURCA GRAİNNE, *Instruments and the Hierarchy of norms*, https://www.oxfordlawtrove.com/view/10.1093/he/9780198714927.001.0001/he-9780198714927-chapter-4, Accessed 19 July 2021.

[40] GÖNENÇ LEVENT, ESEN SELİN; *The Problem of Application of Less Protective International Agreements in Domestic Legal System: Article 90 of the Turkish Constitution*, European Journal of Reform, Vol. VIII, no4, 2007, p. 490.

[41] One should note the exception of the United States where the Supreme Court has written that First Amendment, protecting freedoms of speech, assembly and belief do have a "preferred position" among the other human rights found in the Bill of Rights.

According to the 9th paragraph of Article 104 of the Constitution, the President:

He/she shall appoint and dismiss the high ranking executives, and shall regulate the procedure and principles governing the appointment thereof by presidential decree.

In addition, according to the 9th paragraph of Article 104 of the Constitution:

The President of the Republic may issue presidential decrees on matters regarding executive power. The fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution shall not be regulated by a presidential decree. No presidential decree shall be issued on the matters, which are stipulated in the Constitution to be regulated exclusively by law. No presidential decree shall be issued on the matters explicitly regulated by law. In the case of a discrepancy between provisions of the presidential decrees and the laws, the provisions of the laws shall prevail. A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter.

The first two phrases of paragraph 9 are in line with the provisions of Article 90 paragraph 5 of the Constitution. The executive may only issue decrees within the limits of his duty and it cannot interfere with the legislative power competences.

Finally, Article 148 of the Constitution, which enacts the functions, and powers of the Constitutional Court does not make any alteration between types of legal instruments shown in the hierarchy of norms. It says:

The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance.

In this case, will the Constitutional Court control the presidential decrees, which are in the nature of administrative act? Since Article 148 regulates the conformity to the constitution, these decrees are subject to the review and control of the Constitutional Court[42]. Moreover, looking at the 17th paragraph of Article 104, it can be said that it is not possible to change or abolish a law in any field by presidential decree[43].

The importance of the subject will be more evident with the example of the withdrawal of Turkey from the Istanbul Convention by a President decision.

Turkey's withdrawal from the Council of Europe's İstanbul Convention

On 10 March 2021, by a presidential decision[44] published in the Official Journal of 20 March 2021, Turkey terminated its membership in the "Council of Europe Convention on preventing and combatting violence against women and domestic violence" which was opened for signature on 11 May 2011, (ironically) in Istanbul. The Convention was approved and put into the act, accordingly to the decision of the Council of Ministers by law No: 2012/2816, on 10/2/2012. As explained, in the previous chapters, an action of the Council of Minister's has the force of law. Though the Council of Ministers may not exist anymore, replaced by the president in the re-organization of the Turkish government after the changeover, it does not mean that laws enacted, approved by them no longer exists. Law no 6284 was passed with the aim of incorporating the Istanbul Convention into domestic law. Its Article 1(a) states that it is 'based on the Turkish Constitution and international treaties to which Turkey is a state party, in particular, the Council of Europe Treaty on Preventing and Combating Violence against Women and Domestic Violence[45].'

The presidential decree enabling the termination of Turkey's participation in. the Convention is, Decree No.9, Article 3[46] stipulates that:

ARTICLE 3- (1) Ratification of international agreements, prolonging the validity period, by not notifying their termination, making necessary notifications for the enforcement of certain provisions of an international agreement, binding the Republic of Turkey, determining the scope of application of international agreements, modifying or suspending the implementation of their provisions or terminating them will be made by the decision of the President.

It is clear that the executive is interfering in the sphere of legislation with this Decree[47].

As Prof. Kemal Gözler has pointed out: if the subject of ratification of international agreements is within the "executive power", article 3 of the Presidential Decree No. 9 complies with our Constitution in terms of this first condition (which is The President of the Republic may issue presidential decrees on the matters regarding executive power); if the Decree Law is not "a matter

[42] YILDIRIM İBRAHİM, *Cumhurbaşkanlığı Kararnameleri* (tra. Presidential Decrees), MUHF- HAD, C.23, S.2, s. 17.

[43] YILDIRIM İBRAHİM,*ibid*. s.27.

[44] Presidential decision No. 3718 reads as; 'It is decided that the Council of Europe Treaty on Preventing and Combating Violence against Women and Domestic Violence signed on 11/5/2011 and ratified on 10/2/2012 with the Council of Ministers Decision No 2012/2816 is to be terminated based on Presidential Decree No 9 paragraph 3.'

[45]ÇALLI BAŞAK, *Withdrawal from Istanbul Convention by Turkey: A Testing Problem for the Council of Europe*; https://www.ejiltalk.org/withdrawal-from-the-istanbul-convention-by-turkey-a-testing-problem-for-the-council-of-europe/ Accessed 19 July 2021.

[46] Publication date and Number on the Official Journal: 15/7/2018- 30479.

[47] One should ask, on the other hand, why the opposition party has not opposed to this decree by applying to the Constitutional Court at its the entry into force on 15/7/2018?

of executive authority", it is against our Constitution[48]. The author says that the ratification or the approvals of the International Treaties are not a matter of executive authority. To conclude, the withdrawal is unconstitutional.

At the same time, as the provision of paragraph 5 of Article 90, give supremacy to the international conventions on "basic human rights", in case of conflict with the Constitution, the withdrawal -again- is unconstitutional. The Convention contains right to life, right to physical integrity of woman, which are considered as "basic human rights" in all societies.

The Council of State 10th Chamber ruled, however, on 28/6/2021, that the President has the authority to withdraw from the Convention.

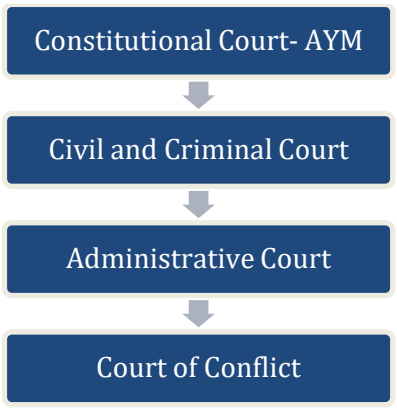
The implications for this decree include the concern about other bilateral or multilateral Conventions, to which Turkey is a party. Can Turkey's earlier decisions about basic freedoms be changed overnight with the stroke of a pen?

c) Non compliance with the decisions of the Constitutional Court

Thus far, we wanted to show the excessive use of authority of the executive and the relation between the merit system in the administration[49] of the country. In this section we will try to show the abolition of legal certainty, which is inherent to the rule of law.

One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question[50]. The whole ECHR draws its inspiration from the rule of law.

The general court structure and the hierarchy among them is:



It is a fundament of the Rule of Law that all courts should apply the final decision of the Constitutional Court. This principle has been flouted in recent Turkish history.

On 11 January 2018, the General Council of AYM decided, in the application of Şahin ALPAY[51], that the rights to liberty and security and the freedom of expression of the applicant were violated.

[48] GÖZLER KEMAL, *Cumhurbaşkanının Uluslararası Sözleşmeleri Feshetme Yetkisi Var mı?* (Tra. Does the President have the power to withdraw International Agreements) https://www.anayasa.gen.tr/ua-sozlesme-fesih.htm Accessed 16/7/2021.

[49] See p. 6.

[50] ECtHR, Case Brumărescu v. Romania ([GC], no. 28342/95, §§ 61-62, ECHR 1999-VII)

13th and 14th assize courts have rejected twice the release order of the detainee. While the unlawful detention of the applicant continues, the applicant re-lodged an individual application before AYM, saying that the decision of the higher Court is not being executed.

AYM, (ironically) underlined the supremacy of its own decision and the rule of law saying that the decisions of the AYM are final. Its decisions bind legislative, executive, judiciary, and administrative authorities, real and legal persons. Therefore, there is no doubt that the decision of the AYM is final and binding for the account of the applicant. Accordingly, the decisions given by the AYM are not open to discussion. There is no constitutional basis for a contrary evaluation of tribunals[52]. AYM's decision was sent to the İstanbul 13th Assize Court and the Applicant was released on 16 March 2018[53].

To push the ambiguity one step further, in its Mehmet Hasan Altan v. Turkey judgment, although the Constitutional Court decided on the release of the Applicant, ECtHR found a violation of article 5 of the Convention, because of the non execution of the High Court decision by İstanbul 26th and 27th Assize Court.

According to the Constitution, the decision is "not the execution of an order or instruction given to the courts, but the realization of the right of access to a court in a state of law"[54].

When the judiciary is politicized and fails to uphold legal principles that guarantee the rule of law, no individual can be free from political persecution, or trust that the legal system protects his/her rights[55]. Today, the highly politicized judiciary functions as a primary weapon against government critics and opponents – particularly in the media, parliament and civil society. Sham trials against political detainees abound. Indictments are frivolous and based on years-old offenses. Evidence offered is thin, arbitrary or non-existent[56].

To conclude, the Rule of Law constitutes the essence of the human rights like right to a fair trial, freedom of expression and the right to liberty and security. It is only with an independent judicial body that rule of law and the legal certainty that comes with it can be achieved. Only an independent judiciary that accepts the Rule of Law can retain the confidence of the people in the legal system.

d) *Non compliance with the judgments of ECtHR*

Another example of Turkey's flouting the Rule of Law can be found in its treatment of the Kavala case. Kavala, currently detained, a philanthroph and an activist was arrested in Istanbul and placed in police custody on 18 October 2017. He was suspected of having sought to overthrow the constitutional order and the Government through force and violence. On 19 February 2019 the Istanbul public prosecutor filed a bill of indictment in respect of the applicant (and 15 other suspects, including actors, NGO leaders and journalists). There were accusations about Gezi

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[51] AYM, Şahin Alpay. Genel Kurul (General Council) B. No: 2016/16092, 11/1/2018, §§ 111, 147.
[52] AYM, Şahin Alpay. B. No: 2018/3007, 15/3/2018.
[53]İstanbul 13. Ağır Ceza Mahkemesi. Karar No/ Sayı No: 2018/133 Değişik İş ve 16 Mart 2018 t.
[54] İLKİZ FİKRET, Anayasayı hiçe sayan yargının hal-i pür melali (tra. The state of the judiciary that disregards the constitution) https://m.bianet.org/bianet/hukuk/238874-anayasayi-hice-sayan-yarginin-hal-i-pur-melali Accessed 17/7/2021.
[55] TAHİROĞLU, MERVE, "*How Turkey's Leaders Dismantled the Rule of Law." The Fletcher Forum of World Affairs*, vol. 44, no. 1, 2020, p. 84.
JSTOR, www.jstor.org/stable/48599281. Accessed 16 July 2021.
[56] TAHİROĞLU, MERVE, ibid. p.68.

Protests and accusations concerning the attempted coup of 15 July 2016. He accused them, in particular, of having attempted to overthrow the government by force and violence within the meaning of Article 312 of the TCK, and of having committed numerous breaches of public order – damaging public property, profanation of places of worship and of cemeteries, unlawful possession of dangerous substances, looting, etc.

On 29 December 2017 the applicant lodged an individual application with the Constitutional Court. He alleged, *inter alia*, a violation of Article 5 (lack of reasonable suspicion, absence of relevant and sufficient reasons, lack of access to the investigation file, no public hearing when his applications for release were examined, etc.) of the Convention. He also submitted that his deprivation of liberty had been imposed with a view to dissuading human-rights defenders from carrying out activities to protect rights and freedoms. In particular, referring to the requirement of rapidity imposed by Article 5 § 4 of the Convention, he asked that his application be given priority. Constitutional Court determined that Kavala's detention did not violate his right to liberty and security. In their dissenting opinions by the president and the vice-president of the High Court concluded there was a lack of concrete convincing evidence that the applicant financed the protesters. They also stressed that the aim of the protesters, as said, overthrowing the government, was not grounded.

The ECtHR decided on 10 December 2019 immediate release of Kavala concluding that there has been

- violation of the Article 5 § 1 of the ECHR on the account of lack of reasonable suspicion that the applicant had committed an offence;
- violation on Article 5 § 4 of ECHR having regard to the total duration of the Constitutional Court's review of legality in the context of the individual application and to what was at stake for the applicant, the Court concludes that the proceedings by which the Turkish Constitutional Court ruled on the lawfulness of the applicant's pre-trial detention cannot be considered compatible with the "speediness" requirement of Article;
- violation of Article 18 in conjunction with Article 5 § 1 of the Convention by which the Court considers it to have been established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence. Further, in view of the charges that were brought against the applicant, it considers that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders. In consequence, it concludes that the restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence, as prescribed by Article 5 § 1 (c) of the Convention.

The Court ordered the immediate release of the Applicant, as an individual measure because the nature of the violation found is such as to leave no real choice as to the measures required to remedy[57] it. In the light of this case-law, it considers that any continuation of the applicant's pre-trial detention in the present case will entail a prolongation of the violation of Article 5 § 1 and of Article 18 in conjunction with this former provision, as well as a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention. In those conditions, having regard to the particular circumstances of the case and the grounds on which the Court based its findings of a violation it considers that the Government must

[57]ECtHR Case Assanidze Ilaşcu and Others v. Moldova and Russia ([GC], no. 48787/99, § 490, ECHR 2004-VIII.

take every measure to put an end to the applicant's detention and to secure his[58]. The lower Turkish courts chose to ignore this order without consequence.

What we have examined under title of non-execution of the Constitutional Court decision repeat itself for ECtHR decision as well. As it has been explained from the start of our study, the non-execution of the ECtHR judgments is a reflection of the absence of the rule of law.

The Kavala case is now the subject of an appeal before the ECtHR because of the non-execution of its order.

Conclusions:

All the examples used throughout the entire study silently grumble the famous saying of Montesquieu: *"It is establish by eternal experience that anyone with power tends to abuse it"*.

History does not have complete answers to the questions we now ask ourselves. Nevertheless in times of uncertainty and when there are urgent calls for a change, history/or what other nations have lived though, may provide an understanding of the values that can serve with practical and peaceful solutions. The reality is that, sovereign governments need to abandon the perception that they have time to make every mistake, to create their own epic. They need to have a more universal view. Human rights after all are more than good words on pages and the Governments must endorse their practice.

Every day that political detainees like Kavala spend behind bars, other pro democratic activists in Turkey feel that, they too could be locked up unfairly anytime[59].

In these days when urgent calls for the realignment of powers manifests itself very openly, Turkey can only break the vicious circle of violations with the existence of an effective Parliament and an independent and impartial judicial power which recognizes the Rule of Law.

[58] ECtHR CASE OF KAVALA v. TURKEY, App. No. 28749/18, 10/12/2019, §239, 240.
[59] TAHİROĞLU, MERVE, opcit.

Bibliography:

1. ÇALLI, BAŞAK; Withdrawal from Istanbul Convention by Turkey: A Testing Problem for the Council of Europe; https://www.ejiltalk.org/withdrawal-from-the-istanbul-convention-by-turkey-a-testing-problem-for-the-council-of-europe/ Accessed 19 July 2021.

2. CRAİG, PAUL; DE BURCA GRAİNNE, *Instruments and the Hierarchy of norms*, https://www.oxfordlawtrove.com/view/10.1093/he/9780198714927.001.0001/he-9780198714927-chapter-4, Accessed 19 July 2021.

3. ECHR, Guide on Article 10 of the ECtHR, Freedom of Expression, Council of Europe/ ECHR, 2021, pp. 132.

4. GÖNENÇ LEVENT; ESEN SELİN; "*The Problem of Application of Less Protective International Agreements in Domestic Legal System*": Article 90 of the Turkish Constitution, European Journal of Reform, Vol. VIII, no4, pp. 485-500, 2007.

5. GÖZLER, KEMAL; Cumhurbaşkanının Uluslararası Sözleşmeleri Feshetme Yetkisi Var mı? (Tra. Does the President have the power to withdraw International Agreements) https://www.anayasa.gen.tr/ua-sozlesme-fesih.htm Accessed 16 July 2021.

6. İLKİZ FİKRET; Anayasayı hiçe sayan yargının hal-i pür melali (tra. The state of the judiciary that disregards the constitution) https://m.bianet.org/bianet/hukuk/238874-anayasayi-hice-sayan-yarginin-hal-i-pur-melali Accessed 17 July 2021.

7. IUTİSONE, SALEVAO; "*The Rule of Law: Principles, Issues and Challenges." Rule of Law, Legitimate Governance & Development in the Pacific*, by, ANU Press, Canberra, 2005, pp. 1–35. *JSTOR*,

8. İYİMAYA, AHMET; "*Turkey's Proposed Presidential System: An Assessment of Context and Criticisms." Insight Turkey*, vol. 18, no. 4, 2016, pp. 29–40. *JSTOR*, www.jstor.org/stable/26300449. Accessed 18 July 2021.

9. KARAMAN, EBRU; *Türk İdari Yargısının Anayasal Temeli,,(*tra. The Constitutional Basis of the Turkish Administrative Jurisdiction, On İki Levha Yayıncılık, Yayın No. 392, İstanbul, Ekim 2013, 127s.

10. KOLBÜKEN, BİLAL; *"Cumhurbaşkanına Hakaret Suçu üzerine bir deneme",* (tra. An Essay on the Defamation of the President*),* Ankara Barosu Dergisi, 2015/3, s.33-50.

11. TAHİROĞLU, MERVE; "*How Turkey's Leaders Dismantled the Rule of Law*" , *The Fletcher Forum of World Affairs*, vol. 44, no. 1, 2020, pp. 67–96. *JSTOR*, www.jstor.org/stable/48599281. Accessed 16 July 2021.

12. ÜLGEN, CELAL, *Hukukun Üstünlüğü ve Kuvvetler Ayrılığı* (tra. Rule of law and Separation of Powers- Symposium)**,** 30 Nisan 2010, Panel Notları, İstanbul Barosu Yayınları, 2010, 124 s.

13. YILDIRIM, İBRAHİM; *Cumhurbaşkanlığı Kararnameleri* (tra. Presidential Decree), MUHF-HAD, C.23, S.2, s. 13-28.