



## Türkiye

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### United Nations Human Rights Committee Consideration of the 2<sup>nd</sup> Periodic Report of Türkiye - 142<sup>nd</sup> session, from 14 October to 8 November 2024

**Submission to the United Nations Human Rights Committee by Human Rights Joint Platform (IHOP), submitted on 16 September 2024.**

**Human Rights Joint Platform** Human Rights Joint Platform (IHOP), an independent platform was founded in 2005 by human rights organisations. Presently members of the network are Human Rights Association, Citizens Association, Human Rights Agenda Association, the Association for Monitoring Equal Rights and Rights Initiative. The Platform also supports the Refugee Rights Coordination and the Coalition Against Impunity in Turkey. As the network of the human rights organisations, has the vision of a participatory and pluralist democracy in Turkey based on Human Rights principles and the rule of law. The Network seeks to contribute to the provision of a structure and solidarity for its members and the human rights movement in Turkey to influence the public administration, political actors and the public opinion concerning human rights.

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**Methodology:** The information in this submission is collected through ongoing desk-based research by the members of the Board of IHOP.

## Rule of law and immunity of elected MPs

### *Introduction*

1. This report covers the case of MP Can Atalay, which involves violations of the general principle of the rule of law underpinned by the UN Covenant on Civil and Political Rights on the Rights to Liberty and Security of the Person, the Right to Vote and to be Elected, the Independence of the Judiciary, and the principle that there is no crime and punishment without law (*nullum crimen sine lege, nullum poena sine lege*). Although the issue is related to the personal situation of Can Atalay, it clearly demonstrates how the rights and freedoms of all individuals in society are under threat, as it clearly demonstrates the interference of the executive branch and the legislative majority party in judicial processes

### ***Violation of the Constitutional Rights of Can Atalay, Elected Member of Parliament, in relation to Parliamentary Immunity!***

2. "Can Atalay, who was nominated by the Workers' Party of Turkey (TİP), was elected as a member of parliament in the 2023 general elections. Atalay, who was one of the defendants in the Gezi Trial, which is under the supervision of the Committee of Ministers of the Council of Europe due to the failure to remedy the violation of Article 18 of the European Convention on Human Rights, was sentenced to 18 years in prison on April 25, 2022, in the hearing held at the 13th Heavy Penal Court in Silivri, Istanbul. Atalay, who appealed the decision against him, was in prison while he was elected as a member of parliament. He requested the relevant Criminal Court to issue a suspension of the trial and his release under Article 83 of the Constitution, citing his parliamentary immunity. This request was reviewed and rejected by the Court in its decision dated July 13, 2023.
3. "Article 83 of the Constitution of the Republic of Turkey grants immunity to elected members of parliament. The scope of immunity is limited to criminal law, and individuals benefiting from immunity cannot be detained, interrogated, arrested, or prosecuted while serving as members of parliament. According to past judicial practices and Constitutional Court's established jurisprudence, elected members of parliament who are in detention must be released immediately from the moment their election is officially confirmed."<sup>1</sup>

### ***Can Atalay's First Appeal to the Constitutional Court Against the Violation and the Constitutional Court's Ruling of Violation***

4. "Despite this jurisprudence, Atalay was not released. After his objection was rejected, Atalay submitted an individual application to the Constitutional Court on July 20, 2023. The Court found the application justified, determining that Article 14 of the Constitution, which excludes certain crimes from parliamentary immunity, is not suitable for interpretation in a manner that would meaningfully establish clarity and predictability solely through judicial decisions. In this context, the Court ruled that, due to the absence of a constitutional or legal provision providing fundamental guarantees for the protection of the right to be elected and to engage in political activities, and ensuring clarity and predictability, the applicant's right to be elected and engage in political activities under Article 67 of the Constitution, as well as his right to personal liberty and security, had been violated. In the ruling's verdict section, it was stated that in order to eliminate the violations of rights listed above, the case should be retried, the enforcement of the conviction should be suspended, Atalay should be released from the penal institution, and a suspension of the proceedings should be granted in the retrial. The ruling was sent to the Istanbul 13th Heavy Penal Court for these procedures to be carried out."

### ***The established case law of the Constitutional Court***

5. Article 83 of the Constitution of the Republic of Turkey provides immunity for MPs. The scope of immunity is limited to criminal law and the person benefiting from immunity cannot be held, interrogated, arrested or tried during his/her term of office as an MP.
6. Parliamentary immunity under the Constitution is not absolute. Article 83 of the Constitution stipulates two exceptions to legislative immunity in the 1982 Constitution. These are; in case of a serious criminal offense and the situations in Article 14 of the

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<sup>1</sup> See the Constitutional Court's decisions on Sebahat Tuncel, Mustafa Ali Balbay, Mustafa Hamarat, Kadri Enis Berberoğlu and Leyla Güven.

Constitution, provided that the investigation has been initiated before the election<sup>2</sup>. It is usual for the immunity to be lifted automatically in cases of a serious criminal offense, because in this case, there is a strong presumption about the seriousness of the accusation. In other words, in this case, it is no longer possible to claim that the accusation is groundless, fabricated and politically motivated. However, the Constitutional Court does not find the second exception in Article 14 of the Constitution applicable without a concrete legal regulation. Since many of the concepts and principles mentioned in this article are vague concepts and principles and it is difficult to determine objectively which crimes they correspond to in criminal law, Article 14 of the Constitution requires a law to be enacted for the sanctions to be imposed based on this article, as they may cause arbitrariness. To date, no such legal regulation has been made.

7. The Constitutional Court evaluated this problem most comprehensively *in the Ömer Faruk Gergerlioğlu Decision*<sup>3</sup>. Pursuant to Article 13 of the Constitution, the right to be elected and to engage in political activity “can only be restricted by law”. Likewise, paragraph 1 of Article 67 of the Constitution states that these rights can be exercised “in accordance with the conditions set forth in the law” and the third paragraph of the same article emphasizes that “the exercise of these rights shall be regulated by law”. Here, the criterion of “legality” for the restriction of rights under Article 13 of the Constitution is also expressed in two different paragraphs of Article 67 in terms of the rights to be elected and to exercise political activity. As a matter of fact, *in the Sebahat Tuncel Decision*, the Constitutional Court stated that according to the Article 13 of the Constitution, the only possibility of restriction of rights and freedoms could be done by a law enforced by the parliament. Naturally, it is clear that the rights specified in Article 67 of the Constitution could also be restricted.<sup>4</sup> However, in the regime of restriction of rights and freedoms, Article 13 of the Constitution must be taken into account in any case.<sup>5</sup>
8. In the concrete case of Ömer Faruk Gergerlioğlu's application, the Constitutional Court found that the proceedings initiated before the applicant became an MP were continued despite the applicant's election as an MP and made evaluations within the framework of the principles mentioned above and underlined that the criterion of legality must be ensured much more strictly in the case of legislative immunity.<sup>6</sup> The decision on violation of rights of Gergerlioğlu, like previous similar cases (see foot note no 1), was obeyed by the other courts and Gergerlioğlu released from the prison.

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<sup>2</sup> None of the rights and freedoms enshrined in the Constitution may be exercised in the form of activities aimed at destroying the indivisible unity of the State with its territory and nation and abolishing the democratic and secular Republic based on human rights

Article 14 of the Constitution: None of the provisions of the Constitution may be interpreted in such a way as to make it possible for the State or individuals to engage in any activity aimed at the destruction of the fundamental rights and freedoms recognized by the Constitution or to limit them more extensively than provided for in the Constitution.

The sanctions to be imposed on those who engage in activities contrary to these provisions shall be regulated by law.

<sup>3</sup> Constitutional Court, Ömer Faruk Gergerlioğlu Application, B. N. 2019/10634, K. T. 1/7/2021

<sup>4</sup> Constitutional Court, Mustafa Ali Balbay Application, B. N. 2012/1272, K.T. 4/12/2013, p. 131.

<sup>5</sup> Constitutional Court, Sebahat Tuncel Application, B. N. 2012/1051, K.T. 20/02/2014, p. 71.

<sup>6</sup> **ÖMER FARUK GERGERLIOĞLU APPLICATION**, (Application Number: 2019/10634), Decision Date: 1/7/2021 R.G. Date and Number: 8/7/2021-31535, for access: [Turkish Constitutional Court](#)

### *Non-compliance of the Court of First Instance and the Court of Cassation with the Constitutional Court's Violation Decision*

9. The Constitutional Court's decision in the Can Atalay case not only reflects the established view of the Court, but also repeats the reasoning of the Court in the previous cases mentioned above. The reasoned decision of the Constitutional Court was published in the Official Gazette dated 27.10.2023 and numbered 32352. However, this time the Istanbul 13th Criminal Court, which is authorized to execute the Constitutional Court's decision, has resisted to execute the decision in an attitude that continues to restrict Atalay's rights and freedoms. As a justification for the aforementioned act of "resisting", the court sent the file to the Chief Public Prosecutor's Office of the Court of Cassation to be forwarded to the 3rd Criminal Chamber of the Court of Cassation, citing that "the decision of violation subject to the individual application by the Constitutional Court is related to the decision of the relevant Criminal Chamber of the Court of Cassation to reject the release request".
10. With its decision dated November 8, 2023, the 3rd Criminal Chamber of the Court of Cassation ruled that the violation decision of the Constitutional Court cannot be attributed legal value and validity and that there is no decision that should be applied within the scope of Article 153 of the Constitution and decided not to comply with the decision of the Constitutional Court in the face of the executable conviction verdict, which was approved and finalized by the decision of the Chamber during the examination process of the individual application subject to violation, to send a copy of the decision to the Turkish Grand National Assembly for the initiation of the procedures for the withdrawal of the applicant's parliamentary deputy due to the final conviction. In addition, the Chamber also decided to file a criminal complaint to the Chief Public Prosecutor's Office of the Court of Cassation to appreciate and execute necessary actions against the members of the Constitutional Court who supported the decision of the Court that the rights of Can Atalay were violated by the reason of exceeding the limits of their authority.

### *The Executive's Support through the Media to the Courts that Issue Judgments on the Non-Compliance with the Constitutional Court's Violation Decision*

11. In his statement dated November 8, 2023, Mehmet Uçum, Chief Legal Advisor to the President of the Republic, stated that the criminal complaint against the members of the Constitutional Court who voted in favor of the Supreme Court's decision was a reactionary attitude due to the accumulation of attacks against the 'National Judiciary' **and that the courage shown cannot be discussed.**<sup>7</sup> Uçum also added that the Supreme Court's decision is a litmus test, that it reveals who is in favor of the 'National Judiciary' and who is not, that it reveals who defends the 'National Judiciary' to the end against the westernist and neo-liberal understanding of the judiciary, and that no one should have any doubts about this.

### *Second application to the Constitutional Court due to the failure of the courts to comply with the Constitutional Court's decision and the second violation decision of the Constitutional Court*

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<sup>7</sup> [The Constitutional Court violated the Constitution with the Can Atalay decision: Reactions came one after another!](#) - Haber 7 CURRENT, November 9, 2023

12. Atalay filed a second individual application on November 24, 2023 due to the non-implementation of the Constitutional Court's decision by the Court of Cassation.<sup>8</sup>
13. In its judgment on this application, the Constitutional Court found that Atalay was still being held in a penal institution as a convict in the execution of the conviction despite the violation decision. The Court emphasized that the continuation of the applicant's convict status in the penal institution after the violation decision lacked a legal basis, and that the continued deprivation of liberty of individuals despite the Constitutional Court's decision led to the arbitrariness of the detention, and that the non-arbitrariness of the interference with the freedoms of individuals is a fundamental guarantee that must be applied even in periods when extraordinary administrative procedures are adopted. According to the Court, this process, which started when the Istanbul 13th High Criminal Court sent a file within its jurisdiction to the 3rd Criminal Chamber of the Court of Cassation, and which was shaped by a decision of the Chamber disregarding the provisions of the Constitution, clearly contradicted the wording of the Constitution and ultimately led to the arbitrary deprivation of the applicant's liberty. In this case, the fact that the applicant is still being held in a penal institution with the status of a convict is contrary to Article 19 of the Constitution, which guarantees the right to personal liberty and security.
14. Based on the above-mentioned determinations, the Court decided to initiate the retrial proceedings, to suspend the execution of the conviction sentence and to release the applicant from the penal institution, to terminate the applicant's convicted status, and to issue a stay order in the retrial, as *it is mandatory* to fulfill these procedures. For these purposes, the Court sent the decision to the Istanbul 13th Assize Court.<sup>9</sup>

### ***The Insistence of the Court of First Instance and the Supreme Court to Disobey the Decision and the Executive's Threats to the Constitutional Court***

15. Istanbul 13th Assize Court did not apply the judgment part of the Constitutional Court's decision and sent the file to the Court of Cassation. The 3rd Criminal Chamber of the Court of Cassation ruled on January 3, 2024 that since the violation of rights decisions of the Constitutional Court on Ş.Can Atalay's individual applications dated 25.10.2023 and 21.12.2023 cannot be attributed legal value and validity, there is no decision that should be implemented within the scope of Article 153 of the Constitution in this context, the aforementioned decisions of the Constitutional Court should not be complied with, and the decision should be sent to the legislative body for the proceedings for the removal of his parliamentary seat. On the same day, the President's Chief Legal Advisor Mehmet Uçum made a statement that it is an important goal to eliminate the structure of the Constitutional Court, which has been characterized by reckless constitutional disregard and audacious violations of law since its establishment, and to restructure the Constitutional Court within the new constitution.<sup>10</sup>

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<sup>8</sup> [Turkish Constitutional Court](#), Application No: 2023/53898

<sup>9</sup> [Turkish Constitutional Court](#), Date of Decision: 25/10/2023, R.G. Date and Number: 27/10/2023-32352

<sup>10</sup> [Mehmet Uçum also entered the Can Atalay debate. Harsh words for the Constitutional Court. Mehmet Uçum, Chief Advisor to the President: The Constitutional Court is a defective structure \(medyatava.com\); Saray Satisfied with the Decision! A remarkable support for the Court of Cassation \(halktv.com.tr\)](#), January 4, 2024

16. Muhsin Şentürk, the President of the 3rd Criminal Chamber of the Court of Cassation, who filed a criminal complaint against the members of the Court who did not implement the decisions of the Constitutional Court and who voted in favor of the Constitutional Court's decision, was elected as the Chief Public Prosecutor of the Court of Cassation by the President of the Republic on May 16, 2024. The Chief Public Prosecutor's Office of the Court of Cassation has not taken any action on this criminal complaint until today. It is not clear whether an investigation file has been opened. The fact that the judge who filed the criminal complaint has been appointed as the Chief Public Prosecutor poses a threat to the independence of the members of the Constitutional Court.

***The Removal of Can Atalay's Parliamentary Status by Majority Votes of Members of Parliament from the Ruling Party in the Grand National Assembly of Turkey (TBMM), and the Nullification of the Removal by the Constitutional Court Following an Appeal***

17. At the end of this process, Atalay's parliamentary status was revoked<sup>11</sup> on January 30, 2024, after the Court of Cassation's decision was read aloud in the General Assembly of the TBMM. Atalay, who was stripped of his parliamentary status by the TBMM, appealed this decision once again to the Constitutional Court.

18. The Constitutional Court, due to its previous definitive and binding rulings on rights violations, ruled on February 22, 2024, by underlining the fact that TBMM's action was considered null and void, and that Ş.Can Atalay's parliamentary status continued, and requested the fulfilment of its previous rulings. The decision made on February 22, 2024, was published in the Official Gazette on August 1, 2024.<sup>12</sup>

***The Executive's Call on the Judiciary and the Legislative Branch to Disobey the Constitutional Court's ruling and the process that followed!***

19. On the same day, the President's Chief Legal Advisor Mehmet Uçum claimed in a media broadcast that no relevant authority is legally obliged to act or take action in accordance with the Constitutional Court's decision.<sup>13</sup>

20. The third decision of the Constitutional Court regarding Can Atalay has not been implemented until today. As a result of the request for a General Debate on the issue, which was accepted with the initiative of the Main Opposition Party, the session was terminated due to the attack of the ruling party deputies in the legislative body convened on August 16, 2024. The second meeting request made by the Main Opposition Party has not been responded to until today.

**Conclusion**

21. With its most recent decision on February 22, 2024, the Constitutional Court ruled that the process of stripping Hatay MP Ş.Can Atalay of his parliamentary seat by reading out the conviction decision against him in the General Assembly of the Grand National Assembly of Turkey (TBMM) was "null and void." A ruling of "nullity," unlike annulment, means that the decision deemed void has had no legal effect from the moment it was

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<sup>11</sup> Need to put link

<sup>12</sup> See [2024-65-nrm.pdf \(anayasa.gov.tr\)](#)

<sup>13</sup> [Mehmet Uçum criticizes 'Can Atalay' to Constitutional Court - Son Dakika Siyaset Haberleri | Cumhuriyet](#), 1.08.2024

made. Therefore, according to the Constitutional Court's decision, Hatay MP Ş.Can Atalay's parliamentary seat was never actually revoked.

22. In its statement made in early August 2024, the Union of Turkish Bar Associations pointed out that it is impossible to describe the gravity of the situation where the Constitutional Court had to issue a ruling of nullity concerning an action by the Grand National Assembly of Turkey. The Union submitted a petition to the Speaker of the Grand National Assembly of Turkey, emphasizing the necessity of ensuring the physical presence of Hatay MP Ş.Can Atalay in the Assembly.<sup>14</sup> As of the time this report was written, no positive developments had occurred.

## **Recommendations**

### **1. Guaranteeing the binding force of the Constitutional Court's judgments**

As the Can Atalay case shows, three decisions of the Constitutional Court on the same issue have not been implemented, these decisions have been deemed “null and void” both at the first instance and at the appellate court level, and the executive branch and the ruling party have politically supported these non-implementation decisions. This de facto situation poses the threat that not only the rights subject to this case, but all constitutional rights will remain unprotected for all who will be in need.

- All relevant state organs, especially the judiciary, should immediately implement these three interrelated rulings of the Constitutional Court and restore Ş. Can Atalay's parliamentary rights as required by these rulings.
- The judgment of the ECtHR in Kavala v. Turkey, which is characterized by the ECtHR as a “politically motivated” lawsuit filed by Osman Kavala, one of the convicted persons, including Ş. Can Atalay, which forms the basis of all these court proceedings that undermine the rule of law, should also be implemented immediately.

### **2. Ensuring the Judicial independence and security of judges**

In these cases,

- It is worrying that no disciplinary review of the implementation of the first instance court judgment by the Council of Judges and Prosecutors (CJP) has taken place. Accountability mechanisms should be established and improved for all state bodies that fail to implement the judgments of the Constitutional Court and the ECtHR, and existing accountability mechanisms should be implemented.
- The Supreme Court of Cassation chambers have more judges than the number of panels to hear cases due to the workload. Judges for each case are selected by the head of the chamber from a pool of panel members. This practice gives excessive authority to the heads of chambers to determine the judges. It is necessary to establish an objective system for the composition of the panel to hear incoming cases.
- Information should be provided on the fate of the criminal complaint filed by the 3rd Chamber of the Court of Cassation against the members who issued the violation verdict in the Can Atalay case, the stage of which is unknown to the public. The fact that the public has not been informed about this issue for almost a year, and the fact that the president of the court panel that filed the criminal complaint was appointed

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<sup>14</sup> [TBB SUBMITTED APPLICATION TO TGNA FOR THE IMPLEMENTATION OF THE CONSTITUTIONAL COURT'S DECISION ON CAN ATALAY'S DISMISSAL OF HIS NULLITY - Union of Turkish Bar Associations \(barobirlik.org.tr\)](https://www.barobirlik.org.tr), 14.08.24

to the Chief Public Prosecutor's Office of the Court of Cassation, which will evaluate this criminal complaint, poses a threat to the objective and subjective independence of the judiciary.

**3. Turkey should fully fulfill its obligations under its Constitution and International Human Rights law**

- Comply with the Constitution's articles on freedom and security of the person and the right to vote, Articles 9 and 25 of the Covenant on Civil and Political Rights and Article 5 and its Additional Protocol No. 1 (Article 3) of the European Convention on Human Rights, and take measures to bring Turkey's national law in line with international human rights standards, guided by the Human Rights Committee's General Comment No. 25.
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