

TRIAL MONITORING REPORT UNDER THE RIGHT TO A FAIR TRIAL

Assoc. Prof. Dr. Ali Rıza Çoban

April 2025



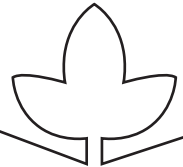


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INTRODUCTION

The aim of this study is to analyze the findings of trial monitoring conducted by the Human Rights Association within the scope of the right to a fair trial. To this end, 112 hearings were monitored in 30 different cases. The monitoring was carried out in the form of trial observation. Yet, the trial observations were not limited to the courtroom; developments outside the courtroom, especially the security measures taken around the court building on the day of the trial, measures, if any, to prevent lawyers, observers, civil society organizations and observers who wanted to be present and observe the trials from entering the courtroom, or other measures taken, if any, to prevent press statements, assemblies and demonstrations were also recorded.

Almost all of the cases monitored were initiated against journalists and various social groups for their public participation activities in the form of statements of opinion, press conferences or demonstrations.

The cases monitored were selected as much as possible from those filed in different regions and cities in Türkiye. In this context, a total of 30 cases were monitored, including eight cases in Ankara, seven cases in İstanbul, five cases in Van, four cases in İzmir, four cases in Diyarbakır, and one case each in Eskişehir and Muğla.

All of the cases monitored were initiated due to the defendants' statements or activities such as organizing assemblies, demonstrations or press releases. Therefore, these cases can be characterized as cases that essentially aim to silence critical voices and instrumentalize the judicial system as a tool to this end.



How these trials are conducted and whether the principles of fair trial are respected are of vital importance for the functioning of the rule of law and the protection of fundamental rights and freedoms. Therefore, in this study, the principles of the right to a fair trial established by the European Court of Human Rights (ECtHR) and the Constitutional Court will be presented and the problems identified in the trial observations will be addressed within this framework.

The main problem with these cases, however, is not whether they are conducted fairly or not, but the fact that these cases have indeed been filed. In other words, these are cases that should not have been brought at all, and should not have even been the subject of an investigation, but were initiated into acts that are in their very essence the exercise of fundamental rights and freedoms to deter and intimidate. In other words, the main problem with these cases is not how they are conducted, but why they are filed.

For instance, one of the cases monitored is the case against the participants of the 700th-week vigil of the Saturday Mothers, which took place on 25 August 2018. Women whose relatives were forcibly disappeared in the 1990s had been staging peaceful sit-ins in front of Galatasaray High School every Saturday for 700 weeks in order to find their disappeared relatives. However, in the 700th week, the protest was not allowed to take place on the grounds that it had not been notified to the local administrative authority and was therefore an illegal gathering, and was forcibly dispersed by law enforcement officers. Under Article 32 of the Law No. 2911 on Meetings and Demonstrations, a criminal case was filed against the participants of this demonstration, demanding imprisonment from six months to three years on the grounds that they participated in an unlawful meeting or demonstration and insisted on not dispersing despite warnings and use of force. In the case filed against 37 defendants in 2020, 15 hearings were held and in the 15th hearing held on 14.03.2025, all defendants were acquitted.

It is of vital importance to reveal the violations of rights during the trial in this case. So much so that, no matter how fair the trial was conducted, 37

people who were under the threat of punishment from 2018 to 2025, who had to hire lawyers to follow the case and defend themselves, suffered pecuniary and non-pecuniary damages. The fact that the case ended in acquittal does not mean that these individuals did not suffer any loss of rights. On the contrary, being under the threat of punishment for seven years created a serious psychological burden for these individuals and generated a deterrent effect on them in seeking their rights. However, this case should never have been filed and law enforcement should never have intervened in the vigil. In fact, all defendants were acquitted in the case and the Constitutional Court found a violation in the individual application against the intervention.¹

In other words, the Constitutional Court found that the intervention that led to the prosecution of the defendants was unconstitutional. Being under the threat of punishment for nearly seven years due to an investigation and trial filed on the grounds that they participated in a sit-in protest, and that they disobeyed the unlawful order of the security forces, has created a victimization in itself. Particularly, because the participation in a sit-in protest should not have been subject to interventions in the first place and which was the exercise of a constitutional right.

Therefore, it is important to highlight this aspect of the monitored cases and to draw attention to the rights violations resulting from the investigation or prosecution process itself.

There is a growing tendency around the world to instrumentalize the judicial system to silence dissenting voices. Such lawsuits are called “Strategic Lawsuits Against Public Participation” (SLAPPs). The term SLAPPs is widely used to refer to this type of judicial harassment.

The European Commission defined Strategic Lawsuits against Public Participation as a special form of harassment in its European Democracy Action Plan published in 2020 (COM (2020) 790 final, 3.12.2020). Such lawsuits, brought by powerful individuals, corporations or state officials

¹ Maside Ocak Kışlakçı [1st Sec.], App. No: 2019/21721, 16/11/2022.

based on unsubstantiated allegations, often against journalists and human rights defenders, aim to censor, intimidate and silence those who express criticism on a matter of public interest.²

On 20.02.2024, the European Union adopted the “Directive on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings.” The concept of SLAPP is defined as the obstruction of public debate, journalism, advocacy and social media on matters of “public interest” by malicious lawsuits and/or sanctions.³

Considering the content and conduct of the cases monitored, they can easily be handled within the framework of this concept. Strategic lawsuits against people’s or public participation are defined as civil or criminal lawsuits that aim to intimidate, harass and deter those who want to publicize unlawful, ethical violations or report them to the competent authorities, raise their voices against rights violations, participate in peaceful protests or boycotts, or bring abuses and corruption to the public agenda.⁴

Journalists, activists, whistleblowers, advocacy groups, and other “public watchdogs,” have long been the target of various forms of abuse around the world. SLAPPs, however, have become a growing threat to these actors.

The objective of SLAPPs is not to redress the plaintiff’s breached legal rights but to intimidate and harass the target into silence. For the SLAPP litigant, therefore, the outcome of the lawsuit is generally irrelevant, as the litigation process itself is enough to advance the goals of the lawsuit. SLAPPs can be brought by powerful and wealthy private individuals

² See. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0790&from=EN, s. 14.

³ Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (‘Strategic lawsuits against public participation’), A9-0223/126, 20.02.2024, §15

⁴ CASE, Shutting Out Criticism: How SLAPPs Threaten European Democracy A report by The Coalition Against SLAPPs in Europe (CASE) March 2022, p. 1

seeking to shut down critics, as well as by individuals and institutions exercising public authority.

Especially in countries where the rule of law is relatively strong, wealthy individuals and corporations abuse the legal system by filing lengthy, expensive and often baseless lawsuits to silence critical voices against them. Thus, in these countries, lawsuits against public participation often take the form of civil or commercial litigation.⁵

In countries where the rule of law is weak and the judiciary along with the bureaucracy are largely under the influence and control of the executive and the ruling party, however, those in power themselves or private pro-government individuals prefer to initiate criminal proceedings by filing reports or complaints instead of initiating civil proceedings. Even without a notice or complaint, criminal investigations or prosecutions are initiated by the direct action of the law enforcement or the prosecutors' offices. Considering that all of the cases monitored are criminal cases, it can be argued that they fall under this category.

The Commissioner for Human Rights of the Council of Europe devoted a separate chapter to judicial harassment in their February 2017 memorandum on freedom of expression and media freedom in Türkiye. The Commissioner noted that the space for democratic debate in Türkiye has narrowed down alarmingly as a result of several factors, including increased judicial harassment of a broad cross-section of society (including journalists, members of parliament, academics and ordinary citizens) and government actions that undermine pluralism, and lead to self-censorship. The Commissioner urged the authorities to fulfill their commitment to restore judicial independence and protect freedom of expression by revising criminal legislation and practices.⁶

⁵ Indeed, the anti-SLAPP Directive issued by the European Union in 2024 (DIRECTIVE (EU) 2024/1069 of the European Parliament and the Council of Europe of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') data.europa.eu/eli/dir/2024/1069/oj is based on civil and commercial litigation.

⁶ Nils Muiznieks, Memorandum on freedom of expression and media freedom in Tur-

In a 2024 memorandum on “freedom of expression and of the media, human rights defenders and civil society in Türkiye,” the Commissioner for Human Rights noted that journalists in the country were subjected to strategic lawsuits against public participation, which can be civil or criminal, and gave the example of journalists who were sentenced to pay fines for their articles.⁷

Therefore, in the second part of the study, the principles of the right to a fair trial and the problems and violations identified in the trial observations will be discussed. The third part of the study will demonstrate that the monitored cases can be understood within the framework of litigation against public participation and judicial harassment, and will offer relevant recommendations.

key, CommDH(2017)5, 15.02.2017, para. 43-71. images.derstandard.at/2017/02/15/CommD-H20175EN.pdf

⁷ Memorandum on freedom of expression and of the media, human rights defenders and civil society, CommHR(2024)16, 05.03.2024, para. 19. <https://rm.coe.int/memorandum-on-freedom-of-expression-and-of-the-media-human-rights-defe/1680aebf3d>

II

OBSERVATIONS ON THE RIGHT TO A FAIR TRIAL

The right to a fair trial is one of the cornerstones of the rule of law. Indeed, individuals can only feel legally secure in countries where fair trial guarantees are rigorously implemented. It is not enough for the law to have a fair content in order to benefit from individual fundamental rights and freedoms equally. The law must also be applied in an equitable manner. The right to a fair trial and the principles deriving from this right guarantee that the law is applied within the framework of a just procedure.

The elements inherent in the right to a fair trial guaranteed under Article 36 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR) have been enriched and clarified by the case-law of the ECtHR and the Constitutional Court. Article 6 of the ECHR incorporates a more comprehensive regulation. The Constitutional Court also recognizes that Article 36 of the Constitution covers the elements of Article 6 of the Convention.

Article 6 of the Convention guarantees that everyone charged with a criminal offense is entitled to a fair and public hearing within a reasonable time by an impartial and independent tribunal established by law. The second paragraph of the Article sets out the presumption of innocence, while the third paragraph guarantees the right of the accused to be informed of the charges, to have adequate time and facilities for the preparation of their defense, to have legal assistance, to examine prosecution witnesses and to have their own witnesses heard on the same terms as prosecution witnesses, and finally to have the assistance of an interpreter if they do not understand the language used in court.

The ECtHR has derived a number of other elements from the concept of fair trial in the first paragraph of Article 6, such as the right of access to a court, the right to equality of arms, the right to adversarial proceedings, and the right to a reasoned judgment. Since it is not possible to explain all of these rights in detail in this report, the rights that are important for the cases monitored will be emphasized.

A The Right to a Fair Trial by an Independent and Impartial Tribunal Established by Law

Article 6 of the ECHR explicitly regulates the right to have one's case heard by an **independent and impartial tribunal established by law** as an element of the right to a fair trial. The ECtHR has held that the concept of "a tribunal established by law" cannot be understood independently of the concepts of "independence" and "impartiality" of the court, and that there is a very close relationship between these concepts (*Guðmundur Andri Ástráðsson v. Iceland* [GC], 2020, § 218).

In particular, the Court established that a judicial body which does not meet the requirements of independence, in particular of the executive, and impartiality cannot even be characterized as a "tribunal" for the purposes of Article 6 § 1. It held that a tribunal established in contravention of the legal guarantees of independence, or a panel whose members were elected or appointed unlawfully, cannot be considered a tribunal established by law. Consequently, this violates the right of any person to be tried by a court that is established in accordance with (*Guðmundur Andri Ástráðsson v. Iceland* [GC], 2020, § 287-290).

In the case-law of the ECtHR, "**independence**" is defined as the absence of undue influence or pressure on the judge or court deciding on the merits of the case. "Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterizes both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and

operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of their duties (*Guðmundur Andri Ástráðsson v. Iceland* [GC], 2020, § 234).

In determining whether a judicial authority can be characterized as “independent”, the ECtHR takes into account the following criteria: i. the manner of appointment of its members; ii. the term of office of its members; iii. the existence of guarantees against outside pressures; iv. whether the body presents an appearance of independence (*Findlay v. the United Kingdom*, 1997, § 73). The ECtHR has extensive and detailed case-law on these elements. However, it is not possible to have a detailed account here.

The ECtHR found a violation of the principle of an independent tribunal in Türkiye only in respect of the military members of the State Security Courts. Regarding these courts, the ECtHR stated that it was legitimate for civilians charged with crimes relating to state security to be concerned about the independence and impartiality of courts that are subject to the chain of command and military discipline, to which military judges are appointed for a certain period of time, to which their superiors issue record reports, and in which administrative and military authorities play a role in many of the decisions regarding their appointment (*Incal v. Turkey*, App. No: 1/1997/825/1031, 9/6/1998, §§ 68, 72, 73; *Özel v. Turkey*, §§ 33, 34; *Özdemir v. Turkey*, §§ 35, 36). Similarly, the Constitutional Court held that the right to be tried by an impartial and independent tribunal was violated, due to the rejection of a request for retrial made following a judgment by the ECtHR finding a violation on the grounds that the original court lacked impartiality and independence (*Abdullah Altun* [1st Sec.], App. No: 2014/2894, 17/7/2018).

In the case-law of the ECtHR, impartiality generally means the absence of prejudice and bias (*Piersack v. Belgium*, App. No: 8692/79, 1/10/1982, § 30). According to established case-law, the existence of impartiality is

determined on the basis of a subjective method and an objective one. The subjective method refers to the determination by personal conviction whether the judge has a personal bias in a particular case, while the objective method refers to the determination whether the composition of the court provides sufficient safeguards to eliminate any legitimate doubt as to impartiality (*Fey v. Austria*, App. No: 14396/88, 24/2/1993, § 28). In other words, the existence of impartiality is determined according to the subjective test, which is the attempt to determine the personal convictions of a particular judge in a case, and the objective test, which is the determination of whether a judge has adequate safeguards to prevent legitimate doubts about their impartiality (*De Cubber v. Belgium*, App. No: 9186/80, 26/10/1984, § 24).

The objective impartiality requirement provides an important additional safeguard in certain cases where the boundary between *objective and subjective impartiality* is not clear-cut and where it may be difficult to adduce evidence to rebut the presumption that the judge is subjectively impartial. Indeed, in the vast majority of applications where there was a question of impartiality, the objective method was applied (*Micallef v. Malta* [GC], App. No: 17056/06, 15/10/2009, § 95).

With regard to the subjective test, a judge's personal impartiality is presumed in any event, unless there is evidence to the contrary. As regards the objective test, it is necessary to determine whether there are certain facts, distinct from the judge's personal conduct, which may cast doubt on their impartiality. At this point, in determining objective impartiality, it is important whether sufficient guarantees are provided to eliminate any legitimate concerns or fears regarding the impartiality of the judge. The case-law of the ECtHR emphasizes that even appearances may be of importance in the matter of impartiality, in other words, justice must not only be done, but must also be seen to be done, so that in a democratic society the courts must inspire confidence in those who seek their rights (*Micallef v. Malta*, §§ 94, 97, 98).

In this context, judges must recuse themselves from the case if there is a legitimate reason to fear that they are not impartial. This situation ac-

knowledges that the defendant's perspective is important but not decisive when determining whether there is a legitimate reason to fear that a judge is not impartial in a particular case. What is decisive is whether this concern is objectively justified. This depends on the specific circumstances of each case (*Hauschildt v. Denmark*, App. No: 10486/83, 24/5/1989, §§ 47-49).

The Constitutional Court also emphasizes that one of the elements of the right to a fair trial guaranteed by Article 36 of the Constitution is the right to be tried by an impartial and independent court. The Constitutional Court's jurisprudence is also parallel to that of the ECtHR. Accordingly, impartiality generally means that there is no prejudice, partiality, or interest that would affect the outcome of the case, and that there is no opinion or interest in favor of or against the parties to the case (*Tahir Gökatalay*, App. No: 2013/1780, 20/3/2014, § 61; *Serkan Şeker*, App. No. 2017/15118, 2 June 2020, § 34).

The concept of judicial impartiality is explained in terms of the institutional structure of the court itself and the conduct of the judge responsible for hearing the case. Accordingly, impartiality has two dimensions: subjective and objective. The judge's personal impartiality in the case at hand as an individual is referred to as subjective impartiality, while the impression of impartiality that the court as an institution leaves on the individual is referred to as the objective impartiality. Although Article 36 of the Constitution does not explicitly refer to the impartiality of courts, the principles regarding the independence and impartiality of courts set forth in Articles 138, 139, and 140 of the Constitution should be taken into account in determining the scope of the right to be heard by an independent and impartial court (*Tahir Gökatalay*, § 60; *Serkan Şeker*, § 35).

In addition to its judgments on violations relating to the State Security Courts in applications against Türkiye, the ECtHR has not ruled on direct violations of Article 6 in terms of impartiality and independence. While finding a violation of Article 18 in its *Kavala* and *Demirtaş* judgments the court also drew attention to the parallelism between the statements and arguments of the executive, particularly the president, and the conduct

of the judicial organs (*Kavala v. Turkey*, no. 28749/18; 10.12.2019, § 229; *Selahattin Demirtaş v. Turkey* (2) [GC], no. 14305/17, 22.12.2022, §§ 432-434). It would, of course, be incorrect to argue that the influence of the president and other elements of the executive branch on the conduct of the judiciary is limited to these two cases.

It is clear that there are serious problems regarding the *institutional independence of the judiciary* in Türkiye. Although there were problems before, the 2010 constitutional amendment changed the structure of the Council of Judges and Prosecutors, which is responsible for the management and supervision of the judiciary, and since then, there have been frequent conjunctural legal changes specifically regarding the number of members of higher courts and their formation along with the election of chief justices, interfering with the structure of the Council and the higher courts. These changes have interfered with the structure of the Council and the higher courts, with the aim of bringing the judiciary as a whole under the control of the executive branch. The purges following the coup attempt (at least 5,000 judges and prosecutors were dismissed) and the 2017 constitutional amendment, which changed the title and structure of the Council once again, have further weakened the institutional independence of the judiciary.⁸

The Venice Commission recently published a comprehensive opinion on the independence of the Council of Judges and Prosecutors. The opinion, which found that the structure of the Council established after 2017 was not in line with European standards, included detailed points of criticism and recommendations.⁹ Other bodies of the Council of Europe, in par-

⁸ For a detailed report on the institutional independence of the judiciary, see Ali Rıza Çoban, “Judicial Reform Recommendations to Ensure Rule of Law”, Freedom Research Association, (2023), <https://oad.org.tr/en/publications/reports/judicial-reform-recommendations-to-ensure-the-rule-of-law/>

⁹ Venice Commission, “Türkiye, Opinion on the Composition of the Council of Judges And Prosecutors And the Procedure for the Election of Its Members”, CDL-AD(2024)041, 9 December 2024, [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2024\)041-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)041-e), Also see. Levent Köker, “Hakimler ve Savcılar Kurulunun Yeniden Yapılandırılması”, [Restructuring of the Council of Judges and Prosecutors], Özgürlük Araştırmaları Derneği (2025), oad.org.tr/yayinlar/hakimler-ve-savci-lar-kurulunun-yeniden-yapilandirilmasi

particular the High Commissioners for Human Rights, have also addressed issues related to judicial independence in Türkiye in detail.¹⁰ However, the ECtHR appears to have turned a deaf ear to the findings of other Council of Europe bodies to date.

There is a clear correlation between issues related to the institutional independence of the judiciary and the filing of cases monitored within the scope of this study. In many cases, indictments that do not contain the elements of the alleged crime, do not clearly state which actions constitute a crime, and therefore should be rejected, are accepted and lead to lengthy trials.

A situation that frequently occurs in Türkiye and raises doubts about the objectivity and impartiality of the judiciary is the courts' collection of evidence on their own accord. The Code of Criminal Procedure No. 5271 (CCP) does not adopt an investigation system, but rather an allegation system. This means that courts cannot conduct "investigations ex officio" or collect evidence during the prosecution phase. According to Article 160 of the CCP, the obligation and authority to collect evidence belongs to public prosecutors. However, Article 237/3 of the former CCP accepted the method of courts collecting evidence ex officio. Yet, Article 177 of the new CCP does not grant the courts the authority to collect evidence directly, but rather grants the defendants and their defense counsels the right to present evidence and request that the courts collect such evidence, limited to the preparatory phase of the trial and before the trial has begun. However, Article 207 states that the delayed submission of evidence and facts shall not be sufficient grounds for rejecting the request to present such evidence and facts.

Therefore, in criminal procedure law, the substitution of evidence is a power belonging to the prosecution and defense, and the court should not initiate an investigation of evidence on its own initiative. The court's investigation of evidence is an act that may raise doubts as to its objective impartiality,

¹⁰ Dunja Mijatovic, Report Following Her Visit to Turkey From 1 To 5 July 2019, rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e

and it must therefore be avoided. However, in practice, prosecution does virtually nothing during the trial and merely submits an opinion repeating the indictment at the end of the prosecution. This approach is also problematic in light of the rule in the CCP that only issues and evidence brought before the court and discussed during the trial may be used as the basis for a ruling. Therefore, it should be noted that the court or judge's objective impartiality is compromised if they collect evidence on their own initiative without a request from the prosecution or defense.

Another conduct that could cast doubt on the impartiality of a court or judge is unnecessary interference with the defense, interrupting the defendant or defense counsel, or displaying prejudiced or biased attitudes when addressing the defendant. Such behavior has been observed in some of the trials monitored. In seven or eight hearings, it was observed that the judge made excessive and unnecessary interventions in the defendant's or lawyer's defense. In one hearing, it was observed that the judge addressed the defendant, who was an LGBTI+ individual, as "my son" contrary to the person's request. In one hearing, when the defendant was about to faint during the hearing, the judge approached the defendant and said: "Don't worry, there are still higher courts to appeal to," even though the hearing had not yet ended and no decision had been made. When the defense attorneys asked the judge, "Has a decision been made?" the judge stated that no decision had yet been made. It is clear that such attitudes and conduct raise doubts about the impartiality of the courts.

Another circumstance affecting the objective impartiality of the courts is the relationship between the judge or court and the prosecution along with their conduct during the trial. In its *Diriöz v. Turkey* judgment, the ECtHR found that the prosecutor's elevated physical position in the courtroom was merely formal and did not affect the fairness of the trial (No. 38560/04, 31.05.2012). However, it is difficult to argue that this position is purely formal. The court panel tends to view the prosecutor not as a party to the case but as part of the court and to treat them accordingly. On the same day, nearly 30 hearings are held in criminal

courts, and the trial prosecutor spends their entire working day with the judges. In this situation, it is inevitable that the prosecutor will establish a very close relationship with the judges. The design of the courtrooms allows the prosecutor to be in constant close communication with the judges or panels. What is more alarming is that during the hearing, there are often dialogues between the prosecutors and the judges that defendants and the defense cannot hear. It is highly likely that these dialogues relate to the case and its progress. Since defendants and the defense are unaware of the content of these dialogues, however, they are deprived of the opportunity to respond. Such dialogues violate the principle of equality of arms and undermine the fairness of the trial. Furthermore, even if such dialogues are not related to the course of the case, they may cast doubt on the impartiality of the court in the eyes of those observing the trial.

Another issue in this regard is that the prosecutor does not leave the courtroom when the court retires to deliberate at the end of the hearing. In most cases, the court panel conducts its deliberations in the presence of the prosecutor. Even if the prosecutor has not expressed any opinion on the decision to be made, the fact that the prosecutor remains in the courtroom while the defendant, defense attorneys, and the audience are removed from the courtroom will raise suspicion among the parties to the case and those observing.

The cases monitored, by their characteristics, were those in which the victims or parties are the state or public officials. In such cases, the fact that the prosecutor acting on behalf of the public is in constant dialogue and interaction with the court casts doubts about the courts' objective impartiality.

In 19 of the 112 trials monitored, observers noted that there were conversations between the judges and the prosecutors that the audience could not hear. This highlights the seriousness of the issue.

The requirements regarding the impartiality of the courts are not mandatory for the prosecution. However, the CCP stipulates that the prosecu-

tors must collect not only evidence and facts against the defendant, but also in their favor.

Moreover, the obligation of impartiality also applies to experts who submit reports on which the courts' rulings are based. There is no explicit provision in Article 6 of the Convention requiring an expert witness heard by a court to meet the criteria of impartiality and independence. But the opinion of an expert witness appointed by a competent court to address the issues raised in the case may play a significant role in the court's assessment of the case. The ECtHR has held that, under certain conditions, the lack of impartiality of an expert appointed by a court may violate the principle of equality of arms within the concept of a fair trial (*Bönisch v. Austria*, 06.05.1985 (Merits), §§ 30-35 Series A No. 92; *Brandstetter v. Austria*, 28.08.1991, § 33 Series A No. 211). In particular, factors such as the expert's position and role must be taken into account in the case. (*Sara Lind Eggertsdóttir v. Iceland*, No. 31930/04, § 47, 5 July 2007; *Sarıdaş v. Turkey*, No. 6341/10, § 35, 7 July 2015). In other words, if the opinion expressed by the expert appointed to the case plays a decisive role in the court's ruling, the expert must be impartial. For instance, if an investigation into the actions of law enforcement is conducted by another law enforcement officer working in the same institution, there is serious reason to doubt the impartiality of the expert.

This concern is particularly relevant in several of the monitored cases involving the dispersal of assemblies by law enforcement. In these cases, law enforcement officers complained that they had been subjected to violence by participants in assemblies in cases where assemblies and demonstrations were dispersed by law enforcement using force. In such cases, courts decided that the camera footage in the possession of law enforcement had to be reviewed by an expert rather than being presented to the court for viewing. In most cases, another law enforcement officer working in the same place as the complaining law enforcement officers was appointed as the expert witness. Such appointments raise serious concerns about impartiality and violate the principle of equality of arms in court, especially when the expert's opinion plays a decisive role in the court's ruling.

B The Right to a Public Trial

The public nature of trials ensures that justice is administered in a manner open to public scrutiny, thereby protecting the parties to the cases. Publicity is also one of the means of maintaining trust in the courts. Thus, publicity contributes to the achievement of the objective of a fair trial under Article 6 § 1 of the Convention by making the administration of justice visible (*Riepan v. Austria*, 2000, § 27; *Krestovskiy v. Russia*, 2010, § 24; *Sutter v. Switzerland*, 1984, § 26). The general principle that trials should be held open to the public and the press is a fundamental right for the parties to the proceedings, particularly the defendant. Therefore, even if the other procedural rights guaranteed under Article 6 remain intact, a trial conducted in camera cannot be considered fair. Thus, the principle of a public trial cannot be waived on the grounds that the defendant's right to an oral hearing and such principles as adversarial proceedings and equality of arms are protected, unless it is demonstrated that there is an absolute necessity for the trial to be held in camera (*Kilin v. Russia*, 2021, §§ 111-112).

The principle of public proceedings consists of two elements: hearings must be open to the public and rulings must be announced publicly (*Sutter v. Switzerland*, 1984, § 27; *Tierce and Others v. San Marino*, 2000, § 93).

The principle of public proceedings also covers the right to oral hearings in criminal cases and the right of the defendant to be present at the hearing. The rights to oral hearings and to be present at the hearing also guarantee other rights enshrined in Article 6, such as equality of arms, the right to examine witnesses, and the right to interpretation. (*Hermi v. Italy* [GC], 2006, §§ 58-59; *Sejdovic v. Italy* [GC], 2006, §§ 81 and 84; *Arps v. Croatia*, 2016, § 28). In addition, the right to be present at the hearing allows the defendant to verify the accuracy of their defense and to compare it with the statements of the victims and witnesses (*Medenica v. Switzerland*, 2001, § 54). Local courts are obliged to ensure the defendant's presence by duly summoning them (*Colozza v. Italy*, 1985, § 32; *M.T.B. v. Turkey*, 2018, §§ 49-53) and take measures to prevent the defendant from being unjustly excluded from the hearing (*Medenica v. Switzerland*, 2001, § 54).

Some problems related to the right to a public trial have been observed in the trials monitored. First of all, in some trials, it has been observed that some spectators and lawyers were not allowed to enter the courthouse due to security measures taken around the courthouse on the day of the trial. Further, a significant portion of the trials monitored were multi-defendant cases brought against members of civil society organizations. Thus, requests were made for the trials to be held in larger courtrooms so that lawyers, members of civil society organizations, and relatives of the defendants could attend and observe the trials, but in most cases these requests were denied. As a result, a significant number of those who wished to observe the hearings were not allowed into the courtrooms. In fact, in some cases the number of lawyers allowed to attend the hearings was limited, and in others, lawyers were removed from the courtroom on the grounds that they had argued with the court.

It is also necessary to mention some problems encountered with regard to the right to be present in the courtroom. One such problem is that defendants on remand participate in the trial remotely via the Audiovisual Information Technology System (SEGBIS) rather than being brought to the courtroom. On the one hand this practice greatly facilitates the trial process, yet on the other hand it is difficult to argue that defendants who are not present in the courtroom but are connected to it via a remote audiovisual system are fully aware of the proceedings. It should be noted that they experience certain disadvantages in terms of hearing witnesses and participants, and questioning witnesses.

Another problem is that, particularly when anonymous witnesses are heard via SEGBIS, the sound and images are altered, making it impossible for both the defendants to question the witnesses and for the court to observe the gestures, facial expressions, and attitudes of these witnesses. As a result, the benefits expected from the principles of publicity and directness (face-to-face) of proceedings cannot be achieved.

C The Right of Access to Court

One of the rights not included in the text of Article 6 of the Convention but derived by the ECtHR through interpretation is the *right of access to*

court. The Court defined this right in its judgment in the case of *Golder v. the United Kingdom* (no. 4451/70, 21.02.1971, §§ 28-36). The Court held that the right of access to court constitutes the essence of the guarantees provided by Article 6 of the Convention, referring to the principles of the rule of law and the prevention of arbitrariness underlying the Convention. (*Zubac v. Croatia* [GC], no. 40160/12, 05.04.2018, §§ 76 et seq.; *Grzeda v. Poland* [GC], no. 43572/18, 15.03.2022, § 298). The right to a fair trial guaranteed by Article 6 § 1 of the Convention requires that the parties to the proceedings have access to an effective legal remedy enabling them to assert their civil rights (*Běleš and Others v. the Czech Republic*, no. 47273/99, 12 November 2002, § 49; *Nait-Liman v. Switzerland* [GC], no. 51357/07, 15 March 2018, § 112). In this context, the right of access to court guarantees individuals the right to request an examination of claims relating to the rights and freedoms recognized by the Convention. For this right to be effective, the remedies provided for in domestic law must be “practical and effective” rather than “theoretical or illusory” (*Zubac v. Croatia*, §§ 76, 77).

In this context, the right of access to a court also includes the right to have one’s case decided by a court and to have final and binding judicial decisions executed. The right to have an executable ruling delivered by any court is an integral part of the “right to a court” (*Scordino v. Italy* (no. 1) [GC], no. 36813/97, March 20, 2006, § 196; *Hornsby v. Greece*, no. 18357/91, March 19, 1997, § 40). Otherwise, the right to a fair trial guaranteed by Article 6(1) of the Convention would be rendered meaningless and ineffective (*Burdov v. Russia*, no. 59498/00, May 7, 2002, §§ 34 and 37). Therefore, an unreasonable delay in the execution of a binding ruling may constitute a violation of the Convention (*Burdov v. Russia* (no. 2), no. 33509/04, January 15, 2009, § 66).

As is seen, the right of access to court applies primarily to legal disputes. However, this does not mean that the right of access to a court with full jurisdiction to examine the merits of a claim, which is a requirement of the right of access to court, does not apply to criminal cases. The ECtHR examines whether an applicant’s arguments were genuinely assessed

during proceedings before the national courts (*Obermeier v. Austria*, 28 June 1990, § 68, Series A no. 179), and whether, in this regard, a “sufficient examination” was carried out within the meaning of Article 6 of the Convention. (*Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, §§ 51 and 54, Series A No. 43). Article 6 of the Convention, as a matter of principle, requires a legal remedy where a court has the authority to examine all aspects of the dispute before it, both in law and in fact (*Terra Woningen B.V. v. the Netherlands*, 17 December 1996, § 52). This particularly requires that the relevant court has the authority to examine the merits of all issues raised by the parties without rejecting any of them and, if it does reject any, to provide clear reasons for its rejection. With regard to the facts, the court must be able to examine all facts that are important to the parties. (*Bryan v. the United Kingdom*, 22 November 1995, §§ 44-45, Series A no. 335 A; *Aleksandar Sabev v. Bulgaria*, no. 43503/08, § 51, 19 July 2018).

The Court must determine whether the scope of the examination carried out by the national courts in the case before them was sufficient (*Patronale hypothécaire v. Belgium*, no. 14139/09, § 38, 17.07. 2018). In this context, it should not be overlooked that the Convention aims to provide “practical and effective rights rather than theoretical or illusory rights.” If the proceedings do not allow for the examination of the parties’ claims and do not produce a meaningful outcome for the parties, or if the party propounding an allegation has no chance of success, it must be remembered that the right to effective access to court is not guaranteed (*Pişkin v. Turkey*, no. 33399/18, § 133, 15 December 2020).

There may be situations in which this principle applies in criminal cases. In particular, where the court has not examined and evaluated the arguments put forward by the defendant to prove their innocence, it cannot be argued that the defendant has been tried by a genuine court. This right is, of course, closely related to other elements of the right to a fair trial. Failure to consider the defendant’s arguments may constitute a violation of the right to defense or the right to a reasoned decision. In this context, in order to speak of a violation of the “right to court,” it must be

demonstrated that the trial was conducted without examining or evaluating the defense's arguments regarding the defendant's innocence.

No such practice has been observed that would give rise to such a serious allegation of violation in terms of the cases monitored. However, it is known that in trials conducted in Turkish judicial practice for actions constituting the exercise of fundamental rights and freedoms, the defense's arguments invoking the case-law of the Constitutional Court and the ECtHR are generally not given credence, and no examination or evaluation of these arguments is conducted. In cases where the courts' disregard for fundamental rights affects the outcome of the entire trial, it may be possible to argue that the essence of the "right to a fair trial" has been violated.

D Equality of Arms and the Right to Adversarial Proceedings

The principle of equality of arms, which is not explicitly regulated in the text of the article but has been established by the ECtHR through case-law, is one of the fundamental elements of the right to a fair trial. The Court has held that the principle of equality of arms requires that each party to the proceedings be given a reasonable opportunity to present its case under conditions that do not place it at a significant disadvantage vis-à-vis the other party (*APEH Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, § 39, ECtHR 2000 X; *Öcalan v. Turkey* [GC], no. 46221/99, ECtHR 2005-IV, § 140).

According to the case-law of the ECtHR, if a court's approach to a case results in it failing to respond to the applicants' allegations and examine their fundamental complaints, Article 6 of the Convention is violated with regards to the obligation that the case needs to be handled in an appropriate manner. (*Dulaurans v. France*, no. 34553/97, 21/3/2000, § 33; *Kuznetsov v. Russia*, no. 184/02, 11/4/2007, §§ 84-85). The principle of equality of arms requires that the prosecution's witnesses or experts and the defendant's witnesses and experts be treated equally at trial (see *Bönisch v. Austria*, no. 8658/79, 6 May 1985, §§ 32-33).

The principle of equality of arms, which applies in both criminal and non-criminal cases, requires that the parties be given a reasonable opportunity to present their claims and arguments on equal terms with the other party (*Kress v. France*, no. 39594/98, 7/6/2001, § 72). As a result of this requirement, although there is no specific provision in the ECHR regarding the hearing of experts in court, the ECtHR has assessed the institution of expert testimony by linking it to the “principle of equality of arms” based on the right to hear witnesses set out in Article 6(3)(d) of the Convention (*Bönisch v. Austria*, no. 8658/79, 6/5/1985, § 32; *Brandstetter v. Austria*, nos. 11170/84, 12876/87, 13468/87, 28/8/1991, § 42).

According to the Constitutional Court, too, the fundamental purpose of criminal proceedings is to establish material truth in accordance with the procedure prescribed by law, without violating fundamental rights and freedoms. In accordance with this purpose, the evidence presented to the court and the charges based on it must be debated in line with the principle of adversarial proceedings (*Yankı Bağcıoğlu and others* [GA], B. No: 2014/253, 9/1/2015, § 62).

In criminal cases, the principle of equality of arms refers to the fact that the prosecution and the defendant must have equal opportunities in the trial proceedings. Since the prosecution has the entire state apparatus behind it in criminal cases, equality of arms is a fundamental guarantee of the defendant’s right to defense. According to the principle, the defense and the prosecution must have the same opportunities to prepare and present their cases under equal conditions. The principle of equality of arms requires, at a minimum, that the material information presented and obtained by the prosecution be disclosed and that no distinction be made between the prosecution and the defense in terms of examining the case file (*Yankı Bağcıoğlu and Others* [GA], § 63).

Under the principle of equality of arms, there should be complete equality between the parties to the case in terms of their rights and obligations during the proceedings before the court, and this equality should continue throughout the trial. All procedural actions taken during the trial process, such as the presentation of evidence and counter-evidence, and the making of claims and counter-claims, must also be carried out in ac-

cordance with the principle of equality of arms. This principle also covers the prevention of the creation of a legal situation that is detrimental to the defendant in criminal proceedings.

The examination of documents submitted to the case file and the copying of these documents, access to expert reports on which the court's decision is based and the opportunity to obtain them, as well as the right to object to the evidence and documents presented by one of the parties to the trial, express opinions and refute such evidence, as well as the right to present counter-evidence, are requirements of the principle of equality of arms.

The key factor in determining whether there is equality of arms is the significance of the proceedings being reviewed in the trial. When assessing compliance with the principle of equality of arms, the ECtHR examines whether the alleged inequality in a specific case actually and genuinely renders the trial unfair (*Kremzov v. Austria*, no. 12350/86, 21/9/1993, § 75). If one party to the case is not given the opportunity to present evidence that forms the basis of its defense against the other party's claim, then this may constitute a violation of the principle of equality of arms (*De Haes and Gijssels v. Belgium*, no. 19983/92, 24/2/1997, § 58).

In the monitored cases, it is often necessary for the defense to request the court to collect evidence demonstrating that the acts or statements alleged to constitute a crime are under the case-law of the Constitutional Court and the ECtHR, an exercise of a fundamental right. Such requests may also seek to establish the content, context, addressee, position of the speaker and addressee, and previous acts of the addressee of the statement under trial, or to prove – such as through nearby video footage – that a defendant accused of resisting a police order to disperse did not, in fact resist. In such cases, it is required to request the court to collect the evidence in question, together with the reasons why it is necessary. Such evidence may include written or digital documents held by state institutions, the examination of witnesses, the acquisition of footage held by private individuals or institutions, or the necessity of an expert examination. The court must grant such requests, which have been shown to be important for the outcome of the case.

In the trials monitored, it was noted that courts generally responded positively to the defense's requests. However, in one trial, it was observed that the court rejected the defense's request to repeat the complainants' statements -which had been taken without the defense's knowledge in the presence of the court - and to allow the defense to question the complainants. Similarly, in another trial, it was observed that the court rejected the defense's request to view DVDs related to the case during the trial.

One of the most important issues in terms of the adversarial proceedings principle is that the prosecution's opinion simply repeats the indictment without making any assessment of the admissibility of the evidence discussed at the trial. In this case, it is not possible to speak of an adversarial trial. This is because if the arguments regarding the admissibility of evidence and whether the evidence proves the charges are not clearly presented in the opinion, it is not possible to conduct a proper final defense. However, if the opinion contains proper arguments, the prosecution's claims can be refuted with counter-arguments, and it is possible to speak of adversarial proceedings. Otherwise, the prosecution is deemed to have failed to meet the burden of proof. In this case, since the allegations have not been proven, the court must acquit the defendant. Otherwise, the burden of proof is reversed, and the defendant is required to prove their innocence, which clearly constitutes a violation of the presumption of innocence.

It is seen that a significant portion of the cases monitored resulted in acquittals, and therefore the opinions of the prosecution were not handled in detail. However, it is not very clear to what extent the opinions requesting punishment or acquittal were justified by a detailed evaluation of the evidence presented at the trial.

1 Providing an Opportunity to Raise Objections to the Authenticity and Reliability of Evidence

The principle of adversarial proceedings, which is one of the elements of the right to a fair trial, requires that the parties be given the right to obtain information about the case file and to comment on it, and therefore requires the parties to actively participate in the entire proceedings.

In this sense, failure by the court to hear the parties or to give them the opportunity to challenge the evidence may result in the trial proceedings becoming unfair. Therefore, in criminal cases, the defendant must be given the opportunity to be informed of the opinions and evidence submitted to the file with the aim of influencing the court's decision and to effectively challenge them.

One of the purposes of adversarial proceedings is not limited to ensuring that an opinion/request is entered into the file, but also to ensure that it is taken into account by the court and a conclusion is reached. The principle of adversarial proceedings requires that evidence against the defendant be presented to the court in an adversarial manner and that not only witnesses but also other evidence be discussed. In this way, applicants will be able to express their claims and objections regarding the reliability of the evidence by assessing its relevance and weight to the case.

In one of its decisions, the Constitutional Court stated that the decisive evidence leading to the applicant's conviction and to a sentence above the minimum limit was the testimony of witnesses heard through the rogatory procedure. The Court noted, that although the testimony was entered into the file between hearings, it was neither read out to the applicant during the hearing nor were they invited to comment on it. It further observed that, although the applicant raised this issue through the normal legal channels, neither the Regional Court of Appeals nor the Court of Cassation had assessed whether the testimony not read to the applicant could be accepted as evidence against them. The Court ruled that this situation was not in accordance with the principles of equality of arms and adversarial proceedings and did not contain safeguards protecting the applicant's interests, and therefore constituted a violation of the right to equality of arms and adversarial proceedings (*Mehmet Ayko* [1st Sec.], Case No. 2019/41322, 7 January 2025).

In another application, when ruling on the conviction of the applicant for the crime of forgery of an official document, a local court did not examine the document in question by having it produced, did not make a direct observation as to whether the document had the capacity to deceive, and did not evaluate the applicant's requests regarding the opening of

the case for examination although relying on an expert report in its reasoning. The Constitutional Court concluded that the applicant was placed at a disadvantage compared to the prosecution in terms of procedural opportunities and that the method followed by the local court was not in line with the principles of equality of arms and adversarial proceedings (*Alptekin Dibekoğlu* [2nd Sec.], App. No: 2021/50114, 18/9/2024, § 31-42).

Similarly, in another case, the Court ruled that the right to equality of arms and the right to a fair trial had been violated because an expert report submitted to the file during the appeal stage was not served on the defendant and the appeal was dismissed without a hearing (*Özkan Sarı*, App. No: 2020/5353, 19/1/2023, § 32).

In another application, the Constitutional Court stated that the applicant's objections regarding the analysis reports on chemical pesticides found in food products above the legal limit and that the necessary elements to justify this situation were not included in the reasoning of the ruling, the applicant's claims could not be proven by the applicant's own means, and that the method followed by the judicial authorities in these circumstances was contrary to the principles of equality of arms and adversarial proceedings (*Yetimler Tarım Ürünleri İç ve Dış Ticaret Ltd. Şti.* [2nd Sec.], App. No: 2021/20122, 2/10/2024, § 9-24).

The Constitutional Court ruled that an applicant's request to undergo an alcohol test at a hospital arguing that the breathalyzer produced an incorrect reading was rejected on the grounds of a general directive issued by the governor's office, thereby denying the applicant the opportunity to present evidence to the contrary, which he was unable to obtain. The Court found that the applicant was not provided with reasonable opportunities to present evidence and was placed at a disadvantage in terms of procedural opportunities, thereby violating the principles of equality of arms and adversarial proceedings in the trial (*Murat Ergan*, App. No: 2020/2395, 1/2/2023, § 18).

Similarly, the ECtHR held that an applicant's right to freedom of expression was violated because the police report on the content of the

applicant's speech and the news reports by news agencies were contradictory, and the applicant's request to hear witnesses to resolve this contradiction was rejected in its judgment in the case of *Hatice Çoban v. Turkey* (no. 36226/11, 29 October 2019).

As can be seen, both the Constitutional Court and the ECtHR have ruled that the right to equality of arms has been violated in cases where the defendant has been deprived of the right to argue or request an examination of the evidence on which their conviction was based. Within the scope of the present study, no trial monitoring report has been seen in which the defendants' views were not taken into account regarding the evidence entered into the file, or in which the defendants' requests for examination of evidence were not taken into consideration. However, this should not mean that no such problems were encountered in these cases. This is because not all hearings in the monitored cases were observed, and the written statements submitted to the files and the entire contents of the files were not examined, thus, problems in this regard may not have been reflected in the trial observations.

2 Court's Evaluation of Evidence Presented by the Defense

The principle of equality of arms means that the parties to a case must be subject to the same conditions in terms of procedural rights and that each party must have the opportunity to present its claims and defenses in a reasonable manner before the court without being placed in a weaker position than the other party, as explained above. This procedural guarantee includes the obligation to provide both parties to the dispute with the opportunity to present the evidence on which their defense is based.

In general, in order for a fair trial to be conducted in accordance with the principles of equality of arms and adversarial proceedings, it is essential that the parties be provided with appropriate opportunities to present their claims. The parties must also be granted appropriate opportunities to present and get their evidence examined, including witness testimony.

One of the purposes of adversarial proceedings is not limited to ensuring that an opinion/request is included in the case file, but also to ensuring that it is taken into consideration by the court and that a conclusion is reached. The principle of adversarial proceedings requires that evidence against the defendant be presented to the court in an adversarial manner and that not only witnesses but also other evidence be discussed. Thus, applicants will be able to express their claims and objections regarding the relevance and weight of the evidence and its reliability (*Cezair Akgül*, § 28; *Mehmet Ayko* [1st Sec.], App. No: 2019/41322, 7/1/2025, § 18).

The Constitutional Court ruled that the refusal to sustain the request for an expert examination of the technical data related to ByLock, which served as the basis for the applicant's conviction, violated the right to equality of arms and the right to a fair trial (*Esra Saraç Arslan* [GA], Case No. 2019/10514, 28 December 2022, §§ 58-59).

In another case, the Constitutional Court ruled that the principles of equality of arms and the right to a fair trial had been violated due to the unjustified denial of the request to hear as witnesses the individuals whose statements had led to the imposition of disciplinary sanctions on the applicant (*Sözdar Oral*, App. No: 2018/21028, 13/9/2022, § 57).

An observation report stated that in only two of the hearings monitored, the defense attorneys' requests to hear witnesses were not taken into consideration. Similarly, in one trial, the defense attorney's request to view DVDs related to the case during the trial was rejected.

E The Right to a Reasoned Decision

The right to a reasoned decision or judgment, which is not expressly provided for in Article 6 of the Convention, but is recognized as an essential element of the right to a fair trial under the case-law of the ECtHR, is necessary for the proper administration of justice (*Moreira Ferreira v. Portugal*, no. 2, 2017, [GC], § 84; *Papon v. France*, 2001). According to Article 141 of the Constitution, all courts are required to provide written reasons for all their decisions. The Constitutional Court also considers the

right to a reasoned decision to be part of the right to a fair trial. According to the Court, “The right to a reasoned decision, like the right to a trial within a reasonable time, is a concrete manifestation of the right to a fair trial. The Constitutional Court also [...] incorporates principles and rights such as the right to a reasoned decision and the principle of equality of arms, which are included in the literal content of the Convention and recognized by the case-law of the ECtHR as part of the right to a fair trial, within the scope of Article 36 of the Constitution” (*Mürsel Bayrak*, App. No: 2014/6419, 25.03.2015, para. 23).

The reasoning primarily shows the parties that their arguments have been understood and taken into consideration by the court, thereby contributing to the acceptance of the decision by the parties to the case. In addition, the obligation to state reasons compels judges to base their decisions on objective arguments. This makes the defendants’ defenses an important element of the trial process. Local courts must clearly state the reasons on which they base their decisions. The courts’ explanation of the grounds on which their decisions are based also enables the parties to effectively pursue legal remedies. In other words, if the grounds on which the decision is based are clearly stated, any legal or factual errors in the reasoning can be identified, and the chances of success in legal proceedings increase when these legal errors are highlighted in the appeal (*Hadjianastassiou v. Greece*, 1992).

Yet, the scope of the obligation to provide reasons will vary depending on the specific circumstances of a case (*Ruiz Torija v. Spain*, 1994, § 29). While courts are not required to provide a detailed response to every claim raised (*Van de Hurk v. Netherlands*, 1994, § 61), it must be clear from the decision that the substantive issues of the case have been examined (*Boldea v. Romania*, 2007, § 30; *Lobzhanidze and Peradze v. Georgia*, 2020, § 66). In other words, the claims that are decisive for the outcome of the case must have been addressed (*Moreira Ferreira v. Portugal* (no. 2) [GC], 2017). In criminal proceedings, the failure of the local court to take into account a specific, relevant, and important issue raised by the defendant, which would be decisive for determining whether the defen-

dant is guilty, constitutes a violation of the obligations under Article 6 § 1 of the Convention (*Yüksel Yalçinkaya v. Türkiye* [GC], 2023, §§ 337- 341; *Cupiał v. Poland*, 2023, § 57).

In the case of *Sercan Çelik*, the Constitutional Court ruled that the failure of the court to evaluate the claims that were essential for the resolution of the dispute, and that required a separate and explicit response, constituted a violation of the right to a reasoned decision. (*Sercan Çelik*, Case No. 2017/37350, 24 June 2020, § 41). Similarly, in its judgment in the case of *Gencebay Keleş and Others*, the Constitutional Court concluded that the failure to provide a sufficient assessment and to discuss the claims raised by the applicants before rendering a decision constituted a violation of the right to a reasoned decision (*Gencebay Keleş and Others*, Case No. 2018/3465, 10 December 2019, § 19). This is because, in a case, the parties must be able to understand and assess why they are considered right or wrong under the legal system. This requires a decision that is properly formed, that clearly indicates the content and scope of the ruling, the factors the court considered or did not consider in reaching its decision, and that uses carefully chosen wording and clarity leaving no room for doubt. Such reasoning is mandatory for the “right to a reasoned decision” (*Sencer Başat and Others*, App. No: 2013/7800, 18/6/2014, § 38).

Both the Constitutional Court and the ECtHR require that court decisions containing criminal sentences that interfere with fundamental rights and freedoms include “relevant and sufficient grounds.” If the legitimacy of an interference with a fundamental right—i.e., whether the interference is necessary in a democratic society within the framework of the principles established by the Constitutional Court and the ECtHR—is not demonstrated by local courts, a decision is rendered that the relevant right has been violated. In order to meet these requirements, local courts adjudicating on acts involving the exercise of fundamental rights must, in their reasoning, conduct an assessment in accordance with the principles established by the Constitutional Court and the ECtHR and demonstrate that any sentence handed down is consistent with the case-law of the Constitutional Court and the ECtHR.

Considering the content of the cases monitored, it is seen that all of them are related to the right to freedom of expression or the right to freedom of assembly. Therefore, regardless of whether the courts have acquitted or convicted the defendants, they are expected to demonstrate that their conclusions are consistent with the case-law of the Constitutional Court and the ECtHR. However, since the monitoring within the scope of the project is limited to court observations, the data obtained is limited to the court records of the decision hearings. In order to assess whether the decision is reasoned, it is necessary to have access to all written and oral defenses and requests, and to have the reasoned decisions available. In 19 of the 30 cases monitored, all defendants were acquitted. One case is still pending. In another case, the trial was suspended due to the defendant's election as a member of the parliament. In the remaining nine cases, all or some of the defendants tried were sentenced. It is not possible to argue that the local courts justified their decisions in all nine cases within the framework of the case-law of the Constitutional Court and the ECtHR, i.e., that they did not provide relevant and sufficient reasoning.

F Presumption of Innocence

The presumption of innocence is guaranteed in Article 6, paragraph 2 of the ECHR. The main requirements of this principle, as established in the case-law of the ECtHR, are as follows: (1) court members must not act with any preconceived opinion that the defendant committed the crime with which they are charged while performing their duties; (2) the burden of proof must lie with the prosecution (3) the defendant must benefit from any doubt (*Barberà, Messegué and Jabardo v. Spain*, 1988, § 77). The presumption of innocence, regarded as a procedural guarantee in criminal proceedings, includes, among others, the burden of proof (*Telfner v. Austria*, 2001, § 15); legal presumptions of a factual and legal nature (*Salabiaku v. France*, 1988, § 28; *Radio France and Others v. France*, 2004, § 24); the privilege against self-incrimination (*Saunders v. United Kingdom*, 1996, § 68); news reports about the person before the trial (*G.C.P. v. Romania*, 2011, § 46); and early statements made by the court conducting the trial or other public officials regarding the defendant's guilt prior to

the trial (*Alletet de Ribemont*, 1995, §§ 35-36, *Nešťák v. Slovakia*, 2007, § 88).

Article 6 § 2 of the Convention covers not only the examination of the merits of the charge but also the entire criminal proceedings, regardless of the outcome of the prosecution (*Poncelet v. Belgium*, 2010, § 50; *Minelli v. Switzerland*, 1983, § 30; *Garycki v. Poland*, 2007, § 68). Consequently, the presumption of innocence applies to the reasons given in the operative part of a judgment acquitting the defendant, and the reasoning and the operative part of the judgment must not be separated. If the reasoning reflects an opinion that the defendant is essentially guilty, this may constitute a violation of the presumption of innocence principle (*Cleve v. Germany*, 2015, § 41).

The presumption of innocence continues throughout the trial and also continues after the trial if it ends in acquittal. The first dimension of the guarantee relates to the period until the conclusion of criminal proceedings against a person, in other words, the period during which a person is charged with a criminal offense (is under criminal investigation), and prohibits early statements regarding the person's guilt and acts until a judgment establishing guilt is rendered. The scope of this dimension of the guarantee is not limited to the court conducting the criminal proceedings. The guarantee also requires that all other administrative and judicial authorities refrain from making any statements or implications suggesting that the person is guilty until their guilt has been established by a final judgment, and that they are not treated as if they were guilty. Therefore, the violation of the presumption of innocence may occur not only within the scope of criminal proceedings related to the criminal charge but also in other legal processes and proceedings conducted concurrently with criminal proceedings (such as administrative, civil, or disciplinary proceedings) (*Galip Şahin*, App. No: 2015/6075, 11/6/2018, § 40; *Hasan Çölgeçen*, App. No: 2016/392, 2/12/2020, § 59).

Two issues should be emphasized considering the cases monitored. First, the judge or court conducting the trial must not act with prejudice against the defendant and must refrain from statements and behavior that imply

that the defendant is guilty. For example, if the judge makes statements implying that the defendant is guilty or has committed the crime while questioning the defendant, this would be inconsistent with the presumption of innocence. The trial minutes record that during a hearing, the judge addressed the defendant as “you have committed crime x.” The judge’s approach was prejudicial and violated the presumption of innocence of the defendant.

Further, public officials outside the court, especially members of the executive branch or members of the press close to those in power, making statements or declarations regarding the guilt of suspects or defendants in connection with investigations or trials that have been initiated, expressing the belief that suspects or defendants are guilty, or the running of intensive media or social media campaigns that amount to defamation, will violate the presumption of innocence.

When one takes into account the content and scope of the cases monitored, it is evident that most of the acts subject to litigation are aimed at criticizing or protesting the policies, acts, measures, and conduct of the government. It is also noteworthy that those who carried out these acts are individuals or institutions that do not support the government politically. In such cases, if the statements or publications made by members of the government or pro-government media members during these investigations and trials turn into a campaign of accusation or defamation, it is clear that such publications and statements will violate the presumption of innocence.

Some factors identified in the case-law of the ECtHR regarding the assessment of the impact of such campaigns on the fairness of the trial include: the time elapsed between the start of the media campaign and the commencement of the trial, whether the publications in question can be attributed to the competent authorities or whether the investigation is based on information obtained from these publications, and whether the publications have influenced the judges or the court in such a way as to prejudice the outcome of the trial (*Beggs v. United Kingdom*, 2012, § 124; *Abdulla Ali v. United Kingdom*, 2015, §§ 87-91; *Paulikas v. Lithuania*, 2017, § 59).

Although it is difficult to determine whether any cases have been filed as a result of such an intense campaign in the cases monitored, it is clear that there has been intense coverage in the pro-government media during the investigation and prosecution of some cases. For example, the case against members of the Ankara Bar Association's Board of Directors was initiated due to a press release they published criticizing the discriminatory statements made by the President of the Directorate of Religious Affairs against LGBTI+ individuals. During this process, there was a clear intensive media campaign targeting the bar association's administration.

Furthermore, the presumption of innocence is closely linked to the right not to incriminate oneself (*Heaney and McGuinness v. Ireland*, 2000, § 40). The ECtHR has not considered that subjecting a person to procedures that could establish their guilt constitutes a violation of the right to a fair trial in certain circumstances. For instance, the Court did not find that the requirement for vehicle owners to identify the driver in the case of a suspected traffic offense was contrary to Article 6 of the Convention (*O'Halloran and Francis v. United Kingdom* [GC], 2007). Similarly, it concluded that subjecting drivers to compulsory alcohol or blood tests does not violate the presumption of innocence principle (*Tirado Ortiz and Lozano Martin v. Spain*, 1999).

G The Right to be Informed of the Accusations

Paragraph 3(a) of Article 6 of the Convention provides that the suspect has the right “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.” Defense can only be mounted once the nature of the charges is understood. Considering that the right to be informed of the nature and grounds of the charges must be assessed in light of the defendant's right to prepare a defense, it is evident that Article 6(3)(a) and (b) of the Convention are interconnected (*Pélissier and Sassi v. France* [GC], 1999, § 54; *Dallos v. Hungary*, 2001, § 47).

Since a substantial defense cannot be made unless the suspect/defendant is informed of the charges against them, it can be concluded that

the “right to defense” regulated in Article 36 of the Constitution also includes the right to be informed of the accusations (charges).

According to Article 160 of the CCP No. 5271, which regulates the duties of the public prosecutor, “the public prosecutor shall, upon learning of a situation that gives the impression that a crime has been committed through a report or in any other manner, immediately begin investigating the facts of the case in order to decide whether there are grounds for initiating public prosecution” and “is obligated to collect and preserve evidence both favorable and unfavorable to the suspect, and to protect the suspect’s rights, in order to investigate the material truth and ensure a fair trial.” Once the evidence has been collected, if there is sufficient suspicion that a crime has been committed, the public prosecutor shall prepare an indictment (CCP 170/2). Article 170/5 of the CCP provides that, as a result of the prosecutor’s obligation to investigate the facts, “The indictment shall include not only the facts detrimental to the suspect but also those favorable to them.”

Similarly, Article 19 (5) of the Constitution states that “Individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge.”

The Constitutional Court also holds the right to be informed of the charges against one as part of the right to a fair trial. According to the Constitutional Court, the right to be informed of the charges is a substantive right, not a procedural one. The Court has defined this right as follows: “[...] the right to defense must be guaranteed to the person charged with a crime in a real sense, not just in form. To this end, the person subject to criminal charges must be informed of the charges so that they can prepare their defense and present it before the court, thereby influencing the outcome of the trial. It is impossible for someone who is unaware of the charges against them to defend themselves. The charges are communicated to the defendant so that they can defend themselves. To this end, the

communication must explain of what act the defendant is accused and what crime they have committed. In other words, the defendant must be informed of the reason for and the nature of the charge. The reason for the charge is constituted by the act committed by the defendant, where and when it was committed (the incident/incidents constituting the crime charged). These must be explained in sufficient detail to enable the defendant to prepare their defense, rather than in abstract terms. In this way, the defendant will know where and when they are accused of committing the act in question and will be able to prepare their defense accordingly. The legal classification of the act is the nature of the charge. The information regarding the nature of the charge must also be sufficient for the defense, and the charge must specify which norm the act the defendant is accused of committing violates. If the legal nature of the act changes during the trial, the defendant must also be informed of such change. In this way, the fairness of the trial is ensured in accordance with the principles of equality of arms and adversarial proceedings” (*Ali Kemal Tekin*, App. No: 2014/875, 2/2/2017, §§ 40- 43).

The ECtHR has also examined what the requirement of being “informed in detail” of the charges against them means under the Convention: “The extent of the ‘detailed’ information referred to in this provision varies depending on the particular circumstances of each case, the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defense. In this respect, the adequacy of the information must be assessed in relation to sub-paragraph (b) of paragraph 3 of Article 6, which confers on everyone the right to have adequate time and facilities for the preparation of their defense, and in the light of the more general right to a fair hearing embodied in paragraph 1 of Article 6” (*Mattoccia v. Italy*, no. 23969/94, 25.7.2000, para. 60).

Article 6 § 3 (a) of the Convention does not lay down any specific formal requirements as to how the accused must be informed of the nature and substance of the charges against them (*Pélissier and Sassi v. France* [GC], 1999, § 53; *Drassich v. Italy*, 2007, § 34; *Giosakis v. Greece* (no. 3), 2011,

§ 29). In this context, the indictment plays an important role in criminal proceedings because, from the moment it is served, the defendant is officially and in writing informed of the substance and legal basis of the charges against them (*Kamasinski v. Austria*, 1989, § 79).

As explained above, if the indictment does not clearly indicate the nature of the charge and the grounds on which it is based, the court has the authority to reject the indictment. However, in practice, indictments that are vague regarding the nature of the charge and the grounds on which it is based are often accepted, particularly in cases similar to those monitored. For example, indictments that do not clearly state which paragraph of Article 216 of the Turkish Penal Code (TPC) the similar acts are charged under have been accepted. Or, there have been cases where the charges in the indictment were changed during the trial and the trial was conducted under a different crime and sentence. Or the same statements may be subject to charges of propaganda for a terrorist organization under Article 7/2 of the Anti-Terrorism Law (ATL), or of aiding a terrorist organization without being a member under Article 220/7 of the TPC, or even of membership in a terrorist organization under Article 314 of the TPC.

Sometimes, indictments incorporate vague grounds for charges. For example, a long passage from a speech or article is quoted in the indictment, and punishment is sought for crimes such as insulting a public official or insulting the president. Without clearly identifying which specific words, phrases, sentences, or paragraphs constitute the offense, the indictment states that the offense of insult has been committed and seeks punishment. Or, a case is filed alleging the crime of resisting a public official, but the indictment does not specify which specific acts constitute the crime. Such indictments, which contain vague charges that do not allow for a defense, should essentially be rejected by the courts.

However, in practice, such indictments are not rejected, instead they are accepted, and prosecution is initiated. Since the defense has no opportunity to intervene in the process of accepting the indictment, objections to the indictment can only be raised at the first hearing. However, the courts

do not take these objections into consideration at this stage and state that the case has been opened and that there is nothing more to be done. While the prosecutor should request the clarification of the charges at this stage, the courts either clarify the charges themselves or do not clarify them at all, merely reading the indictment and requesting the defendants and their defense attorneys to present their defense accordingly.

It should be noted that both of these practices are contrary to the right to a fair trial. In other words, it should be noted that the court's objective impartiality is compromised when the court itself substantiates the charges. On the other hand, it is clear that both the right to know the charges and the right to defense would be violated if the charges were not substantiated. Therefore, in cases where the indictment is unclear, an objection should be raised from the outset, and the substantiation of the charges should be requested in order to enable the defense.

If the charge is reclassified during the trial, i.e., if the nature of the offense changes, the defendant must be given the opportunity to exercise their defense rights in a practical and effective manner and in a timely manner (*Pélissier and Sassi v. France* [GC], 1999, § 62; *Block v. Hungary*, 2011, § 24; *Haxhia v. Albania*, 2013, §§ 137-138; *Pereira Cruz and Others v. Portugal*, 2018, § 198). If the nature of the offense attributed to the defendant is to be changed, the defendant and their counsel must be informed of the situation in a timely manner and be given sufficient time and facilities to prepare their defense.

H The Right to Have Adequate Time and Facilities for the Preparation of Defense

Article 6 § 3 (b) of the Convention provides that two elements are necessary for a defense to be properly conducted: adequate time and facilities. According to this rule, the defendant must be fully informed of the charges against them during the preparatory phase of the trial, i.e., the indictment must be served to them, and they must have access to all the “necessary” means to respond to the factual and legal allegations set forth in the indictment. The defendant must be able to prepare their de-

fense in an appropriate manner, present all relevant defense statements before the court conducting the trial, and thus have the opportunity to influence the outcome of the proceedings (*Gregaćević v. Croatia*, 2012, § 51). Whether the time and facilities granted to a defendant are adequate must be assessed in light of the particular circumstances of each case (*Iglin v. Ukraine*, 2012, § 65; *Galstyan v. Armenia*, 2007, § 84).

Therefore, the amount of time considered adequate for defense depends on the nature and complexity of the charges. In one case, the ECtHR ruled that the five days granted to the defendant and their counsel to examine a six-volume file of approximately 1,500 pages was not sufficient to safeguard the essence of the right guaranteed by Article 6 §§ 1 and 3 (b) of the Convention. The Court took into account that the applicant had conducted a detailed analysis of the case materials during the appeal proceedings, was represented before the appellate court by two lawyers who confirmed that they had had sufficient time to examine the case file, and that there were no restrictions on the frequency or duration of meetings with their lawyers (*Lambin v. Russia*, 2017, §§ 43-48).

In assessing whether the time allowed is adequate, the workload of a defendant's lawyer must also be considered. Naturally, since a lawyer's sole job is not to represent a single defendant, the reasonable time that can be allocated to the defendant's case among other cases must also be taken into account. If technical analysis is required in order to respond to the charges, the reasonable time that such analysis may take must also be considered.

In some cases, the court may need to postpone the hearing on its own initiative in order to allow adequate time for the defense (*Sadak and Others v. Turkey* (no. 1), 2001, § 57; *Sakhnovskiy v. Russia* [GC], 2010, §§ 103 and 106).

The concept of facilities to be granted for the defense may cover many different aspects depending on the nature of the charges and the specific circumstances of the defendant. For example, if the defendant is on remand, they may need an environment where they can examine the

indictment and its annexes with a clear mind and gather their thoughts to prepare a response. A very crowded prison environment may not be compatible with the concept of facilities necessary for the defense.

Defense facilities also apply to new circumstances that arise during the trial and new documents added to the file. In particular, defendants and their lawyers may need time to respond after the prosecution has presented its case; in such cases, the court must allow adequate time.

No complaints have been encountered regarding the failure to provide the necessary time and facilities for the preparation of the defense in the cases monitored. When new documents are introduced into the case file, requests for the postponement of the hearing or for time to prepare the defense appear to have generally been granted by the courts.

I The Right to Defend Oneself in Person or through Legal Assistance

Article 6 § 3 (c) of the Convention provides that a person charged with a criminal offense has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

When considered as a whole, Article 6 of the Convention demonstrates that a person charged with a criminal offense has the right to participate in the trial (*Zana v. Turkey [GC]*, 1997, § 68). Closely related to this right, Article 6 § 3 (c) provides the defendant with the opportunity to defend themselves in person. Therefore, unless otherwise required by the interests of justice, a defendant must be able to defend themselves in person (*Galstyan v. Armenia*, 2007, § 91).

However, if a defendant wishes to defend themselves through a lawyer and does not have the means to hire one, the state has an obligation to provide a lawyer. The right of access to a lawyer is not limited to cases where a person is arrested or questioned by the police (*Simeonovi v.*

Bulgaria [GC], 2017, § 111; *Sirghi v. Romania*, 2016, § 44), but also applies when a person is summoned by the police for questioning on suspicion of having committed an offense, even if they are not deprived of their liberty (*Dubois v. France*, 2022, §§ 45-46, 69-75) and procedural measures such as identification procedures or showing the scene of the crime (*İbrahim Öztürk v. Turkey*, 2009, §§ 48-49; *Türk v. Turkey*, 2017, § 47; *Mehmet Duman v. Turkey*, 2018, § 41) and also during search and seizure procedures (*Ayetullah Ay v. Turkey*, 2020, §§ 135 and 163). Furthermore, the right of the defendant to participate effectively in criminal proceedings generally encompasses not only the right to be present but also the right to have the assistance of a lawyer when necessary (*Lagerblom v. Sweden*, 2003, § 49; *Galstyan v. Armenia*, 2007, § 89). Similarly, the mere presence of the applicant's lawyer cannot compensate for the defendant's absence (*Zana v. Turkey* [GC], 1997, § 72).

The right to effective legal assistance includes the right of the defendant to confer privately with their lawyer. The state may restrict confidential consultations between the detained person and their lawyer only in exceptional circumstances (*Sakhnovskiy v. Russia*, 2010, § 102). If a lawyer is unable to meet with their client and cannot receive confidential instructions from them without supervision, the benefit of the assistance is significantly reduced (*S. v. Switzerland*, 1991, § 48). Any restriction imposed on the relationship between lawyers and their clients, whether fundamental or not, must not constitute an obstacle to the right of the accused to effective legal assistance (*Sakhnovskiy v. Russia* [GC], 2010, § 102).

The right to effective legal assistance is not fulfilled merely by the appointment of a lawyer. The appointed lawyer must also provide effective defense. If the appointed lawyer fails to perform their duties and does not defend the defendant adequately, the court must request the appointment of another lawyer (*Güveç v. Turkey*, 2009, § 131).

No complaints were encountered regarding the right of defendants to access a lawyer in the cases monitored. However, many cases were observed in which defendants were not heard by the court or the prosecutor while presenting their defense, were distracted by other matters,

were frequently interrupted by the presiding judge or other judges, or were subjected to interventions aimed at curtailing their defense. Some judges were also found to have shortened the defense significantly and recorded it in their own words.

The same situation applies to defense counsel. In many cases, the presiding judge or other judges intervened in the defense counsel's statements, some issues were not recorded in the minutes on the grounds that they were irrelevant, or in cases where defense counsel insisted on defending their clients, they were removed from the courtroom. Of course, the presiding judge, who is responsible for the conduct of the trial, is responsible for ensuring the discipline of the trial process and conducting the trial in an orderly manner. However, frequent and aggressive interventions that restrict the right to defense must be avoided. The statements of the defendant and the defense counsel should not be interfered with as long as they remain within the scope of the defense.

Furthermore, the practice of summarizing defenses by the judge and recording them in the minutes instead of recording them directly should be abandoned. In many cases, the judge summarizing the defense of the defendant and the lawyer omits the grounds for the arguments put forward by the lawyer or the defendant, and weakens the arguments. Such practices have also been observed in some hearings.

It is clear that such practices undermine the right to defense. Therefore, in cases where the judge interrupts the defense, refuses to allow the defense to speak, or records the defense incompletely or incorrectly in the minutes, it is important for attorneys to intervene in an appropriate manner and have the events recorded in the court minutes.

J The Right to Examine Witnesses

Article 6 § 3 (d) of the Convention guarantees that a person charged with a criminal offense has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

The Constitutional Court has interpreted the concept of *witness* in many of its judgments as any person who provides information about the act attributed to the defendant and has established the principles regarding the right to examine witnesses (*Atila Oğuz Boyalı*, App. No: 2013/99, 20/3/2014; *Selçuk Demir*, Case No. 2014/9783, 22 January 2015; *AZ. M.*, Case No. 2013/560, 16 April 2015; *Baran Karadağ*, Case No. 2014/12906, 7 May 2015; *Orhan Güleriyüz*, Case No. 2019/30221, 28 December 2021). The ECtHR also interprets the concept of *witness* as an autonomous concept (*Damir Sibgatullin v. Russia*, 2012, § 45). Any information that may assist the court in determining the manner in which the incident occurred may be accepted as witness testimony. Accordingly, in a criminal trial, the defendant has the right to cross-examine or have cross-examined witnesses who testify against them. The defendant's ability to question witnesses, confront them, and test the accuracy of their statements during the criminal proceedings against them is necessary for a fair trial (*AZ. M.*, § 55).

Furthermore, the defendant's rights are restricted to an extent incompatible with the guarantees provided by Article 36 of the Constitution if a conviction—whether solely or decisively— is based on statements made by a person who the accused was unable to examine or have the person examined during the investigation or trial, and if no procedure providing adequate safeguards is provided (*Orhan Güleriyüz*, § 35).

The Constitutional Court has stated in its judgments regarding the right to examine witnesses that a three-stage test must be applied to assess whether the admission of witness statements obtained before or outside of a specific trial as evidence prejudices the fairness of the trial. Accordingly, first, the failure to bring the witness before the court must be based on a valid reason. Second, it must be assessed whether the statement made by the witness who was not examined or cross-examined by the defendant constitutes the sole or decisive evidence on which the conviction is based. If it is determined that the statement of the witness who was not given the opportunity to cross-examine or have the witness cross-examined is the sole or decisive evidence, then, as a third stage, it must be established whether a procedure providing sufficient counter-

balancing safeguards to compensate for the disadvantage suffered by the defense was carried out. (See, *mutatis mutandis*, *Abdurrahim Balur*, App. No: 2013/5467, 7/1/2016, § 80; *Onur Urbay*, App. No: 2014/6222, 6/3/2019, §§ 36, 40; *Zekeriya Sevim*, Case No. 2018/18989, 16 June 2021, §§ 44, 51).

Relying on other corroborating evidence supporting unsubstantiated witness statements when delivering a judgment may be considered one of the compensatory safeguards within this scope (*Orhan Güleriyüz*, § 39). The court's ability to hear witnesses outside its judicial locality -in a manner that allows the defendant to ask them questions and form personal impressions of their answers- may be considered a compensatory safeguard (*mutatis mutandis*, *Uğur Özcan*, App. No: 2021/12137, 26/7/2022, § 40). Another compensatory guarantee that may be provided to the defense to determine the reliability and accuracy of the statement of an unquestioned witness is to allow the defendant to narrate the incident from their own perspective and present evidence (*Orhan Güleriyüz*, § 40; *Kutlay Tellî* [1st Sec.], App. No: 2021/29783, 19/11/2024, § 17).

The use of confidential witnesses has become increasingly problematic in recent years. Although statements made by confidential witnesses cannot, on their own, form the basis for a conviction unless supported by other evidence, it is clear that confidential witnesses are increasingly being used in practice and that problems are encountered in verifying their reliability. There are also cases where confidential witness testimony has merely become a profession. In particular, in cases involving organized crime, there are instances where a single confidential witness has testified against hundreds of people. Considering the practices regarding the hearing of confidential witnesses, even if they are heard in court via the audiovisual information system, their voices and images are altered, thus those present in the hearing have no way of verifying whether the witness is telling the truth based on their demeanor and conduct.

In two of the cases monitored, statements made by confidential witnesses were included in the case files. It was alleged that these statements were contradictory and, in one case, irrelevant to the subject matter of the trial.

Furthermore, defendants have the right to request that their own witnesses be heard. This is a requirement of the principle of equality of arms. This right, however, is not absolute. The defendant requesting that a witness be heard may be required to demonstrate how the witness's statement would affect the course of the trial. Therefore, it is not sufficient for a defendant to complain that their own witnesses were not heard; they must support their request by stating the reasons why it is important that the relevant witnesses be heard, and the testimony of the witnesses must be necessary in the context of establishing the truth and the rights of the defendant (*Perna v. Italy* [GC], 2003, § 29; *Băcanu and SC « R » S.A. v. Romania*, 2009, § 75). If the statements of the witnesses whom the defendant wishes to call would not alter the outcome of the case, the rejection of such a request by the local courts does not constitute a violation of Article 6 §§ 1 and 3 (d) (*Kapustyak v. Ukraine*, 2016, §§ 94-95).

The ECtHR has developed a three-part test to assess whether the rejection of a request to hear a witness violates Article 6 (*Murtazaliyeva v. Russia* [GC] (2018, § 158). Accordingly: (1) whether the request to hear a witness was sufficiently justified and relevant to the charges in question; (2) whether the domestic courts assessed the admissibility of the witness's testimony and whether they sufficiently justified their decision not to examine a witness during the trial; and (3) whether the domestic courts' decision not to examine a witness undermines the overall fairness of the proceedings. If the testimony of the witness whose hearing is requested would serve to refute the evidence relied upon by the prosecution, or if it would demonstrate that the elements of the crime were not present or that the defendant did not commit the act, then refraining from hearing such witnesses would affect the fairness of the trial.

In the cases monitored, it was noted that the defendants' requests to hear witnesses were rejected in some hearings. However, no significant complaints were found in the hearing observation records regarding the hearing of witnesses or the questioning of prosecution witnesses.

K The Right to Have Assistance of an Interpreter

Article 6 § 3 (e) of the Convention guarantees that a person charged with a criminal offense has the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

Accordingly, if the defendant does not understand the language of the proceedings, they have the right to free interpretation services. A defendant who understands the language used may not insist on the provision of interpreter services in order to defend themselves in another language, including the language of the ethnic minority community to which they belong (*Lagerblom v. Sweden*, 2003, § 62).

According to Article 202(4)(b) of the CCP, the defendant “may make their oral defense in another language in which they claim to be able to express themselves better when the opinion on the merits is delivered.” Within this framework, interpreters are assigned to defendants who do not speak or understand Turkish or who state that they can express themselves better in Kurdish. In the cases monitored, it was noted that problems arose in the courtrooms because the Kurdish interpreters assigned to three different hearings were not sufficiently proficient in the language. Therefore, it is clear that greater care must be taken to ensure that persons assigned as interpreters are sufficiently proficient in the language.



STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION AND JUDICIAL HARASSMENT

As explained in the introduction, lawsuits against public participation are a type of judicial punishment, defined as civil and criminal lawsuits that aim to silence the defendants rather than secure the plaintiffs' rights. In these lawsuits, the judicial process is transformed into a means of deterrence, intimidation, and silencing. Thus, the defendants in such cases are often journalists, civil society organizations, human rights defenders, victims, social media users, and other individuals who report on, bring to public attention, or protest controversial policies and practices that are unlawful, corrupt, harmful to the public interest, or damaging to the environment, as well as unethical situations.

Lawsuits against public participation tend to suppress communication on issues of public interest and have a broader deterrent effect on freedom of expression. Lawsuits and commercial cases against public participation are usually filed by powerful private, corporate, or political actors and target activists, non-profit organizations, journalists, and media outlets that speak out on issues of public concern. As a result, they typically involve an imbalance of power between the disputing parties and transform issues of public interest into private disputes where one party can use resources to gain an advantage.

A typical example of such cases is *Steel and Morris v. United Kingdom* (no. 68416/01, 15.02.2005), and the ECtHR ruled that the failure to provide legal aid to the defendants in cases brought by a multinational company with branches all over the world against activists who participated

in protests for ethical and environmental reasons, taking into account the imbalance of power between the parties, constituted a violation of both the right to freedom of expression and the right to a fair trial.

As explained in the introduction, in countries where the rule of law is relatively strong, lawsuits filed against public participation are generally civil or commercial lawsuits. However, in countries where the rule of law is weak and judicial independence is problematic, such lawsuits generally take the form of criminal proceedings. Criminal cases initiated as a result of investigations launched *ex officio* following reports or complaints by members of the ruling party or those close to it, or smear campaigns conducted by pro-government media outlets, are more common. This is because in such cases, it is much easier and less costly for the plaintiffs to silence the defendants, while the threat is more serious and effective for the defendants.

In authoritarian regimes, investigative authorities acting as protectors of the regime take initiative on their own to silence dissenting voices deemed dangerous to the regime, leading to judicial harassment through investigations and prosecutions initiated *ex officio*.

As a result, the concept of strategic lawsuits against public participation in Europe is mostly seen as limited to private law cases like legal and commercial cases. Indeed, the European Union's Directive 2024/1069 of 11 April 2024, on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (Strategic Lawsuits against Public Participation), also limits the concept to private law cases.¹¹

The Organization for Security and Co-operation in Europe (OSCE) uses the concept of "judicial harassment" in particular in relation to the misuse of public and private law against journalists.¹² Although the OSCE report concerns journalists, the findings of the report are valid and applicable to all public actors. The report incorporates some findings related to the

¹¹ Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), data.europa.eu/eli/dir/2024/1069/oj

¹² Office of the OSCE Representative on the Freedom of the Media, "Special Report: Legal Harassment and Abuse of the Judicial System against The Media" 23 November 2021.



misuse of public law. According to these findings, public law, which involves the use of state power and state resources, is susceptible to being misused to silence the media reporting on sensitive or critical issues for authorities, sometimes resulting in severe penalties such as lengthy prison sentences or the complete closure of a media outlet.¹³

Examples of abuse of public law that could be brought against media workers or other public participants include violation of privacy, contempt of court or disclosure of confidential information, defamation, tax violations, possession of drugs, incitement to racial and religious hatred, violation of curfew, hooliganism, membership of illegal organizations, opposition to the Law on Meetings and Demonstrations, and violation of laws related to public order, or at the extreme end of the spectrum, disclosure of state secrets, extortion, espionage, “extremism” and terrorism charges. Depending on these charges, administrative or criminal penalties may be imposed, and protective measures such as detention, house arrest, or a travel ban may be applied.

Lawsuits against public participation are not limited to specific categories of claims and can take various forms, including both civil and criminal claims. Examples of abuse of private law include defamation lawsuits, privacy lawsuits, copyright infringement, unfair competition, and lawsuits alleging violations of data protection laws. Lawsuits against public participation are characterized by the misuse of the judicial process, including exaggerated or unfounded claims for damages, the alteration or withdrawal of claims or defenses, and the abuse of application procedures. In short, the proponents of lawsuits against public participation rely on the procedural costs and the threat of disproportionate damages necessary to pursue the lawsuit in order to prevent the defendants from effectively exercising their right to public participation. As a result, lawsuits against public participation can be understood as “punishment through process.” Therefore, merely revising the content of substantive legal rules may not be sufficient to deter the abuse of the legal process.¹⁴

¹³ Ibid. p. 3.

¹⁴ Open SLAPP Cases in 2022 and 2023; The Incidence of Strategic Lawsuit against Public Participation, and Regulatory Responses in the European Union, November 2023, p. 13, www.europarl.europa.eu/supporting-analyses

Whether they arise in the form of civil lawsuits or criminal investigations and prosecutions, such cases cause serious material and psychological harm to those involved, but the real harm is to society as a whole, which is deprived of the opportunity to learn the truth.

All thirty cases monitored were brought against actions that constituted the exercise of the rights to freedom of expression or of assembly. For instance, the case of the 700th Saturday Mothers' meeting in Istanbul, the case of the 950th Saturday Mothers' meeting, the case of Boğaziçi University students, the case related to the "From Now On, It's Up to Us" protest by Boğaziçi University students, the Boğaziçi Pride March case, the Eskişehir Pride March case, the case against 84 people who were prosecuted for issuing a press statement protesting the trial of police officers accused of the murder of Ethem Sarısülük in Ankara, the case related to the "We Can't Afford to Live" protests, the case filed in İzmir protesting the government's withdrawal from the Istanbul Convention, the case related to the 6th anniversary commemoration of the Suruç Massacre, and the cases filed against the Van Peace Mothers. All of which are typical examples of cases filed for exercising the right to freedom of assembly. Other cases are related to the exercise of the right to freedom of expression. In this context, the case against members of the Ankara Bar Association's Executive Board for issuing a press statement condemning the President of the Directorate of Religious Affairs, the case against members of the Ankara Branch of the Chamber of Architects, the case against the Central Council of the Turkish Medical Association titled "War is a public health problem," the lawsuit filed against the press statement made by the Van and Hakkari Medical Chambers, the lawsuit filed against the joint statement made by the Health and Social Services Workers' Trade Union and the Van Hakkari Medical Chamber, the lawsuit filed against the Diyarbakır Bar Association for its statement of April 24, and all other lawsuits filed against human rights defenders for their statements and posts are lawsuits concerning interference with freedom of expression.

In these cases the main charges are, refusing to disperse despite warnings pursuant to Article 32/1 of Law No. 2911 on Meetings and Demonstra-

tions, resisting a public official in the performance of their duties under Article 265 of the TPC, aiding a terrorist organization under Article 220/7 of the TPC, insulting a public official in connection with their duties under Article 125/3-a of the TPC, insulting the President of the Republic under Article 299 of the TPC, inciting the public to hatred or hostility under Article 216 of the TPC, insulting state institutions under Article 301 of the TPC, and even membership in a terrorist organization under Article 314 of the TPC, as well as Article 7/2 of the ATL for terrorist propaganda.

As mentioned above, in 19 of these cases, all defendants were acquitted of all charges. One case was suspended due to the defendant being elected as a member of the parliament, and one case is still pending. In the remaining nine cases, some defendants were handed down various prison sentences or fines for certain charges. A significant portion of these convictions were for aiding a terrorist organization under Article 220/7 of the TPC, some were for terrorist propaganda under Article 7/2 of the ATL, one case was for membership in a terrorist organization under Article 314 of the TPC, and one case was for insulting the president under Article 299 of the TPC, and in one case for violating Article 32/1 of Law No. 2911.

The ECtHR has ruled that the principle of legality has been violated due to the unforeseeable application of most of these provisions. In its judgments in *Bakır and Others v. Turkey* (no. 46713/19, 10.7.2018) and *İmret v. Turkey* (No. 2) (No. 57316/10, 10 July 2018) the Court held that Article 220/7 of the TPC failed to meet the requirements of legality due to its unforeseeable application and that the applicants' rights to freedom of assembly had been violated. The ECtHR determined that Article 220/7 of the TPC, in its current form, was open to arbitrary application, that its direction of application was not "foreseeable," and therefore lacks the quality of "legality." It concluded that the penalties imposed violated the freedoms of assembly and association guaranteed by Article 11 of the ECHR. In reaching this conclusion, the ECtHR noted that participants in the march could not be distinguished from those who committed criminal acts and emphasized that the disproportionate nature of the penalties imposed, together with the broad interpretation of Article 220/7 of the

TPC in conjunction with Article 314, would deter the public from participating in demonstrations, marches, and open debate. However, as can be seen, the same unforeseeable approach continues to be applied in imposing penalties on participants in peaceful assemblies. For instance, in both cases brought against the Van Peace Mothers, individuals who gathered in solidarity with prisoners on hunger strike and death fast were sentenced to more than two years' imprisonment under Article 220/7 of the TPC.

Similarly, in the case of *Vedat Şorli v. Turkey* (no. 42048/19, 19 October 2021), the ECtHR ruled that the provision in Article 299 of the TPC, which provides greater protection to the President of the Republic than to other persons, was incompatible with the spirit of the Convention and that the most appropriate solution was to amend the provision under Article 46 of the Convention. In accordance with this judgment, the provision must be amended. However, even if the provision is not amended, its application is not possible under Article 90 of the Constitution, as it conflicts with Article 10 of the ECHR. Nevertheless, as in thousands of other cases, in the *Aytül Uçar* case being monitored in Izmir under this project, the defendant was sentenced based on this very provision.

With regard to Article 314 of the TPC, the ECtHR ruled in both the case of *Selahattin Demirtaş v. Turkey* (2) [GC], (no. 14305/17, 22 December 2020) and the case of *Yüksek v. Turkey* (no. 4/18, 22.10.2024) that the interpretation and application of Article 314 of the TPC in the specific cases were not foreseeable. In particular, in its Grand Chamber judgment, the Court, relying on the opinions of other Council of Europe bodies, namely the Commissioner for Human Rights and the Venice Commission, stated that the interpretation and application of the article had become systematic and unforeseeable. The Court's findings are as follows:

“89. In that connection, the Court refers to the findings of the Commissioner for Human Rights, who pointed out that it was **increasingly common in Türkiye** for the evidence used to justify detention to be **solely limited to statements and acts that were manifestly non-violent and which should in principle be protected by Article 10 of the**

Convention. The Commissioner viewed that as a **systematic omission** on the part of Turkish prosecutors and courts to perform appropriate contextual analyses and to filter evidence in the light of the Court’s well-established case-law concerning Article 10 of the Convention.

90. Similarly, the Venice Commission also found that the domestic courts, in applying Article 314 of the Criminal Code, often **tended to decide** on a person’s membership of an armed organization **on the basis of very weak evidence** (see paragraph 59 above). The present case also supports that finding. The range of acts that may have justified the applicant’s pre-trial detention in connection with serious offences punishable under Article 314 of the Criminal Code is so broad that the content of that Article, coupled with its interpretation by the domestic courts, does **not afford adequate protection against arbitrary interference by the national authorities**. In the Court’s view, such a **broad interpretation of a provision of criminal law** cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to an illegal armed organization in the absence of any concrete evidence of such a link.”

The ECtHR’s ruling on the application of Article 314 of the TPC is also applicable to any other provision of criminal law. Moreover, as explained above, the ECtHR has delivered similar judgments regarding other provisions relied upon in the cases at hand.

Such systematic unforeseeable application is essentially a result or reflection of the use of criminal law as a tool to silence, deter, and suppress dissenting voices. In none of the decisions imposing criminal penalties was an attempt made to justify the decisions based on the case law of the Constitutional Court and the ECtHR.

Even if procedural errors in the trials are set aside, it can be argued that the decisions rendered are of a nature that violates fundamental rights and freedoms. In particular, it is understood that human rights standards relating to the rights to freedom of expression and of assembly have not been protected.

However, the problem is not limited to cases where defendants were convicted. It is also necessary to point out that the fundamental rights of defendants have been violated in cases where no conviction has been handed down, i.e., where all defendants have been acquitted of all charges. The ECtHR has ruled in numerous cases that even if a case does not result in a conviction, or even if no criminal case is filed and the investigation is closed without prosecution, the deterrent effect of being under the threat of criminal punishment is sufficient to constitute a violation of the applicant's freedom of expression.

In the case of *Taner Akçam v. Turkey*, an investigation was initiated against the applicant under Article 301 of the TPC on the grounds that a nationalist individual complained about the applicant. The applicant gave a statement to the public prosecutor's office, but the latter decided not to bring charges, stating that the applicant's statement fell within the scope of Article 10 of the Convention. However, the ECtHR, taking into account the *Hrant Dink v. Turkey* case (nos. 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, § 107, ECtHR 2010), that persons against whom such investigations were initiated were labeled as "traitors" and "agents" for insulting Turkishness, and that in the *Dink* case, the applicant was murdered by ultra-nationalists for this very reason. Therefore, the Court noted in this context that, although no prosecution was initiated against the applicant under Article 301 and he was not found guilty, the criminal complaints filed against him by extremist individuals due to his opinions on Armenians had turned into a smear campaign and harassment, and that the applicant was forced to respond to the allegations under this provision. Despite the fact that the contested provision was not applied against the applicant, the Court took into account that the possibility of future investigations against the applicant caused him stress and anxiety and that the fear of investigation and prosecution would deter him from expressing his opinions (§ 75).

In the *Dilipak v. Turkey* judgment, the case against the applicant was dismissed due to the statute of limitations. The applicant, who applied to the ECtHR before the case was concluded, was granted the right to a

fair trial by the ECtHR, which stated: “On the one hand, criminal charges were pending against the applicant for a considerable, indeed excessive length of time (§ 29). On the other hand, that the applicant could not be sure that he would not, either during those criminal proceedings or at any future stage, face further legal consequences if he, as a journalist and political columnist, wrote further articles on matters relating to links between the armed forces and the country’s general politics “ (*Dilipak v. Turkey*, no. 29680/05, 15.9.2015, § 49).

In the case of *Döner and Others v. Turkey*, where parents were prosecuted for aiding and abetting a terrorist organization due to a petition they filed for their children’s right to education in their mother tongue, the ECtHR ruled that the acquittal of the applicants was not sufficient to remove their status as victims, the status of victimhood would continue to exist unless the national authorities explicitly acknowledged the violation of the Convention in the content of their decision and provided redress (no. 29994/02, 7.3.2017, § 89).

The ECtHR’s case law in this regard has become established, and for rights to be effectively protected in a state governed by the rule of law, safeguards must be applied in a manner that prevents arbitrary interference, taking into account the specific circumstances of each case. When evaluated in light of the ECtHR’s case law, it must be acknowledged that the freedom of expression of individuals who are prosecuted or led to prosecution for exercising their freedom of expression has also been violated.

Similarly, most of the acts subject to prosecution are those that should have been protected under the right to freedom of assembly, as they constitute the exercise of that right. Indeed, the case concerning the participants in the 700th-week vigil organized by the Saturday Mothers also ended in acquittal. The court’s acquittal decision demonstrates that the case was brought unnecessarily. Further, in the application filed against the intervention by the police to disperse the vigil, the Constitutional Court ruled that the intervention violated the right to assembly (*Maside Ocak Kışlakçı* [1st Sec.], App. No: 2019/21721, 16/11/2022).

The court established that the intervention was not legitimate:

“23. In the specific case, the District Governor’s Office prohibited the protest in question on the grounds that the legally required notification had not been made; law enforcement officers also intervened in the meeting based on this decision. The burden of proving that the intervention was necessary to meet a pressing social need and was proportionate generally falls on the administrative authority that intervened and the judicial authority that reviewed the intervention. In this regard, the prohibition decision issued due to the failure to comply with the notification obligation of the administration and the necessity of the intervention made based on this decision in the democratic social order should be evaluated. ... In addition, a fair balance should be established between the applicant’s right to assembly and public order, and the relevant issues should be presented with relevant and sufficient reasons (İsmail *Sarıkabadayı and Others*, App. No: 2016/23696, 8/6/2021, § 45).

24. The ban decision on which the intervention was based **did not set out any explanation as to how the failure to give notice of the meeting would disrupt public order or violate the rights and freedoms of others, and therefore it is unclear how the administration reached this conclusion.**

25. It also failed to take into account that the purpose of the right in question was to enable the authorities to take reasonable and appropriate measures to ensure the effective exercise of that right. Indeed, **the act in question has been taking place at specific times and places for approximately twenty-four years, and it cannot be argued that the administration had no prior knowledge of its occurrence.** In the case of a peaceful act, the administration **automatically resorted to prohibition instead of taking measures to ensure the effective exercise of the right to assembly**, as required by its positive obligations to ensure the effective exercise of this right in light of the specific circumstances of the case. Indeed, the administration did not establish that there were compelling conditions such as the disruption of public

order, the risk of such disruption, or the necessity to protect the rights of others in its ban decision. For the reasons explained, **it cannot be argued that the grounds relied upon by the administration for banning the event are valid and convincing.**

26. Further, the applicant's wish to stage a sit-in and issue a press statement with the aim of finding the missing relatives of the group to which they belong and raising public awareness should be respected in a democratic society. According to the information and documents submitted to the file, it has been understood that **certain objects were thrown at law enforcement officers, the police intervened in the meeting despite it not being necessary, and some participants, including the applicant, were arrested** (see § 6). Although certain sanctions may be imposed on participants for unlawful acts committed during the intervention, this **does not render the unlawful intervention by law enforcement officers lawful.** In this context, it has been concluded that the law enforcement officers intervened in the event without establishing a reasonable justification for doing so and without showing tolerance for the exercise of the aforementioned right."

As can be seen from this lengthy excerpt from the judgment, it is clear that the lawsuits filed because the participants refused to disperse due to the unnecessary intervention of the police, which should not have intervened in the first place, are also unnecessary lawsuits, and that such lawsuits are intended to deter the exercise of rights, the pursuit of justice, and accountability within a democratic framework.

Fighting such lawsuits is by no means easy for the victims. For these lawsuits are not brought due to ignorance of the law or its misinterpretation. On the contrary, it must be understood that we are dealing with lawsuits brought by the deliberate distortion of law.

The fundamental condition for avoiding such cases is to ensure the independence and impartiality of the judiciary. As long as the judiciary remains under the influence and control of the executive branch, any amendment

to criminal and procedural laws will have no positive effect. Indeed, Article 7 of the ATL, which serves as the basis for some of the cases being monitored, has been amended at least four times on the grounds of compliance with ECtHR judgments. However, unnecessary cases continue to be filed and convictions handed down based on this provision.

Therefore, it must be emphasized that the fundamental solution lies in ensuring the institutional independence of the judiciary through comprehensive structural reform. Of course, this requires a political will committed to democracy and the construction of a rule of law based on human rights. Given that this is not possible in the short run, it is essential to develop and implement defense strategies tailored to the nature of these cases in order to partially address judicial harassment under current conditions.

Investigative and prosecuting authorities should be reminded of human rights standards from the outset and intervention should be made to ensure that any deviations are corrected. All rights should be exercised to ensure respect for procedural rights, and any inappropriate practices and conduct should be recorded. Furthermore, human rights standards should be raised at every stage of the proceedings.



IV

CONCLUSION

All thirty cases monitored were initiated due to acts involving the exercise of fundamental constitutional rights and freedoms. In a democratic state governed by the rule of law and respectful of human rights, none of these cases should have been brought. Indeed, in 19 of the 30 cases monitored, all defendants were acquitted of all charges.

The filing of these lawsuits demonstrates an intention to silence dissenting voices, discourage the pursuit of rights, and deter participation in public debate. In such cases, it is essential to ensure compliance with procedural safeguards inherent in the right to a fair trial, as well as, and even more importantly, with substantive safeguards related to human rights, particularly the standards pertaining to the rights to freedom of expression and of assembly.

Therefore, the primary objective should be to prevent such cases from being brought before courts. However, if a case is brought to court, necessary measures should be taken to ensure that both criminal and criminal procedure law as well as human rights law principles and standards are upheld.

The right to a fair trial is the guarantee of equal application of the law to everyone. Therefore, it constitutes the cornerstone of the rule of law. If the guarantees of a fair trial are strictly adhered to, arbitrary applications can be prevented. Some fundamental procedural problems were observed in the trials monitored. In particular, issues were encountered in some of the fundamental procedural guarantees, such as respect for the right to defense, informing of the charges, responding effectively to the charges, adversarial proceedings in accordance with the principle of equality of arms, hearing witnesses and cross-examining prosecution witnesses, and

access to interpretation. Notably, it was observed that in most cases, the request to hold hearings in larger courtrooms due to the large number of defendants and the need to ensure that all spectators could observe the hearings was not accepted in some cases, resulting in only a limited number of observers being able to attend the hearings. This caused tension between the presiding judge and defense attorneys, and some attorneys were removed from the courtrooms.

One of the issues that restricts the right to defense is the unnecessary presence of law enforcement officers in courtrooms and their observation of trials. Their presence may cause defendants to feel inhibited while presenting their defense.

Further, frequent interruptions during the defense and warnings to the defendant and defense counsel to keep the defense brief will result in a violation of the right to defense. The fact that statements made during the defense are not directly recorded in the minutes but are summarized by the judge and then recorded in the minutes should be considered an interference with the right to defense.

In cases where an interpreter is needed, if it is determined that the appointed interpreter is not sufficiently proficient in the language, the trial should be immediately suspended and a new interpreter appointed.

Procedural violations during trials may not only violate the right to a fair trial but also lead to the violation of material rights. Therefore, the procedural safeguards of the right to a fair trial must also take into account the procedural dimensions of the rights to freedom of expression and of assembly.

It is clear that avoiding criminal proceedings that constitute judicial harassment aimed at preventing public participation is directly linked to ensuring the institutional independence of the judiciary. Therefore, a constitutional reform is needed to guarantee the institutional independence of the judiciary.



Although it seems impossible for a reform to emerge under the current political conditions, demands in this direction should not be abandoned.

It is also necessary to introduce some legal amendments to curtail judicial harassment aimed at discouraging public participation. First, the provisions of Law No. 2911 must be brought into line with international human rights standards and the principles of the Constitutional Court and the ECtHR. There is also a need for reforms to revise norms that have been found by the ECtHR to be unforeseeable. Legal changes are also needed, such as the repeal of Article 299 of the TPC, the improvement of Article 220/7, and the non-application of Article 125/3(a) to elected politicians.

It is imperative that law enforcement and judicial officials must have sufficient training and the will to apply human rights standards. To this end, necessary training should be provided both before and during their careers and should be updated at regular intervals.



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