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Meeting: 1419th meeting (December 2021) (DH)

Communication from an NGO (Life Memory Freedom Association) (29/11/2021) in the case of OYAL v. Turkey (Application No. 4864/05) and reply from the authorities (30/11/2021) (appendices in Turkish are available at the Secretariat upon request).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419e réunion (décembre 2021) (DH)

Communication d'une ONG (Life Memory Freedom Association) (29/11/2021) relative à l'affaire OYAL c. Turquie (requête n° 4864/05) et réponse des autorités (30/11/2021) (des annexes en turc sont disponibles auprès du Secrétariat sur demande) ***[anglais uniquement].***

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DH-DD(2021)1294: Communication from an NGO in Oyal v. Turkey & reply from the authorities.
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29 NOV. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

29.11.2021

COMMUNICATION

In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by Life Memory Freedom Association

in Oyal v. Turkey
(Application no. 4864/05) and
10 Repetitive Cases

Introduction

1. The present Rule 9.2 submission concerns general measures and updated information concerning the following cases: Oyal v. Turkey (Application no. 4864/05), Mehmet Ulusoy v. Turkey (Application no. 54969/09), Oney v. Turkey (Application no. 49092/12), Nihat Soylu v. Turkey (Application no. 48532/11), Tulay Yıldız v. Turkey (Application no. 61772/12), Erkan Birol Kaya v. Turkey (Application no. 38331/06), Erdinc Kurt and Others v. Turkey (Application no. 50772/11), Asiye Genc v. Turkey (Application no. 24109/07), Akkoyunlu v. Turkey (Application no. 7505/06), Altug and Others v. Turkey (Application no. 32086/07), Senturk v. Turkey (Application no. 13423/09).

2. Life Memory Freedom Association [Yaşam Bellek Özgürlük Derneği] is a non-governmental organization working in the field of human rights. The Association made applications to the Constitutional Court and the European Court of Human Rights regarding restrictions to the freedom of expression. Among the members of the Association are lawyers who have experience in similar cases and academics who are specialized in human rights law and other related legislations.[1]

1. Case Description

3. These cases concern the failure of the Turkish authorities to protect the lives of the applicants or their next-of-kin between 1996 and 2005 on account of medical negligence or medical errors committed by health care providers employed mainly by state-run hospitals (substantial and/or procedural violations of Article 2).

4. The European Court identified the following violations of Article 2 in its substantive aspect:

[1] See the web page of the Association: https://yasambellekozgurluk.org/

-Failure to cover fully the applicant's (who was infected with HIV virus after birth) medical expenses despite full liability attributed to the State by decisions of civil and administrative courts (Oyal);

-Refusal to admit patients in critical medical condition to hospitals and to provide medical treatment because of the patient's inability to pre-pay hospital fees (Mehmet Şentürk and Bekir Şentürk) or because of lack of sufficient number of incubators in a hospital (Asiye Genç);

-Lack of coordination between hospitals before a patient in an emergency situation is transferred from one hospital to another and the absence of medical assistance during transfer (Asiye Genç);

5. The European Court identified the following violations of Article 2 in its procedural aspect:

-Failure of domestic courts to examine cases of medical negligence with exceptional diligence and promptness, in particular on account of excessive delays encountered in the submission of medical reports setting out liability of health care providers, which resulted in exceptionally lengthy proceedings, as well as on account of the absence of relevant and requisite information in such reports;

-Dropping of charges on account of the application of prescription periods in lengthy proceedings or refusal to give administrative authorisation so that proceedings could be initiated against health care providers;

-Failure of a domestic court to establish the facts.

6. The Court further found in the Oyal case that the administrative courts failed in their duty to conduct the compensation proceedings with exceptional diligence in view of the applicant's condition and the gravity of overall situation (violation of Article 6 § 1) and that the Turkish legal system failed in providing an effective remedy whereby the length of the proceedings could successfully be challenged (violation of Article 13). In this case, the European Court held that the respondent Government must provide free and full medical cover for the applicant during his lifetime.

2. Related Recent Developments

2.1. General Measures Taken in Regard to Healthcare Services

2.1.1. On the Statistical Data in the Government's Opinion

7. Although statistics on the lawsuits filed against health institutions related to medical negligence are included in paragraph 10 of the Government's opinion, the details of these statistics (court, type of lawsuit, number of plaintiffs and defendants, etc.) are not disclosed. As in previous years, there is no classification and evaluation of medical negligence in the forensic statistics published in 2020.[2] Information on this subject cannot be accessed on the websites of the Ministry of Health, the Ministry of Justice, the Court of Cassation, the Council of State or the Constitutional Court. Taking the population of the country and the problems

[2] https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1692021162011adalet_ist-2020.pdf

arising from health services into account, we anticipate that compensation cases arising from medical negligence are much larger. However, since there is no data shared with the public, it is not possible to make further evaluations on this issue.

8. The paragraph 11 of the Government's opinion includes information about city hospitals. Some studies evaluate the negative effects of these hospitals on the health system.[3] The Turkish Medical Association, the only doctors' association in the country, is absolutely against such health facilities.[4] According to the Association, these facilities are inefficient, expensive and inaccessible for the public.

9. Some statistical information is given in the Government's opinion (on family physicians in paragraph 12, the number of hospital beds and the number of general practitioners in paragraph 13, and some developments in the field of health in paragraph 14). Despite the improvements observed in the data, the problems experienced in accessing health services continue. The data does not reflect the real situation in the underdeveloped regions and rural areas of the country.[5] On the other hand, the problems of access to health services for the discriminated segments of society (Roma[6], immigrants[7], prisoners[8], the poor[9], etc.) are much more extensive.

10. Although the statistics in paragraphs 15 to 31 of the Government's opinion show that there has been significant progress in maternal and newborn health, there still are two to three times negative differences with developed countries in all statistical data.[10]

2.1.2. Developments in intensive care services neonatal units

11. In Asiye Genç judgement, European Court of Human Rights considered that the lack of sufficient number of incubators in a hospital as a violation of Article 2. In paragraphs 32 to 37 of the Government's opinion, information and statistical information are given about a notification issued in order to ensure coordination regarding the intensive care and neonatal units and the functioning of these units. However, the information provided does not show that the deficiencies and problems related to intensive care and neonatal units have disappeared. It has been shown in a MD thesis accepted in 2020 that emergency service applications are not taken into account in the structuring of intensive care services, and

[3] Gökkaya, Durmuş, Türkiye'de kamu özel ortaklığı bağlamında şehir hastanelerinin değerlendirilmesi: Nitel bir araştırma [Evaluation of city hospitals in the context of public private partnership in Turkey: A qualitative research], PhD Thesis, Isparta, 2020.
[4] https://www.ttb.org.tr/kutuphane/sehirhastkitapSML.pdf
[5] Demir, Şeyhmus, Sağlık hizmetlerinde bölgesel eşitsizliklerin analizi ve Türkiye örneği [Analysis of regional inequalities in health services and the case of Turkey], MSc Thesis, Edirne 2019.
[6] Erhalim Gumus Buse, Türkiye'de Roman Kadınların Sağlık Hizmetlerine Erişimi: İzmir Örneği [Access of Roma Women to Health Services in Turkey: The Case of Izmir], MSc Thesis, Manisa 2021.
[7] Aksu Alexandra Zehra, Experiences of Syrian Refugees Regarding Healthcare Access in Ankara, MSc Thesis, Ankara 2020.
[8] Sereli Kaan, Mutlu, Tutuklu ve Hükümlülerin Sağlık Hakkı ve Sağlık Hizmetlerine Erişimi [Prisoners and Convicts' Right to Health and Access to Health Services], MSc Thesis, Ankara 2020.
[9] Şantaş, Fatih. Yoksulluk olgusu ve Türkiye'de yoksulluğun ve çeşitli faktörlerin sağlık statüsü ve sağlık hizmetleri kullanımı üzerine etkisi [The phenomenon of poverty and the effect of poverty and various factors on health status and use of health services in Turkey], PhD Thesis, Ankara, 2016.
[10] For detailed statistical data, see: https://data.worldbank.org/indicator/SP.DYN.IMRT.FE.IN

therefore there are structural inadequacies related to intensive care services.[11] In the conclusion part of the aforementioned study, the following is stated about the sample hospital examined: "…It was observed that the Neurosurgery Intensive Care Unit is inadequate due to the fact that it is the 2nd level intensive care unit, and the patients related to its own branch are mostly followed and treated in the 3rd level intensive care units. …It was observed that both the level of the unit and the number of beds in the Chest Diseases Intensive Care Unit were insufficient and could not respond to the increasing critical patient load with emergency service applications. The number of beds in the Neurology Intensive Care Unit was found to be insufficient…"[12] On the other hand, information on the geographical distribution of neonatal intensive care units is lacking. In general, it can be said that the problems related to access to health services are also valid for neonatal intensive care units. It is thought that coordination problems related to intensive care and newborn health services cannot be solved due to lack of capacity.

2.1.3. The admission of patients in critical medical condition to hospitals and/or to provide medical treatment without pre-pay hospital fees

12. In Mehmet Şentürk and Bekir Şentürk judgement, European Court of Human Rights considered refusal to admit patients in critical medical condition to hospitals and to provide medical treatment because of the patient's inability to pre-pay hospital fees as a violation of Article 2. In paragraphs 38 to 47 of the Government's opinion, it was reported that the charge for benefiting from emergency health services was abolished, patient rights units were established and therefore no further measures were required. However, problems regarding the use of emergency health services continue. Increasing the Efficiency of Health Services and Financial Sustainability Special Specialization Commission Report states that *"…[t]he level of awareness in the society about what emergency health services are and which health conditions are urgent is unsatisfactory. Even in non-emergency situations, individuals unconsciously continue to use the units where emergency health services are currently provided, with the belief that access to health services is easy or that they will not pay contributions or fees. First aid training of health personnel who are assigned to provide emergency health services is not effective. Current legislation on emergency health services and organizations is insufficient.*"[13] After the publication of the report, no legislation has been developed or comprehensive practices have not been implemented to solve the mentioned problems.

13. On the other hand, if a health service is not evaluated as an emergency, the cost must be paid by the beneficiary. Persons who can benefit from health services free of charge are specified in Article 60/c-1 of Law No. 5510 as follows: "*Citizens whose monthly income per person is less than one-third of the minimum wage can benefit from health services. The income is determined by the Institution, using test methods and data, taking into account their expenditures, movable and immovable properties and their rights arising therefrom."* Accordingly, for the year 2021, people with a monthly income of more than 1.192.33 TL[14]

[11] Kabınkara, Emrullah, Hastanelerde Yoğun Bakim Yatak Sayilarinin Planlanmasinda Acil Servis Başvurularının Değerlendirilmesi [Evaluation of Emergency Service Applications in Planning the Number of Intensive Care Beds in Hospitals], MD Thesis, Konya 2020.
[12] Kabınkara, p.41.
[13] https://www.sbb.gov.tr/wp-content/uploads/2018/10/10_SaglikHizmetlerininEtkinligininArtirilmasiveMaliSurdurulebilirlik.pdf
[14] This equals to EURO 110,61 (Exchange rate at the date October 20th, 2021).

can benefit from health services by paying a premium. This regulation severely limits the number of people who can benefit from health services free of charge. According to Article 67 of the Law No. 5510, people who can benefit from health services have provide the following conditions: "…a) General health insurance holders and their dependents, except for subparagraphs (c) and (f) of the first paragraph of Article 60 and the twelfth, thirteenth and fourteenth paragraphs of the same article, must have a total of 30 days of general health insurance premium payment days in the last one year before the date of application to the health service provider, (3) b) General health insurance holders and their dependents subject to sub-clause (2) and sub-clause (g) of clause (a) of the first paragraph of Article 60, and along with the condition listed in the above paragraph, must have no debt of any kind for more than 60 days on the date of application to the health service provider, in accordance with Article 48 of the Law on Collection of Public Claims No. 6183, dated July 21st, 1953, except for those whose postponement and installments continue, (4) c) General health insurance holders and their dependents subject to subparagraphs (b) and (d) of the first paragraph of Article 60, must not have any premiums and all kinds of debts related to the premium at the time of application to the health service provider, together with the condition listed in the above paragraphs." It is not possible for people with premium debt to benefit from non-emergency health services. Despite the existence of general health insurance, household health expenditures increase.[15]

2.1.4. The lack of coordination between hospitals and the lack of medical assistance during the transfer of patients

14. In paragraphs 48 to 58 of the Government's opinion, developments regarding the solution of the problems related to the lack of coordination during patient transfers and the lack of medical personnel were mentioned. Although the statistical information given shows that there have been important developments, the problems still exist. Statistical data do not include information on the geographical distribution of equipment and personnel provided. It is clear that in cases where there are problems with access to health services in general, coordination problems and similarly problems with personnel would occur in patient transfers. There is not enough data to make a more detailed assessment on this subject.

2.1.5. Developments in Blood Transfusion

15. In paragraphs 59 to 79 of the Government's opinion, developments in resolving the problems related to blood transfusions were mentioned. In the Government's opinion, data on persons infected with HIV as a result of blood transfusions were not shared. Between 1985 and 2018, the number of AIDS patients was 21,500. More than half of these patients were diagnosed in the last five years. It was determined that 7518 out of 21.500 patients became ill with infected blood transfusions. This number is quite high.[16] It is seen that the precautions regarding the transmission of the disease through blood transfusion are insufficient. In a

[15] Doğan Emrah, Türkiye'de genel sağlık sigortası uygulamasının hane halkı sağlık harcamalarına etkisi [The effect of general health insurance implementation on household health expenditures in Turkey], MD Thesis, İstanbul 2019.

[16] https://hsgm.saglik.gov.tr/depo/birimler/Bulasici-hastaliklar-db/hastaliklar/HIV-ADS/Tani-Tedavi_Rehberi/HIV_AIDS_Kontrol_Programi.pdf

report published in 2021, it is stated that infected blood was provided by the Red Crescent and legal actions were initiated.[17]

16. On the other hand, the problems related to AIDS patients are ignored. The legal legislation regarding the disease is insufficient and the current legislation does not observe the rights of patients or even violates the basic human rights of AIDS patients in many respects.[18]

2.1.6. Failure to cover fully the medical expenses of patients who were infected with the HIV virus

17. In paragraphs 80 to 85 of the Government's opinion, it has been stated that the health expenditures of HIV-infected persons are covered by the Social Security Institution, as other diseases are. However, there is no specific legal regulation regarding HIV-infected persons. In addition, there are many problems in benefiting from the General Health Insurance. In addition to other problems, people who do not fulfill their obligation to pay premiums or who have premium debt do not have the legal right to benefit from health services except in emergencies.[19] In many scientific studies, it is recommended to have private insurance in addition to general health insurance, due to the insufficient general health insurance.[20] However, the situation of people who cannot afford to have private health insurance is not evaluated in such studies. Large sections of the society do not have the economic capacity to have private health insurance. This is the often case also for HIV-positive people.

2.1.7. Requirement of Informing the Patients of the Medical Treatment

18. In Tülay Yıldız judgement, European Court of Human Rights considered the doctors' failure to provide sufficient information to the patient regarding the treatment, unsatisfactory post-operation care and medical follow-up as a violation of Article 2 in terms of procedural aspect. In paragraphs 86 to 97 of the Government's opinion, the legislation and judicial decisions on informing patients about medical treatments are mentioned. Problems regarding informing patients and their relatives about treatments continue. Legislation on the subject is inadequate and not implemented in practice.[21] In a MSc thesis accepted in 2015, it is stated that "[h]owever, in practice, this issue is not given the necessary attention. It is seen as an extra workload, and it consists of simply signing the forms and putting them in the files, often ignoring the information of the patient. The excessive workload is considered to be the reason

[17] https://pozitifyasam.org/wp-content/uploads/Raporlar/Pozitif%20Ya%C5%9Fam%20Derne%C4%9Fi-3%20Ayl%C4%B1k%20Rapor%206.pdf

[18] https://pozitifyasam.org/wp-content/uploads/Kitaplar/AIDS,%20%C4%B0nsan%20Haklar%C4%B1%20ve%20Yasalar.pdf

[19] Kızılova, Arif Türker, Türkiye'de Genel Sağlık Sigortası Gelişimi Uygulanması ve Sorunlar [General Health Insurance Development Implementation and Problems in Turkey], MSc Thesis, Bursa 2015 ; Başmanav Yasemin, Genel Sağlık Sigortasının Kişi Bakımından Kapsamı [Personal Coverage of General Health Insurance], MSc Thesis, İstanbul 2014.

[20] Tapan Birkan, Genel Sağlık Sigortasının Sürdürülebilirliği İçin Tamamlayıcı Sağlık Sigortasının Gerekliliği [Necessity of Complementary Health Insurance for Sustainability of General Health Insurance], PhD Thesis, İstanbul 2008 ; Dağ Celal, Türk Genel Sağlık Sigortası Sisteminin Seçilmiş Bazı Ülke Sistemleri ile Karşılaştırılmalı Analizi [Comparative Analysis of Turkish General Health Insurance System with Some Selected Country Systems], PhD Thesis, İstanbul 2013.

[21] Günler Zeynep, Aydınlatılmış Onam ve İnsan Hakları [Informed Consent and Human Rights], MSc Thesis, İstanbul 2021.

that leads the physician and health worker to this situation."[22] In another study published in 2015, it is stated that "the patients read and did not understand the surgical informed consent, the consent was signed by the nurses, the explanation was made by the nurses, and the consent was signed because it was a formality. In line with these results, it may be suggested to define and solve the problems related to the implementation of informed consent and to establish institutional strategies for their solution."[23]

19. The judicial opinions of the Constitutional Court also demonstrate the existence of problems in this context. In its decision dated June 30th, 2021, the Constitutional Court's conclusion is as follows: In the case, the applicant claimed that he was injured due to the incorrect injection, that the integrity of his body was damaged, and that he was not informed about the possible consequences of this process. He also claimed that the courts of instance rejected the claim for pecuniary damages without examining this matter despite these facts. *The fact that the person was not informed before the medical intervention and his consent was not obtained does not constitute a violation.*[24] Similarly, in its decision dated September 12th, 2018, the Constitutional Court decided that the applicant did not claim that the consent was not obtained, therefore the application was inadmissible.[25] In this decision, the Constitutional Court states that "…the applicant does not claim that she did not give her consent for natural birth or that she was not informed by the doctor, but only claims that she does not have her signature on official documents." It is clear that the absence of the applicant's signature in the official documents meets the claim of not being informed. In another decision of the Constitutional Court on June 30th, 2021, the application was found to be inadmissible by clearly stating that "...the application was not examined in the context of the administration's obligation to inform, since the applicant had no claim that they were not informed before the medical intervention (injection) and their consent was not obtained."[26] Decisions in this direction seem to limit the obligations of informing the patient and/or their relatives about the medical treatment applied.

2.2. General Capacity Building Activities in the Expert System and Expertise in Malpractice Cases

20. In paragraphs 98 to 106 of the Government's opinion, information is given about the regulations regarding the experts and especially the practice of experts in cases of medical negligence. In our country, serious problems regarding legal experts continue. In a master's thesis accepted in 2021, it is stated that "…[a]ll these problems that we have expressed throughout our work shows that the innovations brought by the legislation do not meet the expectations. Until recently, it was still a common practice to send thousands of files to a single expert. In the selection of the experts, distribution of the files and other procedural issues, the problems continue, and it is seen that the reports are not satisfactory in terms of

[22] Yıldırım Selda, Tıbbi Müdahalelerde Aydınlatılmış Onam [Informed Consent in Medical Interventions], MSc Thesis, İstanbul 2015.

[23] https://archhealthscires.org/en/examination-of-the-patients-information-levels-about-surgical-informed-consent-16261

[24] Decision of inadmissibility on Ferha Perçin's individual application (2018/23894), Constitutional Court, Division 1, June 30th, 2021.

[25] Decision of inadmissibility on Ayşe Özkara and Safiye Özkara's individual application (2015/13646), Constitutional Court, Division 2, September 12th, 2018.

[26] Decision of inadmissibility on Engin Aslan's individual application (2017/15517), Constitutional Court, Division 1, June 30th, 2021.

content and that incomplete and erroneous evaluations are too common."[27] Another master's thesis accepted in 2019 includes similar observations: "…Contrary to the nature of the legal expertise, it is used by the judges in order to eliminate the deficiencies caused by problems such as heavy workload and lack of knowledge, therefore, the desired benefit cannot be obtained from expertise. Exceeding the purpose of expertise, experts, who assist the judges in order to provide technical and special information they do not have, are used by the judges as assistants in all matters. Even the duties that require legal knowledge and qualification are expected from experts, and these results in the transfer of jurisdiction. Although new regulations and amendments introduced by the Law on Expertise are sufficient to take expertise to its desired position, the problems from the past still continue in practice. Practices such as expecting reports on legal matters, appointing lawyers as experts, and inability to make a judgment contrary to the expert report show us that the solution lies not in the legislative changes, but in changing the understanding of the practitioners."[28] In a thesis in medicine accepted in 2019, it was pointed out that there were no standards regarding expert reports, and that there were delays and incomplete examinations caused by experts.[29] On the website of the Department of Expertise, between 2017 and 2021, 42 experts were warned for various reasons[30]; 90 experts were removed from the expert list temporarily[31]; 195 experts were removed from the expert list[32]; and 14 experts were banned from working as experts[33]. On the other hand, according to the Forensic Statistics for 2020, there are 65,824 files pending before of the Forensic Medicine Institute Specialization Boards and 527,114 files pending before of the Forensic Medicine Institute Specialization Departments.[34] It is clear that the personnel capacity of the institution is far below this workload.

2.2.1. Delays encountered in the submission of medical reports

21. In paragraphs 107 to 116 of the Government's opinion, information is given about the regulations and practices regarding expert reports in cases related to medical negligence. Problems arising from the delay of expert reports in cases related to medical negligence continue. It is a positive development that the Constitutional Court canceled the legislation requiring reports only from the Supreme Health Council. However, the problems did not disappear with this step. Article 20 of the Forensic Medicine Institute Law Implementation Regulation, which concerns the files which should be prioritized, does not include any cases arising from medical negligence.[35] When evaluating the time needed to prepare a report on a

[27] Yılmaz Zeynep, Ceza Muhakemesi Hukukunda Bilirkişilik [Expertise in Criminal Law], MSc Thesis, İstanbul 2021.

[28] Kayılıoğlu Deniz, Türk İdari Yargılama Hukukunda Bilirkişilik [Expertise in Turkish Administrative Law] , MSc, Ankara 2019.

[29] Mutlu, Bahtiyar Ali, Tıbbi Uygulama Hatası İddialarında Bilirkişilik ve Uzman Mütaalası [Expertise and Expert Opinion in Allegations of Medical Malpractice], MD Thesis, İstanbul 2019.

[30] https://bilirkisilik.adalet.gov.tr/Home/SayfaDetay/uyarma15012021024508

[31] https://bilirkisilik.adalet.gov.tr/Home/SayfaDetay/gecici-sureyle-listeden-cikarma15012021024546

[32] https://bilirkisilik.adalet.gov.tr/Home/SayfaDetay/bilirkisilik-sicilinden-ve-listesinden-cikarilma15012021024613

[33] https://bilirkisilik.adalet.gov.tr/Home/SayfaDetay/bilirkisilik-yapmaktan-yasaklanma22012021035202

[34] https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1692021162011adalet_ist-2020.pdf

[35] Regulation on the Implementation of the Law on the Forensic Medicine Institution, Prioritizing Files Article 20 — "Files sent to the units of the Institution for examination are put in order and taken for examination. However; the following files are prioritized in the special boards, departments and branches: a) Files with detainees, b) Promissory notes, checks and similar legal instruments related to the amount to be determined periodically by the Board of Presidents of the Forensic Medicine Institute upon the recommendation of the

file in the Forensic Medicine Institute, it has to be considered that a re-evaluation should be made for reasons such as getting a report upon the objection of the parties, getting a report due to the contradictions between the reports received from other institutions, and re-reporting on the reversal and retrial decisions of the Courts of Appeal and the Court of Cassation. Statistics on the number of times a report is received for a case and on the report preparation times are not shared.

22. Court decisions show that the reporting processes in the Forensic Medicine Institute take years. In the decision E:2018/2025 K:2020/844 of the 4th Civil Chamber of the Court of Cassation, it is stated that "…the report dated September 26th, 2016 received by the relevant court from the Forensic Medicine Institute shows that the report of the Forensic Medicine Institute dated January 22nd, 2016, the disability rate of the plaintiff was determined as 20.2%, but there was no causal link between the cervical vertebrae (which was evaluated as disability in the re-examination of the file) and the accident that was the subject of the lawsuit, therefore, the traffic accident on May 30th, 2008 did not cause permanent disability. In the report of the General Assembly of Forensic Medicine dated July 27th, 2017, it was determined that the period of incapacity was 9 months, and that the file was sent to the General Assembly of Forensic Medicine due to the contradiction in the Forensic Medicine Institute reports received on January 22nd, 2016 and September 26th, 2016. The report of the Forensic Medicine Institute dated September 26th, 2016 was confirmed and it was reiterated that the traffic accident on May 30th, 2008 did not cause permanent disability and the period of temporary incapacity was 9 months. It is understood that the lawsuit of the non-litigated insurance company regarding the cancellation of the objection was partially accepted, and the decision is in the appeal review…"

In the decision E:2016/6154 K:2019/379 of the 4th Civil Chamber of the Court of Cassation, it is stated that "…[w]ithin the scope of the case, it is understood that he was found to be defective at the rate of 4/8 in the report of the Supreme Health Council dated September 7th-8th, 2006; 4/8 in the expert committee report dated January 28th, 2014, 6/8 in the report of the Specialized Board of the Forensic Medicine Institute. In this case, a report from the General Assembly of the Forensic Medicine Institute is necessary to eliminate the contradiction between the existing reports, and a decision should be made according to the result." In the decision E:2018/1669 K:2018/5126 of the 4th Civil Chamber of the Court of Cassation, it is stated that "… [i]n the report of the Specialized Department 3 of the Forensic Medicine Institute dated December 23rd, 2011, regarding the disability of the plaintiff in relation to the event that is the subject of the case, it was stated that the plaintiff had recovered without leaving any functional scars due to the traffic accident that occurred, therefore there was no room for a permanent disability rate determination, and the recovery period could extend up to 9 months from the date of the incident. After the plaintiff's attorney objected to this report, another report regarding the disability of the plaintiff was prepared. In the report dated November 27th, 2014 prepared by Department of Forensic Medicine in Trakya University Faculty of Medicine, it was determined that the plaintiff had a permanent disability of 15.2% due to the traffic accident, and the recovery period is 1 year and 50 days. Although the court made a judgment based on the account report prepared on the basis of the report of the Trakya University Forensic Medicine Department, the determination of the scope of the damage and

Special Department for Medicine in the forensic document examination branch of the Special Office for Medicine, c) Case files, the urgency of which has been decided by the court by giving justification, d) Case files that are approaching the statute of limitations."

the establishment of the judgment accordingly were not correct without eliminating the contradiction between the report of the Forensic Medicine Institute Specialized Board 3 and this report." In all these and many similar decisions, the proceedings are renewed in order to get a report again, so the processes take longer times, as in the decision E:2016/6154 K:2019/379 of the 4th Civil Chamber of the Court of Cassation in progress for 13 years.

2.2.2. Quality of medical reports

23. In paragraphs 117 to 127 of the Government's opinion, the quality of medical reports is assessed. Some of the evaluations here are related to the explanations in paragraph 20 above. In order to avoid repetition, it would be useful to consider the explanations there in terms of this part as well. There are major problems with the quality of the expert reports obtained in cases involving claims of medical negligence. It is possible to trace issues with inconsistent reports from court decisions. In the decision E:2021/3153 K:2021/2473 of the 4th Civil Chamber of the Court of Cassation, it is stated that "…. as of the accident on July 24th, 2016, the Regulation on the Disability Criteria Classification and Health Board Reports to be Given to the Disabled is in effect. Since it is not clear on which regulation the report dated April 12th, 2017 received from Samsun Training and Research Hospital is based, and the report dated June 29th, 2018 prepared by the Institute of Forensic Sciences Department of Medical Sciences (Forensic Medicine), Karadeniz Technical University and submitted to the file by the plaintiff upon the interim decision of the Appeal Committee **was not prepared in accordance with the provisions of the regulation in force at the date of the accident, both reports are unsuitable for inspection.** Moreover, there is a clear contradiction between these two reports and the medical opinion on disability rates signed by a Forensic Medicine Specialist and a single doctor, dated July 15th, 2017. While the reports available in the file were not suitable for inspection, the arbitration committee should have a new report from the Specialized Board 3 of the Forensic Medicine Institute or from a Forensic Medicine Department of a university, based on the provisions of the "Regulation on Health Board Reports to be Given to the Disabled" which was in force as of the date of the accident regarding the disability status of the plaintiff. Since a proper new report should have been obtained, the contradiction between the reports in the file resolved, the decision made by examining the other objections of the defendant's attorney according to the result; it was not considered correct to make a written decision with an erroneous assessment, improper reasoning and incomplete examination." Thus, the decision was reversed.

In the decision E:2021/2544 K:2021/2371 of the 4th Civil Chamber of the Court of Cassation, it is stated that "…[i]n the disability medical report submitted by the plaintiff, it was determined that the plaintiff was 13% disabled due to femur fracture, insufficiency of union and hip limitation. Upon the defendant's objection, it was stated that there was no room for his disability appointment, and the arbitration committee decided to reject the defendant's application based on a committee report from Hacettepe University, which stated that there was no sequel disability. Although it is not clear which regulation is taken as basis in terms of determining the disability rate in the health report submitted by the plaintiff, and **the report is not suitable for making a decision as such, there is a clear contradiction between the report received by the arbitration committee and the disability health report** submitted by the plaintiff. Since a new report should have been taken and a decision should have been made by the arbitration committee to resolve the contradiction, the decision as a result of incomplete examination and research was considered incorrect, and it was necessary to decide to reverse the decision for this reason." A large number of contradictory, ill-founded reports continue to result in very long proceedings.

2.3. Measures Taken with respect to Domestic Proceedings

2.3.1. Dropping of charges on account of the application of prescription periods or refusal of administrative authorization to initiate criminal proceedings

24. The paragraphs 138 to 155 of the Government's opinion include information on the legal situation regarding the failure to carry out a criminal or disciplinary investigation due to the occurrence of the statute of limitations. The number of personnel who are subject to criminal or disciplinary investigations for reasons arising from medical negligence is unknown. Data on this subject are not shared with the public. Again, no information is available on the number of personnel whose criminal or disciplinary investigations have been closed due to the statute of limitations. There are very serious problems with the general investigation of public officials. In cases arising from medical negligence due to the statute of limitations, it is seen that the cases are closed by dismissal decisions or upholding dismissal decisions.[36] On the other hand, according to the established case-law of the Constitutional Court, filing a lawsuit for compensation in criminal investigations related to medical negligence is a priority and effective remedy.[37] It is clear that decisions in this direction limit the conduct of an effective criminal investigation.

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[36] Decision E:2021/465 K:2021/4099 12th Criminal Chamber of the Court of Cassation (Annex 1); Decision E:2020/2146 K:2020/5574 12th Criminal Chamber of the Court of Cassation (Annex 2); Decision E:2020/1978 K:2020/5193 12th Criminal Chamber of the Court of Cassation (Annex 3); Decision E:2018/800 K:2019/4791 12th Criminal Chamber of the Court of Cassation (Annex 4); Decision E:2018/5197 K:2018/8786 12th Criminal Chamber of the Court of Cassation (Annex 5); Decision E:2016/7484 K:2016/12055 12th Criminal Chamber of the Court of Cassation (Annex 6); 7. Decision E:2015/3962 K:2015/8623 12th Criminal Chamber of the Court of Cassation (Annex 7); 8. Decision E:2012/20408 K:2012/19875 12th Criminal Chamber of the Court of Cassation (Annex 8).

[37] Decision of inadmissibility on Nail Artuç's individual application (2013/2839), Constitutional Court, Division 1, April 3rd, 2014. In this decision, the Constitutional Court stated that "… 46. [i]f there is a violation of the right to life in terms of the alleged violation of the obligation to protect life by not making the correct diagnosis on time and not applying the necessary treatment, it is primarily the responsibility of the administrative authorities and the courts of instance to remedy this violation (App. No: 2013/2075, December 12th, 2013, § 75). Although the applicant filed a criminal complaint against the doctor, whom he claimed was negligent, and requested a criminal investigation, it is seen that he did not apply to any legal remedy regarding the administrative and legal responsibilities of the doctor or the hospital. Considering the case-law of the Court of Cassation (§ 24-27) on the subject mentioned above, depending on the person to whom the enmity is directed against acts and omissions that do not constitute a crime under the penal laws, remedies for damages incurred before administrative and civil courts against the administration or individuals based on error or even strict liability are regulated under Law No. 2577 and 6098 (§ 21-23) (App. No: 2013/2075, December 4th, 2013, § 74). 47. In the case subject to the application, there are opportunities to apply to the mentioned legal and administrative legal remedies for the applicant, who applied to the relevant legal remedy for the determination of criminal responsibility but could not get any results. For this reason, it cannot be said that all of the administrative and judicial remedies stipulated in the law for the action, act or omission alleged to have caused the violation in terms of medical intervention have been exhausted before the individual application is made. 48. For the reasons explained, it should be decided that the allegations that the right to life has been violated by not providing timely and adequate treatment services are inadmissible because 'recourses have not been exhausted.'" In the more recent application, Ahmet Akgün and Others 2015/16235 individual application, in its decision of inadmissibility on July 4th, 2019, the Constitutional Court, Division 2 stated that "71. As a matter of fact, the Constitutional Court has stated in many previous decisions that in cases of death as a result of malpractice and negligence, the means of compensation, which can both determine the responsibility of the relevant health personnel and provide appropriate reparation by paying the damage, should be exhausted first by the relatives of the deceased. (*Özer Er* [PA], App. No: 2014/11770, March 15th, 2018, §§ 42-66; *Berat Ağardan*, App. No: 2014/11076, October 27th, 2016, §§ 18-32). 72. In the case, the applicants made

2.3.2. Imposition of disciplinary sanctions and their effectiveness

25. Paragraphs 156 and 165 of the Government's opinion refer to the effectiveness of disciplinary measures in relation to allegations of medical negligence. Since there is no data shared with the public on this subject, an evaluation cannot be made. It should be kept in mind that the actions subject to disciplinary action, the number of personnel subject to disciplinary action, and the disciplinary penalty applied are not shared with the public. On the other hand, the number of personnel related to disciplinary affairs is insufficient.[38]

2.3.3. Failure of the consideration of events and evidence by domestic courts and the issue of reasoning

26. Paragraphs 166 to 184 of the Government's opinion refer to the issues in cases involving allegations of medical negligence and more generally in the way courts evaluate facts and evidence and justify their decisions. Serious problems regarding this issue still continue. In many of its decisions, the Constitutional Court has ruled on violations arising from the lack of justification and errors in the evaluation of facts and evidence in cases arising from medical negligence.[39] However, the case-law of the Constitutional Court also has problematic aspects

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an individual application after the criminal investigation carried out about the incident that resulted in the death of their relatives. The applicants did not submit any information and documents to the Constitutional Court regarding that they exhausted the full remedy action, which is one of the existing legal remedies in the Turkish legal system, which can both determine the liability of the administration and, if necessary, ensure the payment of damages. In this case, it cannot be said that all of the judicial remedies stipulated in the law in terms of complaints regarding the lack of protection of the right to life have been exhausted before the individual application is made. 73. For these reasons, it should be decided that this part of the application is inadmissible due to the failure to exhaust the remedies without further examination in terms of other admissibility conditions."

[38] https://teftis.saglik.gov.tr/TR-26156/mufettisler.html

[39] The violation decision for Şahin Aydoğan's 2017/17832 individual application, the Constitutional Court, Division 2, June 29th, 2021: "… 45. With these explanations, when the trial process is evaluated as a whole, it is seen that the applicant's objections and demands for the expert report that were not ill-founded were not met, in this case, the claims essential for the settlement of the dispute were not examined with the care and depth required by Article 17 of the Constitution, and sufficient and relevant justification specific to the dispute was not presented. Since it cannot be said that the public authorities have fulfilled their positive obligations in terms of the case, it is concluded that the person's right to protect their material and spiritual existence has been violated." The violation decision for Murat Aydoğdu and Oktay Aydoğdu 2018/3285 individual application, the Constitutional Court, Division 2, June 6th, 2021: "… 46. H.Ş., who was taken into an emergency operation at the Faculty Hospital on March 4th, 2009, had applied to Bakırköy Hospital on February 28th, 2009 with the complaint of vomiting and nausea. Although intestinal obstruction was detected at the application date, he was not taken into operation or directed to another hospital for operation. He was kept there for four days, and then transferred to another hospital the conditions of which were claimed to be unsuitable. It is understood that although put forward by the applicants at every stage, these were not evaluated by the court. In other words, the court did not determine whether H.Ş.'s death after the emergency operation due to intestinal obstruction in the faculty hospital (to which he was transferred at his own request) was effected by the fact that he had been kept for four days without being taken into operation in the first hospital he had applied; or whether there was a causal link between the death event and the process in question. Therefore, the Court did not use its ex-officio investigative power to bring these issues to light, although it was also claimed by the applicants. The expert report includes the following statement: 'The patient's follow-ups were implemented properly in the dates from February 28th to March 3rd 2009.' However, the lack of any grounding explanations makes this statement ineffective in bringing the issue to light. It has been concluded that the claim of delay in question is serious and needs to be clarified in the context of a positive obligation regarding the right to life,

in this regard. In its various decisions, the Constitutional Court has decided that the allegations regarding the lack of justification and errors in the evaluation of facts and evidence in cases arising from medical negligence do not constitute a violation.[40] In court

since his problem had been identified in Bakırköy Hospital on February 28th, 2009, and later he was taken into emergency operation at the faculty hospital. 47. According to this situation, it is understood that in order to reveal the legal responsibility in the context of the positive obligations of the state within the scope of the right to life, a thorough and careful examination was not carried out at the level required by Article 17 of the Constitution, and as a result, the positive obligations of the state were not duly fulfilled." The violation decision on Hakan Kamer's individual application 2018/11847, the Constitutional Court, Division 2, June 16th, 2021: "40. In conclusion, considering the fact that the hospital administration is responsible for keeping the patient file on whether the injection applied was incorrect, it was concluded that no justification was presented based on concrete findings and the objections of the applicant regarding this were not met. In this case, it was concluded that the public authorities did not fulfill their positive obligations in the event that was the subject of the application."

[40] The non-violation decision on Ali Fındık and other's individual application 2018/15233, the Constitutional Court, Division 2, May 18th, 2021. In this decision it is stated that: "… 49. Although, as applicants claim, the issue of taking permission before the operation was not included in the justification note and in the text of the decision by the court of instance, it is understood that the decision was approved after the documents signed by the Chamber 14 of the Council of State were obtained from the administration and included in the examination process at the appeal stage. 50. On the other hand, the expert report which is the basis for the refusal includes evaluations on S.F.'s treatment, surgery and death process in detail with the citation of medical documents, on the presence of S.F.'s pre-operative trauma/fall-related complaints, on the risk S.F's operation had, and on the fact that the practice performed in the hospital is in compliance with the medical rules. It is seen that the final conclusion was made by taking all these into account. 51. When the trial process is considered as a whole, it is seen that the medical process (the reason for S.F.'s illness, the treatment process, the permission for the operation, the characterization of the relevant treatment process, obtaining an expert report, and obtaining the relevant documents regarding the succession of the operation and death) is examined with depth and care, as required by Article 17 of the Constitution." In addition to the common problems mentioned in paragraph 19 above regarding consent to the operation, it is wrong to base the decision on the documents related to the consent, which were found to be included in the file at the appeal stage and objected by the applicants, and that no violation decision was made in the application. The non-violation decision on Abdussemet İnalhan and other's individual application 2018/35517, the Constitutional Court, Division 1, January 28th, 2021. In this decision it is stated that: "… 59. Considering the aforementioned data, it is seen that although the elimination of measles was not fully achieved when the applicant's son M.N.İ. was born, constantly increasing vaccination rates were achieved for the elimination of measles, and in this context, various vaccination campaigns were carried out in addition to routine vaccinations. Considering that the administrative authorities are in a more favorable position in determining the priority of the needs and in terms of how much public resource will be allocated to which health service, it has been evaluated that no responsibility can be attributed to the competent authorities for the fact that measles was not completely eliminated in the aforementioned period. There is no record in the application form and its annexes that there was a situation in the region the applicants lived at the time of the incident which may require taking some additional measures in addition to routine vaccinations, and that the public authorities were notified in this regard at that time. The applicants did not claim that they had reported the situation to the public authorities, or that the public authorities had known about the situation, or that the public authorities had not taken the necessary measures at the time of the events when M.N.İ. had not yet been diagnosed with measles and when there was measles in his close circle. In fact, it should be accepted that the responsibility for vaccination follow-up is primarily on the parents, as stated in the decisions of the courts of instance, in normal cases where there is no case of an infectious disease and/or there is no epidemic or a danger of epidemic. … 61. When all these are evaluated together, it is not possible to say that the state did not fulfill its obligations within the scope of preventive health services in this case. Moreover, even if the case was rejected, it cannot be said that the applicant did not benefit from an effective judicial protection. 62. For the reasons explained, it should be decided that the person's right to protect and develop their material and spiritual existence has not been violated in the event that is the subject of the application." Inadequate vaccination is the responsibility of public authorities. There is a clear and serious error of the administration in the events that are the subject of

decisions at all levels, there are justification deficiencies and errors related to the evaluation of facts and evidence.

2.4. The case-law of the High Courts

2.4.1. The Constitutional Court

27. Paragraphs 185 to 195 of the Government's opinion include information about the individual applications to the Constitutional Court and the applications related to the claims of medical negligence. As considerations have been made in paragraphs 19, 21, 24, 25 and 27 above regarding the case-law of the Constitutional Court, these case-law will not be re-presented. It will be useful to take those explanations into consideration when evaluating the applications made to the Constitutional Court within the scope of the individual application method. It can be said that the case law of the Constitutional Court is not consistent and does not fully meet the standards of the European Court of Human Rights. On the other hand, there is a crisis in the country regarding the implementation of the decisions of the Constitutional Court. Even the President of the Constitutional Court pointed out the serious problems related to this issue in a speech he made on October 23rd, 2021.[41] In this context, there are decisions regarding non-fulfillment of the decisions of the Constitutional Court and re-infringement decisions made by the Constitutional Court.[42]

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the application. It is wrong to reject the claim for compensation and not give a violation decision. The non-violation decision on Hatice Çalış and other's individual application 2017/40500, the Constitutional Court, Division 1, September 29th, 2020. In the decision, it is stated by the member who voted against the aforementioned decision that "…2. In the doctrine and administrative case-law, in the case of 'malpractice', which completes the theory of neglect of duty, it is stated that the administration can be held responsible if it is possible to refer to the administration even if the error of the administrative agent is weakly connected with it. Considering the 'rising standard' of the administration, the responsibility arising from the duties of the administration agents (physicians and midwives) who gave birth can be attributed to the administration in accordance with the 'malpractice' principle. It seems that the courts of instance did not comply with this obligation, and the burden (damage) of a lifelong disability of a child was left on the applicants. It is not possible to accept this issue in the face of the final paragraph of Article 125 of the Constitution. 3. For the reasons explained; since I have come to the conclusion that the applicants' right to protect and develop the material and spiritual existence of the person, which is guaranteed in Article 17 of the Constitution, has been violated in terms of its procedural and material dimensions, I do not agree with the decision of the majority."

[41] https://www.anayasa.gov.tr/tr/baskan/konusmalar/anayasa-mahkemesinin-temel-haklar-alanindaki-kararlarinin-etkili-sekilde-uygulanmasinin-desteklenmesi-projesi-acis-konusmasi/

In addition, see CommDH(2020)1 / 19 February 2020 / / acl_seccommhr_rw_world_ro, Report on the visit to Turkey, from 1 to 5 July 2019, by Dunja Mijatović, the Council of Europe Commissioner for Human Rights *"…95. The Commissioner thinks that there are currently four interconnected issues casting doubt on the effectiveness of the individual application procedure to the Constitutional Court as a remedy for human rights violations in Turkey. These concern the tardiness of the Constitutional Court in remedying serious human rights violations, the lower courts' highly problematic attitude vis-à-vis the case-law of the Constitutional Court, the extraordinary burden that this state of affairs put on the Constitutional Court, and finally recent judgments of the Constitutional Court in which it appears to be departing from its previous, Convention-compliant approach… 105. In summary, the Commissioner considers that there are many developments which taken together jeopardize the future of the individual application procedure before the Constitutional Court as an effective remedy for human rights violations…"*.

[42] The violation decision on Aligül Alkaya and other's individual application 2016/12506, Constitutional Court, Division 1, November 7th, 2019. In this decision, it is stated that "… 68. In conclusion, it should be decided that the right to a fair trial has been violated due to the failure to implement the violation decision of the Constitutional Court, which is inconsistent with the guarantees it provides to the right to a fair trial within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution." The violation decision on Kadri Enis Berberoğlu's individual application 2020/32949, Plenary Assembly of the Constitutional Court, January

2.4.2. The Council of State

28. Paragraphs 196 to 200 of the Government's opinion include information about the case-law and institutional activities of the Council of State regarding the allegations of medical negligence. First of all, it should be noted that almost all the violation decisions of the Constitutional Court arising from the claims of medical negligence included in this opinion stem from the decisions of the Council of State. It can be said that the case-law of the Council of State is not consistent and does not fully meet the standards of the European Court of Human Rights. On the other hand, it is seen that the decisions of the Council of State regarding the claims of medical negligence are basically based on defectiveness[43], the complications that emerge in the medical intervention and treatment processes are not handled within this framework, and the responsibility of the state is not determined according to the principle of strict liability. It should be considered that the principle of strict liability can be applied in terms of socializing the financial losses suffered by people who have experienced severe complications.

2.4.3. The Court of Cassation

29. Paragraphs 201 to 206 of the Government's opinion include information about the case-law and institutional activities of the Court of Cassation regarding claims of medical negligence. No information was given about the outcome of the judicial process in the decision mentioned in paragraph 205 of the Government's opinion. It is understood that the date of crime in the case, which was the subject of the reversal decision, is before 2013. The date in the first judgment in paragraph 206 is 2008 and the date in the second judgment is 2013. The proceedings have been going on for more than 8 and 13 years, and it is highly probable that the case is dormant. There are many files in a similar situation.[44] Prolonged trials not only reduce the effectiveness of criminal proceedings, but also lead to violations of

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21st, 2021. In this decision, it is stated that "… 117. In conclusion, it should be decided that the right to be elected and to engage in political activities has been violated due to the failure to implement the violation decision of the Constitutional Court, which is also inconsistent with the guarantees provided by the right of access to the court." The violation decision on Sedat Haspolat's individual application 2020/22495, Constitutional Court, Division 1, June 15th, 2021. In this decision, it is stated that "… 59. [i]n the concrete case, the Constitutional Court evaluated whether there was a legal basis for the interference with the right to property in the light of the state of law, which is a constitutional principle, and concluded that the application of the obligation-bearing law, which came into force after the date of the transaction, deprived the intervention of any legal basis. It was found quite surprising that the Labor Court, whose task consisted of examining whether there was any other legal basis for the intervention in question, tried to refute the conclusion reached by the Constitutional Court by referring to the Court of Cassation decisions. It is clear that this effort of the Labor Court is incompatible with the principle of bindingness of the Constitutional Court's decisions. (For detailed explanations on this issue, see Kadri Enis Berberoğlu (3), B. No: 2020/32949, 21/1/2021, §§ 82-100.)"

[43] Although it is observed that there is an evolution from gross fault to fault in the case-law of the Council of State, strict liability is not accepted. Akgül Aydın, İdarenin Sağlık Hizmetlerinden Doğan Tazmin Sorumluluğu ve Danıştayın Yeni Yaklaşımı [Responsibility for Compensation of the Administration arising from Health Services and the New Approach of the Council of State], Gazi Üniversitesi Hukuk Fakültesi Dergisi V. XX, Y. 2016, N. 1.

[44] The extremely long duration of criminal proceedings is evident from many decisions. The fate of these files cannot be determined by us, but it is highly probable that they were dropped due to the statute of limitations. Decisions E:2019/10051 K: 2021/5532, E:2020/10537 K:2021/5360, E:2021/461 K:2021/3368, E:2019/8075 K:2020/2909, E:2019/5235 K:2020/1973, E:2019/13238 K:2020/234, 12th Criminal Chamber of the Court of Cassation (Annexes 9-14)

the right to a fair trial for the defendants. On the other hand, criminal liability is even more limited for doctors who are not public officials. These people cannot be prosecuted for malpractice or extortion.[45] It can be said that criminal proceedings are not effective and therefore do not fully meet the standards of the European Court of Human Rights. As the judgments of the Court of Cassation on civil cases have been evaluated in paragraphs 22 and 23 above, these case-laws will not be re-presented here. It can be said that the approach of the Court of Cassation to civil lawsuits regarding claims of medical negligence is also not effective and in this respect, it does not fully meet the standards of the European Court of Human Rights.

3. Conclusions and Recommendations

30. There are serious problems with health services. In the light of the problems described above, the Life Memory Freedom Association kindly asks the Committee of Ministers to request the Turkish authorities to take the following measures:

- The improvements in the scope and capacity of medical services should continue.
- Data on access to health services, including geographic distribution, should be collected by authorities and shared.
- Statistical data on the geographical distribution of equipment and personnel should be shared.
- Access to health services should also be secured in underdeveloped regions of the country.
- Problems related to the access of discriminated groups to health services should be resolved.
- Maternal and neonatal health services should be improved.
- Emergency health services should be developed.
- Patient transport procedures and coordination should be improved.
- Measures should be taken to end prevent HIV from being transmitted by blood transfusions.
- All health needs of HIV-positive and AIDS patients should be met free of charge, and regulations that protect the human rights of these people should be made.
- Data on the medical negligence should be shared with the public.

31. There are serious problems with legal experts. In this respect, the Life Memory Freedom Association kindly asks the Committee of Ministers to request the Turkish authorities to take the following measures:

- The number of experts and the quality of experts should be increased.
- The capacity of the Forensic Medicine Institute should be improved.
- The number of specialized boards, specialized offices and personnel of the Forensic Medicine Institute should be increased.
- The Law on the Forensic Medicine Institute should be revised.
- The matters related to medical negligence should be prioritized in the Forensic Medicine Institute.

[45] Decision E:2021/1364 K:2021/5173 12th Criminal Chamber of the Court of Cassation (Annex 15), Decision E:2017/10551 K:2021/177 12th Criminal Chamber of the Court of Cassation (Annex 16), Decision E:2019/13900 K:2020/5228 12th Criminal Chamber of the Court of Cassation (Annex 17).

- The quality of medical reports should be improved.
- Statistics on the number of times a report is received for a case and on the report preparation times should be shared.

32. With regard to the ongoing serious problems with disciplinary and criminal investigations related to allegations of medical negligence, the Life Memory Freedom Association kindly asks the Committee of Ministers to request the Turkish authorities to take the following measures:

- The public should be informed about disciplinary and criminal investigations related to allegations of medical negligence.
- Effective and rapid processes should be implemented so that disciplinary and criminal investigations are not closed due to statute of limitations.
- Disciplinary and criminal investigations should be examined within the scope of individual application in terms of violation of Article 2, material or procedural aspect.

33. As regards procedural obligations, we respectfully request the Committee of Ministers to continue supervision of this group of cases under enhanced supervision track (given the length of time which passed since the judgments became final).

Judicial and human rights reforms should not remain on paper; they should actually be implemented.

DH-DD(2021)1294: Communication from an NGO in Oyal v. Turkey & reply from the authorities.
Document distributed under the sole responsibility of its author, without prejudice
to the legal or political position of the Committee of Ministers.

Annexes

1. Decision E:2021/465 K:2021/4099 12th Criminal Chamber of the Court of Cassation
2. Decision E:2020/2146 K:2020/5574 12th Criminal Chamber of the Court of Cassation
3. Decision E:2020/1978 K:2020/5193 12th Criminal Chamber of the Court of Cassation
4. Decision E:2018/800 K:2019/4791 12th Criminal Chamber of the Court of Cassation
5. Decision E:2018/5197 K:2018/8786 12th Criminal Chamber of the Court of Cassation
6. Decision E:2016/7484 K:2016/12055 12th Criminal Chamber of the Court of Cassation
7. Decision E:2015/3962 K:2015/8623 12th Criminal Chamber of the Court of Cassation
8. Decision E:2012/20408 K:2012/19875 12th Criminal Chamber of the Court of Cassation
9. Decision E:2019/10051 K: 2021/5532, 12th Criminal Chamber of the Court of Cassation
10. Decision E:2020/10537 K:2021/5360, 12th Criminal Chamber of the Court of Cassation
11. Decision E:2021/461 K:2021/3368, 12th Criminal Chamber of the Court of Cassation
12. Decision E:2019/8075 K:2020/2909, 12th Criminal Chamber of the Court of Cassation
13. Decision E:2019/5235 K:2020/1973, 12th Criminal Chamber of the Court of Cassation
14. Decision E:2019/13238 K:2020/234, 12th Criminal Chamber of the Court of Cassation
15. Decision E:2021/1364 K:2021/5173 12th Criminal Chamber of the Court of Cassation
16. Decision E:2017/10551 K:2021/177 12th Criminal Chamber of the Court of Cassation
17. Decision E:2019/13900 K:2020/5228 12th Criminal Chamber of the Court of Cassation

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DGI
30 NOV. 2021
SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Permanent Representation
of Turkey
to the Council of Europe

Strasbourg, 30 November 2021

2021/33766324/33583078
Oyal Group of Cases (4864/05) v. Turkey

Ms Ovey,

I enclose herewith the Government's Submission in response to the communication from the Life Memory Freedom Association concerning the execution of the above-mentioned judgments.

Please accept, Ms Ovey, the assurances of my high consideration.

Çağla Pınar TANSU SEÇKİN
Co-Agent of the Government of the Republic of Turkey
before the ECtHR
Deputy to the Permanent Representative

Enc.: As stated

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DGI
30 NOV. 2021
SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Ankara, November 2021

THE GOVERNMENT'S SUBMISSION IN RESPONSE TO THE COMMUNICATION FROM THE LIFE MEMORY FREEDOM ASSOCIATION DATED 29 NOVEMBER 2021

Oyal Group of Cases (4864/05)

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1. The Turkish Authorities would like to make the following explanations in response to the communication of the Life Memory Freedom Association dated 29 November 2021 in the case of *Oyal* (4864/05).

2. The Turkish authorities would like to mention that detailed information about this group of cases have submitted in the action report dated 15 November 2021. The Turkish authorities reiterate these explanations in this regard.

3. In this communication, there is a claim that there is no sufficient statistical data on healthcare services and the capacity of the health care services may differ depending on the geographical position of a region. The other claim is that although there is significant progress in maternal and new-born health, there are three times differences with developed countries and the problems related to the overall capacity of intensive care and neonatal units persists.

4. The statistics provided in the action report illustrate the fact that there have been significant infrastructural developments. It is also noteworthy to remind here that the Committee of Ministers had already "noted with satisfaction the large number of measures taken with a view to increasing the quality of health care services in state-run hospitals" in 2016 in its 1259th meeting.

5. The claims about the Şentürk case, the Governmnet would like to state that this case took place in 2000. In the said judgment the Court crtisized the fact that applicant's next of kin had not been admitted to the emergency unit for not having paid the hospital fees. The submission therefore seems to be irrelavant with the findings of the Court. Against this background, the improvements in the health care system and the legislative amendments after this date brings the obligation to admit emergency patients to the hospitals regardless of their status of social security or payment of any fee. Furthermore, there exists an administrative complaint mechanism to complain against any possible refusal or any other wrongdoing by the health-care providers. According to the statistics, this mechanism is widely used and the decisions finding a violation suggest that it is effective.

6. Despite to the claim about the coordination between hospitals, the Government would like to indicate that the Hospital Coordination System became operational in 2018, through which the Ministry of Health and 112 Command and Control Centres (KKM) have been monitoring the occupancy status of the beds in public, private and university hospitals, as well as incubator and ventilator information.

7. The Regulation of the Ministry of Health on Ambulance Services dated 7 December 2006 specifies different types of ambulances used for different purposes. Article 7 provides that there shall be at least one medical staff member in addition to the driver in an ambulance used for patient transfers. A team consisting of at least three staff members works in the immediate aid ambulances. The team includes at least one doctor or one paramedic or emergency medical technician who completed his/her module training determined by the Ministry of Health along with another medical staff member and a driver.

8. The measures, with the use of technology as well, ensure the coordination between hospitals in order to find an available place for the patients who need to be transferred from one hospital to another. Furthermore, the regulation in force requires the presence of medical staff in ambulances.

9. In the communication, it refers to a report numbers about the situation of AIDS in Turkey and indicates that 7.518 out of 21.500 patients are infected with blood transfusion. However, this information is false. The report indicates that only 1 % of the patients are possibly to have been infected with a blood transfusion (The data covers the years between 1985 and 2018). The Government would like to indicate that this is misleading information.

10. About the individual measures of the Oyal case, the Government would like to state that the detailed information submitted in the action report. The Government submitted that a decision was taken by the Social Security Institution in 2012. Pursuant to this decision, it was decided that all medical expenses of the applicant in Oyal would be covered by the State, and that the same practice would be followed in similar matters from that moment. Finally, HIV treatment today is completely free of charge within the scope of social security in Turkey. No fees are required for examinations, tests and medicines. For those who do not yet have social security, all treatment can be accessed free of charge by being covered by General Health Insurance.

11. There are some cases which includes the violation of informing the patients of the medical treatment. Despite the claims, the general measures submitted in the action report is enough. The incidents in the cases took place before the several capacity building activities and improvements carried out in Turkish health system as comprehensively explained in the

action report. The legislation was amended to strengthen the patient's right to be informed and relevant mechanisms to bring complaints against any misconduct have been established.

12. In the communication there is a claim that there are still problems in the quality of reports and delays in their submission. The action report included a series of reforms in the expert system both structural and legislative.

Conclusion

13. The Turkish authorities kindly ask that the information submitted here and the action report is considered during the supervision process.