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THE IMPACT OF THE CASE LAW OF THE CONSTITUTIONAL COURT OF TÜRKİYE ON THE REPUBLIC OF TÜRKİYE'S COMPLIANCE WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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A. INTRODUCTION

1. This Report assesses the effectiveness of the Constitutional Court of Türkiye ("the TCC") by evaluating how its case law affects the overall legislative and procedural landscape in terms of the Republic of Türkiye's obligations under the European Convention on Human Rights ("the ECHR") and implementation of the ECHR's subsidiarity principle.

2. The Report first gives some background concerning the TCC and its handling of cases that are relevant for the securing of rights and freedoms guaranteed by the ECHR.

3. It then outline's the ECHR's subsidiarity principle and what this means for the role to be played by institutions such as the TCC in the implementation of the ECHR.

4. This is followed by an examination of the assessment made by the European Court of Human Rights ("the ECtHR") of the contribution, whether positive or negative, made by rulings of the TCC when considering applications alleging violations of the ECHR. In particular, it considers the extent to which the rulings of the TCC are considered by the ECtHR to adequately reflect the latter's understanding as to how rights and freedoms under the ECHR should be interpreted and applied.

5. The Report then makes some observations based on a review of selected TCC decisions and judgments, most of which have not been the subject of rulings by the ECtHR, regarding the approach of the former to taking account of the latter, as well as some other issues relevant to the impact of the rulings of the TCC in ensuring compliance with obligations under the ECHR.

6. Thereafter the Report considers the extent to which rulings of the TCC are seen as having a role in the execution of judgments of the ECtHR in which violations of the ECHR have been found to have occurred.

7. In all these sections, consideration is given to the relationship between the TCC and other courts in the Republic of Türkiye, as well as with the executive branch of government, in ensuring the effective implementation of requirements under the ECHR, as elaborated in the case law of the ECtHR.

8. Having regard to the foregoing, the Report concludes with an indication as to how the authority and operation of the TCC might be enhanced so that it is better able to contribute to fulfilling the Republic of Türkiye's obligations under the ECHR.

9. The Report has been prepared by Mr Jeremy McBride[1] under the auspices of the Council of Europe's Project "Supporting the Effective Implementation of Turkish Constitutional judgments in the Field of Fundamental Rights.

10. Its preparation has benefited from the input of Professor Ulaş Karan.[2]

B. THE TCC[3]

11. This section considers the competence of the TCC, certain aspects of its organisation, workload and procedure, the publication of its rulings and the arrangements regarding the provision of remedies where it finds violations of the Constitution.

1. Competence

12. Provision is made for establishment and operation of the TCC in Articles 146-153 of the Constitution.

13. The powers conferred on the TCC include the examination of the constitutionality, in respect of both form and substance, of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of the Republic of Türkiye, and deciding on applications submitted to it by individuals ("individual applications").

14. This last power has existed only since 2012, with Article 148(3) now providing that:

> Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.

15. Thus, there is explicit authorisation for the TCC to take account of those rights and freedoms under the ECHR, and by implication the relevant judgments and decisions of the ECtHR, which are also guaranteed by the Constitution.

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[3] This section draws upon material Council of Europe, *Assessment Report of the Current System of Execution of Judgments of the Turkish Constitutional Court*, 2021 and statistical material published by the TCC.

16. In addition, Article 152 provides that:

> If a court hearing a case finds that the law or the presidential decree to be applied is unconstitutional, or if convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the trial court is not convinced of the seriousness of the claim of unconstitutionality, such a claim, together with the court judgment, shall be decided upon by the competent authority of appeal.

17. However, issues relating to fundamental rights and freedoms primarily come before the TCC through individual applications.

18. The ECtHR has generally taken a very positive view of the institution of the individual application procedure, as is clear from the following observations by it:

> The Court observes that it has already found in the *Uzun* decision (cited above) that the Turkish legislature has demonstrated its intention to entrust the Constitutional Court with jurisdiction to find violations of Convention provisions and with appropriate powers to provide redress for such violations (see *Uzun*, cited above, §§ 62-64). Furthermore, with regard to complaints under Article 5 of the Convention, in *Koçintar* (cited above) the Court considered the nature and effects of decisions delivered by the Constitutional Court in accordance with the Turkish Constitution. Article 153 § 1 of the Constitution provides that the Constitutional Court's judgments are "final". Moreover, as the Court noted in *Koçintar*, Article 153 § 6 provides that decisions of the Constitutional Court are binding on the legislative, executive and judicial organs (see, to similar effect, *Uzun*, cited above, § 66). In the Court's view, therefore, it is clear that the Constitutional Court forms an integral part of the judiciary within the constitutional structure of Turkey and that – as the Court has previously noted in *Koçintar*, and as the Government explicitly submitted before the Court in the present case – it plays an important role in protecting the right to liberty and security under Article 19 of the Constitution and Article 5 of the Convention by offering an effective remedy to individuals detained during criminal proceedings (see also *Mercan*, cited above, §§ 17-30).[4]

19. However, as will be seen,[5] the ability to submit an individual application is not always being regarded by the ECtHR as an effective remedy.

20. Article 153(6) of the Constitution provides that:

> Decisions of the Constitutional Court … shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies.

21. Apart from the Constitution, the activities of the TCC are governed by the Law on the Establishment and Rules of Procedure of the Constitutional Court ("the TCC Law").

[4] *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, at para. 138.
[5] See paras. 81 and 124 and fn. 55 below.

2. Organisation, workload and procedure

22. The TCC is comprised of fifteen judges and is supported by ?? rapporteurs and experts, organised in a number of internal structures devoted to matters including ones concerned with individual applications and the execution of judgments.

23. The volume of individual applications submitted to the TCC has increased every year since the institution of this procedure, rising from 1,342 in 2012 to 66, 121 in 2021. There does not seem to be any sign of the rate of increase slowing down as the TCC had already received 67, 395 individual applications in the first half of 2022.

24. The specific rate of adjudication of individual applications has varied from year to year. The overall rate of adjudication, i.e., for the total of all such applications submitted to the TCC, the rate is 74.7%. However, perhaps unsurprisingly given the number of individual applications in the first half of 2022, the rate of adjudication so far in that year is only 26%.

25. In order to submit an individual application, all available remedies must first have been exhausted and the other procedural conditions in the TCC Law in Articles 46-47 must also be satisfied.[6]

26. In addition, the TCC can:

> decide that applications which bear no importance as to the application and interpretation of the Constitution or regarding the definition of the borders of basic rights and freedoms and whereby the applicant has incurred no significant damages and the applications that are expressly bereft of any grounds are inadmissible.[7]

27. During the examination of the merits of an individual application, the TCC can issue interim measures in respect of measures "deemed essential for the basic rights of the applicant.[8]

28. Of those individual applications that have been adjudicated, some 86.2% were found to be inadmissible, with another 4.0% being rejected on administrative grounds and 0.5% being terminated in some other way. This leaves 9.0% of the individual applications in

[6] I.e., primarily that the applicant's current and personal right is directly affected, the information required for the petition of application, the payment of the fee and submission of the individual application within thirty days from the exhaustion of legal remedies. The requirement to exhaust all applicable judicial and administrative remedies is in Article 45.

[7] Article 48(2) of the TCC Law.

[8] Article 49(5) of the TCC Law; "In the event of a decision for such a measure, the decision regarding the merits shall be made latest within six months. Otherwise, the decision for the measure is automatically lifted".

which a violation has been found of at least one right under the Constitution and a further 0.3% of them in which no such violation is found.

3. Publication of rulings

29. All the judgments determining the merits of individual application are published on the website of the TCC,[9] as are some but certainly not all of decisions regarding admissibility.

30. This seems to be a consequence of giving priority to the specification in Article 50(3) of the TCC Law that decisions on the merits should be published on the website of the TCC over the stipulation in Article 153 of the Constitution that "Decisions of the Constitutional Court shall be published immediately in the Official Gazette", which makes no distinction as to the nature of the decision involved.

31. In practice, the publication of decisions other than those on the merits are regulated by the Internal Rules of the TCC, Article 81(4) and (5)5), which provides for this to occur in respect of those that are either of "principal significance from an admissibility point of view" or are determined by the Section President to "bear the quality of being pilot decisions made by the Section or bear principal significance in displaying case law".

32. This approach makes it very difficult to assess the extent to which the latter decisions are consistent with the approach considered appropriate by the ECtHR in interpreting the scope of rights and freedoms under the ECHR.

4. Remedies

33. Where a violation is found in respect of an individual application, the steps that should follow are governed by Article 50 of the TCC Law, which provides:

> (1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.
> (2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will

[9] https://www.anayasa.gov.tr/en/home-page/.

remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation.
(3) The decisions of the sections regarding the merits shall be notified to those concerned and the Ministry of Justice with the justifications thereof and they shall be published on the web page of the Court. Issues pertaining to which of such decisions are to be published in the Official Gazette are indicated in the Internal Regulation.
(4) Differences between the case-laws of commissions shall be settled by the sections to which they are attached; and the differences of case-laws between the sections shall be settled by the General Assembly. Other issues in relation thereto shall be regulated by an Internal Regulation.
(5) In the event of waiver from the case non-suit shall be decreed.

34. Thus, there are essentially four types of decisions taken where a violation of a right or freedom guaranteed by the Constitution has been found, namely,

- A copy is sent to the court whose judgment gave rise to the violation found for a retrial to eliminate the violation and its consequences;
- A certain amount of pecuniary and/or non-pecuniary compensation is determined where there is no legal interest in holding a retrial;
- A copy is sent to the relevant body for it to eliminate the violation and its consequences; and
- A lawsuit is to be filed in the general courts where the determination of the amount of compensation requires a more detailed examination.

35. In other words, in many cases the responsibility for remedying a violation of rights and freedoms under the Constitution, is passed to the body that brought it about rather than resting with the TCC.

36. The remedies in the vast majority of cases are awards of non-pecuniary compensation and re-trial.

37. Although there are instances of other specific remedies resulting from a finding of a violation – such as release of a detained person or execution of a judgment – these are not usually prescribed in decisions of the TCC.

38. Although the finding of a violation by the TCC is supposed to be binding, that does not seem to be the view of all criminal court judges and members of the Council of State and the Court of Cassation.[10]

[10] In Council of Europe, *Needs Assessment Report on the Individual Application to the Constitutional Court of Turkey*, it was stated that criminal court judges did not consider TCC judgments to be generally binding, while member of the Council of State stated that they only took them into account and members of the Court of Cassation regarded them as *inter partes.*

39. There is now a system within the TCC for monitoring the execution of its judgments but that does not lead to any further action being taken and the outcome of it is not published.

40. Although the volume of cases raising the same issue may lead the TCC to adopt a pilot judgment, there is no special arrangement in place whereby it will indicate that any systemic problem revealed by that judgment - such as the need for changes to judicial and administrative practice or to fill a legislative gap[11] – should be taken.

41. Rather, when transmitting the judgment to any public authority concerned, the TCC will ask it to examine whether the law or practice poses a structural problem and may indicate what action could eliminate such a problem.[12]

42. Moreover, in the case of a series of judgments constituting a structural problem, even that suggestion of reflection is not possible as the court to which the judgment is transmitted will only be concerned with the issue of retrying the specific case and not the general problem.

C. THE ECHR'S SUBSIDIARITY PRINCIPLE

43. Although specific reference to the subsidiarity principle in the ECHR was only introduced with the adoption of Protocol No. 15, it has long been recognised in the case law of the ECtHR as something guiding its role in determining the approach to interpreting and applying rights and freedoms alleged to have been violated in the applications submitted to it.

44. The relevance of subsidiarity for adjudication by the ECtHR was thus reaffirmed and underlined by the addition through Article 1 of Protocol No. 15 of the following recital to the ECHR's preamble:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

45. In the case law of the ECtHR, two aspects of the subsidiarity principle can be discerned.

[11] The invalidating of legislation contrary to the Constitution would have to take place in the procedure for constitutionality review rather than pursuant to an individual application.

[12] For an instance of the latter see *Y.T.*, no 2016/22418, 30 May 2019, at paras. 75-76. As to which, see further para. 151 below.

46. The first relates to the interpretation of domestic law and the assessment of the facts in a case.

47. As the Grand Chamber observed in *Mugemangango v. Belgium*:

> In accordance with the subsidiarity principle, it is not for the Court to take the place of the national authorities in interpreting domestic law or assessing the facts. In the specific context of electoral disputes, the Court is not required to determine whether the irregularities in the electoral process alleged by the parties amounted to breaches of the relevant domestic law (see *Namat Aliyev*, cited above, § 77). Nor is the Court in a position to assume a fact-finding role by attempting to determine whether the alleged irregularities took place and whether they were capable of influencing the outcome of the elections. Owing to the subsidiary nature of its role, the Court needs to be wary of assuming the function of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case.[13]

48. Secondly, and more pertinent for the purpose of the present Report, the ECtHR has emphasised that:

> its fundamentally subsidiary role in the Convention protection system has an impact on the scope of the margin of appreciation. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, *inter alia*, *M.A. v. Denmark* [GC], no. 6697/18, § 147, 9 July 2021; see also Protocol No. 15, which entered into force on 1 August 2021).[14]

49. Moreover, as the ECtHR has also frequently underlined:

> under the subsidiarity principle it falls first to the national authorities to provide redress for any violation of the Convention. In that regard, the question of whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *Karahalios v. Greece*, no. 62503/00, § 21, 11 December 2003, and *Malama v. Greece* (dec.), no. 43622/98, 25 November 1999).[15]

50. However, this primary role for national courts carries with it a significant responsibility for them, in that:

> the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention (see, in particular, the references to the Izmir and Brighton Conferences

[13] [GC], no. 310/15, 10 July 2020, at para. 71.
[14] *Thörn v. Sweden*, no. 24547/18, 1 September 2022, at para. 48.
[15] E.g., *Mansour v. Slovakia*, no. 60399/15, 21 November 2017, at para. 38.

and Declarations in *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., §§ 120-22, 12 October 2017).[16]

51. Moreover, the ECtHR has underlined that:

> As a corollary to the subsidiarity principle, where an applicant's pleas relate to the "rights and freedoms" guaranteed by the Convention, the courts are required to examine them with particular rigour and care (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 96, 28 June 2017). In the present case, the Court attaches importance to the fact that the Court of Cassation when examining the applicants' request for exemption did not address their argument based on the Convention, notably their express reliance on the Court's judgment in *Kreuz* (cited above) on excessive court fees.[17]

52. Furthermore, the ultimate responsibility for determining what is required to give full effect to the ECHR rests with the ECtHR.

53. Thus, as the Explanatory Report to Protocol No. 15 stated:

> The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level. … The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.[18]

54. For example, in discussing the approach required for determining the applicability of the exception to the right of appeal for offences of a "minor character" under Article 2(2) of Protocol No. 7, the subsidiary principle was seen by the ECtHR in *Saquetti Iglesias v. Spain*[19] to lead to the conclusion that the domestic authorities were responsible for assessing the proportionality and any especially serious consequences that a penalty might have in the light of a person's individual circumstances.

55. However, the ECtHR concluded that the exception could not be applicable in that case where there had been no assessment of the proportionality of the measure in issue and no consideration had been given to the applicant's individual circumstances or the documents and evidence which he had provided.

[16] *Grzęda v. Poland* [GC], no. 43572/18, 10 March 2022, at para. 324.
[17] *Nalbant and Others v. Turkey*, no. 59914/16, 3 May 2022, at para. 46.
[18] Paragraphs 8-9.
[19] No. 50514/13, 30 June 2020.

56. Thus, in discharging their role in implementing the rights and freedoms under the ECHR, national courts and authorities – even if better placed to judge the specific requirements in a particular case – must always do so in a manner that is compatible with the approach elaborated by the ECtHR.

57. This entails those courts and authorities not just being familiar with the case law of the ECtHR but also, more importantly, them having fully internalised its doctrines and methodology, so that these are then reflected in their own working practices, reasoning and decisions.

D. VIEW TAKEN OF TCC RULINGS IN ADJUDICATION BY THE ECtHR

58. There are many cases in which the ECtHR has had to consider the relevance of rulings by the TCC when determining whether there have been one or more violations of the ECHR.

59. Its consideration of those rulings has demonstrated significant variations in the approach of the TCC where an issue of applying a right or freedom under the ECHR could be involved, with this sometimes occurring even in the same case.

60. Thus, in some cases it is clear that the assessment of a situation by the TCC is the same as that of the ECtHR. Nonetheless, there have also been a significant number of cases where the approach taken by the TCC for the determination of individual application submitted to it has led to the ECtHR finding violations of the ECHR and some where the approach to compliance with the ECtHR's case law might be regarded as uneven.

61. In the discussion that follows, the cases cited are illustrative of these different aspects of the TCC's approach and not an exhaustive listing of all those relevant for a particular issue.

1. Clear consistency with ECHR requirements

62. Certainly, there have been cases where the ECtHR relied on the acknowledgement by the TCC of a factual situation that was material for its conclusion that there was a violation of the ECHR.[20]

[20] See, e.g. the TCC's acknowledgement of "the persisting problems of overcrowding and the lack of regular outdoor exercise at the Kumkapi Removal Centre", which was referred to in *G.B and Others v. Turkey*, no. 4633/15, 17 October 2019, at para,106.

63. There have also been cases where the ECtHR has endorsed the assessment of the TCC regarding the extent of a measure's compliance with the Constitution, treating this assessment as leading to the conclusion that the measure concerned was to be regarded as either being in compliance with standards required or limitations allowed by the ECHR[21] or amounting in substance to a violation of them[22].

64. In addition, the ECtHR has endorsed the conclusions reached by the TCC in one case concerning the victim status in an application to it[23] and in others that the circumstances amounted to a public emergency threatening the life of the nation as understood in the ECtHR's case law relating to Article 15 of the ECHR[24].

65. Moreover, the ECtHR, having regard to a variation made by the TCC to its case law concerning thresholds for election to parliamentary seats and the distribution of seats within provinces, concluded that it had – by exercising vigilance to prevent any excessive effects of the impugned electoral threshold by seeking the point of equilibrium between the principles of fair representation and governmental stability - provided a guarantee calculated to stop the threshold concerned impairing the essence of the right to free elections enshrined in Article 3 of Protocol No. 1.[25]

66. Furthermore, the ECtHR has shared the concern of the TCC in two cases about the preclusion of any judicial scrutiny of acts performed by the governor of a region subject to a state of emergency, in which the latter court said this could not be reconciled with the rule of law and was something inconceivable in countries run by democratic regimes and founded on freedom.[26]

67. However, although such acts were not amenable to constitutional review by the TCC, those that were the subject of the application to the ECtHR were regarded by it as not necessary in a democratic society and beyond the requirements of the legitimate aim pursued, thereby violating the right to freedom of expression under Article 10 of the ECHR.

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[21] See, e.g., *Bahaettin Uzan v. Turkey*, no. 30836/07, 24 November 2020 (concerning the interpretation of the constitutional principle of "natural judge"); *Leyla Şahin v. Turkey* [GC], no. 44774/98, 10 November 2005 (as regards proportionality in the application of the principle of secularism); and *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], no. 13 February 2003 (as regards the compatibility of a political party's policy with democracy).

[22] See, e.g., *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, concerning pre-trial detention in breach of Articles 19(3), 26 and 28 of the Constitution and thus of Articles 5(1) and 10 of the ECHR.

[23] *Cengiz and Others v. Turkey*, no. 48226/10, 1 December 2015.

[24] *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018 and *Alparslan Altan v. Turkey* v. Turkey, no. 12778/17, 16 April 2019.

[25] *Yumak and Sadak v. Turkey* [GC], no. 10226/03, 8 July 2008.

[26] *Çetin and Others v. Turkey*, no. 40153/98, 13 February 2003 and *Fevzi Saygılı v. Turkey*, no. 74243/01, 8 January 2008. The cases concerned a ban on the circulation and distribution of a newspaper.

68. Also, the ECtHR has referred to decisions adopted by the TCC following its previous rulings on the blocking of access to an entire website when finding in a subsequent case that not only was there initially no legal basis for a similar measure but that the measure ultimately relied upon was in conflict with the actual wording of Article 10(1) of the ECHR.[27]

69. The ECtHR has also cited a ruling of the TCC as having appropriately highlighted what action was necessary to give effect to the procedural obligation arising from Articles 2 and 3 of the ECHR.[28]

70. In another case, it applauded the approach of the TCC to the use of evidence obtained from searches deemed to be contrary to the relevant statutory provisions.[29]

71. In a third case, the ECtHR noted that TCC had not treated as decisive the signature of a suspect on a document according to which he had not asked to benefit from the assistance of a lawyer before giving statements to the police.[30] That approach was broadly in line with the case law of the ECtHR.

2. A more mixed picture

72. There have been cases where a finding by the TCC of certain legislative provisions to be void was part of the background to a ruling by the ECtHR that there was no violation of the ECHR in one case[31] but the existence of a violation in another one[32]. However, there were others where such a ruling came too late to preclude a finding of a violation in respect of some applicants.[33]

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[27] *Cengiz and Others v. Turkey*, no. 48226/10, 1 December 2015.

[28] Thus, in *Köse v. Turkey*, no. 15014/11, 18 December 2018, referring to the TCC's response to the suspending of a judgment in which some police officers had been found guilty of having injured certain of the applicants in the case before it, the ECtHR stated that "noting that the trial court had then suspended the pronouncement of its judgment, the Constitutional Court concluded that the suspended judgment could neither be regarded as a deterrent punishment for the police officers nor as adequate redress as regards the applicants' complaints of ill-treatment. It also concluded that the suspension of the pronouncement of the judgment had resulted in impunity and rendered the investigation ineffective because one of the important requirements of an effective investigation was to ensure that perpetrators of such offences were subjected to punishments which corresponded to the seriousness of their offences" (para. 20).

[29] *Budak v. Turkey*, no. 69762/12, 16 February 2021.

[30] See *Ruşen Bayar v. Turkey*, no. 25253/08, 19 February 2019.

[31] See, e.g., *Baş v. Turkey*, no. 66448/17, 3 March 2020 (as regards the alleged lack of independence and impartiality of magistrates' courts).

[32] *Kamoy Radyo Televizyon Yayıncılık ve Organizasyon A.Ş. v. Turkey*, no. 19965/06, 16 April 2019 (as regards a regulation rendering the protection of trademarks meaningless).

[33] See, e.g., *Evrenos Önen v. Turkey,* no. 29782/02, 15 February 2007 (as regards the absence of a public hearing during a prosecution); *Çakır and Others v. Turkey*, no. 25747/09, 4 June 2013 (as regards the need to pay fees in order to receive copies of judgments required for enforcement proceedings); *Çapın v. Turkey*, no. 44690/09, 15

73. Moreover, although there have been cases where the time taken by the TCC to deal with challenges to the legality of detention did not comply with the speediness requirement in Article 5(4), as elaborated in the case law of the ECtHR, this did not always lead to the latter finding a violation of the ECHR.

74. Rather, in some of them, the ECtHR, having regard to the new and complicated issues involved and the TCC's caseload following the declaration of a state of emergency, found that there was no violation of that provision of the ECHR.[34] In this connection, the deployment of resources to deal with the backlog of cases came also to be recognised as a factor in assessing the acceptability of the time taken to review the legality of detention.[35]

75. On the other hand, there have also been some cases with a similar duration, where the duration of the TCC's review of legality was considered to be too long.[36]

76. In the cases dealing with the duration of the review of legality, a derogation under Article 15 of the ECHR was not invoked or seen as potentially relevant.

77. However, while the ECtHR agreed with the reasoning in one case that the similar provision in Article 15 of the Constitution could afford a justification for the time taken to review the legality of a person's detention, it did not accept that the TCC was acting consistently with the ECHR in a subsequent case in which it had found that there was no reason to depart from its conclusions in the earlier case. This was because the TCC's approach was not consistent with that seen as appropriate under the ECtHR's case law regarding measures taken under a derogation over the course of an emergency.[37]

October 2019 (as regards time limits for paternity actions); *Semir Güzel v. Turkey*, no. 29483/09, 13 September 2016 (as regards a ban on the use by political parties of any language other than Turkish); and *Börekçioğulları (Çökmez) and Others v. Turkey*, no. 58650/00, 19 October 2006 (as regards the lapsing of the right to bring an action against the *de facto* occupation of property).

[34] See, e.g., *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018 and *Selahattin Demirtaş v. Turkey (No. 2)* [GC], no. 14305/17, 22 December 2020.

[35] See *Ahmet Hüsrev Altan v. Turkey***,** no. 13252/17, 13 April 2021, at para. 181.

[36] E.g., *Kavala v. Turkey*, no. 28749/18, 10 December 2019.

[37] This can be seen in the following observations in *Baş v. Turkey*, no. 66448/17, 3 March 2020: "224. However, the Court considers that the reasoning adopted by the Constitutional Court in the case of *Aydın Yavuz and Others* – which the Court itself has accepted – inevitably becomes less relevant with the passage of time, in view of the changing circumstances. While it is true that the difficulties with which the country, and specifically its judicial system, had to contend in the first few months after the coup attempt were such as to justify a derogation under Article 15 of the Convention, the same considerations have gradually become less forceful and relevant as the public emergency threatening the life of the nation, while still persisting, has declined in intensity. The exigency criterion must therefore be applied more stringently. 225. The Court notes that the provisions in issue – Article 6, paragraph 1 (ı), of Legislative Decree no. 667 and Article 3, paragraph 1 (ç), of Legislative Decree no. 668 – remained in force throughout the duration of the state of emergency, a period of about two years. The restrictions were not

78. The approach of the TCC to the award of compensation for violations of the various aspects of the right to liberty and security under Article 5 of the ECHR has not been seen to be at the same level of awards that would be made by the ECtHR.

79. At the same, some of those awards by the TCC, while lower than those of the ECtHR, have not been regarded by the latter as wholly disproportionate and so allegations that such awards were violations of Article 5(5) have been rejected as manifestly ill-founded.[38]

80. However, Article 5(5) of the ECHR has been found to have been violated where the TCC had rejected an application alleging that the right to liberty and security, as safeguarded by Article 19(3) of the Constitution, had been breached.[39]

81. Similarly, in another case the ECtHR considered the sums awarded by the TCC to a person who had been placed and retained in pre-trial detention in the absence of plausible reasons to suspect him of committing a criminal offence had been manifestly inadequate.[40] The ECtHR held therefore that the individual remedy before the TCC could not, in that case, amount to an effective remedy within the meaning of Article 5(5) of the ECHR.

82. Moreover, there have also been cases where the TCC only alluded to a possible problem that would raise an issue of compliance with the ECHR without actually dealing with the specifics of the situation before the ECtHR.[41]

83. Furthermore, there have also been cases where a ruling of the TCC that legislation was incompatible with a standard required by the Constitution, and in substance by the ECHR, was not sufficient to deal with all the problems of compliance with it.[42]

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eased during that period; legislation and practice have not evolved in the direction of increasing respect for individual liberty (see *Ireland v. the United Kingdom*, cited above, § 220)".

[38] See, e.g., *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018 and *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018.

[39] *Ahmet Hüsrev Altan v. Turkey***,** no. 13252/17, 13 April 2021, at para. 191.

[40] *İlker Deniz Yücel v. Turkey*, no. 27684/17, 25 January 2022.

[41] See, e.g. the ECtHR's observation in *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015 that "the highest Turkish court ruled on the issue of whether the appraisal system complied with the constitutional principle of the independence of the justice system in a general manner, without making a distinction between the duties of the bench, which consist in ruling on the merits of cases, and the military court's jurisdiction in the area of reviewing criminal investigations. Thus, the Constitutional Court did not specifically rule on this latter point" (para. 248).

[42] See, e.g., *İbrahim Gürkan v. Turkey***,** no. 10987/10, 3 July 2012 (as regards the independence and impartiality of military criminal courts).

3. More substantial problems of compliance with the ECtHR's case law

84. A particular matter of concern can be seen in the wide range of issues in which violations of the ECHR have been found following summary inadmissibility decisions by the TCC in respect of individual applications to it, thereby revealing significant shortcomings by it in giving effect to the ECtHR's case law.

85. In one of them, the TCC had done so without establishing the facts, which the ECtHR then undertook and found a violation of the ECHR.[43]

86. In another there had been a failure to conduct an analysis of the legal and factual issues in question.[44]

87. In a third, the ECtHR found a violation of the right under Article 6(1) of the ECHR to trial within a reasonable time despite the TCC having considered an individual application to it to be manifestly ill-founded.[45]

88. In a fourth, the ECtHR found a violation of the right to freedom of expression in respect of the refusal to provide a member of an NGO with an official copy of the minutes of a meeting of the Cultural and Natural Heritage Board concerning the conservation plans for an ancient site and the planned construction of a dam, notwithstanding that the case law had already established that there was a legitimate interest in having access to such a document.[46]

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[43] Thus, in *Boudraa v. Turkey*, no. 1009/16, 28 November 2017, it was stated that "in its decision, the Constitutional Court did not establish the facts surrounding the material conditions of the applicant's detention and confined its examination to the medical assistance provided to him while detained (…). In the absence of an assessment of the facts surrounding the applicant's detention conditions in the Constitutional Court's decision, the Court considers that it cannot take that decision as the starting point in its examination. The Court will therefore carry out its own assessment of the facts and examine the case in the light of the submissions made by the parties, although its task is not easy in the absence of the establishment of the facts surrounding the material conditions of the applicant's detention by the Constitutional Court" (para. 27) (cross-reference omitted).

[44] This was a source of much regret by the ECtHR in *Pişkin v. Turkey*, no. 33399/18, 15 December 2020; "As regards the Constitutional Court, the Court observes that the applicant lodged an individual appeal before that court, relying on the protection of his constitutional rights, in particular his right to a fair trial (see paragraph 29 above). There can be no doubt that, in the framework of the proceedings in question, the Constitutional Court could have played a fundamental role at the national level in protecting the right to a fair trial and remedying the breaches noted above, as is shown by the two recent judgments in cases similar to the present case" Para. 148). It went on to find that: "the conclusions set out in the judicial decisions given in the instant case do not demonstrate that the domestic courts conducted an in-depth, thorough examination of the applicant's arguments, that they based their reasoning on the evidence presented by the applicant and that they validly reasoned their dismissal of the latter's challenges" (para. 149).

[45] *Çevikel v. Turkey*, no. 23121/15, 23 May 2017.

[46] *Cangı v. Turkey*, no. 24973/15, 29 January 2019.

89. In a fifth, the ECtHR found a violation of Article 10 in respect of refusal to allow a detained lawyer access to the Internet sites of the ECtHR, the TCC or the Official Gazette when it had not been shown that this had been necessary, having regard to the legitimate aims of maintaining order and safety in the prison and preventing crime.[47]

90. Although the TCC had found the lawyer's individual application to be manifestly ill-founded, in the view of the ECtHR it had not been provided with sufficient explanations as to why his access to the sites concerned could not be considered as pertaining to his training and rehabilitation, for which prisoners' access to the Internet was authorised by the national legislation, nor on whether and why he ought to be considered as a prisoner posing a certain danger or belonging to an illegal organisation, in respect of whom Internet access could be restricted. Furthermore, there was no explanation as to why the contested measure had been necessary, having regard to the legitimate aims of maintaining order and safety in the prison and preventing crime. Thus, there was a complete failure to deal with the potential bases for imposing limits on the right under Article 10 of the ECHR.

91. A similar failure can be seen in a sixth decision, in which the TCC found manifestly ill-founded an application concerning criminal proceedings in respect of two posts shared on a Facebook account. The content of the posts comprised, among other things, a caricature and a photograph of the President of the Republic accompanied by satirical and critical comments concerning him.

92. However, as the ECtHR underlined, affording increased protection by means of a special law on insult would not, as a rule, be in keeping with the spirit of the ECHR and a State's interest in protecting the reputation of its head of State could not serve as justification for affording her/him privileged status or special protection vis-à-vis the right to convey information and opinions concerning him.[48]

93. A seventh such example concerns the dismissal of an application concerning access to a court being dismissed as manifestly ill-founded, with the TCC considering the applicant's grievances to be of a fourth-instance. However, following its case law, the ECtHR found the refusal of a request for exemption from court fees – the subject of the individual application breached the very essence of the applicant's right of access to a court under Article 6(1) of the ECHR because this had been without relevant and specific grounds, resulting in his claims being never examined by a court on the merits.[49]

[47] *Ramazan Demir v. Turkey*, no. 68550/17, 9 February 2021.
[48] *Vedat Şorli v. Turkey*, no. 42048/19, 19 October 2021.
[49] *Ersoy v. Turkey*, no. 13761/17, 14 December 2021.

94. A final example concerned an individual applications about the non-enforcement of an award by the Compensation Commission for excessive length of proceedings. These had been rejected by the TCC for non-exhaustion of domestic remedies on the basis that the applicants had not applied to the Commission before lodging their applications to it, despite them having already done so. Unsurprisingly, the ECtHR found a breach of Article 6(1) and Article 1 of Protocol No. 1 in respect of the non-enforcement of domestic decisions given in their favour.[50]

95. However, the problem of compliance with the requirements of the ECHR has not been limited to admissibility decisions.

96. Thus, there was a case where the TCC did not examine complaints about several persons' right to liberty and security either in its dismissal of their request for interim measures or at any other stage during the course of their detention, with its final ruling coming three and a half years after the application had been lodged, which simply recognised that they could now seek compensation for their unlawful detention. The handling of the case by the TCC was seen as problematic by the ECtHR not only because it did not comply with the particular expedition required for examining the lawfulness of detention of children but also because one of the periods of their detention was never subject to an effective judicial review.[51]

97. In another case, the TCC was found not to have examined the applicants' allegation that they had been subjected to ill-treatment while in police custody. Moreover, it had not given any explanation, on the one hand of the discrepancies between the various medical reports obtained at the beginning and at the end of police custody and on the other of the damage observed on the bodies of the applicants after the end of their police custody. As a result, the ECtHR found a violation of both the procedural and substantive obligations arising from the prohibition on ill-treatment under Article 3 of the ECHR.[52]

98. In yet another case, there was seen to be a failure to discharge the obligation to protect a person against sex-based discrimination, arising from the constituent document of a foundation allowing the male but not the female descendants of the founder to be paid sums from its surplus income. In finding a violation of the prohibition of discrimination under Article 14 of the ECHR taken together with Article 1 of Protocol No. 1, the ECtHR found that the approach taken by the TCC and other courts had been merely to establish and then apply the wishes of the founder, without seeking to examine them in the light of public-policy rules. In particular, no attempt had been made to assess whether the

[50] *Tetik and Others v. Turkey*, no. 25885/19, 15 March 2022.
[51] *G.B. and Others v. Turkey*, no. 4633/15, 17 October 2019.
[52] *Şorli v. Turkey*, no. 78727/16, 5 April 2022.

founder's wishes were compatible with the ECHR, the Constitution or the legislation, although the relevant provisions clearly raised an issue under the principle of non-discrimination and the principle of equality between men and women.[53]

99. Moreover, in a fourth case, the ECtHR considered that the TCC had not effectively taken into account, when considering the imposition of pre-trial detention, the fact that the person concerned was not only a member of parliament but also one of the leaders of the political opposition, whose performance of his parliamentary duties called for a high level of protection.[54] It also noted that it was only the dissenting opinion of the minority that had addressed the failure of the first instance courts to explain why the imposition of an alternative measure to detention would have been insufficient in the case.

100. Furthermore, in that case the ECtHR considered that the individual application mechanism before the TCC had not proven effective in respect of the complaints made regarding the material conditions of the detention of the persons concerned because, after their release for reasons unrelated to those conditions, all the TCC could do was recognise the inadequacy of those conditions retrospectively and award them damages compensation for the harm already sustained, or refer them to another remedy with the capacity to do the same. The TCC had chosen the latter option but neither one addressed the need - in respect of the prohibition on torture and inhuman or degrading treatment or punishment in Article 3 of the ECHR – for the establishment, over and above a compensatory remedy, an effective mechanism in order to put an end to the prohibited treatment rapidly.

101. As the ECtHR emphasised, in the absence of such a mechanism, the prospect of future compensation would legitimise particularly severe suffering in breach of this core provision of the ECHR and unacceptably weaken the legal obligation on the State to bring its standards of detention into line with its requirements.[55]

102. Also, in one case, the ECtHR considered that the TCC, in holding that a measure suspending the publication and distribution of two newspapers was compatible with the right to freedom of expression under the Constitution, had not addressed the legal issues addressed in a similar case in which it had found a violation of Article 10 of the ECHR.[56] The ECtHR considered that there were no particular circumstances in the latter case which would require it to depart from the conclusions drawn in the previous one.

[53] *Dimici v. Turkey*, no. 70133/16, 5 July 2022.
[54] *Selahattin Demirtaş v. Turkey (No. 2)* [GC], no. 14305/17, 22 December 2020. This led to a finding of a violation of Article 3 of Protocol No. 1.
[55] As a result, it was found that there had been a violation of the right to an effective remedy under Article 13, in conjunction with Article 3.
[56] *Turgay and Others v. Turkey*, no. 8306/08, 15 June 2010.

103. In another case, the ECtHR found certain shortcomings in the TCC's approach in its assessment of whether remarks by a politician about another politician were protected by the right to freedom of expression, despite it having recognised – in line with the case law under the ECHR - that the words and deeds of the latter to be subject to stringent scrutiny and that the case involved public figures.[57] In particular, it had treated the remarks as insults rather than political criticism and had highlighted the abstract nature of certain of the remarks without engaging in any-depth analysis as to whether they were made up of value judgments and had a sufficient factual basis.

104. Furthermore, the ECtHR considered that the TCC, in rejecting a complaint about a breach of the right to protection of the reputation of a member of the armed forces on account of a series of articles published in newspapers accusing him of involvement in an action plan aimed at creating conditions favourable to the overthrow of the government, had wrongly considered that the courts below had carried out the balancing exercise required between that right on the one hand and freedom of press on the other.

105. In the ECtHR's view, following its case law, the content of the articles had been incompatible with the standards of responsible journalism and insufficient consideration to the seriousness of the breach of the right to protection of reputation resulting from the publication of allegations, resulting in a violation of the right to respect for private life under Article 8 of the ECHR.[58]

106. In yet another case, the ECtHR observed that the TCC had adopted a broad interpretation of offences such that, contrary to the right to freedom of expression under Article 10 of the ECHR, the TCC had adopted a broad interpretation of certain offences so that political statements in which the applicant had expressed his opposition to certain government policies or merely mentioned that he had taken part in the congress of a lawful organisation were held to be sufficient to constitute acts capable of establishing an active link between him and an armed organisation.[59]

107. In at least one instance, the ECtHR has also seen the view of the minority rather the majority of judges of the TCC as being in line with the approach considered applicable to the application of the right to freedom of thought, conscience and religion under Article 9 of the ECHR.[60]

[57] *Kılıçdaroğlu v. Turkey*, no. 16558/18, 27 October 2020.
[58] *Sağdıç v. Turkey*, no. 9142/16, 9 February 2021.
[59] *Selahattin Demirtaş v. Turkey (No. 2)* [GC], no. 14305/17, 22 December 2020.
[60] *Sinan Işık v. Turkey*, no. 21924/05, 2 February 2010, at para. 42, as regards whether disclosure of religion or belief would strike at the very substance of the freedom that Article 9 is designed to guarantee.

108. Moreover, there have been instances where the TCC's understanding of whether deprivation of liberty "in accordance with a procedure prescribed by law" and thus compatible with Article 5(1) of the ECHR departed significantly from the approach of the ECtHR by following an extensive interpretation of a concept in a provision that had been adopted by the Court of Cassation.[61]

109. In addition, the approach of the TCC to determining whether there was a "strong suspicion" that someone had committed an offence – which was a precondition for imposing pre-trial detention – has, in at least some instances, been far from according with the test of reasonable suspicion under Article 5(1)(c) of the ECHR.

110. For example, not only has the TCC referred to evidence that had not been before the court ordering detention at the material time but it also relied upon categories of evidence that could not, as required in the case law of the ECtHR, demonstrate a clear link with the offences for which the person concerned was being detained.[62]

111. Similarly, the use of social media regarding current political events – in particular the attempted coup – expressing value judgments or criticisms of various government actions, as well as the person's position on the legality and legitimacy of administrative or judicial measures taken against alleged members or followers of illegal organisations., which contained no incitement to commit terrorist offences, advocacy of the use of violence or encouragement of an uprising against the lawful authorities was considered by the ECtHR, unlike the TCC, as affording no plausible reason to suspect her of committing the offences of belonging to a terrorist organisation or of attempting to overthrow the government or of hindering its functioning.[63]

112. In addition, in both those cases, the failure to comply with the approach required by the ECHR was compounded by the apparent failure to recognise that the charges against the applicant concerned related mainly to the exercise of rights under the ECHR.

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[61] See *Alparslan Altan v. Turkey* v. Turkey, no. 12778/17, 16 April 2019, in which the ECtHR stated, with respect to the view that a suspicion of membership of a criminal organisation may be sufficient to characterise a case of discovery *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act, that: "this amounts to an extensive interpretation of the concept of discovery *in flagrante delicto*, expanding the scope of that concept so that judges suspected of belonging to a criminal association are deprived of the judicial protection afforded by Turkish law to members of the judiciary, including the applicant, a judge serving on the Constitutional Court and hence entitled to such protection under Law no. 6216. As a result, in circumstances such as those of the present case, this interpretation negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive" (para. 112).

[62] *Selahattin Demirtaş v. Turkey (No. 2)* [GC], no. 14305/17, 22 December 2020, at paras. 332-338.

[63] *Ilıcak v. Turkey (No.2)*, no. 1210/17, 14 December 2021.

113. There have also been a number of cases in which the upholding by the TCC of the dissolution of political parties did not comply with the need for this, pursuant to the right to freedom of association under Article 11 of the ECHR, to be based on relevant and sufficient circumstances and, in particular, concrete evidence that it would engage in activities inconsistent with that right.[64]

114. Moreover, there have also been cases where the approach of the TCC to issues involving expropriation have been seen by the ECtHR as problematic. They have included the award of compensation following expropriation that was not in line with that in the case law of the ECtHR [65] and the treatment of a case of expropriation as raising issues of access to court[66],

115. Also, an order by the TCC declaring that the parliamentary seats of persons of a political party as a secondary measure attending its decision to dissolve that party – which meant that they were prohibited from engaging in their political activities and could no longer fulfil their mandate – was regarded by the ECtHR as disproportionate and thus in violation of the right to free elections under Article 3 of Protocol No. 1 since the forfeiture of their seats was the consequence of the dissolution of the political party of which they were members and occurred regardless of their personal political activities.[67]

116. In a further case, the ECtHR found that the TCC had failed to develop consistent, clear and precise case law that would have enabled a political party to foresee how ambiguous constitutional and legislative provisions as to expenditure would be interpreted and enforced in practice and, as a result, regulate its conduct accordingly.[68] This meant that warning given to the political party and orders for confiscation of its assets" in the amounts corresponding to its unlawful expenditure for each respective year under review were interferences with the right to freedom of association under Article 11 of the ECHR that could not be regarded as prescribed by law.

117. It is also clear from cases coming before the ECtHR that, even if the TCC reaches a conclusion that is entirely in accordance with the requirements of the ECHR, this will not be sufficient to prevent a finding of a violation of the ECHR because of the subsequent

[64] See *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998, *Socialist Party and Others v. Turkey*, no. 21237/93, 25 May 1998, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, no. 23885/94, 8 December 1999, *Yazar and Others v. Turkey*, no. 22723/93, 9 April 2002 and *HADEP and Demir v. Turkey*, no. 28003/03, 14 December 2010.
[65] E.g., *Dökmeci v. Turkey*, no. 74155/14, 6 December 2016.
[66] *Musa Tarhan v. Turkey,* no. 12055/17, 23 October 2018.
[67] *Sadak and Others v. Turkey (No. 2)*, no. 25144/94, 11 June 2002.
[68] *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, 26 April 2016.

failure of other courts to comply with its rulings despite the stipulation in Article 153(6) of the Constitution that these are binding on all State authorities.[69]

4. Conclusion

118. From the foregoing it can be seen that a good number of the applications under the ECHR in respect of the Republic of Türkiye have been followed by judgments in which the approach to the interpretation and application of the guaranteed rights and freedoms is regarded by the ECtHR as fully concordant with that which it itself adopts.

119. There were some instances of divergence by the TCC from the ECtHR's approach which were only partial or could be regarded as admissible on account of certain exceptional circumstances.

120. Nonetheless, there have also been a significant number of cases in which the approach of the TCC was considered to have departed in a major way from the approach adopted by the ECtHR. Moreover, this has been so in respect of the application of a wide range of rights and freedoms.

121. Particular problems have arisen from the failure to engage in factual and legal analysis seen as relevant by the ECtHR and the readiness of the TCC to dismiss some individual applications to it in a summary manner.

122. However, even where consideration of applications has reached the merits stage, there are many instances of the assessment made by the TCC not reflecting the approach followed by the ECtHR in its case law. In this connection, a particular difficulty might be seen in the way, at times, the TCC resolves situations in which competing rights are engaged.

[69] See, e.g., *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, in which the TCC had transmitted its ruling that the applicant's pre-trial detention was contrary to Article 19(3) of the Constitution to the Istanbul 26th Assize Court so that it could take the necessary action. However, the latter court rejected the applicant's request for release on two grounds; "Firstly, it found that the Constitutional Court did not have jurisdiction to assess the evidence in the case file and that that court's judgment was therefore not in compliance with the law. Secondly, it found that ordering the applicant's immediate release on the basis of the Constitutional Court's judgment would run counter to the general principles of law, the independence of the judiciary, the principle that no authority could give instructions to the courts, and the right to a court. The 26th Assize Court, having regard to the evidence before it, the large scale of the attempted military coup, the risk of the applicant's absconding, the current state of the case file and the severity of the potential sentence in the event of a conviction, ordered the continuation of the applicant's pre-trial detention" (para. 139).

123. At the same time, there have been cases in which the concepts used by the TCC might seem similar to ones used by the ECtHR but the outcome in practice is not the same.

124. The cases reviewed also reveal that at times the individual application procedure does not satisfy the ECtHR's understanding of an effective remedy and that, notwithstanding the constitutional underpinning for that procedure, other courts in the Republic of Türkiye fail to respect the authority of the TCC.

E. SOME OBSERVATIONS CONCERNING TCC DECISIONS AND JUDGMENTS

125. The Report makes some observations based on a review of decisions and judgments published in the TCC's series *Selected Judgments* for the years 2018-2020 ("the series"), most of which have not been the subject of rulings by the ECtHR, regarding the approach of the former to taking account of the latter, as well as some other issues relevant to the impact of the rulings of the TCC in ensuring compliance with obligations under the ECHR.

126. It is recognised that the decisions and judgments included in this series are not entirely representative of the work of the TCC, since the vast majority of its rulings are inadmissibility ones. However, these decisions and judgments do give some indication of the approach of the TCC to dealing with the issues brought before it in individual applications, with the Introduction to each volume in the series underlining that those selected give an insight into the case law which it has established. Moreover, the majority of the judgments in the series are ones finding a violation of the Constitution, reflecting the outcome of most individual applications that do get to have a determination on their merits.

127. The first point to make is that, as might be expected from the great volume of individual applications to the TCC, there are too many that ought not to have been submitted to it.

128. This is a partly a consequence of some individual applications involving matters that should never have needed to be raised before the TCC, although that does not seem to be the evident from any of its rulings included in the series. However, it is the position regarding those rulings resulting from applications concerned with failures to execute judgments of the ECtHR[70] and those of the TCC itself,[71] as well as of lower court decisions which seemed oblivious to well-established requirements under the ECHR[72].

[70] *Abdullah Altun*, no. 2014/2894, 17 July 2018.
[71] *Şahin Alpay (2),* no. 2018/3007, 15 March 2018.
[72] *Hasan Balli*, no. 2017/21825, 2 June 2020 (as regards the absence of an opportunity to examine a key witness).

129. Secondly, the problems seen in some of rulings of the ECtHR discussed in the previous section regarding the assessment of the factual and legal issues in particular cases also seem evident in some decisions and judgments of the TCC included in the series.

130. Thus, there seems sometimes to have been a ready acceptance of rather thin evidential basis as justifying pre-trial detention by reference to a risk of flight in one case[73] and by reference to alleged membership of an armed terrorist organisation in another,[74] as well as a refusal to decide on the lawfulness of the performance of activities by the State's intelligence agencies[75]

131. At the same time, there are other cases where there was a detailed examination of contested factual situations[76] and a full engagement with the difficult legal issues involved[77].

132. Thirdly the structure of the analysis of the rulings shows - regardless of particular conclusions that one might have as to the outcome in particular cases - a similar methodology to that of the ECtHR and an implicit familiarity with the latter's case law. However, reference to that case law is only made exceptionally and then on matters of general principle rather the substantive issue before the TCC.[78]

133. There is, of course extensive reference to the TCC's own case law, which is entirely appropriate.

134. In general, there is, in principle, no need for there to be any specific reference to the case law of the ECtHR so long as the approach in a ruling is consistent with its requirements.

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[73] *Ayşe Nazlı Ilıcak*, no. 2016/24616, 3 May 2019 (the applicant was not at either of her homes but was found in the city where one of them was located. There was no specific evidence of preparation to flee but reliance on what were said to be the general conditions prevailing at the time of ordering her detention; para. 70).

[74] *Ayşe Nazlı Ilıcak*, no. 2016/24616, 3 May 2019 (reliance was placed on articles and social media posts in the person's capacity as a journalist, which – as has already been seen – was subsequently held by the ECtHR in *Ilıcak v. Turkey (No.2)*, no. 1210/17, 14 December 2021 to be in violation of Article 5 of the ECHR). Cf. the assessment of articles by a journalist in *İlker Deniz Yüzel*, no. 2017/16589, 28 May 2019.

[75] *Bestami E*roğlu, no. 2018/23077, 17 September 2020 (on account of a threat to national security being "imminent", para. 125.

[76] See, e.g., *Mahin Parjani and Others*, no. 2015/19219, 10 October 2019 (as regards the effectiveness of an investigation into a death) and *Esra Özkan Özakça*, no. 2017/35052, 8 October 2020 (as regards detention in the absence of strong suspicion of guilt.

[77] *Y.T.*, no 2016/22418, 30 May 2019 (concerning the effect of a legislative amendment on the ability to challenge a deportation decision giving rise to a risk of ill-treatment).

[78] See, e.g., *Fatih Saraman*, no. 2014/7256, 27 February 2019, at para. 65 (referring to ECtHR case law on judicial decisions meeting the lawfulness requirement) but *cf. Feride Kaya (2),* no. 2016/13985, 9 June 2020, at paras. 72 and (referring to ECtHR judgments on the substantive issues).

135. Indeed, in this connection, the TCC in one of the cases in the series has emphasised the importance of the ECtHR's case law, stating that it;

> avails itself of the ECHR's case-law to a significant extent notably in its examinations and assessments as to individual applications and pays regard to the latter's approach in determining the meaning and extent of the constitutional provisions on fundamental rights and freedoms. In this sense, the Court also endeavours not to lead to any contradiction with the ECHR's case-law as a result of its interpretation of fundamental rights and freedoms.[79]

136. However, there are at least two reasons why it would be useful to make specific reference to the case law of the ECtHR.

137. In the first place, that can have the value both of educating courts and public authorities as to wider context in which rights and freedoms are to be protected and of reinforcing the authority of a particular ruling by the TCC in that its implementation is required to give effect not only to constitutional requirements but also to international obligations undertaken by the Republic of Türkiye.

138. A second reason is that this can promote a useful dialogue between the TCC and the ECtHR as to the appropriate application of requirements under the ECHR in specific contexts.[80]

139. A possible instance of this might be seen in the case cited above,[81] where reference was made to the importance for the TCC of the ECtHR's rulings.

140. In that case, the TCC sought to explain why the detention of a judge was not contrary to domestic law and thus in violation of the right to personal liberty and security under Articles 13 and 19 of the Constitution despite the prior ruling of the ECtHR that reliance on an extensive interpretation by the TCC and other courts of the legal provision purportedly authorising such detention was not only problematic in terms of legal certainty but also manifestly unreasonable.[82]

141. It remains to be seen whether the ECtHR will accept that the TCC's reappraisal of the effect of provisions in the relevant legislation – which involves a fairly complex analysis of them – still does not amount to an extensive interpretation and thus incompatible with Article 5 of the ECHR.

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[79] *Yıldırım Turan*, no. 2017/10536, 4 June 2020, at para. 116.

[80] See, in this connection the reflections in both *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011 and *Hutchinson v. United Kingdom* [GC], no. 57592/08, 17 January 2017 of the ECtHR on its case law following the rulings of the highest court of the United Kingdom.

[81] I.e., *Yıldırım Turan*, no. 2017/10536, 4 June 2020.

[82] *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019. See further fn. 61 above.

142. However, this is beside the point that the ruling in this case does entail a serious engagement with the reasoning of the ECtHR and undertaking such an approach in respect of other cases – not only as regards the appropriate interpretation of legislation but also, for example, as regards factors relevant to the balancing of competing rights and interests – would underline for all concerned the shared responsibility of the two courts for application and interpretation of the ECHR in respect of the Republic of Türkiye.

143. A fourth, and connected, observation about the cases in the series is that the TCC in two of them anticipated the ECtHR in the approach required when applying the right to personal liberty and security in the context of an emergency held that:

> regardless of the reasons, the detention of the individuals in the absence of indication of guilt, even in a state of emergency, cannot be regarded as a measure "required by the exigencies of the situation,[83]

an approach that was endorsed by the ECtHR[84].

144. The readiness to interpret and apply the ECHR in circumstances that have yet to be addressed by the ECtHR is something that is entirely consistent with the subsidiarity principle. So long as a ruling is in line with the general approach followed by the ECtHR, there is no reason why national courts should not be the first to provide leadership as to how the ECHR is to be applied.

145. Finally, many of the cases in which a violation of the Constitution is found by the TCC in respect of decisions by inferior courts leads to it sending the case for retrial and/or awarding compensation.

146. However, although the specification of the need for a retrial will indicate that it is to be conducted for ensuring redress of the violation found and its consequences, entailing the issuing of a fresh decision, there is not always sufficient direction as to what that should entail.[85] As a result, that leaves it to the inferior court to interpret the TCC's ruling and possibly fail to give effect to it appropriately.

147. Moreover, although it was recognised in one case that the violation of the Constitution found in it

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[83] *Mehmet Hasan Altan (2*), no. 2016/23672, 11 January 2018, at para. 157.

[84] In *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018 and *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018.

[85] See, e.g., *Ebru Bilgin*, no. 2014/7998, 19 July 2018, para. 103 *Şehrivan Çoban*, no. 2017/22672, 6 February 2020, at para. 115.

> stemmed from a failure to ensure coherence and unity in the case-law through elimination of the difference of opinion among the chambers of the Court of Cassation, despite the considerable length of time elapsed since the emergence of that difference, in cases brought by individuals in similar circumstances on the basis of the same legal reason,[86]

the judgment only ordered that

> a copy of it be sent to the First Presidency Board of the Court of Cassation for the latter to become informed and assess whether there is a need for a decision on case-law unification in order to redress the consequences of the violation of the right to be tried on a fair and equitable basis,[87]

which is hardly a strong requirement that the source of the violation be eliminated.

148. This does not mean that there are not instances in which there is greater specificity as to the nature of the redress required.

149. Thus, there have been cases where it is clear indication that a person should be released where there was no basis for her/his detention after a first ruling of a violation in consequence of the absence of such a basis had not led to the applicant's release.[88]

150. There have also been instances in which the approach to a retrial should be handled.[89]

151. Moreover, there has been an instance where there was a clear indication as to how to remedy the violation ensuing from the adoption of a particular legislative provision that prevented challenges to deportations where there was a risk of ill-treatment in the receiving country.[90]

152. Thus, there is certainly more scope for more specific direction as to how violations of the Constitution should be remedied where this would entail more than the payment of compensation.

F. CONTRIBUTION TO EXECUTION OF ECtHR JUDGMENTS

153. A role has been ascribed to the TCC in the general measures to be taken for the execution of judgments in which the ECtHR has found one or more violations of the ECHR.

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[86] *Yasemin B*odur, no. 2017/29896, 25 December 2018, at para. 61.
[87] *Ibid*, point D.
[88] *Şahin Alpay (2*), no. 2018/3007, 15 March 2018.
[89] *Aylar Demir İşat*, no. 2018/24245, 8 October 2020.
[90] *Y.T.,* no. 2016/22418, 30 May 2019, at para. 76; namely, reinstatement of the provision that was previously in effect.

154. Indeed, the introduction of the right of individual application to the TCC has been cited amongst the general measures that have led to the supervision of the execution of a judgment by the Committee of Ministers being closed.[91]

155. This has also been the case where it had been submitted by the Republic of Türkiye that domestic case law, in particular that of the TCC, had changed in the light of judgments adopted by the ECtHR.[92]

156. In addition, reference has also been made to findings by the TCC that the provision in law was unconstitutional[93] or that that was its view of secondary legislation.[94]

157. It has also been so where a disputed decision of the TCC had been based on a provision in the Constitution that had subsequently been amended.[95]

158. Moreover, in at least one instance, the ruling that the application of a piece of legislation giving rise to a violation of the ECHR had been annulled before the ECtHR handed down its judgment.[96]

159. Furthermore, reliance has also been placed on subsequent judgments of the TCC in respect of cases whose execution is still under supervision.[97]

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[91] See, e.g., *Aksoy v. Turkey*, no. 21987/93 and *Ormanci and Others v. Turkey*, no. 43647/98, 21 December 2004.

[92] See, e.g., *Akkus v. Turkey*, no. 19263/92, 9 July 1997 and *Aka v. Turkey*, no. 19639/92, 23 March 1998.

[93] As in *I.R.S. and Others v. Turkey*, no. 26338/95 (a provision in the Law of Expropriation had been held by the TCC to be unconstitutional on the grounds that its application was not in conformity with the principle of the rule of law and violated ECHR requirements, with the result that it became null and void) and *Adem Arsalan v. Turkey*, no. 75836/01 (the similar holding regarding a provision that prevented the holding of hearings in cases in which small fines were adopted by "sentence orders" only on the basis of an examination of the file).

[94] As in *Erkol v. Turkey*, no. 50172/06, 19 April 2011 (concerning disciplinary regulations).

[95] As in *Sadak and Others v. Turkey (No.2),* no. 25144/94.

[96] *Kamoy Radyo Televizyon Yayincilik ve Organizasyon A.S. v. Turkey*, no. 19965/06. This concerned the retroactive application of the Patent Institute Act. The TCC had held in 2018 that this constituted a violation of the applicant's right to a fair trial and the judgment of the ECtHR finding a violation of Article 1 of Protocol No. 1 was handed down on 16 April 2019.

[97] See, e.g., *Bati and Others v. Turkey*, no. 33097/96 (citing ten TCC judgments delivered between 2016 and 2021 in which it had found procedural violations of Article 17 of the Constitution (prohibition of torture and ill-treatment) on account of ineffectiveness of the investigations or criminal proceedings) and *Akarsubasi v. Turkey*, no. 70396/11 (Thus, it was submitted that the TCC had maintained an approach to the interpretation and application of Law No. 2911 which is consistent with the principles outlined by the ECtHR. Examples given were: (a) holding that the mere lack of notification before a meeting does not justify an intervention by law enforcement officers, that acts of violence by a few participants are not sufficient to qualify the entire event as violent and that the authorities should tolerate peaceful gatherings and demonstrations; (b)finding convictions under Law No. 2911 for holding a demonstration without giving prior notification, along an unauthorised route, to violate the right to freedom of assembly, emphasising that the first instance court should have assessed whether the demonstration was violent before convicting the applicants; and (c) finding violations of the right to assembly and procedural and substantive

160. However, the fact that the emerging case law of TCC now seemed to be in line with ECHR standards has not been seen as sufficient where some issues in judgments of the ECtHR remained unresolved.[98]

161. In particular, there are cases where the problem still to be addressed is bringing the legislative framework fully into line with the case law of both the ECtHR and the TCC.[99]

162. In this connection, there was an indication to the Committee of Ministers that the TCC had decided to apply a pilot judgment procedure to a case pending before with the aim to identifying whether this case resulted from a structural problem in the application of this provision, with its judgment being transmitted to the Parliament to find a solution.[100]
163. In addition, there have been concerns expressed in the execution process for some cases still under supervision as to whether the TCC's case law was being followed by other courts.[101]

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violations of the prohibition of ill treatment arising from the disproportionate use of force by police to break up a demonstration and the failure of the prosecuting authorities to investigate properly).

[98] See, e.g., *Pakdemirli v. Turkey*, no. 35839/97 (concerning civil defamation proceedings) and *Cetinkaya v. Turkey*, no. 75569/01 (reference was made to two TCC judgments that had stressed the need to respect and tolerate peaceful demonstrations but the violation was not only based on the shortcomings of the legislative framework itself but also on the way it was interpreted by domestic courts which had failed to make an assessment of the peaceful nature of the applicant's behavior).

[99] See, e.g., *Ataman v. Turkey*, no. 74552/01, 5 December 2006 (as regards interventions by law enforcement officers to disperse demonstrations and meetings); *Artun and Guvener v. Turkey*, no. 75510/01 (a Rule 9(2) submission pointed out that there were no concrete signs of progress in terms of aligning the relevant legislative provisions with the TCC's findings in a pilot judgment) and *Altug Taner Akcam v. Turkey*, no. 27520/07 (as regards unjustified and disproportionate interferences with freedom of expression; The Deputies "welcomed the pilot judgment delivered in June 2021 by the Constitutional Court pointing out the deficiencies in the application of Article 220 § 6 of the Criminal Code and the need for its amendment; urged the authorities to adopt the necessary legislative solutions with respect to Article 220 §§ 6 and 7 of the Criminal Code to comply with the findings of the Constitutional Court and the European Court, without further delay; and to introduce concrete steps in the framework of the implementation of the Human Rights Action Plan of 2021 with regard to all of the above legislative amendments required for execution of the present groups of judgments").

[100] *Nedim Sener v. Turkey*, no. 38270/11 and *Oner and Turk v. Turkey*, no. 51962/12 (as regards Article 220(6) of the Criminal Code whereby anyone who commits a crime on behalf of an illegal organisation shall be sentenced as a member of that organization. In its judgment, the TCC held that this provision did not meet the requirements of the "quality of law" and found a violation of Article 34 of the Constitution (corresponding to the Article 11 of the Convention), which stemmed from a structural problem.

[101] See, e.g., *Opuz v. Turkey*, no. 33401/02 (as regards the response to domestic violence; "The Deputies … further recalled that at its 1331st meeting the Committee a) underlined the importance for the relatively new jurisprudence of the Constitutional Court to become well-established and followed at all levels of the judiciary, to help reverse the generalised and discriminatory pattern of judicial passivity identified by the European Court and to combat the impunity enjoyed by aggressors"); *Kaya and Seyhan v. Turkey*, no. 30946/04 (as regards disciplinary proceedings for taking part in a demonstration; "The recent decisions of domestic courts and the Constitutional Court demonstrate a positive trend in the manner the Convention and the Court's case-law are applied at domestic level. Despite the above mentioned measures however, and the positive trend observed in domestic court decisions, it appears that the European Court recently communicated three similar cases (*Yılmaz* (793/18) and *Zengin* (43178/18) in January

164. Also, there have been instances where execution remained under supervision for which it was pointed out in a Rule 9(2) submission that relevant individual applications were still pending before the TCC[102] and that magistrate courts systematically disregard the case law of the TCC[103].

165. Furthermore, reference has been made in respect of a case pending execution to the conferral on the TCC of the power to issue interim measures and its subsequent use.[104]

166. There have not generally been any significant issues involving the TCC as regards the adoption of individual measures required for the execution of a judgment of the ECtHR.

167. However, in respect of one case the Committee of Ministers has expressed concern about the time taken by the TCC to deal with a complaint connected to such a measure, as well as the scope of its ruling.[105]

168. There are also some cases in which information was awaited regarding the outcome of proceedings before the TCC in respect of them.[106]

2019 and *Kaymak and others* (62239/12) in November 2017"; and *Ozmen v. Turkey*, no. 28110/08 (as regards the return of wrongfully removed children to their habitual residence; "The Deputies … 4. while noting the continuing positive developments as regards the case-law of the Court of Cassation and the Constitutional Court, underlined that the average length of proceedings before first instance courts as indicated in the statistical data is still excessive, falling far short of the six-week time-limit for completion of proceedings set by the Hague Convention, and that the overall number of cases dismissed between 2012 and 2018 was higher than the number of cases accepted, which does not appear consistent with the Constitutional Court's ruling that such applications should be dismissed only exceptionally; 5. therefore urged the authorities to adopt measures to ensure that first-instance courts consistently apply the case law of the Constitutional Court in this field and the principles of the Hague Convention, including as regards the time-limit for completion of proceedings, for example by giving consideration to the creation of specialised chambers within the family courts").

[102] See, *Ulke v. Turkey*, no. 39437/98 (as regards compulsory military service in respect of pacifists and conscientious objectors).

[103] See *Ahmet Yildirim v. Turkey*, no. 3111/10 (as regards blocking access to internet sites).

[104] As in *Gulay Cetin v. Turkey*, no. 44084/10 (relating to the release of prisoners on health grounds).

[105] *Selahattin Demirtas v. Turkey (No. 2)*, no. 14305/17. This case concerns the arrest, pre-trial detention and criminal proceedings against the applicant, one of the leaders of the Peoples' Democratic Party (HDP, a pro-Kurdish opposition party) and a member of the National Assembly. The Deputies "regretted that no date has yet been indicated for the determination by the Constitutional Court of the applicant's complaint concerning his detention lodged on 7 November 2019; and urged the authorities to take all steps at their disposal to ensure that the Constitutional Court completes its examination of the applicant's complaint without further delay and in a manner compatible with the spirit and conclusions of the Court's judgment, including in particular its reasoning under Article 18 of the Convention".

[106] See, e.g., *Öner and Türk v. Turkey*, no. 51962/12 and *Artun and Güvener v. Turkey*, no. 75510/01.

169. Thus, it is clear that the development of the case law of the TCC can contribute to executing judgments of the ECtHR and thus give effect to the obligation to implement the ECHR.

170. However, where this is possible, there is a need for the response of the TCC to be prompt in those cases where the relevant issue is raised in an individual application submitted to it.

171. Moreover, any useful contribution to execution by the TCC will ultimately be dependent upon its rulings being appropriately acted upon and not disregarded by all the other courts in the Republic of Türkiye.

G. THE WAY FORWARD

172. As has been seen, the impact of the case law of the TCC on the Republic of Türkiye's compliance with the ECHR is uneven, with the ECtHR finding in many cases that the resolution of individual applications to the TCC have not precluded the need to find violations of rights and freedoms.

173. At the same time, there are also very many instances where the TCC has resolved such applications in a manner consistent with the approach of the ECtHR and even anticipated the way in which how the latter would deal with an issue.

174. Thus, it can justifiably be concluded that the case law of the TCC already plays a significant role in the implementation of the ECHR in the Republic of Türkiye

175. Nonetheless, there a number of ways in which the impact of the TCC in this regard could be enhanced.

176. In considering them, account must first be taken of the mounting volume of individual applications now being submitted to the TCC.

177. The unrelenting increase in the number of individual applications since this procedure was first introduced in 2012 is hardly desirable since it not only creates serious doubt as to the adequacy of efforts overall to implement the ECHR but it also is going to create obstacles for any efforts that might made to strengthen the contribution that the TCC is already making in this regard.

178. Certainly, the growth in individual applications experienced by the TCC can hardly be regarded as sustainable, given the ever-increasing resources that will be required to

process them if a significant backlog in their resolution is to be avoided, bringing with it an inevitable loss of confidence in securing redress for actual or perceived grievances.

179. Furthermore, any focus on improving the processing of cases by the TCC would be looking at the problem from the wrong end of the telescope; it is at the level of first instance and appellate courts, as well as of administrative decision-making, where the principal failings in giving effect to rights and freedoms under both the Constitution and the ECHR exist.

180. At the same time, three sets of steps to strengthen the impact that the TCC can have also has the potential to reduce the burden falling on it if those steps are particularly directed to changing the approach of the other courts with respect to giving effect to the rights and freedoms concerned. Indeed, it will only by tackling these failings that there can be any realistic expectation of reducing the burden currently falling on the TCC.

181. The steps that seem necessary concern the rulings of the TCC themselves, their execution and their dissemination.

182. As regards the rulings, the first measure that could usefully be adopted, if it does not already occur, is having an arrangement for systematic reflection within the TCC on those of its rulings that have subsequently been considered by the ECtHR to have contributed to the latter finding one or more violations of the ECHR. As has been seen, such findings have occurred particularly where factual and legal issues of significance for the application of the ECHR have not been addressed or where the approach to balancing competing rights and interests has not been in accordance with the approach seen as appropriate by the ECtHR.

183. Such reflection would be valuable not just to enable the TCC to see whether any adjustment is needed to its approach to the determination of individual applications, including whether there is a need for a more critical assessment of the evidence adduced in support of particular restrictions on rights and freedoms.

184. In addition, it would provide an opportunity to see whether the TCC has adequately explained its thinking in the rulings concerned and, if not, to consider how this might be improved in future ones. This could then be a precursor to engaging in dialogue with the ECtHR in subsequent cases so that the latter is in a much better position to appreciate the way in which the TCC has handled a particular matter coming before it.

185. There may also be scope for supporting both the reflection and the dialogue by taking full advantage of opportunities to obtain information from the ECtHR through the Superior Courts Network and to second TCC staff to ECtHR as temporary lawyers within

the Registry in order to enhance their familiarity with the methodology and reasoning being employed there.

186. Finally, as regards the TCC's rulings, it would be desirable for these to indicate, on a consistent basis, more precisely what is expected of courts and authorities where matters are remitted to them so that then (a) there would be no ambiguity as to what is required and (b) there could be no doubt about whether appropriate execution of the relevant ruling has actually occurred.

187. It does not seem that there is any legal obstacle to the TCC acting in this way but, insofar as there is, priority should be given to adopting any amendment that might be required so that an effective outcome can be achieved once a ruling has been adopted.

188. Moreover, in order to facilitate the specification of the action required for execution of a judgment, proposals regarding this should be required to be included in the individual applications submitted to the TCC and be subject to debate in the course of processing the application concerned.

189. The actual execution of a TCC judgment where the matter involved has been remitted to a court or authority is, and should be, something for which the court or authority concerned has the principal responsibility.

190. However, as has been seen, that does not always happen and this leads to the same matter coming again before the TCC.

191. In addition, the TCC has itself instituted an internal mechanism for monitoring the execution of its judgments. The goal should, of course, be to prevent repetitive examination of issues by the TCC. Nonetheless, it does not seem appropriate for the TCC – a judicial body - to be concerned with the issue of execution other than through receiving and recording the relevant information as to what has been done. A comparable arrangement in the ECHR system would result in the ECtHR both adjudicating cases and taking on the role currently played by the Committee of Ministers.

192. Rather, a failure to execute within a prescribed deadline – the setting of which may require legislation – should be recognised as a serious disciplinary offence and the Council of Judges and Prosecutors should be charged with overseeing compliance with obligations to execute and instituting the disciplinary process where this does not occur. This should not be a prolonged process, particularly if the TCC ruling is clear about what action is required for its execution.

193. The resistance of other courts might also be addressed through efforts being made by the TCC to explain its role to them and to provide guidance on the execution of its rulings.

194. However, that is unlikely to be effective in the absence of sustained leadership from court presidents regarding the fundamental obligation of all judges to comply with the Constitution and thus give effect to the TCC with its constitutional mandate to determine whether there has been a violation of the guaranteed rights and freedoms and the requirements of those provisions of the ECHR that come within their scope.

195. There is also a need for more comprehensive and more effective dissemination of the rulings of the TCC.

196. As part of this, all TCC rulings – i.e., all admissibility decisions and judgments on the merits - should be published on the website and should be searchable in a similar manner to the HUDOC database of the ECtHR.

197. Full dissemination in this way is likely to assist those prepare individual applicants, whether the applicants themselves or their lawyers, to appreciate whether there is a realistic prospect of success for a particular matter and thus ultimately lead to a diminution of applications that are unquestionably inadmissible.

198. That outcome might also be facilitated by the TCC providing concrete guidance for potential applicants as to issues to be considered in preparing an application, such as regarding the circumstances in which there is a need to pursue different available remedies and the considerations that are relevant for a conclusion that an application is to be manifestly ill-founded.

199. At the same time, the publication of all admissibility decisions will enable academic lawyers and other commentators to scrutinise and appraise the basis for particular rulings. This will undoubtedly lead to some being criticised but that has already been the effect of judgments of the ECtHR finding some such rulings to have given rise to violations of the ECHR. However, such criticism is healthy for an institution as it should prompt it to consider afresh whether its own conclusion is well-founded or a different approach might be more appropriate.

200. The formal dissemination of its rulings should be accompanied by efforts to promote greater public understanding as to the mission of the TCC. Such an understanding is important not only for an appreciation as to what can be legitimately expected of the TCC but also as to the need for other courts and public authorities to respect and implement those of its rulings that are directed to them. The latter can undoubtedly contribute to

increasing the pressure to give effect to rulings by the TCC in a timely and appropriate manner.

H. CONCLUSION

201. The introduction of the possibility of submitting individual applications to the TCC has undoubtedly led to some improvement in the effectiveness of implementation rights and freedoms guaranteed by both the Constitution and the ECHR.

202. However, as regards the ECHR, this mechanism and the case law generated through it has not meant – as the review of the judgments of the ECtHR concerning the Republic of Türkiye has shown – that there are no longer any problems regarding implementation of the ECHR.

203. Rather there remain a good number of instances in which the interpretation and application of rights and freedoms fails to reflect the approach of the ECtHR. This shortcoming is compounded by a problem in securing the execution of rulings of the TCC that do comply with not only the requirements of the ECHR but also those of the Constitution.

204. This situation clearly needs attention, particularly with the rising number of individual applications. Without such attention, there is a risk that the TCC – with an excessive caseload and problems in securing execution – will become the simulacrum of the ECtHR since the enjoyment of the guaranteed rights and freedoms will be less likely to be practical and effective.

205. The Report has identified a number of steps that could contribute to preventing such a scenario from being realised. It is imperative, therefore, that the taking of these steps be given the priority appropriate for rights and freedoms of such fundamental importance, thereby building on what has already been achieved by the TCC in safeguarding them.