ASSESSMENT OF THE EFFECTIVENESS OF ADMINISTRATIVE JUSTICE IN THE RIGHT TO ASSEMBLY IN TURKEY

A REVIEW OF ANNULMENT ACTION AGAINST BANS AND ACTION FOR DAMAGES AGAINST ILL-TREATMENT

D. ÇİĞDEM SEVER

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Equal Rights

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Introduction

Freedom of expression and the right to assembly are among the areas of freedoms that have narrowed down the most in recent years, through frequent and various violations touching upon the essence of the right as well the emergence of the disproportionate nature of these practices. Not only during the state of emergency between 2016 and 2018, but also after the lifting of the state of emergency, bans on and suspension of assemblies and demonstrations have become quite common. After the pandemic broke out, such bans could also be implemented as part of the anti-pandemic measures.

The data collected by the Association for Monitoring Equal Rights (AMER) between 2018-2021 from the websites of various governors' and district governors' offices, news reports and from freedom of information requests, the number of decisions to ban, either in the form of general or specific bans, on assemblies and demonstrations was 1,088. These decisions include 8 that are solely in practice, which qualify as de facto bans with no administrative action. While 684 of these decisions are general bans, 404 ban a certain activity or event exclusively. Some of these bans also impose a requirement for obtaining permission for these activities, which is unconstitutional. As a striking example, 90 decisions to ban were issued in Van, covering the entire province, for up to five and a half years, most of which were repeated at 15-day intervals. Although action was brought against some of them, none of the said bans was annulled.

Data compiled by AMER presented 710 decisions which contain general or special decisions to ban and are accessible on the websites of governors' offices. Although decisions for general bans are not available on some civil administration websites, applications for information have been made if a ban was featured on the news. To that end, 103 applications for information were made regarding different provinces and different periods. Although very similar data were requested in such applications, some replies provided information only about the decisions themselves while some others stated that these were previously announced decisions or were commu-

nicated to the relevant person(s). The rest were dismissed on the grounds that they were outside the scope of the right to information due to the need for additional or special research, while a few applications were not answered at all. From the responses given, it was found that a decision for a general ban could be issued in İzmir and Diyarbakır, although it was not announced to the public on any website.[1]

Considering that this period covered the COVID-19 pandemic, when it is evaluated whether there is a concentration in the decisions to ban after 2020, it should be noted that while 299 decisions were issued in 2019 before the pandemic, 368 and 307 decisions were accessible in 2020 and 2021 respectively. In this respect, it must be noted that the pandemic created a qualitative difference rather than a quantitative one. In some decisions, other general reasons such as pandemic and public order were cited, and it was observed that pandemic-related bans could spread to a wider geography through lockdowns. In the fight against the pandemic in Turkey, reliance on security-related provisions as a basis by governorates under the orders of Ministry of Interior rather than on the public health councils and the Ministry of Health pursuant to the Public Health Law exacerbated this tendency. The decisions of the Public Health Councils were cited in the justification of only 20 decisions. Although the data will be referenced later on, it should be noted here that the bans may intensify in certain provinces or on certain dates.

Despite such a large number of comprehensive administrative action, it is difficult to come across a stay of execution (SoE) or annulment decision in administrative proceedings. Similarly, the Constitutional Court (CC) has recently passed various judgments where it found a violation regarding cases where action for damages to compensate for damages incurred during response to demonstrations did not constitute an effective remedy. These violation judgments are related to cases such as those where the person attending an assembly is deemed negligent for doing so or where any negligence is not reviewed at all. Despite not commonly mentioned in these decisions, the Court issuing its judgment solely based on the statements of the administration is another apparent problem.

This report focuses on whether annulment action against the prohibition or suspension of assemblies and demonstrations as well as action for damages to seek compensation for damages incurred due to interventions in assemblies and demonstrations or a failure to provide security can be considered as an effective remedy under Article 13 of the ECHR and Article 40 of the Constitution. To that end, first of all, the legislation in Turkey, the remedies against such procedures and the data on decisions to ban covering the years 2018-2021 as collected by the Association for Monitoring Equal Rights were reviewed. Furthermore, interviews were made with lawyers who had knowledge of the relevant cases, and the case files they shared were reviewed.

This study does not primarily focus on matters such as the limits of the right to assembly in Turkey or the compliance of the relevant legislation with the constitution

1 The data were collected by the Association for Monitoring Equal Rights and this report does not include an analysis of such data. The data were only used to determine the general case with decisions to ban. Since a separate report is being prepared by AMER with data for the years 2018-2021, the details and analysis of the data are not included here. For the annual reports for 2016, 2017 and 2018 and the quarterly monitoring bulletins after 2017, see https://www.esithaklar.org/yayinlar/

and international conventions. To that end, legislative or practical problems such as legislation in Turkey being evaluated only in terms of compliance with the law, without considering the peaceful nature of said assembly as mentioned in ECHR, especially where interventions with assemblies take place – which was subject to various violation decisions – is not the focus of this study.

Accordingly, the report will rather discuss whether (I) judicial review is an effective remedy against general or specific bans or suspension decisions, which trigger less court action despite an increase in this practice in recent years, and (II) action for damages lawsuits as an effective remedy in damages arising from unjustified response to assemblies and demonstrations. Since the issue of effective judicial review regarding these two problems needs to be addressed from different perspectives, the study initially focuses on how to decide whether a remedy is effective or not, followed by a consideration of cases where the stay of execution mechanism may not be effective from a legislative point of view in court action against decisions to ban and suspend as well as the practical drawbacks and the relevant court decisions.

I. Scope of the Right to an Effective Remedy

The right to an effective remedy is enshrined in Article 13 of the European Convention on Human Rights (ECHR): "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Similarly, Article 40 of the Constitution titled "Protection of Fundamental Rights and Freedoms" sets forth the following: "Everyone whose constitutional rights and freedoms are violated has the right to request prompt access to the competent authorities." There is a key difference between the scope of application of these two articles, since the rights regulated in the Constitution are more comprehensive. However, in practice, these two articles exhibit the same scope, since the national courts do not conduct any review in terms of this article other than individual application, and the Constitutional Court considers individual applications to be limited only as a review of the common protection area of both the ECHR and the Constitution rather than of all the rights in the constitution. One of the common elements in both articles is that the right to an effective remedy is defined as a right related to an arguable claim regarding the violation of a particular right. In this respect, just like in Article 14 of the ECHR, this right will have to be asserted together with a claim that another right has been violated. From this point of view, Article 13 also guarantees that the rights set forth in the Convention are effectively protected and that, in the Court's words, the rights go beyond merely being an "illusion".

Although the article seems extremely short and clear, there are certain difficulties in determining the scope of the right in practice. One of the fundamental questions regarding the implementation of the article, particularly for the European Court of Human Rights (ECtHR), is the question of which remedies will be qualified as an effective remedy. While this problem is linked to Article 35, which is related to the Court's being a secondary remedy and includes the obligation to exhaust domestic remedies before applying to the Court, the article itself regulates the availability of effective remedies in national legal systems for the protection of human rights. Since the articles does not present any criterion for effectiveness, the case law of the Court plays a key role in determining which remedies are effective as a condition for this right to become functional. The Court accepts that administrative and judicial remedies may be regulated distinctly and that states have a margin of evaluation in this regard and does not stipulate an absolute delegation of the application to a specific branch of the judiciary or a specific court structure or a specific type of case. On the other hand, the Court emphasizes that the obligation to bring an effective remedy varies according to the content of the right relied upon. Accordingly, it can be stated that the Court places more responsibility on the states under Article 13 in terms of the alleged violation of Articles 2, 3, 5 and 6.

The Constitutional Court adopts a similar approach to the ECtHR. According to the Court, "The scope of the guarantees that individuals have in terms of the right to an effective remedy varies according to the nature of the right that is the subject of the alleged violation. (...) ...when the right subject to the alleged violation is the prohibition of "torture", "torment" or any punishment or treatment which is "incompatible with human dignity", as guaranteed in Article 17 of the Constitution, in order to be able to talk about

the effectiveness of the remedy that must be provided in relation to such rights pursuant to the absolute prohibition stipulated by the Constitution, this remedy must be a remedy which offers a reasonable compensation to prevent the violation and serves as a complementary element. Otherwise, the provision of only compensation for such violations will partially/implicitly legitimize what is done to people who have been subject to such treatment and will unacceptably reduce the obligation of the state to raise the conditions of detention to the same level of standards guaranteed by the Constitution".[2]

On the other hand, the ECtHR evaluates not only which article was violated, but also the context such as the nature of the dispute, the characteristics of the legal system and practice, and the importance of the consequences of the decision to be rendered at the end of the case. While evaluating effectiveness, it is considered whether the relevant administrative or judicial remedy is effective not only in theory but also in practice.[3]

Effective remedies may be in the form of preventing the violation from occurring or, after the violation has taken place, an adequate compensation (redress) mechanism for this violation or even an effective investigation into the matter. At this point, it should be noted that the Court may not consider compensation as an adequate redress per se, depending on the peculiarities of the case.

To assert the right to an effective remedy, there must first be an "arguable claim" that the rights protected by the Constitution/ECHR have been violated. On the other hand, the review in terms of the right to an effective remedy is not dependent on the condition that it has been decided beforehand that another Constitutional provision has been violated.[4]

As of 24 January 2022, the Constitutional Court has issued 93 judgments regarding the right to an effective remedy. 36 of these judgments found a violation. The subjects of these judgments on violation are as follows: (a) The legal remedies in the legislation against deportation orders are not effective (T*he legislation was later amended*), (b) There is no legal remedy against poor detention conditions, (c) Action for damages in cases of injury or death does not include an effective review, (d) Action for damages in cases with inadequate conditions at the detention facility is dismissed for lack of jurisdiction, (e) The compensation cases to be filed due to the interception of communication are dismissed on the grounds that they do not fall within the scope of the Code of Criminal Procedure, (f) Appeals against judgments blocking access do not stand any chance of success. Some of these judgments decided on a violation of the right to an effective remedy alongside a certain right. Yet there are also judgments where it is decided that only the effective remedy is violated.

The Constitutional Court states that the right to an effective remedy means "providing anyone who claims that any constitutional right of theirs has been violated with the opportunity to apply to reasonable and accessible administrative and judicial remedies that are suitable to prevent the occurrence or continuation of the violation or to eliminate its consequences so that they can have their claims reviewed in accor-

2 K *K.A.* [GC], App. No: 2014/13044, 11/11/2015, §71-72.
3 For instance, *Aksoy v. Turkey*, 21987/93, 18 December 1996, § 95.
4 *Abdullah Yaşa* [GC], App. No: 2015/12486, 5 November 2020, § 64.

dance with the nature of the right".[5] The right to an effective remedy should offer a chance of success not only theoretically but also practically. The Court notes that "... the administrative and judicial remedies that should have been exhausted should be accessible as well as capable of redress and, when exhausted, should give the applicant a reasonable chance of success in resolving their complaints. Therefore, it is not sufficient to include these remedies in the legislation alone, and they must be proven to be effective in practice or at least they must be proven to be ineffective".[6]

Practical effectiveness will be evaluated on a case-by-case basis. The Constitutional Court notes that "the fact that a remedy is effective both in legally and practically does not prevent the evaluation of whether there is an interference with the right to an effective remedy in terms of the present case".[7] In this respect, for instance, although action for damages is an effective remedy for the damages caused by the administration, the court's decision without conducting any review of negligence or the fact that it lacks a justification and review on the key issues affecting the merits of the decision may lead to a violation of the right to an effective remedy. On the other hand, it is possible to resort to the pilot judgment method[8] in case the remedy is not effective due to the legislation and to pass judgments that require wide-ranging or legislative changes regardless of the specifics of the case. The Constitutional Court judgment in the case of *Y.T.* against the deportation order is an important example in that it requires a legislative amendment.

In its judgment in the case of *Y.T.*, the Constitutional Court did not consider it sufficient to issue a stay of execution against the deportation order or to pass a quick judgment. The Court notes "The fact that the judicial bodies have the power and capacity to stay execution or the mechanisms to make urgent decisions are also not sufficient in terms of ensuring the guarantees within the scope of the right to an effective remedy. It seems impossible to provide an effective protection without the establishment of a legal infrastructure of a system which will ensure that these people can stay in the country and follow their cases during the litigation period - before they reach the court."[9] In the footsteps of the ECtHR case law, this judgment highlighted the absence of a mechanism to stop deportation proceedings during the litigation period. On the other hand, in its judgment in the case of *Senih* Özay regarding the lockdown imposed as part of the COVID-19 measures, the Court stated that the request for a stay of execution was effective. The Court initially found the following:

5 *Yusuf Ahmed Abdelazım Elsayad*, App. No: 2016/5604, 24 May 2018, §§ 59, 60; Özgür *Sağlam*, App. No: 2016/9076, 30 June 2021, § 62.
6 *Ramazan Aras*, App. No: 2012/239, 2 July 2013, §§ 28, 29.
7 *Yusuf Ahmed Abdelazım Elsayad*, App. No: 2016/5604, 24 May 2018, §§ 59-61.
8 This method is regulated in Article 75 of the Internal Regulations of the Constitutional Court: Pilot judgment procedure ARTICLE 75- (1) In the event that the Sections determine that an application stems from a structural problem and that this problem has led to other applications or that they anticipate that this will lead to new applications, they can implement the pilot judgment procedure. In this procedure, a pilot judgment shall be made by the Section in relation to the matter. Applications of similar nature shall be resolved by administrative offices within the framework of these principles. In the event that they are not resolved, they shall be reviewed and concluded collectively by the Court. (2) The Section can initiate the pilot judgment procedure *ex officio* or upon the request of the Ministry of Justice or the applicant. (3) The application selected for the pilot judgment practice shall be considered as part of the prioritized affairs on the agenda. (4) In its pilot judgment, the Section shall demonstrate the structural problem it has identified and the measures which need to be taken for its solution. (5) With the pilot judgment, the Section can postpone the review of similar applications which are related to the structural problem that is the subject of this judgment. The concerned shall be informed regarding the judgment on postponement. In the event that it deems this to be necessary, the Section can put on the agenda and conclude the applications it has postponed.
9 *Y.T.* [GC], App. No: 2016/22418, 30 May 2019.

> "...the only criterion of the effectiveness of a remedy is not its capacity to identify violations and offer redress. In addition, the remedy in question must present the potential to decide on the request of the person concerned at a reasonable speed in accordance with the sensitivity of the situation in the present case. Undoubtedly, how long the reasonable period will be is determined within the circumstances of each present case, taking into account the nature of the right that is the subject of the case. To that end, issuing a judgment after a period of time that would make it impossible to exercise the right or make the filing of the said action meaningless or render a possible annulment judgment inconclusive may lead to the ineffectiveness of the said mechanism."[10]

Following this description, the Court ruled that the remedies available in the present case were effective, setting forth the following justification:

> "It is clear that waiting for the administration to issue a defense statement or for the time granted to the administration for defense to expire will fairly prolong the process of adjudicating the stay of execution request. This may delay the examination of the legality of the decision regarding the lockdown as well as the adjudication of the request for a stay of execution. However, the applicant has the opportunity to request a shortening of the defense period and even a personal notification delivery by an officer. As a matter of fact, when Article 27 of the Law No. 2577 is observed, it is seen that the administrative court has the authority to shorten the defense period and to stay the execution of the administrative action temporarily until personal notification delivery by an officer and the defense of the administration is received or the time allocated to the administration expires. Therefore, it is also possible for the applicant to request a decision for the stay of execution without waiting for the defense of the administration, claiming that lockdown is one of the actions that will be exhausted once implemented. Accordingly, there are legal provisions that allow the suspension of the ban in an annulment action to be filed against the lockdown and enable a decision as quickly as the situation requires. To that end, it is possible for the relevant judicial bodies to conduct a legality review during the process of applying the ban via the aforementioned provisions. In the present case, no data that would lead to an opposite conclusion could be put forward by the applicant. There is nothing that requires the Constitutional Court to reach the conclusion that this remedy, which presents the capacity to make a decision at a reasonable speed theoretically, will not actually work effectively."

It should be noted that there are certain differences between the two judgments in terms of both the nature of the right and the effects of the interference with the right. Although the deportation order severely violates many rights, including the right to life, and it is very difficult/impossible to restore the former state with the overdue SoE judgment, which was made after deportation, the lockdown is an ongoing violation, and it is still possible to stop the violation even when an overdue judgment is issued. On the other hand, another key

10 *Senih* Özay, App. No: 2020/13969, 9 June 2020.

factor for the Constitutional Court to reach different conclusions is the difference in the process of reviewing the incident and what right was interfered with while making the SoE judgment. For instance, since the application of *Senih* Özay is related to the legality of a regulation, it is possible for the court to perform an illegality review without the defense of the administration, but a case-specific review must be made in the case of a deportation order, making it difficult to run such an illegality review without the defense of the administration. Particular emphasis should be placed on the fact that such elements should be considered while performing reviews in terms of the subject of the report.

One of the factors that should be taken into account while deciding whether the remedy is effective or whether the guarantees in the relevant legislation are sufficient is the balance between the number of cases and of judges within the judicial review mechanism. This issue has become a serious problem in terms of various aspects of the right to a fair trial in Turkey and exhibits a similar outlook in administrative justice as well. According to the judicial statistics for 2020, the number of case files (new and transferred) brought before the administrative courts in 2020 was 361,178.[11] According to the same set of statistics, the total number of case files per judge is 408. (p. 256) Moreover, since it is an exception to pass judgments with a single judge in administrative justice, it can be expected that the number of judgments signed by the judges will be three times as much. This should also be considered in reviewing an effective remedy, particularly for cases that require quick decisions.

Considering the ECtHR judgments, the standards developed by the ECtHR may differ depending on the right to be reviewed and the nature of the interference, as stated before, while reviewing the right to an effective remedy. Furthermore, if various international organizations, particularly the Council of Europe, have specific recommendations on substantive and procedural guarantees, these standards are also taken into account. While making its judgments on access-blocking as quoted in the judgment in the case of *Keskin Kalem and Others* or on reviewing deportation orders as stated in the *Y.T.* judgment, the Constitutional Court also considered the relevant recommendations and their compliance with the aforementioned guarantees in its effectiveness review.

The ECtHR judgments involving Turkey on a violation of Article 13 in conjunction with Article 11 were limited to two issues: The unavailability of judicial review as a remedy in the cases where a warning is issued as a penalty to those who attend an assembly upon a call by the trade union within the scope of freedom of association[12], and the decisions issued during the state of emergency not being subject to judicial review.[13] Since the former was eliminated through the 2010 Constitutional amendment and the latter through the annulment of the relevant article in the State of Emergency Law, the violations mentioned in these two decisions are no longer on the agenda. Three ECtHR judgments, which are not related to Turkey but are important for our subject, are instructive: (1) Bqczkowski and Others v. Poland (2007); (2) Alexeyev v. Russia (2010); (3) Lashmankin v. Russia (2017). These judgments will be discussed later in the evaluation of whether the remedies in Turkey are effective or not.

11 Ministry of Justice Judicial Statistics for 2020, p. 259. https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/22420211449082020H%C4%B0ZMETE%C3%96ZELK%C4%B0TAP.pdf

12 Karaçay (2007); Kaya and Seyhan (2009); Doğan Altun and Others (2015).

13 Metin Turan (2006)

II. Banning and Suspending Assemblies and Demonstrations in Turkey

a. Relevant Provisions and Practice

Article 34 of the 1982 Constitution as amended in 2001[14] reads as follows: "(1) Everyone has the right to organize unarmed and peaceful assemblies and demonstrations without prior permission. (2) The right of assembly may only be restricted by law for the purposes of national security, public order, prevention of crime, protection of public health and morals or the rights and freedoms of others. (3) The form, conditions and procedures to be applied in exercising the right to organize assemblies and demonstrations shall be prescribed in the law." As it can be understood from this article, the notification system rather than the permission system has been accepted as the law enforcement procedure in terms of assemblies and demonstrations in Turkey.

The law specifying how to exercise this right is the Law No. 2911 on Assemblies and Demonstrations.[15] Although a notification system has been adopted in the law in accordance with the Constitution, it is prescribed to establish various administrative actions to impose restrictions on assemblies and demonstrations, and it is possible to file administrative lawsuits against such actions. These are basically (a) actions regarding the determination of the venue and route of assemblies and demonstrations in provinces and districts, (b) decisions preventing the organization of assemblies for a certain period of time, (c) suspension and ban actions.

In the case that a state of emergency is declared, the State of Emergency Law cites "Prohibiting, suspending or requiring permission for assemblies and demonstrations to be held indoors and outdoors or determining, identifying and allocating venues and times where and when assemblies and demonstrations will be held; keeping any and all permitted assemblies under surveillance and watch and breaking them up if necessary" among the measures in Article 11(m) titled "Measures to Take Against Violent Acts". Provisions in Article 11(f) and Article 11(h) on prohibiting any and all audio broadcasts and announcements and prohibiting theatre plays and stage performances as well as movies in theaters could also be employed to ban such events in cases where a state of emergency is declared.

Article 15 of the Law No. 2911 on non-state of emergency periods stipulates that if multiple assemblies will be held on the same day within the borders of a province, the governor can suspend some of the assemblies only once and for a maximum of ten days if the governor deems that the security forces under their command and the other forces they

14 The article read as follows before the amendment in 2001: "Everyone has the right to organize unarmed and peaceful assemblies and demonstrations without prior permission. (2) In order to prevent disruption of the city order, the authorized administrative body can determine the venue and route where the demonstration will take place. (3) The form, conditions and procedures to be applied in exercising the right to organize assemblies and demonstrations shall be prescribed in the law. (4) The competent body indicated by the law can prohibit a certain assembly and demonstration or suspend it for a period not exceeding two months, in the case that events that will seriously disturb the public order or violate the national security requirements or acts to destroy the main characteristics of the Republic are highly likely to be committed. In cases where the law stipulates a ban on all assemblies and demonstrations in districts of a province based on the same reasons, this period cannot exceed three months. (5) Associations, foundations, trade unions and public professional organizations cannot organize assemblies and demonstrations other than those regarding their own subject matters and purposes".

15 Date adopted: 6.10.1983, OG: 8.10.1983-18185.

can deploy if needed are not sufficient to ensure that these assemblies are held safely. Furthermore, Article 16 allows the suspension of an assembly by the Ministry of Interior in case a notification is given to hold an assembly in multiple provinces on the same day.[16] Article 17 is more commonly employed and also allows suspensions or bans. Accordingly, "The regional governor, governor or district governor can postpone *a certain assembly* for a period not exceeding one month for purposes related to national security, public order, prevention of crime, protection of public health and morals or the rights and freedoms of others or can prohibit such assembly if there is a clear and imminent threat that a crime will be committed." A justified judgments for suspension or ban shall be communicated to the chairperson of the organizing committee or, if not present, to one of the members of the committee in writing at least twenty-four hours before the start of the meeting. Article 19 regulates that governors can prohibit all assemblies for a period not exceeding one month in one or more districts of a province for purposes related to national security, public order, prevention of crime, protection of public health and morals or the rights and freedoms of others *and* if there is a clear and imminent threat that a crime will be committed. In particular, problems such as the wide scope of open-ended concepts (public order, protection of the rights and freedoms of others, etc.) included in the provision regarding the power of suspension, and the ability to make decisions based on the enumeration of the reasons stated in the law despite the need for a justified judgment make it significantly difficult to exercise the right. There are even examples in judgments where exceptions are determined indefinitely. For instance, in the decision announced by Kahramanmaraş Governorship on 14 December 2021,[17] the programs to be held by political parties and "activities that are in the public interest" are excluded after the reasons in the law are listed. In particular, it should be noted that 19 December marks the anniversary of the Maraş Massacre when the victims are commemorated, and a decision to ban was made only on the same dates in 2020[18] and 2018. The decision to ban in 2021 was not repeated immediately after that date. A similar practice has also been observed in Urfa, specific to the date when the Suruç victims were commemorated.[19]

Another striking element in the decisions to ban is that certain events are made subject to permission in violation of the Constitution, although there is no declaration of a state of emergency. For example, according to a statement by the Governor's Office in Van, the following expressions were issued after demonstrations and outdoor assemblies were banned: "Pursuant to the provisions of Article 11(a) and 11(c) of the Provincial Administration Law No. 5442, any press statements, sit-ins and surveys, setting up/opening of tents and booths, organizing petition campaigns, distribution of leaflets and flyers in our province HAS BEEN MADE SUBJECT TO THE PERMISSION OF THE LOCAL CIVIL AUHORITY between the specified dates".[20] This decision, an example of which can be found in Batman and other provinces as well, is a power that is not included in the Law No. 2911 and can only be exercised in cases of emergency. Therefore, although

16 Although the text of the article still bears the expression 'regional governor', this is not mentioned in the text as it is not possible to implement it.

17 http://kahramanmaras.gov.tr/2021-yili-yasaklama-karari

18 http://kahramanmaras.gov.tr/yasaklama-karari

19 In order to prevent protests after the Suruç massacre, a ban was immediately issued in 2015, followed by other bans in 2016, 2019, 2020 and 2021.

20 http://www.van.gov.tr/15102021-tarihli-yasaklama-karari. This template was used in almost all decisions by Van Governor's Office. The original emphases in the text have been preserved. Similarly, in the decisions by Batman Governor's Office, the method of requiring permission is frequently used.

the Provincial Administration Law is used as a basis in the decisions, the provisions in the cited articles are as follows: "... takes the required measures to prevent crime and to protect public order and trust" and "Establishing peace and security, personal immunity, security of disposition, public welfare and preventive law enforcement authority within the borders of the province are among the duties and duties of the governor. (Additional sentence: 25 July 2018-7145/Art. 1) To ensure these, the governor takes the required decisions and measures". Based on these provisions, it is not possible to enact such a power that may prevent the exercise of a fundamental right and freedom, and even if such a power is specifically given to cover non-state of emergency periods in these laws, it would be clearly unconstitutional. On the other hand, no court has so far passed an annulment judgment on the grounds of unconstitutionality.

One of the major problems about bans is that general decisions to ban are spread over a very long time and are inconsistent. According to the collected data, the longest ban was experienced in the province of Van. Provincial decisions to ban have been issued uninterruptedly from 10 April 2019 until 13 June 2022 and for a total of 99 times since 2018. Although the decisions between 2016 and 2019 before these dates could not be accessed on the website, it is understood that decisions to ban were made regularly starting from 21 November 2016. In these decisions, no specific justification was offered, the existence of a clear and imminent danger that a crime would be committed was not disclosed, but only the reasons for bans in the law were repeated. The decisions cited the following, same statements as the justification for the measure: "To prevent acts and attacks, which are considered to directly and clearly constitute the restriction and prohibition conditions stipulated in our Constitution and laws, to ensure the safety of life and property of our citizens, to eliminate the plans of terrorist organizations, and - in this context - to ensure national security, to protect public order and general health, to prevent offending, to ensure the continuation of fundamental rights and freedoms and the rights and freedoms of others and of general security and to prevent the spread of violent acts, demonstrations and outdoor assemblies to be held in accordance with the provisions of the Law No. 2911 on Assemblies and Demonstrations are BANNED **...** for (15) days within the geographical borders of the province of Van pursuant to Article 17 of the Law No. 2911". However, Article 17, the legal basis in this decision, is about the suspension or prohibition of "a specific assembly" and not of assemblies in general. While the purpose of "national security, public order, prevention of crime, protection of public health and morals or the rights and freedoms of others" is sufficient for suspension, there must be a "clear and imminent threat of crime" in order to ban a certain assembly.[21] Suspension or prohibition of all assemblies is regulated in Article 19. Regarding the decisions to ban and according to the version of the provision after the 2003 amendments, the condition of "clear and imminent threat of crime" has been added along with the general objectives for the governor's offices to make this decision.[22] Furthermore, in this Law adopted in 1983, the powers specific

21 In the first version of the article, while the provision "... can prohibit a certain assembly or suspend it for a period not exceeding two months" was included, the power in the provision was limited with the amendment made in 2003: "... can postpone a certain assembly for a period not exceeding one month or suspend it in case of a clear and imminent threat of crime".

22 The first version of the article stated that the regional governor could postpone "all assemblies in one or more provinces in the region or in one or more districts of the province for a period not exceeding three months in order to protect national security, public order, prevent crime, protect public health and morals or the rights and freedoms of others". Subsequently, the second sentence in the provision stated that "Governors can also ban all assemblies in one or more districts of the province for a period not exceeding three months based on the same reasons". After the 2003 amendments, the three-month period was reduced to one month, and it was stipulated that governors could exercise this power on the condition that "this is based on the same reasons and there is a clear and imminent threat".

to the regional governor and the powers specific to the governor were defined, and the regional governor was given the power to make a decision to ban assemblies in the whole province, while the governor was given the power to make decisions to ban in one or more of the province's districts, not the whole province, and the district governors were not vested with power for a general ban. Although regional governorships have ceased to exist in Turkey since 1984[23] and amendments were made to Article 19 in 2002 and 2003, this division of authority was preserved through the powers of the regional governor, and a provision was not added in terms of vesting governors with power that applies to the entire province. In this respect, just as Article 17, which is cited as a basis in the governor's decisions, cannot be a basis for a general decision to ban, it is necessary to present the clear and imminent threat of crime in order for the governors to exercise the power to ban all assemblies specific to the districts referred to in Article 19. In addition, there is no administrative power for requiring permission for holding assemblies in non-state of emergency periods. Thus, requiring permission is manifestly unconstitutional.

Despite all this unlawfulness, 14 annulment actions were filed by the Van Bar Association against these decisions to ban. None of these actions resulted in an SoE judgment, and all of the cases were ultimately dismissed.[24] In the cases, it was not concretely discussed whether the conditions of authorization were realized, with some news reports or the reactions to the appointment of trustees being deemed sufficient. It was even stated that the authorization for the lockdown added to Article 11(c) of the Provincial Administration Law[25] was sufficient.[26] One of the issues that the former president of the bar association expressed during meetings is that the cost

23 Regional governorships were introduced with the Decree in the Force of Law (DIFL) No. 71 on Regional Governorships published in the Official Gazette of 4 October 1983 and were abolished with the Law No. 3036 published in the Official Gazette of 28 July 1984. Since the Law No. 2911 was enacted right after the DIFL No. 71, the expressions 'regional governor' in this DIFL were nevertheless included. Although the state of emergency regional governorships were established starting from 1987, the expression 'regional governor' does not correspond to that, as the Law related to non-state of emergency periods. Indeed, the state of emergency regional governorships were first established in the region covering the provinces of Bingöl, Diyarbakır, Elazığ, Hakkari, Mardin, Siirt, Tunceli, Van through the DIFL No. 285 of 14 July 1987, with Batman and Şırnak being added through the DIFL No. 426. The implementing regulation starting from 1990 was the Decree in the Force of Law No. 430 on the State of Emergency Regional Governorships and the Additional Measures to be Taken During the State of Emergency.

24 According to information received from Att. Mahmut Kaçan, former president of Van bar association, the information regarding these cases is as follows. Judgments for dismissal of SoE and of action were made in all of the following cases: Case Docket No. 2019/859 before the 1st Administrative Court of Van; Case Docket No. 2019/928 before the 3rd Administrative Court of Van; Case Docket No. 2019/1881 before the 1st Administrative Court of Van; Case Docket No. 2019/1139 before the 2nd Administrative Court of Van; Case Docket No. 2019/987 before the 3rd Administrative Court of Van; Case Docket No. 2019/2158 before the 3rd Administrative Court of Van; Case Docket No. 2019/2424 before the 2nd Administrative Court of Van; Case Docket No. 2019/2564 before the 2nd Administrative Court of Van; Case Docket No. 2019/2614 before the 1st Administrative Court of Van; Case Docket No. 2019/2860 before the 1st Administrative Court of Van; Case Docket No. 2019/2990 before the 1st Administrative Court of Van; Case Docket No. 2019/3183 before the 3rd Administrative Court of Van; Case Docket No. 2019/3514 before the 2nd Administrative Court of Van.

25 The power added to the article in 2018 is as follows: "The governor can restrict the entry to and exit from certain places in the province of those who are suspected to disrupt public order or public security for a period of no more than fifteen days in cases where public order or security is disrupted or there are serious signs that it will be disrupted in a way to interrupt the normal flow of life and can regulate or restrict the movement and gathering of persons and the navigation of vehicles at certain places or hours and prohibit the possession and transportation of all kinds of weapons and bullets, even if they are licensed." This article has a scope to restrict the power to assemble at certain places and times. It will not cover a general power to ban, and the Law No. 2911, which is a special provision, will have to be implemented.

26 "It has been concluded that there is no violation of the law and legislation in the action subject to the lawsuit since it is concluded that Article 11(c) of the Law No. 5442 meets the criterion of 'prescription by law' required for lockdowns, that the ban has a legitimate aim to prevent acts of violence by the members of the separatist terrorist organization and to ensure the security of life and property of the citizens and was a part of the measures to prevent offending, that the response does not constitute a violation of the "requirements of the democratic social order" in view of the nature and intensity of the violent acts and the nature of the actual damage and is appropriate, necessary and proportionate to achieve the intended purpose, i.e. was in compliance with the 'principle of proportionality'." 1st Administrative Court of Van, D. 2019/2860, J. 2019/2159.

of the lawsuits which were filed against those decisions that were issued in multitude and for a period of 15 days were completely dismissed was compelling even for the bar association. In that regard, it should be noted that there is such a deterring element in terms of filing lawsuits in such actions, which are repeated at short intervals.

In practice, it has been observed that during the 2016-2018 state of emergency, all kinds of events by LGBTI+ organizations were banned indefinitely and on discriminatory grounds, [27]and this ban continued indefinitely after the end of the state of emergency and only ended with a court decision in April 2019. In this example, a 1.5 year ban was imposed uninterruptedly. Similarly, it was not possible to exercise the right of assembly in the long-term lockdowns both in the state of emergency and in the non-state of emergency periods. Demonstrations were also banned during the pandemic process, independent of the lockdowns, but assemblies of certain political parties or on certain subjects could be held at the same time. In such cases, although it was possible to hold an assembly by taking the necessary measures in terms of general health, this was not what was opted for. Furthermore, discriminatory practices were adopted in exercising the freedom of assembly, while certain assemblies, even the general assemblies of bar associations were not allowed under very similar conditions and dates, while political party congresses or anti-vaccination demonstrations by unvaccinated persons were allowed.[28]

The yearly distribution of a total of 1088 decisions between 2018 and 2021 which could not be found on the governor's office websites or in news reports despite being unavailable on the governor's office websites is as follows:

Period	Number
2018	114
2019	299
2020	368
2021	307
Total	**1088**

27 The most obvious example in this regard is the decision no. 32017 by Ankara governor on 18 November 2017 regarding the prohibition of all kinds of LGBT events. The judgment reads as follows: "Information is obtained from various social media and some written and visual media outlets that various non-governmental organizations under the name of LGBTT (Lesbian, gay, bisexual, transgender or transvestite) and LGBTI (Lesbian, gay, bisexual, transgender, intersex) will organize events such as cinema, cinevision, theater, panel, conversation and exhibition involving social sensitivities in various parts of our province." ... "Considering that the aforementioned posts will openly incite hatred and enmity of a segment of the society against another segment with different characteristics in terms of social class, race, religion, sect or region and that it may therefore lead to a clear and imminent threat in terms of public security and jeopardize public order, prevention of crime, protection of general health and morals or the rights and freedoms of others, some groups may act on certain social sensitivities and react to the groups and individuals who will participate in the planned event, ultimately causing provocations."http://www.ankara.gov.tr/yasaklama-kararina-iliskin-basin-duyurusu-19112017

28 https://www.indyturk.com/node/334956/kongreler-siyasi-partilere-serbest-barolara-hala-yasak-80-baronun-ve-tbb-nin-se%C3%A7imleri-ne;
https://www.dw.com/tr/maltepede-maske-ve-sosyal-mesafesiz-a%C5%9F%C4%B1-kar%C5%9F%C4%B1t%C4%B1-eylem/a-59153922

When we have a closer look at the distribution of the decisions by provinces, it is found that there are decisions to ban in 65 provinces and there are 7 decisions covering all provinces.

Province	Number
Van	90
İstanbul	87
Batman	76
Elazığ	74
Hakkari	67
Mardin	57
Siirt	52
Muş	50
Adana	39
Tunceli	39
Ankara	33
Diyarbakır	33
Şanlıurfa	29
İzmir	23
Bitlis	22
Düzce	20
Gaziantep	20
Mersin	18
Muğla	18
Şırnak	18
Kocaeli	17
Osmaniye	15
Aydın	14
Antalya	12
Adıyaman	11
Hatay	11
Eskişehir	9
Kırklareli	9
Artvin	7
Manisa	7
Samsun	7
Tüm iller	7
Bursa	6

Province	Number
Ağrı	5
Bolu	5
Çanakkale	5
Iğdır	5
Konya	5
Tekirdağ	5
Amasya	4
Denizli	4
Kahramanmaraş	4
Kars	4
Malatya	4
Sinop	4
Tokat	4
Edirne	3
Sakarya	3
Afyonkarahisar	2
Bartın	2
Bingöl	2
Çorum	2
Erzincan	2
Karaman	2
Rize	2
Trabzon	2
Uşak	2
Balıkesir	1
Erzurum	1
Giresun	1
Kastamonu	1
Kayseri	1
Kilis	1
Kütahya	1
Nevşehir	1
Sivas	1

When the contents of the accessible decisions are reviewed, it is found that some of these decisions include a decision to ban together with the expression of some other events "requiring permission".

Content of Judgment	Number
Ban	872
Permission requirement	75
Both Ban and Permission requirement	136
Other	4
Unknown	1

b. Administrative Judicial Review Against Decisions to Ban and Suspend, and the Issue of Effectiveness

The number of administrative lawsuits filed against the suspension and ban decisions is extremely limited when compared to the number of bans. When the case law databases were scanned, a total of 9 decisions comprising of 3 Regional Administrative Court and 6 Council of State judgments could be accessed. In addition, as a result of the interviews with the lawyers who were found to have brought such cases, some decisions were reached regarding the cases brought by these lawyers. Considering that the number of decisions such as suspension and ban is not low and that there are applications which can spread over long periods, the low number of these is an issue that needs to be evaluated on its own and should also be taken into account in the evaluation of an effective remedy.

Two factors have been discussed regarding whether the administrative action to be filed against such actions qualifies as an effective remedy. The first of these is the nature of the review conducted through the procedural rules stipulated in the legislation and applied in annulment cases, while the second is how this review is practically performed.

The Turkish administrative justice provides for a speedy trial in two special articles. Articles 20(A) (summary procedure: tender, urgent expropriation, privatization, environmental impact assessment, etc.) and 20(B) (trial procedures for central and joint examinations) added to the Administrative Procedure Law in 2014 shorten all the deadlines for the disputes listed in these articles compared to other cases and attempt to eliminate difficulties in the implementation of overdue decisions. However, the summary procedure regulated in these articles set forth in Turkey does not generally focus on securing fundamental rights and freedoms. The former focuses on the possibility of a speedy disposition in cases with a significant expected economic outcome while the latter focuses on the possibility of difficulties in the implementation of the decision due to the large number of people affected by the decision and the time elapsed. Since these provisions do not include a special administrative procedure regarding the bans on assemblies and demonstrations, general provisions are applied in the lawsuits filed against these decisions to ban/suspend.

Accordingly, a lawsuit can be filed within 60 days against an administrative action in the administrative court of the place where the administration that performs the action resides. Upon the filing of the lawsuit, an initial review is performed by a delegated member of the panel of judges or an investigating judge from the Council of State (Code of Administrative Procedures, Art. 14) on whether the complaint for action complies with the procedures, whether the lawsuit is filed in the authorized court of jurisdiction and whether there is a compulsory administrative application remedy that needs to be exhausted before filing a lawsuit as well as to check the term of litigation and hostility. After the initial review is complete, if the court decides that the two conditions are satisfied together, it may order a stay of execution. These conditions are as follows: Damages difficult or impossible to repair arise if the administrative action is implemented, and the administrative action is manifestly unlawful. A different regime has been adopted in the law in terms of actions the effects of which will and will not be exhausted once implemented, and it has been stated that the execution of administrative actions the effect of which will be exhausted can be temporarily stayed without the defense statement of the administration, to be decided later after the defense statement is received. The stay of execution judgments must be justified in terms of these two conditions.

If a decision is made to wait for the defense of the administration, the maximum period for the administration to submit a defense statement is set at 30 days in Article 16 of the Law, but this period may be extended by the court of jurisdiction for once and for a maximum of thirty days upon the request of any of the parties if justifiable reasons exist. In cases where the stay of execution is requested, these periods may be shortened, or it may be decided that the notification be made by an officer in person. Administrative jurisdiction in which the principle of ex officio investigation is applicable does not stipulate that the parties must place a request for shortening the deadlines or personal notification by an officer when the wording of this article is considered, and it is possible for the court to decide so on its own depending on the subject of the case.

For most of the assemblies and demonstrations, the place and/or time of the assembly is of particular importance. This may be about assemblies bearing a particular meaning and significance if held only on a specific date such as May 1, March 8, Newroz, July 2, 1993 Madımak Massacre commemoration, December 19 Maraş massacre commemoration, October 10 Train Station Massacre commemoration, or it may be in the form of a social reaction in the aftermath of a specific event/incident (death/funeral, the enactment of a law, a political development or a reaction to an administrative decision, etc.). In such cases, not holding the assembly and demonstration on that date may render the exercise of this freedom meaningless. Considering that right to assembly is closely related to freedom of expression and expresses the reaction of the society against social and political developments, it is meaningful and possible that the reaction to the cutting of trees, for example, due to a construction project will naturally be given on or before the cutting dates. In addition, the effort to organize assemblies and demonstrations and the deterrent nature of such obstacles also apply for all assemblies. In this respect, it should be evaluated whether it is theoretically and practically possible to conclude the lawsuit before the assembly date, whether administrative justice is an effective remedy in terms of ban and suspension decisions, which foreclose the right to assembly. Therefore, it is necessary to review both the decision-making process of the administration and the SoE decision-making processes of courts.

In terms of the decision-making process of the administration, although it may be considered that those who want to organize an assembly should prepare a petition and, if necessary, give a power of attorney to a lawyer to file a lawsuit on the very same day - almost impossibly against the normal flow of life - in the face of the fact that the suspension decision can be made at least 24 hours before the start of the assembly or that there is no obstacle to the making of decisions to ban immediately before a certain event, it should be evaluated whether the administrative courts are likely to decide the case in such a short time.

The issue of effective remedy regarding administrative courts should be addressed in terms of the aforementioned SoE decision, which is a concern specific to administrative justice, before the case is decided on its merits. Therefore, the Constitutional Court decided that individual applications filed without waiting for the case to be decided on its merits meet the condition of exhaustion of remedies. In its judgment of İsmail *Sarıkabadayı and others*, the Court acknowledged that "the applicants have filed an individual application upon the dismissal of the request for a stay of execution without waiting for the annulment action to be decided on merits and - under the current circumstances - have thus exhausted the remedy that offered a reasonable chance of success and could provide a solution in terms of the alleged violation of their right to organize an assembly and demonstration".[29] To that end, if an SoE decision has not been made on the date of the assembly, it is possible to resort to individual application after the dismissal of the SoE request in cases claiming a violation of the right to an effective remedy. In fact, if the SoE decision, which can provide a solution and is the remedy to be exhausted, has not been made after the assembly date, it is possible to claim that the violation has occurred, so it is necessary to resort to an individual application without waiting for the result of the SoE decision.

It is clear that in order for an SoE decision to be made, the first review and the review of the "manifest" illegality claim in the file will take a certain amount of time, and certain information and documents – which are mostly only in the hands of the administration – will need to be reviewed depending on the nature of the case. Even assuming that a court can review very quickly, taking into account the date of the assembly, another problem arises in this respect. The possibility of a temporary SoE decision without taking the defense of the administration is very unlikely to implement actually in terms of suspension and ban decisions. As mentioned above, decisions to ban and suspend rarely include a detailed and concrete justification as to why such a decision had to be made at that time. Decisions usually only list the reasons enumerated in the law. For example, although it is thought that suspension poses a public security risk, there is no justification as to why the measures to be taken for the safety of the assembly participants are not increased and such a decision is rather made. The example of "social sensitivity" cited in the decision to ban all kinds of events and activities by LGBTI+ organizations, which seems to be the most concrete, is not actually a justification in real terms. Moreover, in the dismissal decision by the 4th Administrative Court of Ankara, which was made one year after the administrative action, the following justification was deemed sufficient: "*... it is possible that some groups may react due to certain social sensitivities and that mass*

29 İsmail *Sarıkabadayı and Others*, App. No: 2016/23696, 8 June 2021, par. 34.

reactions and provocative actions may occur for this reason and that there may be shortcomings in preventing provocative actions and delivering an effective and timely on-site response due to the additional obligations the state of emergency has brought to the law enforcement authorities".[30] The court did not feel the need to carry out a proportionality check that should be performed during the state of emergency, and this decision could only be repealed after 1 year and 3 months at the stage of appeal.[31] The judicial review of the decision regarding the prohibition of the Pride Parade, which was to be held in Istanbul on 30th June 2019 – after the end of the state of emergency – was also performed similarly. The court of first instance dismissed the case, considering justifications such as public order, the possibility of provocation and social sensitivities sufficient. Subsequently, the action was canceled on 7 October 2020 at the stage of appeal.[32] On a close date, in the lawsuit filed against the action to ban events for 30 days in relation to the events to be held in Maçka Park on 22nd June 2021 as part of the 19th Istanbul LGBTI+ Pride Parade, the request for an SoE was dismissed four months later on 21st October 2021. Even if an annulment decision was made, the administration did not even send a defense in this case, where the ban had already been implemented, and was content with sending the file of actions.

Similarly, the administration did not submit a defense statement in the lawsuit filed against the decision regarding the indefinite ban on the staging of the play named 'Beru: Klakson Borizan Birt' on 13th October 2020 at the IMM City Theaters Gaziosmanpaşa Stage. In the defense, only the information in the report was included, and based on the statements in a report kept by the law enforcement officers as well as a concept such as "cohesion", which has been a very problematic practice in terms of legal security in recent years, and with data that are found to be based on "intelligence-led" judgments lacking any concrete basis, it was assumed that all the information stated by the administration was completely true and it was emphasized that the administration must enjoy a broad discretion. Consequently, the request for annulment was dismissed on 31st May 2021 with a decision of less than two pages.[33] The absolute manner in which this decision was written appears to be contrary to the principle of equality of arms per se, which is an element of the right to a fair trial, and does not present a nature to justify the decision to ban.

The information regarding the reasons for the 163 bans reviewed in the report[34] by the Social Law Group on the restrictions on freedom of assembly during the state of emergency between 2016-2018 is instructive in this regard:

30 4th Administrative Court of Ankara, D. 2017/3255, J. 2018/2623, 15 November 2018. In the lawsuit filed against the 20-day ban by Mersin Governor's Office on the same grounds, a dismissal decision was made for almost the same reasons, stating that it was a ban in accordance with public order. 1st Administrative Court of Mersin, D. 2019/712, J. 2019/1173, 21 November 2019.

31 Ankara Regional Administrative Court, 12th Administrative Chamber, D:2019/93, J: 2019/306

32 9th Administrative Court of Istanbul, 27 November 2019, D. 2019/1382, J. 2019/2489;appeal judgment Istanbul Regional Administrative Court, 10th Administrative Chamber, 2020/910, J. 2020/1502, 7 October 2020.

33 10th Administrative Court of Istanbul, D. 2021/346, J. 2021/815, 31 May 2021.

34 http://www.toplumsalhukuk.net/wp-content/uploads/2019/02/OHAL-RAPORU.pdf, Att.Doğukan Tonguç Cankurt, Att. Mert Ekinci, Att.Gözde Demirci and sendika.org correspondent Edip Mert Arslan - Social Law, Report on Violations of the Freedom of Assembly During the State of Emergency, p. 5. The report covers the two years in which the state of emergency lasted, and a total of 163 bans were identified in 50 provinces during these two years. The reasons for these 163 decisions are provided in the table.

Justification Cited	Instances
"protection" or "preservation" of "public order"	66
"protecting the rights and freedoms of others"	43
"establishing peace and security"	34
potential "violent acts" or "actions"	22
"indivisible integrity of the state with its country and nation"	18
"abuse of freedoms"	13
"eliminating the plans of terrorist organizations" or of "terrorist acts"	15

Justification Cited	Instances
"preventing offending"	20
"could be provoked" or "could cause provocation"	20
"preservation of a peaceful environment"	19
"establishing public well-being"	19
"protecting" or "establishing" "the safety of life and property"	19
"could evolve into a propaganda by terrorist organizations"	10
"could manifestly incite a segment of the society to hatred and enmity against another segment"	5

On the one hand, the prevalence of general and abstract framework provisions and open-ended concepts in the relevant regulations, and on the other hand, the fact that the administrations make decisions that only suffice in repeating these concepts cause the judicial review to become more difficult. It is not possible for a court to write a justification as to whether a ban or suspension decision similar to the one we have mentioned above is in compliance with the law, or even that it is "manifestly" unlawful in order to make a SoE decision without a defense. In order for the court to make a SoE decision, there is a need for administrative explanations regarding why the action was established (the cause factor) and why a legal consequence was set forth in this direction (the subject factor) in its justification for illegality. Considering the passive attitude of administrative justice in recent years in Turkey in terms of the scope of judicial review, especially in certain matters, and the tendency to consider the intelligence-based defenses or one-sided information provided by the administrations to be sufficient, it is difficult to expect an administrative court to render a judgment without taking the administration's defense against such a decision. In this respect, the judicial review of the aforementioned decisions is not of the nature to evaluate the proportionality of the lockdown decision and the pandemic conditions, as in the Constitutional Court's *Senih* Özay judgment.

Another problem regarding time is that many assemblies are held on weekends in order to increase participation, and there is no on-duty judge system to make an administrative decision at the weekend, in case the administration gives notice of suspension or ban during working hours on Friday, for example, in accordance with the rule of at least 24 hours before. While the prosecutor's office and the courts on duty in the judiciary operate on weekends, the on-duty court in administrative justice is an institution that only works during working hours on weekdays, and even if all conditions are perfect and the court will issue a decision within one day, it will not be possible to make a decision outside of working hours or at the weekend.

In all the decisions and news reports reviewed, the only example that was partially suspended before the date of the demonstration is the suspension of the march for Soma

miners the day before.[35] The difference of this lawsuit from the others is that it is about a single assembly, and it was filed against an action stating that the march could not be held because the venue and route announced in line with the decision to march to Ankara to raise the rights of the miners after gathering in a park are outside the routes previously determined by the Governor's Office. The Court cited the cancellation of the phrase "general roads" in the Law No. 2911 by the Constitutional Court and the justification for that judgment as well as miscellaneous judgments on individual applications and decided that restricting one's freedom as it would supposedly contradict the flow of daily life would be disproportionate in terms of route (of the demonstration), albeit not in terms of venue.

Another striking example is the fact that the lawsuit filed against the banning of Queer Olympix events in Istanbul's Kalamış Park, although an annulment decision was made, was not awarded an SoE decision.[36] In this case, the administration only sent the action in its pleading, did not attend the hearing and did not even find it necessary to explain any reasons because the event to be held shortly after the lawsuit was filed could not be held anyway and the administration realized its purpose – unlawfully. 7 months after the event, there is no point in making an annulment decision in the case where no substantial information and documents were presented about the ill-founded action.

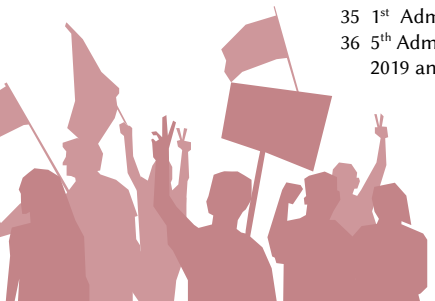
Similarly, the court judgment to annul the decision of 16th May 2019 regarding the inconvenience of the press statement that the president of Ankara Bar Association LGBTIQ+ Rights Center wanted to make on Friday, 17th May 2019 to mark the "International Day Against Homophobia and Transphobia" due to the general decision to ban could only be made on 18 March 2020. Moreover, due to the annulment of the decision to ban, which was the basis for this action, the cause factor had completely disappeared, but it took ten months for the decision to be rendered.

Despite the fact that banning or postponing the right to hold assemblies and demonstrations is a general ban (blanket ban) and is a heavy intervention that can touch the essence of the right, blanket bans are an extremely common practice in Turkey. In the cases to be filed against such actions, since special periods are not set forth in SoE review, it takes a certain period of time for the courts to conduct the first review and to examine the requests for SoE. Since the holding of assemblies on a specific date is important in terms of exercising this freedom, the date of the court judgment on actions such as suspensions/bans goes beyond the planned date for the event - in the normal flow of life. In that regard, the reviews made are mostly *post-hoc* reviews. On the other hand, it is difficult to say that the administrative judicial review method, which seems impossible to be effective in theory, works effectively in practice as it does not sufficiently cover the basis and scope of the court's authority, whether there is a clear and imminent threat in substantial terms, and the evaluation of the principle of proportionality.

The Constitutional Court has so far avoided reviewing two relevant individual application judgments. The problem of the effectiveness of the judicial review method was recently discussed in the Constitutional Court judgment in İsmail *Sarıkabadayı and*

35 1st Administrative Court of Manisa, D. 2019/868.

36 5th Administrative Court of Istanbul, D. 2019/1976, J. 2020/483, 13 March 2020. The event date should have been 24 August 2019 and 25 August 2019.



Others[37]. Similarly, even though an annulment decision was made by the administrative judiciary body, a decision of lack of personal jurisdiction was made in the *Kaos GL (2)*[38] application pertaining to the decision to ban all kinds of events by LGBT organizations, which lasted for 1.5 years.

Kaos Gay and Lesbian Cultural Research and Solidarity Association (Association) is one of the leading associations of the LGBTI+ movement in Turkey. It was founded in Ankara in 1994 and is headquartered in Ankara. As its name signifies, the Association works solely and directly in relation to the rights of LGBT subjects. In Kaos GL (2) judgment, the Court found the application inadmissible due to a lack of personal jurisdiction on the grounds that Kaos GL Association did not have victim status in terms of the application in question. The case subject to the application relates to the allegation that the right to organize assemblies and demonstrations has been violated in the meantime, since the decision to ban all kinds of events by LGBTI organizations was annulled after 1.5 years. The aforementioned decision to ban is limited to this issue only. The decision makes no evaluation in terms of the right to an effective remedy and only provides a decision of inadmissibility in terms of the freedom of assembly. It would be useful to quote the decision directly in order to show the "irrationality" of the court's reasoning and its effect on the right to an effective remedy:

> "32. In the present case, the applicant Association did not provide any cases and explain in the individual application form the importance for itself of using the right to organize assemblies and demonstrations between the date of administrative action and the date of application and stated that its constitutional rights were violated due to purely administrative action. *The applicant also did not claim that due to the ban decision by the administration at that time, the functions of its own legal entity were affected, that a planned assembly and demonstration became completely ineffective or that the awareness desired to be created by the events it would do would not be achieved. (emphasis added)*
>
> 33. To make an individual application, the victim status must exist, and this status must persist until a decision is made about the application. Accordingly, the administrative action that was the subject of the application on the claim that the right to assembly was violated was canceled in favor of the applicant through the decision on the merits of the case, and the result of this decision provided a certain satisfaction for the applicant, removing the victim status by eliminating the alleged violation.
>
> 34. For the aforementioned reasons, since it is understood that the applicant's victim status has disappeared in terms of the alleged violation of the right to organize an assembly and demonstration, it should be decided that it is inadmissible due to lack of personal jurisdiction without any review in terms of other admissibility conditions.

Since the action was annulled at the end of this period, the court did not conduct

37 İsmail *Sarıkabadayı and Others*, App. No: 2016/23696, 8 June 2021,
38 *Kaos Gay and Lesbian Cultural Research and Solidarity Association (2)*, App. No: 2018/10351, 7 September 2021.

an assessment in terms of the right to an effective remedy, since it did not accept that there was an "arguable claim" that the rights were violated in terms of the time elapsed. Even if the court did not decide on lack of personal jurisdiction and ultimately did not decide for a violation, since the decision to ban includes per se an "arguable claim of violation" – using its power to qualify which article has been violated – it should have also conducted a review of the right to an effective remedy.[39] In other words, according to the Court, the decision that no assembly could be held directly in the working area for a period of nearly 1.5 years did not "victimize" the association, and the applicant became personally incompetent as it could not prove that it had planned the already-banned assembly tautologically despite the ban.

The decision including a direct assessment on the subject is the one made in İsmail *Sarıkabadayı and Others*. In the judgment, it was decided to "ban all kinds of events to protest the temporary shelter center" for 30 days, covering the whole province, just two days before the planned demonstration on 7-8 May 2016. In the annulment action filed against this judgment, an interim decision was made to render the judgment after taking the defense statement of the administration regarding the request for an SoE, which was later dismissed on 29th June 2016. While evaluating the allegation that the right to an effective remedy has been violated, the Court considered it sufficient that the SoE request can be submitted temporarily without obtaining a defense, and that arrangements have been made to shorten the defense period and speed up the notification. Although all of the relevant regulations are the decisions that the judge could make ex officio (spontaneously), the Court ruled the application inadmissible on the grounds that "*the applicants failed to fulfill the obligations that can be expected from them in order to ensure the effectiveness of the institution of stay of execution, which is theoretically effective in terms of the intervention subject to the application, and accordingly, it is not possible to suggest that there is a violation of their right to an effective remedy in connection with their right to assembly.*" (par. 66) In the same judgment, the Court stated that this evaluation of the right to an effective remedy, regardless of the outcome of the decision, "is related to the capacity to have the legality of the relevant decision to ban reviewed by the judicial body in the time period it is valid and to get a result". (par. 67)However, in administrative justice where the ex officio investigation principle is applicable and the judge is in an active position, a request for shortening the periods is not mandatory, and it is not possible to make an assessment that this remedy would become effective if there were such a request.

It should be noted that these two judgments of the court do not include a comprehensive review on different grounds and diverge from the approach of the ECtHR. In this respect, it would be useful to examine how the ECtHR evaluates Article 13 in terms of the right to peaceful assembly (Art. 11).

c. Approach of the ECtHR on Effective Remedy in Decisions to Ban and Suspend

Initially in its *Bqczkowski and Others v. Poland* judgment and then in *Lashmankin v. Russia* and *Alekseyev v. Russia* judgments, the ECtHR stated that the effective rem-

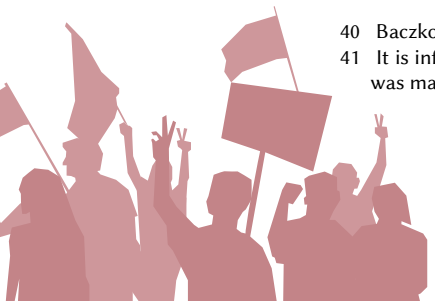
39 At this point, it should be noted that the violation of the right to an effective remedy does not need to be asserted in the courts of first instance -due to the nature of the right- and this argument that the Court has highlighted in some of its decisions cannot be used, either.

edy for restrictions on freedom of assembly before the date of assembly implied the possibility that the final decision on such restrictions would be made before the date of assembly. In the Court's view, a post-hoc remedy would not provide adequate redress in relation to Article 11 of the Convention. It is therefore important for the effective enjoyment of freedom of assembly that relevant laws provide for reasonable deadlines which State authorities must comply with when making decisions.[40] In this respect, the ECtHR emphasized in both *Alekseyev* and *Lashmankin* judgments that although certain time limits were imposed on the organizers to organize an assembly in accordance with the existing regulations in Russia, no time limits were imposed on the administrations and that the existing remedies are of a post-hoc nature, a quality reinforced by the absence of a regulation[41] that the courts must decide before the assembly date in the judicial review of administrative decisions to prevent the assembly. (Alekseyev, par. 99; Lashmankin, par. 346-347) At this point, it should be noted that, according to the relevant regulations in Russia, the organizers of the assembly should make an application 15 days before the assembly at the earliest and 10 days before the assembly at the latest, that the administrative bodies have the authority to refuse/change the venue, time or method of the assembly within three days and that there are regulations stipulating that courts must conclude such cases within ten days. In its *Lashmankin* judgment, the ECtHR found that the State did not present a convincing document or statistics that this ten-day period applicable to the Russian courts had been implemented and therefore was not found convincing and that the cases subject to this application could not be decided within 10 days. It specifically stated that it is not a guarantee to make a decision before the assembly day, even if the application is made on the first day and all deadlines are complied with.

When these evaluations of the ECtHR and the provisions of the Code of Administrative Procedure in Turkey and the Law No. 2911 are considered together, it is concluded that the institution of stay of execution in ban and suspension decisions, which are widely applied in Turkey and can be made even one day before an event, is usually adjudicated on after the assembly date. As explained above, it is impossible to say that an annulment action is an institution that can fulfill the necessary conditions to emerge as an effective remedy in such judgments, when facts such as the absence of special procedural norms, the difficulty of applying for a stay of execution without a defense, the procedural rules required for writing the decision, the absence of a court on duty and the limited norms restricting the administration in terms of time are considered. Although it is not of particular importance for each assembly to be held on a certain date, the importance of the time element for most assemblies should be specifically emphasized. Furthermore, in the administrative and court decisions examined, elements that make it difficult for annulment action to be an effective remedy in practice include the courts' failure to discuss legal issues such as the unconstitutional permission requirements for assemblies, the inference of the authority to limit this freedom from the general authority to take measures, the application of exceptions to the decisions in a way that allows discriminatory practices, the overstepping of the legal basis and the failure to present the cause factor concretely and the courts' making judgments only by referring to the relevant articles and the justifications provided by the administration.

40 Baczkowski and Others v. Poland, no. 1543/06, § 81-83, 3.5.2007; Lashmankin and Others v. Russia, 2017, § 345.

41 It is inferred from the decision that, upon the annulment decision of the Russian Constitutional Court, a legal regulation was made in Russia in 2015, which includes the obligation to conduct a judicial review before the assembly date. § 351.



III. The Issue of Effectiveness of Action for Damages for Interference with the Right to Assembly

The last paragraph of Article 40 of the Constitution, which is related to effective remedy, reads as follows: "Damage suffered by a person as a result of unjust acts by public officials shall be compensated by the State according to the law." A special guarantee has been introduced regarding such damages. In addition, Article 125 of the Constitution has the following provision: "The administration shall be obliged to pay for the damages arising from its own acts and actions." This presents a basis for both the strict and fault liability of the administration. Article 129(5) states that in case of fault liability, the administration shall be the defendant, and the administration shall ask the relevant public official for the repayment of the damages paid. The appearance of this financial liability (compensation case) as a type of case in administrative justice is the action for damages regulated in CAP 2.

While exercising the right to assembly, the prohibition of ill-treatment or interventions violating the right to life, constitute a crime in the criminal legal sense. Furthermore, it becomes possible to file an action for damages in administrative jurisdiction for the damage suffered by the person. The intervention itself leads to a review of Articles 2 and 3 of the ECHR in their material dimension, and failure to conduct an effective criminal investigation against the relevant public officials may also violate the procedural dimension of these articles. While criminal proceedings are the main remedy for the ECtHR and the Constitutional Court, action for damages to be filed with a demand for compensation for the damages caused by the administration's neglect of duty in administrative justice is also a complementary remedy.

Impunity in the prosecution of public officials who cause harm, abuse or arbitrarily impede the enjoyment of a right covers not only criminal justice but also administrative justice. In accordance with Article 129 of the Constitution, in these compensation cases directed not to the public official but to the relevant administration, it is evaluated whether there is a neglect in the execution of the duty. In this respect, the neglect of duty of the administration as an organization is decided rather than a personalized fault, and the paid compensation must be claimed from the public official who caused the damage in the first place. Failure to carry out these cases effectively and to provide compensation to the injured persons, to reduce the compensation or failing to claim the paid damages from the relevant public official should be considered as two separate forms of impunity. The first is that the administration's fault characterization in cases is not done adequately. The fact that the courts only take into account the statements of the administration or the passive attitude of the judiciary despite the fact that the administration has the essential information and documents regarding the proof of fault - although the ex officio investigation principle applies - may prevent these lawsuits from being an effective remedy in practice. Similarly, resorting to strict liability directly means that the fault of the administration is not ensured and that the remedy fails a recourse to the negligent public official. Secondly, examples such as the elimination or reduction of the responsibility of the administration by attributing fault to the third person or the injured person, especially in terms of the damages suffered by the participants of the demonstration, may also mean that administrative justice does not operate effectively.

7 of a total of 11 judgments by the Constitutional Court regarding the violation of the effective remedy in relation to such interventions so far are related to the direct strict liability decision of the administration in the October 10 massacre, without discussing the neglect of duty.[42] The other three judgments of violation are also about actions for damages related to the alleged ban on ill-treatment during the Gezi Resistance.[43] In two of them (*Barış Barışık,* Şadiye *Dilan Doğan*), both ill-treatment and violation of the right to an effective remedy were ruled, while in *Abdullah Koç* judgment it was decided that only the right to an effective remedy was violated. The judgment on *Abdullah Yaşa*, who was wounded in the head with a gas canister during a demonstration in Diyarbakır in 2006, is about an incident that had already been the subject of the ECtHR's decision in 2013 due to ill-treatment, hence the sole decision on the violation of the right to an effective remedy.

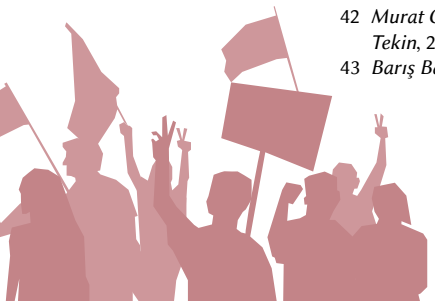
Although there is no dispute about the fact that the applicant was severely injured in the head with a gas canister in the incident that was the subject of the *Barış Barışık* judgment, the administrative court ruled in its calculation of damages that the compensation be given at a rate of fifty percent, stating that the applicant "had fifty percent contributory negligence since he deliberately, willingly and actively attended the violent demonstration which was organized illegally and without permission, exceeded the limits of a democratic demonstration and was held in the campus of a university other than the one he was studying at".

In accordance with the case law of the ECtHR, the Court stated that "the principles it has accepted regarding the use of firearms should also be taken into account as an evaluation criterion in the use of these weapons, to the extent appropriate" (para. 52). Although the Court stated that "a legislation which authorizes law enforcement officers and adequately and effectively regulates the method of their use should include guarantees that will prevent the arbitrary and excessive use of these weapons", it did not evaluate the legislation in Turkey in this respect, only stating that the prosecution file was insufficient to determine whether there was negligence on a case-by-case basis.

One of the important aspects of the decision is that although the criminal court decided to convict the applicant on the grounds that he had committed the crime of resisting to cause failure to perform one's duty, "no determination was made as to what actions the applicant took, in other words, the actions of the applicant were not materialized" either in the criminal court or in the administrative court, and it is stated that attending the assembly is considered a negligence. (para. 58) According to the court, "Any evidence that would lead the applicant to believe that physical force was used against him due to his own conduct was not reflected in the investigation or application file. Therefore, it was concluded that the public authorities could not prove that the use of force against the applicant had become inevitable". (para. 59) These statements indicated that the applicant's conviction decision is unfounded and there is no evidence regarding the occurrence of the crime. They also stated that the

42 *Murat Orçun* Çalış, 2018/24472; *Mehmet Elmascan*, 2019/5448; *Zilan Gül*, 2018/36804; *Mustafa* Şenoğlu, 2018/24347; *Ali Hıdır Tekin*, 2018/35243; *Abdül Kadir* Ünlü, 2018/33200; *Celaleddin* Çakmak, 2018/22072.

43 *Barış Barışık*, 2018/2697; Şadiye *Dilan Doğan*, 2016/9604; *Abdullah Koç*, 2018/4912; *Abdullah Yaşa*, 2015/12486.



administrative court considered it "to be the negligence of the aggrieved that the applicant participated in the illegal demonstration, which the applicant agreed that his mere participation in the illegal demonstration prevented the full compensation of the damages suffered due to injury." (para. 88), which also led to a decision of violation of the right to an effective remedy.

In the *Abdullah Koç* judgment, the applicant was injured during the Gezi protests by a plastic object hitting his face on Konur Street, where his workplace is located, leaving a permanent scar. The applicant claimed that a police officer shot him with a rubber bullet, and although the plastic pieces removed from his face were shown as evidence, the prosecutor's office failed to identify the perpetrators. In the action for damages filed, the administrative court rejected the claim for compensation on the grounds that "*the defendant administration cannot be blamed on the basis of reports that the plaintiff was injured as a result of a foreign object hitting his face, and it could not be concretely demonstrated that the damage was caused by the defendant administration's fault*". One of the characteristics of this decision is that the failure to carry out the criminal investigation effectively in ill-treatment claims may become an element that can render action for damages brought before the administrative court not an effective remedy.[44] Although the outcome of the criminal proceedings will not be directly binding in terms of administrative justice, the ineffective execution of the criminal proceedings may prevent the proof of neglect of duty due to the limited evidence in administrative justice and the frequent links to the criminal file. To cite an example, although it cannot be determined which public official is responsible for ill-treatment, it is sufficient to determine that this is an act of the administration to be able to award compensation due to neglect of duty. The identification of the responsible public official is a key matter for the recourse stage. However, if the act cannot be proven to be an act of the administration or if presumptions cannot be established, as in the case of ill-treatment in custody, the criminal proceedings will affect the effectiveness of the action for damages. Similarly, although the actions of certain public officials have been detected, the decision of acquittal based on the reasons of compliance with the law, without detecting any fault in terms of criminal law, also has an impact on administrative justice. In the words of the Court, in this particular application, "the applicant was not able to exhaust this remedy as the remedy for compensation, which was employed due to the deficiencies in the criminal investigation but turned out to be ineffective in practice". (para. 72)

In the application by Şadiye *Dilan Doğan*, who was injured in her foot, face and back as a result of the police intervention during the Gezi protests, it was observed in video footage that the police hit the passive applicant in the face with a baton and then the applicant battered the police by kicking and that the applicant was injured when she was hit by the Shortland vehicle, aka the Scorpion, which ran over her feet. In

44 Another example of this was observed in the action for damages brought by the family of Kemal Kurkut, who wanted to enter the event venue before the Newroz event started in 2017 in Diyarbakır and was killed by the police. Although the administrative court ruled for compensation based on disciplinary investigations that established the fault of the police officers, on the multiple shots fired directly into the vital organs of Kurkut, who was running stripped to the waist and with a knife in his hand, and on the fact that there was no one in the venue yet, the criminal court ruled on an acquittal but the ruling was overturned at the appeal stage and the case was dismissed. (3rd Administrative Court of Diyarbakır, Docket No: 2018/213, Judgment No: 2020/671; Gaziantep Regional Administrative Court, 3rd Administrative Chamber, Docket No: 2020/1867, Judgment No: 2021/1998)

the compensation case filed by the applicant in the administrative court, it was ruled that "the case be dismissed on the grounds that there was no finding that the police had hit the applicant intentionally and that the video footage and statements also supported this and that the intervention of the administration remained within the legal limits and the faulty behavior of the applicant had a fundamental effect on this injury." (par. 46) On the other hand, the Constitutional Court stated "In the present case, there is no record or image showing that the applicant personally resorted to violence or resisted the law enforcement officers before she was battered. In addition, the applicant was not subject to any criminal measure or investigation due to this demonstration. Therefore, the necessity and proportionality of the use of force could not be demonstrated by the law enforcement units" (para. 74) and further stated that the applicant's act of kicking was proven, but "... no evidence that would lead the applicant to think that physical force was exerted against her due to her own attitude was not included in the investigation or application file. Therefore, it was concluded that the public authorities could not prove that the use of force against the applicant had become inevitable". (para. 76) Based on the said reasons, the Court decided that the administrative court's dismissal of the request for compensation for damages caused by the violation, in clear contradiction with the findings of the violation of the ban on torture, violated the right to an effective remedy.

In the *Abdullah Yaşa* judgment, the applicant was injured by a gas canister during an unlawful and non-peaceful demonstration and filed an application before the ECtHR after a decision of non-prosecution. In 2013, the ECtHR ruled that Article 3 was violated. In the subsequent action for damages, the claim for compensation was dismissed on the grounds that "the applicant was injured when he participated in illegal protests through his own fault, and thus the causal link between the damage and the action of the administration was severed". Although it is clear that the damage was caused by the action of the administration, the applicant was acquitted in the criminal case brought against him because his actions were not proven.

The difference in this case is that the ECtHR had already ruled on a violation of Article 3 and compensation regarding the event that is the subject of this application, whereas the administrative court did not rule on the responsibility of the administration, citing the applicant's negligence. In response to the ministry's opinion that the ECtHR's award of compensation would lead to the removal of the victim status, the Court made the following statement:

> "Even though the ECtHR has ruled for compensation in favor of the applicant, this does not show that the applicant's financial grievances have been completely resolved. First, the Administrative Court did not make any assessment of the damage suffered by the applicant. It is the duty of the Administrative Court to assess how much damage the applicant suffered as a result of his injury. It cannot be concluded that the Administrative Court has fulfilled its obligation, since the damage was assessed in the ECtHR judgment. Secondly, it is not known at this stage whether the compensation awarded by the ECtHR fully covers the damage suffered by the applicant. It is the duty of the court of instance to evaluate

> this. However, - since the Administrative Court ruled that the state was not at fault - it did not evaluate the extent of the damage suffered by the applicant and whether the compensation awarded by the ECtHR covered this damage. Under these circumstances, it should be decided that the applicant's victim status continues." (para. 60)

In these judgments, it is understood that in administrative justice, decisions were made to dismiss or reduce the claim for compensation due to the plaintiff's own fault, only if the assembly and demonstration did not meet the conditions specified in the law. However, for instance, if an assembly is held outside the designated places, no notification is made, it is against the decision to ban or even if it is not a peaceful assembly, a person's mere participation in this assembly shall not mean that the said person is at fault if they are harmed during the intervention.

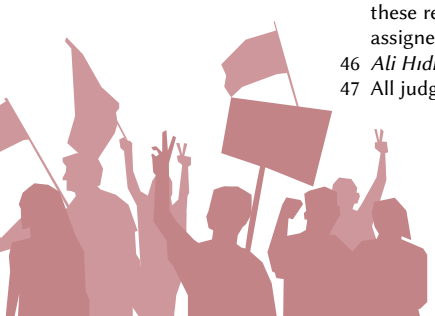
The applications regarding the October 10 massacre, on the other hand, are -unlike the others- about the ruling on strict liability without administrative courts considering the allegations that "despite the existence of a real and imminent risk of a bomb attack, the public authorities did not take the necessary measures to prevent the realization of the risk within the scope of their powers and within reasonable limits despite being aware of such risk". Although some faults were mentioned in the report prepared by the chief inspectors assigned by the Ministry of Interior, the courts did not take these allegations into account.[45] The Court stated the following: "In an action for damages filed on the allegation that the public authorities did not take reasonable measures to prevent the realization of a real and imminent threat that jeopardizes the life of the general public, the failure to investigate the allegation that the incident occurred through the fault of the public authorities and dealing with the matter within the framework of strict liability may result in a violation of the right to an effective remedy in conjunction with the right to life. In general, an action for damages is effective because it can detect the violation based on negligence and provide remedies accordingly and reveal what measures can be taken by the administrative authorities in similar cases. However, it does not turn out to be an effective remedy in a case where the negligence is not assessed and would thus fail to offer the plaintiff a chance of success.[46]

To that end, avoiding the detection of neglect of duty of the administration is also a special aspect of impunity, and the important aspect of the decision is the assessment that the compensation paid based on strict liability does not remove the victim status.[47] According to the Court, since a judgment made by direct recourse to the principle of social risk does not "express any opinion as to whether the obligation to protect life has been violated in the present case", the victim status persists in terms of individual application.

45 Although not related to these applications, it should be noted that in the decision of the Council of State in July 2021, these reports were cited but it was concluded that there was no neglect of duty considering the number of police officers assigned. It should be noted that this review is not sufficient, either.

46 *Ali Hıdır Tekin*, App. No: 2018/35243, 15 September 2021, § 49, *Mehmet Elmascan*, par. 46.

47 All judgments regarding these claims have arrived at the same conclusions. *Ali Hıdır Tekin*, par. 44-45.



Conclusion

The right to assembly, which is one of the most narrowed down rights in Turkey in recent years, is limited by both decisions to ban and disproportionate interventions in peaceful assemblies. The existence of an effective remedy against such intense restrictions and interventions is an extremely important guarantee, and the effectiveness of judicial remedies against these decisions and practices, and not just these interventions, should be discussed. In order for a review method to be an effective remedy in allegations of violation of a fundamental right and freedom, it must be effective both theoretically and practically in the light of the regulations in the legislation. While reviewing the legislation, both the administrative procedures regarding the action or practice presenting an alleged violation and the rules in the trial procedure should be considered.

Despite the fact that decisions to ban in terms of the right to an effective remedy are very common and constitute a severe interference in assemblies and demonstrations, the stay of execution in administrative justice is far from being an effective review mechanism. It is very difficult to get a stay of execution so quickly in cases brought before administrative justice, although decisions regarding the banning of a particular demonstration can be taken one day in advance, and general decisions to ban can be made immediately before an event, since there is no time limit for the administration. Although a temporary stay of execution decision can be made without taking the administration's defense, the courts prefer to wait for the administration's defense in order to evaluate unlawfulness, due to the difficulty of conducting an initial review and writing a decision in such a short time, and the decisions to ban are made only by enumerating the reasons set forth in the law. On the other hand, structural factors such as the inability to conduct reviews on weekends and during working hours, the fact that information and documents are in the hands of the administration, and the number of cases per each administrative judge are the factors that make it difficult for stay of execution to be effective. In the files reviewed, it is found that no rights and freedoms-based review is performed in terms of content, that the factors such as proportionality, touching the essence of the right and being necessary in a democratic society are not sufficiently reviewed in the decisions by adopting an approach that emphasizes the discretion of the security guards and the administration, and that even unconstitutional decisions such as requiring permission are not reviewed from this point of view, and that in the limited cases where an annulment decision is made, the decision is always made after the assembly date, except for a single decision. To that end, it is not possible to say that administrative justice is an effective remedy against decisions to ban.

Another problem regarding the effective remedy in terms of the right to assembly is actions for damages filed in case of ill-treatment during police intervention in assemblies. Although such actions can be effective and complementary to criminal proceedings in theory, it is observed that they may not be an effective remedy in practice. This is also evident in various violation judgments by the Constitutional Court. It also emanates from the fact that in the case of an assembly and demonstration held without notification - even if the assembly was a peaceful one or it cannot be proven with substantial evidence that the plaintiff directly caused the damage through their own negligence - the plaintiff is denied compensation or the compensation is reduced on the grounds that the plaintiff was at fault just because they attended the said assembly. Another case lacking an effective review is that, as in the October 10 massacre, when a terrorist act takes place during an assembly, the administration's negligence is not discussed, and a ruling of strict liability is made. In both of these cases, administrative justice is not an effective remedy.

ASSESSMENT OF THE EFFECTIVENESS OF ADMINISTRATIVE JUSTICE IN THE RIGHT TO ASSEMBLY IN TURKEY

A REVIEW OF ANNULMENT ACTION AGAINST BANS AND ACTION FOR DAMAGES AGAINST ILL-TREATMENT

D. ÇİĞDEM SEVER

NED NATIONAL ENDOWMENT FOR DEMOCRACY
SUPPORTING FREEDOM AROUND THE WORLD

ESHİD
Eşit Haklar
İçin
İzleme Derneği