

## **Türkiye has Indispensable Duties to Implement the Yaçinkaya Judgment of the Grand Chamber of the ECtHR Despite Political Expression of Unwillingness**



05/10/2023

### **The European Convention on Human Rights (ECHR) and Türkiye's Ratification of the Convention**

The European Convention on Human Rights (ECHR), adopted in 1950 by the Council of Europe, a distinct entity from the European Union comprised of 47 sovereign states, serves to safeguard fundamental human rights in Europe. Türkiye signed the ECHR on November 22, 1950, and officially ratified it on January 18, 1954, signifying its commitment to the Convention's principles. By becoming a party to the ECHR, Türkiye bound itself to comply with its provisions and accept the jurisdiction of the European Court of Human Rights (ECtHR) for cases alleging rights violations. This move was a significant stride toward aligning Türkiye's legal system with European human rights standards.

### **Article 90 of the Turkish Constitution**

Article 90 of the Turkish Constitution establishes the supremacy of international agreements, such as the ECHR, over domestic law in cases of conflict. It mandates that in such conflicts, international agreement provisions take precedence, requiring Turkish authorities and courts to adhere to these agreements, including judgments from bodies like the ECtHR. This

reinforces Türkiye's commitment to aligning its laws and practices with international human rights obligations.

### Overview of the key aspects of ECHR, ECtHR and its Grand Chamber

- **European Convention on Human Rights (ECHR):** The ECHR is a legal instrument that establishes a comprehensive list of civil and political rights for individuals in Council of Europe member states, obligating these states to safeguard and uphold these rights for all individuals within their jurisdiction.
- **European Court of Human Rights (ECtHR):** The ECtHR, based in Strasbourg, France, is a supranational court that adjudicates cases alleging ECHR violations by member states to ensure their compliance with ECHR obligations.
- **Grand Chamber:** The Grand Chamber, consisting of 17 judges, reviews select cases when there are critical ECHR interpretation issues, a potential major Convention violation, or conflicting lower chamber decisions, acting as the court's higher authority. Some cases are referred to the Grand Chamber for several reasons: *Complex Legal Issues, Serious Violations, Conflicting Decisions*

**Responsibility of European Council Member Countries:** Council of Europe member states must adhere to ECtHR rulings, requiring them to address ECHR violations by compensating victims, amending domestic laws, or taking other corrective actions, with non-compliance potentially leading to diplomatic pressure, political consequences, and in rare instances, expulsion from the Council of Europe.

In respect to the case at hand, the ECHR and the ECtHR play a crucial role in safeguarding human rights across Europe. The Grand Chamber, which decided on *Yalçınkaya* case that Türkiye has violated articles 6/1, 7 and 11 of the convention<sup>1</sup>, is a significant part of the court's structure, dealing with complex or important cases. Member states are legally bound to adhere to the court's judgments and take measures to prevent future violations of human rights as outlined in those judgments.

---

<sup>1</sup> Press Release issued by the Registrar of the Court:

<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7756172-10739780&filename=Grand%20Chamber%20judgment%20Y%C3%BCKsel%20Yal%C3%A7inkaya%20v.%20T%C3%BCrkiye%20-%20systemic%20problem%20of%20convictions%20for%20terrorism%20offences%20based%20on%20use%20of%20ByLock%20messaging%20application.pdf>, and full text of the judgment: [YÜKSEL YALÇINKAYA c. TÜRKİYE \(coe.int\)](https://hudoc.echr.coe.int/#%7B%22itemid%22%3A%5B%22001-228009%22%5D%7D) - <https://hudoc.echr.coe.int/#%7B%22itemid%22%3A%5B%22001-228009%22%5D%7D>

# The General Applicability of the ECHR in the Case of Yüksel Yalçinkaya v. Türkiye (Grand Chamber - Application No. 15669/20; September 26, 2023)

## Background:

The applicant, Yüksel Yalçinkaya, a teacher at a state school in Kayseri, Türkiye, was convicted on March 21, 2017, by the Kayseri Heavy Penal Court for membership in an armed terrorist organization described as "FETÖ/PDY" by the Turkish government (para. 63).

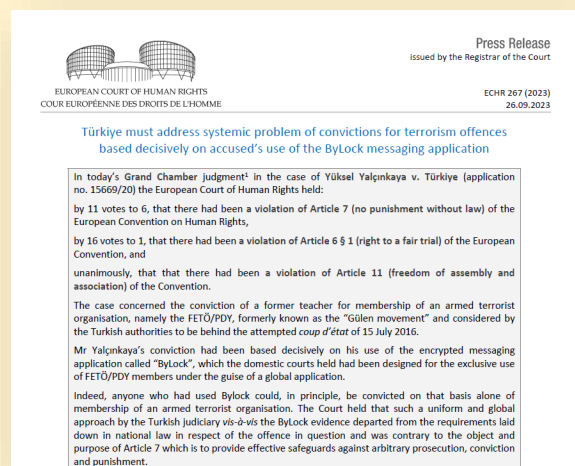
The conviction was based on the applicant's use of an encrypted messaging application called "ByLock," his ownership of an account in Bank Asya, and his membership in a trade union and an association (para. 1, 24, 27).

The applicant submitted an application to the European Court of Human Rights (ECtHR) on March 17, 2020, alleging violations of *Articles 6, 7, 8, and 11 of the European Convention on Human Rights (ECHR)* in connection with his prosecution and conviction (para. 1, 2).

The application was referred to the Second Section of the Court, which selected the case as a "leading case" for similar cases on March 2, 2021. On May 3, 2022, the Second Section decided to waive jurisdiction in favour of the Grand Chamber (para. 6).

[The Grand Chamber held a public hearing on the application on January 18, 2023](#) (para. 9). Following closed deliberations held on January 18 and June 28, 2023, the Grand Chamber delivered its judgment on a later date, on September 26, 2023.

The ECtHR, taking into consideration the provisions of the ECHR, including Article 7(1) ("*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*"), Article 6(1) ("*In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...*"), and Article 11 ("*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*"), found violations of these treaty provisions due to the fact that the use of the ByLock application, ownership of a lawful account in Bank Asya, and membership in a lawful association and union during the period of their activities were treated as elements of the offense of terrorism membership, the non-



disclosure of ByLock data to the applicant, the lack of equality of arms, and the absence of a fair trial, and the fact that membership in an association and a union, which are fundamental rights protected by the Convention and are legal, were considered as criminal offenses. Moreover, it was found that while exercising these rights, there should be trust in the law and the legal system, and the anticipation of being charged with a crime in the future should not exist.

## Summary of the 185-page Judgment in the Case of *Yüksel Yalçınkaya v. Türkiye*<sup>2</sup>

(Grand Chamber - Application No. 15669/20; September 26, 2023)

- 1. Applicant and Conviction:** The applicant, Yüksel Yalçınkaya, a teacher at a state school in Kayseri, Türkiye, was sentenced to six years and three months in prison on March 21, 2017, by the Kayseri Heavy Penal Court for membership in an armed terrorist organization referred to as "FETÖ/PDY" by Turkish authorities (para. 63).
- 2. Grounds for Conviction:** The conviction was based on the applicant's use of an encrypted messaging application called "ByLock," his ownership of an account in Bank Asya, and his membership in a trade union and an association (para. 1, 24, 27).
- 3. Reasons for Application:** The applicant submitted his application to the European Court of Human Rights (ECtHR) on March 17, 2020, alleging violations of Articles 6, 7, 8, and 11 of the European Convention on Human Rights (ECHR) in connection with his prosecution and conviction (para. 1, 2).
- 4. Leading Case Status of the Application:** The application was referred to the Second Section of the Court, which selected it as a "*leading case*" for similar cases on March 2, 2021. On May 3, 2022, the Second Section decided to waive jurisdiction in favour of the Grand Chamber (para. 6).
- 5. Examination Process of the Application:** [The Grand Chamber held a public hearing on the application on January 18, 2023](#)<sup>3</sup> (para. 9). Following closed deliberations held on January 18 and June 28, 2023, [the Grand Chamber delivered its judgment on a later date, on September 26, 2023](#).
- 6. Suspension of Obligations Arising from the Convention:** Turkish authorities, on July 21, 2016, notified the Secretary-General of the Council of Europe of their intention to suspend their obligations arising from the Convention under Article 15 (due to a state of emergency) (para. 15, 205).
- 7. ECtHR's Decision on Suspension:** The ECtHR, while noting that Türkiye did not clearly specify which articles of the Convention it intended to suspend, stated that it would examine whether the special measures taken against the applicant were absolutely necessary and whether they were consistent with other international obligations under international law. The ECtHR rejected Türkiye's request to benefit from Article 15 of the Convention (para. 211-213, 347-355, 398-401).

---

<sup>2</sup> Full text of the judgment: [YÜKSEL YALÇINKAYA c. TÜRKİYE \(coe.int\)](https://hudoc.echr.coe.int/#%7B%22itemid%22:%5B%22001-228009%22%7D) - <https://hudoc.echr.coe.int/#%7B%22itemid%22:%5B%22001-228009%22%7D>

<sup>3</sup> [https://youtu.be/moghYDp\\_WcY?si=yjWRb6-47QWwvsZg](https://youtu.be/moghYDp_WcY?si=yjWRb6-47QWwvsZg)

- 8. Determination of Terrorist Organization Status by Courts:** The ECtHR confirmed with reference to precedent cases that under Turkish law, the official recognition of an entity as a "terrorist organization" is subject to a decision by the courts (para. 251). This dispelled the notion that individuals knew that the Gülen Movement was a criminal organization based on opinions in court decisions and National Security Council resolutions related to the events of December 17/25 and beyond.

#### **ECtHR's Findings on Article 7 of the Convention and Grounds for Violation:**

In the case of *Yüksel Yalçınkaya v. Türkiye*, the European Court of Human Rights (ECtHR) examined the application in relation to Article 7 of the European Convention on Human Rights (ECHR). Article 7(1) of the ECHR prohibits finding someone guilty of a criminal offense unless it was a criminal offense under national or international law at the time it was committed, and no heavier penalty shall be imposed than the one applicable at the time of the offense.

The ECtHR emphasized the importance of Article 7 as a fundamental element of the rule of law. It highlighted that deviations from this guarantee should not be allowed, even in times of war or exceptional circumstances. The Convention should be interpreted and applied to provide effective safeguards against arbitrary prosecution, conviction, and punishment. The ECtHR found that the automatic attribution of membership in a terrorist organization to all individuals alleged to have used ByLock, without concrete evidence or other relevant information, was problematic. It concluded that there was a violation of Article 7 of the ECHR.

The ECtHR's judgment in this case underlines the importance of legal certainty and the prohibition of retrospective application of criminal law, particularly in relation to terrorism-related charges. The Court found that the automatic attribution of terrorism membership on the basis of ByLock usage alone, without any specific evidence of intent or material contribution to the organisation, as well as the use of depositing money in a legitimate bank, being a member of an association or trade union, attending religious gatherings and sermons, sending a child to a private school, subscribing to a newspaper, writing a column in a newspaper as a basis for terrorism charges violated the principles of legality and individual criminal responsibility under Article 7 of the ECHR.

In short, the Court found a violation under Article 7 of the Convention on the basis that the conviction for membership of an armed terrorist organisation was based on a broad and unpredictable interpretation of the relevant domestic law.

#### **ECtHR's Findings on Article 6 of the Convention and Grounds for Violation**



The Court found that the proceedings leading to the applicant's conviction for a serious criminal offence carrying a heavy penalty had been substantively and fundamentally unfair within the meaning of Article 6 of the Convention.

In the case of *Yüksel Yalçınkaya v. Türkiye* involving the contested evidence of ByLock, the ECtHR emphasized that its primary role was to assess the overall fairness of the trial rather than delve into the legality of evidence. The Court criticized the lack of procedural safeguards for electronic evidence collection by the National Intelligence Organization (MİT) compared to those specified in the Code of Criminal Procedure. Furthermore, it noted that doubts about the reliability of ByLock data could not be easily dismissed and raised concerns about whether any measures were taken to address these doubts.

The ECtHR found that the trial did not meet the requirements of Article 6 § 1 of the Convention due to the absence of safeguards allowing the applicant to effectively challenge the evidence and conduct an equal defense with the prosecution. This, in turn, undermined confidence in the judiciary and violated the essence of procedural rights. As a result, the Court concluded that Article 6 § 1 had been violated in this case of *Yüksel Yalçınkaya*.

#### **ECtHR's Findings on Article 11 of the Convention and Grounds for Violation:**

In the *Yüksel Yalçınkaya* case, the European Court of Human Rights (ECtHR) addressed the application of Article 11 of the European Convention on Human Rights (ECHR). Article 11 of the ECHR guarantees the freedom of association and assembly, including the right to form trade unions and be a member of such unions. The ECtHR affirmed that this freedom encompasses the right to establish associations and emphasized that the ability to form legal entities for collective action in pursuit of common interests is a crucial element of the freedom of assembly and association, without which this right would lose its meaning (para. 385).

In addition, the ECtHR assessed the abuse of the scope of Article 314 of the Turkish Penal Code, which deals with membership in armed terrorist organizations. The Court observed that the scope of this provision had been abused in a way that could include membership in a union or association legally operating during the relevant period without requiring concrete elements of continuous, diverse, and intensive involvement indicative of criminal behavior, highlighting that this expansion did not provide the necessary minimal protection against arbitrary interference. Therefore, the ECtHR found that Article 314 § 2 of the Turkish Penal Code, as interpreted in the context of the applicant's memberships in Active Education Union and Kayseri Volunteer Educators Association, did not meet the "prescribed by law" requirement of Article 11 § 2 of the Convention (para. 396). Consequently, the ECtHR concluded that there had been a violation of Article 11 of the ECHR in the present case (para. 402).

## **ECtHR's Application of Article 46 of the Convention:**

In its 185-page motivated judgment, the court stated in paragraphs 414-416:

*414. The Court therefore considers that the situation that led to a finding of violations of Articles 7 and 6 of the Convention in the present case was not prompted by an isolated incident or attributable to the particular turn of events, but may be regarded as having stemmed from a systemic problem. This problem has affected – and remains capable of affecting – a great number of persons (see, mutatis mutandis, Broniowski v. Poland [GC], no. 31443/96, § 189, ECHR 2004-V). This is evidenced by the fact that there are currently over 8,000 applications in the Court’s docket involving similar complaints raised under Articles 7 and/or 6 of the Convention relating to convictions that were based on the use of ByLock as in the present case.*

*415. Following the relinquishment of jurisdiction in the present case to the Grand Chamber, the Government were requested to indicate the approximate number of criminal cases still pending before the domestic courts, including the Constitutional Court, involving charges under Article 314 § 2 of the Criminal Code on the basis of, in particular, the use of the ByLock messaging application as in the present case. The Government replied that the official statistics pertaining to the criminal cases pending before domestic courts did not include information that would enable them to respond to the Court’s specific query. However, having regard to the number of ByLock users identified by the authorities, which was around one hundred thousand (see, for instance, paragraph 119 above), the Court notes that many more applications with similar complaints under Articles 7 and/or 6 of the Convention may potentially be lodged with it.*

*416. It is clear from the Court’s case-law that where a violation originates in a systemic problem affecting a large number of people, general measures at national level will be called for in the execution of such a judgment (see, for instance, Broniowski, cited above, §§ 188-94, and Văleanu and Others v. Romania, nos. 59012/17 and 27 others, §§ 269-73, 8 November 2022).*

Although the pilot judgement procedure under Rule 61 of the Rules of the Court is frequently invoked, the Court has also referred to general measures in cases where this procedure has not been applied.

## **ECtHR's Application of Article 41 of the Convention:**

The European Court of Human Rights (ECtHR) applied Article 41 of the Convention, which stipulates that if the Court determines a breach of the Convention or its Protocols, and if the internal legal system of the relevant High Contracting Party can only partially remedy this breach, the Court may, as necessary, rule for fair compensation to the aggrieved party. In the present case, the ECtHR found that the applicant had not presented evidence for pecuniary compensation and, concerning non-pecuniary compensation, since the applicant had the option to reopen domestic proceedings following the issuance of the current judgment under Article 311 § 1 (f) of the Turkish Code of Criminal Procedure, and this would essentially

constitute the most suitable form of redress in accordance with the requirements of the relevant Convention provisions, the ECtHR decided to reject the claim (para. 424-425). The Court directed the payment of a total sum of 15,000 euros to the applicant to cover expenses and costs (para. 432).

### **The Judgment in brief:**

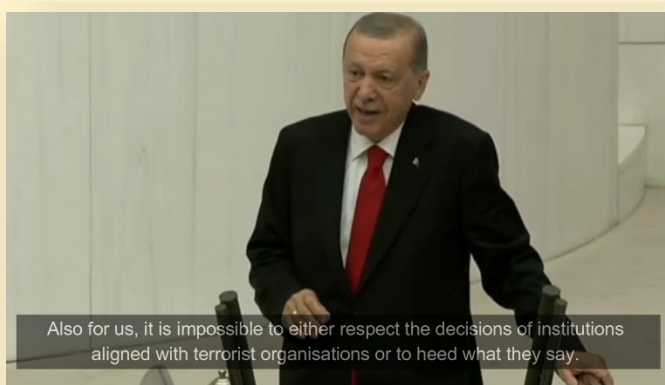
- The European Court of Human Rights (ECtHR) determined, with the majority vote, that there was a violation of Article 7 of the Convention.
- It also found, with a majority vote, a violation of Article 6 § 1 of the Convention.
- The unanimous decision was made that there was a violation of Article 11 of the Convention.
- Furthermore, the Court ruled, with a majority vote, that the finding of a violation constituted sufficient just satisfaction for the moral harm suffered by the applicant. Additionally, it ordered the respondent State to make a payment of 15,000 euros, along with any applicable taxes, within three months.

## **The reactions of the Turkish Government Officials to the *Yalçinkaya***

### **Judgment:**

#### **President Recep Tayyip Erdogan**

President Erdogan spoke in the opening of the Turkish parliament on 1 October against the ECtHR and their *Yalçinkaya* judgment.<sup>4</sup>



*"I would like to express here that we have no more tolerance for new impositions and new conditions in our process of full membership, which we have patiently brought to this day despite the European Union itself. On the other hand, the recent decisions of the European Court of Human Rights, an institution of the Council of Europe, have been the last drop in the bucket. It is impossible for us to either respect the decisions of institutions aligned with terrorist organisations or to heed what they say.*

<sup>4</sup> Video available here: <https://youtu.be/vQJR2MCjGkk>



*Moreover, this is not the only issue. Those who lecture us on democracy are playing three monkeys in the face of the Islamophobia that has enveloped them like a venom."*

### **Minister of Justice Yılmaz Tunç**

Minister of Justice Yılmaz Tunç was indeed the first to react on the same day the judgment was delivered. Minister Tunç stated on 26 September that the European Court of Human Rights (ECtHR), in its judgement against Turkey, exceeded its authority in examining evidence and that the judgement was unacceptable.<sup>5</sup>



In a statement made on his social media account<sup>6</sup>, Minister Tunç stated that the ECHR, in its decision announced on 26 September, ruled on the violation of the application of a person who was found to be a member of the Fethullahist Terrorist Organisation (FETO) as a result of the trial conducted by Turkish courts.

"It is unacceptable for the ECtHR to overstep its authority and issue a decision of violation by examining the evidence in a case where our judicial authorities at all levels, from the Court of First Instance to the Court of Appeal, from the Court of Cassation to the Constitutional Court, have deemed the evidence sufficient."

Tunç drew attention to the fact that the ECtHR is not a court of appeal. Recalling the ECtHR's judgements stating that "the admissibility of evidence or how to evaluate evidence is within the competence of national law and national courts", Tunç noted the following:

*"The ECtHR emphasised that the application and interpretation of the rules of law and the evaluation of evidence by national courts cannot be the subject of its examination. However, in the Yalçinkaya judgement announced today, the ECtHR departed from this established case law. The ECtHR has clearly exceeded its jurisdiction by making an evaluation of the evidence and has made the application of the rules of law and the evaluation of evidence by national courts the subject of its review. Although the ECtHR has repeatedly stated in its jurisprudence that it has*

---

<sup>5</sup> [Adalet Bakanı Tunç'tan AİHM'in Türkiye aleyhindeki "Yalçinkaya" kararına tepki \(aa.com.tr\) - https://www.aa.com.tr/tr/gundem/adalet-bakani-tunc-tan-aihm-turkiye-aleyhindeki-yalcinkaya-kararina-tepki/3001568](https://www.aa.com.tr/tr/gundem/adalet-bakani-tunc-tan-aihm-turkiye-aleyhindeki-yalcinkaya-kararina-tepki/3001568)

<sup>6</sup> <https://x.com/yilmaztunc/status/1706691787002191985?s=20>

*no jurisdiction to evaluate evidence, it has resorted to evidence evaluation when it comes to FETÖ trials."*

Two days later on 28 September, Minister of Justice answered a journalist's question regarding the ECtHR judgment:<sup>7</sup>

*"There is an assessment that "ByLock alone would not be a crime" in the violation decision of the ECHR based on the principle of "no crime without law". We see that a decision has been made without taking these precedents into consideration, especially our (domestic) judicial practice. Here, we see that there is an intervention in the national judgements of the countries by evaluating the evidence. In particular, we think that it is a decision only applicable to that file. ... Therefore, we think that it will not set a precedent. ... we see that this standard is ignored and our domestic law practice is not taken into consideration. This judgement is only valid for that (Yalçinkaya) case."*

#### **President of the Constitutional Court (AYM) Zühtü Arslan**

On the same day a few hours after President Erdogan's harsh reaction to the ECtHR judgment, President of the Constitutional Court Zühtü Arslan answered the questions of journalists at the new legislative year reception organised on 1 October at the Grand National Assembly of Turkey.<sup>8</sup>

Upon a journalist's question regarding the European Court of Human Rights' (ECtHR) decision on Bank Asya and ByLock (Yüksel Yalçinkaya), Arslan said that they do not agree with the ECtHR's decision. He added,

"The decision of the Constitutional Court (about Yalçinkaya) is already clear. Therefore, they made a different decision from our judgement."

---

<sup>7</sup> [https://x.com/adalet\\_bakanlik/status/1707329504819974332?s=20](https://x.com/adalet_bakanlik/status/1707329504819974332?s=20)

<sup>8</sup> [Anayasa Mahkemesi Başkanı Arslan: AİHM kararına biz katılmıyoruz \(gazeteduvar.com.tr\) - https://www.gazeteduvar.com.tr/anayasa-mahkemesi-baskani-arслан-aihm-kararina-biz-katılmıyoruz-haber-1640350](https://www.gazeteduvar.com.tr/anayasa-mahkemesi-baskani-arслан-aihm-kararina-biz-katılmıyoruz-haber-1640350)



Arslan continued as follows:

*"The judgements of the ECtHR are known to public and widely debated. The latest judgement is also being debated. But in the end, the courts in Türkiye will decide. We will look at the retrial process. It will come before us and we will decide then."*

Contrarily, at many occasions prior to *Yalçınkaya judgment*, with emphasis on how ECtHR case law has had a decisive influence on the legal system of Turkey, Arslan stated:<sup>9</sup>

*"At this point, it should be noted that the Strasbourg organs, particularly the ECtHR, have played a very important role in the transformation of the legal systems of the Contracting Parties to the Convention. In this sense, the case law of the ECtHR has had a decisive influence on the development of the constitutional and legal system of Turkey, which has been a party to the European Convention on Human Rights since 1954. Especially in the justifications of the 1995, 2001, 2004 and 2010 constitutional amendments, direct references were made to the ECHR and the ECtHR."*

In an online panel held by Bahcesehir University on 3 May 2021, Arslan explained:<sup>10</sup>

*"The Constitutional Court has played an important role in the protection of fundamental rights and freedoms through its judgements on individual applications and has established an important human rights jurisprudence based on the case-law of the ECtHR."*

In his Summer School Opening Speech in Ankara dated 7 September 2021, Zühtü Arslan:<sup>11</sup>

<sup>9</sup> [Anayasa Mahkemesine Bireysel Başvuru Sisteminin Desteklenmesi Ortak Projesi Kapanış Konferansı Açış Konuşması | Anayasa Mahkemesi - https://www.anayasa.gov.tr/tr/baskan/konusmalar/anayasa-mahkemesine-bireysel-basvuru-sisteminin-desteklenmesi-ortak-projesi-kapanis-konferansi-acis-konusmasi/](https://www.anayasa.gov.tr/tr/baskan/konusmalar/anayasa-mahkemesine-bireysel-basvuru-sisteminin-desteklenmesi-ortak-projesi-kapanis-konferansi-acis-konusmasi/)

<sup>10</sup> [Türkiye’de İnsan Haklarının Korunmasında Bireysel Başvurunun Rolü\\* | Anayasa Mahkemesi - https://www.anayasa.gov.tr/tr/baskan/konusmalar/turkiye-de-insan-haklarinin-korunmasinda-bireysel-basvurunun-rolustar/](https://www.anayasa.gov.tr/tr/baskan/konusmalar/turkiye-de-insan-haklarinin-korunmasinda-bireysel-basvurunun-rolustar/)

<sup>11</sup> [Asya Anayasa Mahkemeleri ve Muadili Kurumlar Birliği 9. Yaz Okulu Açış Konuşması | Anayasa Mahkemesi - https://www.anayasa.gov.tr/tr/baskan/konusmalar/asya-anayasa-mahkemeleri-ve-muadili-kurumlar-birligi-9-yaz-okulu-acis-konusmasi/](https://www.anayasa.gov.tr/tr/baskan/konusmalar/asya-anayasa-mahkemeleri-ve-muadili-kurumlar-birligi-9-yaz-okulu-acis-konusmasi/)

*"Turkish law, as expressed in Law No. 6216, determines the binding nature of the judgements of the Constitutional Court and their implementation, in particular in cases where violations have been established. This legislation largely reflects the characteristics of violation judgments set out in the ECtHR case-law and emphasises the state's obligation to bring violations to an end, redress grievances and prevent future violations."*

In his opening speech at the Regional Meeting in Bursa on 13 June 2022, President of the Constitutional Court Zühtü Arslan said:<sup>12</sup>

*"In fact, in a state of law, it is unacceptable that the implementation of court decisions is even on the agenda, let alone discussed. This is because the effective enforcement of judicial decisions is a necessary consequence of the principle of supremacy and binding force of the Constitution. It is a requirement of the supremacy of the Constitution that laws and the procedures and decisions based on them cannot be contrary to the Constitution. Likewise, the binding nature of the Constitution means that the constitutional provisions, on the one hand, and the decisions of the Constitutional Court interpreting and applying these provisions, on the other hand, bind the legislative, executive and judicial organs, real and legal persons."*

At another occasion on his speech to the Plenary Session of the Venice Commission on 17 December 2022, he referred to ECtHR standards:<sup>13</sup>

*"In adjudicating constitutional complaints, the Turkish Constitutional Court draws on the case-law of the ECtHR and sets standards for the protection of constitutional rights in line with the principles set by the ECtHR."*

Furthermore, most recently, in a speech in June 2023, Zühtü Arslan specifically highlighted a case in which the Constitutional Court's approach changed following the introduction of individual applications:<sup>14</sup>

*"The Court prioritised international treaties over domestic law provisions, emphasising gender equality and drawing on relevant international conventions and ECtHR case law to identify a conflict between national law and international*

---

<sup>12</sup> [Anayasa Mahkemesinin İhlal Kararlarının Etkileri | Anayasa Mahkemesi - https://www.anayasa.gov.tr/tr/baskan/konusmalar/anayasa-mahkemesinin-ihlal-kararlarinin-etkileri/](https://www.anayasa.gov.tr/tr/baskan/konusmalar/anayasa-mahkemesinin-ihlal-kararlarinin-etkileri/)

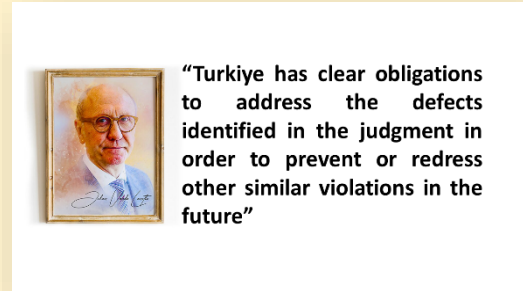
<sup>13</sup> [Türkiye’de Anayasa Şikâyeti: On Yıllık Tecrübe | Anayasa Mahkemesi - https://www.anayasa.gov.tr/tr/baskan/konusmalar/turkiye-de-anayasa-sik%C3%A2yeti-on-yillik-tecrube](https://www.anayasa.gov.tr/tr/baskan/konusmalar/turkiye-de-anayasa-sik%C3%A2yeti-on-yillik-tecrube)

<sup>14</sup> ["Adli ve İdari Yargıda Bireysel Başvuru İhlal Kararları ve İhlalin Sonuçlarının Ortadan Kaldırılması" Konulu Erzurum Bölge Toplantısı Açış Konuşması | Anayasa Mahkemesi - https://www.anayasa.gov.tr/tr/baskan/konusmalar/adli-ve-idari-yargida-bireysel-basvuru-ihlal-kararları-ve-ihlalin-sonuclarinin-ortadan-kaldirilmesi-konulu-erzurum-bolge-toplantisi-acis-konusmasi/](https://www.anayasa.gov.tr/tr/baskan/konusmalar/adli-ve-idari-yargida-bireysel-basvuru-ihlal-kararları-ve-ihlalin-sonuclarinin-ortadan-kaldirilmesi-konulu-erzurum-bolge-toplantisi-acis-konusmasi)

*human rights standards. This reflects the Court's commitment to harmonise its judgments with international norms and standards."*

The council representing Mr. Yalçinkaya before the Grand Chamber of ECtHR, Prof. Johan Vande Lanotte commented as below after the delivery of the judgment:<sup>15</sup>

*Mr. Yalçinkaya's conviction had been based decisively on the use of ByLock, an encrypted messaging application similar to Signal and Telegram, which the Turkish domestic courts held that it had been designed for the exclusive use of the "Gülen Movement" – a group designated by Turkish state authorities as the "FETÖ/PDY".*



*Between 2015 and 2021 approximately 270 000 persons had been convicted for their alleged membership of a terrorist organization, namely the "FETÖ/PDY", and criminal investigation and prosecutions still continue in Türkiye. Most of these individuals had been convicted based on their alleged use of ByLock as well their membership of unions or other associations disbanded in the post-2016 coup period due to their alleged affiliations to the "Gülen Movement".*

*In the Yalcinkaya judgment, the Grand Chamber found that these convictions based on the use of ByLock clearly violate fundamental principles enshrined in the ECHR including Article 6 and 7 ECHR. In particular, The Grand Chamber underlined that the victims of these arbitrary judicial decisions suffered from an almost automatic presumption of guilt, making it nearly impossible for them to contradict the ByLock evidence and exonerate themselves.*

*More importantly, the Grand Chamber highlighted that "the problems which had led to findings of violations were systemic in nature". In this regard, the Grand Chamber called on Türkiye to take necessary measures to address those systemic problems, notably with regard to the Turkish judiciary's approach to Bylock evidence.*

*The Turkey Tribunal has repeatedly underlined that hundreds of thousands of people in Turkey have fallen victim to massive arbitrary convictions and imprisonment. In the Yalcinkaya judgment, The ECtHR's Grand Chamber, the highest authority concerning human rights in Europe, unequivocally confirmed this finding. Following today's judgement, the Turkey Tribunal would like to underline that Türkiye has clear obligations under the ECHR to implement the Yalcinkaya judgment and take both individual measures including the reopening of the*

<sup>15</sup> Video available here: <https://youtu.be/BGVYT14qnKY?si=r2FY0aqGuvKmSC4h>



*criminal proceedings to put an end to the violations found in the present case and afford redress to Mr. Yalçinkaya and general measures to address the defects identified in the judgment in order to prevent or redress other similar violations in the future, for instance by creating the possibility for other victims of the same violations to have their rights reinstated.*

On the other hand, the other council of the applicant Yalçinkaya, Lawyer Johan Heymans approached the matter from the perspectives of other victims. While leaving the Grand Chamber right after the delivery of the judgment, Heymans said:

*"Above all, with this judgement, there is now a glimmer of hope for hundreds of thousands of other victims of the systemic problems within the Turkish judiciary."*



Here are just a few impressions from a live discussion streamed on 28 September by Turkish experts on the matter:<sup>16</sup>

- **Dr. Emre Turkut:** *"The Yalçinkaya case marks a potential turning point and will hopefully be extensively referenced in legal and political circles in Turkey and beyond."*
- **Former Judge Yavuz Aydın:** *"Türkiye faces systemic and widespread human rights issues, particularly focusing on the lack of judicial independence. With this Yalçinkaya judgment, individuals, even those without the so-called evidences used by Turkish courts, can resort to remedies and ask for retrial or equity based on Article 7 violation."*
- **Lawyer Hakan Kaplankaya:** Outlining the domestic legal avenues available for those impacted by the judgment, said, *"Individuals with finalized convictions should use the remedy of retrial, despite the uncertainties in the legislation. The systemic breach highlighted in the judgment is significant."*

A few more noteworthy views among many of Turkish academics, experts, legal professionals:

- **Prof. Dr. Ali D. Ulusoy** in his article published on 4 October 2023:<sup>17</sup> *"A court, even if it is a supreme court, which does not recognise the precedential effect of the judgments of the ECtHR and the Constitutional Court, i.e. their binding force as an example, both dynamises the foundation of the judicial system and violates the Constitution itself."*

<sup>16</sup> Video available here: <https://www.youtube.com/live/Pj1ehliNeX8?si=F4LeQUgo7BPognzY>

<sup>17</sup> [AiHM ve AYM kararlarının bağlayıcılığı sorunu \(t24.com.tr\)](https://t24.com.tr) - <https://t24.com.tr/yazarlar/ali-d-ulusoy/aihm-ve-aym-kararlarinin-baglayiciligi-sorunu,41730>

- **Former Chief Justice, President of the Supreme Court Sami Selcuk** on Flash TV News program on 29 September 2023:<sup>18</sup> *"What Türkiye is doing is completely unlawful. You have to comply with those judgements. It's as simple as that. I am 85 years old. I have never seen such a disgrace. I feel sad for my country."*
- **Administrative law expert Prof. Dr. Metin Günday** on his twitter account:<sup>19</sup> *"Those who say "these judgements do not bind me" or "I do not agree with these judgements" in the face of the violation judgements of the ECtHR and the Constitutional Court are those who not only ignore the Constitution, but also want to perpetuate the violations of rights established by these judgements."*



## **CONCLUSION:**

Türkiye is a party to the European Convention on Human Rights (ECHR). As a result, Türkiye is bound by the ECtHR's rulings. By refusing to implement the Yalçınkaya judgment, Türkiye would be violating its international obligations.

<sup>18</sup> [https://www.youtube.com/live/WK-QJ\\_6D2ig?si=vu-bVrNo8gvzn4t6&t=2703](https://www.youtube.com/live/WK-QJ_6D2ig?si=vu-bVrNo8gvzn4t6&t=2703)

<sup>19</sup> <https://x.com/MetinGnday/status/1709862346338803861?s=20>

Türkiye has indispensable obligations to implement of the Yalçinkaya judgment as Türkiye is still a party to the European Convention on Human Rights (ECHR). As a result, Turkey is bound by the ECtHR's rulings. By refusing to implement the Yalçinkaya judgment, Türkiye would be violating its international obligations.

### **RECOMMENDATIONS:**

We urge President of the Constitutional Court Zühtü Arslan and other relevant authorities to:

- ✓ reconsider their position on the Yalçinkaya judgement and ensure that it is implemented in full compliance with Türkiye's international obligations,
- ✓ adhere to the principles of consistency, independence of the judiciary and the rule of law, which has already been endorsed many times by the authorities,
- ✓ demonstrate unwavering commitment to respecting international treaties and conventions, ensuring rule of law and judicial independence in Türkiye,
- ✓ strive for consistency by reconciling their comments on the Yalçinkaya judgement with their previous statements, thereby upholding the principles that President Arslan so eloquently defended.

### **Contact Us**

E-mail: [info@turkeytribunal.com](mailto:info@turkeytribunal.com)

Website: <https://turkeytribunal.com/>

X: [https://twitter.com/turkey\\_tribunal](https://twitter.com/turkey_tribunal)