

EXTENDED SUMMARY

In the decision of Şerafettin Can ATALAY 2, the Constitutional Court ruled with a majority of votes that the right to be elected and to engage in political activities guaranteed under art. 67 of the Constitution and the right to personal liberty and security guaranteed under art. 19 of the Constitution were violated for the applicant who applied for individual application upon his request to benefit from parliamentary immunity was not fulfilled. In the case that constitutes the basis for the decision of the 3rd Chamber for Criminal Matters of the Court of Cassation numbered 2023/12611 File no., 2023/Other issues and 8.11.2023 dated, the decision of the Constitutional Court on the violation of rights (Şerafettin Can ATALAY 2) upon the individual application of Şerafettin Can ATALAY to the Constitutional Court was subject to examination. The 3rd Chamber for Criminal Matters of the Court of Cassation has decided not to comply with the Constitutional Court's ruling in the Şerafettin Can ATALAY 2 judgment on retrial to benefit from parliamentary immunity. This decision, the 3rd Chamber for Criminal Matters of the Court of Cassation filed a criminal complaint with the Chief Public Prosecutor's Office of the Court of Cassation against the members who voted on the violation of rights in the Şerafettin Can ATALAY 2 application, on the grounds that the Constitutional Court unlawfully exceeded the limits of its jurisdiction by violating the provisions of the Constitution and engaged in judicial activism. This decision of the Court of Cassation raises many questions and problems. This study is based on four main questions. First of all, it has been discussed whether the alleged criminal act should be clearly stated when filing a criminal complaint against the members of the Constitutional Court. In its decision, the 3rd Chamber for Criminal Matters of the Court of Cassation merely expressed its assessment that the Constitutional Court exceeded its judicial authority and engaged in judicial activism, but did not explicitly state the fact of the crime. It has been concluded that it is in the public interest that the public should know what crime the incident subject to the criminal complaint constitutes and what the members of the Constitutional Court are accused of. Secondly, in special investigation procedures regulated in the legislation, such as the investigation of the members of the Constitutional Court, an answer was sought to the question to which authority the criminal complaint should be filed. In the case

of the members of the Constitutional Court, it was investigated to which authority the criminal complaint should be filed. Considering that the Chief Public Prosecutor's Office of the Court of Cassation is not a super prosecutor's office or a prosecutor's office of Turkiye, it has been concluded that the authority that will be authorized to file a criminal complaint and conduct an investigation within the scope of Law No. 6216 and art. 158 of the Criminal Procedure Code is the Presidency of the Constitutional Court, not the Chief Public Prosecutor's Office of the Court of Cassation. Thirdly, the manner in which the investigation of the members of the Constitutional Court should be conducted is analyzed. Within the scope of the regulations in the legislation, attention was drawn to the ineffectiveness of the criminal complaint in conducting the special investigation procedure for the members of Constitutional Court and the failure of the legislator to exhibit farsightedness as nomothete obligation while regulating the special investigation procedure in question. When criminal complaints are filed against a large number of Constitutional Court members, it is not possible to form an Inquiry Board according to Law no. 6216. Accordingly, it was concluded that the fact that the quorum of the General Assembly of the Constitutional Court is ten members prevents the effective functioning of this procedure and that this procedure clearly contradicts the criterion of independence and impartiality in the obligation of effective investigation set by the ECtHR in terms of authorizing persons working within the same institution to conduct judicial proceedings against each other. Finally, it sought answers to the questions of what potential problems the criminal complaint filed by the 3rd Chamber for Criminal Matters of the Court of Cassation against the members of the Constitutional Court would cause in a society that has adopted the rule of law principle and in the international community. With this criminal complaint, attention has been drawn to the danger that, from this stage onwards, the requirement of exhaustion of domestic remedies in the application to the European Court of Human Rights in similar cases may not be required. It is concluded that this danger may result in the harm of the Turkish people and the pseudo-fairness of the Turkish judiciary in the national and international community and that if it is considered that the Constitutional Court has exceeded its jurisdiction, the solution is not in the Chief Public Prosecutor's Office of the Court of Cassation, but in the Grand National Assembly of Turkey and the President of the Republic, who is obliged to ensure the implementation of the Constitution and the orderly and

harmonious functioning of the State organs within the scope of art. 104/2 of the Constitution. It has been argued that procedures such as criminal complaints against members of the supreme court in the exercise of judicial power may be perceived as a power struggle between the supreme judicial authorities, and that this may harm pseudo-fairness.

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