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Date: 04/02/2019

**DH-DD(2019)125**

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Meeting: 1340<sup>th</sup> meeting (March 2019) (DH)

Communication from a NGO (Human Rights Joint Platform [IHOP]) (25/01/2019) and reply from the authorities (04/02/2019) in the ATAMAN group of cases v. Turkey (Application No. 74552/01).

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

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Réunion : 1340<sup>e</sup> réunion (mars 2019) (DH)

Communication d'une ONG (Human Rights Joint Platform [IHOP]) (25/01/2019) et réponse des autorités (04/02/2019) relative au groupe d'affaires ATAMAN c. Turquie (requête n° 74552/01)  
**(Anglais uniquement).**

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

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24.01.2019

**Rule 9.2 Communication from IHOP (in the *Oya Ataman group of cases v. Turkey* (Application No. 74552/01)).**

1. The aim of this submission is to update the Committee of Ministers concerning the retrogressive legislative and executive developments with respect to the ongoing lack of full and effective implementation of general measures in *Oya Ataman group of cases*. The submission is prepared by Human Rights Joint Platform (IHOP), a platform of human rights organisations in Turkey whose mission is to contribute to the development of a civil society working to advance rule of law and respect for human rights and freedoms. Human Rights Joint Platform previously submitted a Rule 9.2 communication with respect to this group of cases on 5 January 2015.

**Background**

2. Ataman group of cases comprise of 56 judgments concerning violations of the applicants' right to freedom of peaceful assembly and/or ill-treatment of the applicants by the law enforcement officers on account of the force used by the law enforcement officers to disperse demonstrations. Certain cases also concern the failure to carry out an effective investigation into the applicants' allegations of ill-treatment or lack of an effective remedy in this respect (violations of Articles 3, 11 and 13 of the Convention). **The Ataman group of cases underline structural problems with respect to the full and effective enjoyment of freedom of assembly and the arbitrary restrictions on freedom of assembly through the employment of bans, dispersion of peaceful assemblies through use of force, and criminalisation of those who take part peacefully in assemblies.** Ataman Group is are pending for execution before the Committee of Ministers for **twelve years**.

3. In its 310th meeting on 13-15 March 2018, the Committee of Ministers underlined that 'the common feature of these cases was the authorities' **failure to show a certain degree of tolerance towards peaceful gatherings** and, in some cases, the precipitate use of physical force, including tear gas, by law enforcement officials. The Committee recalled that '**the origin of the problem stems from the legislation under which any demonstration carried out without prior notice is considered to be unlawful, irrespective of its peaceful nature.**'

4. As to general measures, the Committee of Ministers asked Turkey **to fully align Law No. 2911 with the Court's jurisprudence**; and invited the authorities to provide a copy of the Directive "on Tear Gas, and Defence Rifles, the Use and Storage of Equipment and Ammunitions relating to them and Training of User Personnel" (2016) and information on whether, and if so how, the above directive differs from that of 2008 regulating the use of tear gas; whether it harmonises the diverse legislation on the use of tear gas and related equipment and ammunition by law enforcement agents; whether the "interference assessment meetings" provided under the directive are capable of reviewing the necessity and reasonableness of any use of force.

5. Most recently, the government provided information on the state of implementation on 20 December 2017 and 4 January 2019.

**Legislative developments: Lack of full alignment of Law 2911 with Court's jurisprudence and introduction of further restrictions on freedom of assembly through new legislative amendments, in particular to the Provincial Administration Law (No. 5442)**

6. Since the last review of the state of implementation of Ataman group of cases, Law No 2911 has not been fully aligned with the Courts' jurisprudence. Instead, right to peaceful assembly has become more restrictive under ordinary law. Law 2911 continues to incorporate no tolerance for the peaceful nature of assemblies and allows for unfettered discretion for banning assemblies and subsequent use of force against peaceful protesters by the use of tear gas or force. Peaceful protesters who are in what is called 'an unlawful assembly' do not enjoy any protections. Being at an unlawful assembly makes them subject to use of police force, tear gas, detention, and criminal prosecution..

7. Alongside Law 2911, **Law 5442 on Provincial Administration under Article 11(c)** continues to allow for unfettered discretion to provincial governors to take **any decisions or preventative measures** within their province. Such measures extend to decisions on any type or size of assembly or gathering in open or closed places. Under Article 66 of the same law, those who do not respect the decisions of the governors are subject to sanctions under Article 32 of the Law 5326 on Misdemeanors. This makes individuals taking part in a peaceful assembly that is deemed against Article 11(c) automatically subject to sanctions in the form of fines. The current amount of fine for taking part in an unlawful gathering is 320.00 TL. This is 20 percent of the current minimum wage in Turkey.

7. On 18 July 2018, the state of emergency, which allowed for high restrictions on the right to assembly, in Turkey came to an end. On 31 July 2018, the Parliament passed an omnibus law allowing emergency-type restrictive measures into ordinary laws. Of significant relevance to the Ataman group is **the amendment to Article 11/C of the Provincial Administration Law (No. 5442)**. This amendment **allows** provincial governors to take preventive measures for maintaining peace, security, right to physical integrity and the public order in their provinces by banning the entry or exit of individuals to their provinces for fifteen days. Furthermore, these restrictions can be extended after the initial fifteen days on a continuous basis.

8. With the 31 July 2018 omnibus law, Articles 6 and 7 of Law 2911 were also amended.

9. The amendment to Article 6 allows the provincial governors the right to decide on the venue and the route of gatherings provided that the venue or the route 'do not make the daily life of citizens excessively and unbearably difficult.' This amendment is vague and is open to subjective assessment as it does not clearly define what makes the daily life of citizens excessively and unbearably difficult, given that mass peaceful gatherings concerning the matters of public concern and interest, in part, do aim to disturb the daily life of citizens by their nature. Article 34 of the Constitution recognises this when it allows for the right to peaceful assembly without prior permission without any specific qualifiers. The right to peaceful assembly is a qualified right. However due to the close connection between assembly and expression, the qualifiers have to be construed narrowly and concretely, and in a foreseeable way., For example reference may be made to routes of essential concerns of citizens such as hospitals in the law itself. This amendment does not meet the foreseeability test in its current form and continues to carry the risk of selective application.

10. The amendment to Article 7 allows for gatherings in open places until night time and in open places until midnight. It also allows for gatherings in open places to continue until midnight with the permission of the governor. This amendment, too, falls short of the Court's general principles on the non-touchable core of right to peaceful assembly without permission. It makes twenty-four hour protests, or days long protests for example, by default unlawful. Automatic time restrictions for gatherings do not meet the necessity in a democratic society test of the Court's case law.

### **Executive practice: Bans of assemblies of selected groups and retaliatory use of tear gas, as well as civil and criminal law against peaceful protesters**

10. The executive practice concerning the Ataman group of cases continues to be banning or declaring unlawful, assemblies of selected groups in society without any regard to the peaceful character of such assemblies, use of force by police, including tear gas once the gathering is deemed unlawful and use of criminal sanctions under Law 2911 or misdemeanor fines under Law 5326.

11. In the interest of space, we provide three well-documented, public and easily accessible examples as evidence for lack of due regard for the peaceful nature of assemblies. It should be noted that these examples relate to the period after the end of the state of emergency in the country.

12. **Saturday Mothers:** Saturday mothers are individuals who gather at 12.00 pm every Saturday in a pedestrian area in the Galatasaray district of Istanbul **since 27 May 1995**, that is, **for twenty four years**, to raise awareness and demand accountability for the well documented enforced disappearances that took place since the 1980s in Turkey. Some of these have also been subject to final judgments by the ECtHR and are cases that are under the supervision of the Committee of Ministers. Saturday Mothers is a movement inspired by the Mothers of Plaza del Mayo. The gathering takes place in the form of a vigil with mothers, and relatives holding the pictures of their children. On August 25th, 2018, Turkish authorities announced that the district governor of Beyoglu, banned the 700th gathering of the event. Subsequently those peacefully walking to the square were dispersed with the use of teargas, and painted bullets. Arrests, including of elderly mothers, also took place.<sup>1</sup> The statement of the governor is a testament to the twelve-year long impasse in the legislative general measures in the Ataman Group. The Governor wrote:

‘The call for a gathering at 12.00 pm in Galatasaray Square on 25.08.2018, as advertised by in social media accounts related to the PKK terrorist organisation, is not part of the lawful gathering places under Law 2911, no one has legally informed us of this gathering and therefore, the governor will not allow this gathering under Articles 10 and 17 of Law 2911 and under 32/ç of the Law 5442 of Provincial Governance.’<sup>2</sup>

What this example shows is that the executive and the police forces under his command took no account of the Ataman group case law, banned and subsequently used force to disperse one of the most globally well-known and peaceful gatherings in the country’s contemporary history with blanket references to Law 2911 and Law 5442.

13. **Continuous banning of gay pride and bans on LGBTI events:** Gay prides are banned, **despite the existence of lawful requests to hold them**, since 2014 in Turkey, by decisions of local governors. Gay prides are peaceful and celebratory gatherings of all individuals in Turkey. These bans also extend well beyond the gay pride and extend to wide range of assemblies in open and closed public spaces.<sup>3</sup> In addition, during the state of emergency, Ankara Governorship imposed a blanket ban on all LGBTI activities on 19 November 2017 despite any rational link between the reasons for declaring a state of emergency and LGBTI activities in Ankara, The unlawfulness of this under the state of emergency aside, even after the end of the state of emergency Ankara Governor, in a letter of 3 October 2018, informed all police within its jurisdiction that ‘LGBTI, etc. events are banned in the city.’<sup>4</sup> As justification of the ban, the governor invoked “social sensitivities and sensibilities”, “public security”, “protection of general public’s health and morality” and “protection of the rights of the others” in an abstract manner. More crucially, as per the example of Saturday Mothers, the governor cited the Provincial Administrative Law No.5442 and Law No.2911 on

<sup>1</sup> <https://www.bbc.com/turkce/haberler-turkiye-45307188>

<sup>2</sup> *ibid.*

<sup>3</sup> <http://kaosgl.org/page.php?id=25052>

<sup>4</sup> <http://kaosgl.org/page.php?id=26759>

Meetings and Demonstrations as the justification for the ban. This widespread and systematic use of law 2911 and 5442 against the activities of one segment of the society further provides evidence as to the lack of due regard to the peaceful qualities of assemblies and the ease with which laws are employed by the executive in a blanket, arbitrary, and discriminatory manner.

**14. The case of 'Yüksel Resistance' : A group of former public servants** have been protesting against their purge from their employment at the municipality of Ankara with a state of emergency decree. The group carry out peaceful protests in the pedestrian Yüksel Street in Ankara. They are often seen standing and carrying a sign that saying 'we want our jobs back' on this street. Amongst them is Veli Saçılık, who previously was an applicant before the European Court of Human Rights due to the ill treatment he suffered in the hands of prison authorities which led to him losing one arm.<sup>5</sup> Together with other demonstrators, Saçılık was shot with multiple plastic bullets and was subject to ill treatment of by police officers following the characterisation of his street protest as unlawful.<sup>6</sup> Furthermore, each time demonstrators took part in this protest, they were fined under Article 32 of the Law on the Law 5326 on Misdemeanors. By 8 November 2018, Mr. Saçılık, for example, was fined 24,000 TL in total, 15,000 TL was final. This is an amount nearing 4000 Euros. On the same day, the authorities confiscated his car in return for his pending fines as he was not able to pay them. This individual example demonstrates the punitive use of Misdemeanors Law against those exercising their right to peaceful protest. Individuals thus do not only risk police violence, subjection to tear gas and plastic bullets, arrest, prosecutions and threat of criminal sanctions under Law 2911, but also hefty fines when exercising their right to peaceful protest under Law 5522.

#### **Judicial practice**

**15.** Courts are not the institutions for ensuring the full and effective implementation of **general measures** in the Ataman Group cases. Without a complete overhaul of law 2911 and Law 5442 in line with Court's case law, it is not realistic to expect courts to set aside ordinary laws and directly apply Convention standards. As per the previous findings of the Committee of Ministers, **the root cause of the problem in Ataman group cases clearly lie in the lack of an adequate legal framework and arbitrary nature and operation of the existing legal framework..** Criminal prosecutions and application of the misdemeanor law, too, directly flow from deep flaws of Laws 2911 and Law 5442.

**16.** None of the judicial organs in Turkey, including the Turkish Constitutional Court, is able to amend ordinary law through individual cases. In the case of the Turkish Constitutional Law, the maximum it can do through an individual complaint is to award compensation or to ask for the case to be re-tried by domestic courts. Given the major deficiencies in the laws themselves and the widespread and systematic arbitrary use of the laws by the executives, courts cannot compensate for the need to adopt urgent and comprehensive legislative reforms as general measures. **It is only when twelve year delayed and as urgent as ever adequate legislative changes that fully align the law with Court's jurisprudence that the Committee of Ministers should continue to monitor Ataman Group with regard to whether the legal framework is complied with by the executive and the judiciary.**

#### **Conclusions and recommendations**

**17. There has been no progress achieved with regard to the provision of an adequate legislative framework that enables the protection of Article 11 and full and effective implementation of Ataman Group cases. What is more, twelve years on, the legislative framework has become more arbitrary and punitive.**

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<sup>5</sup> Saçılık and Others v. Turkey (Merits and partial just satisfaction), nos. 43044/05 and 45001/05, 5 July 2011 and Saçılık and Others v. Turkey, Applications nos. 43044/05 and 45001/05, 14 April 2015.

<sup>6</sup> For multiple plastic bullets images: <http://www.diken.com.tr/kolu-yetmedi-isini-geri-isteyen-veli-sacilik-plastik-mermi-izlerini-paylasti/>

- 18. Recent amendments to Law 2911 do not meet the Committee of Ministers requirement of fully aligning Law 2911 with the Court's case law in terms of foreseeability and necessity in a democratic society standard. Recent amendments to Law 5422 make the enjoyment of right to assembly even more unforeseeable and more significantly, arbitrary and selective.**
- 19. The executive practice confirms the arbitrary use of laws 2911 and 5422, alongside punitive use of misdemeanour laws.**
- 20. The Ataman Group cases should remain under enhanced procedure, and given the close connection between assembly and expression as foundational pillars of a democratic society, the Committee of Ministers should review the Ataman Group in frequent and regular intervals as to the legislative and executive general measures or lack thereof.**
- 21. The Committee of Ministers should raise concern with regard to not only the lack of progress in fully aligning the Law 2911 with Convention standards, but also the introduction of retrogressive measures under Law 5422.**
- 22. The Committee of Ministers should request regular updates and data on the executive practice of governors with respect to bans of peaceful gatherings, meetings, small and large scale protests from the Government .**
- 23. Given the 12th year of the monitoring of the execution of the general measures in the Ataman Group cases, the Committee of Ministers should consider issuing an interim resolution on the lack of legislative measures to align Law 2911 with Convention standards and the introduction of a retrogressive and arbitrary legal framework.**

1 February 2019, Ankara

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**THE GOVERNMENT RESPONSE**

**TO**

**THE RULE 9.2 COMMUNICATION**

**Oya Ataman Group of Cases**

**(Application No. 74552/01)**

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**I. INTRODUCTION**

In the communication submitted by IHOP with respect to Oya Ataman group of cases, it is asserted that the legislative amendments introduced into the Law on Provincial Administration (No. 5442) and the Law on Meetings and Demonstrations (No. 2911) further restricted the freedom of assembly and association. In addition, the NGO submitting this communication, notably IHOP, referring to certain incidents, claims that the individuals' freedom of assembly and association are extraordinarily restricted in practice.

**II. INFORMATION ON LEGISLATIVE AMENDMENTS**

1. The Turkish authorities would like to indicate that the amendment introduced into Article 11 (c) of the Law No. 5442 basically specified the conditions of preventive security measures in case of extraordinary circumstances.
2. The authorities would like to note that there has been no a legal framework outlining the boundaries of governor's power with respect to take preventive measures concerning public order. Accordingly, the governors could take any measure as a consequence of his/her very broad powers in this respect. For example, the governor could declare a curfew on the basis of security concerns. For this reason, this provision was constantly criticized on the grounds that the governors had excessive powers to declare curfew and take similar measures to restrict individuals' freedom of assembly.

3. Therefore, the current provision should be welcomed as it has adopted strict conditions to outline a clear legal framework. First of all, according to amended Article 11 (c), in order to take preventive security measures, there must be strong indications, justifying that public order or security has been disrupted or to be disrupted. Secondly, tangible restrictions and measures were provided in this Article; the governor may restrict certain individual's access to certain places on reasonable suspicion, declare curfew in certain places with a specific time-limit and prohibit carrying firearms. Furthermore, these measures and restrictions can be applied maximum for 15 days.
4. In this respect, the authorities would like to note that the amended Article 11 (c) is a step forward as it specified the governors' powers on the basis of cause, reasoning, duration etc.
5. Furthermore, in the communication submitted the legal amendments introduced in Articles 6 and 7 of the Law on Meetings and Demonstrations are also criticized.
6. Article 6 provides the determination of places where meetings and demonstrations may take place. Before the Constitutional Court's annulment in 2017, it was required that the places were to be determined in view of the fact that the individuals' everyday life was not disturbed. Following the annulment, it was adopted that, when determining the places of meetings, it should be considered whether these places can unbearably and excessively disrupt individuals' everyday life. Accordingly, the mere fact of disturbance is not sufficient to reject the individuals' request to access in certain places to hold meetings. It must unbearably and excessively disturb individuals' everyday life. In this respect, the current version of Article 6 has broadened the scope of freedom to assembly.
7. As regards the amendment in Article 7, the authorities would like to indicate that this provision regulates the meetings and demonstrations as to the duration. It provides that the meetings in open space should end at night. If the participants request continuation of the meeting, they are required to have permission. As regards the indoor meetings, it is provided that the meeting should end at 00:00 at the latest. In this respect, this provision envisages measures ensuring that the meetings are conducted in a secure environment



without interrupting the public order. Accordingly, this Article provides a regulation rather than a restriction.

### III. INFORMATION ON PRACTICE

8. The Turkish authorities would like to emphasize that unlike the claims raised in the communication individuals can make use of their freedom of assembly and association. To illustrate, the following chart would demonstrate the improvement attained in the last four years.

STATISTICS ON POLICE INTERVENTION IN MEETINGS AND DEMONSTRATIONS			
YEARS	TOTAL NUMBER OF MEETINGS/ DEMONSTRATIONS	TOTAL NUMBER OF INTERVENTIONS	INTERVENTION RATE (%)
2015	48909	1560	3,2 %
2016	40016	813	2 %
2017	38976	318	0,8 %
2018	45553	356	0,8 %

9. The Turkish authorities would like to note that the “Directive on Tear Gas, and Defence Rifles, the Use and Storage of Equipment and Ammunitions relating to them and Training of User Personnel” has significantly improved the practice since its introduction in 2016. In 2015, before the current directive, the rate of intervention in the meetings was 3,2 %. This rate sharply dropped to 0,8 % in years 2017 and 2018.

10. In other words, in 2018, the security forces intervened in the meetings only in 356 cases out of 45553 in total. Accordingly, interventions are today quite exceptional practices.

11. The specific incidents indicated in the communication are not currently examined by the European Court or the Committee of Ministers. In this respect, the authorities would not like to speculate in the incidents asserted by the NGO in question.

#### **IV. CONCLUSION**

12. As a conclusion, the Turkish authorities would like to indicate that the legislative amendments specified in the communication have not further restricted individuals' freedom of assembly and association.

13. The authorities would also like to note that the interventions in the meetings are rarely made in exceptional circumstances in accordance with the conditions provided by the Law.