

Demanding Accountability Is Not a Crime

On the Investigation Initiated Against Av. Prof. Dr. Osman Korkut Kanadoğlu

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ABSTRACT

The Istanbul Chief Public Prosecutor’s Office has opened an investigation, on its own motion, into Osman Korkut Kanadoğlu — a practising lawyer, professor of constitutional law and candidate for the presidency of the Istanbul Bar Association — over remarks he made at the Bar’s 128th Ordinary General Assembly. Kanadoğlu’s “offence” was to say that the decisions of members of the judiciary who fail to comply with Constitutional Court judgments and who order arbitrary detention would be monitored and reported, and that they would be held to account. This paper shows that the remarks satisfy the elements of none of the offences that might be invoked: threat, insult, attempting to influence the judiciary, degrading the judicial organs of the State, designating a target under anti-terror legislation, and incitement to commit an offence. The speech was made in the area that enjoys the highest protection under Article 26 of the Constitution and Article 10 of the European Convention on Human Rights: public debate on the functioning of the judiciary. The investigation also disregards the authorisation requirement in Article 58 of the Attorneyship Act and the Constitutional Court’s recent case law on the point. The episode is the latest link in an established practice in Türkiye whereby criticism is silenced through the instruments of criminal procedure — investigation, police custody, detention and judicial control. What ought to be investigated is not the lawyer who says that Constitutional Court judgments are not being complied with, but the members of the judiciary who fail to comply with them.

INTRODUCTION

Where a professor of constitutional law who asks that Constitutional Court judgments be complied with becomes the subject of a criminal investigation, the problem in that country lies not in the words of the speaker but in the law itself.

At the 128th Ordinary General Assembly of the Istanbul Bar Association, held at the Haliç Congress Centre on 24–25 October 2026, Av. Prof. Dr. Osman Korkut Kanadoğlu, the candidate of the Lawyers’ Rights Group, took the floor and addressed judges and prosecutors. He

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said that the decisions of judges who fail to comply with Constitutional Court judgments, and of magistrate judges who order arbitrary detention, would be recorded one by one, monitored, reported and shared with the public. He added that those who do so should not imagine that they will escape responsibility. The speech was presented in pro-government media outlets as “profiling” and as “threatening the judiciary”, and on the evening of 26 October the Istanbul Chief Public Prosecutor’s Office announced that it had opened an investigation of its own motion, “taking into account the content and context” of the remarks. The announcement did not state which offence was under investigation.

This investigation targets not a person but a profession. Its true addressees are every lawyer who voices unlawfulness within the judiciary, the right of bar associations to speak freely from their own rostrums, and ultimately the binding force of Constitutional Court judgments. The reaction has accordingly cut across political lines. Prof. Dr. Ümit Kocasakal — Kanadoğlu’s rival in the election and its winner, now President of the Istanbul Bar Association — stated that the investigation lacks any legal basis, that it amounts to “an act of intimidation directed at the defence and at bar associations as well”, and that under Articles 58 and 59 of the Attorneyship Act it requires the authorisation of the Ministry of Justice. The outgoing President of the Istanbul Bar Association, Prof. Dr. İbrahim Kaboğlu, noting that he may differ with Kanadoğlu in his views, summarised the matter in a single sentence: “Bar rostrums belong to lawyers. The defence cannot be silenced.” The President of the Ankara Bar Association, Elçin Özge Şimşek Çağlayan, emphasised that bar general assemblies are the guarantee that lawyers may speak freely, and that interferences with freedom of expression are multiplying by the day.

The clearest measure of the reaction is the joint statement entitled “No Shadow of Investigation May Be Cast Over the Voice of the Defence!”, bearing the signatures of seventy-nine bar associations, among them those of Istanbul, Ankara and İzmir. The great majority of Türkiye’s bar associations signed the same text, declaring that the investigation is received with deep concern in terms of freedom of expression, the independence of the defence and the democratic functioning of bar associations, and that it should be brought to an end with due regard to constitutional guarantees. That statement shows that Kanadoğlu’s words express not one person’s view but the shared conviction of the defence profession. It is easy to treat a single utterance as a crime. But where seventy-nine bar associations claim that same utterance as the voice of the defence, seeking to silence it means seeking to silence the profession as a whole.

The argument advanced here is built in three steps. First, Kanadoğlu’s remarks satisfy the elements of no criminal offence. Second, those remarks were made in the area most strongly protected by freedom of expression and the rights of the defence, and the investigation is the latest instance of an established practice in Türkiye whereby criticism is silenced through the instruments of criminal procedure. Third, the claim at the heart of the speech — that Constitutional Court judgments are not being complied with — is a fact established by the Constitutional Court’s own judgments. The speech is therefore not an offence but a report of one.

I. WHAT WAS SAID?

A. The Full Text of the Remarks

The passage of the speech that appears to have been made the subject of the investigation reads as follows:

“Türkiye is being governed, amid systematic lawlessness, by a government moving towards becoming authoritarian, indeed totalitarian. I address all judges and prosecutors serving on the bench: judges who do not comply with Constitutional Court judgments, magistrate judges who issue arbitrary detention orders — we are noting you down one by one. We are following each of your decisions. We are reporting these decisions. We will share them with the public, and we will not withdraw into a corner saying ‘the judiciary is not independent’. If these judges and prosecutors think ‘I will not obey the law, I will make lawyers and citizens suffer, and I will bear no responsibility for it’, let them know that we will have them by the collar.”

B. To Whom, and Why, Were the Words Addressed?

These words were not spoken at a street demonstration or in the midst of a personal feud, but in the highest organ of a professional body having the status of a public institution: a bar association general assembly. The speaker was a lawyer and professor of constitutional law standing for the presidency of that bar association. The subject was the functioning of the judiciary, the manner in which the measure of detention is applied, and the failure to comply with Constitutional Court judgments. These are matters that could not possibly go unmentioned in a bar association election.

Not one judge or prosecutor is named in the speech. The addressees are not particular individuals but members of the judiciary who engage in a particular conduct. The criterion too is not personal but legal: failing to comply with Constitutional Court judgments, issuing arbitrary detention orders, disobeying the law and supposing that one will not be held responsible for doing so. In other words, no member of the judiciary who decides in accordance with the Constitution and the law is an addressee of these words. Kanadoğlu himself, in the statement he made after the investigation was announced, said that his words consisted of reminders intended to draw attention to the situation arising from the failure of judicial organs to comply with Constitutional Court judgments, and that the speech fell entirely within freedom of expression.

None of the criticisms levelled at the speech contains a legal characterisation. The outlet that ran the speech under the headline “A lawyer in his robe threatened the judiciary” did not say which offence had been committed; it confined itself to calling the monitoring of decisions “profiling”, and carried the debate as far as the speaker’s father. Where a legal ground is absent, epithets speak. Criminal law, however, works not with epithets but with definitions of offences.

II. FROM THE STANDPOINT OF CRIMINAL LAW: THERE IS NO OFFENCE

Because the Chief Public Prosecutor's announcement contains no name of an offence, the remarks must be examined against every offence that might be raised. When that examination is carried out, every door is found to open onto the same conclusion.

A. "We Will Have Them by the Collar": Not a Threat but a Demand for Accountability

This is the sentence at the centre of the debate. Article 106/1 of the Turkish Penal Code penalises threatening another person by stating that an attack will be carried out against that person's life, or physical or sexual integrity, or that of a relative. A threat to cause harm to property or to inflict "some other harm" may be investigated only upon the complaint of the victim.

The essence of a threat is the announcement of an unjust harm. To say that a lawful avenue will be pursued is not a threat, however much it may discomfit the person addressed. The Court of Cassation applies this principle consistently. The 18th Criminal Chamber held that words directed, within the whole of the incident, at having recourse to legal remedies cannot be accepted as a threat (Court of Cassation, 18th Criminal Chamber, 15.4.2019, E. 2019/930, K. 2019/7429). The 4th Criminal Chamber likewise held that stating that legal remedies will be pursued does not constitute the offence of blackmail either, and that the defendant should be acquitted (Court of Cassation, 4th Criminal Chamber, 12.4.2021, E. 2018/5113, K. 2021/12894).

Kanadoğlu's sentence cannot be severed from the words that precede it. Immediately before it, he says that decisions will be noted, monitored, reported and shared with the public. He then addresses those who fail to obey the law and think they will "bear no responsibility". The sentence's counterpart lies within the speech itself: responsibility set against the idea of impunity. To "seize someone by the collar" means, in Turkish, not to let go of a person, to hold that person to account. The avenues through which a lawyer and a bar association may hold members of the judiciary to account are well known: complaint to the Council of Judges and Prosecutors, criminal complaint, individual application to the Constitutional Court, application to the European Court of Human Rights, and an action for damages. The speech contains not the slightest allusion to any other avenue, let alone to physical attack.

On this point the Constitutional Court's judgment in *Barzan Demirhan* reads almost as though it had been given for the present case. A young lawyer who alleged that his client had been tortured in police custody was convicted of making threats, and banned from the profession for seventy-five days, on the allegation that he had told a police officer: "the place where we will settle accounts is not the courts; you will see, we will settle accounts." The Constitutional Court held that there had been a violation of freedom of expression, emphasising that statements must be assessed within the context in which they were used and without being severed from the whole, that it had not been taken into account that the lawyer was acting in order to defend his client's rights, and that the limits of acceptable criticism directed at public officials are far wider than for ordinary citizens (Constitutional Court, *Barzan Demirhan*, App. No. 2019/40007,

7.3.2024, §§ 58-60). Kanadoğlu's words are far more measured than those in that case. There is no particular addressee, no face-to-face confrontation, and not a single word pointing outside the law in the manner of "not the courts". On the contrary, what Kanadoğlu points to is precisely the law.

Finally, it is plain that no attack on life or on physical or sexual integrity has been announced. As regards "some other harm", there is neither an announcement of harm nor an identified victim. To reduce an idiom to its literal meaning and make it the subject of a criminal investigation is to violate the most elementary rule of interpretation in criminal law: the rule that words are to be assessed within the integrity of the utterance.

B. Insult

Article 125 of the Turkish Penal Code penalises the attribution of a concrete act or fact capable of impugning a person's honour, dignity and reputation, or the uttering of abuse. There is no abuse in the speech. Nor is there any attribution directed at a particular person. Failing to comply with Constitutional Court judgments and issuing arbitrary detention orders is not an attribution directed at a particular judge; it is criticism of a form of conduct.

The Court of Cassation expressly accepts that the limits of criticism directed at those exercising public authority are far wider. In quashing a conviction for insulting the President, the 4th Criminal Chamber held that not every severe criticism or disturbing utterance may be regarded as an insult and, citing a judgment of the Plenary Criminal Chamber, emphasised that politicians, publicly known persons and officials exercising public authority must tolerate a greater degree of criticism by reason of the function they perform. The Chamber concluded that the words were "in the nature of severe political criticism falling within freedom of expression" (Court of Cassation, 4th Criminal Chamber, 24.11.2025, E. 2023/5112, K. 2025/19020). If even severe criticism directed at the head of the State is protected by that standard, words that name no one and criticise only an unlawful form of conduct cannot conceivably be treated as an insult.

The European Court of Human Rights takes the same view. According to the Grand Chamber, save for baseless and gravely damaging attacks, judges, as members of a fundamental institution of the State, may be subject to personal criticism within acceptable limits and not merely at a general and abstract level. When they act in their official capacity, the limits of acceptable criticism are wider in their regard than for ordinary citizens (ECtHR [GC], *Morice v. France*, App. No. 29369/10, 23.4.2015, § 131).

C. Attempting to Influence the Judiciary

Articles 277 and 288 of the Turkish Penal Code penalise acts directed at influencing a person performing a judicial function so that an unlawful decision is given in a particular pending case. There is no particular case in Kanadoğlu's speech. More importantly, the aim of the speech is not to procure an unlawful decision but to secure that judges decide in accordance with the Constitution, with Constitutional Court judgments and with the law. To ask that lawful decisions

be given removes the element of unlawfulness in these offences from the outset. If asking judges to comply with the Constitution amounts to influencing the judiciary, then Article 138 of the Constitution influences the judiciary too.

D. Degrading the Judicial Organs of the State

Article 301/1 of the Turkish Penal Code penalises publicly degrading the judicial organs of the State. The third paragraph of the same article, however, expressly provides that expressions of opinion made for the purpose of criticism do not constitute an offence. Under the fourth paragraph, an investigation for this offence is subject to the authorisation of the Minister of Justice. The speech does not degrade the judiciary; it asks that confidence in the judiciary be restored. It lies within the field of criticism that the legislature itself has removed from the scope of the offence.

E. Designating a Target

Article 6, first paragraph, of the Anti-Terror Law penalises disclosing the identities of public officials who have taken part in the fight against terrorism, or designating persons as targets by that means. Not one element of this offence is present. As Prof. Dr. Tolga Şirin has rightly pointed out, since no report has yet been prepared, no act of designating a target has materialised. Judges cannot be regarded as “public officials who have taken part in the fight against terrorism” merely by virtue of their office, for judicial office is not a policing function. Moreover, the names of the judges alleged to have failed to comply with Constitutional Court judgments are already known to the public. The European Court of Human Rights accepts that, where the identities of officials have already entered the public domain, the interest in protecting those identities is considerably diminished upon their being named again, and that the harm sought to be prevented has already occurred (ECtHR, Saygılı and Karataş v. Türkiye, App. No. 6875/05, 16.1.2018, § 39; Fatih Taş v. Türkiye, App. No. 36635/08, 5.4.2011).

Türkiye has paid the price in Strasbourg before for characterising sharp criticism of public officials as “designating a target”. In *Ergin and Keskin v. Türkiye* (No. 2), the editor-in-chief and the owner of a newspaper that had published a general’s photograph and background in an article headed “Who is Veli Küçük?” were convicted under Article 6, first paragraph, of the Anti-Terror Law of designating that general as a target for terrorist organisations, and the newspaper was closed for seven days. The European Court of Human Rights accepted that parts of the article painted an extremely negative picture of the State and lent a hostile connotation to the narrative, but emphasised that the text contained no call to violence, armed resistance or insurrection and did not amount to hate speech, and that this was the decisive consideration. The penalties imposed were found to be disproportionate and a violation of freedom of expression was found (ECtHR, *Ergin and Keskin v. Türkiye* (No. 2), App. No. 63926/00, 16.6.2005, §§ 22-23).

Korkmaz v. Türkiye (No. 2) is closer still to the present case. There the owner of the newspa-

per Evrensel, which had published an article headed “Ağar’s bloody rise”, was convicted under the same provision on the ground that he had designated the then Minister of Justice, Mehmet Ağar, as a target for terrorist organisations. The domestic court had accepted that a minister’s being well known did not prevent his being designated as a target. The European Court of Human Rights found that the article was a sharp and virulent criticism of the minister’s political career, and drew particular attention to the fact that the applicant had been tried not under the provisions on insult but under anti-terror legislation. According to the Court, although the words were extremely wounding and hostile, they contained no call to violence, armed resistance or insurrection and did not amount to hate speech. The heavy fine imposed was not found necessary in a democratic society, and a violation of freedom of expression was found (ECtHR, *Korkmaz v. Türkiye* (No. 2), App. No. 42589/98, 20.12.2005, §§ 25-29).

These two judgments show how old, and how unsound, the accusation of “designating a target” now directed at Kanadoğlu is. In both cases the person criticised was a senior public official whose identity was known to all. In both cases the criticism was punished not under the provisions on insult but under anti-terror provisions. In both cases the criterion was the same: absent a call to violence or hate speech, criticism, however severe, does not amount to designating a target. In Kanadoğlu’s speech there is not even the name of a single person. There is a call not to violence but to law. If articles criticising a general and a serving Minister of Justice by name fall within freedom of expression, a speech in which no judge is named and in which only the monitoring of decisions is promised cannot possibly be regarded as designating a target.

Nor is the reporting of judicial decisions a form of “profiling”. Under Article 141 of the Constitution, hearings before the courts are open to all and the decisions of all courts are written with reasons. The meaning of decisions being public and reasoned is that they are open to public scrutiny. If to follow and assess public decisions is profiling, then every case note, every law review and every bar association report is profiling too.

F. Incitement to Commit an Offence, and the Exercise of a Right

The speech contains no call for any offence to be committed (Article 214 of the Turkish Penal Code). The acts called for are the monitoring, reporting and public sharing of decisions. These are not offences; they are the very work a professional body is expected to do. Even if the words were to satisfy the elements of some offence, under Article 26/1 of the Turkish Penal Code no penalty may be imposed on a person who exercises a right. Article 26 of the Constitution guarantees freedom of expression and Article 74 the right to petition the competent authorities. Article 2 of the Attorneyship Act defines the purpose of the legal profession as ensuring that the rules of law are fully applied before judicial organs at every level. What Kanadoğlu said is precisely those rights and that duty.

III. FREEDOM OF EXPRESSION AND THE RIGHTS OF THE DEFENCE

A. Criticism of the Judiciary Is a Requirement of Democracy

Freedom of expression protects not only ideas that are welcome or regarded as harmless, but also those that offend, shock or disturb the State or a section of the population. This principle, made classic by *Handyside v. the United Kingdom* (ECtHR, App. No. 5493/72, 7.12.1976), has been adopted in identical terms by the Court of Cassation (4th Criminal Chamber, 24.11.2025, E. 2023/5112, K. 2025/19020). Without pluralism, tolerance and broadmindedness there is no democratic society.

Debate concerning the functioning of the judiciary is the field in which this protection is strongest. According to the European Court of Human Rights, there is little scope for restriction as regards political speech and debate on questions of public interest. Words concerning the functioning of the judiciary relate to the public interest, and the margin of appreciation of the authorities is particularly narrow (*Morice v. France*, §§ 125, 128). In *Baka v. Hungary* the Court likewise emphasised that statements concerning judicial independence and the functioning of the judicial system form part of a debate of great public interest and must be afforded a high level of protection (ECtHR [GC], *Baka v. Hungary*, App. No. 20261/12, 23.6.2016, §§ 165, 171). That a matter has a political dimension does not prevent it from being debated.

B. If the Lawyer Is Silenced, the Defence Is Silenced

The lawyer is a central actor, an intermediary between the public and the courts in the administration of justice. According to the European Court of Human Rights, lawyers are entitled to comment in public on the administration of justice (*Morice v. France*, §§ 132, 134). The restriction of defence counsel's freedom of expression, even by a light criminal sanction, can be accepted as necessary in a democratic society only in exceptional circumstances (§ 135). A lawyer must be able to draw the public's attention to shortcomings in the justice system, and the judiciary itself benefits from constructive criticism (§ 167). In the same judgment the Court accepted that the duty of defence may also be performed outside the courtroom (§ 138). It observed that the imposition of a sanction on a lawyer also affects professional standing and clients' confidence, and that even the lightest sanction produces a chilling effect (§ 176; see also ECtHR, *Mor v. France*, App. No. 28198/09, 15.12.2011).

The Constitutional Court takes the same approach. In *Keleş Öztürk* it found a violation of the freedom of expression of a lawyer who had criticised the public prosecutor at a hearing and had been convicted of insult. According to the Court, interferences with the freedom of expression of a person acting as defence counsel may be regarded as necessary in a democratic society only in highly exceptional circumstances. Lawyers' being subjected to criminal proceedings on account of their words produces a chilling effect on the duty to defend their clients' interests with vigour. For that reason recourse should be had to criminal investigations only in exceptional circumstances, even where the penalties imposed are light (Constitutional Court, *Keleş Öztürk*, App. No. 2014/15001, 27.12.2017). In *Hasan Ercan*, the punishment of an applicant who had used harsh words about the judge of whose decision he complained was likewise held to violate

freedom of expression. The Court emphasised that even accepting the criticism of the judge to have been severe, the words related to the judge's decision, and that making even coarse words the subject of criminal proceedings produces a chilling effect (Constitutional Court, Hasan Ercan, App. No. 2015/54, 12.11.2019). In those cases the words had personally targeted a particular prosecutor or judge. Kanadoğlu has targeted no one personally.

C. The Bar Rostrum, the Election and the Academy

The place where the speech was made and the capacity of the speaker do not narrow the protection; they compound it. The bar association general assembly is the most authoritative organ in which the purpose of the legal profession is debated at the level of the professional body. Article 135 of the Constitution guarantees that professional organisations having the status of public institutions shall be organised on democratic principles, and Articles 76 and 95 of the Attorneyship Act impose on bar associations the duty of defending the rule of law and human rights. As the joint statement of seventy-nine bar associations rightly emphasises, bar general assemblies are not merely meetings at which elections are held; they are democratic platforms on which the functioning of the judiciary, allegations of unlawfulness and professional problems are freely debated. For candidates in a bar election to speak of the functioning of the judiciary, of detention practices and of the non-implementation of Constitutional Court judgments is the very subject of the election. What problem of lawyers is a candidate for the presidency of a bar association who cannot speak of these matters expected to address? For a candidate to face an investigation, while the election is still under way, on account of an election speech is a warning issued to every lawyer who will take that same rostrum.

Nor can it be overlooked that the speaker is a professor of constitutional law. The binding force of Constitutional Court judgments is among the most fundamental subjects of constitutional law. For an academic who is an expert in that field to draw attention to a practice contrary to Article 153 of the Constitution is an activity also protected by the freedom of science enshrined in Article 27 of the Constitution. Kanadoğlu's speech stands at the point where freedom of expression, the rights of the defence and the freedom of science intersect. That is precisely the point at which the legal order should take the greatest care to protect.

IV. WHEN CRIMINAL PROCEDURE BECOMES AN INSTRUMENT OF SILENCING

A. The Problem Is Not a Single Investigation

The investigation concerning Kanadoğlu will be misread if it is read in isolation. In our view, criticism in Türkiye has for a long time been met not with the substantive rules of law but with the protective measures of criminal procedure. Investigation, police custody, detention, judicial control, travel bans and the seizure of assets have ceased to be instruments for gathering evidence and securing the trial, and have become sanctions that take the place of punishment. Under this arrangement a conviction is often unnecessary, because the opening of an investigation, the summons to give a statement, sometimes a dawn raid and months of uncertainty, achieve their

purpose even where an acquittal is ultimately given. The process is itself the punishment.

This is not merely an opinion. The European Court of Human Rights has established it repeatedly in respect of Türkiye. In *Şahin Alpay v. Türkiye* the Court stated that criticism of governments should not be made the subject of grave charges such as membership of a terrorist organisation. According to the Court, the detention of anyone expressing critical views inevitably produces a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices. That effect arises even if the person is subsequently acquitted (ECtHR, *Şahin Alpay v. Türkiye*, App. No. 16538/17, 20.3.2018, §§ 181-182). The Constitutional Court likewise stated, in respect of the same applicant, that it was clear that detention without any concrete fact being established beyond his writings would produce a chilling effect on the freedoms of expression and of the press (Constitutional Court [Plenary], *Şahin Alpay* (2), App. No. 2016/16092, 11.1.2018, § 140).

The Court has gone further and, applying Article 18 of the Convention, has found that the real purpose of certain detentions was not the purpose declared. In *Kavala v. Türkiye* it found established beyond reasonable doubt that the impugned measures pursued an ulterior purpose contrary to the Convention, namely to silence the applicant, and were capable of having a dissuasive effect on the work of human rights defenders (ECtHR, *Kavala v. Türkiye*, App. No. 28749/18, 10.12.2019, § 232). In *Selahattin Demirtaş v. Türkiye* (No. 2) the Grand Chamber found that the detention pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate. According to the Court, the judicial authorities had reacted harshly to the opposition and to dissenting voices generally, which sent a dangerous message to the whole of society and considerably narrowed the space for free democratic debate (ECtHR [GC], *Selahattin Demirtaş v. Türkiye* (No. 2), App. No. 14305/17, 22.12.2020, §§ 436-437).

B. Lawyers Are the Direct Target of This Arrangement

The face of this practice turned towards lawyers has also come before the Constitutional Court. In *Eyyup Akıncı*, the Chief Public Prosecutor's Office immediately opened an investigation into a lawyer who had shared on social media the irregularities and bribery allegations in the files he was following, announced that the lawyer had cast suspicion on "approximately 200 judges and prosecutors" and damaged confidence in the administration of justice; an arrest warrant was then issued and the lawyer was placed under judicial control in the form of house arrest. The Constitutional Court stated that the duty of defence may also be performed outside the courtroom, and that a lawyer's bringing irregularities in judicial proceedings to the attention of the public and of the relevant authorities is connected with the practice of the profession. It found that, because the investigation had been commenced without authorisation from the Ministry, the lawyer had been deprived of the procedural safeguards provided for him and that his right to personal liberty and security had been violated (Constitutional Court, *Eyyup Akıncı*, App. No. 2023/101443, 18.5.2026, §§ 56-58). Barely five months have passed since that judgment. The same scenario is now being staged once more, this time at a bar association general assembly.

C. Why Was Article 58 of the Attorneyship Act Passed Over?

Under Article 58 of the Attorneyship Act, investigations concerning lawyers in respect of offences arising from, or committed in the course of, their practice or their duties within the organs of the Union of Turkish Bar Associations or of the bar associations are conducted upon the authorisation of the Ministry of Justice. The bar general assembly is an organ of the bar association. A lawyer who takes the floor at the general assembly does so as a member of that organ and speaks on a matter concerning the profession. Where the Constitutional Court has treated even a social media post made outside the courtroom as connected with the practice of the profession, it is not possible to say that a speech made at a bar general assembly falls outside that safeguard. In our view, therefore, every step taken without authorisation is unlawful for want of a procedural condition of prosecution. If Article 301 of the Turkish Penal Code is to be invoked, the authorisation of the Minister of Justice is separately required in respect of that offence.

That procedural safeguards can be passed over so easily is itself part of the arrangement described above. The safeguards afforded to lawyers are not a personal privilege. They exist so that the defence may remain independent in the face of power, for a lawyer who speaks under the threat of investigation cannot fully defend his client either. The bar associations drew attention to the same point in their joint statement, expressly stating that the speech fell within the scope of professional activity and that, under Articles 58 and 59 of the Attorneyship Act, the authorisation of the Ministry of Justice was required for an investigation. According to that statement, making speeches delivered at bar general assemblies the subject of criminal investigation carries the risk of creating a chilling effect and self-censorship among lawyers, and concerns not only the democratic functioning of professional organisations but also the independent defence that is a fundamental element of the right of access to justice and the right to a fair trial guaranteed by Article 36 of the Constitution.

V. WHAT OUGHT TO BE INVESTIGATED

A. Non-Compliance with Constitutional Court Judgments Is a Fact

Under the final paragraph of Article 153 of the Constitution, judgments of the Constitutional Court bind the legislative, executive and judicial organs, the administrative authorities, and natural and legal persons. Article 138 of the Constitution provides that judges shall decide in accordance with the Constitution, the law and the law's requirements. The final paragraph of the same article lays down compliance with court decisions as a constitutional obligation. As the bar associations' joint statement also notes, judicial independence does not mean that judicial decisions may not be criticised. Criticising judicial practice, voicing allegations of unlawfulness and demanding compliance with court decisions are natural requirements of the rule of law and of democratic scrutiny. That is exactly what Kanadoğlu has done, for what he demands is compliance with the Constitution itself.

The finding at the centre of Kanadoğlu’s speech — that certain judicial authorities fail to comply with Constitutional Court judgments — is not a supposition. The Plenary of the Constitutional Court established it itself in *Şerafettin Can Atalay* (3). The judgment noted that the 3rd Criminal Chamber of the Court of Cassation had given a decision unknown to Turkish law, in the form of “non-compliance with the judgment of the Constitutional Court”, and emphasised that refusing to implement judgments is an interpretation and a practice manifestly at odds with the wording of the Constitution and contrary to the will of the constituent power (Constitutional Court [Plenary], *Şerafettin Can Atalay* (3), App. No. 2023/99744, 21.12.2023). In the course of the same proceedings, the 3rd Criminal Chamber of the Court of Cassation filed a criminal complaint against the members of the Constitutional Court who had given the violation judgment and, after a second violation judgment, again ruled that the judgment should not be implemented. The non-implementation of judgments of the European Court of Human Rights is part of the same picture. In *Kavala v. Türkiye* the Grand Chamber found, for the first time in respect of Türkiye, that a violation judgment had not been complied with within the meaning of Article 46 § 4 of the Convention (ECtHR [GC], *Kavala v. Türkiye*, App. No. 28749/18, 11.7.2022).

As Prof. Dr. Tolga Şirin has aptly observed, the investigation opened in respect of Kanadoğlu suffers, ironically, from the very problem of non-implementation of Constitutional Court and European Court of Human Rights judgments. A jurist who says that Constitutional Court judgments are not being implemented is being investigated while the Constitutional Court’s own judgment concerning lawyers goes unimplemented. That is the clearest proof of the problem.

B. The Speech Is a Report of an Offence

Under Article 160 of the Code of Criminal Procedure, a public prosecutor who learns, through a report or by any other means, of a situation giving the impression that an offence has been committed shall immediately begin to investigate the truth of the matter. Kanadoğlu’s speech is a statement made before the public and widely disseminated. That statement asserts that certain members of the judiciary have failed to comply with Constitutional Court judgments and have issued arbitrary detention orders.

The knowing non-implementation of a binding Constitutional Court judgment means acting contrary to the requirements of office and thereby causing harm to persons, and is a situation that must be examined from the standpoint of the offence of misconduct in office under Article 257 of the Turkish Penal Code. Depriving a person of liberty in the absence of the statutory conditions must also be assessed separately under Article 109. It cannot of course be said that every unlawful decision constitutes an offence. But the way to determine the character of a given decision is to investigate the allegations themselves, not the person who voices them. Investigations of judges and prosecutors in respect of offences arising from their office are subject to the authorisation procedure laid down in Article 82 et seq. of Law No. 2802 on Judges and Prosecutors. The existence of that procedure does not remove the duty to investigate. On the contrary, it

requires the Chief Public Prosecutor's Office to transmit this statement to the Council of Judges and Prosecutors and to set the authorisation procedure in motion.

The Chief Public Prosecutor's Office says that it has taken into account the "content and context" of the criticism. Had they truly been taken into account, it would have been seen that the content is a report of an offence and the context a judicial order in which Constitutional Court judgments are not complied with. What ought to be investigated is not the person who says that Constitutional Court judgments are not being complied with, but the person who fails to comply with them.

CONCLUSION

There is no offence in Kanadoğlu's words. The sentence "we will have them by the collar" is the continuation of a promise to monitor, to report and to share with the public, and it conveys that unlawful conduct will be called to account by legal means. To say that legal remedies will be pursued is not, according to the case law of the Court of Cassation, a threat. The Constitutional Court has held even the punishment of a lawyer who said "not the courts; you will see, we will settle accounts" to be a violation of freedom of expression. The speech contains no attribution directed at a particular person, no abuse, no designation of a target, no intention to influence a particular case and no call to commit an offence.

The speech was made at the point where freedom of expression, the rights of the defence and the freedom of science intersect, in the field of public debate concerning the functioning of the judiciary. The European Court of Human Rights and the Constitutional Court have clearly established that making even severe criticism of the judiciary the subject of criminal investigation produces a chilling effect and can be accepted only in exceptional circumstances. The investigation also disregards the authorisation requirement in Article 58 of the Attorneyship Act and the Constitutional Court's judgment in *Eyyup Akıncı*.

This investigation is the latest link in an arrangement whereby criticism in Türkiye is silenced through the instruments of criminal procedure. The European Court of Human Rights has identified the ulterior purpose of that arrangement in its judgments concerning Türkiye: to silence, to deter, to narrow the space for debate. The investigation of a professor of constitutional law who asks, at a bar association general assembly, that Constitutional Court judgments be complied with shows that this purpose now extends as far as the rostrums of professional organisations.

What will protect the rule of law is not silencing the person who says it has been violated, but removing the violation. The investigation concerning Kanadoğlu should be brought to an end forthwith by a decision of non-prosecution; the speech should be treated as a report of an offence within the meaning of Article 160 of the Code of Criminal Procedure; and the necessary investigation should be carried out, through the statutory authorisation procedure, into the members of the judiciary who fail to comply with Constitutional Court judgments. Demanding accountability is not a crime. The crime is the refusal to account.