THE CONSTITUTIONAL COURT
OF
THE REPUBLIC OF TURKEY

Annual Report

2017

Annual Report

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Prof. Dr. Zühtü ARSLAN
President the Constitutional Court of the Republic of Turkey

The raison d'être of constitutional courts is to protect the fundamental rights and freedoms guaranteed by it. The Turkish Constitutional Court gives decisions to secure the constitutional justice in the field of both norm review and individual application.

One has to set forth the contribution of the Constitutional Court within the framework of the duty assigned thereto to protect fundamental rights and freedoms.

In this scope the Annual Report of the Constitutional Court second of which is prepared for the year 2017 fulfills an important function in the context of accountability and transparency.

The first chapter of the report, prepared to serve such a function, provides brief information on the formation of the Plenary, Sections and Commissions.

The second chapter includes information on the duties and powers of the Plenary, Sections and Commissions.

The third chapter covers the Court's structure, functioning, approach, press and public relations, publications, and national and international relations.

The fourth chapter includes the Opening Speech of the 55. Anniversary of the Constitutional Court and speeches delivered in other activities.

The fifth chapter of the report includes brief summaries of the Court's leading judgments both in constitutional review cases and individual applications in 2017 with a view to revealing the case-law of the Court on various subjects.

This aims to present the paradigm of the Court on fundamental rights and freedoms and to contribute to all those showing interest to the Court's case-law, notably academicians and those practicing justice. This part constitutes the backbone of the report which is developed out of the fact that the fundamental products of the Court's judgments.

The final chapter contains a year by year comparison of the Court's performance in 2017 by providing various statistical data together with graphics.

Sincerely wishing that this report prepared by the Constitutional Court will serve to ensure the rule of law and increase public awareness on fundamental rights and freedoms.

CHAPTER ONE

FORMATION OF THE COURT

I. FORMATION OF THE COURT

The Constitutional Court is comprised of seventeen members. However, upon the approval of the constitutional amendment in the public referendum held on 16 April 2017, the number of the members taking office in the Constitutional Court has been reduced to fifteen as the military justice system was abolished.[1]

The Parliament elects, by secret ballot, two members from among three candidates nominated for each vacancy by the General Assembly of the Court of Accounts amongst their presidents and members and one member from among three candidates nominated by the Chairmen of Bar Associations amongst private lawyers. The President of the Republic selects three members from among three candidates nominated for each vacancy by the General Assembly of the Court of Cassation amongst its presidents and members, two members from among three candidates nominated for each vacancy by the General Assembly of the Council of State amongst its presidents and members, one member from among three candidates nominated for each vacancy by the General Assembly of the Military Court of Cassation amongst its presidents and members, one member from among three candidates nominated for each vacancy by the General Assembly of the Military Supreme Administrative Court amongst its presidents and members, three members from candidates nominated for each vacancy by the Council of Higher Education amongst lecturers who work in the fields of law, economics and political sciences of higher education institutions and who are not members of the Council itself, four members from among senior managers, private lawyers, first class judges and prosecutors and rapporteurs of the Constitutional Court who have worked as a rapporteur for at least five years.

One shall hold the following qualifications to become eligible for Court membership: to have completed forty-five years of age, to be conferred the title of a professor or assistant professor in higher education institutions (for academics), to have worked as a private lawyer effectively for at least

1 *As per the provisional Article 21 § D which was incorporated into the Constitution by Article 17 of the Law no. 6771 and dated 21/1/2017, those who have been appointed as the members of the Constitutional Court from the Military Court of Cassation and the Supreme Administrative Military Court shall continue acting as the members of the Court until the termination of their offices for any reason.*

twenty years (for lawyers), to hold a degree in higher education and to have effectively worked in the public sector for at least twenty years (for senior managers), to have a work experience of at least twenty years including the probationary period (for first class judges and prosecutors).

A president and two vice-presidents of the Court are elected for a term of four years by secret ballot from among the members by an absolute majority of the total number of members and those whose terms of office expire may be re-elected.

Although the earliest version of the Constitution did not prescribe a term of office for the members of the Court, such term of office was limited to a non-renewable period of twelve years by an amendment in Article 147 of the Constitution through Law No. 5982 on 7.5.2010. One cannot be elected for a second term. In any event, the members of the Court shall retire after completing sixty-five years of age.

According to Article 149 of the Constitution and Article 20 of Law No. 6216, The Constitutional Court functions in the form of the Plenary, Sections and Commissions.

A. FORMATION OF THE PLENARY

The Plenary shall comprise of seventeen member of the Court. The Plenary shall convene with the participation of minimum ten members and shall be chaired by the President or a Vice-President to be designated by the President.

As of 31.12.2017 the members of the Plenary are as follows.

President
Prof. Dr. Zühtü ARSLAN

Vice-President
Burhan ÜSTÜN

Vice-President
Prof. Dr. Engin YILDIRIM

Justice
Serdar ÖZGÜLDÜR

Justice
Serruh KALELİ

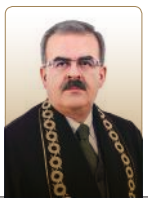
Justice
Osman Alifeyyaz PAKSÜT

Justice
Recep KÖMÜRCÜ

Justice
Nuri NECİPOĞLU

Justice
Hicabi DURSUN

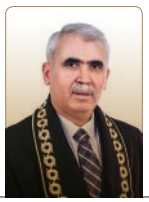
Justice
Celal Mümtaz AKINCI



Justice
Muammer TOPAL

Justice
M. Emin KUZ

Justice
Hasan Tahsin GÖKCAN



Justice
Kadir ÖZKAYA

Justice
Rıdvan GÜLEÇ

Justice
Doç. Dr. Recai AKYEL

Justice
Prof. Dr. Yusuf Şevki HAKYEMEZ

B. FORMATION OF THE SECTIONS

There shall be two Sections of the Court in order to examine individual applications and such Sections shall be composed of the members except for the President of the Court. Each Section shall consist of seven members and a vice-president. These sections shall be named "The First Section" and "The Second Section".

The members of the Section, except for the Vice-Presidents, shall be designated by the President taking into account their origin of appointment to the Court and a balanced distribution among the Sections. The Section of a member may be changed by the President upon the relevant member's request or proposal by one of the Vice-Presidents.

Each Section convenes with four members under the chair of a vice-president. In absence of the Vice-President, the most senior member shall chair the meeting of the Section. In order to determine the four members to participate the meeting of the Section, all seven members in that Section (except for the Vice-President) shall be listed according to their seniority. The first month's meetings shall be at- tended by the Vice-President and four members of highest seniority. In the following months, it shall be ensured that each member who has not participated in the meetings serves in rotation according to their seniority ranking starting with the most senior member. The President of the Section shall prepare a list demons- trating the schedule for this rotation at the beginning of each year. If a new member joins the Section, the President of the Section shall make the necessary arran- gement accordingly. The lists shall be announced to the members.

If a Section fails to achieve the quorum for meeting, the President of the Section shall assign the members from within the Section who do not participate in the meetings to participate in the meeting according to seniority ranking. If this is not possible, then the President of the Court shall assign members from the other Section upon the proposal of the President of Section.

The composition of the Sections, as of 31.12.2017, is as follows:

1. FIRST SECTION

Pursuant to Article 29 of the Internal Regulations of the Constitutional Court, the list of the Justices who served in rotation in the meetings of the First Section in 2017 is as follows.

SIRA	ADI SOYADI	UNVANI
1	Burhan ÜSTÜN	President
2	Serruh KALELİ	Justice
3	Nuri NECİPOĞLU	Justice
4	Hicabi DURSUN	Justice
5	Hasan Tahsin GÖKCAN	Justice
6	Kadir ÖZKAYA	Justice
7	Rıdvan GÜLEÇ	Justice
8	Yusuf Şevki HAKYEMEZ	Justice

2. SECOND SECTION

Pursuant to Article 29 of the Internal Regulations of the Constitutional Court, the list of the Justices who served in rotation in the meetings of the Second Section in 2017 is as follows.

SIRA	ADI SOYADI	UNVANI
1	Engin YILDIRIM	President
2	Serdar ÖZGÜLDÜR	Justice
3	Osman Alifeyyaz PAKSÜT	Justice
4	Recep KÖMÜRCÜ	Justice
5	Celal Mümtaz AKINCI	Justice
6	Muammer TOPAL	Justice
7	M.Emin KUZ	Justice
8	Recai AKYEL	Justice

C. FORMATION OF THE COMMISSIONS

Commissions consisting of two Justices under each Section have been set up to examine the admissibility of the individual applications. Such Commissions have been assigned a number and named together with the number of the Section they are affiliated to. The President of the Section shall not take part in the Commissions and they shall be chaired by the senior member.

For the purpose of forming the Commissions, the members of a Section, except for the Vice-President, shall be listed according to their seniority. The least senior member shall not participate in the first month's meetings of the Commissions. In the following months, it shall be ensured that each member who has not par- ticipated in the meetings serves in rotation according to their seniority starting with the most senior member. The President of the Section shall prepare the list demonstrating the schedule for this rotation at the beginning of each year. If a new member joins the Section, the President of the Section shall make the neces- sary arrangement accordingly. The lists shall be announced to the members.

In case of a vacancy in any of the Commissions, then the reserve member of Section shall substitute the absent member of that Commission.

The Plenary may change the Commissions affiliated to the Sections or alter the number of members composing the Commissions. In this case, the Commissions shall be re-formed in line with the procedure stipulated in the above paragraphs.

SECOND CHAPTER

DUTIES AND POWERS OF THE COURT

I. OVERVIEW

The duties and powers of the Court are as follows:

a) To deal with annulment cases filed on the grounds that laws, decree-laws and the Rules of Procedure of the Grand National Assembly of Turkey or certain articles or provisions thereof are against the Constitution as to the form and merits and that amendments to the Constitution contradict with the Constitution in terms of the form.

b) To conclude contested matters referred by courts to the Constitutional Court through concrete norm review pursuant to Article 152 of the Constitution.

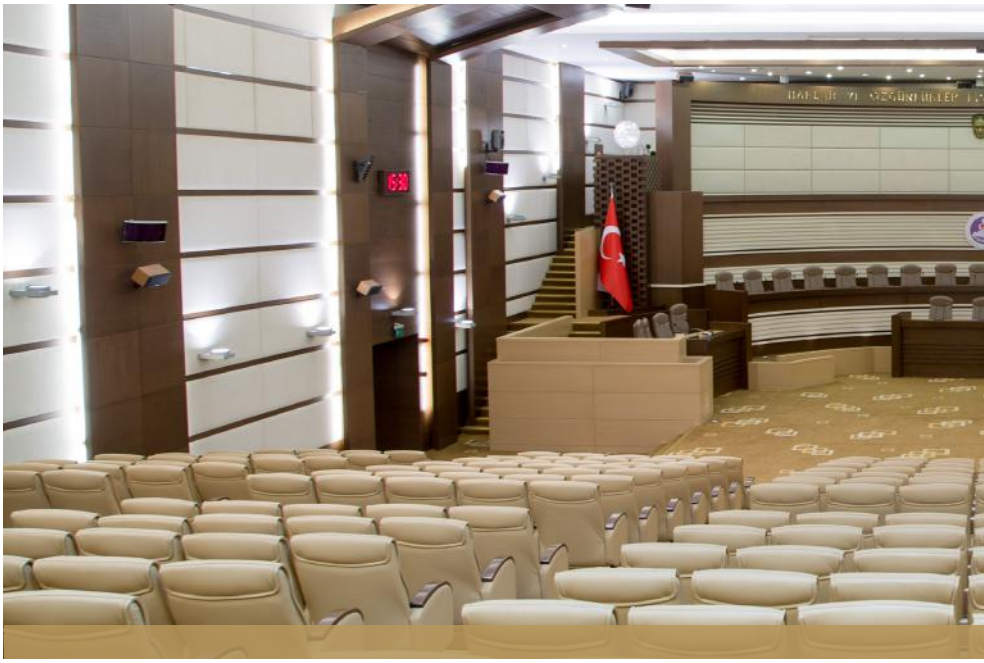
c) To conclude individual applications filed pursuant to Article 148 of the Constitution.

d) To try, in its capacity as the Supreme Criminal Court, the President of the Re-public, the Speaker of the Grand National Assembly of Turkey, members of the Council of Ministers; the presidents and members of the Constitutional Court; the presidents, members and chief public prosecutors and deputy chief public prosecutor the Court of Cassation and the Council of State; the presidents and members of the High Council of Judges and Prosecutors and the Court of Accounts, the Chief of General Staff, the Chiefs of Land, Naval and Air Forces due to offenses relating to their duties.

e) To conclude cases concerning dissolution and deprivation of political parties of state aid, warning applications and demands for determination of the status of dissolution.

f) To review or have reviewed lawfulness of property acquisitions by the political parties and their revenues and expenditures.

g) In case the Grand National Assembly of Turkey resolves to remove parliamentary immunity or revoke membership of the parliamentary deputies or remove the immunity of the non-deputy ministers, to conclude annulment demands of the concerned or other deputies alleging repugnance to the provisions of the Constitution, law or the Rules of Procedure of the Grand National Assembly of Turkey.



h) To elect the President and Vice-Presidents of the Constitutional Court and the President and deputy president of the Court of Jurisdictional Disputes amongst members of the Court.

i) To carry out other duties set forth in the Constitution.

The Court carries out these duties through the Plenary, two Sections and the Commissions affiliated to each Section.

II. DUTIES AND POWERS OF THE PLENARY

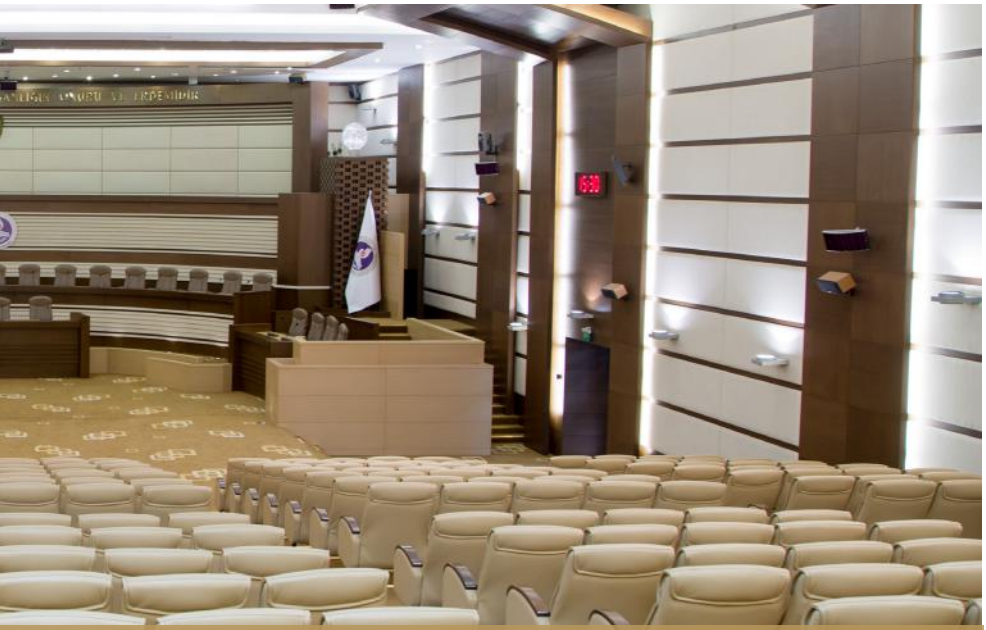
The Plenary of the Court shall perform the duties and have powers as follows:

a) To deal with annulment and objection cases and cases which it will proceed in its capacity as the Supreme Criminal Court.

b) To conduct financial audits on political parties and conclude cases and applications related to political parties.

c) To adopt or amend the Court's Rules of Procedure.

d) To elect the President and Vice-Presidents as well as the President and the Deputy President of the Court of Jurisdictional Disputes.



Hall of the Supreme Criminal Court (The Grand All)

e) To resolve the conflicts between the decisions and judgments of the Sections in dealing with the individual applications and to decide on the matters referred to the Plenary by the Sections.

f) To ensure the distribution of work between the Sections.

g) To resolve, by request of the President, the disputes arising from the distribution of work among Sections definitively,

h) To assign the other Section in case the workload of a Section increases within the year to an extent that the Section is unable to cope with in the normal course of operation, there arises an imbalance of workload among the Sections or if a Section is unable to deal with a task in its competence due to a factual or legal impossibility.

i) To decide on whether to institute disciplinary and criminal investigations against members, examination and prosecution measures and, when necessary, on disciplinary punishments to be pronounced or termination of membership,

j) To examine objections.

k) To carry out duties assigned to the Plenary by the Law and the Court's Rules of Procedure

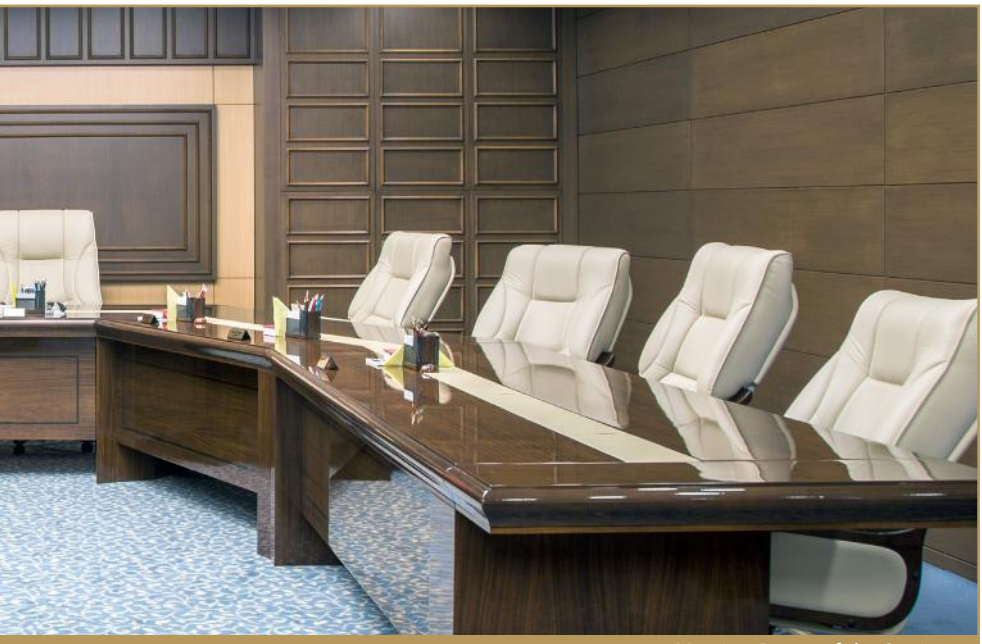
The Plenary shall render its decisions by an absolute majority of participants. In case of equal division of votes, the decision shall be made in line with the side which the President has opted for. A two-thirds majority is sought for decisions on annulment of Constitutional amendments, dissolution of political parties or deprivation of political parties of state aid.

III. DUTIES AND POWERS OF THE SECTIONS

The duties and powers of the Sections are as follows:

a) To carry out the examination on merits of the applications declared admissible by the Commissions. If deemed necessary by the chair of the Section, to carry out the joint examination both on admissibility and on merits of the applications the admissibility of which could not be decided by the Commissions.

The Sections may declare an application inadmissible at any stage of the examination if they determine an obstacle to admissibility or such circumstances arise later on.



Meeting Room of the Sections

If the decision to be made by one of the Sections regarding a pending application is likely to conflict with a decision previously made by the Court or if the nature of the subject matter requires it to be resolved by the Plenary, then the relevant Section may relinquish from deciding that application. The President of the Section shall bring this matter to the attention of the President of the Court to refer the application to the Plenary.

The Sections shall render its decisions by an absolute majority of the participants.

After examination on the merits, a decision on violation or non-violation of the applicant's right is rendered by the Section. In case of a decision on violation, a judgment may be rendered on actions to be taken in order to abolish the violation and its consequences. In this case the following options are available for the Court:

a) If it is determined that the violation arouse from a court judgment, the file is forwarded to the concerned court in order to renew the judicial procedure so that the violation and its results will be cleared up. The relevant court shall carry out a retrial in such a way as to remove the

violation and its consequences as explained by the Section's decision determining the violation and shall urgently make a decision based on the file if possible.

b) In case of a decision on violation, where any legal interest is not seen with renewal of judicial proceedings, it can be decided payment of a reasonable compensation in favor of the applicant.

c) In the event that the determination of the compensation amount requires a more detailed examination, the Sections may direct the applicant to general courts to bring lawsuits.

IV. DUTIES AND POWERS OF THE COMMISSIONS

The examination on admissibility of applications shall be conducted by the Commissions.

An individual application to be declared admissible shall meet the requirements stipulated under Article 45 to 47 of the Law no. 6216. The examination on admissibility of applications shall be conducted by the Commissions.

The decisions by the Commissions on admissibility or inadmissibility of an application shall be taken unanimously. If unanimity cannot be obtained, the application shall be referred to the Section to conduct the admissibility examination.

Inadmissibility decisions are final and are notified to the concerned parties.

CHAPTER THREE

THE COURT IN 2017

I. DEVELOPMENTS AT THE COURT IN 2017

The Court continued also in 2017 its "rights-based" approach and took new steps towards this subject. In line with this approach, the Court still endeavored to ensure constitutional and individual justice through constitutionality review and individual application and, thereby, continues to function as an institution which became the guarantor of fundamental rights and freedoms.

In the decisions rendered in the year 2017, adopted an approach that broadened the field of protection and improved the standards of a range of fundamental rights and freedoms from the right to life to freedom of expression, protection of material and spiritual entity, liberty and security of person, right to a fair trial, the right to respect for private life, prohibition of discrimination to right to property.

These decisions rendered by the Court, on one hand serve to fulfill the longtime aim in our country to raise the human rights standards and on the other give the opportunity to contribute to the universal jurisprudence and increase our countries reputation on international level.

The new practices in the field of norm review and individual application that were launched in 2015 and the positive results of which were observed were also continued in 2017.

The codes used to classify pending cases regarding the coherence of the case law and ensuring of the coordination and first implemented in 2015 were developed in the direction of needs.

The number of right based groups established to be more effective with individual applications have been increased in line with the growing necessity and important developments were made in the rapidly finalizing of the cases that fall in the work field by these groups.

The number of the language experts employed at the Court has been increased to carry out the editorial review of draft decisions.

Two translator and interpreters were employed after the exam of the Constitutional Court and the speed to translate the press releases of decisions was increased.

Due to the judicial and administrative proceedings after the coup attempt of July 15, more than expected (4 times than the annual average) individual

applications were made to the Constitutional Court in the year 2017. Some additional measures have been taken to register, classify and finalize the applications in a reasonable time. In this framework the decision-making structure was developed with the listing method.

With the entering into force of the Inquiry Commission on the State Of Emergency Measures approximately 71,000 applications have been concluded with a decision of inadmissibility via a list procedure on the grounds of "Non-exhaustion of remedies" because they have not applied to the Inquiry Commission on the State Of Emergency Measures about first of all the decisions to be removed from profession and other measures taken within the scope of state of emergency decree laws, as stated in the Decree Law no 685.

In 2017 the "decisions database" serving on our website was totally renewed and the access was opened.

The mobile application of our website was updated in order to announce the decisions and press releases in a fast and efficient way.

Based on the Energy Efficiency Law No. 5627, Energy Efficiency Improvement Applications (insulation, use of highly efficient engines, etc.) have been passed in line with the Energy Survey Report prepared in 2015.

The work of the press unit continued by further developing the monitoring, reporting, and publishing of press releases and improving of the corporate communication with the press. 48 Press releases about Constitutional Court decisions/judgments were published in the year 2017.

Again in this period of time, the Court prepared, published and distributed many works within the scope of its publications and public relations activities. In this framework the book "55 Years 55 Articles", composing of works selected from among articles contributing to constitutional law of valuable Turkish lawyers and scientist. Again on the occasion of the 55th Anniversary of the Foundation of the Constitutional Court the "Constitutional Court Album" was published which is prepared every five years. Within this scope, the Court published and distributed on domestic and international level the 52nd issue of the "Journal of Constitutional Court Decisions" of 2015. in 7 volumes and the 53rd issue of 2016 in 3 volumes, "Selected Judgments on Individual Applications 2016, Turkish and English versions of the "Annual Report 2016", and the "Symposia Proceedings of Constitutional Justice" of 2016.

Also within the scope of the joint project of the Constitutional Court and the Council of Europe titled "Supporting the Individual Application to the Constitutional Court in Turkey" the following books were published: "Individual Application Admissibility Criteria Guide", "Decisions Concerning Criminal Proceedings in the Individual Application", "Decisions Concerning the civil law in the Individual Application"

Also in 2017 1295 new publications were added to the Court's Library.

II. INTERNATIONAL ACTIVITIES OF THE COURT

A. OVERVIEW

The Constitutional Court of Turkey, being one of the oldest constitutional justice organs of the world, has become a center of interest of the global constitutional justice in the recent years due to its important contributions to the interpretation in the fields of human rights and constitution.

Due to its many cultural and historical links to a great number of countries, the Turkish Constitutional Court is among the first members of both the "Conference of the European Constitutional Courts" and the "Association of Asian Constitutional Courts and Equivalent Institutions". The Turkish Constitutional Court is also one of the founding members of the World Conference on Constitutional Justice, which is an umbrella organization for all the constitutional justice organs and organizations from around the world.

The Constitutional Court of Turkey attaches utmost importance to the cooperation with foreign constitutional courts and international courts or institutions.

Presidents, Justices and academicians both from our country and foreign countries are invited to the symposia organized annually within the scope of the traditional foundation anniversary activities by the Court.

Also, the Constitutional Court participates actively in international symposia, and undertakes various activities like academic studies, publishing of books, bilateral cooperation etc. to promote itself and the Turkish judiciary to the world.

In order to promote the cooperation between international constitutional justice institutions, the President of the Constitutional Court Mr. Zühtü ARSLAN organized a meeting at Dolmabahçe Palace with the representatives of the Constitutional Courts of the Balkan

Region during the 55th anniversary activities of the Court. At the meeting, a consensus to establish a forum with a view to improving the cooperation among the mentioned Constitutional Courts, and to carry on the activities for the establishment of the "Association of Balkan Constitutional Courts" in the future was reached.

B. COOPERATION WITH THE INTERNATIONAL ORGANIZATIONS

The Constitutional Court of Turkey attaches utmost importance to its relations with the Council of Europe, especially with the European Court of Human Rights and the Venice Commission (The European Commission for Democracy through Law). The Court is member to the following international organizations in the field of constitutional justice:

1. World Conference on Constitutional Justice

The World Conference on Constitutional Justice unites 104 Constitutional Courts/ Councils/Supreme Courts and promotes constitutional justice that fulfills the function of protecting human rights.

The 4th Congress of the World Conference on Constitutional Justice was held with the participation of about 90 member countries in Vilnius, Lithuania, between 11 - 14 September 2017. The topic of the Congress was the Rule of Law and Constitutional Justice in the Modern World. This theme was divided into four sub-topics: 1. the different concepts of the rule of law; 2. new challenges to the rule of law; 3. the law and the state; 4. the law and the individual.

The 12th Meeting of the Bureau and the 2nd General Assembly of the World Conference on Constitutional Justice were also held during the Congress.

Participation of the President of the Court, Justice Mr. Celal Mümtaz Akıncı and the accompanying delegation in the 4th Congress of the World Conference on Constitutional Justice with the theme of "Rule of Law" held in Vilnius, Lithuania

Participation of the President of the Court, Justice Mr. Celal Mümtaz Akıncı and the accompanying delegation in the 4th Congress of the World Conference on Constitutional Justice with the theme of "Rule of Law" held in Vilnius, Lithuania

The President of the Constitutional Court of Turkey Prof. Dr. Zühtü ARSLAN, Justice Mr. Celal Mümtaz AKINCI and Rapporteur Dr. Mücahit AYDIN participated in the Congress on behalf of Turkey.

An amendment to the Statute of the World Conference has been adopted by the General Assembly. Under the amended Statute, one representative from each four continent (Africa, Asia, America, and Europe) shall be elected for the Bureau term membership by the given continent. Countries that are members of constitutional justice conferences for two continents, such as Turkey, shall vote for the election of the representatives of both continents. At the Bureau meeting, Algeria was elected as the term president of the World Conference on Constitutional Justice.

Throughout the Congress, the Turkish delegation held meetings and exchanged views with delegations from Africa, Asia, Europe and the Balkans.

In the Vilnius Communiqué adopted at the end of the Congress, the principle of the rule of law and the independence of courts were underlined, and all kinds of unconstitutional attempts to undermine the state of law were condemned.

2. Conference of European Constitutional Courts

The Conference of European Constitutional Courts, which was established in Dubrovnik in 1972, brings together representatives of 40 European constitutional or equivalent courts conducting a constitutional review.

The President of the Constitutional Court of the Republic of Turkey Mr. Zühtü ARSLAN, the Constitutional Court Justice Mr. Muammer TOPAL and Rapporteur-Judge Mr. Yücel ARSLAN participated in the XVII. Congress of the Conference of European Constitutional Courts and "Circle of Presidents" held on 28 June - 1 July 2017 in Batumi, Georgia.

Participation of the President of the Court, Justice Mr. Muammer Topal and the accompanying delegation in the XVII. Congress of the Conference of European Constitutional Courts and the Circle of Presidents held in Batumi, Georgia

The Presidents and/or delegations of Constitutional Courts of 41 member countries and the Presidents and/or representatives of international organizations including the Venice Commission, the Conference of Constitutional Jurisdictions of Africa and the Association of Asian Constitutional Courts and Equivalent Institutions attended the aforementioned Congress.

President ARSLAN, having delivered a speech during the Congress on the role of Constitutional Courts in times of emergency, also made explanations on the judgment rendered on 20 June 2017 by the Plenary of the Constitutional Court where the constitutional principles to be paid regard in individual applications lodged due to detention on remand ordered within the scope of the state of emergency were determined.

3. Association of Asian Constitutional Courts and Equivalent Institutions

Association of Asian Constitutional Courts and Equivalent Institutions, or AACC, is an Asian regional forum for constitutional justice established in July of 2010 to promote the development of democracy, rule of law and fundamental rights in Asia by increasing the exchanges of information and experiences related to constitutional justice and enhancing cooperation and friendship between institutions exercising constitutional jurisdiction.

The Turkish Constitutional Court undertook the term presidency for the period between 2012-2014. It was unanimously decided at the 2nd Congress and Board of Members Meeting of the AACC in April 2014 in İstanbul, that the "Summer School of the AACC" would be hosted annually by our Court. Besides, at the 3rd Congress of the AACC organized in Indonesia's Bali Island

While the President of the Court Mr. Zühtü Arslan was delivering his speech within the scope of the events of the 5th Summer School at the Hall of the Supreme Criminal Court (Grand Hall)

in 2016, it was decided to establish the Permanent Secretariat and establish and launch the Centre for Training and Human Resources Development, one of the three pillars of the Permanent Secretariat, in Turkey. In this context, subsequent to the 4th Summer School, the 5th Summer School was realized within the scope of the activities of this Centre.

Among those who participated in the 5th Summer School are rapporteur judges, assistant judges, researchers, legal experts and advisors from the constitutional courts or equivalent institutions of Azerbaijan, Afghanistan, Bulgaria, Indonesia, Georgia, Montenegro, Kazakhstan, Kyrgyzstan, Korea, Kosovo, Malaysia, Mongolia, Uzbekistan, Russia, Tajikistan, Thailand and Turkey.

The 5th Summer School Program started with the inaugural speech delivered by the President of the Turkish Constitutional Court, Mr. Zühtü ARSLAN, at the Grand Hall of the Court. The inaugural speech was followed by a welcome reception, a tour of Court building, and lunch at the Court restaurant. The participants then proceeded to the venue of the Summer

5th Summer School events held in the Hall of the Supreme Criminal Court (Grand Hall)

General Assessment Session held on 20 September 2017 Wednesday within the scope of the 5th Summer School Programme

School (the hotel) for academic sessions. In the evening, a gala dinner was hosted by the Constitutional Court in the honour of the participants.

The working languages of the Summer School were English and Russian. The participants of the Summer School presented the legal framework and case-law of their jurisdictions in the field of "Migration and Refugee Law." The participants had the opportunity to share and discuss views and information through the discussions and question-answer sessions.

It was observed with delight that the friendship and communication among the members of the Association improved through the bowling tournament and similar activities organized for the guests throughout the program.

The 5th Summer School Program ended with the General Assessment Session and Certificate Ceremony at noon on Wednesday, 20 September 2017. In the afternoon, a social program was organized for our guests. Again, in the scope of the social program, they had the opportunity to see the historical, cultural and natural beauties of İstanbul between 21 – 24 September 2017.

3. COOPERATION WITH NATIONAL CONSTITUTIONAL COURTS

In the last decade, the Court signed twenty-three (23) memoranda of understanding with other constitutional and/or supreme courts in order to

enhance bilateral cooperation activities. In this respect, the Court hosts foreign delegations, judges, researchers and staff members of constitutional courts with the spirit of traditional Turkish hospitality and amity. Such protocols of cooperation serve as a basis for mutually beneficial exchanges that we organize with our counterpart institutions for the benefit of both parties.

The Turkish Constitutional Court signed Memorandum of Understanding with the following Constitutional Courts or Equivalent Institutions:

COUNTRY	COURT - INSTITUTION	DATE OF SIGNATURE
Indonesia	The Constitutional Court of Indonesia	24 April 2007
Macedonia	The Constitutional Court of Macedonia	26 April 2007
Azerbaijan	The Constitutional Court of Azerbaijan	10 May 2007
Chile	The Constitutional Court of Chile	07 June 2007
Korea	The Constitutional Court of the Republic of Korea	24 April 2009
Ukraine	The Constitutional Court of Ukraine	24 April 2009
Pakistan	The Federal Supreme Court of Pakistan	24 April 2009
Bosnia and Herzegovina	The Constitutional Court of Bosnia and Herzegovina	24 April 2009
Bulgaria	The Constitutional Court of Bulgaria	07 April 2011
Tajikistan	The Constitutional Court of Tajikistan	26 April 2012
Montenegro	The Constitutional Court of Montenegro	28 April 2012
Afghanistan	The Independent Commission for Overseeing the Implementation of Constitution of the Islamic Republic of Afghanistan	25 April 2013
Albania	The Constitutional Court of Albania	10 June 2013
Thailand	The Constitutional Court of the Kingdom of Thailand	29 April 2014
Kyrgyzstan	The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic	28 September 2014
Romania	The Constitutional Court of Romania	17 October 2014
Algeria	The Constitutional Council of Algeria	26 February 2015
Turkish Republic of Northern Cyprus	The Supreme Court of Northern Cyprus	29 June 2015
Kosovo	Constitutional Court of Kosovo	27 April 2016
Iraq	Federal Supreme Court of Iraq	25 April 2017
Kazakhstan	Constitutional Council of the Republic of Kazakhstan	25 April 2017
Mongolia	Constitutional Court of Mongolia	25 April 2017
Georgia	Constitutional Court of Georgia	28 April 2017

D. INTERNATIONAL RELATIONS IN 2017

The Court maintained its mutual exchanges of visits with both the supreme courts of other countries and international judicial organs and organizations in the year 2017.

In this framework, Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Turkey, and Mr. Abdullah ÇELİK, Chief Rapporteur-Judge, participated on 8 August 2017 in the Board of Members Meeting of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) of which the Constitutional Court of the Republic of Turkey conducts the Centre for Training and Human Resources Development under the Permanent Secretariat of the AACC. The Meeting of the Secretaries General of AACC was also held within the scope of the organization. During the Board of Members Meeting, Mr. President and during the Meeting of the Secretaries General, on behalf of the Secretary General of the Constitutional Court Mr. Abdullah ÇELİK presented the views of the Constitutional Court on the matters in question.

The Federal Court of Malaysia was elected as the Term President of the Association at the Board of Members Meeting of the AACC. Furthermore, a bilateral cooperation agreement was signed between the AACC and the Conference of Constitutional Jurisdictions of Africa.

Following the Board of Members Meeting, the Delegation of the Turkish Constitutional Court also participated in the 14th Anniversary of the Constitutional Court of the Republic of Indonesia held in Solo, Indonesia and in the International Symposium held within this scope and themed

While the President of the Court Mr. Zühtü Arslan was delivering his speech at the Board of Members Meeting of the AACC held in Solo, Indonesia

Participation of the President of the Court and the accompanying delegation in the international symposium held by the Constitutional Court of Indonesia on 9-10 August 2017 with the theme of "the Constitutional Courts as the Guardian of Ideology and Democracy in the Pluralistic Society"

"the Constitutional Courts as the Guardian of Ideology and Democracy in the Pluralistic Society" on 9-10 August 2017. Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Turkey, presided over one of the sessions held in this scope, and delivered a presentation in a session.

Within the framework of both organizations, Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Turkey, held bilateral meetings with the competent officials of many Constitutional Courts and the representatives of some international institutions such as Venice Commission, and during these meetings, he provided his addressees with information on the true nature of the state of emergency in Turkey and also on the resolutions rendered recently by our Court on the individual applications filed against the procedures falling within the scope of the state of emergency.

Participation of the President of the Court Mr. Zühtü Arslan, Justices of the Court and the accompanying delegation in the Opening Ceremony and Seminar of the European Court of Human Rights

The President of the Constitutional Court of the Republic of Turkey Mr. Zühtü Arslan and the accompanying delegation consisting of the Court's Member Judges and Rapporteur-Judges rendered a study visit to the European Court of Justice (ECJ), the Council of Europe (CoE) and the European Court of Human Rights (ECHR) between 24-27 January 2017 and participated in the Opening Ceremony and Seminar of the ECHR organized on 27 January 2017.

During the visit, bilateral meetings were held with the President of the ECJ Mr. Koen Lenaerts, the Secretary General of the CoE Mr. Thorbjørn Jagland, the President of the ECHR Mr. Guido Raimondi and Vice-President Mrs. Ayşe Işıl Karakaş.

In the framework of the Joint Project on "Supporting Individual Application to the Constitutional Court in Turkey" The Regional Round Table Meeting on "Emerging Issues in the Individual Application to the Constitutional Court" was organized on 20 -21 February 2017 in Erzurum.

The meeting aimed at identifying problematic areas that are subjects in individual applications and directly concern local courts and prosecution offices and at contributing to solution of issues resulting in violation judgments at its roots. Members and rapporteurs of the Constitutional Court, members of Erzurum Court of Appeals, Chairs of Justice Commissions in affiliated provinces, Chief Public Prosecutors and Presidents of Bar Associations as well as judges, prosecutors and lawyers from Erzurum and academics from faculties of law in various universities and representatives from the Council of Europe and the European Court of Human Rights participated in the meeting.

Case Law Forum with the theme of "Individual Application Judgments related to Criminal Proceedings" held in Ankara within the scope of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey

Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Turkey, delivered the featured address titled "Xenophobia, Racism and Anti-Islamism based on Migration" at the IV. International Symposium on Ombudsman Institutions held under the theme of "Migration and Refugees" by the Ombudsman Institution of Turkey in Ankara between 2 – 3 March 2017.

Within the framework of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey a Case Law Forum on the judgments of the Turkish Constitutional Court related to Criminal Judiciary on 2-3 March 2017

Representatives and academicians from the Constitutional Court, Supreme Court, Ministry of Justice, Council of Judges and Prosecutors, Regional Courts of Justice and the Turkish Bar Association, Council of Europe and European Court of Human Rights participated to the Case Law Forum where many individual applications relating to criminal law were discussed.

Justice of Constitutional Court of the Republic of Turkey Mr. Hicabi DURSUN and Rapporteur Judge of the Constitutional Court Mr. Yılmaz ÇINAR paid a visit to Chişinău, Moldova to participate in the international conference organized on 2 – 3 March 2017 by the Constitutional Court of the Republic of Moldova together with the Venice Commission.

Justice of Constitutional Court of the Republic of Turkey Prof. Dr. Yusuf Şevki HAKYEMEZ and Rapporteur Judge of the Constitutional Court Mr. Yücel ARSLAN participated in the 11th Bureau Meeting of World Conference on Constitutional Justice held in Venice on 11 March 2017.

Participation of Justice Yusuf Şevki Hakyemez and the accompanying delegation in the 11th Bureau Meeting of World Conference on Constitutional Justice held in Venice

The 55th Anniversary Program of the Constitutional Court

The Opening Ceremony of the 55th Anniversary of the Constitutional Court of the Republic of Turkey commenced with the opening speech delivered by Mr. Zühtü ARSLAN, the President of the Court, in the Grand Hall of the Constitutional Court on 25 April 2017.

The introductory film prepared on the occasion of the 55th Anniversary of the Court was presented during the ceremony in which the Presidents and Judges of the Constitutional Courts of thirty different countries participated.

Symposium themed "Constitutional Courts as the Guardians of Fundamental Rights" and held on 25-26 April 2017 within the scope of the events of the 55th Anniversary of the Constitutional Court

In the scope of the events of the 55th Anniversary of the Constitutional Court an international symposium with the title "Constitutional Courts as the Guardians of Fundamental Rights" and participation of the Presidents and Judges of Constitutional Courts from many countries and representatives from the European Court of Human Rights, Court of Justice of the European Union and the African Court on Human and Peoples' Rights and local and foreign academicians as guests was organized between 25-26 April 2017.

Balkan Countries Constitutional Courts Meeting held on 27 April 2017 at the Dolmabahçe Palace within the scope of the events of the 55th Anniversary of the Constitutional Court

Gala Dinner held at the Beykoz Mecidiye Kasrı on occasion of the 55th Anniversary of the Constitutional Court with the participation of the President of the Republic of Turkey Mr. Recep Tayyip ERDOĞAN, President of the Grand National Assembly of Turkey Mr. İsmail KAHRAMAN and President of the Constitutional Court of the Republic of Turkey Mr. Zühtü Arslan

On 27 April 2017 the Balkan Countries Constitutional Courts Meeting was held at the Dolmabahçe Palace, and the consensus on founding a forum to develop the cooperation among the relevant Constitutional Courts and continuing to work on the establishing of the Association of Balkan Constitutional Courts in the future was achieved.

The Gala Dinner held on the occasion of the 55th Anniversary was honored by the President of the Republic of Turkey Mr. Recep Tayyip Erdoğan, President of the Grand National Assembly of Turkey Mr. İsmail Kahraman and the participation of guest from home and abroad and Judges and Rapporteurs of the Constitutional Court.

The activities of the 55th Anniversary ended on 28 April 2017.

The President of the Constitutional Court Mr. Zühtü Arslan held bilateral meetings with the Constitutional Court Presidents of Iraq, Mongolia and Georgia and the Constitutional Council President of Kazakhstan. The Constitutional Court of the Republic of Turkey Memorandum of Understanding on Bilateral Cooperation on 25 April 2017 with the Federal Constitutional Court of Iraq, the Constitutional Council of Kazakhstan and the Constitutional Court of Mongolia, and with the Constitutional Court of Georgia on 28 April 2017.

Prof. Dr. Engin Yıldırım, Vice-President of the Constitutional Court of the Republic of Turkey, participated in the international conference under the

Participation of the Vice-President of the Constitutional Court Mr. Engin Yıldırım in the international conference held in St. Petersburg, Russia with the theme of "Constitutional Justice: Doctrine and Practice" within the framework of "VII. St. Petersburg International Legal Forum"

theme of "Constitutional Justice: Doctrine and Practice" held within the framework of "VII. St. Petersburg International Legal Forum" on 16 – 20 May 2017 in St. Petersburg, Russia, and delivered a presentation titled "Individual Application and the Turkish Constitutional Court: A Balance-Sheet" during the conference.

The President Mr. Zühtü Arslan and the accompanying delegation composed of the Vice-President, Judges and Rapporteur Judges of the Constitutional Court paid a study visit to the Constitutional Court of Spain on 18 – 19 May 2017 within the scope of the Project on Supporting the Individual Application to the Constitutional Court.

Study visit of the President of the Constitutional Court Mr. Zühtü Arslan, Vice-President Mr. Burhan Üstün and the accompanying delegation composed of Justices and Rapporteur Judges of the Constitutional Court to the Constitutional Court of Spain on 18-19 May 2017 within the scope of the Project on Supporting the Individual Application to the Constitutional Court

Study visit of the delegation composed of the President, Vice-President, Justices and Rapporteur Judges of the Constitutional Court to the Constitutional Court of Spain on 18-19 May 2017 within the scope of the Project on Supporting the Individual Application to the Constitutional Court

In the context of the visit, mutual exchanges of information were realized on "Relationship between Ordinary Legal Remedies and Individual Application" and "Constitutional Significance". In addition, a bilateral meeting was held between Mr. Zühtü Arslan, the President of the Constitutional Court of the Republic of Turkey, and Mr. Juan José González Rivas, the President of the Constitutional Court of Spain.

Justice of Constitutional Court of the Republic of Turkey Mr. Rıdvan Güleç and Rapporteur Judge of the Constitutional Court Mr. Yunus Emre Yılmazoğlu participated in the international conference on "A Quarter of a Century of Constitutionalism" dedicated to the 25th Anniversary of the Constitutional Court of Romania held in Bucharest on 24-25 May 2017.

Participation of Justice Rıdvan Güleç and the accompanying delegation in the international conference on "A Quarter of a Century of Constitutionalism" held on 24-25 May 2017 in Bucharest

Participation of the President of the Court in the Round Table Meeting titled "the Legal Remedy of Intermediate Appeal and the Individual Application before the Constitutional Court" and held on 1 June 2017

In the scope of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey, on 1 June 2017 the conference titled "the Legal Remedy of Intermediate Appeal ("İstinaf Kanun Yolu") and the Individual Application before the Constitutional Court" and on 2-3 June 2017 a Round Table Meeting titled "Intermediate Appeal and Individual Application in the context of the Turkish Criminal Law Reform" were organized.

Representatives from the Constitutional Court, the Court of Cassation, the Council of State, Ministry of Justice, the Council of Judges and Prosecutors, Justice Academy, Regional Courts of Appeal, the European Union and the Council of Europe and domestic and foreign academicians have participated in the programme co-organized with the Law Faculty of the İstanbul University,

The conference started with the opening speech of the President of the Constitutional Court Mr. Zühtü Arslan and continued with the panel titled "The effect of the Individual Application and the Turkish Criminal Law Reform on ECtHR decisions". The program ended with the Round Table Meeting where presentations and discussions were held in the context of the right to a fair trial and assessments were made on the first year of the legal remedy of intermediate appeal in Turkey and where foreign academicians shared their country experiences in the intermediate appeal.

Participation of the Vice-President of the Court Mr. Burhan Üstün and Justice Mr. Recai Akyel in the international conference with the theme of "Constitutional Justice: Actual Issues and Prospects" held on occasion of the 25th Anniversary of the Constitutional Court of Mongolia between 30 June and 1 July 2017

Mr. Burhan Üstün, Vice-President and Assoc. Prof. Dr. Recai Akyel, Judge of the Constitutional Court of the Republic of Turkey, participated in the international conference under the theme of "Constitutional Justice: Actual Issues and Prospects" held within the framework of the 25th Anniversary of the Constitutional Court of Mongolia between 30 June – 1 July 2017 in Ulaanbaatar, Mongolia. Mr. Akyel delivered a presentation during the conference. The Turkish Delegation also visited the Turkish Embassy in Ulaanbaatar.

Judge of the Constitutional Court of the Republic of Turkey Mr. Recep Kömürcü and Rapporteur Judge of the Constitutional Court Ms. Berrak Yılmaz participated in the international conference under the theme of "Constitution and Modernization of Society and the State" devoted to the

Participation of Justice Mr. Recep Kömürcü and the accompanying delegation in the international conference with the theme of "Constitution and Modernization of Society and the State" held on 28-31 August 2017 in Astana, the capital of Kazakhstan

Visit of the President of the Supreme Court of the Sultanate of Oman and the accompanying delegation to our Court on 27 September 2017

Constitution Day of the Republic between 28 – 31 August 2017 in Astana, the capital of Kazakhstan, and also attended the social activities.

As part of the programme organized by the Justice Academy of Turkey, the President of Oman Sultanate High Court Mr. Ishaq Ahmed Al-Busaidi and the accompanying delegation paid a visit to our Court on 27th of September 2017. The delegation was received by the President of the Constitutional Court Mr. Zühtü Arslan. During the visit, the delegation was informed on the topics of the structure and powers of the Constitutional Court, individual application, and 15th July coup attempt and emergency measures.

Round table meeting on "Evaluation of Judgments on Deportation and Entry Bans within the context of Fundamental Rights and Freedoms" within the Joint Project on "Supporting the Individual Application to the Constitutional Court of Turkey" was organized on 2-3 October 2017 in İstanbul.

In the meeting, members and rapporteurs of the Constitutional Court (TCC), administrative judges, law academics, national and international experts, lawyers and representatives of the Council of State, Directorate General of Migration Management and UNHCR analysed and discussed problematic areas related to deportation and entry bans

Within the events of the 25th Anniversary of the Constitutional Court of the Republic of Albania, the International Conference on "Europeanization of Domestic Constitutional Law and Constitutionalization of European Law – Challenges for the Future" was held in Tirana, Albania on 20 October 2017

Participation of the President of the Constitutional Court Mr. Zühtü Arslan, President of the Court of Jurisdictional Disputes Mr. Nuri Necipoğlu and the accompanying delegation in the international conference on "Europeanization of Domestic Constitutional Law and Constitutionalization of European Law – Challenges for the Future" held on occasion of the 25th Anniversary of the Constitutional Court of the Republic of Albania on 20 October 2017

with the participation of the representatives of the Constitutional Courts from Europe and the representatives of certain international institutions such as the Venice Commission.

President of the Constitutional Court of the Republic of Turkey Mr. Zühtü Arslan, President of the Court of Jurisdictional Disputes Mr. Nuri Necipoğlu and Rapporteur Judge Mr. Nahit Gezgin participated in the Conference on behalf of the Turkish Constitutional Court.

Mr. Arslan chaired one of the Sessions in the Conference. In his speech delivered as a chairperson, Mr. Arslan indicated that with the introduction of individual application mechanism in Turkey, the "Europeanization" process of the Constitutional Law gained momentum; however, the coup attempt of 15 July paralyzed this process. Noting that the coup attempt was in the nature of an attack towards the basic values of the Council of Europe such as democracy, human rights and rule of law, Mr. Arslan also emphasized that conducts and behaviors discriminating "others" and taking place in many European countries – such as xenophobia, racism and Islamophobia – were constituting an extremely serious threat to such basic values.

Throughout the Conference and other events, the delegation of the Turkish Constitutional Court held meetings and exchanged views with other delegations.

Within the framework of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey Regional round table

meeting on "Emerging Issues in Individual Application to the Constitutional Court" was organized within the Joint Project on Supporting Individual Application to the Constitutional Court of Turkey on 23-24 October 2017 in Gaziantep.

The meeting was organized with the participation of the Presidents and Members of the Criminal Chambers of Gaziantep Court of Appeals and Chairs of Justice Commissions, Public Chief Prosecutors and Presidents of Bar Associations from affiliated provinces, member, deputy secretary general and rapporteurs of the Constitutional Court and experts including academics, judges, prosecutors and lawyers made presentations and contributed to the identification of problematic areas that are subjects of individual application to the Constitutional Court and to the solution of problems that result in violation judgments.

The solemn ceremony of the 8th Judicial Year of the Constitutional Court of the Republic of Kosovo was held in Pristina, the capital of Kosovo, on 25 October 2017 with the participation of the Presidents and Justices of the Constitutional Courts of several countries and of the representative of the Venice Commission.

On behalf of the Constitutional Court of the Republic of Turkey, Justice Mr. Yusuf Şevki Hakyemez and Deputy Secretary General Mr. Salim Küçük participated in the ceremony.

The 1. International Symposium of the Research and Development Secretariat of Association of Asian Constitutional Courts and Equivalent

Participation of Justice Mr. Yusuf Şevki Hakyemez and the accompanying delegation in the opening ceremony of the 8th judicial year of the Constitutional Court of the Republic of Kosovo held on 25 October 2017

Participation of Justice Hasan Tahsin Gökcan and the accompanying delegation in the 1st international symposium on "Constitutionalism in Asia: Past, Present and Future" held by the Constitutional Court of the Republic of Korea

Institutions was held by the Korean Constitutional Court in Seoul, Korea between October 30th and November 3rd 2017. The topic of the Symposium was "Constitutionalism in Asia: Past, Present and Future". The representatives of the Members of the Association and the Venice Commission have participated in the Symposium.

On behalf of the Turkish Constitutional Court, Justice Hasan Tahsin Gökcan and Rapporteur Dr. Mücahit Aydın have participated in the Symposium. Justice Gökcan made a presentation entitled "The Progress of Constitutionalism in Turkey" which provided information regarding Turkish constitutional history and the individual appeal remedy before the Turkish Constitutional Court.

The delegation of the Court held meetings and exchanged views with the Members of the Association. The delegation also attended 29 October Turkish Republic National Day Reception and paid an official visit to the Turkish Republic Seoul Embassy.

Case Law Forum with the theme of "Individual Application Judgments related to Civil Proceedings" held on 23-24 November 2017 in Ankara within the scope of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey

Participation of the President of the Court Mr. Zühtü Arslan and Justice Hicabi Dursun in the 2nd international conference on "Individual Access to Constitutional Justice" jointly held by the Conference of Constitutional Jurisdictions of Africa and the Constitutional Council of Algeria on 24-27 November 2017

Within the framework of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey a Case Law Forum on the judgments of the Turkish Constitutional Court related to Legal Judiciary on 23-24 November 2017 in Ankara.

Representatives and academicians from the Constitutional Court, Supreme Court, Ministry of Justice, Council of Judges and Prosecutors, Regional Courts of Justice and the Turkish Bar Association, Council of Europe and European Court of Human Rights participated to the Case Law Forum where many individual applications relating to legal law were discussed.

The 2nd International Conference on "Individual Access to Constitutional Justice" was jointly held by the Conference of Constitutional Jurisdictions of Africa and the Constitutional Council of Algeria in Algiers, Algeria between 24-27 November, 2017 with the participation of the representatives of the Constitutional Courts and certain international institutions such as the Venice Commission.

President of the Constitutional Court of the Republic of Turkey Mr. Zühtü Arslan and Justice Hicabi Dursun participated in the Conference on behalf of the Turkish Constitutional Court.

Arslan delivered a speech at the Conference and explained the exception of unconstitutionality in the Turkish legal system. Arslan also emphasized the importance of individual applications system with respect to individual access to constitutional justice by drawing conclusions from Turkish experience. Expressing that concrete review and individual application mechanisms complement each other in pursuing constitutional justice,

Arslan explicated the interaction between these two legal mechanisms by giving examples from the practice of the Turkish Constitutional Court.

Throughout the Conference, the delegation of the Turkish Constitutional Court held meetings and exchanged views with other delegations.

The International Conference on "Role and Significance of the Constitution in Building Democratic State Governed by Rule of Law" was held in the city of Tashkent of Republic of Uzbekistan between 30 November - 1 December, 2017 with the participation of the Presidents and members of Asian Constitutional Courts.

President of the Constitutional Court of the Republic of Turkey Mr. Zühtü Arslan and Rapporteur Hüseyin Mecek participated in the Conference on behalf of the Turkish Constitutional Court. Arslan made a presentation in the Conference titled "The Role of Constitutional Courts in Upholding Democratic State of Law: Turkish Example".

Mr. Arslan stated that constitutions provide a) the legal framework for a democratic order by ensuring the exercise of fundamental rights during normal times, b) and special procedures and defense mechanism in order to protect democratic state of law during emergencies. Within this scope, Arslan explained the role of Constitutional Courts in protecting democratic legal state by giving examples from the leading case-law of the Turkish Constitutional Court before and after July 15 coup attempt.

Throughout the Conference, the delegation of the Turkish Constitutional Court held meetings and exchanged views with other delegations.

Participation of the President of the Court and the accompanying delegation in the international conference on "Role and Significance of the Constitution in Building Democratic State Governed by Rule of Law" held between 30 November 2017 and 1 December 2017 held in celebration of the 25th Anniversary of the Uzbekistan Constitution

CHAPTER FOUR

PRESIDENT'S SPEECHES

A. OPENING SPEECH ON THE OCCASION OF THE 55th ANNIVERSARY OF THE TURKISH CONSTITUTIONAL COURT

His Excellency Mr. President,

Esteemed Guests,

I would like to express my gratitude for your attendance in our ceremony on the occasion of the 55th Anniversary of the Constitutional Court and I greet you with all my heart and respect.

A great number of presidents and members of the Constitutional Courts and supreme courts from all over the world and the representatives of international courts are accompanying us today in this ceremony. I would like to welcome all of them and to extend my thanks for standing with us on such a special day.

Two important events, which are of a particular concern to the constitutional democracy, have taken place in our country since our anniversary ceremony of the last year. The first one is the coup attempt taking place on 15 July 2016, which constitutes a dark mark in our history of democracy. Thanks to our public's consciousness of democracy and firm stand, this attempt aiming at overthrowing the democratic constitutional order failed, and thereby the Turkish democracy successfully has overcome such a significant challenge.

The second remarkable development is the referendum held on 16 April 2017. Democracy is defined, in the most general sense, as the "ruling of the people by the people for the sake of the people". The most important element of this definition is that the subject of the ruling is the people. As is known to all, the people - as a political subject - express their fundamental preferences through elections and referendums.

In the referendum held on 16 April, our people ensured high participation in voting through a wise and democratic way. The fact that the referendum was held with a participation rate of over eighty-five percent is per se an achievement for our democracy. I would like to take this occasion to wish that this referendum be auspicious for our country and people.

Independently of the referendum, as enshrined in the Constitution, the Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of indivisible integrity of the state, national sovereignty and justice, and based on separation of powers and human rights. It must be our common responsibility to bring the democratic Republic that endow with these characteristics, which express our constitutional identities, beyond the level of

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contemporary civilization that was indicated by Mustafa Kemal Atatürk, the founder of the Republic and that is expressed in the Preamble of the Constitution.

Undoubtedly, the most significant indicator of the contemporary civilization is to secure justice. Justice which is also the raison d'être of the courts is the resource of all virtues. As defined by Aristotle, "All virtues exist together in justice. Justice is not a part of virtue, but the whole virtue". According to Nizam al-Mulk, just as justice predominates, so does the benevolence; justice is salvation for the rayah (folks) and a cornerstone for kindness.

The Turkish nation has a rich historical accumulation also in respect of the legal and political practices of justice. The principle dominating over the legal and political order of the Ottoman Empire, which is one of the most powerful and sublime states witnessed by the history, is justice. The circle of justice ("daire-i adalet") having an important role in the Ottoman's state tradition amounts to an understanding starting and finishing with justice. Obedience by the army, the state and the public, which are the other elements of the circle of justice, depends on merely the establishment of justice. In brief, what maintains order and salvation of the universe is justice. In his speech delivered at the opening ceremony of the First Turkish Parliament on 19 March 1877, the Sultan Abdulhamid II made reference to the role of justice in fate of the states by stating "The development of states and nations can only be achieved by justice".

These words regarding the importance of justice and its functioning are also prevailing today. Nowadays, the most significant manifestation of justice is the effective protection of the fundamental rights and freedoms. As is also emphasized in a judgment rendered by the Constitutional Court last month, "the task entrusted with the state in democratic countries is to protect and develop the fundamental rights and freedoms and to take measures which would ensure effective enjoyment thereof".

In this respect, the most important measure required to be taken by the state is to ensure a secure environment where the fundamental rights and freedoms may be enjoyed to the broadest extent possible. In an insecure environment, it would become difficult or even become impossible for the individuals to effectively enjoy their fundamental rights and freedoms from the right to life to the freedom of expression. Security and liberty are therefore values complementing each other.

The delicate relation between liberty and security especially comes into prominence in periods during which emergency administration procedures are in force. As is also underlined in the judgments of the Constitutional Court, "the aim of the emergency administrations must be to secure and protect the constitutional order". In other words, the aim of the emergency administrations is to eliminate the threat resulting in the state of emergency and to ensure

returning towards the ordinary period through which the fundamental rights and freedoms may be enjoyed to the optimal extent.

His Excellency Mr. President,

It is obvious that there are significant duties on the part of the constitutional courts in case of state of emergency. The first and foremost among these is to protect the fundamental rights and freedoms against the interventions that go beyond the extent required by the state of emergency.In performing these duties, the constitutional courts must act within the constitutional framework of the emergency administration.

Within this context, the Turkish Constitutional Court renders its decisions and judgments in the fields of the constitutionality review and individual application by remaining within the constitutional boundaries. This is a constitutional requisite by virtue of Articles 6 and 11 of the Constitution which respectively provide for that no organ shall exercise any state authority not emanating from the Constitution, and that the provisions of the Constitution are binding upon legislative, executive and judicial organs.

In constitutional democracies, the one drawing the map of powers is the constituent power, in other words, the constitution-maker, and the map of powers is the constitution. It may be certainly asserted that such boundaries are insufficient to secure a state of law along with its all institutions and rules. However, the existing constitutional boundaries are binding upon all of us by the time they are changed. Therefore, it cannot be expected from the Constitutional Court, which is entrusted with the task of protecting such boundaries, to go beyond these constitutional boundaries.

Changing the rules, which are explicitly set out by the constitution-maker as to its wording, meaning and legislative intent, by way of interpretation indeed amounts to making a constitutional amendment through the Court. It is without any doubt that this would lead to a debate of judicial activism and legitimacy. Therefore, the "rights-based" approach adopted by the Constitutional Court must be understood as the protection of the fundamental rights and freedoms by means of remaining within the constitutional boundaries and not resorting to judicial activism.

Within this scope, for instance, Article 148 of the Constitution which entails the duties and powers of the Constitutional Court explicitly sets forth that the decree-laws issued under a state of emergency cannot be brought before the Constitutional Court on the basis of their alleged unconstitutionality as to

form or substance. In the light of this explicit constitutional provision and the principles cited above, the Court held that it did not have the jurisdiction to review the decree-laws issued under the state of emergency.

On the other hand, it has been revealed that the constitution-maker envisages that the decree-laws in question be subject to judicial review following their ratification by the parliament. As a matter of fact, actions for annulment of certain decree-laws which had been issued under the state of emergency and subsequently enacted upon being ratified by the Grand National Assembly of Turkey were filed with the Constitutional Court. In respect of these actions, the preliminary examination process was completed; however, the examination as to merits has still been pending.

His Excellency Mr. President,

As is known, one of the most significant changes taking place in the Turkish constitutional jurisdiction is the assignment of the task to examine the individual applications to the Constitutional Court upon the constitutional amendment of 2010. The Court has so far fulfilled this duty with due diligence and in an effective manner, which is also confirmed in the international arena.

As I also expressed with satisfaction in my speech last year, the annual ratio of applications concluded by the Court is ever increasing year by year. This ratio, which was 50% in 2013, increased to 53% and to 77% in 2014 and 2015, respectively. The ratio of concluding the individual applications lodged with the Court increasingly continued until July 2016 and reached to 85%. Our aim was to increase this ratio to 100% by the end of year in 2016; however, the coup attempt of July 15th took place in Turkey. Nevertheless, the number of individual applications concluded by the Court in 2016 is more than that of 2015.

The coup attempt has had an impact on the Court as well as other institutions and organizations. Following 15 July, the number of individual applications has considerably increased. In 2016, while 12.712 individual applications were lodged with the Constitutional Court until 15 July, 68.044 individual applications were lodged with the Court in the remaining five and a half months of the year. The number of individual applications filed in the first months of 2017 is less compared to the last months of 2016; however, the Constitutional Court has continued receiving individual applications which are higher in number than those filed in the ordinary period.

The number of individual applications pending before the Court as of today is 101.557. Out of these applications, 75% of them are comprised of those lodged

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within the scope of the state of emergency. This number is much higher than the total number of applications lodged with the European Court of Human Rights by 47 countries.

The Court has been taking necessary measures since the first day due to this heavy workload breaking out unexpectedly and within a short time. The Constitutional Court primarily increased its capacity for "receiving application". This increase was sometimes about tenfold higher compared to the ordinary period. Subsequently, these applications were "registered" and "classified" by the Court.

Furthermore, necessary actions were taken for concluding the applications classified according to their subject-matters. The leading case-files in respect of which principle decision would be rendered were determined on each subject-matter and were communicated, by virtue of law, to the Ministry of Justice for receiving observations of the Ministry.

While carrying out such actions on one hand, for several months the Constitutional Court has been, on the other hand, conducting technical-legal study as to in the light of which principles and how to examine the individual applications in time of state of emergency. This study under which the relevant case in the international law and the comparative law is also dealt with is about to be completed.

Out of the applications lodged following 15 July, those which were filed against the acts and actions directly materialized by virtue of the decree-laws issued under the state of emergency take a significant place. For this reason, introducing the opportunity to apply to the Commission, which was established by the Decree-Law no. 685 on the Establishment of the Commission for the

Examination of Proceedings under the State of Emergency, against the actions directly performed by virtue of such Decree-Laws and subjecting the decisions of the Commission to judicial remedies are important improvements.

A considerable number of individual applications were lodged with the Court in respect of the other acts and actions falling into the scope of the state of emergency. The applications lodged due to the measure of detention constitute a great part of these applications.

The technical study carried out, by the rapporteurs, on one of the leading case-files under which the examination procedure and method of the measure of detention within the scope of the state of emergency would be established is about to be completed, and accordingly, a principle decision will be soon rendered in this respect. Following the conclusion of the leading case-files, it is aimed to conclude also the individual applications regarding the measures of detention within a reasonable period.

In the meantime, it should be noted that the Constitutional Court also continues examining the applications lodged in the previous years. The Court could uninterruptedly maintain its ordinary process also in the period following the coup attempt of July 15th and concluded the applications that were filed mainly in 2014. Accordingly, the Constitutional Court rendered various decisions and judgments in respect of almost all fundamental rights and freedoms from the right to life and the freedom of expression.

Consequently, the Constitutional Court has, within a few months, encountered with a high volume of workload which has never been faced with by any national or international judicial body examining individual applications. I would like to emphasize that the Constitutional Court, which has at the same time maintained its ordinary process, has acted in a rapid and decisive manner and has taken and continues taking all necessary measures.

The individual application system, which serves for the better protection and improvement of the fundamental rights and freedoms, is a crucial acquisition for our country. Therefore, it must be noted that the endeavours to reflect the system of individual application as an ineffective remedy are not proper.

His Excellency Mr. President,

In this part of my speech, I would like to deal with a matter which poses a threat to the contemporary civilization and is of a particular concern to all of us. This matter is xenophobia which has been especially promoted and increasingly deepened in the West.

As is known, many constitutional courts in Europe and the European Court of Human Rights were founded in reaction to the intensive human rights violations taking place in the course of the Second World War and to the totalitarian regimes giving rise to these violations. The raison d'être of the relevant courts is to protect the fundamental rights and freedoms.

I consider, in spite of these historical facts, adopting the same opinion and maintaining the same conscience is a great tragedy at the point where we stand now following all wars, massacres and systematic right violations taking place in the last century. What is much graver is feeling the effect of the xenophobia and Islamphobia, which have originally taken place in the social and political field, also within the judiciary.

Within this scope, the prohibitive decisions rendered by the national and international judicial organs especially concerning headscarf are remarkable. It is not possible to associate this approach, which on one hand closes doors for the refugees and consider them as detrimental elements that must not be allowed to enter inside their country and which on the other hand excludes headscarf from public and social spheres, with the human rights which are one of the fundamental values of the Europe.

Such an exclusivist approach, which has increasingly become widespread and new instances of which we encounter with every day, would make Immanuel Kant, who stated "not as a matter of charity but by virtue of ¢the right to hospitality¢ they have, we are obliged not to treat aliens, upon crossing our borders, as an enemy", turn in his grave. In the same vein, this attitude which does not fulfil their responsibilities towards those who they regard as "the other" makes the spirit of Emmanuel Levinas, who said "The conscience of the European is not at ease at the very hour of its modernity (...) it is also the guilty conscience arising at the end of many ongoing thousands of years", suffer anguish.

It is beyond question that what underlies this important matter is the failure to establish a proper relationship with "the other". Therefore, the way to eliminate the global guilty conscience being suffered is to regard someone else as a human being and to acknowledge human rights are at the same time "the rights of the other". This approach requires adopting and internalising an understanding which regards human being as "the most glorious of those created by Allah" (eşrefî mahlukât).

Indeed, we all know a philosopher and a statesman who was the pioneer of this understanding. This person is the late Alija Izetbegović. He was addressing as

follows in the middle of a devastating war during which his public was being slaughtered at the centre of Europe and in front of the whole world: "being humane and maintaining to be so are our responsibilities towards Allah and us".

Alija transferred the notion of "being humane and maintaining to be so", which was completely qualified by him as a moral value, to the political field and indicated that this notion corresponded to "a lawful state" where "no one would be subject to oppression due to his religion, national (identity) or political belief" and where this is deemed to constitute the fundamental law. In brief, the notion of "being humane or maintaining to be so" was formulated, in the political context, as the pluralist, democratic state of law.

The dimension of "maintaining to be humane" of this notionmeans not to diverge from law and the rule of law even in the most critical situations. I hope that the humanity adopting the same opinion and maintaining the same conscience and therefore seemed to be exposed to new guilty conscience would pay attention to the universal message of Alija Izetbegović.

His Excellency Mr. President,

Esteemed Guests

On this occasion, I would like to express my condolences to the relatives of Mr. Necdet Darıcıoğlu, the retired President of the Court, Mr. İhsan Necdet Tanyıldız and Mr. Ahmet Oğuz Akdoğanlı, the retired justices of the Court, and all of our other personnel, who passed away last year. May Allah rest their souls in peace!

I would like to express my gratitude, on behalf of the Court and myself, to the Vice-Presidents, members, rapporteurs, assistant rapporteurs and all personnel of the Court, who are serving under a heavy workload in a devoted manner and with great eagerness.

I firmly believe that declarations to be presented and discussions to be held during the symposium which will start in the afternoon will make significant contributions to the accumulation of the constitutional jurisdiction. I would like to express my thanks in advance to all participants who will provide contributions for the symposium through their declarations, questions and comments.

Once again, I would like to express my gratitude for your participation to honour our anniversary and for your attention. I extend my wishes of health and prosperity to all of you.

B. WELCOME ADDRESS AT THE ROUNDTABLE MEETING AND CONFERENCE ON "THE LEGAL REMEDY OF INTERMEDIATE APPEAL AND THE INDIVIDUAL APPLICATION BEFORE THE CONSTITUTIONAL COURT"

Esteemed guests,

Distinguished participants,

I would like to express my gratitude towards you for your attendance in the conference themed "the Legal Remedy of Intermediate Appeal and the Individual Application before the Constitutional Court" and I greet you with all my heart and respect.

The constitutions include certain articles in respect of which all other articles included therein constitute an annotation. Article 5 of the Turkish Constitution is this kind of a provision. This article which is entitled "the fundamental aims and duties of the State" and which amounts to the essence and spirit of the social contract principally places emphasis on the security and liberty which are, in principle, raison d'etre of the State.

Pursuant to Article 5 of the Constitution, the fundamental aims and duties of the state are, on one hand, to "ensure the welfare, peace and happiness of the individual and society" and on the other hand to "strive for the removal of ... obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law and to provide the conditions required for the development of the individual's material and spiritual entity".

The review conducted by the Constitutional Court in the processes of the constitutionality review and the individual application is, in fact, concerning the implementation of Article 5 of the Constitution. In this provision, reference is made to the negative and positive obligations of the State within the meaning of the protection of the fundamental rights and freedoms. The review conducted by the Constitutional Court in concluding that there is a violation of a constitutional right and freedom in an individual application is also, in one sense, directed at determining the sphere and limits of the negative and positive obligations of the State.

Under extraordinary circumstances, the establishment of the security and the protection of fundamental rights and freedoms by the State become important more than ever. The reputable French philosopher Jacques Derrida stated immediately after the terrorist attack of

Conference on "the Legal Remedy of Intermediate Appeal and the Individual Application before the Constitutional Court"

11 September "We must support the human rights more than ever. (As a matter of fact), we are in need of the human rights".[1]

Indeed, the human rights built on human dignity are the most important values determining the ontological status of human being. Subject of the human rights is human being who is deemed to be "the most glorious of those created by Allah (e§refi mahlukat)". Centuries ago, Hz. Mevlana Celaleddin-i Rumi explained the place of human being in the universe as follows: "You are the essence, foundation of the universe. The universe was created by virtue of you".[2]

In spite of the central significance of human being and his rights, the security concern has gradually spread over the world especially following 11 September,

1. Jacques Derrida, "Autoimmunity: Real and Symbolic Suicides - A Dialogue with Jacques Derrida", in Giovanna Borradori, *Philosophy In a Time Terror: Dialogues with Jurgen Habermas and Jacques Derrida,* (Chicago: The University of Chicago Press, 2003), p. 132
2. Mevlana, *Rubailer,* Translated by §efik Can, (istanbul: Kurtuba Kitap, 2009), No. 345, p. 74.

and as a result, the Islamophobic attitudes have expanded especially in the West. In the period following 11 September, counter-terrorism has led to excessive restrictions imposed on the fundamental rights and freedoms in certain countries.

In the same period, the relation between liberty and security followed a different course. Only 22 days after 11 September, the constitutional amendments of 2001 were materialized, and the scope of the fundamental rights and freedoms was thereby expanded. The same tendency also continued through the constitutional amendments taking place in 2004. A sentence was added to Article 90 of the Constitution. Accordingly, it is envisaged therein that in case of a conflict between international agreements concerning fundamental rights and freedoms and the laws, the former one shall prevail. By this amendment, the supremacy of the international law on human rights over the laws has been acknowledged in the domestic law.

Distinguished participants,

The individual application mechanism emerged as the continuation of this liberalistic tendency. In this scope, one of the most significant changes in the Turkish constitutional jurisdiction is undoubtedly investing the Constitutional Court with the duty to examine individual applications by the constitutional amendment of 2010. A paragraph was added to Article 148 of the Constitution in 2010, and thereby it is enabled that "everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities".

Upon the introduction of the individual application mechanism in our legal system, a new era started in the protection of the constitutional rights and freedoms. Since 23 September 2012 the date when the Constitutional Court started receiving individual application, it has been performing this duty in a meticulous and effective manner, which has been also confirmed in the international arena. It is known that the individual application mechanism operating in Turkey is shown to be a successful and good practice which must be also taken into consideration by the other countries.

As is known, the individual application mechanism has brought along crucial improvements both in the functioning of the Constitutional Court and, in general terms, in the Turkish law. Upon the introduction of the individual application mechanism, the Constitutional Court is no longer an institution merely making constitutional review of the laws and has become a judicial tribunal which has a bearing on the daily lives of the individuals, directly deals with the incidents and thereby influences the society.

On the other hand, the individual application mechanism has also led to a paradigm shift in the constitutional jurisdiction. The Constitutional Court started rendering decisions and judgments both in the constitutionality review and the individual application processes within the "right-based" paradigm which gives priority to the protection of the fundamental rights and freedoms. As a matter of fact, very nature of the individual application entails such a paradigm shift. This is probably because the legislative intention of the constitutional amendment includes the following sentence "by virtue of the new legal arrangement, the Constitutional Court has been entrusted with the duty of protecting and developing freedoms by means of being entitled to examine individual applications".

As is known, the individual application mechanism has also a practical aim. This aim which is also mentioned in the legislative intention of the constitutional amendment reduces the number of applications lodged and the number of violations found against Turkey before the European Court of Human Rights ("the ECtHR"). This practical aim inherent in the individual

application system was materialized to a large extent until the coup attempt of 15 July. Thanks to the effective implementation of the individual application mechanism, the number of applications lodged and violations found against Turkey before the ECtHR has decreased significantly. However, the number of pending applications before the ECtHR has shown an increase due to the applications lodged subsequent to 15 July.

As in the countries where the individual application mechanism is implemented successfully, namely Germany and Spain, it is explicit that there are certain problems resulting from the implementation of the individual application mechanism also in our country. A significant part of these problems stems from the inability to sufficiently comprehend the principle of "subsidiarity".

It should be once again indicated that the individual application before the Constitutional Court or the constitutional complaint is not an ordinary remedy. The individual application mechanism is an extraordinary remedy of a secondary nature which may be resorted to in the event that the alleged right violations could not be eliminated through the ordinary remedies. As is also emphasized in the judgments of individual applications, respect for the fundamental rights and freedoms is a constitutional obligation entrusted to all bodies of the State, and the elimination of right violations occurring due to non-fulfilment of this obligation is the duty of administrative and judicial authorities.[3] What is principal in the individual application system is the respect for the rights and freedoms by public authorities and the elimination of any possible violation through ordinary administrative and/or judicial remedies.

Therefore, the principle of subsidiarity of the individual application essentially requires the assertion and the elimination of the right violations primarily and especially before the inferior courts. When it is not possible, the review by the Constitutional Court comes into play. Through the individual application process, the Constitutional Court establishes whether there is a right violation, and in case of finding a violation, it also determines how the violation in question

3. Ayşe Zıraman and Cennet Yeşilyurt, no. 2012/403, 26/3/2013, § 16.

may be eliminated. For instance, if the elimination of the violation requires a retrial, the Constitutional Court may decide that a retrial would be held, or if it does not find a legal interest in a retrial, an amount of compensation is awarded. The Constitutional Court does not have an authority to annul the decisions of the inferior courts or to render a decision/judgment by means of substituting itself for the inferior courts. In this sense, the review of the Constitutional Court in the individual application process is neither a first

instance trial nor an appellate examination. It should be known that the individual application mechanism does not offer a new and "super" appellate opportunity following the ordinary legal remedies.

It should be also known that the individual application is not a means for the elimination of all right violations one by one. Even if it is a desired situation, it is not possible to materialize it. Substantially, the objective aim of the individual application is to establish the situations leading to right violations and to ensure the elimination of these violations by public authorities and the prevention of new violations. In this regard, the success and future of the individual application mechanism depend on not only the Constitutional Court but also proper functioning of the judicial system.

At this stage, I am of the opinion that follow-up and assessment, by the public authorities, of the decisions and judgments on the individual applications especially by the judicial organs are of great importance. To that end, we are holding symposiums, round-table meetings, workshops and case-law fora together with the parties concerned and the shareholders, such as the conferences we have just inaugurated today.

Apart from this, we are publishing summary of the judgments that are in the nature of principle judgment ("ilke karari") or that are followed closely by the public on our web-site. All of the decisions and judgments rendered by the Plenary Assembly and the Sections are available on our web-site. Moreover, we are compiling the outstanding decisions and judgments rendered every year in a book entitled "Selected Decisions and Judgments" and transmitting this book to those concerned. Once more, the "Annual Report" in which the summary of the decisions and judgments are included is published and distributed to those concerned, in order to ensure easy follow-up of the Constitutional Court's decisions and judgments.

Esteemed guests,

The main problem posing a threat for the future of the individual application mechanism is the increasing workload. By today, there are over 103.000

individual applications pending before the Constitutional Court. Even if the cyclical increase taking place in an extraordinary period following 15 July is left aside, the individual application system must be implemented in a way which would enable rendering of judgments directed at preventing right violations by means of ensuring structural and systematic changes in the medium and long terms.

Among the Constitutional Court's judgments finding a violation, the lengthy proceedings take an important place. The Constitutional Court has so far rendered 2219 judgments finding a violation. Out of these judgments, 1757, in other words, 79,2%, concern the right to a fair trial. Out of the violations concerning the right to a fair trial, 84% is related to the right to a trial within a reasonable time. In 55% of these judgments finding a violation, the length of proceedings is between 5 and 10 years whereas in 21% of these judgments, the length of proceedings is between 10 and 15 years, and 15% of them the length of proceedings exceeds 20 years.

The main obstacle before the establishment of justice is the increasing workload and, in conjunction therewith, the problem of lengthy trial. The increasing workload and lengthy proceedings continue to be probably the most important structural problem of the judicial system in Turkey.

The failure to conclude the cases within a reasonable time leads to problems not only within the scope of the right to a fair trial but also, regard being had to the conflicts that are subject- matter of the cases, may tarnish the aim of effective protection of all other fundamental rights from the right to life to the right to property.

When examined from the perspective of the fundamental rights, we must keep in mind that the judiciary has the functions of protecting the rights from the unlawful interventions, remedying the improper practices and redressing the damages occurring in respect of the fundamental rights. In this respect, conclusion of the conflicts in a more effective manner and within reasonable periods is important for the protection of all fundamental rights and freedoms.

As is known, the most important reason for the prolongation of the proceedings is probably the heavy workload. I would like to reiterate that we welcome the steps taken for the settlement of this problem. As is known to all, the intermediate appellate practice has been in use with the thought that the judiciary must be re-organized in accordance with its main aim and the characteristics of its works for ensuring its functioning in a more productive manner.

In this sense, we hope that the courts of intermediate appeal ("istinaf mahkemeleri"), which started operating on 20 July 2016, will make contribution to more effective functioning of the judiciary. As a matter of fact, short-term experience gained by the courts of intermediate appeal strengthens our hope in this direction.

According to data provided by the Ministry of Justice, the courts of intermediate appeal have handled the criminal cases and civil cases before them at the rates of respectively 78% and 68%. The fact that the average period of handling a case before the courts of intermediate appeal has been so far 73 days in criminal cases and 121 days in civil cases is really pleasing and promising for us. I congratulate all members of the judiciary serving in the courts of intermediate appeal for their impressive performance and wish them a continued success.

It is beyond any doubt that we do not just now have sufficient data for making an assessment about the courts of intermediate appeal in respect of the individual application. Until today since the date when the courts of intermediate appeal started functioning, a total of 164 individual applications was lodged with the Constitutional Court in respect of the cases which were finally concluded by these courts. Six out of these applications were concluded with an inadmissibility decision. In respect of the final decisions rendered by the courts of intermediate appeal, there is no individual application which has been subject to an examination on the merits yet.

As I have expressed above, the principle of subsidiarity of the individual application mechanism requires the elimination of the right violations primarily and especially before the inferior courts. I would like to share my belief that the courts of intermediate appeal would make contribution thereto.

Before ending my speech, I wish this meeting, where the academicians and the members of the judiciary as the practitioners have been ensured to convene, will be successful and fruitful. I would like to express my thanks in advance to those taking role in the organization, especially those who will make contributions to the conference through their presentations and questions, and to all participants.

I greet all of you with respect and extend my wishes of health and prosperity to all of you.

C. SPEECH AT THE XVII. CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS HELD IN GEORGIA

XVIIth Congress of the Conference of European Constitutional Courts
Theme: "Role of Constitutional Courts in upholding and applying constitutional principles"

Batumi, June 28-30, 2017

Distinguished participants,

Ladies and gentlemen,

Before I start I would like to thank the President, all the members, and staff of the Constitutional Court of Georgia for their warm and generous hospitality.

Thank you Mr. Zaza Tavadze also for giving me the opportunity to address such distinguished colleagues.

Within my limited time, I would like to say a few words about the potential role of constitutional courts in a time of emergency with a special reference to the recent experience of Turkey.

Let me start with a simple statement: "We must (ilfaut) more than ever stand on the side of human rights." Thus spoke Jacques Derrida in an interview made a few weeks after 9/11 terror attacks. He continued to emphasise that "We need (il faut) human rights. We are in need of them...."[1]

In fact, this simple statement by Derrida points the direction that the constitutional courts should follow in times of emergencies. Although this statement appears to be simple, the realization of the aim of protecting rights in emergencies is extremely difficult.

Constitutional courts exist to guarantee constitutional boundaries with a view of protecting basic rights and liberties of individuals against possible encroachments of state authorities. This role of the constitutional courts is much more important in states of emergency where the fundamental rights may become more fragile and vulnerable as a result of extended executive powers.

Almost all constitutions lay out the conditions for declaring states of emergency and stipulate the basic requirements for emergency decrees and acts. So it may

1. Jacques Derrida, "Autoimmunity: Real and Symbolic Suicides- A Dialogue with Jacques Derrida", in Giovanna Borradori, *Philosophy In a Time Terror: Dialogues with Jurgen Habermas and Jacques Derrida,* (Chicago: The University of Chicago Press, 2003), p.32.

be regarded as an "emergency constitution" that provides a legal framework for public emergencies.

In fulfilling their critical roles in a state of emergency, the constitutional courts must be cautious at least in three regards. First of all, as constituted powers the courts must be aware of the fact that they are also bound by the constitution. In other words, they may only exercise the powers defined in the provisions of "emergency constitution". The courts' self-respect for constitution is crucial especially in a state of emergency because any kind of judicial activism during such times may lead to legitimation crises. The constitutional courts must protect constitutional rights by operating within the boundaries of the constitution itself.

Secondly, judicial and/or constitutional review of the courts must not go beyond the statement that any law or administrative action is unlawful or unconstitutional for certain reasons. It is not the job of the courts to dictate which policies are necessary to protect rights and liberties. "This is unacceptable for reasons a, b, c,...; find a better way' is seen as an appropriate stance for a constitutional court".[2] As a way of example, constitutional courts must refrain from imposing their own ideas on executive by engaging in substantive analysis regarding policies in fighting terrorism. In other words, an effective counter-terrorism policy requires a judicial modesty and deference to executive organs to a certain extent. The deferential view rests on the widespread assumption that "executive is the only organ of governments with the resources, power, and flexibility to respond to threats to national security".[3]

Thirdly, even though the executive is in a better position to evaluate the threats to public security and the means to eliminate them, it by no means has unlimited powers. The executive must act within the law, and a state of exception must be governed by the rule of law.[4] Therefore, the role of the constitutional courts is to "ensure that the battle against terrorism is conducted within the framework of the law and not outside it".[5]

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2. Ian Shapiro, *Democratic Justice,* (New Haven: Yale University Press, 1999), p.61.
3. Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts,* (Oxford: Oxford University Press, 2007), p. 4. See also Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, (Oxford: Oxford University Press, 2006).
4. See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency,* (Cambridge: Cambridge University Press, 2006), p.2.
5. Aharon Barak, *Dialogue between Judges- Proceeding of the Seminar 29 January 2016,* the European Court of Human Rights, Strasbourg, 2016, p. 27.

To sum up, during emergencies the courts have a limited and circumscribed power in reviewing the acts and activities of the executive power. It is certainly beyond the power of the courts to remove the terrorist threat to the public order. Solving the problem of terrorism is the task of executive and legislative powers. The role of the courts in such process is to ensure that the state authorities act within "emergency constitution" and law in general.

Distinguished colleagues,

Let me turn to the case of Turkey in order to elaborate further on the application of these principles regarding states of emergency. The current state of emergency was declared due to the military coup attempt of 15 July 2016, which caused severe casualties, including 249 dead and over 2000 injured.

I must say that the coup attempt, which indeed is a heinous terror attack, is far more extensive and disruptive compared to the terror attacks in France or in any other European state. It may only be compared with 11 September (9/11) of the United States in terms of the traumatic effect it created.

As the Council of Europe Commissioner for Human Rights has stressed in his Memorandum, "the success of (coup attempt) would have marked the end of democracy in Turkey and the defeat of all the values underlying the Council of Europe".[6] Likewise, the Venice Commission indicated in its opinion on emergency decrees that "[a] military coup against a democratic government, by definition, denies the values of democracy and the rule of law".[7]

Indeed the 15 July coup attempt was a violent assault on constitutional democracy, rule of law, and human rights. Therefore, at the very beginning of the coup attempt the Turkish Constitutional Court (TCC), as the guardian of the Constitution, made the following declaration: "We repudiate all kinds of antidemocratic attempts against the constitutional order and we stand on the side of the democratic state governed by the rule of law".

Responding to this coup attempt, the Council of Ministers decided on 20 July 2016 that a nationwide state of emergency be declared for a period of ninety days, which has been extended for a three months period for the third time effective as from19 April 2017, in order to fight against the "FETO/PDY" and other terror organizations in a comprehensive and effective manner.

6- Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, CommDH(2016)35, Strasbourg, 7 October 2016, par. 4.

7. Opinion on Emergency Decree Laws Nos. 667- 676 Adopted Following the Failed Coup of 15 July 2016, CDL- AD(2016)037, Strasbourg, 12 December 2016, par. 7.

Following the declaration of the state of emergency, Turkey notified the Council of Europe its derogation from the European Convention on Human Rights under Article 15 of the Convention. The derogation is still effective as the state of emergency period was extended until 19 July 2017.

The state of emergency poses an onerous challenge for the Turkish Constitutional Court at the level of both norm review and individual (constitutional) complaint. With respect to the norm review, the Constitutional Court rejected to review the constitutionality of emergency decrees by referring to Article 148 of the Constitution, which explicitly provides that emergency decree laws shall not be subject to judicial review of the Constitutional Court.[8] The TCC, however, has the power to review the constitutionality of emergency decree laws once they are adopted by the Parliament in the form of statute.

Moreover, within the state of emergency period, the administrative actions and decisions are subject to judicial review. The only limitation for administrative courts is that they may not order the stay of execution of administrative actions and decisions taken under the emergency decrees.

Compared to norm review, the individual complaint remedy presents more complicated issues during states of emergencies. Before touching upon these issues, I would like to say a few words on the individual complaint system in Turkey. The adoption of constitutional complaint (individual application) system in 2012 has been a revolutionary step in the way of protecting constitutional rights and freedoms in Turkey. In a relatively short period of its practice, the Court proved that constitutional complaint has been an effective remedy for violations of basic rights.

The effectiveness of the constitutional complaint before the TCC has also been confirmed by the European Court of Human Rights.[9] Most recently the Strasbourg Court rejected the applications related to the implementation of emergency decrees on the ground that the applicants failed to exhaust the domestic remedy of individual application before the TCC.[10]

The Turkish Constitutional Court has faced two basic challenges regarding constitutional complaints during the state of emergency. First, the case-load has increased dramatically, reaching currently over 105.000. About 75 per cent

8. E.2016/166, 2016/159, 12.10.2016; E.2016/67, K. 2016/160, 12.10.2016.
9. *Hasan Uzun v. Turkey,* Application No. 10755/13, 30/04/2013.
10. *Zeynep Mercan v. Turkey,* Application No. 56511/16, 17/11/2016; *Zihni v. Turkey,* Application No. 59061/16, 29/11/2016.

of these applications is related to the measures taken during state of emergency, most notably to the dismissals of civil servants and detentions. The number of pending applications before the TCC is more than the total number of pending cases before the European Court of Human Rights coming from 47 states. In this regard I must also note that the number of applications lodged against Turkey before the European Court of Human Rights has increased to a great extent in the course of recent emergency measures.

There is no doubt that the establishment of the "Investigation Commission" by the Emergency Decree Law No. 685 on 2 January 2017 has been a positive step in the way of examining complaints against emergency measures such as dismissals of civil servants. The Commission is expected to receive applications this month and thereby to mitigate the work-load of the TCC.

The TCC has yet to decide whether the Commission is considered to be an effective remedy that must be exhausted before lodging a constitutional complaint. However, last month in the case of Koksal v. Turkey (application no. 70478/16), which concerns dismissal of a teacher by an emergency decree law, the Strasbourg Court has unanimously found the application inadmissible on the ground of failure to exhaust domestic remedies. The Court declared that the applicant had to refer his case to the Investigation Commission whose decisions are subject to judicial review of administrative courts. The Court has also stated that decisions of the administrative courts may be challenged before the Constitutional Court through constitutional complaint.

The second challenge for the Turkish Constitutional Court is to maintain its well established rights-based approach for protection of constitutional rights and liberties. In cases of individual applications lodged during the state of emergency, the Court interprets and applies Article 15 of the Constitution, which lays down the conditions and requirements for the emergency measures.

Article 15 of the Constitution, an almost identical counterpart of Article 15 of the European Convention on Human Rights, reads that in a state of emergency "the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation". Article 15 also lists the non-derogable, absolute rights and freedoms such as the prohibition of torture, presumption of innocence and freedom of religion and conscience.

Distinguished colleagues,

Last week the TCC has delivered its first judgment in a case of individual application concerning detention of the persons allegedly involved in the coup

attempt.[11] This judgment, which is published at today's Official Gazette, is very important because it laid down the basic constitutional principles to be applied in similar cases.

In this pioneering judgment the TCC has stressed that the public authorities have a very broad margin of appreciation as to the adoption of policies and means to eliminate the dangers led to the state of emergency, but they have no unlimited power. It is the task of the TCC to review the emergency measures in the light of constitutional principles enshrined in the Constitution.[12]

In this regard the Court for the first time interpreted and applied the provisions of Article 15 of the Constitution in a systematic manner. The Court pointed out that any interference with constitutional rights in a state of emergency must meet three criteria set by Article 15. In other words, the TCC applies a three-level test in a constitutional complaint if it is related to the emergency measures.

First of all, an emergency measure must not interfere with non-derogable, absolute rights and liberties stated in Article 15 of the Constitution. Secondly, the interference or restriction must not violate the obligations under international law. Setting out these two criteria, the Court made a special reference to the extended list of non-derogable rights and liberties provided by the UN Convention of Civil and Political Rights and the European Convention on Human Rights. Thirdly, any restriction on derogable rights and liberties must be required by the exigencies of the situation. The last level of the test under Article 15 involves the application of well-known constitutional principle of proportionality.[13]

The TCC applied these principles to the concrete case and found inadmissible the claims that the applicants' detention were unlawful and detention period of 11 months was unreasonable. In fact the Court did not refer to Article 15 of the Constitution in reaching this conclusion, simply because it found these claims to be inadmissible even under non-emergency, default legal regime. In other words, these claims have already failed to survive the admissibility test applied during a state of normalcy. Therefore, the Court relied on Article 13, not on Article 15, in order to declare these parts of the applications inadmissible.[14]

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11. *Aydın Yavuz and Others,* (Plenary), Application No. 2016/22169, 20/6/2017.
12. *Aydın Yavuz and Others,* § 210.
13. *Aydın Yavuz and Others*, §§ 196-211.
14. *Aydın Yavuz and Others,* §§ 301, 320.

On the other hand, the Court found admissible the claim that objections to the extension of detentions had been reviewed without conducting a hearing within the detention period of 8 months 18 days. According to the Court, this would have been considered to violate the principle of proportionality under Article 13 of the Turkish Constitution. As a matter of fact, the Court had previously found violation in similar cases under state of normalcy.

However, since the extension of the applicants' detention took place during the state of emergency, this measure must be evaluated under Article 15 of the Constitution. After considering the "situation" with a special reference to the dismissals of so many judges and prosecutors from office and the number of detentions following the coup attempt, the TCC declared that the extension of detention period for 8 months and 18 days without hearing was required by the exigencies of the situation, and therefore it was not unproportionate.[15]

This approach of the TCC, I believe, is very much in line with the international human rights law, especially with the jurisprudence of the European Court of Human Rights.

In conclusion, the constitutional courts assume a very difficult yet critical role in states of emergency. During such times, it is upon the constitutional courts to undertake the endeavor for protecting fundamental rights while respecting the extended authorities of the executive branch under emergency constitutions.

Let me end my speech by reiterating what Derrida said after 9/11: "We must more than ever stand on the side of human rights".

Thank you for your attention.

15. *Aydın Yavuz and Others*, §§ 350-359.

THE FIFTH SECTION

LEADING JUDGMENTS OF THE CONSTITUONAL COURT IN 2017

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I. LEADING JUDGMENTS IN THE CONSTITUTIONAL REVIEW

1. Press release concerning the decision on allocation of covert appropriation to the budget of the presidency

(No. E.2015/42, K.2017/8, 18/1/2017)

Grounds for the requests for annulment

In the petition, it is maintained in brief: that according to the Constitution of 1982 which has adopted a parliamentary system, the duty and power to rule is conferred upon the Council of Ministers along with political responsibility; that establishment and analysis of the State's intelligence and authorization granted for covert operations fall into the scope of the Government's general policy; that the determination of the procedures and principles concerning the use of this covert appropriation by a decree law issued by the Presidency do not comply with the requirements of the parliamentary democracy considering that covert appropriation is supposed to be used for confidential intelligence and defence services, national security and high interests of the State, the requirements of the State's prestige and the needs of the State and the Government for political, social and cultural purposes and extraordinary services; that although such activities of the Government may be supervised by the members of the Grand National Assembly of Turkey, the supervision of the President's such activities is impossible; and that by the allocation of covert appropriation, the President has been vested with a power not set forth in the Constitution. In this respect, it is argued that the rule in question is incompatible with Articles 6, 8, 98, 99, 100, 105 and 112 of the Constitution.

A- Allocation of covert appropriation to the budget of the Presidency

Provision requested to be annulled

The impugned provision provides the allocation of covert appropriation to the budgetary of the Presidency.

The Court's Assessment

Assessments of the Constitutional Court regarding these allegations are briefly as follows:

The Constitution contains no provision concerning covert appropriation, nor is there a Constitutional rule that prevents the legislator from making

an arrangement in this respect. Therefore, the legislator has discretion in making arrangements allowing the allocation of covert appropriation to some institutions and organizations. The discretion of the legislator also covers the determination of the institutions and persons to whom the covert appropriation will be allocated.

The duties and powers of the President who constitutes the other wing of the executive organ are set forth in Article 104 of the Constitution. In the first paragraph of Article 104, it is stated that the President of the Republic is the head of the State, and in this capacity, he/she shall represent the Republic of Turkey and the unity of the Turkish Nation; and that he/she shall ensure the implementation of the Constitution, and the regular and harmonious functioning of the State organs. In the second paragraph of Article 104, the duties and powers of the President are listed under three headings, which are related to legislation, execution and judiciary respectively. In the last paragraph of Article 104, it is stated that the President of the Republic shall also exercise powers of election and appointment, and perform other duties conferred on him/her by the Constitution and laws, meaning that the President may be assigned with other duties by the laws.

It is provided in the Constitution that the powers conferred upon the President by the Constitution and the relevant laws and not requiring the signatures of the Prime Minister and the Minister concerned shall be exercised by the President representing the Republic of Turkey and the unity of the Turkish Nation, who shall ensure the regular and harmonious functioning of the State organs and shall have no political responsibility.

As a matter of course, the covert appropriation sought to be included in the budget of the Presidency by the challenged provision may be used within the scope of the duties and powers granted to the President by the Constitution and the relevant laws. Allocation of covert appropriation to the Presidency does not extend the personal powers of the President. Nor does it require a change in the duties and powers of the President. The powers that can be exercised by the President alone continue to exist in the same manner. Allocation of covert appropriation to the budget of the Presidency in order to be used within the scope of the duties and powers granted to the President exclusively does not mean that the area in which he can carry out acts without any responsibility has been expanded.

The covert appropriation planned to be included in the budget of the Presidency in accordance with the impugned provision may be used in

the activities where the President exercises powers alone. The fact that the covert appropriation spent for such activities cannot be subject to the parliamentary inquiry, general debate, interpellation and the parliamentary investigation is a natural consequence of the fact that in the Constitution, the mechanisms in question are regarded as the means that are only used for the supervision of the Government.

Furthermore, it is at the discretion of the legislator to decide whether an allocation of covert appropriation is required with respect to the duties and powers entrusted to the President, and this issue cannot be subject to the constitutionality review.

In this case, since there is no constitutional provision that prevents the inclusion of covert appropriation in the budget of the Presidency, the legislator's making an arrangement in this respect by using his discretion in accordance with the principle of the generality of the legislative power is not in breach of the Constitution.

Consequently, the Court dismissed the annulment request as it found no violation of the Constitution.

B- Determination of the procedures and principles concerning the use of the covert appropriation included in the budget of the Presidency by a decree law issued by the Presidency

Provision requested to be annulled

The impugned provision provides that the issues such as the place where the covert appropriation included in the budget of the Presidency will be used, the person who will make the expenditures, the method to be used in keeping and closing the accounts, the documents to be handed over to a new official in case of a change in the person making expenditures, and the principles to be applied in making expenditures by using the covert appropriation shall be determined by a decree law issued by the Presidency.

The Court's Assessment

Assessments of the Constitutional Court regarding these allegations are briefly as follows:

The fact that the legislative organ, after determining the basic rules, defers the issues requiring expertise to the executive cannot be construed as the delegation of the legislative power.

As there is no provision in the Constitution which provides that the covert appropriation shall be regulated by law, it is possible to leave the power to regulate the covert appropriation to the administration. In this respect, it is at the discretion of the legislator to delegate the authority to regulate covert appropriations to the concerned Minister such as Prime Minister or Minister of Finance. Similarly, it is at the discretion of the legislator to delegate the authority to regulate the rules and procedures concerning the covert appropriation of the Presidency to the President. Granting power to the Presidency, by virtue the impugned provision, to regulate these issues cannot be regarded as delegation of the legislative power.

Article 107 of the Constitution provides that the establishment, the principles of organization and functioning, and the personnel appointment proceedings of the General Secretariat of the Presidency shall be regulated by presidential degrees.

Unlike the legislative power, the administration's power to regulate is not principal, but derivative. Accordingly, the executive organ must be authorized by the legislative organ in order to be able to make an arrangement on a matter. However, there is an exception to this rule in Article 107 of the Constitution regarding presidential decrees, which provides that the establishment, the principles of organization and functioning, and the personnel appointment proceedings of the General Secretariat of the Presidency shall be regulated by presidential degrees, without a need for authorization by the legislative organ.

Although the power to regulate regarding the issues set forth in Article 107 of the Constitution is granted to the Presidency as a principal power, this provision does not mean that the Grand National Assembly of Turkey cannot vest the President with a power to regulate within the scope of the duties granted to the President by the Constitution and the relevant laws. The fact that the legislator entrusts the President with the power to regulate in terms of the matters falling into the scope the President's duties cannot be considered in breach of Article 107 of the Constitution.

Consequently, the Court dismissed the annulment request as it found no violation of the Constitution.

2. Press release concerning the decision on appointments and assignments to the institutions affiliated to the central organization of the ministry of national education

(No. E.2016/164, K.2017/75, 15/3/2017)

Ground for the Request for Annulment

In brief, it is maintained in the request for annulment that the disputed provisions have vested the Minister with a very broad power, scope of which is not defined and which is not based on any standard, in determining the institutions to be directly affiliated to the central organization of the Ministry of National Education ("the Institutions") and in the appointment of teachers and the assignment of directors to the Institutions. Besides, the provision envisaging that the Civil Servants Law and the other legislation, insofar as they relate to exams and appointment, shall not apply to such appointments and assignments has resulted in higher uncertainty of the scope and limits of this power. Vesting such power in an executive organ without establishing basic principles and setting the limits violate the principles of certainty and inalienability of legislative power, and the principle that the appointments of civil servants and other matters related to their status shall be regulated by law, which is a prerequisite of the rule of law. It is accordingly alleged that these provisions are contrary to Articles 2, 7 and 128 of the Constitution.

A- Authorization of the Minister for Appointments and Assignments to the Institutions

The Contested Provision

This provision envisages that appointments of teachers and assignments of directors to the Institutions shall be made by the Minister.

The Constitutional Court's Assessment

In brief, the Constitutional Court has made the following assessments:

Pursuant to the principle of inalienability of the legislative power and the principle of legality, the legislator must not authorize the executive or leave an unlimited and indefinite realm to the executive's discretion, without establishing basic principles and setting the limits. However, if necessary, the legislator may leave regulation of certain issues to the administration on condition of setting the limits. Accordingly, in the economic, technical or similar fields, granting the administration with the power to regulate the

details thereof after establishing basic rules may neither be regarded as a delegation of the legislative power nor would constitute a breach of the principle of legal regulation.

In the impugned provision, it is explicitly specified to which institutions and by which authority an appointment may be made and a director may be assigned. In this respect, there is no unconstitutionality in vesting the power to appoint with the Minister, who is the top-level official within the Ministry and responsible, before the Prime Minister, for the practices of the Ministry and acts and actions of his subordinates, pursuant to Article 4 § 1 of the Decree Law no. 652.

Although the requisites for appointments and assignments are not specified in the provision, legal requirements for appointment of teachers or assignment of directors are set forth in Articles 48 and 88 of the Civil Servants Law and Article 43 of the Fundamental Law of National Education.

Unless otherwise specified, the requirements specified in the above-mentioned legislation shall also be applicable in appointments of teachers and assignments of directors to the Institutions. In this respect, it is obvious that limits of the power vested in the executive is definite and its basic principles are established by law.

Accordingly, as the provision has not been found unconstitutional, the request for its annulment has been rejected.

B- Non-applicability of the Legislative Provisions concerning Exams and Appointments in Appointments and Assignments of Academic Members and Teachers Serving in the Ministry to the Institutions

The Contested Provision

This provision envisages that provisions of the Decree Law no. 652, the Civil Servants Law and the other legislation, insofar as they relate to exams and appointment, shall not apply to appointment and assignment of academic members and teachers serving in the Ministry to the Institutions.

The Constitutional Court's Assessment

In brief, the Constitutional Court has made the following assessments:

Pursuant to this provision, provisions of the Decree Law no. 652, the Civil Servants Law and the other legislation, insofar as they relate to exams and appointment, shall continue to be in full force in appointments of

teachers and assignments of directors to the Institutions; however, these provisions shall not apply to appointments and assignments only of academic members and teachers serving in the Ministry. The scope of this exemption is limited to the provisions of all relevant legislation including the Decree Law no. 652 and the Law no. 657 insofar as they relate to exams and appointment. Relevant provisions concerning the matters other than exams and appointment shall remain in full force.

As there is no separate position available for directors within the Institutions, directors cannot be "appointed" but "assigned". Therefore, the contested provision must be construed as follows: the legislative provisions concerning appointment shall not apply in cases when academic members and teachers serving in the Ministry are appointed to the Institutions, and the legislative provisions concerning exams shall not apply in cases when they are assigned as directors to the Institutions. In other words, scope of the provisions, which shall not apply, varies by the nature of the act to be performed, whether appointment as a teacher or assignment as a director.

The phrase *"teachers serving in the Ministry…"* covers all the teachers serving in the central and provincial organizations of the Ministry, as well as its organization abroad, who have been already appointed as teachers by fulfilling the appointment conditions set out in the Law no. 657, the Decree Law no. 652 and relevant provisions of the other legislation. Accordingly, it appears that the notion of "appointment" in this provision does not refer to appointment to civil service post for the first time but means appointment by way of relocation.

As appointment of teachers serving in the Ministry to the Institutions is exempted from only the legislative conditions concerning appointment by way of relocation and such teachers have already fulfilled all conditions required for becoming a teacher, this provision does not lead to any uncertainty or arbitrariness. Nor is it contrary to the principles of inalienability of legislative power and legal regulation.

The notion of *"academic members"* specified in the provision refers to professors, associate professors and assistant professors who have appointed as an academic member by fulfilling the conditions set out in Articles 23-26 of the Higher Education Law. In this sense, stipulating that legislative provisions concerning appointment shall not apply in cases when academic members, who are performing education and training tasks like teachers,

are appointed as teachers to the Institutions with a view to benefitting from their knowledge, skills, and experiences obtained at universities does not lead to any uncertainty or arbitrariness, as all conditions required for becoming a civil servant for the first time have been already fulfilled.

Provisions which shall not apply in assignments of academic members and teachers serving in the Ministry as directors to the Institutions are limited to the legislative provisions concerning exams. There is no legal obstacle for applying all of the remaining provisions in the legislation which are specified to be required for assignment as a director, other than those concerning exams, also in the assignment of teachers serving in the Ministry and academic members as a director to the Institution.

By the very nature of the service carried out by the legislator, it is within the legislator's discretionary power to waive general conditions required for appointments and assignments to the Institutions, to determine different conditions and, accordingly, not to seek the legislative provisions concerning appointment and exams in terms of those who have certain qualifications. As which provisions and which institutions such an exemption shall apply to and who shall benefit from this exemption have been designated, it cannot be maintained that the scope and limits of the power to regulate, which has been vested in the executive, are uncertain and that its basic principles have not been established. It is possible, through the regulatory acts to be prepared by the executive, to prescribe special conditions in appointments and assignments of the teachers serving in the Ministry and academic members to the Institutions and to determine the details of the appointment and assignment process.

Accordingly, as the impugned provision has not been found unconstitutional, the request for its annulment has been rejected.

3. Press release concerning the rule barring tax payers to file a lawsuit against the declared tax bases and the taxes levied accordingly

(No. E.2017/24, K.2017/112, 14/6/2017)

Rule requested to be annulled

The contested rule provides that tax payers may not file a law suit against the declared tax bases and the taxes levied accordingly.

Grounds for the request

In summary, it is stated in the petition that although it is possible to file a law suit against the taxes levied according to the declaration made with a reservation within the legal period, under the impugned rule it is not possible to add a reservation to the delayed declarations —known as corrective declaration— and, therefore, there is no possibility to file a law suit against corrective declarations. It is alleged that this situation is against the equality before law, legal security and principle of clarity, and it limits the right to legal remedies. Accordingly, the contested rule allegedly violates Articles 2, 10, 13 and 36 of the Constitution.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

Legal actions against the application of the tax legislation are regulated in Article 378 of the law no. 213. Prerequisites of filing a lawsuit before tax courts is that the tax be levied, the fine be issued, the decisions of the alteration and valuation commissions be notified, withhold taxes be paid to the beneficiaries and the tax be deducted by the party who made the payment.

In the second paragraph, which also includes the contested provision, it is stipulated that taxpayers may not file a lawsuit against the tax bases they declare and the taxes assessed accordingly, save the provisions of the law on tax mistakes.

Taxation based on declaration is based on the trust to the taxpayers. In this system, each taxpayer calculates the base of his/her own tax himself/herself. The administration assesses and levies the tax based on taxpayers' declaration. The rule basically prohibits the objection of taxpayers against their own declarations.

It is clear that the impugned rule, which stipulates that taxpayers cannot sue against the tax bases and the taxes levied within this scope, interferes with the *"right of access to the court"*, and, therefore, with the right to a fair trial. The tax system adopted in the Turkey is based on levy assessed on declaration. In this method, the taxpayer declares tax base and the tax administration makes the tax assessment based on the declared tax base. The contested rule prohibits taxpayers from filing a lawsuit against their own declarations. As a matter of fact, there is no legal benefit for a person to file a lawsuit

against his/her own statement. Moreover, the contested rule states that tax mistakes constitute an exception the bar.

There exists another exception to the rule with respect to tax declarations made with reservations, which emerged in practice and indirectly regulated in Article 27 (4) of the law no. 2577 dated 6.01.1982.

The contested rule limits the opportunity to challenge tax bases before courts on the ground whether the income of the taxpayers are subject to taxation due to exceptions, exemptions and similar reasons. However, when considered together with the exceptions, it is concluded that the rule does not infringe on the essence of the right of access to the court and does not constitute an unproportionate interference with the right to legal remedy.

The questions whether a law suit can be brought against tax declarations with reservations —basically arising from the issues such as what types of declarations are subject to reservations or whether delayed declarations can be subject to reservations— primarily relates to reservations rather than the contested rule. As in the concrete case, the questions whether corrective declarations that emerged in practice can be subject to reservations or whether corrective declarations with reservations can be subject to a lawsuit do not arise under the contested rule; rather, those questions relate to the exception which is provided in Article 27 paragraph 4 of law no 2577.

In addition, despite the allegation that the divergence on the case-law —on the issue whether delayed tax declarations can be subject to reservations— contradicts the Constitution, a divergence in case-law itself does not present a constitutional conflict considering that it stems from the nature adjudication and there exists legal remedies to resolve such differences.

Consequently, the Court dismissed the annulment request as it found no violation of the Constitution.

4. Press release concerning the decision on the rule regulating that a person can not perform the presidency of the same exporters' association more than two terms

(No. E.2017/24, K.2017/112, 14/6/2017)

Rule requested to be annulled

Any person may chair the same association for a maximum of two periods as of the effective date of this Law and may not be elected for the same office once again.

Grounds for the requests for annulment

It is stated in the annulment request that alleges that Article 135 of the Constitution guarantees the organs of professional organizations having the characteristics of public institutions to be elected by their members; accordingly it is envisaged that the members of the organization are entitled to elect and to be elected, and that the prohibition of the reelection of those who already presided at exporter's associations' administrative boards for two periods has the nature of preventing the use of democratic rights and indicates an excessive limitation of the right to elect and be elected, therefore it is violating Articles 2, 6, 13, and 135 of the Constitution.

The Court's Assessment

Assessments of the Constitutional Court regarding these allegations are briefly as follows:

The Constitution does not include any regulation regarding the duration of the duties of professional organizations having the characteristics of public institutions. The legislator has the authority to make arrangements with respect to the professional organizations or higher institutions having the characteristics of public institutions in terms of matters that are not regulated in the Constitution, provided that they do not contradict with the principles stated in the Constitution. In this context, it is the discretion of the legislator to limit the chairmanship of a person's board of administrators to two periods in the same exporters' association. However, it is necessary for the legislator to exercise the discretionary powers in the legislative matters within constitutional borders and taking the criteria of justice, equity and public good into account.

The contested rule restricts the duration of the administrative duties at professional organizations and or higher institutions, and it was made for the purpose of preventing the inconveniences caused by occupation of the positions with same persons for long durations, it aimed at providing equality in opportunity and dynamism in the administration, and, therefore, it is not contrary to the public interest.

In addition, since the contested rule's scope is limited to presidential terms in the same exporters' association, there is no obstacle for a person at the end of two presidential periods to act as a member of the administrative board in the same exporter's association or to be a president in a different exporters' association. When the purpose of the limitation is taken into

account, the limitation of the presidency with two terms cannot considered to be proportionate.

Consequently, the Court found no violation of the Constitution and dismissed the annulment request.

5. Press release concerning the decision on certain provisions of the law on meetings and demonstrations

(No. E.2014/101, K.2017/142, 28/9/2017)

A. Determination of the Site and Route of the Meeting and the Demonstration by the Supreme Civilian Authority

Grounds for the requests for annulment

In the petition, it is maintained in brief that the contested rule vests the supreme civilian authority with wide discretion in determination of the site and route of meetings and demonstrations, that the right to organize a meeting and demonstration also involves determination of the area where the demonstration shall take place, that determination of such issues by the civilian authority destroys the essence of the right, that this discretion does not respond to a pressing social need and is not necessary in a democratic social order. It is accordingly maintained that the rule is contrary to Articles 2, 5, 11, 12, 13, 26, 34 and 90 of the Constitution.

The Rule requested to be annulled

The rule prescribes that the site and route of a meeting and demonstration shall be determined by the supreme civilian authority of the locality.

The Court's Assessment

The assessments of the Constitutional Court regarding these allegations are briefly as follows:

When the purpose and nature of the right to organize a meeting and demonstration is considered, it is understood that this right also includes the freedom to choose the site where the meeting or the demonstration shall take place. Since the purpose of organizing a meeting and demonstration is to express an idea, to defend the common interests, to form a public opinion within the framework of certain ideas and thoughts and to influence the political decision-making bodies, the site where the meeting

and demonstration is organized is of importance in terms of the expressed thought being available to reach the addressees and to have an influence. For this reason, the choice of the site where the meeting and demonstration shall take place, as a rule, ought to be left to the discretion of the organizers. In this respect, the regulations restricting the freedom to determine the site where the individuals shall organize the meeting and the demonstration interfere with this right.

It is obvious that limitation of the locality of the areas where the meeting and demonstration can be organized to the site and route determined by the supreme civilian authority interferes with the right to choose the site where the individuals shall hold the meeting or demonstration.

This right, not being unlimited in spite of the fact that it is important in terms of the democratic society, can be subjected to some restrictions provided that it is in accordance with the guarantees provided in Article 13 of the Constitution.

The Constitution makes it possible for the legislator to restrict this right in respect of determination of the sites where the meeting and demonstration can be held, with a view to protecting the public order.

Besides, the right to organize a meeting and demonstration is an indispensable element of the democratic society. To be able to interfere with this right in a democratic society only depends on pressing reasons.

Considering the measures required to be taken for meetings and demonstrations depending on factors such as place, purpose, or the number of participants, it cannot be concluded that it is not necessary in a democratic society to vest the supreme civilian authority with the power to determine the sites and routes where the meetings and demonstrations can be held.

In accordance with the second paragraph of Article 6 of the Law, it is ensured that political parties, trade unions, professional organizations and the relevant municipalities also take part in the decision-making process regarding the exercise of this power.

On the other hand, it is natural that the civilian authority should exercise this power in such a manner that he/she shall respect the organizers' freedom to choose the site. It is a requirement of the principle of proportionality that the delicate balance be struck between the individual interests of

the individuals wanting hold a meeting and demonstration in having the freedom to choose the site and the public interest in protection of the public order and of the rights of the third persons.

Finally, it is obvious that the discretion of the civilian authority is not unlimited, and the decision he/she renders is to be reviewed by the authorities of administrative justice and thereby can be annulled if necessary. Thus, interference with the right to hold a meeting and demonstration by vesting the civilian authority with the power to determine the site and route of the meeting and demonstration cannot be considered as excessive.

For the reasons mentioned above, the Constitutional Court has found that the rule is not contrary to Articles 13, 26 and 34 of the Constitution and dismissed the request for annulment.

B. The Criterion of not Making Daily Lives of Citizens Difficult in Determination of the Site and Route of the Meeting and Demonstration

Grounds for the request for annulment

It is maintained in the petition in brief that meetings and demonstrations have influence on daily lives of citizens to a certain extent, which stems from the nature of such events, therefore, the restriction does not respond to a "pressing social need", and the rule is contrary to Articles 2, 5, 26 and 34 of the Constitution.

The Rule requested to be annulled

The rule prescribes that the supreme civilian authority of the locality shall also observe the criterion of *"not to make daily lives of citizens difficult"* while determining the site and route of the meeting and demonstration.

The Court's Assessment

The assessments of the Constitutional Court regarding this rule are briefly as follows:

Determination of the site and route of the meeting and demonstration in a way as not to make daily lives of citizens difficult shall lead to limitation of the sites where the meeting and the demonstration can be organized; and thus, it interferes with this right.

It is understood that the rule has aimed at protection of the rights and freedoms of others.

The fact that organization of a meeting and demonstration in a public area affects the rights and freedoms of the persons making use of this area for different reasons does not require that holding of a meeting and demonstration be banned in that area. A proper solution ensuring that both sides enjoy their rights should be found.

The right to organize a meeting and demonstration can be interfered in a democratic society only if there are pressing reasons. It is required that daily life be difficult *"to an excessive and intolerable extent"* so that closing of a site to the meetings and demonstrations could be justified as a result of the fact that organization of a meeting and demonstration at a site renders a citizen's daily life difficult. As for the contested provision, no criterion has been prescribed as to what extent daily life is affected. The rule, as it is, also provides that the sites of the meetings or demonstration may be restricted depending on a number of difficulties which should be welcomed in a democratic society. Therefore, the interference with the right to organize a meeting and demonstration from being necessary and renders it unmeasured.

For the reasons mentioned above, the Constitutional Court has found that the rule is contrary to Articles 13, 26 and 34 of the Constitution and annulled it.

C. Receiving Opinions only from Political Parties having a Group in TGNA

Grounds for the request for annulment

It is maintained in the petition in brief that the rule is contrary to Articles 2, 10 and 68 of the Constitution, stating that excluding political parties that does not have a group in the Parliament is not compatible with the principle of the rule of law and damages the principle of equality.

The Rule requested to be annulled

The rule prescribes that the supreme civilian authority shall ask for the opinions of the city and county representatives of the political parties only having a group in the TGNA for determining the sites and routes of the meetings and demonstrations in the cities and counties.

The Court's Assessment

The assessments of the Constitutional Court regarding this rule are briefly as follows:

When the difficulties concerning receiving the opinions of all the political parties are considered, it is within the discretion of the legislator that the political parties whose opinions shall be asked for be limited to the ones having a group in the TGNA. For this reason, the rule is not contrary to the principle of the rule of law.

In addition, it is obvious that the representation ratio of the parties having a group in the TGNA and the other parties is not the same. The legislator, relying on this objective criterion, subjects the political parties having a group in the TGNA to different rules, which does not damage the principle of equality. In this context, the contested rule prescribing that for determining the sites and routes of a meeting and demonstration in the cities and counties, the supreme civilian authority shall ask for the opinions of the city and county representatives of the political parties having a group in the TGNA, is contrary to the principle of equality.

For the reasons mentioned above, the Constitutional Court has found that the rule is not contrary to Articles 2 and 10 of the Constitution and dismissed the request for annulment.

D. The Obligation concerning that the Meetings and Demonstrations shall be Dispersed after Sun Sets

Grounds for Objection

It is maintained in the decision regarding the application in brief that the rule is contrary to Articles 2, 5, 11, 12, 13, 26, 34 and 90 of the Constitution, stating that there is no point in making a distinction between day and night when today's conditions and technological opportunities are considered, that illegal limitations cannot be imposed on the right of assembly in terms of time (ratione temporis), that the meetings held at night should also be maintained within the scope of "freedom of peaceful assembly".

The Rule as the subject matter of the objection

The rule bans continuation of the meetings and demonstrations in the open areas after the sunset.

The Court's Assessment

The assessments of the Constitutional Court regarding this rule are briefly as follows:

It is obvious that limitation of the duration of the meetings and demonstrations in the open areas with the sunset is an interference with the right to organize a meeting and demonstration.

It is probable that holding a meeting and demonstration at night will disturb people taking a rest at home in peace and quietude. This risk can increase further especially later at night. Likewise, some difficulties might be experienced in carrying out the positive duties of the state within the scope of the right to organize a meeting and demonstration during night hours and, therefore, in taking the necessary measures for maintaining the public order. Thus, limitation of the right to organize a meeting and demonstration may be necessary to prevent the disturbance of other people and public order.

However, it cannot be said that dispersion of the meetings not constituting a threat to the public order and maintaining a peaceful nature just because they extend to the period after the sunset is necessary in a democratic society.

When the nature of the right to organize a meeting and demonstration and its significance in respect of the democratic society are considered, putting a ban categorically on holding a meeting and demonstration after it gets dark can lead to the conclusion that the right is excessively limited. Without an evaluation on whether or not a ban is necessary after assessing if continuation of a meeting after the sunset affects the public order and damages the rights and freedoms of others, in other words, prescribing an absolute ban on the meetings and demonstration after sunset constitutes a disproportionate interference with the right to organize a meeting and demonstration. It should be expressed that a categorical ban in this way becomes more problematic in terms of evening hours when people relatively continue their daily activities.

In this regard, as prescribed in the contested provision, the interference with the right to organize a meeting and demonstration is not considered to be necessary and proportionate in a democratic society.

For the reasons mentioned above, the Constitutional Court has found that the rule is contrary to Articles 13, 26 and 34 of the Constitution and annulled it.

E. The Condition of Public Notice forty-eight Hours in Advance

Grounds for Objection

It is maintained in the petition in brief that the rules are contrary to Articles 2, 5, 11, 12, 13, 26, 34 and 90 of the Constitution, stating that the form requirements regarding the notice render the exercise of the right difficult and indeed change the condition of notice into permission, that

the unexpected and instant meetings and demonstrations held without a notice become illegal, and that the spontaneous reactions should be securely maintained within the scope of the freedom of assembly.

The Rule as the subject matter of the objection

To hold a meeting is subjected to the notice procedure by Article 10 of the Law. In the first paragraph of the Article, in order for a meeting to be held, it is established that a notice signed by all the members of the organization committee shall be submitted at least forty-eight hours before the meeting, during the working hours, to the office of the governor or of the district governor; and in the second paragraph, it is stated that the purpose, the site, day, beginning and ending time of the meeting, the identities, professions, places of residence and if available places of work of the chairmen and members of the organization committee shall be indicated in the notice and the documents indicated in the by-law shall be attached to the notice.

The Court's Assessment

The assessments of the Constitutional Court regarding this rule are briefly as follows:

It is obvious that subjecting the meetings and demonstrations to the condition of notice is an interference with this right. This interference should not be contrary to the criteria specified in Article 13 of the Constitution in order to be in accordance with the Constitution. One of the criteria specified in Article 13 of the Constitution is the criterion of *"not being contrary to the wording of the Constitution."*

By stating in the first paragraph of Article 34 of the Constitution that "*Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission",* it is clearly provided that organization of a meeting and demonstration cannot be subjected to the condition of getting permission.

However, no rule providing that a meeting and demonstration cannot be subjected to the condition of notice exists in the Constitution. In the third paragraph of Article 34 of the Constitution, it is stated that the manner, the conditions and procedures with regard to the exercise of the right to organize a meeting and demonstration shall be prescribed by law. Accordingly, it is possible for the legislator to prescribe the condition of notice pursuant to this provision. Thus, it is concluded that imposing the condition of notice is not contrary to the Constitution.

The purpose of the notice is to determine whether or not the meeting

and demonstration involve any element which is contrary to the law and to provide the competent administration with the opportunity so that the necessary measures including security could be taken, as required under the positive obligations of the state. It is realized that this purpose is for ensuring the public order and therefore, by imposing the condition of notice, the interference with the right to organize a meeting and demonstration is based on the reason *"protection of the public order"* provided for in the second paragraph of Article 34 of the Constitution.

It is prescribed that the notice shall be submitted at least forty-eight hours before the meeting to the competent authority within the working hours. The reason for obligation to make the notice before the date of the meeting or demonstration arises from the need for the measures to be taken by the public authorities. However, this period should be reasonable and be determined in such a way as not to render a meeting or a demonstration impossible or meaningless in terms of individuals.

When the nature of the measures to be taken by the public authorities is considered, it is concluded that the forty-eight period is reasonable and the balance between the public interest and the individual interest is struck. In addition, it is out of the question that the condition of notice subjects a meeting or a demonstration to implicit permission, or makes it difficult, or renders it infeasible, since making a notice suffices to hold a meeting or demonstration without the approval of the administration (as long as a ban or adjournment decision is not rendered by the administration).

In this regard, the interference with the right to organize a meeting and demonstration by imposing a notice in advance is proportionate.

For the reasons mentioned above, the Constitutional Court has found that the rules are not contrary to Articles 13, 26 and 34 of the Constitution and dismissed the request.

F. Audio Video Recordings of the Participants and Speakers during Meetings and Demonstrations may be Openly Made by Law-enforcement Officers

Grounds for the request for annulment

It is maintained in the petition in brief that the rule is contrary to Articles 2, 5, 26 and 34 of the Constitution, stating that the audio video recordings of the participants and speakers during meetings and demonstrations openly made by the law-enforcement officers might have a dissuasive effect on the

exercise of the right to organize a meeting and demonstration, and render the exercise of this right difficult, and that they constitute an excessive interference with the right to organize a meeting and demonstration.

The Rule requested to be annulled

The rule prescribes that the audio video recordings of the participants and speakers during meetings and demonstrations can be openly made by the law-enforcement officers, and that such recordings or images cannot be used for any purposes other than detection of the suspects or criminal evidence.

The Court's Assessment

The assessments of the Constitutional Court regarding this rule are briefly as follows:

The regulations resulting in in dissuasion of individuals from participating in meetings and demonstrations, which constitutes an indispensable part of the democratic society, constitute an interference with the right to organize a meeting and demonstration. The audio video recordings of the participants and speakers during meetings and demonstrations made by the law-enforcement officers might have a dissuasive effect on participation in the meetings and the demonstrations to a certain extent. For this reason, prescribing that the audio video recordings of the participants and speakers during meetings and demonstrations made by the law-enforcement officers constitutes an interference with the right to organize a meeting and demonstration.

However, this interference is based on the purpose of crime prevention, complying with the reasons set forth in Article 34 of the Constitution.

A peaceful meeting held in accordance with the law might turn into an illegal event after the meeting starts or some actions constituting criminal offence may be committed during the meeting. It is in some cases impossible to detect who has carried out the actions constituting criminal offence due to the fact that the meetings or demonstrations are held by crowded groups. In such cases, responsible persons may go undetected and unpunished. It is clear that the audio video recordings of the participants and speakers during meetings and demonstrations being made by the law-enforcement officers shall be instrumental in overcoming such difficulties of proof and ensure the possibility of punishment of suspects.

The audio video recordings of the participants and speakers during meetings and demonstrations made by the law-enforcement officers have a dissuasive effect on some individuals with regard to participation in a meeting and demonstration. In spite of that, this issue remains rather limited and does not reach to such an extent that overcomes the necessity of having criminal evidence and punishment of suspects. In addition, it is prescribed in the rule that such recordings or images cannot be used for any purposes other than detection of suspects or as criminal evidence. In this regard, it cannot be mentioned that the interference prescribed by the rule is not necessary in a democratic society, and, therefore, it is considered disproportionate.

For the reasons mentioned above, the Constitutional Court has found that the rule is not contrary to Articles 13, 26 and 34 of the Constitution and dismissed the request for annulment.

G. The Ban on Holding a Meeting on Highways

Grounds for Objection

It is maintained in the decision regarding the application in brief that the rule is contrary to Articles 2, 5, 11, 12, 13, 26, 34 and 90 of the Constitution, stating that the purpose of holding a meeting and demonstration is to ensure that some claims are shared with the public in the democratic sense, that the constitutional right will in fact be non-exercisable in the event that the meeting or demonstration is held at the sites where it is not possible for the public to be aware of such events.

The Rule as the subject matter of the objection

The assessments of the Constitutional Court regarding this rule are briefly as follows:

As putting a ban on determination of the highways as the site of a meeting limits the sites where the meeting shall take place, it will be an interference with the right to organize a meeting and demonstration.

Holding a meeting on the highways might damage people's right to transportation. For this reason, by putting a ban on determination of the highways as the site of a meeting, it is realized that the interference with the right is legitimate and based on the purpose of protection of the rights and freedoms of others.

In case there is a conflict between fundamental rights and freedoms, enjoyment of both rights must be secured through striking a reasonable balance among them. The fact that holding a meeting on highways would paralyze the traffic and make daily life difficult *"to an excessive and intolerable extent"* justifies closing of highways to meetings and demonstrations.. However, the contested rule prescribes an absolute ban without making any evaluation on to what extent daily life is affected. Therefore, it renders the interference with the right to organize a meeting and demonstration excessive and unnecessary in a democratic society.

For the reasons mentioned above, the Constitutional Court has found that the rule is contrary to Articles 13, 26 and 34 of the Constitution and annulled the rule.

6. Press release concerning the judgement on the rule regulating the pecuniary rights of staff appointed or reappointed to the regulatory and supervisory public bodies and on some rules amending some laws and decree laws

(No. E.2016/133, K.2017/155, 15/11/2017)

A. The Definition *"Water canal is a waterway created artificially by the development plan decision and through which transportation is provided by marine vehicles"* added following the definition of "Building" to Article (5) of the Development Law numbered 3194

The Grounds for the Request for Annulment

It is stated in the petition in brief that the rule is contrary to the provisions of the Preamble and Articles 2, 5, 13, 44, 45, 56, 166 and 169 of the Constitution, alleging that the water canal defined by the contested rule in fact defines the project called "Canal Istanbul" and sets up a legal framework for the project, that the project shall have a serious effect on the ecosystem of Trakya (the Thrace Region), on the land of Istanbul, and the legal regime of the straits, that the project will lead to environmental and urban disasters and irremediable legal problems on international level, as revealed in the scientific studies conducted by scientists on the issue.

The Contested Rule

The rule defines the water canal as the waterway created artificially by the development plan decision and through which transportation is provided by marine vehicles.

The Court's Assessment

The assessments of the Constitutional Court regarding these allegations are briefly as follows:

It is within the legislator's power to enact rules on issues not regulated by the Constitution, provided that it is not contrary to the fundamental principles enshrined in the Constitution and that it meets the criteria of foreseeability. In this context, the power to define the water canal and to determine its elements also belongs to the legislator. With this definition, the issue as to what could be deemed as the water canal within the scope of construction law has been specified through the rule. The rule involves no aspect incompatible with the public interest when it is considered that it has been issued with a view to providing a legal status to the water canals to be constructed within the frame of development plans.

Even if it is alleged in the petition that the rule was essentially issued for the purpose of setting up a legal framework for the project it defined, which was called *"Canal İstanbul"*, within the limits of the definition in the rule, it could be decided that a water canal would be constructed anywhere in the country in the scope of the development plan. There is no impediment in bringing an action before the administrative judicial authorities with the claim for annulment of the development plan, alleging that the water canal is incompatible with the principles of planning and urbanization.

For the reasons mentioned above, the Constitutional Court has found that the rule is not contrary to the Constitution and decided to dismiss the request for annulment.

B. Changing the status of of the public properties such as meadow, summer pasture and winter quarters included in the project field of the European Side of Istanbul by the Ministry of Transport, Maritime Affairs and Communication without complying with the provisions of this Law, and registration of these real properties in the name of the Treasury

The Grounds for the Request for Annulment

It is maintained in the petition in brief that the rule is contrary to Articles 7 and 45 of the Constitution, stating that registration of the public properties such as meadow, summer pasture and winter quarters included in the project field of the European Side of Istanbul directly in the name of the Treasury

without complying with the procedure specified in the Law numbered 4342 is not compatible with the obligation of the state to protect these lands and to prevent them from being destroyed; that no principles are set forth on modification procedures and obligations of these lands, the absence of such regulation gives a wide discretion to the the Ministry of Transport, Maritime Affairs and Communication, which amounts to the delegation of legislative power.

The Contested Rule

It is prescribed in the contested rule that the characteristics of the public properties such as meadow, summer pasture and winter quarters included in the project field of the European Side of Istanbul shall be removed by the Ministry of Transport, Maritime Affairs and Communication without complying with the provisions of this Law, and be registered in the name of the Treasury.

The Court's Assessment

The assessments of the Constitutional Court regarding these allegations are briefly as follows:

Considering that Istanbul is under earthquake risk and that in order to prevent a possible disaster the Project Field of the European Side of Istanbul has been declared as a new settlement area, in order to clear off the unauthorized buildings without an appropriate occupancy permit which are under disaster risk, there is no element contrary to the public interest in altering the characteristics of the meadow, summer pasture and winter quarters within the specified area limits and registering such fields in the name of the Treasury, without complying with the provisions of the Law numbered 4342.

It is obvious that the rule leads to improper use of the meadow, summer pasture and winter quarters safeguarded by Article 45 of the Constitution. On the other hand, it is a duty imposed on the State by Article 56 of the Constitution to take preventive measures against disaster risks and to ensure that individuals live in a healthy environment by attaching particular importance to the safety of their lives and properties. When considered from this perspective, there is no unconstitutionality regarding the rule based on the superior public interest in order for the individuals to live in a healthy environment.

For the reasons mentioned above, the Constitutional Court has found that the rule is not contrary to the Constitution and decided to dismiss the request for annulment.

C. Some buildings within the limits of the risky areas but apart from the risky structures required to be subject to the Law numbered 6306 in terms of implementation integrity

Grounds for the Request for Annulment

It is maintained that despite the Constitutional Court's decision (Reg.No. 2012/87 and Dec.No. 2014/41, 27.2.2014) finding the application of the rules (the Law numbered 6306) prescribed for risky buildings to non-risky buildings unconstitutional, the contested rule in essence has the same effect with the annulled rule because the minor amendment requiring the consideration of the non-risky feature of a building in value appraisal does not indeed make any substantial difference, and, therefore, the rule is contrary to Article 153 of the Constitution.

The Contested Rule

The rule prescribes that some buildings located among the buildings which are within the limits of the areas determined for the implementation of the Law numbered 6306 but which are apart from the risky buildings shall also be subject to the provisions of the Law numbered 6306, as required by the Ministry in terms of implementation integrity, provided that it is regarded that the structure is not under risk in appraisal studies.

The Court's Assessment

The assessments of the Constitutional Court regarding these allegations are briefly as follows:

The purpose of the Law numbered 6306 is betterment, clearance and restoration so as to constitute healthy and secure living environments in accordance with the science and art norms and standards in the areas under the disaster risk and the lands and fields in which the risky structures are located. The rule has been drafted to ensure the implementation integrity with regard to the applications to be performed in accordance with this general purpose. There is no doubt that there is public interest in this respect.

However, in addition to public interest objective, such limitation imposed by the Law should also strike a fair balance between the public interest and the

fundamental rights of individuals and be proportionate. The rule does not set out a special procedure concerning non-risky buildings, it merely refers to risky building procedures in that regard. Those procedures, however, have been regulated with consideration of risky feature of buildings and a balance between public interest and the rights of individuals has been aimed in this scope. The application of the rules, through which the balance of interests has been thus created, with regard to the non-risky buildings constitutes an inconsistency with the principle of *"proportionality"*,enlisted among the criteria for limitation of the fundamental rights in Article 13 of the Constitution, and it contravenes the balance to be struck between the public interest and the property rights of the owners of the non-risky structures.

Indeed, the rule attempts to make a balance of the interests concerning non-risky buildings by requiring that non-risky features of these buildings shall be taken into account in value appraisal. However, in case that the provisions of the Law no 6306 are considered to apply to sound buildings by the Ministry, the principles of liability law would require full compensation of the damages suffered by the owners of sound buildings. It is within this scope that the Law requires the soundness of buildings in project areas be considered in value appraisals. Therefore, the restriction of property rights due to extension of the Law to sound buildings cannot be considered proportionate.

For the reasons explained above, the Constitutional Court has found that the rule unconstitutional and annulled it.

D. Equalization the pecuniary rights of the professional staff titled as experts appointed for the first time or reappointed to the regulatory and supervisory bodies after 15.1.2012

Grounds for the Request for Annulment

It is maintained in brief that the rules are contrary to Articles 2, 10, 49 and 55 of the Constitution, stating that the distinction between the ones appointed before and after 15.1.2012 in respect of the salary of the staff functioning under the same titles at same institutions is contrary to the principle of equality, that it disturbs the internal labor peace, and that the vested rights of the Chairperson, Vice Chairperson, Board Members, and the staff titled as Supervisors and Experts having started to hold office at the Savings Deposit Insurance Fund (SDIF) and the supreme boards between 15.1.2012 and

26.4.2016 are taken away in breach of the principle of non-retroactivity of laws.

The Contested Rule

The rule prescribes that the total monthly net amount of all kinds of salaries, allowances, wages, extra charges, premiums, wage increases, pecuniary damages, bonuses, overtime allowances, dividends, the other payments under whatever name they are, and of all the payments in cash and in kind within the scope of the social rights and benefits made to the professional staff titled as experts appointed for the first time or reappointed to the posts and positions at SDIF and regulatory and supervisory bodies after 15.1.2012, cannot exceed the total monthly net amount of the payments considered to be rendered to the Prime Ministry experts within the scope of the financial rights and social rights and benefits based on their positions in the respective legislation, and that such employees shall be regarded as equal to the staff determined as their peers in terms of pension rights as well.

The Court's Assessment

The assessments of the Constitutional Court regarding these allegations are briefly as follows:

One of the basic requirements of the principle of the state of law laid down in Article 2 of the Constitution is respect for the vested rights. The vested rights of public officials are the rights born depending on the type of employment, finalized in respect of the person and become personal claim. The transformation of the objective and general legal status into special legal status by means of *acte-condition* is not sufficient in terms of the vested right. The rules can always be altered or can be deemed unconstitutional or contrary to the law and thus can be annulled by the judicial organs. The alteration or repealing of the rules affects the related acte-condition regarding the individuals. For this reason, the prospective (expected) rights depending on the status may not be considered as falling within the scope of vested rights.

As for the principle of legal certainty which is another requirement of the principle of the state of law, it necessitates that the legal norms be foreseeable, that the individuals be able to have confidence in the state with regard to all their acts and actions, and that the state abstain from the methods damaging this sense of confidence in its legislative regulations. It is a requirement established by the principle of legal certainty that confidence

of an individual engaging in legal transactions based on the existing regulations must be preserved. However, preserving confidence should not be considered as an immunity to the existing legal status. Perceiving the legal certainty as immunity for the present legal status results in making the dynamic social structure static and inert through the rules, which might lead the society to be behind the times. Therefore, for the purpose of public interest, the legislator can make amendments on the requirements for entrance into public office as well as the other areas within the frame of the rules laid down in the Constitution.

It was prescribed that the payments to be rendered to the Chairperson, Vice Chairperson, Board Members, Supervisors and Experts appointed for the first time or reappointed to the regulatory and supervisory bodies and SDIF within the scope of financial and social rights, as laid down in subparagraph (b) of the additional article 11 of the Decree Law numbered 375, would be equalized with the payments rendered to the peer staff listed in subparagraph (b) of the additional article 11 of the Decree Law numbered 375. While the regulation went into effect on 26.4.2016, 15.1.2012 was determined as the beginning date of the enforcement through the contested rule.

The first regulation on this matter was made by the Decree Law dated 11.10.2011 and numbered 666. It was prescribed by the mentioned Decree Law that all kinds of payments to be rendered to the Chairperson, Vice Chairperson, Board Members, Supervisors and Experts appointed for the first time or reappointed to the regulatory and supervisory bodies and SDIF within the scope of financial and social rights, as laid down in subparagraph (b) of the first paragraph of the additional article 11 added to the Decree Law numbered 375, shall be equalized with the payments rendered to the peer staff listed in the subparagraph, and it was ruled that the regulation would go into effect on 15.1.2012. The Constitutional Court found the relevant provision of the Decree Law unconstitutional on the grounds that in the authorization act, the Cabinet of Ministers was not vested with the power to issue a regulation directly with regard to the financial rights of public officials, and annulled the phrase *"supervisors and"* by its decision dated 22.10.2015 (Reg.No.2015/1 and Dec.No.2015/91); the phrase *"experts"* by its decision dated 3.12.2015 (Reg.No.2015/101 and Dec.No.2015/111); the phrase *"Board Members"* laid down in the subparagraph by its decision dated 16.3.2016 (Reg.No.2016/15 and Dec.No.2016/14). The decisions on annulment were rendered by the Court by virtue of the fact that the

mentioned regulations did not fall into the scope of the authorization act, not in consequence of the review of constitutionality of the content of the rules constituting the subject matter of objection.

This time, the legislator made the regulation through the law in accordance with the above-mentioned judgments and provided that the rule would be applied to the ones appointed for the first time or reappointed to the posts and positions provided in the Law after 15.1.2012 by taking as basis the mentioned date which is known by everybody and on which the relevant provision of the annulled Decree Law goes into effect.

The date 15.1.2012 cannot be considered as unforeseeable for the concerned persons. Besides, it cannot be mentioned that the law is retroactive in real terms by virtue of the fact that the date on which the relevant rule went into effect in the past has been taken as basis.

The persons appointed to office for the first time or again at the regulatory and supervisory bodies and SDIF after 15.1.2012, knew and accepted that they would be entitled to the same financial and social rights as those of the peer staff listed in subparagraph (b) of the additional article 11 of the Decree Law numbered 375. Thus, it cannot be concluded that the vested rights of such persons, in terms of their financial and social rights, are violated, and at the same time, it cannot be mentioned that they have a rightful expectation that their pecuniary rights would be remunerated according to the previous system.

On the other hand, the payment to the listed staff according to previous system upon the judgments of the Constitutional Court neither hinders new regulations on the matter nor requires to continue to pay on the previous system forever. In addition, considering the content of the judgment of the Turkish Constitutional Court, the argument that the concerned persons had rightful expectations with respect to the payments lacks legal ground.

It is intended with the rule that the pecuniary rights of the staff holding office under similar titles at public bodies and institutions be equalized, that integrity be established by among institutions in terms of wages of staff, and that uniformity be ensured in the public personnel regime in terms of the financial and social rights. Therefore, the rule cannot be considered to be contrary to the public interest.

The staff titled as Chairperson, Vice Chairperson, Board Members, Supervisors and Experts appointed for the first time or reappointed to positions at the

regulatory and supervisory bodies and SDIF before and after 15.1.2012 are not in the same legal position. The date of 15.1.2012 was taken as basis with a view to protecting the rightful expectations of the staff taking office before the regulations enacted by the legislator on the matter. As the staff who took office before and after 15.1.2012 are not in the same legal position, there is no inconsistency with the principle of equality regarding their subjection to different rules.

For the reasons mentioned above, the Constitutional Court has found that the rule is not contrary to the Constitution and decided to dismiss the request for annulment.

7. Press release concerning the decision on blocking access to internet due to obscenity

(E.2015/76, K.2017/153, 15/11/2017)

Ground for the Requests for Annulment

In the request lodged with the Constitutional Court, it has been maintained in brief that internet is of great importance for exercise of fundamental rights and freedoms; that blocking access to internet is directly associated with the freedom of communication; and that this provision is in breach of Article 22 of the Constitution for imposing a restriction on the freedom of communication without the approval of a judge.

The Contested Provision

The contested provision envisages that the TCP may *ex officio* order blocking access to internet content constituting the offence of obscenity.

The law was amended by the Decree-Law no. 671 and dated 15 August 2016. Despite the amendment, the provision is subject to review in its original form due to the fact that the original form of the rule is applicable to the case before the court making the request.

The Constitutional Court's Assessment

Examining the contested provision within the scope of the freedoms of communication and expression, the Constitutional Court has made, in brief, the following assessments:

It is beyond any doubt that internet, which has become widespread as a mass communication media and has been increasingly preferred

over the conventional means, falls within the realm of the freedom of communication. However, it is also used for the purposes of committing an offence or facilitating the commission of an offence. Therefore, the internet clearly differs from conventional communication means such as telephone and telegraph, and all content on the internet cannot be considered to fall into the scope of the freedom of communication.

The freedom of communication safeguards the internet content or applications which are in the nature of or intended for communication or contact. However, it does not offer protection especially for internet content which merely serves for commission of offence or its facilitation. There is no unconstitutionality in enabling administration for blocking access to internet *ex officio* and without judge approval for the content serving to commit an offence or its facilitation.

On the other hand, the assurance of approval of judge with regard to the freedom of communication covers internet sites or applications that is primarily used or intended for mass communication, such as social media, but nevertheless include criminal content as well. In other words, although the internet sites or applications used or intended for communication might include criminal content, they are subject to the constitutional safeguard that requires judge approval for restriction. Therefore, enabling the TCP to block access to internet sites or applications of mass media or communication without judge approval contradicts Article 22 of the Constitution, which requires that the order of restriction of communication by due authorities under law shall be submitted for the approval of the competent judge within twenty-four hours.

In addition to the freedom of communication, blocking access to internet, which is also a means widely used for imparting, disseminating and receiving information and thoughts and for sharing comments, opinions and criticisms, is also directly associated with the freedom of expression.

The freedoms of communication and expression, which are safeguarded by Articles 22 and 26 of the Constitution, may be subject to restriction for the grounds specified in these articles, providing that such restriction complies with the requirements set out in Article 13 of the Constitution. As stipulated in Article 13, fundamental rights and freedoms may be restricted only by law without infringing upon their essence, and restrictions shall not be contrary to the requirements of the democratic order of the society and the principle of proportionality.

As regards the Article 13 requirement that fundamental rights and freedoms may be restricted only *"by law"*, a regulation must meet legality requirement not only with respect to the form but also with respect to the substance. As noted in many judgments of the Constitutional Court, the principle of legal certainty entails that laws must be clear, precise, understandable and impartial to the extent they would not cause hesitation and doubt both for individuals and the administration; and that they must not yield to arbitrary acts and actions by the public authorities.

In the contested provision, it is merely set forth that the TCP may *ex officio* order blocking access to internet content on the ground of the offence of obscenity. It is not specified therein whether such order would be only limited to the relevant content, section and part or would extend to the whole of the web-site, or whether access thereto would be blocked gradually as stipulated in Articles 8/A and 9 of the Law. Thereby, the administration is vested, by virtue of this provision, with a power to block access to internet in a way that is indefinite in its scope and limits. As the contested provision, which is the basis for the order blocking access, fails to meet the requirements of being clear and precise, it does not comply with the safeguard provided in Article 13 of the Constitution that fundamental rights and freedoms may be restricted only "*by law*".

For these reasons, the provision was found incompatible with Articles 13, 22 and 26 of the Constitution.

8. Press Release Concerning The Decisions On The Rules Regarding Gender Reassignment

(No. E.2015/79, E.2017/130, K.2017/179, 29/11/2017)

Provisions requested to be annulled

Article 40 § 2 of the Code, requested to be annulled, provides that where it is certified by an official medical board that a gender reassignment surgery has been performed in accordance with the purpose and the medical techniques, based on the authorization granted to this end, the court shall decide to proceed with the rectification of the civil registration records.

Article 40 § 1 of the Code provides that any person wishing to change sex may personally apply to the court seeking authorization to undergo a gender reassignment surgery; however, for such an authorization to be granted, the applicant must be older than 18 years old and she/he must not be married,

as well as, she/he must obtain a report from the official medical board of an education and research hospital to certify that she/he has a transsexual tendency and that the change of sex is necessary for her/his mental health and that she/he be permanently sterilized. The phrase requested to be annulled is "*…and that she/he be permanently sterilized…*" therein.

Grounds for the request for annulment

1. Grounds for the request for the annulment of Article 40 § 2 of the Turkish Civil Code no. 4721

In the petition, it is maintained in brief; that according to the contested provision, where it is certified by an official medical board that a gender reassignment surgery has been performed in accordance with the purpose and the medical techniques following the court's authorization for gender reassignment surgery, the civil registration records shall be rectified; however, protection of individuals' physical and mental health must be assessed within the scope of the protection of physical integrity; and that therefore forcing women having transsexual tendencies to live as a woman for the sole reason that they have not undergone a gender reassignment surgery is in breach of Article 17 of the Constitution safeguarding the corporal and spiritual existence of individuals.

2. Grounds for the request for the annulment of the phrase "…and that she/he be permanently sterilized…" set forth in Article 40 § 1 of the Turkish Civil Code no. 4721

In the petition, it is maintained in brief; that one of the conditions required for authorization of gender reassignment regulated in the imputed provision is to be permanently sterilized; that therefore the transsexual persons who are not permanently sterilized do not have access to gender reassignment surgery; that this situation causes inequality between transsexual persons depending on their ability to procreate or be sterilized; and that, however, the transsexual persons who are not sterilized should not be expected to continue their lives without undergoing a gender reassignment surgery and they should not be forced to live in this manner; which are in breach of Articles 10, 17 and 20 of the Constitution.

The Court's Assessment

1. Application concerning Article 40 § 2 of the Turkish Civil Code no. 4721

In the provision, regarding the regulation of sex change in civil registration records, the legislator has stipulated with reference to the concept of biological

sex that a transsexual person may request a change in the sex section of her/his civil registers on the condition that it is certified by an official medical board that a gender reassignment surgery has been performed in accordance with an authorization granted by the court to this end.

The condition required for changing the sex in civil registration records constitutes a restriction to the right to protect and improve one's corporeal and spiritual existence and the right to respect for one's private life.

A person's civil register is formed by taking into account her/his biological sex at the time she/he was born, and according to her/his sex stated in her/his civil register, she/he exercises different rights and obligations, as provided in the legal system. On the other hand, a person's biological sex can be changed in very exceptional situations. Under certain conditions, a person may change her/his biological sex, in other words, she/he can undergo a gender reassignment surgery.

The irreversible nature of the gender reassignment surgery and its health risks require that the conditions of such surgeries must be determined by the legislator and that the process must be supervised by the State. For these reasons, gender reassignment surgeries are subject to the regulation by the legislator with a view to maintain the exceptional nature of such surgeries and preventing them from becoming usual and common with no supervision. It is also aimed to refrain from making courts merely rubber-stamp authorities for such requests. These are the purposes lying behind the contested provision.

The reason for a medical report indicating that a gender reassignment surgery has been performed in accordance with a court authorization in order to make a change in the sex sections of civil registers is the significance of the civil registers in view of the legal system and the protection of the public order in this sense. The restriction imposed by the provision aims the prevention of arbitrary changes in the civil registers, namely changes without undergoing a gender reassignment surgery.

Transsexual persons feel themselves as the opposite sex, differently from their biological sexes, and they identify themselves with the opposite sex. If such persons meet the conditions set forth in Article 40 § 1 of the Law, they are allowed to undergo a gender reassignment surgery with the court's permission.

The provision imposes an obligation on transsexual persons to undergo a gender reassignment surgery in order to be able to make a change in the sex section of their civil registers. At the same time, it provides an opportunity for such persons who underwent a gender reassignment surgery to make a change in the sex section of their civil registers.

The provision does not interfere with the transsexual persons' right to choose whether to undergo a gender reassignment surgery or not and their preferences of sex within the scope of their right to respect for their private lives. In cases where the relevant person wishes to make a change in the sex section of her/his civil register, the provision imposes an obligation to submit a report issued by an official medical board stating that the relevant person underwent a gender reassignment surgery. This restriction introduced by the provision emanates from the pressing social needs of a democratic social order, such as ensuring the civil registers to be absolute and accurate, and this restriction does not prevent the persons from changing the sex sections in their civil registers. As a matter of fact, a transsexual person who underwent a gender reassignment surgery with the permission of a court is always entitled to request a change in the sex section of her/his civil register on the condition that she/he certifies the surgery.

In addition, assumption of the fact that a transsexual person can make a change in the sex section of her/his civil register without undergoing a gender reassignment surgery will cause a difference between a person's biological sex and the sex stated in her/his civil register. In other words, it will create a de facto legal situation that contradicts the person's biological sex.

Further, if not gender reassignment surgery is required, a person might change his/her sex in the civil register just to enjoy or refrain from certain rights that are recognized by the legal order distinctively for the opposite sex. This would negatively affect the social life and hence the public order, and it could create an obstacle for individuals to enjoy their rights and freedoms properly.

Accordingly, regard being had to the legal consequences of the change of sex in the civil register without a gender reassignment surgery and the problems and negative effects it may cause in public and social order, the provision does not prescribe a disproportionate restriction to the relevant persons' right to improve corporal and spiritual existence and right to respect for private life. Besides, the provision aims to protect the public order, and it is not contrary to the requirements of a democratic social order.

In conclusion, the provision has been found not to violate Articles 13, 17 and 20 of the Constitution, therefore the request for its annulment has been dismissed.

2. Application concerning the phrase "…and that she/he is permanently sterilized…" set forth in Article 40 § 1 of the Turkish Civil Code no. 4721

The provision in Article 40 § 1 of the Law stipulates that in order for an authorization to be granted for gender reassignment surgery, the person concerned must be permanently sterilized, which constitutes a restriction to her/his right to improve her/his corporal and spiritual existence and right to respect for her/his private life.

Transsexual persons feel themselves to be of the opposite sex, differently from their biological sexes, and they may be sterilized or not. Transsexual persons who are naturally sterilized from birth or have been sterilized through surgery are allowed to undergo gender reassignment surgery if they also meet other conditions provided in Article 40 § 1 of the Law and received an authorization from the court to this end.

The conditions for court authorization for gender reassignment surgery includes permanent sterilization, which requires a medical intervention for the persons wishing to obtain such authorization.

However, as Article 40 § 2 of the Law stipulates that the civil registration records can be rectified only if where it is certified by an official medical board that a gender reassignment surgery has been performed in accordance with the purpose and the medical techniques following a court authorization, there is no doubt that a transsexual person who is able to procreate would be permanently sterilized as a result of a gender reassignment surgery.

In this sense, permanent sterilization, which is a result of gender reassignment surgery, is stipulated as a separate condition in the provision in order to obtain authorization from the court for the surgery. Subjecting a person, who will undergo a gender reassignment surgery, to another medical intervention before the gender reassignment surgery for sterilization constitutes an interference that is not necessary to bear on the part of the relevant person both physically and mentally. As there is no reasonable balance between the restriction imposed on the relevant person's physical and corporal existence as well as her/his private life and the aim sought to be reached, such a restriction constitutes a disproportionate interference.

In addition, it is clear that if a person who has been permanently sterilized through a medical intervention would not be able to undergo a gender reassignment surgery for any reason, she/he would remain permanently unable to procreate even though she/he would have not undergone a gender reassignment surgery. This demonstrates that the medical intervention required as a precondition for gender reassignment surgery might have very severe and irreparable results. Therefore, the provision is not proportionate in this aspect as well.

In conclusion, the provision has been found to violate Articles 13, 17 and 20 of the Constitution and annulled.

9. Press release concerning the decision on the provision banning staff of the presidency of religious affairs from engaging in politics

(No. E.2016/7, K.2017/171, 13/12/2017)

Ground for the Requests for Annulment

In the applications lodged with the Constitutional Court, it has been maintained in brief that it is not clearly specified in the provision which acts would constitute "*praising and criticizing political parties*" on the ground of which staff of the Presidency of the Religious Affairs ("the Presidency") will be dismissed from office; that it is uncertain whether the ban of praising and criticizing political parties extends to the provincial, district and town organizations, as well as the assembly groups of the local administrative bodies; and that, without having regard to nature and weight of the acts, direct dismissal of the staff praising or criticizing the political parties amounts to a disproportionate sanction. It has been accordingly alleged that Articles 2, 25, 26 and 38 of the Constitution were violated.

The Contested Provision

The contested provision sets out that all staff holding office in the Presidency of Religious Affairs cannot perform the acts and actions prohibited by the Civil Servants Law; nor are they allowed, under any circumstances and either within or outside the scope of their religious duties, to praise and criticize any of the political parties or their attitudes and conducts; and that those who are proven, through investigation, to have committed such acts shall be dismissed from office by the relevant and competent authorities.

The Constitutional Court's Assessment

In brief, the Constitutional Court has made the following assessments:

The contested provision, without any distinction, prohibits the Presidency staff *"under any circumstances"* from praising and criticizing any of the political parties or their attitudes and behaviours. Therefore, the phrase *"under any circumstances"* specified therein amounts to the absolute ban and means that there is no exception to this provision.

The Presidency of the Religious Affairs is a public institution operating under the Prime Ministry within the general administration in order to perform works concerning the beliefs, worship and moral principles inherent in Islam, to enlighten the public about the religion and to manage the places of worship. By Article 136 of the Constitution, the Presidency is granted a constitutional status, and it is set forth that the Presidency shall exercise its duties, in accordance with the principle of secularism, removed from all political views and ideas. Thereby, regard being had to the secular nature of the State, constitutional significance is attributed to the Presidency's exclusion from all political views and ideas. The legislator's taking of certain measures in respect of the Presidency staff for the protection of the democratic and secular State from probable interferences by the Presidency, which operates in order to carry out works concerning the beliefs inherent in Islam, is a requisite of Articles 2 and 136 of the Constitution. In this respect, the provision –by virtue of which the Presidency staff are banned from performing any act in favour of or against a political party or making statements praising and criticizing it and which also prescribes that those who are performing such acts shall be dismissed from office– attains the legitimate aim of securing public order.

Within the scope of its regulatory power, the legislator may introduce certain rights or obligations for civil servants whose employment based on a legal status. In this respect, it may be considered natural to hold the Presidency staff subject to strict professional restrains in terms of their statements and acts either within or outside their religious duties.

Any act performed or any statement made, in favour of or against a political party, either by the Presidency of the Religious Affairs itself or personally by its staff within or outside their religious duties may cast doubt on the impartiality of the Presidency, which is a condition *sine qua non* for the secular political system prescribed by the Constitution and safeguarded

by Article 136. It accordingly appears that taking into account this consideration, the legislator bans the Presidency staff from performing any political activity or making political statement, within or outside their religious duties and under any circumstances, and stipulates that those who are proven, through investigation, to have performed such acts shall be dismissed from office. Given the constitutional status of the Presidency, nature of its duties and public sensitivity to religious issues, it is explicit that the contested provision, which was introduced with a view to ensuring the Presidency staff to abstain from any kind of political activity likely to cast doubt on their impartiality, meets a pressing social need. Therefore, the restriction imposed by virtue of this provision on the freedom of expression is not disproportionate, and nor is it incompatible with the requirements of the democratic social order.

Consequently, the Constitutional Court has found the contested provision not in breach of the Constitution and decided to dismiss the requests for annulment thereof.

10. Press Release Concerning The Decision On Provisions Proposing Amendment To The Electricity Market And Certain Laws

(No. E.2016/150, K.2017/179, 28/12/2017)

A. Distribution tariffs consisting of fees, which would cover all costs and services to incur while performing distribution activities such as technical and non-technical electricity-loss cost (fee for loss electricity / illegal use of electricity), power disconnection and connection service cost, meter reading cost and system operation cost, and are charged to consumers

Grounds for the Requests for Annulment

In the petitions and applications lodged with the Constitutional Court, it has been maintained in brief that this provision aims at eliminating financial liabilities of the distribution companies; that pursuant to the principle of individual responsibility, consumers should be held liable to pay charges for goods and services only used or consumed by them, and therefore collection of certain fees which are outside individuals' responsibility is incompatible with the principle of state of law and standards of equity; that this ambiguous provision does not serve for public interest; and that the legal arrangement poses economic obstacles for consumers. It has been

therefore alleged that the contested provision is in breach of Articles 2, 5, 10 and 172 of the Constitution.

The Contested Provision

It is provided in the contested provision that distribution tariffs to be prepared by distribution companies shall contain prices, rules and conditions pertaining to services which would be provided for all natural and legal persons supplied with electric power through distribution system without any distinction among equals; and that these tariffs shall consist of all service costs and fees to incur while performing distribution activities such as distribution system investment expenses, system operation cost, technical and non-technical electricity-loss cost, disconnection and connection service cost, meter reading cost and reactive energy cost. It is also prescribed that target rates of technical and non-technical losses to be taken as a basis by the distribution companies shall be determined by the EMRA in a manner that would promote decrease in the losses; that on condition of not exceeding the target rates determined by the EMRA, costs of technical and non-technical losses shall be included in the distribution tariffs and charged to consumers; and that principles and procedures as to determination and change of target rates of technical and non-technical losses as well as inclusion of the incurring cost in the tariffs and charging of this cost to consumers shall be regulated by the EMRA.

The Constitutional Court's Assessment

In brief, the Constitutional Court has made the following assessments:

Electricity Market Law no. 6446 aims at establishment of a financially strong, stable and transparent electricity market which is capable of operating, pursuant to the provisions of private law, in a competitive environment in order to supply electricity of good quality for consumers in a sufficient, continuous, cost-efficient and environment-friendly manner. It also aims at performance of independent regulation and supervision in this market.

By Law no. 4628, the duty to make necessary arrangements in order to ensure supply of secure, continuous and cost-efficient electric power of good quality for consumers is entrusted to the Energy Market Regulatory Authority ("EMRA"). Accordingly, the EMRA is empowered to review and approve wholesale price tariff, transmission tariff, distribution tariffs as well as retail sale tariffs; to determine main principles of pricing for transmission, distribution, wholesale and retail sale procedures and, when necessary, to revise these principles in line with relevant license provisions.

The EMRA has certain responsibilities with respect to tariffs such as balancing the interests of consumers and suppliers, promoting competition and promoting economic efficiency. In adjusting tariffs, the EMRA also pays regard to the financial sustainability of electricity sector as well as supplying electric power in a cost-efficient manner.

Fees falling into the scope of distribution tariffs are determined on the basis of necessary costs incurring while distribution companies carry out distribution activities. Accordingly, in determination of fees concerning the utilization of distribution system, investment expenses, which are necessary for performance of distribution activities, and all costs and service fees such as reasonable rate of return with respect to investment expenses, system operation cost, technical and non-technical electricity-loss cost, power disconnection and connection service cost, meter reading cost, reactive energy cost as well as amounts paid within the scope of transmission tariff are taken into consideration.

"Loss electricity - illegal use of electricity", which is included in distribution tariffs and expressed as the cost of technical and non-technical loss, is electric power representing the gap between total energy in the distribution system and energy invoiced to consumers. Such loss may result from technical problems occurring during the distribution of electricity and also from illegal use of electricity.

In charging cost of technical and non-technical loss, which incurs from production of electricity to its transmission to the end-consumer, to consumers, regard is being paid to the target rates of loss electricity / illegal use of electricity determined by the EMRA. The EMRA takes into consideration rates of loss electricity/ illegal use of electricity of the previous years while determining the target rates in the distribution regions. Accordingly, fee for technical and non-technical loss is charged by the distribution companies to consumers provided that the EMRA's target rates are not exceeded. If the rate of loss electricity / illegal use of electricity in the distribution region is higher than the EMRA's target rate, surplus rate is borne by the distribution company, whereas this rate is lower than the target rate, surplus rate represents the company's profit. Target rates of loss electricity / illegal use of electricity determined by the EMRA are an incentive for the distribution companies to combat technical and non-technical loss.

To ensure uninterrupted supply of electric power for consumers, distribution companies must purchase electric power from Turkish Electricity Trade and

Contracting Corporation ("TETAŞ") due to technical and non-technical losses. The amount paid by the distribution companies to TETAŞ for technical and non-technical energy loss is collected from consumers through distribution tariffs. It is accordingly observed that fee for loss electricity / illegal use of electricity collected from consumers on the basis of the EMRA's target rates returns to public resources.

As set out in Articles 48 and 167 of the Constitution, State is liable to take necessary measures for supplying consumers with electric power of good quality in a continuous, uninterrupted and cost-efficient manner and thereby establishing a stable electricity market. It appears that the contested provision was introduced within the scope of measures aiming at proper functioning of electricity market. Neither the examination of legislative intent of the provision nor its objective meaning reveals that it pursues any aim other than public interest.

In addition, with a view to supplying electric power of high quality in a safe and continuous manner, fee for technical and non-technical electricity-loss, which is regarded as a cost item along with other cost items included in the distribution tariffs, is charged to the consumers, provided that target rates determined by the EMRA are not exceeded. As the EMRA's target rates of loss electricity / illegal use of electricity encourage the distribution companies to combat technical and non-technical electricity-loss, the provision complies with Article 172 of the Constitution which stipulates that the State has to take measures to protect consumers. The provision does not impose any economic obstacles for consumers.

By the "principle of equality" enshrined in Article 10 of the Constitution, not actual but legal equality is prescribed. Aim of this principle is to ensure that everyone in the same status must be treated equally by the law and to avoid distinction and privilege among persons before the law. Accordingly, the principle of equality may be infringed only when legislation makes distinction or privilege among persons of the same legal status. As the contested provision prescribes that costs and service fees within the distribution tariffs shall be charged to all natural and legal persons utilizing electric power over the distribution system, it is not in breach of the principle of equality.

For these reasons, the request for annulment of the contested provision was dismissed.

B. Application of Article 17 of Law no. 6446 to All Existing Preliminary Enforcement Proceedings, Cases and Applications regarding Distribution, Meter Reading, Retail Sale Service, Transmission Costs and Fee for Loss Electricity / Illegal Use of Electricity

Grounds for the Requests for Annulment

It is briefly maintained in the petitions and applications lodged with the Constitutional Court that the contested provision enables implementation of the legal arrangement, which was subsequently enacted, by extending its scope in a way that would also cover the previously filed acts and actions which have been already in dispute; that it thereby hinders reimbursement of the amounts that were unduly collected from consumers by the distribution companies; and that the principle of non-retroactivity of laws, the principle of acquired rights as well as the principles of legal security and legal certainty are breached. It is also asserted that the courts have been interfered with while exercising their jurisdiction; that the provision imposes restriction on the right to legal remedies, impairing the very essence of the right; and that the legal arrangement is incompatible with the aim of protection of consumers and the principle of equality. It has been accordingly claimed that the contested provision is in breach of Articles 2, 5, 9, 10, 11, 13, 36, 40, 73, 138 and 172 of the Constitution.

The Contested Provision

The provision provides that Article 17 of Law no. 6446 shall apply to all preliminary enforcement proceedings, cases and applications filed due to distribution, meter reading, retail sale service, transmission costs and fee for loss electricity / illegal use of electricity, which have been accrued in accordance with the EMRA's decisions.

The Constitutional Court's Assessment

In brief, the Constitutional Court has made the following assessments:

The fee for loss electricity / illegal use of electricity and the other fees are treated as a single cost item within the tariffs approved by the EMRA and collected from consumers by virtue of Law no. 4628.

Upon the judgments rendered by the General Assembly of Civil Chambers of the Court of Cassation and the 13th Chamber of the Council of State, where different conclusions were reached as to the collection of fee for loss electricity / illegal use of electricity from consumers, the legislator re-formulated Article 17 of the Law in order to eliminate the disputes arising

from different interpretation of the legislation. Accordingly, it is prescribed that the fee for loss electricity / illegal use of electricity and the other fees shall be treated as a single cost item within the relevant tariffs and shall be collected from consumers.

This legal arrangement, which was introduced by the legislator in order to eliminate disputes arising from different interpretation of the existing provision, is envisaged to apply to all cases and applications, which were filed due to this dispute and which have not been concluded yet as of the date when the legal arrangement was put into force, and it does not pose any restriction on the right to legal remedies. Therefore, no aspect of this provision is found to be unconstitutional.

By this provision, it is prescribed that Article 17 of Law no. 6446 shall apply to all preliminary enforcement proceedings, cases and applications filed due to distribution, meter reading, retail sale service, transmission costs and fee for loss electricity / illegal use of electricity, which have been accrued in accordance with the EMRA's decisions. Therefore, within the scope of the provisions, there can be no legal dispute among parties that had been concluded and completed during the period when the previous provision was in force. As there is an ongoing legal process between the parties, there can be no mention of any acquired right or finalized actions.

The principle that the legislator cannot alter court decisions means that the legislative organ cannot annul any finalized court decision through law. This principle will be at stake only when court decisions are altered or their execution is impeded by law, without making any change in the substantive law.

It cannot be concluded that ensuring implementation of legal arrangements introduced by the legislator to eliminate legal disputes, also with respect to ongoing cases and applications, is in breach of judicial independence.

The legislator has not introduced any arrangement as to the manner in which the proceedings would be conducted or the manner through which a certain concrete dispute would be adjudicated. Nor has the legislator enabled alterations in the finalized court decisions or impeded execution of such decisions.

The stipulation that Article 17 of Law no. 6446 shall apply to all preliminary enforcement proceedings, cases and applications filed due to distribution, meter reading, retail sale service, transmission costs and fee for loss electricity / illegal use of electricity —which are accrued in line with the EMRA's

decisions— cannot be characterized as a retroaction which is in breach of the principle of legal security. Nor can it be regarded as an arrangement which aims at rendering judicial decisions ineffective.

A law may be found contrary to the principle of equality only when it causes a distinction or privilege among persons of the same legal status. As the contested provision prescribes application of Article 17 of Law no. 6446 to all preliminary enforcement proceedings, cases and applications, it would apply to all proceedings filed by those who are of the same legal status. In this respect, as no distinction or privilege has been introduced among those who are of the same legal status, the contested provision is not contrary to the principle of equality.

For these reasons, the request for annulment of the contested provision was dismissed.

C. In Applications and Cases Filed with respect to Fee for Loss Electricity / Illegal Use of Electricity, Limiting the Jurisdiction of the Arbitration Committees for Consumers and Courts to the Compatibility Review of These Fees with the EMRA's Regulatory Actions

Grounds for the Requests for Annulment

It is briefly maintained in the petitions and applications lodged with the Constitutional Court that the contested provision causes judicial review to become a formal review; that the rights to legal remedies and to a fair trial exercised by the consumers who claim their rights before arbitration committees and courts conducting judicial reviews have been violated; that the provision led to entry into force of an arrangement which is contrary to the protective measures required to be taken by the State by virtue of the Constitution; and that it is incompatible with the principle of supremacy of the Constitution and its binding nature as well as with the principle of separation of powers. It is therefore asserted that the contested provision is in breach of Articles 2, 5, 9, 10, 11, 35, 36, 73, 125, 138 and 172 of the Constitution.

The Contested Provision

The contested provision prescribes that in applications and cases filed with respect to fees determined by the EMRA within the scope of income and tariffs, the jurisdiction of the arbitration committees for consumers and courts is limited to the compatibility review of these fees with the EMRA's regulatory acts.

The Constitutional Court's Assessment

In brief, the Constitutional Court has made the following assessments:

Fees determined by the EMRA within the scope of income and tariffs consist of various fees which would cover all costs and service fees such as active energy cost, invoicing cost, customer-care services cost, retail sale service cost, distribution system investment expenses, system operation cost, cost for technical and non-technical loss, power disconnection and connection service cost, meter reading cost and reactive energy cost. These fees are determined in line with the Regulation on Electricity Market Tariffs, communiqués and decisions which are the EMRA's regulatory acts.

The contested provision provides that where an application is filed with the arbitration committees for consumers for refund of, or a case is filed with the relevant courts for reimbursement of, the fees determined by the EMRA and collected from the consumers, the jurisdiction of the arbitration committees and courts is limited only to the review as to whether these fees collected from consumers are collected in line with the EMRA's regulatory acts. Therefore, the provision imposes a restriction on the right to legal remedies.

The right to access to a court is a requisite inherent in the right to legal remedies. However, the mere existence of the right to access to a court does not *per se* result in the fulfilment of the right to legal remedies. In cases where a legal arrangement entitles individuals to file a case before courts while at the same time including rules preventing courts from conducting effective proceedings, this arrangement cannot be found compatible with the right to legal remedies.

In applications and cases filed for reimbursement of fees collected from consumers, which are regulated by the EMRA within the scope of income and tariffs, the arbitration committees and courts are required, by virtue of the right to a fair trial, to take into consideration the provisions of the other relevant legislation as well as the EMRA's regulatory acts while conducting compatibility reviews.

The contested provision, which prescribes that in applications and cases filed with respect to the fees determined by the EMRA, the jurisdiction of arbitrary committees and courts is limited to conducting reviews as to the compatibility of these fees with the EMRA's regulatory acts, imposes a disproportionate interference with, and impairs the very essence of, the right to legal remedies.

For these reasons, the contested provision was annulled for being unconstitutional.

II. LEADING JUDGMENTS RENDERED IN THE INDIVUDIAL APPLICATION PROCESS

A. THE RIGHT TO LIFE

1. The judgment finding a violation of the right to life due to failure to take necessary measures for persons in need of protection

***Gürkan Kaçar and Others Judgment* (App. No. 2014/11855, 13/9/2017)**

The Facts

Gürkan Kaçar, one of the applicants, is mentally disabled and he was a minor at the material time. When he was playing on a railway which was separated from the street fronting his house with a ruined wall, he touched a high voltage power line. As a result, he was exposed to electric shock and got injured seriously. The Chief Public Prosecutor's Office launched an investigation. In the report prepared in the scene by the police officers, the way the applicant had been injured was confirmed, as well as it was noted that some of the grounding cables were out of order. The medical report issued by the hospital indicated that the applicant faced a life-threatening danger due to the incident, and his injuries would prevent him from performing his daily activities for fifteen days.

The public prosecutor carried out a scene examination more than five months after the incident and found out that the grounding cable was operating and that there were iron guardrails on both sides of the railway, which constituted a barrier between the street and the railway. The report issued by an expert, who accompanied the public prosecutor, indicated that the applicant Gürkan Kaçar was at complete fault in the incident.

The Chief Public Prosecutor's Office filed a criminal case against the Chief of the Turkish State Railways (TCDD) for recklessly causing injury without specifying the evidence being relied upon.

The report obtained by the criminal court from the academic experts also pointed out that the applicant Gürkan Kaçar, who was mentally disabled, was found to be at complete fault in the incident. At the end of the trial, the court acquitted the accused, and the judgment was upheld by the Court of Cassation.

The applicants applied to the administration by seeking compensation for their alleged pecuniary and non-pecuniary damages. As they did not receive any response, they brought an action for damages before the administrative court. The court held that there was no causal link between the alleged damages and the administrative act in question, therefore it dismissed the action brought by the applicants.

The applicants appealed against the decision of the administrative court. The Council of State quashed the decision on the ground that an examination was necessary with respect to the fault of the applicants who did not fulfil their supervision responsibility, as well as an inquiry was required into the information and documents pertaining to the criminal case filed against the administrative staff for a determination of service fault.

At the retrial made upon the quashing judgment of the appellate court, the administrative court examined the criminal case file and then dismissed the case again. The applicants again appealed, and the Council of the State upheld the decision.

The Applicants' Allegations

The applicants maintained that; Gürkan Kaçar, the minor applicant with mental disability, got injured upon touching the cables as the protective walls near the railway lines had been demolished and the necessary security measures had not been taken, there was a neglect of duty on the part of the administration, their action for damages was dismissed following unreasonably lengthy proceedings. In this respect, the applicants alleged that their son's right to life safeguarded by Article 17 of the Constitution was violated, and they requested compensation for non- pecuniary damages.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

It cannot be understood from the available information whether an examination was made if the security measures observed during the site inspection, which was carried out more than five months after the incident, were actually available at the time of the incident. Besides, the inspection report did not provide sufficient explanation as to how the applicant Gürkan Kaçar had entered the place where the incident occurred and how he was exposed to electric shock.

Furthermore, within the scope of the action for damages, it was

acknowledged; that the applicant had entered the scene from a ruined part of the wall surrounding the railway, that one of the electric cables there was broken or was cut off and picked up to play, and that it was touched to the catenary line on the railway, and therefore the applicant was injured due to electric shock. The action for damages was dismissed for lack of causal link between the damage and the administrative act.

The Constitutional Court considers that the State's obligation to protect the individuals' lives must not be interpreted in such a way as to impose an excessive burden on the public authorities, bearing in mind, in particular, the unpredictability of human conduct. However, the public authorities must take into account children, mentally disabled persons and other persons in need of protection in their prediction of human conduct while carrying out hazardous acts and they must put into practice the appropriate administrative measures in due time.

In the action for damages brought by the applicants, due regard was not paid to the fact that the administration failed to take the necessary measures for the people in need of protection, and that the supervision failure of the applicant's family did not eliminate the responsibility of the administration to do so. The applicant thereby was found to be at complete fault due to his careless conduct. However, this conclusion does not comply with the principles concerning the obligation to protect life.

In addition, the case did not include any difficulty or other element which would cause impeding of the proceedings nor the case was of complex nature to necessitate the prolonging of proceedings for an unreasonable period of 9 years. In the present case it was concluded that the case was not concluded within reasonable time in a manner that might damage the significant role of the current judicial proceedings in the prevention of similar violations of the right to life.

Consequently, the Constitutional Court found a violation of the right to life of the applicant Gürkan Kaçar, safeguarded by Article 17 of the Constitution.

The Constitutional Court also held that the right to a trial within a reasonable time on the part of the applicant's mother and father, guaranteed in Article 36 of the Constitution, was violated due to the excessive length of the administrative proceedings.

2. The judgment Finding a Violation of the Right to Life of Suicidal Prisoners or Detainees due to Lack of Necessary Measures

***Serfinaz Öztürk Judgment* (App. No. 2014/18274, 21/9/2017)**

The Facts

The applicant is the mother of U.Ö. who was born in 1981 and died by suicide on 20 March 2014 while serving his prison sentence.

On 7 and 17 March 2014, the prison psychologist diagnosed U.Ö. with passive suicidal ideation. U.Ö. was examined at a psychiatric hospital next day, on March 18. He was diagnosed with psychotic disorders at the hospital, he was prescribed medication and was asked to revisit the hospital in two weeks for a check-up.

On 20 March 2014, U.Ö. was taken out of the prison to attend a hearing as an accused. After the hearing, he was again taken to his ward at 2.45 p.m. There was no other prisoner in the ward during that time as other prisoners were working in the textile mill.

After the applicant had been taken to the ward, another prisoner was taken there at 4.10 p.m. accompanied by a guardian. The prisoner informed the officers that U.Ö. had hanged himself by a clothesline available in the ward. It was then understood that U.Ö. had lost his life.

Before his death, U.Ö. had applied to the prison administration on 20 March 2014 and requested the medications prescribed for him at the hospital. The medications in question were bought from a private pharmacy on 20 March 2014; however, they could not be given to U.Ö. as he had committed suicide on the same day.

The Chief Public Prosecutor's Office launched an investigation. Within this scope, an incident scene investigation, a post-mortem examination, and an autopsy were carried out. As a result of the classical autopsy performed for the purpose of determining the exact cause of death, it was found that the death had resulted from hanging. The Prosecutor's Office sent a letter to the prison administration and requested information as to the number of prisoners held there, the number of prisoners who had passive suicidal ideation, and whether there was any special measures applied for those having passive suicidal ideation.

The administration stated in its response that they acted in accordance with the reports received from the relevant hospitals concerning the prisoners and that due to the high number of prisoners, the physical structure of the institution, and the insufficient number of expert staff, they did not take any special measure with respect to the prisoners who had suicidal thoughts without having active suicidal ideation.

The Prosecutor's Office took the statements of the responsible officers and some of the prison guardians as suspects. They denied any negligence or malice in the incident. The Prosecutor's Office issued a decision of non-prosecution due to the lack of sufficient evidence and suspicion that the public authorities in question abused or neglected their duties. The applicant contested the decision before the Magistrate Judge's Office, but it was refused with no right of appeal.

The Applicant's Allegations

The applicant alleged that although the authorities were aware of the tendency of the applicant's son to commit suicide, they did not take necessary measures in this respect, which resulted in his son's death, and that public officers who had responsibility for the incident were not indicted, and that thereby the right to life safeguarded by Article 17 of the Constitution was violated. The applicant requested that an effective criminal investigation be conducted against those who are responsible.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

In the present case, it appears that U.Ö. had tendency to commit suicide to the extent that it attracted attention of the prison officers. This was also supported with reports issued by the hospital indicating that U.Ö. was suffering from psychotic disorders and had passive suicidal ideation. Therefore, it must be acknowledged that the authorities were aware, or at least should have been aware,of the risk on the part of U.Ö. to harm himself.

In the circumstances of the concrete case, it is clear that certain measures for protecting U.Ö.'s health and avoiding self-harm should have been taken. First of all, it must be noted that in some cases it might lead to unfavourable results to let a person suffering from psychological disorders to decide whether to pursue the required treatment. U.Ö. was referred to the hospital due to his tendency to commit suicide and was examined accordingly.

However, he was not provided any support concerning the necessary treatment for him, and then he committed a suicide and died.

The system set up to protect the lives and health of the prisoners must be effective not only in theory but also in practice. As the diagnosis made for U.Ö. and the treatment recommended in this respect were not given due importance, no additional special measures were taken to protect his life. U.Ö. was not put into the special wards designated for prisoners suffering from such problems, and no other measures were taken to protect his right to life. Furthermore, he was not even provided with the medications recommended for him, and he was put in a ward alone, where a clothesline that might have made his suicide easier was available.

Considering all these facts, it is concluded in the present case that the conditions were not appropriate in terms of protecting the lives and health of prisoners and that the measures necessary for the protection of U.Ö.'s life were not taken.

It is also concluded that in the criminal investigation, the Prosecutor's Office did not make any assessment concerning the delay in obtaining the medications prescribed for U.Ö. Besides, in the course of the investigation, it was not examined whether the failure to take additional special measures in the relevant prison in respect of the prisoners having passive suicidal ideation was medically appropriate or not. However, under the procedural aspect of the right to life in terms of the obligation to conduct an effective investigation, it would be more acceptable to conclude an investigation concerning such incidents upon inquiring the concept of passive suicidal ideation and upon determining whether it is appropriate not to take additional measures for prisoners with such health problems.

Consequently, the Constitutional Court found a violation with respect to protection of life enshrined in article 17 of the Constitution as well as the procedural aspect of the right to life.

3. Press Release Concerning The Judgment Finding A Violation Of Right To Life Of A Prisoner Who Committed Suicide In Prison

Recep Kolbasar Judgment **(App. No. 2014/5042, 26/12/2017)**

The Facts

The applicant's brother F.K. was detained and imprisoned on 12 May 2008 for intentional killing. After a while, he was examined at the

psychiatry department of a state hospital. He was diagnosed with "psychotic mood disorder" and was prescribed medications.

After some time, F.K. was referred to a psychiatric hospital with the diagnosis of "psychotic disorder due to substance use" and stayed there for approximately two months upon the court's order. The report issued by the hospital stated that F.K. had been taking drugs and stimulants for seven or eight years, that he had been living on the streets for three or four years, that he had such behaviours as talking to himself and not eating foods by telling that medicine had been added to them, and that he had undergone inpatient treatments in different hospitals with the diagnosis of drug addiction and psychotic disorder. However, it was noted that he did not suffer from any mental illness or defectiveness that might affect his criminal liability.

After some time, F.K. was examined at the psychiatry department of a training and research hospital where he was diagnosed with "antisocial personality disorder" and "bipolar disorder" and was prescribed medications.

Afterwards, on 15 December 2008 when F.K. was in prison, he cut his both wrists. Some prisoners who were staying in the same ward with F.K. requested that F.K. be taken to another ward on the ground that they were disturbed. On 16 December 2008, F.K. was taken to a single ward. On the same day, he filled out a "requisition form" in which he demanded a laundry line together with some other things. What he demanded was provided to him by the prison officers.

On 17 December 2008 at around 1 a.m., the other prisoners who were staying in another ward were suspicious about F.K.'s situation and they pushed the emergency button. Thereupon, the guardians came to F.K.'s ward and found his dead body that was hanged on the window grill with a laundry line.

On the same day at around 2 a.m., the Public Prosecutor was informed of the incident. The Prosecutor launched an investigation without delay and carried out an incident scene investigation, as well as a post-mortem examination. The autopsy report issued by the Forensic Medicine Institute stated that the laundry line in question was suitable for hanging and that the death had resulted from hanging.

Within the scope of the investigation, the Chief Public Prosecutor's Office took statements of some of the guardians and prisoners as

suspects, as well as examining the footages. The Chief Prosecutor's Office took statements of the 1st administrator and the 2nd administrator of the prison as suspects, who were on duty at the material time, on 15 July 2010 and 12 August 2010, respectively.

On 18 September 2013, the Chief Public Prosecutor's Office issued a decision of non-prosecution. The applicant contested the decision, but it was refused by the assize court on 7 January 2014.

The Applicant's Allegations

The applicant alleged that although the prison officers, who failed to take the necessary measures for his brother suffering from psychological problems, had negligence in the incident, they were not indicted and that thereby F.K.'s right to life was violated.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

a. Substantive aspect of the right to life

Under certain circumstances, the State is required to take necessary measures in order to protect an individual's life from the risks likely to be caused by the individual's own acts.

In order for such an obligation to arise, which is also applicable for death incidents taking place in prisons, it must be primarily determined whether the prison officers were aware of or ought to be aware of the real risk that a person under their control could kill himself, and if there was such a risk, it must be examined whether they have had performed what is expected from them for elimination of this risk, within reasonable limits and within the scope of their powers.

In the present case, F.K. had been examined at the psychiatry department several times and had been prescribed various medications for treatment. Furthermore, in order to determine whether F.K. had been mentally ill or not, he had stayed at the psychiatric hospital for approximately two months. Ultimately, he had cut his both wrists. Therefore, the authorities can be said to have known that there had been a risk on the part of F.K. to kill himself. Accordingly, in the circumstances of the present case, it is clear that the authorities ought to have taken the necessary preventive measures to protect F.K.'s health and to protect him from self-harm.

It is understood that in the prison there were two specially-designated wards where prisoners who suffered from mental illnesses or who might cause harm to themselves were kept until they calmed down or were referred to a healthcare institution. Although F.K. was undergoing a psychological treatment and had harmed himself, he was taken to a single ward, as well as being allowed to buy a laundry line. These cannot be regarded as simple erroneous considerations or negligence, and it also cannot be said that the necessary preventive measures had been taken to protect F.K.'s health and to protect him from self-harm.

In view of the reasons explained above, the Constitutional Court has found a violation of the obligation to protect one's life under its substantive aspect.

b. Procedural aspect of the right to life

In order for a criminal investigation to be effective, the investigation authorities must act *ex officio* and immediately must determine all evidence capable of clarifying the death incident and identifying those responsible. Any deficiency in the investigation which undermines its ability to establish the cause of death or identify those responsible will fall short of the obligation to conduct an effective investigation. Investigations must also be conducted at reasonable speed.

In the present case, although the other investigation processes were concluded in a short period such as five months, the statements of the suspects were taken one and a half years after the incident, and the investigation lasted about five years. Given the acts carried out within the scope of the investigation, this period cannot be considered reasonable.

In addition, the Public Prosecutor's Office held that selling laundry lines in prisons was in compliance with the legislation and issued a decision of non-prosecution on the ground that F.K. had committed suicide. However, the fact that the circumstances of the present case cannot be regarded as an erroneous consideration or negligence, as explained above, were not taken into consideration.

In view of the reasons explained above, the Constitutional Court has found a violation of the right to life under its procedural aspect.

B. THE RIGHT TO PROTECT AND DEVELOP THE MATERIAL AND SPIRITUAL ENTITY

1. The judgment in which the application was found manifestly lll-founded for non-existence of sufficient evidence indicating that the applicant did not face with any significant adverse outcomes after an article was published against him on a blog

Mustafa Tepeli Judgment **[PA], (App. No: 2014/5831, 1/3/2017)**

The Facts

A comment alleging that certain military officers including the applicant had not consented to the deduction of the cost of foods provided for them during their military exercise from their salary and that such ungenerous conducts of them were severely condemned by the personnel was posted in a blog.

The applicant applied to the Keşan Chief Public Prosecutor's Office and requested that the person writing the above-mentioned comment which was addressing to him and was defamatory in nature be identified and punished. He also submitted his salary roll indicating that the cost of foods provided for him during the military exercise had been deducted from his salary.

In December 2013, the Keşan Chief Public Prosecutor's Office issued a decision of non-prosecution in which it was specified that it was not possible to establish the full identifying information of the suspects and that the impugned comment was removed from the web-site.

The applicant's objection to the decision of non-prosecution was dismissed by the Kırklareli Assize Court.

The Applicant's Allegations

The applicant maintained that his honour and reputation safeguarded in Article 17 of the Constitution and constituting a part of his personal identity and spiritual integrity were attacked by the third parties due to untrue allegations published in the blog and accordingly asserted that the safeguard afforded by the judicial authorities was insufficient.

The Court's Assessment

In brief, the Constitutional Court made the following assessments within the scope of this allegation:

According to the Constitutional Court's case-law, if the applicant requests the punishment of the applicant but does not bring an action for compensation by alleging that there has been intervention with his honour and reputation, the application is declared inadmissible for non-exhaustion of domestic remedies. However, in the present action, it is not possible for the applicant to bring such an action as the public prosecutor indicated that it was not possible to establish the full identifying information of the suspect.

In the present application, the applicant complained of the fact that an unidentified person had posted hearsay information about him through a blog. Following the criminal complaint filed by the applicant before the public prosecutor's office, the comment in question was removed from the blog. It has been revealed that the blog through which this comment was posted is a platform generally used by the military personnel and including posts addressing to a restricted group of persons. It is obvious that such incriminatory statements made, without any basis, by unidentified persons have no legal value. As a matter of fact, neither a criminal investigation nor a disciplinary investigation was filed against the applicant, who was serving as a colonel in the Turkish Armed Forces at the relevant time, on account of these allegations. Moreover, even if it is accepted that the impugned comment is incriminatory and connotative in nature, it cannot have a significant bearing on the applicant's personal life.

In the present incident, having regard to the difficulties experienced in the investigations conducted into offences committed through internet, the public prosecutor decided to discontinue the investigation concerning the applicant's complaint which has not caused far-reaching impacts in the manner which may result in serious concerns with respect to the fundamental rights and freedoms safeguarded in the Constitution or which does not have a bearing on the social interest. Given the facts that there is no sufficient evidence indicating that the applicant faced with significant adverse outcomes and that the complaint is not related to a significant principal issue, it has been concluded that the non-continuation of the investigation has led to no explicit imbalance between the individual's interests and general interests of the society, in respect of the positive obligations imposed on State by Article 17 § 1 of the Constitution.

Consequently, the Constitutional Court declared the application inadmissible for being manifestly ill-founded, without making any further examination as to the other admissibility criteria.

C. THE PROHIBITION OF TORTURE AND ILL-TREATMENT

1. The judgment concerning the fact that the deportation of a foreign family entering into the country through legal means did not breach the prohibition of ill-treatment

***A.A. and A.A Judgment* [PA] (App. No: 2015/3941, 1/3/2017)**

The Facts

The applicants are married and the Iraqı citizens, who entered into Turkey through legal means together with their four children on 2 March 2014. When the applicants, who applied for residence permit before the expiry of their visa for staying in Turkey and got an appointment for interview on 7 July 2014, arrived in the Istanbul Security Directorate for interview, they were taken under administrative custody and then placed in the Kumkapı Removal Centre. By the decision of 7 July 2014 taken by the Immigration Authority Directorate of the Istanbul Governorship, the applicants were ordered to be deported on the ground that they had entered into the country despite being prohibited from entering into Turkey.

Subsequently, the applicants individually filed an action before the Administrative Court on 19 August 2014 for the revocation of the deportation order. In their complaint petitions which were completely of the same content, they maintained that they were an opponent to the current government in Iraq and that in case of being deported, they would be killed or ill-treated. They also indicated that their home located in Iraq was demolished after being bombed by the terrorist organization namely the DAESH and accordingly submitted certain photos in respect thereof.

In the defence submissions presented by the Istanbul Governorship to the Administrative Court on 30 October 2014, it was indicated that a judicial action was taken in respect of the applicants and that a decision prohibiting their entrance into the country had been taken as they were posing a threat to public security. However, the judicial action taken in respect of them was not clarified therein. The 1st Chamber of the Istanbul Administrative Court held that the defence submission of the Governorship was not submitted within the prescribed period. In the letter of the Undersecretariat of the National Intelligence Organization ("the MIT") which was included in the case-file during the proceedings, it was stated that "foreign citizens who

have relation with terrorism have entered / will enter into the regions where armed clashes are taking place in Syria through Turkey, and the applicants may be among such persons". The Governorship's defence submissions and the opinion of the Undersecretariat of the MIT were not served on the applicants. By its decisions of 21 January 2015, the 1st Chamber of the Istanbul Administrative Court separately dismissed the applicants' actions.

The Applicant's Allegations

The applicants maintained that they had entered into Turkey together with their four children on 2 March 2014; that on a subsequent date following their entry into the country, a prohibition of entry into the country was imposed in respect of them; and that although they had applied for a residence permit within the prescribed period, their deportation was ordered. They also asserted that the grounds of their deportation and the defence submission of the administration were not served on them during the proceedings; that they had arrived in Turkey due to the internal disturbance and armed clashes taking place in Iraq; that the DAESH terrorist organization had bombed their home and their lives were not at safe in their own country; that in case of being deported, their lives would be endangered and they would be subject to ill-treatment.

The Court's Assessment

In brief, the Constitutional Court made the following assessments within the scope of this allegation:

The Constitution does not entail any arrangement concerning the foreigners' entry into the country, their residence and deportation from the country. As is also acknowledged in the international law, this issue falls within the scope of the state's jurisdiction. It is therefore undoubted that state has a margin of appreciation in accepting the foreigners into the country or in deporting them. However, it is possible to lodge an individual application in the event that such procedures constitute an interference with the fundamental rights and freedoms guaranteed in the Constitution.

When Articles 17, 5 and 16 of the Constitution are interpreted in conjunction with the relevant provisions of the international law and especially the Geneva Convention to which Turkey is a party, the protection of foreigners who are under the State's jurisdiction and likely to be subject to ill-treatment in the country where they are sent against the risks directed towards their physical and spiritual entity is one of the positive obligations of the state.

Within the scope of this positive obligation, the person to be deported must be provided with the opportunity to raise an objection to the deportation order, for offering a real protection against the risks that person may face with in his own country.

If it is alleged that the prohibition of ill-treatment would be breached in the country where the foreigner would be sent as a result of the act of deportation, the administrative and judicial authorities must inquire in detail whether there is a real risk of ill-treatment in that country. As required by the above-cited procedural safeguards, the deportation orders taken by the administrative authorities must be examined by an independent judicial organ; during this examination period, the deportation orders must not be enforced, and the parties are ensured to effectively take part in the proceedings.

However, the obligation to protect the individuals from ill-treatment does not necessarily require carrying out such inquiry in each act of deportation. For this obligation to be at stake, the applicant must primarily assert a defendable (ascertainable / questionable / worth to be inquired / causing reasonable suspicion) allegation. In this sense, the applicant must explain what the risk of ill-treatment, he has alleged to occur in the country to which he would be sent, in a reasonable manner; must submit (if any) the information and documents in support this allegation, and such allegations must attain a certain level of severity. However, as the assertion of a defendable allegation may vary by characteristics of each concrete case, an assessment must be made in each incident.

In order to conclude that the prohibition of ill-treatment may be breached in case of the enforcement of the deportation order, it must be proven that existence of a risk in the country where the person would be sent is beyond a probability and attains a level of "real risk". The burden of proof in this respect may be on the public authorities and/or the applicant, by the very nature of the allegation.

In the event that the risk in the country where the person would be sent is alleged to arise from persons or groups that are not public officers, the applicant must prove both the existence of this risk and the fact that the public authorities of the relevant country would remain insufficient to afford sufficient protection for the elimination of this risk.

Undoubtedly, the applicant's allegations that their home had been bombed by the DAESH terrorist organization and that their physical and spiritual entity would be endangered in case of being deported are not unfounded. However, it is not possible to accept that every allegation of running away from a terrorist organization is not *per se* defendable. The applicants are required to reasonably explain the current and probable risks concerning their personal situations and to submit, if any, information and documents in respect thereof.

The applicants submitted certain photos by asserting that their home had been bombed by the DAESH terrorist organization. In the action dealt with by the Administrative Court, it has been observed that a certain part of the procedural safeguards that must be provided within the scope of the prohibition of ill-treatment (the obligation to carry out inquiry, effective participation in the proceedings) was not afforded; and that the applicants failed to make an explanation to prove that these photos were of their own home both in the course of the proceedings and the individual application. What is more important, the applicant's refraining from giving information about from which region of Iraq they had come makes difficult reaching the conclusion that their allegations are true.

In the reports issued by the international human rights organizations, it is indicated that the DAESH is effective not throughout Iraq but in certain regions of the country. Neither is there an assessment concerning the fact that the Iraqı Government remains insufficient to ensure safety of its citizens in the regions under its control.

As regards the applicant's assertion that "they are in dispute with the Iraqi government", there is no need to make a further assessment in respect thereof as there is no allegation that the Iraqi government has ill-treated or may ill-treat the applicants due to a dispute nature of which is not known.

Consequently, having reached the conclusion that the applicant's allegations that they may be subject to ill-treatment in their own country in case of being deported are not of defendable nature, the Constitutional Court held that there had been no breach of the prohibition of ill-treatment guaranteed in Article 17 of the Constitution.

2. The judgment concerning the violation of the prohibition of torture and ill-treatment under its procedural aspect due to the failure to conduct a sufficient investigation into the allegations of ill-treatment for intimidation which is inconsistent with the requirements of military training

***Ümit Ömür Salar Judgment* (App. No. 2014/187, 23/3/2017)**

The Facts

Having been graduated from the Kuleli Military High School, the applicant dropped out the Air Force Academy on 24 May 2010 of his consent, alleging that some military officers and some 4th class students defined as leader students at the camp of student selection flight which he had attended in August 2009 had put physical and psychological pressure on him.

Then the applicant filed a criminal complaint with the Ankara Chief Public Prosecutor's Office against some military officers in charge at the camp and during the school term and some 4th class students due to the physical and psychological pressure put on him. The Chief Public Prosecutor's Office referred the file to the Military Prosecutor's Office of the Northern Sea Area Command, stating that the subject matter of the complaint falls within the scope of military justice.

The applicant alleged that E.A. who was a student of the 4th class at the camp of student selection flight applied on him various methods of physical pressure such as leaning his face against the pole again and again, holding him for hours in the chair position called "Chinese sitting", making him somersault for 3 kms, and methods of psychological pressure in such manners that *"You are not a decent person, you are unprincipled, why are you so assertive and resistant? You will end up leaving even if you go to school…"*. He also maintained that porno cds and ladies underwear were put in his case that no action was taken even though he had informed the administration of these issues, and that the commanders unjustly imposed disciplinary punishments on him.

Many of the persons whom the applicant requested to be heard as witnesses confirmed some statements of the applicant. The witnesses İ.A, H.B. and C.O.K alleged that they had been also subject to similar pressures.

On the other hand, it appears from the documents in the investigation file that fifteen persons including the applicant voluntarily dropped out the Air Force Academy during 2009 – 2010 educational year.

The Military Prosecutor's Office decided not to prosecute, considering that in some parts of the applicant's allegations there was no witness, that no complaint had been available in the records of the Air Force Academy and that there has been no report of battery, and stating that even if some alleged actions had been performed, the criminal complaint was not filed in due time in respect of the injury and defamation. The Military Prosecutor's Office emphasized that there was no superior-subordinate relationship among the military students, and in this context the applicant was not under the obligation to carry out the instruction of the upper class students. In the decision rendered by the Military Prosecutor's Office, it was stated that no evidence was found as to expression of the defamatory words with the intent to make the applicant leave school. In addition, it was recalled that in the disciplinary punishments imposed on the applicant, no evidence was found as to defamation made with criminal intent and that administrative remedies might be resorted against administrative disciplinary punishments.

In the decision of non-prosecution, it was stated that no evidence could be found as to the fact that the actions, which were assessed individually, were the output of a common will and part of a criminal intent aiming at causing the applicant to leave school, and also that the statements of the witnesses who had been called by the applicant and who had left the Military Academy for various reasons could not go beyond abstract assessments. In conclusion, the Military Prosecutor's Office rendered a decision of non-prosecution in respect of all the suspects on 30 September 2013, stating that the applicant exercised his right to resign without being under pressure and that no concrete fact and evidence could be found as to the fact that there was a systematic sequence of actions covering the command echelon to ensure the applicant's leave from the school.

The objection made against the decision of the Military Prosecutor's Office was rejected by the judgment rendered on 11 November 2013 by the Military Court of the 1st Army Command.

It was included in the report drawn up upon the submission of numerous petitions of similar content to the Petition Committee of Grand National Assembly of Turkey that there were complaints regarding the understanding

which aims to decrease the number of military staff systematically after having recruited excessive number of personnel for the Air Force Academy. It was also indicated that it was a negative situation for public interest that the distinguished human resource who had been carefully selected in high school years and whose placement had been under the initiative of the administration in all aspects could not be integrated into the profession at high rates.

The Applicant's Allegations

The applicant alleged that the prohibition of torture and ill-treatment provided for in Article 17 of the Constitution was violated, stating that he voluntarily left school since he could not stand the psychological and physical pressure put on him and he did not want others to say "He was dismissed from school", that the treatment and punishments towards him were degrading, that he had to undergo a psychological treatment due to the incidents he had experienced in civilian life as well, and that his complaints regarding this issue remained inconclusive. He therefore claimed pecuniary and non-pecuniary compensation.

The Court's Assessment

In brief, the Constitutional Court made the following assessments in the context of this allegation:

Some witnesses heard by the Military Prosecutor's Office within the scope of the investigation asserted that the 4th class students did not call each other by their real names and that they acted like an organization to make the students from the military high school be dismissed from the school by applying pressure. In addition, the witnesses declared that an effort was made to cause not only the applicant but also some other targeted students to leave school voluntarily through extremely harsh words, treatments and the imposed punishments. Likewise, similar assertions were included in the report of the General Assembly of the Petition Committee of Grand National Assembly of Turkey published on 27 June 2012 prior to the decision of non-prosecution rendered on 30 September 2013 by the Military Prosecutor's Office. No assessment on the mentioned report was made in the decision rendered by the Military Prosecutor's Office.

Given the allegations included in the report of the General Assembly of the Petition Committee of Grand National Assembly of Turkey, it is understood that the Military Prosecutor's Office failed to take into account that it was very

difficult for the applicant to allege that he was exposed to ill-treatment and to defend himself by witnesses or evidence that proved these allegations while he was a student at the Air Force Academy where a strict hierarchical structure prevailed. No assessment was made as well in the said decision as to whether or not the practices exercised on the applicant were by reason of the ordinary difficulties caused by being a student of the military school, and whether or not such practices were training methods applied with the purpose of familiarization of the military students with these difficulties. Without any hesitation, physical and psychological pressure can be put to a certain degree in respect of the practical requirements of some trainings in the military discipline with a view to enabling the students to become familiar with the difficulties arising from the very nature of the military career. However, within the scope of the applicant's allegations and the witness statements, such an impression has been left as to the fact that unlike the training provided for all the students in the context of the military training, the treatments established to be exposed to (by the applicant) aimed at deterring the applicant. It is an expected situation that particularly the applicant leaving the Air Force Academy after having been a student at the military high school for four years was more resistant to the military training, compared with the students from civilian highs schools, for not being unfamiliar with the military trainings and for foreseeing the difficulties he would face during the training at the Air Force Academy. With regard to the investigation into the incident, it should also be taken into account that the applicant being a graduate of the Kuleli Military High School had to leave the Air Force Academy.

In this context, it was not considered either that the complaints that some students from the Military School had been pressed up to drop out the Military Academy increased intensively due to the fact that those students were subject to harassment applying systematically and to physical and psychological ill-treatments, which was incompatible with the training requirements, in the course of their trainings.. This situation which is also shown by the statistics reveals the significance of the allegations.

On the other hand, it cannot be said that the Military Prosecutor's Office investigated in detail whether or not the actions against the applicant had also been carried out against the other students within an organizational structure and in a prevalent way. The fact that the allegations of ill-treatment regarding the actions carried out against many people and extending over

a period of time within an organizational structure, in line with a certain aim, were handled by the investigating authorities as isolated allegations of ill-treatment is one of the most significant obstacles before the efficiency of the investigation. Given the incident as a whole, finding the concrete data, through which connections could be established and which could be interpreted, insufficient in terms of separate incidents and not deepening the investigation in the light of concrete data may lead to the non-execution of specific procedures for the examination of evidence that could be resorted to in respect of organized crimes. The military prosecutor, considering that some actions which could be accepted as normal when the requirements of the military discipline are at issue may constitute ill-treatment when they are carried out by specific motivation other than this aim, should be more willing to examine the evidence supported by concrete data as well; should use all the necessary means of evidence collection and should deepen the investigation, handling it beyond being an individual claim.

The failure to investigate such allegations in due course and in a detailed manner also prevents the structures likely to organize within the Turkish Armed Forces from being revealed. This situation may lead to the continued violation of the individuals' fundamental rights and freedoms implicitly and systematically and also to problems in respect of national security due to the fact that the actions were carried out at a military training institution.

Thus, it should be also examined the allegation that some persons, who were the suspects of the impugned incident and of the coup attempt taking place on 15 July subsequent to the decision of non-prosecution rendered by the Military Prosecutor's Office, were the members of the terrorist organization known as "the Fethullahist Terrorist Organization" and "the Parallel State Structure" ("the FETÖ/PDY") and that whether the organization which is asserted to be existent in the witness statements but which could not be foreseen in the investigation procedure was "FETÖ/PDY".

Consequently, the Constitutional Court concluded that Article 17 § 3 of the Constitution was violated under its procedural aspect, since the allegations in the concrete case were not carefully and diligently discussed at the investigation stage even if the applicant had a defensible allegation of torture and ill-treatment together with the other evidence in the investigation.

For the reasons explained above, the Constitutional Court held that the prohibition of torture and ill-treatment guaranteed in Article 17 § 3 of the Constitution was violated under its procedural aspect.

3. The judgment finding a violation of the prohibition of ill-treatment due to imposition of a deportation order on a foreigner without examining his allegations that he would be exposed to ill-treatment in his country

***Azizjon Hikmatov Judgment* (App. No: 2015/18582, 10/5/2017)**

The Facts

The applicant is a citizen of Uzbekistan, who entered into Turkey through legal means in 2009. He requested to be granted international protection from Turkey by maintaining that he had become a target in his country for involving in political protests against the government during the period when he was a university student and that the opponents were exposed to duress and oppression in his country. The applicant, who was referred to Gaziantep for the completion of the necessary procedures concerning his request, got married with another citizen of Uzbekistan, S.K., with whom he had got acquainted there. They have two children who were born in 2011 and 2012. The applicant and his family were granted a temporary residence permit until the conclusion of their request for international protection, on condition of not leaving Gaziantep without permission. On 30 June 2010, the applicant was granted temporary refugee status by the Office of the United Nations High Commissioner for Refugees ("the UNHCR") upon his application for asylum.

On 15 March 2015, the applicant was arrested while travelling in a vehicle with a Syrian plate which was stopped by the police teams of the Kilis Security Directorate. It was revealed that he did not have any identity card with him. The security officers considered that the applicant, in company with four other persons, tried to enter into certain regions of Syria, where clashes were taking place, through illegal means. However, the applicant maintained that as there was limited number of job opportunities in Gaziantep, he was going not to the region where the clashes were going on but to the safe area, with a view to selling some objects. As a result of the vehicle-search conducted, the police officers found a camouflage (winter coat) owner of which was not known. The applicant submitted documents and certificates indicating that he knew Arabic and that he received trainings in the field of marketing.

Upon these incidents, the applicant's request for granting international protection was dismissed by the Immigration Authority of the Batman

Governorship. A ban on entering into the country was imposed on him, and his deportation was ordered on 14 May 2015 for posing a threat to public safety.

The action brought by the applicant for annulment of the deportation order was dismissed by the decision of the Batman Administrative Court (the Administrative Court) dated 4 November 2015. This decision did not include any examination or assessment as to the applicant's allegation that in case of his deportation, he might be killed or would be ill-treated in Uzbekistan.

The applicant became aware of this decision on 4 December 2015. Thereupon, the applicant lodged an individual application for an interim measure on the same date. The Second Section of the Constitutional Court decided to suspend the deportation order, as a measure, pursuant to Article 73 of the Internal Regulations of the Court.

The Applicant's Allegations

The applicant maintained that he had fled his country, namely, Uzbekistan and taken refuge in Turkey in 2009 as he was under the threat of being oppressed for displaying opposing conduct; that violations of human rights were very common in Uzbekistan where there were systematic tortures in prisons; and that in case of being deported to his country, he would face with the risk of being killed or ill-treated. He accordingly claimed pecuniary and non-pecuniary compensation and requested legal aid.

The Court's Assessment

In brief, the Constitutional Court made the following assessments within the scope of this allegation:

Regard being had to the information and documents submitted by the applicant, the ECtHR's assessments as to the conditions of the country where the applicant was deported, that the applicant had entered into Turkey and had requested to be granted international protection at a date before the clashes took place in Syria (2009) and that the UNHCR granted the applicant temporary refugee status in 2010, it has been observed that the applicant's allegations that he might be exposed to ill-treatment in his country are worth of being investigated.

At the subsequent stage, it will be examined whether the applicant's defendable allegation has been investigated, by the administrative and

judicial authorities, in a comprehensive manner; in other words, whether the procedural safeguards within the scope of the prohibition of ill-treatment have been afforded in the course of the proceedings.

In the impugned incident, the Administrative Court indicated that the applicant was among the persons posing a threat to public safety; that he was banned from entering into Turkey; and that his request for granting international protection was dismissed. It accordingly held that the applicant's deportation was not unlawful.

Besides, the allegations which had been consistently put forth by the applicant since 2009 primarily before the UNHCR and the Immigration Authority and subsequently during the proceedings before the Administrative Court were not taken into consideration. In the course of the proceedings, an investigation was not conducted into the applicant's allegations as to whether they are true, which are discussed in the ECtHR's judgments and in the reports of the non-governmental organizations carrying out researches on the field of human rights. Nor did the Administrative Court's decision include an assessment as to why these allegations were not relied on.

Therefore, the obligation to conduct an investigation into and make an assessment as to the risk likely to be faced with by the applicant in case of being deported to Uzbekistan was not fulfilled in the course of the administrative proceedings.

Consequently, the Constitutional Court held that the prohibition of ill-treatment guaranteed in Article 17 of the Constitution had been breached.

4. The judgment finding a violation of the prohibition of ill-treatment against a prisoner due to the fact that he was kept in the observation room for a long time being handcuffed on his hands behind his back and on his ankles

***Cihan Koçak Judgment* (App. No. 2014/12302, 21/9/2017)**

The Facts

On 25 February 2014 the applicant, who was serving his imprisonment sentence imposed for injuring a person, insulted and battered the prison doctor as his request for referral to a hospital was denied. He also had a quarrel with the guardians visiting the applicant's ward the next day for head

count. According to the incident report drawn up, the applicant threw the petitions at his hand towards the guardians and insulted them. Thereupon, the applicant was handcuffed and placed in an observation room for the fear that he might cause an uproar.

The next day the applicant filed a criminal complaint with the chief public prosecutor's office against the guardians. In his complaint, he maintained that the guardians had insulted him and placed him in the observation room after handcuffing his wrists and ankles and that, therefore, his hands and feet were bruised and swollen.

Within the scope of the investigation initiated thereupon, the prosecutor's office requested the prison administration to refer the applicant to a hospital on 4 March 2014 for a forensic report, to identify the guardians having involved in the incident, to submit photos for the purpose of identification, and to communicate whether the applicant had been taken to the infirmary on 24 February 2014.

Two days later, the prison administration had the applicant identify the relevant guardians and submitted the identity information and photos of these guardians to the chief public prosecutor's office.

On 12 March 2014 the applicant's statement was taken, and on 14 March 2014 a forensic examination report was drawn up in respect of him. It is specified in this report that skin scratches which were slightly scabbed were found on ulnar and radial laterals of his right and left wrist, on anterior surface of his right ankle and distal lateral of his left cruris.

On 14 March 2014 the guardians were questioned, and video footage of the incident was obtained. According to the analysis reports with respect to the footage, the applicant was placed in the observation room at 08.02 a.m. while his wrists and ankles were handcuffed and stayed in the room in this position. At 1:43 p.m., the guardians entering inside the observation room removed the handcuffs on the applicant's ankles. However, as the handcuffs on his hands could not be opened, the applicant stayed there with handcuffs for about another two hours. He was then taken out of the observation room after with no handcuffs. In the footage, there was no indication that the applicant was subject to battery. This footage was also examined by the Constitutional Court. There is no footage showing images of guardians while they were in the ward. According to the footage of

the corridor where headcount process was recorded, the guardians firstly entered inside the applicant's ward for headcount; they then left the ward and locked the door; and thereupon they once again arrived in the ward accompanied by the other guardians. It was revealed from the footage that the guardians entering inside the ward took the applicant to the observation room with his wrists and ankles being handcuffed. The applicant was kept in the observation room for about six hours being handcuffed on his hands behind his back and on his ankles.

On 2 April 2014 the chief public prosecutor's office rendered a decision of non-prosecution on the ground that any concrete evidence could not be obtained with respect to the applicant's allegation. The applicant's petition against this decision was dismissed by the assize court.

The Applicant's Allegations

Maintaining that the guardians entering inside the ward for headcount attacked on him as he did not stand up and handcuffed his wrists and ankles and battered him, and that the decision of non-prosecution was a result of an ineffective investigation; the applicant alleged that there was a breach of the prohibition of torture and ill-treatment. He accordingly claimed compensation.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

Alleged Use of Force

Despite the lack of a clear determination as to whether there was a situation necessitating the guardians' use of force, it cannot be concluded that the force used in the present case was an unnecessary and disproportionate intervention; given the applicant's risk level of aggression, the guardians' behaviours, and the fact that the medical report indicated that there were skin scratches only on the handcuffed parts of the applicant's body.

Therefore, it was concluded that the alleged use of force did not constitute a breach of the substantive aspect of the prohibition of treatment incompatible with human dignity, which is safeguarded by Article 17 § 3 of the Constitution.

Regard being had to the above-cited findings, the Court did not separately examine the applicant's allegations that the use of force constituted a breach of Article 17 of the Constitution under its procedural aspect.

Allegation of Being Taken to the Observation Room and the Subsequent Process

Substantive Aspect

Article 17 of the Constitution also extends to the requirement that a prisoner must be kept under conditions that are compatible with human dignity. The method of execution of a sentence and the attitude displayed during the execution process must not cause prisoners to feel distress and grief more than the degree required by the very nature of deprivation of liberty. In this respect, in examining the alleged ill-treatment under the detention conditions in prisons, the severity and purpose of the measures taken and their bearings on the individuals must be considered together.

In the present case, the applicant was restrained in order to avoid self-harm and damage to guardians and his ward and, in general, maintaining discipline and order in the prison as he was displaying aggressive attitudes. He was then taken to the observation room while his wrists and ankles were handcuffed. Therefore, this practice, which is considered as a temporary measure, cannot be regarded to form an ill-treatment by itself.

On the other hand, it must be determined whether the applicant's placement in the observation room with handcuffs for about six hours amounted to an ill-treatment. Walls of the observation room, also called as "padded room", are completely covered with sponge and designed in a manner that would avoid self-harm. In the present case, the applicant was placed in the padded room in order to avoid self-harm or damage to the guardians and to his ward. Even though this measure cannot be *per se* regarded as an ill-treatment, it is requisite that there should be a reasonable ground which certainly necessitates the applicant's placement in that room for about six hours with handcuffs on his wrists and ankles. The applicant's placement in the padded room —where he could not cause self-harm and damage to other individuals—with handcuffs gives the impression that the applicant was exposed to corporal punishment. Failure to remove handcuffs from his wrists for about two hours is also in support of this impression. Even if it is accepted that the applicant might have continued displaying aggressive behaviours, there is no finding in the footage that he was periodically monitored in order to check whether he was calmed down.

As a result, regard being had to the injuries specified in the medical report and the impugned incident, the applicant's placement in the observation

room for about six hours as being handcuffed was considered to amount to "torment". It was accordingly held that there was a breach of the prohibition of ill-treatment under its substantive aspect, which is safeguarded by Article 17 § 3 of the Constitution.

Procedural Aspect

There is also a procedural aspect of the positive obligation imposed on the State within the scope of an individual's right to protect his/her corporal and spiritual existence. Within the scope of this procedural obligation, the State is to conduct an effective investigation capable of identifying and, if appropriate, punishing those who are responsible for any kind of physical and psychological attacks. Primary aim of such an investigation is to ensure the pursuit of justice and to have public officers or institutions account for the events which have occurred under their responsibility.

It must be primarily stated that the obligation to carry out investigation with respect to the alleged human rights violations in no way amounts to admission of these allegations. Besides, taking such allegations serious and conducting a fair investigation constitute the procedural requirement of the ill-treatment prohibition. In this respect, the most fundamental step in the investigations into an alleged ill-treatment is taking of victim's statements and performance of a detailed medical examination without delay. This is because, a medical report is evidence *sine qua non* for revealing whether the alleged treatment took place and, if so, for determining the extent of such treatment.

In the instant case, the applicant underwent a medical examination seventeen days after being taken out of the observation room. In the investigation into the present incident, no inquiry was made about the failure to have the applicant examined by a doctor just after his getting out of the observation room. As a matter of fact, given the scratches which were still present on the applicant's body seventeen days later, it must be examined why the applicant was not taken to a doctor for medical examination despite submitting a petition of complaint upon being taken out of the observation room. In addition, the investigation authorities failed to consider whether the applicant had been held in the padded room — with handcuffs on his wrists and ankles—for about six hours for the purpose of punishment. Therefore, within the scope of the applicant's allegations, the grounds for his being kept handcuffed in the observation room were not investigated.

Consequently, the Constitutional Court held that the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution was breached under its procedural aspect.

5. The judgment concerning the violation of the procedural aspect of the prohibition of treatment incompatible with human dignity (particularly in relation to the principle of conducting an independent investigation)

***Süleyman Göksel Yerdut Judgment* [PA], (App. No. 2014/788, 16/11/2017)**

The Facts

The facts of the present case may be summarized as follows according to the reports submitted by the public authorities:

The applicant was taken into custody, for participating in the Gezi Parkı Protests, at his home where a search was conducted. The applicant, who was handcuffed for security reasons while being taken to the Karşıyaka State Hospital for the necessary custodial procedures, himself harmed his wrists by tightening and stretching his arms. Following the issuance of a medical report, he resisted to the security officers in order not to get in the vehicle and, within the vehicle, not to allow them to handcuff his left wrist. Thereupon, the security officers handcuffed the applicant's hands behind his back by using force. The applicant's fingerprints were taken at the police station once again by use of force as he continued resisting to the officers. Moreover, while he was taken to the detention room at the police station, his shoestrings were removed by making him lie on the ground. It is specified in the report that all these interventions by the security officers were recorded by the police surveillance cameras.

The facts of the present case may be summarized as follows according to the applicant's statements:

In his statement, the applicant maintained that while being taken to the police vehicle following his custodial medical examination, a police officer in respect of whom a description was given by him kicked his right arm, and another officer kicked his feet; and that after being taken to the police station, he informed the officers that he had pain in his arm and requested to be referred to a hospital; however, the officers twisted his arm to take his fingerprints.

The medical reports indicate the followings:

In the report drawn up at the Karşıyaka State Hospital where the applicant was taken just after his arrest for the custodial procedures, ecchymoses of about 2 cm were found on the exterior surface of his both wrists.

In the Atatürk Training and Research Hospital of the İzmir Katip Çelebi University where he was referred to on the day of his arrest due to the problem in his arm, no other report was drawn up, and the followings were noted at the bottom of the referral paper: *"no bone fracture or dislocation was found on the body of the patient complaining of pain in his right elbow. There is only a red ecchymosis, 5-6 cm in diameter, on the inside surface of his left wrist"*.

The next day of his arrest, the applicant was once again referred to the same hospital as he continued to suffer pain in his arm. In the medical report, it was specified that there was a bone fracture to his right elbow.

In the medical report drawn up at the end of the police custody period, which was two days after his arrest, along with the fracture to his right elbow, an erythema was found on the inner surface of his left forearm and an erythema of 2 cm was found on the inner surface of his left upper arm, as well as superficial scratch of 3 cm on his right lower leg tibia.

Facts as to the post-custody period:

The applicant was detained on remand and held in prison for about five months. After being released, he underwent an operation on his arm.

While being detained on remand, the applicant filed a criminal complaint with the İzmir Chief Public Prosecutor's Office for the identification and punishment of the relevant police officers on account of the acts he was exposed to. In his letter of complaint, the applicant requested the identification of the suspects and examination of the video footage from the surveillance cameras both inside and outside the Karşıyaka State Hospital where he had been taken just after his arrest.

The İzmir Chief Public Prosecutor's Office rendered a decision of non-prosecution on the basis of the existing medical reports and minutes, without fulfilling the applicant's above-cited requests.

The applicant's challenge to this decision was dismissed by the competent Assize Court.

The Applicant's Allegations

Maintaining that he had suffered no health problem until his custody; that he was handcuffed behind his back when taken into custody; that after obtaining the medical report, a police officer kicked his arm, and another officer kicked his feet; that his fingerprints were taken by use of force; and that his arm was broken due to ill-treatment he was exposed to, the applicant alleged that there was a breach of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 § 3 of the Constitution. He requested finding of a violation, as well as claimed pecuniary and non-pecuniary compensation.

The Constitutional Court's Assessment

As the Constitutional Court did not have sufficient materials at its disposal to reach a conclusion as to the merits of the applicant's allegations, its examination in the present case would be limited to the State's procedural obligation to carry out an effective investigation enshrined in Article 17 § 3 of the Constitution.

In brief, the Constitutional Court made the following assessments:

Pursuant to Article 17 of the Constitution taken in conjunction with Article 5 thereof, it is the State's obligation to conduct an effective investigation in case of an alleged violation of torture and ill-treatment, which is defendable. It is not an obligation of result, but of means.

The criminal investigations to be conducted must be effective and sufficient to the extent which would lead to the identification and punishment of those responsible. An investigation may be deemed to be effective and sufficient only when the investigation authorities act *ex officio* and collect all evidence capable of clarifying the incident and identifying those responsible. Therefore, an investigation into the alleged ill-treatment must be conducted in an independent, speedy and exhaustive manner.

Besides, for an effective investigation into the alleged torture and ill-treatment by public officers, those who are conducting the investigation and making inquiries into the incident must be independent from those involved in the incident. An independent investigation entails not only hierarchical or institutional but also a concrete independence.

In the present incident, given the reports drawn up by the law enforcement officers and the applicant's explanations, it has been revealed that there

are several actions which may lead to the fracture to the applicant's arm. During the investigation conducted into the applicant's allegations of ill-treatment, it must be primarily determined when and due to which action the applicant's arm might have been broken.

It seems impossible to make a sound assessment as to the determination of the responsibility, identification of those responsible and as to whether the permitted limit for use of force was exceeded or not in the incident, without making a determination as to the action which might have led to the fracture to the applicant's arm, in other words, without making all inquiries for revealing the material fact. It has been observed that within the scope of the legal actions initiated with respect to the impugned incident, no step was taken in order to obtain an expert report where an assessment as to the time and reason of the fracture to the applicant's arm is included; and that nor does the decision rendered at the end of the investigation include any assessment in this respect.

Although it is specified in the minutes drawn up by the law enforcement officers that the force used was recorded by the surveillance cameras, there is no indication within the investigation file that these footages were examined and assessed by the investigation authorities. It has been also revealed that footages of the surveillance cameras at the Karşıyaka State Hospital collection of which was requested by the applicant and which may be capable of revealing the material fact are not included in the investigation file.

There is no evidence such as footage, expert report, statements of complainants and witnesses or suspects' defence submissions, other than the medical reports received and minutes drawn up by the law enforcement officers, within the investigation file. In the decision of non-prosecution, there is no assessment as to the injuries specified in the medical reports which are included in the investigation file.

Regard being had to the investigation file, it has been observed that the minutes drawn up by the law enforcement officers, who are the suspects, *per se* form a basis for the decision of non-prosecution. For an effective investigation into the alleged ill-treatment by the public officers, only the hierarchical or institutional independence of those conducting the investigation and making the inquiries from those involved in the incident is not sufficient. The investigation must be independent and impartial also

in practice. In other words, this principle requires the investigation to be impartial and independent both *de facto* and *de jure*. In the present case, the minutes indisputably drawn up by the suspects were *per se* taken as a basis for the decision without being substantiated and supported with any other evidence, which is in breach of the principles of an independent and impartial investigation.

When the process is considered as a whole, it has been concluded that due diligence was not exercised in conducting an effective and rigorous investigation capable of determining those responsible and revealing the material fact concerning the injury sustained by the applicant during a period when he was under the control of the State.

Furthermore, the fact that although it was stated in the medical reports that the applicant's arm was broken and he appeared before the courts while his arm was casted, an *ex officio* investigation was not launched into the incident but an action was taken upon the applicant's complaint lodged approximately one and a half month later constitutes a violation of the principle of *ex officio* investigation that is of importance in terms of the effectiveness of investigation.

Consequently, the Constitutional Court found a violation of the procedural obligation inherent in the prohibition of treatment incompatible with human dignity, which is enshrined in Article 17 § 3 of the Constitution. It also ordered re-opening of the proceedings (investigation) for the elimination of the breach and consequences thereof and awarded a net amount of 15,000 Turkish liras in favour of the applicant as non-pecuniary compensation.

D. THE RIGHT TO LIBERTY AND SECURITY OF PERSON

1. The judgment concerning that the arrest warrant having not been executed does not constitute an interference with the liberty and security of person

***Galip Öğüt Judgment* [PA], (App. No. 2014/5863, 1/3/2017)**

The Facts

The Facts The applicant's death sentence was converted into aggravated life imprisonment by the decision of 20 July 2005 delivered by the 4th Chamber of the Ankara Assize Court. The mentioned decision was finalized by the judgment of 3 December 2010 rendered by the 11th Criminal Chamber of the Court of Cassation.

An arrest warrant was issued in respect of the applicant on 13 June 2012 by the Ankara Chief Public Prosecutor's Office for the execution of his imprisonment sentence. There is no record indicating that the applicant's arrest has been effected. In the application form, a residential area in Germany is indicated as the applicant's address.

The applicant lodged an application with the 7th Chamber of the Ankara Assize Court on 7 January 2014 through his lawyer and requested that the search, arrest warrants issued in respect of him and international travel ban imposed on him be removed, stating that there was no longer duration of conviction which would require to be executed given the detention period.

The court decided to reject the request by its decision of 31 January 2014.

The objection raised by the applicant on 4 March 2014 was rejected with a final decision by the 8th Chamber of the Ankara Assize Court.

The Applicant's Allegations

The applicant alleged that his rights guaranteed in Articles 36, 38 and 141 of the Constitution were violated, stating that the requests he made during the trial were rejected by the court without any justification on the basis of the written opinion of the Prosecutor's Office, and that the written opinion of the Prosecutor's Office was not served on him, either.

The Court's Assessment

In brief, the Constitutional Court has made the following within the scope of this allegation:

Even if the arrest warrants have some impacts on fundamental rights and freedoms during the period when they are not executed, it is not possible to define the aforesaid impacts as an interference with the liberty and security of person since the physical liberties of persons are not yet restricted concretely within this period.

It has been observed that the applicant was abroad on the date when the individual application was lodged and the arrest warrant issued in respect of him has not been executed yet, and also that there is no information or document indicating that the applicant's imprisonment sentence had been executed as of the date when the individual application was examined. Accordingly, it is out of question that the applicant has been deprived of his physical liberty. Thus, there has been no interference with the applicant's right to liberty and security of person.

Consequently, the Constitutional Court has declared the application inadmissible for being manifestly ill-founded, since it is obvious that there has been no violation with regard to the applicant's allegation.

2. The judgment concerning that non-communication of the public prosecutor's opinion during the examination of the appeals against detention was devoid of constitutional and personal significance, in the scope of the concrete application

***Devran Duran Judgment* [PA], (2014/10405, 25/5/2017)**

The Facts

On 21 November 2011 around 10.30 p.m. O.A., the Commander of the Nusaybin Central Gendarmerie Station, and R.Ü., a civilian official employed by the Mardin Regional Department of the National Intelligence Organization ("the MIT"), were killed after being shot with automatic weapons from a vehicle, while they were moving towards the city centre by a car. Within the scope of the investigation conducted by the Nusaybin Chief Public Prosecutor's Office, Nusaybin Magistrates' Court issued an arrest warrant against the applicant on the ground that "he could not be reached and there was a risk of fleeing and tampering with evidence on the part of him. The applicant was taken into custody on 30 November 2011. The Nusaybin Magistrates' Court ordered the applicant's detention on remand on 2 December 2011 for intentional homicide, intentional injury, use of stolen goods and committing crime on behalf of an organization.

As the incident was a terrorist act, the investigation file of the applicant was sent to the Diyarbakır Chief Public Prosecutor's Office. Thereupon, a criminal case was initiated against the applicant before the Assize Court in the same judicial district by the indictment issued by the Diyarbakır Chief Public Prosecutor's Office on 10 October 2012 for the applicant's punishment for deliberately killing two persons (twice), disrupting the unity and integrity of the State, purchasing, carrying or possessing weapons or bullets which are considerable in terms both of quality and quantity and causing damage to property. In the bill of indictment, it was also stated that according to the news published on 23 November 2011 on a website operating on behalf of the PKK/KCK terrorist organization, the incident was claimed by this organization and that during the search conducted in the applicant's house, some evidence pointing to his connection with the PKK (6 DVDs and 1 memory card) were seized. The Prosecutor's Office relied on such evidence as the incident scene investigation reports, the statements of anonymous witness, the identification reports, the expert reports, the examination reports and records, the HTS reports pertaining to the cell phone call details and the defence submissions of the suspects. The proceedings were carried out while the applicant was detained on remand.

By Article 1 of Law no. 6526 dated 21 February 2014, the assize courts which were authorized by former Article 10 of the Anti-Terror Law no. 3713 dated 12 April 1991 were abolished. Therefore, the 8th Chamber of the Diyarbakır Assize Court rendered a decision of non-jurisdiction on 7 March 2014 and sent the case file to the 1st Chamber of the Mardin Assize Court.

On 15 May 2014, a hearing was held before the 1st Chamber of the Mardin Assize Court. The applicant attended the hearing through the Voice and Video Informatics System ("the SEGBİS") from the İzmir T-type Closed Penitentiary Institution no. 4 where he was detained on remand, and he requested to be released. The applicant's lawyer, who was present at the hearing, also requested the applicant's release. The court dismissed their request and ordered the continuation of the applicant's detention on remand.

The applicant appealed against the decision on 16 May 2014. On the same day the 1st Chamber of the Mardin Assize Court sent the file to the 2nd Chamber of the Mardin Assize Court as the appellate authority. The latter requested the written opinion of the Public Prosecutor. The Prosecutor submitted to the court his written opinion for dismissal of the applicant's appeal. On 23 May 2014, in accordance with the prosecutor's opinion, the

2nd Chamber of the Mardin Assize Court dismissed the applicant's appeal without holding a hearing and with no further right of appeal.

The judgment of the court was served on the applicant on 26 May 2014. On 24 June 2014, the applicant lodged the individual application no. 2014/10405.

In the subsequent process, a hearing was held on 6 August 2015, where the applicant's request to be released was dismissed. The applicant appealed against the decision on 10 August 2015. The 1st Chamber of the Mardin Assize Court sent the file to the Midyat Assize Court as the appellate authority. The latter dismissed the applicant's appeal with no further right of appeal.

The judgment was served on the applicant on 14 September 2015. On 1 October 2015, the applicant lodged the individual application no. 2015/16156

At the hearing of 10 November 2016, the Public Prosecutor expressed his opinion as to the merits of the case verbally and requested the applicant's punishment for all charges against him.

On 25 November 2016, noting that the detention measure could be applied for the maximum period of five years for the cases under the jurisdiction of the assize courts and that there remained a short time for the expiration of the five-year period in respect of the applicant, the court ordered the applicant's release. The applicant was released on the same day.

The application was still pending before the first instance court on the date of examination of the individual application.

The Applicant's Allegations

The applicant maintained; that he was charged by the investigation authorities relying on insufficient evidence; that there was no concrete fact indicating that he committed the imputed offence; that there was no strong indication of guilt; and that upon learning that the police officers had come his home to take his statement, he went to the police station willingly, however he was detained although there was no risk of tampering with evidence on the part of him. In addition, the applicant argued that the continuation of his detention on remand was ordered on fixed grounds and the reasons for considering the conditional bail as an insufficient measure were not explained. For these reasons, the applicant claimed that his right to

personal liberty and security safeguarded by Article 19 of the Constitution was violated. The applicant alleged that as his appeal against the detention order within the scope of the application no. 2014/10405 was examined without holding a hearing, Article 5 § 4 of the Constitution was also violated. Lastly, the applicant alleged that although the courts reviewing his appeals received the Public Prosecutor's written opinions, they dismissed his appeals without communicating these opinions to him.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

A. Alleged unlawfulness of detention:

Considering that an arrest warrant was issued against the applicant four days after the armed attack in question and he was detained two days after being taken into custody, there is no reason to conclude that the detention of the applicant was not proportionate/necessary in terms of the investigation process. As it is clear that there is no violation as to the alleged unlawfulness of the applicant's detention, this part of the application has been declared inadmissible for being manifestly ill-founded.

B. Allegation that the applicant's detention exceeded the reasonable time

As the applicant lodged an individual application concerning the allegation under this heading without exhausting judicial remedies, this part of the application must be declared inadmissible for non-exhaustion of judicial remedies.

C. Allegation that the applicant's appeal against the detention order was examined without holding a hearing

In a criminal procedure system that allows appeal of all detention orders *ex officio* or upon request before another court, examination of an appeal eight days later without holding a hearing cannot be said to have violated the principles of equality of arms and adversarial proceedings. As it is clear that there is no violation in this respect, this part of the application has been declared inadmissible for being manifestly ill-founded.

D. Allegation that the opinions of the Public Prosecutor that were received during the examination of the appeals against detention were not communicated to the applicant

a. Judgment of the Midyat Assize Court

The applicant alleged that the Public Prosecutor's opinion was received during the examination of his appeal against the decision on the continuation of his detention dated 6 August 2015 but he was not informed of the relevant opinion. However, the applicant failed to submit supporting evidence for his allegation, therefore this part of the application has been declared inadmissible for being manifestly ill-founded.

b. Judgment of the 2nd Chamber of the Mardin Assize Court

It has been concluded that the application concerning the alleged violations of the principles of equality of arms and adversarial proceedings due to non-communication of the Public Prosecutor's opinion to the suspect/accused or his representative –which constitutes a common and clear case-law of the Constitutional Court– did not point to a general issue. It also could not be demonstrated that it was important in terms of application and interpretation of the Constitution or determination of the scope and limits of the fundamental rights.

In addition, regard being had to the fact that the applicant did not make any explanation as to the substantial damage he sustained due to non-communication of the Public Prosecutor's opinion and as to the importance of this opinion for him, it has been concluded that there was no substantial damage on the part of the applicant in this sense.

For the reasons explained above, it has been concluded that this part of the application was neither of significance in terms of the interpretation and application of the Constitution nor of personal significance because the applicant did not sustain a substantial damage. As a matter of fact, in one of its recent judgments (see *İbrahim Kızılkaya*, no. 2014/2517, 5 April 2017), the Constitutional Court declared inadmissible, on the similar grounds, an application concerning the alleged violation of the principles of equality of arms and adversarial proceedings due to non-communication of the notification letter of the Chief Public Prosecutor to the applicant (the accused) during the appellate review, where the decision on the applicant's imprisonment was upheld.

In conclusion, the Constitutional Court declared this part of the application inadmissible for lack of constitutional and personal significance, without further examination under other admissibility criteria.

3. The judgment concerning the constitutional principles to be observed in individual applications lodged due to detention during the state of emergency

***Aydın Yavuz and Others Judgment* [PA], (App. No. 2016/22169, 20/6/2017)**

The Facts

During the coup attempt of 15 July, the campus of Turkish Satellite and Communication Company ("TURKSAT") located in Gölbaşı was occupied by the coup plotters on 16 July 2016 at around 00:47 a.m.

The applicants are electronic and computer engineers, and they reside outside Ankara. They arrived in Ankara at the evening hours on 15 July 2016 and went to TURKSAT campus by a car driven by the applicant Burhan Güneş on 16 July at around 2:00 am. The applicants were stopped at the entrance of the campus by police officers. They told the police officers that "they had been called in from inside the campus" and requested to enter to the campus. Thereupon, they were taken into custody.

On 18 July 2016, Gölbaşı Magistrate's Judge Office ordered the applicants' detention on remand for attempting to overthrow the constitutional order.

The Ankara Chief Public Prosecutor's Office charged the applicants with the offences of "attempting to overthrow the constitutional order, attempting to overthrow the Grand National Assembly of Turkey or prevent it from performing its duties, attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties and being a member of an armed terrorist organization".

This action has been pending as of the date when this application was examined, and the applicants are still detained on remand.

I. General Principles

A. Emergency Administration Procedures

Emergency administration procedures are temporary and exceptional administration regimes which vest the public authorities with broader powers in comparison to those of ordinary times. This is necessary to eliminate severe threats and dangers emerging in cases where the existence of the State and the community or the public order cannot be protected with ordinary powers. Under such emergency procedures, a shift takes in

the legal system. The most significant effect of this shift is the narrowing of the safeguards with respect to the fundamental rights and freedoms. Accordingly, emergency periods may require measures resulting in wider restriction of the fundamental rights and freedoms in comparison to ordinary periods or even suspension of these rights and freedoms, in order to eliminate the existing threat or danger.

B. Examination of Individual Applications in Emergency Periods

1. Power to Examine Individual Applications

Neither the Constitution nor the laws include a provision providing that an individual application cannot be lodged with the Constitutional Court during emergency periods. Therefore, the Constitutional Court has the power to examine individual applications for alleged human rights violations in emergency periods.

2. Examination Process

a. In General

The criteria with respect to the restriction of the fundamental rights and freedoms in ordinary times are laid out in Article 13 of the Constitution whereas the restriction or suspension of the exercise of the rights and freedoms in times of "war", "mobilization", "martial law" and "a state of emergency" are set out in Article 15. In examining the individual applications against emergency period measures, the Constitutional Court is to take into account the protection regime set out in Article 15.

b. Conditions as to the Applicability of Article 15 of the Constitution

i. Existence and Declaration of Emergency Case (*Olağanüstü Durum*)

For the application of Article 15 of the Constitution, there must exist one of the conditions of "war", "mobilization", "martial law" or "state of emergency", and subsequently, the existence of one of those must have been declared by the state authorities empowered by the Constitution.

ii. That the Measure must be related to Emergency Case

For the application of Article 15, it does not suffice that an impugned measure is taken during an emergency period; but this measure must also be related to the elimination of the threat or danger leading to the declaration of the emergency case. In case of failure to establish such a relation, Article 13,

not Article 15, is to be applied in reviewing impugned measures even if it is taken in the emergency period.

c. Examination pursuant to Article 15 of the Constitution

i. Whether the Measure is in breach of the Safeguards Enshrined in the Constitution

In an individual application against a measure interfering with fundamental rights during an emergency period, the impugned measure will be subject to review first under the constitutional safeguards in place for ordinary times. If it is determined that the measure is not in breach of those safeguards, as a principle, a separate examination will not be made under the criteria set out in Article 15. If, however, the complained measure is found be in breach of the safeguards prescribed for ordinary times, then a further examination will be made for determining whether it complies with emergency criteria set out in Article 15. In other words, an emergency measure failing to satisfy constitutional test for ordinary times is subject to further examination for determining whether in can be justified under Article 15.

ii. Whether a Measure in Breach of the Non-emergency Safeguards is Legitimate in time of Emergency Period

In order to satisfy the emergency period criteria set out under Article 15, a measure must be in compliance with all of the following:

(1) Whether the Measure has a bearing on the Core Rights

An emergency measure, which may be in violation of non-emergency standards, must not infringe upon the rights and freedoms provided in Article 15 § 2 of the Constitution.

(2) Whether the Measure is in breach of the Obligations Stemming from the International Law

An emergency measure must also not breach the obligations stemming from the international law, notably those stemming from the international conventions on human rights to which Turkey is a party.

(3) Whether the Measure is within the extent required by the Emergency Case

The final condition set out in Article 15 is that an emergency measure must be "within the extent required by the exigencies of the situation."

C. Assessment as to the Current Emergency Case in Turkey

The incident led to the emergency case in Turkey is the coup attempt that took place on 15 July 2016. Those behind the coup attempt attacked the nation, the legitimate government, the media outlets and the security forces. During the attack, they used war arms such as fighter jets, helicopters, vessels and tanks and heavy weapons, which were entrusted to them for protecting the very people they attacked. This barbaric attempt left behind more than 250 deaths and thousands of injured. The fact that this coup attempt took place at a time when Turkey was under fierce attack of many terrorist organizations made the country even more vulnerable to such attacks and therefore considerably increased the gravity of threat it posed against the existence of the nation.

Accordingly, there is no doubt that the coup attempt of 15 July has posed an existing and severe threat not only to the democratic constitutional order but also to the "individuals' fundamental rights and freedoms" and "national security", both of which are indeed closely associated with one another. This is the most severe attack in the history of the country, targeting the national security and the lives of the people and even existence of the whole nation.

The investigations initiated by the authorities following the coup attempt, the statements of suspects and witnesses, the material facts, and pre-coup attempt investigations on the FETÖ/PDY (the Fetullahist Terrorist Organization / Parallel State Structure), when considered as a whole, indicate that the public authorities' assessment as to the FETÖ/PDY being the plotter/perpetrator of the coup attempt has sufficient factual basis.

The following characteristics of the FETÖ/PDY increase the gravity of the threat it has posed to the democratic social order even more: the FETÖ/PDY has been organized in all public institutions and organizations, notably the Turkish Armed Forces, security directorates, the judiciary, public institutions of education and religion, the political parties, trade and labour unions, non-governmental organizations and business companies; it adopts a mentality attributing holiness to the organization and to its actions without questioning; its members act in full obedience and devotion to the organizational will, and it is made up of hierarchical and cell-type structure; it has been using confidential/covert means of communication; it ultimately aims at taking control of the constitutional institutions of the state, re-designing the society and the individuals in line with its own ideology and governing the country through an oligarchic rule.

The coup attempt made on 15 July 2016 lies behind the declaration of the "*state of emergency*" on 21 July 2016. However, the intense terror attacks against Turkey also have a bearing on the declaration of the state of emergency.

II. Examination of the Applicants' Allegations

A. Alleged Unlawfulness of the Applicants' Detention

1. The Applicants' Allegations

The applicants maintained that at the date of incident they acted together with the convoys formed by the groups resisting the coup attempt and went to the campus where TURKSAT was located; that their act was not associated with any activity falling within the scope of the coup attempt; and that they did not have any connection with the imputed offences, they nevertheless were detained.

2. The Constitutional Court's Assessment

Within the scope of the right to liberty and security of person, the most significant element of the judicial review of the first detention is the existence of "*strong indication*" of having committed an offence, which is specified as one of the requisite conditions of having recourse to detention measure in Article 19 § 3 of the Constitution. In that regard, the existence of serious indication of having committed an offence suffices for the first detention of a person.

As regards the existence of suspicion of having committed an offence in the present case, the detention order referred to the incident scene, the investigation report, and the applicants' statements. According to the determinations of the investigation authorities, the applicants wanted to enter the campus of TURKSAT occupied by coup plotters, and they were stopped by the police officers at the entrance of the campus. They were arrested after the applicant Burhan Güneş, who had been driving the car, had stated that "they had been called by those inside the campus" and had tried to delete the records on his mobile phone in rush. The authorities considered "being called by those who were inside the campus" to be a call by the military officers occupying TURKSAT. In addition to that, the applicants stated that they had been residing in various regions outside Ankara and had met at the bus station in Ankara at the evening hours on 15 July; they had borrowed the car they were using from a person whose

name they did not want to disclose. Although they also stated that they had been acting in order to join the convoys fighting against the coup, they in fact went to the campus of TURKSAT (located in the Gölbaşı district) which was tens of kilometres away from the provincial centre where against-coup demonstrations took place.

Moreover, the suspect U.O. (owner of the car by which the applicants went to TURKSAT) stated to the investigation authorities that *"he met with the applicants at a home on the incident day; the applicants left the home by his vehicle; and later on, the applicants were reported in the news that they raided TRT ("the Turkish Radio and Television Corporation") building together with the coup-plotter military officers for interrupting its broadcasting at the night of the coup attempt*. One of the military officersoccupying TURKSAT, E.U., said in his statement that "*as the TURKSAT personnel did not assist us to stop broadcasting, we were told by our superiors that civilian technicians would arrive from outside to assist us to stop broadcasting".* Accordingly, there are strong reasons substantiating the investigations authorities' suspicion that the applicants committed the imputed offences.

In addition, it has been established that the applicants, Burhan Güneş and Aydın Yavuz, were users of the "ByLock" application (app), which is the digital platform through which the FETÖ/PDY members maintained secure communication among themselves. Taking into account the technical features of this app, it is comprehensible that the fact that the applicants have and use this app is considered by authorities as a strong indication for their connection with FETÖ/PDY. As a matter of course, the degree of this indication may vary by concrete incidents, depending on the factors such as whether this app has been actually used by the individual concerned, the manner and frequency of its use, the position of and importance attached to the contacts (those with whom communication was established via this app) within the FETÖ/PDY, and the content of messages communicated via this app. Moreover, the competent authorities' assessment that the use of ByLock or having it in electronic/mobile devices constitutes a strong indication of having committed an offence cannot be considered as unfounded or arbitrary. Therefore, it must be concluded that there is, also in this respect, a strong suspicion that the applicants Burhan Güneş and Aydın Yavuz, who are users of this app, had committed the imputed offences.

On the other hand, although the pre-requisite of strong suspicion of having committed an offence for detention may exist, it must also be determined

whether the impugned detention measure is proportionate or not. The constitutional review on this matter must be made with regard to the detention process and the grounds thereof. At this stage, the Constitutional Court's duty is not to find out the most appropriate measure or means best serving the establishment of justice but to review the constitutionality of the impugned interference (the detention measure in the present case).

Considering the general circumstances in which the applicants were detained and the particular facts of the present case together, the Constitutional Court found that the legal grounds for the applicants' detention, the risk of tampering with evidence and suspicion, have sufficient factual basis.

For these reasons, the Constitutional Court has declared this part of the application inadmissible for being manifestly ill-founded.

B. Review of Detention without a Hearing

1. The Applicants' Allegations

The applicants Birol Baki, Burhan Güneş, and Salih Mehmet Dağköy also maintained that the review of their detention was carried out without holding a hearing, and therefore their right to liberty and security were violated.

2. The Constitutional Court's Assessment

The suspected offence resulting in the applicants' detention concerns an act relating to the coup attempt of 15 July, which is the primary incident led to the declaration of the state of emergency in Turkey. The state of emergency has been in force during the period when the applicants have been detained on remand. In this respect, the interference to the right to liberty and security of a person in the form of reviewing detention without a hearing is to be examined under Article 15 of the Constitution. Before examining the claims under Article 15, it must be first determined whether the impugned detention reviews breach the safeguards enshrined in Article 19 of the Constitution.

Article 19 § 8 of the Constitution sets forth that persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their detention status and for their immediate release if the restriction imposed upon them is not lawful.

One of the fundamental safeguards deriving from Article 19 § 8 is the right to request for an effective review of detention before a judge. Indeed, a very high importance must be attached to this safeguard considering that this is the primary legal tool for a person deprived of his liberty to effectively challenge his or her detention. In this way, a detained person is given the opportunity to discuss the reasons led to his/her detention and the assessment of the investigation authorities in person before a judge or a court. Therefore, a detained person should be able to exercise this right by being heard before a judge at certain reasonable intervals.

In the present case, the applicants' detentions were prolonged without a hearing within the period from July 2016 to April 2017. The Constitutional Court concluded that review of the applicants' detention without holding a hearing and their deprivation of liberty for 8 months and 18 days under such a procedure are in breach of the safeguards enshrined in Article 19 § 8 of the Constitution.

However, because the applicants were detained in the state of emergency, it must be next examined whether this interference can be justified under Article 15, regulating the restriction and suspension of exercise of the fundamental rights and freedoms in emergency periods.

Under Article 15, it must be examined whether the interference infringes upon the rights and freedoms stated in paragraph 2, whether it violates the obligations stemming from the international law, and whether it is required by the exigencies of the situation.

The right to liberty and security of person is not one of the core rights that are stated in Article 15 § 2 as inviolable in emergency periods.

Nor does the interference violate the obligations arising from international law because the right to liberty and security is not one of the inviolable rights stated in the international conventions to which Turkey is a party, notably the International Covenant on Civil and Political Rights ("the ICCPR") and the Convention as well as the additional protocols thereto. Furthermore, it was not substantiated that the interference with the applicants' right to liberty and security violates other safeguards applicable in emergency periods under the international law.

Having found that the interference satisfied first two standards set out in Article 15, the Court then turned to scrutinize it under the last standard of "*the extent required by the exigencies of the situation*". The interference into

the right to liberty and security in the form of detention without a hearing must not be arbitrary in order to satisfy this standard at the outset. When determining if the interference is required by the exigencies of the situation, in other words, whether it is proportionate or not, the factors to be taken into account are the situation leading to declaration of the state of emergency, the circumstances during the state of emergency and special circumstances of the specific period the impugned interference took place.

Following the coup attempt of 15 July, upon the instructions of the chief public prosecutors' office, investigations were initiated throughout the country against roughly 160.000 persons who involved in the coup attempt or who were considered to be in connection with the FETÖ/PDY regardless of direct involvement in the coup attempt. In this scope, over 50.000 persons were detained on remand and over 47.000 persons were released subject to other measures. The investigation authorities faced with the necessity to immediately initiate and conduct investigations against tens of thousands of suspects upon such an unexpected situation. Also, considering the characteristics of the FETÖ/PDY (secrecy, cell-type structuring, its ubiquitous nature in the state and society organizations, attributing holiness to itself and acting on the basis of obedience and devotion), it is obvious that these investigations are far more difficult and complex than other criminal investigations. In this respect, the judicial and investigation authorities are to manage a heavy workload which was unforeseeable. Furthermore, on 16 July just after the suppression of the coup attempt, the High Council of Judges and Prosecutors ("the HCJP") ordered, at the first stage, suspension of 2.745 judges and prosecutors from office for having connection with the FETÖ/PDY. At the subsequent stages, over 4.000 members of the judiciary were dismissed from office.

Having regard to the severe and unforeseeable workload the judicial and investigation authorities have been exposed after the coup attempt, the suspension and dismissal of thousands of judges and prosecutors (about 1/3 of all members of the judiciary) who would otherwise deal with this workload and maintain efficient operation of the legal system, and dismissal of a significant part of the assistant courthouse personnel and law enforcement officers, it must be acknowledged that the review of detentions over case-documents without holding a hearing for those detained for suspicion of coup-related offences is a measure which is proportionate to the requirements of the state of emergency.

Furthermore, a significant number of guardians and gendarmerie personnel in charge for maintaining the security of penal institutions are also suspended or dismissed from office. Considering that thousands of detainees in connection with the coup attempt and FETÖ/PDY are placed in penal institutions in rural areas, the lack of sufficient number of those personnel and security forces may cause serious security problems during transfer of those detainees to court houses. Accordingly, conducting detention reviews of suspects in question without holding a hearing may be considered even necessary for maintaining public security during the state of emergency.

Under these circumstances, the Constitutional Court concluded that the extension of the detention of the applicants, who are detained on remand with the allegation of having committed offences related to the coup attempt, without a hearing for a period of 8 months and 18 days constitutes a measure "proportionate to the exigencies of the situation".

The Constitutional Court accordingly held that there is no violation of the applicants' right to liberty and security under Article 15.

C. Other Complaints

The applicants also alleged that the extension orders of detentions lacked justification; their detention exceeded reasonable time; their right to defence was restricted due to confidentiality of the investigation file (no or restricted access to investigation documents). The Constitutional Court found those allegations inadmissible for being manifestly ill-founded.

4. The judgment concerning the detention measure in the investigation conducted related to the allegation that a judge is a member of an armed terrorist organization within the scope of the coup attempt of 15 july 2016

***Selçuk Özdemir Judgment* [PA], (App. No. 2016/49158, 26/7/2017)**

The Facts

Prior to the July 15 coup attempt, the applicant was serving as a Judge in the 3rd Chamber of the Bursa Administrative Court.

Following the coup attempt of 15 July 2016, the Ankara Chief Public Prosecutor's Office, considering that the applicant had been caught in an

act as a result of which a heavy sentence would be imposed, launched an investigation against him for the allegation that he was involved in the hierarchical structure of the FETÖ/PDY (the Fetullahist Terrorist Organization / Parallel State Structure).

On 10 August 2016, the applicant was suspended from office by the Second Chamber of the High Council of Judges and Prosecutors (HCJP).

Upon the request of the Ankara Chief Public Prosecutor's Office, on 11 August 2016 the Bursa Chief Public Prosecutor's Office issued a search warrant on the applicant's house, office and car. The applicant was taken into custody on the same day.

Upon the detention order of the Bursa 4th Magistrate Judge's Office, dated 12 August 2016, the applicant was detained on remand for his alleged membership of an armed terrorist organization. On 16 August 2016, the Bursa 5th Magistrate Judge's Office dismissed the applicant's request for review of the detention order. On 30 May 2017, the Istanbul Chief Public Prosecutor's Office indicted the applicant for the offence of membership of an armed terrorist organization.

The case has been pending as of the date when this application was examined, and the applicant is still detained on remand.

On 31 July 2016, the Plenary of the HCJP dismissed the applicant from office due to his relation and connection with the FETÖ/PDY. The Plenary dismissed the applicant's request for review of dismissal on 29 November 2016.

The Applicant's Allegations

The applicant maintained that his right to personal liberty and security safeguarded by Article 19 of the Constitution was violated on the ground that he had no connection with either the coup attempt or the military officers attempting the coup; that he had no links with the FETÖ/PDY; that he was detained despite the lack of evidence; that strong indication of guilt did not exist; that he continued office and did not escape although some judges and prosecutors were suspended from office or detained following the coup attempt; that there was no risk of fleeing on the part of him; and that his detention was not proportionate. In this scope, the applicant requested his release and sought compensation.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

According to Article 19 § 3 of the Constitution, individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. Accordingly, detention of a person only depends on "the presence of a strong indication of guilt." For detention, an accusation should be supported with convincing evidence that can be regarded as strong. The nature of the facts and information which can be considered as convincing evidence is to a large extent based on the particular circumstances of a case.

For an initial detention, it may not always be possible to substantiate a strong indication of guilt with all relevant evidence. Another purpose of detention is to advance the criminal investigation and/or case by means of verifying or refuting the suspicions about the relevant person. It follows that it is not absolutely necessary to require that all relevant evidence be collected in the course of apprehension. The evidence or information forming the basis for an investigation cannot be required to be at the same level with the evidence or information that will be presented and discussed in further criminal proceedings and that is required for conviction.

Concerning the suspicion of guilt in the present case, it was noted in the detention order and in dismissal of the subsequent request for review that concrete evidence existed in the case file, and in those decisions referral was made particularly to the statements of suspects and to suspension of the applicant from office. In the bill of indictment against the applicant, it is noted that the applicant was a user of the "ByLock" mobile application, which is the digital platform through which the FETÖ/PDY members maintained secure communication among themselves.

In the judgment of *Aydın Yavuz and Others* (no. 2016/22169) dated 20 June 2016, the Plenary of the Constitutional Court has stated that, considering the features of the "ByLock" application established by the investigation authorities, its use or its instalment on electronic/mobile devices for use may be regarded as an indication for having a link with the FETÖ/PDY. Accordingly, the consideration of the use of "ByLock" application by the investigation and court authorities as a strong indication of guilt against the applicant who has been accused of membership of FETÖ/PDY cannot be regarded as unfounded or arbitrary. It also appears that some other suspects who were members of the judiciary and accused of being a member of the

FETÖ/PDY said in their statements that the applicant, who was also serving as a judge, had a link with the FETÖ/PDY and was a member of this structure. The suspects, E.B. and E.Y. respectively stated "the applicant had been participating in the meetings (in which judges and prosecutors who were members of this structure and who took office in the same period convened) held at various regions of Turkey every year" and that "the applicant had required them to give a certain part of their salaries for the structure". In this respect, it has been found established that there are strong indications regarding criminal suspicion on the part of the applicant.

On the other hand, it is requisite to determine whether the applicant's detention on remand due to the existence of strong criminal suspicion is proportionate or not. The Constitutional Court's review in this respect must be carried out on the basis of the detention process and the grounds thereof. It is not the Constitutional Court's duty to make an assessment as to what the most appropriate measure or precaution would be in the pursuit of justice but to review the constitutionality of the impugned interference (the applicant's detention in the present case). Accordingly, in determining whether the detention is proportionate or not, all characteristics of the concrete case including general circumstances prevailing at the time of detention must be taken into consideration.

The risk of fleeing in the course of or after the coup attempt by taking advantage of its aftermath or the risk of tampering with the evidence –on the part of the persons who involved in the coup attempt or who, in spite of not having involved in the coup attempt, have a link with the FETÖ/PDY – is much more present compared to offences committed in ordinary times. Moreover, the facts that the FETÖ/PDY infiltrated almost all public institutions and organizations in the country, that it has been operating in more than 150 countries, and that it has significant international alliances would facilitate, to a great extent, fleeing of FETÖ/PDY suspects and their sheltering abroad.

In the present case, the detention order was based on the fact that the imputed offence is among the offences "of which ground for detention may be presumed by virtue of the Law". It has been also stated in the detention order that applying conditional bail would be insufficient, given the lower and upper limits of penalty prescribed in the Law with respect to the imputed offence and the gravity of the act performed by the applicant, and that, therefore, the detention measure is proportionate. In dismissal of the

applicant's objection to detention, it has been stated that; evidence with respect to the imputed act has not been completely collected, examinations of evidence and digital data relating to the coup attempt obtained throughout the country have not been completed, the coup attempt has not been thoroughly uncovered, and that, therefore, at this stage of the case conditional bail would be insufficient against the risk of the applicant's fleeing and/or tampering with the evidence.

In this respect, having regard to the general conditions prevailing at the time when the applicant's detention was ordered, the above-mentioned specific circumstances of the present case and the decisions on the applicant's detention and on the dismissal of the subsequent request for review, it has been observed that the grounds for the applicant's detention due to the risk of fleeing and tampering with the evidence, as well as for the existence of strong criminal suspicion, had factual basis.

For the above-mentioned reasons, the application has been declared inadmissible for being manifestly ill-founded.

5. The judgment finding a violation of the right to liberty and security on the detention ordered without considering the minor status of the applicant

Furkan Omurtag Judgment **(App. No. 2014/18179, 25/10/2017)**

The Facts

The applicant, who was a minor at the relevant time, was detained on remand for attempted theft. The applicant's objections against his detention were dismissed by the Magistrate Judge's Offices.

The chief public prosecutor's office indicted the applicant for malicious damage of property, criminal trespass to a residence, and attempted theft.

After having lodged an individual application, the applicant was released by the competent criminal court. At the end of the trial, the court imposed a fine on him for theft of the material within the fixtures of a building, criminal trespass to a residence, and malicious damage of property.

The Applicant's Allegations

The applicant maintained; that he was detained on remand despite being a minor, that his detention was unlawful and disproportionate, and that the charges against him were not of a severe nature which would necessitate

his detention. He accordingly alleged that his right to liberty and security was violated.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. Article 19 §§ 2 and 3 provide that individuals may be detained under the circumstances enumerated therein with due process of law. Therefore, the right to liberty and security may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which general standards with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to establish whether a restriction complies with the requirements enshrined in Article 13 of the Constitution, i.e., the requirements of being prescribed by law; relying on one or more valid reasons specified in the relevant articles of the Constitution; and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, only "individuals against whom there exists strong indication of guilt" may be detained. Under the same provision, individuals against whom there exists strong evidence of having committed an offence may be detained only upon a detention order given by a judge and solely for the purposes of preventing escape or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention.

Regard being had to the fact that the applicant was arrested running from the police upon committing a criminal act, it has been considered that the existence of strong criminal suspicion on the part of the applicant, as well as the risk of his fleeing had factual basis.

It must be also determined whether the applicant's detention was proportionate or not, bearing in mind that he was a minor at the material time.

As regards the detention of minors, it must be taken into consideration in light of the relevant international conventions and instruments that detention is the last remedy to be applied for the minors and if it is inevitable to have recourse to this measure, it must be discontinued in the shortest

time possible. Nevertheless, this principle cannot be construed that the minors can in no way be detained. As also underlined in a Recommendation adopted by the Committee of Ministers of the Council of Europe addressed to the member states, the detention measure may be applied in exceptional cases where minors who are of relatively older age have committed very serious offences.

In the present case, the detention order against the applicant did not involve an assessment revealing that his status as a minor was taken into consideration. It cannot be therefore concluded that in ordering the applicant's detention, the principles enshrined in the international conventions and instruments were complied with and in finding the other available measures insufficient, due regard was paid to the applicant's age.

Besides, considering the fact that minors may be detained only in exceptional cases of very serious offences, the court ordering the applicant's detention failed to demonstrate to what extent the offence of attempted theft was serious in the specific circumstances of the present case.

Furthermore, the offence imputed to the applicant cannot be considered to be serious in its nature when one considers the penalty imposed. As a matter of fact, at the end of the trial the applicant was only sentenced to a fine for the imputed offences. Regard being had to the relevant legal provision providing that in case of failure to pay a fine imposed on a minor, this penalty cannot be converted into imprisonment, the applicant's detention cannot be considered proportionate as to the seriousness of the offence and severity of the sanction.

Consequently, the Constitutional Court found a violation of Article 19 § 3 of the Constitution safeguarding the right to personal liberty and security. Other complaints were found inadmissible.

6. The judgment on detention of the applicant who is a member of Parliament (Gülser Yıldırım)

***Gülser Yıldırım Judgment* [PA], (App. No. 2016/40170, 16/11/2017)**

The Facts

The applicant is currently a member of the Parliament. She was elected from the Mardin district as the candidate of the HDP on 1 November 2015. A number of investigations were conducted against the applicant by various

chief public prosecutor's offices for certain offences allegedly committed when she was an MP, and nine separate motions were drawn up for lifting her parliamentary immunity.

In the meantime, a provisional article was added to the Constitution for lifting parliamentary immunities for the pending motions (Law no: 6718, article 1, published at the official gazette on 8 June 2016). Provisional article 20 provides that parliamentary immunity shall not be applicable to motions for lifting immunities submitted to competent authorities by 20 May 2016, the date of adoption of this provisional article by the Grand National Assembly of Turkey ("the GNAT").

Because the investigation files against the applicant also fell within the scope of the provisional article, the necessary action was taken, and those files were joined and handled by the Diyarbakır Chief Public Prosecutor's Office ("the Prosecutor's Office").The applicant was summoned by the investigation authorities for taking her statement. Numerous summons issued to that end were served on the applicant on 23 July, 17 August and 11 October 2016. However, she failed to comply with these summons. Furthermore, after the constitutional amendment proposal concerning the parliamentary immunity had been brought before the GNAT, the Co-Chairperson of the HDP expressly noted in his speech that absolutely no MP would appear before the prosecutor's offices for giving statement.

On 4 November 2016, the applicant was taken into custody at her house located in Mardin and subsequently taken to the Prosecutor's Office. On the same date the Prosecutor's Office referred the applicant to the Diyarbakır 2nd Magistrate Judge's Office with a request of her detention. By the decision of the Judge's Office dated 4 November 2016, the applicant's detention was ordered for her alleged membership of an armed terrorist organization and for public incitement to commit a criminal offence.

On 25 January 2017, the Prosecutor's Office indicted the applicant for the offences of establishing or managing an armed terrorist organization, making propaganda of a terrorist organization, publicly inciting hatred and hostility, praising an offence and offender, publicly inciting to commit an offence, and inciting unlawful meetings and demonstration marches.

At the hearing of 22 September 2017, the 3rd Chamber of the Mardin Assize Court separated the case concerning the offence of establishing and managing an armed terrorist organization. In the preliminary examination

over the separated case-file no. E.2017/587 on 25 October 2017, continuation of the applicant's detention was ordered. On the other hand, the Assize Court terminated the detention within the scope of the case-file no. E. 2017/275 on 15 November 2017 with respect to the accusation of publicly inciting to commit an offence. Both cases against the applicant were pending before the first instance court as of the date when the individual application lodged by her was examined by the Constitutional Court. She is still detained on remand within the scope of the case-file no. E. 2017/587.

The Applicant's Allegations

The applicant maintained that her detention was unlawful and that her right to liberty and security was breached on the ground that the acts committed by her fell into the scope of freedom of expression, the right to hold meetings and demonstration marches, and the right to carry out political activities. She claimed that while her expressions among the public or her calls made in various platforms should have been considered under the freedom of expression as she was a political figure, they were mistakenly regarded to constitute an offence.

Noting that the detention order and the dismissal of the request for review of this order were unreasoned and that her allegations were not discussed therein, the applicant claimed that she was deprived of liberty without being provided with a justification as to the ground of her detention and an explanation as to why conditional bail would remain insufficient.

Stating that she was unable to carry out her political activities as an MP for being detained on remand, the applicant also alleged that the detention order aimed at preventing her political activities as a HDP's MP and punishing her due to these activities.

She also complained that her apprehension was unlawful and that her access to investigation file was restricted.

The Constitutional Court's Assessment

Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, certain circumstances under which individuals may be deprived of liberty are set

forth, also provided that the conditions of detention must be prescribed by law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Strong indication of guilt appears only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In cases where there are serious claims that the acts imputed to the suspect or to the accused fall within the scope of the fundamental rights and freedoms, which are indispensable for democratic social order, such as freedom of expression, freedom of the press, freedom of assembly and the rights to elect, to be elected and to carry out political activities, or in cases where such a situation is evident from the circumstances of the concrete case, the judicial authorities ordering detention must apply a higher scrutiny in determining the existence of strong criminal suspicion.

In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court's duty to review

whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case.

In line with these general principles, it must be primarily assessed whether there is a strong indication of guilt on the part of the applicant in the present case.

Referring to the facts within the scope of the "6-7 October events" and "ditch events" and certain acts committed by the applicant, the Magistrate Judge's Office ordering the applicant's detention concluded that there was strong criminal suspicion on the part of the applicant for the alleged membership of an armed terrorist organization, the PKK, and for publicly inciting to commit an offence.

In the present case, the investigation authorities found that when an armed conflict erupted in Kobani between the PYD—considered to be the PKK's Syrian wing—and the DAESH during the Syrian civil war, a call was made on 5 October 2014 through social media account of high-level heads of the PKK to provoke people to defend Kobani and to occupy cities in Turkey for this cause. The next day, a public statement was made through the HDP's social media account that its Central Executive Board had convened with the agenda of Kobani events. Through this statement people were also called to take immediate action and to pour out into the streets for supporting those who had been already fighting to protect regions. It was also stated therein "Everywhere is Kobani from now on. We call you to RESIST FOR AN INDEFINITE PERIOD OF TIME". In the meantime and thereafter, continuous announcements and calls were made through a web site operating under the PKK's guidance urging people to uprise and engage in armed conflicts on streets with security forces. Upon these calls, mass violent acts took place. These violent acts —which created a great public disturbance and resulted in a great number of casualties including many dead and vandalizing of public and private property—started on 6 October 2014, lasted for days and spread to many regions of the country. The applicant did not denounce this call or stated that it was made outside her will; on the contrary, she made statements that were in support of the call in question.

The applicant should have foreseen that the call made for uprising in favour of a terrorist organization upon the conflicts that took place in Kobani between two terrorist organizations might have led to widespread mass violent acts in Turkey, which would undoubtedly disturb the public order.

It is also clear that the civil war in Syria posed a heavy threat to the national security of Turkey due to its location. It is undeniable that in this atmosphere, such a call, which was made from the social media account of the HDP on behalf of the HDP's Central Executive Board, would highly influence a certain part of the community. As a matter of fact, the mass violent acts started on right after these calls were made and spread gradually over time. Accordingly, the investigation authorities relied on factual and legal grounds while establishing a causal link between the calls made on behalf of the HDP's Central Executive Board and the PKK, as well as between the calls and the violent acts in question.

Furthermore, during the period when the terrorist events known as "ditch events" occurred, the PKK tried to gain dominance over some parts of the provinces located in the east and south-eastern regions of Turkey, among which there was also the Dargeçit District of Mardin. To that end, the PKK dug ditches, constructed barricades and planted bombs and explosives in these barricades. The security officers carried out operations for the purpose of filling these ditches and removing the barricades, thereby returning the life to normal. In this scope, operations were carried out also in the Dargeçit District. During these operations, many heavy weapons and explosives were seized, the ditches were filled, the barricades were removed, and many terrorists were neutralized.

It has been established that when the armed conflicts had intensified, the applicant held many phone conversations and exchanged messages with one of the terrorists who were neutralized in the Dargeçit District. The investigation authorities established that the terrorist in question was the member of the PKK and was responsible for the rural area in the Dargeçit District. According to the messages between the applicant and this terrorist, the terrorist asked for help by telling that they were in a difficult situation, and he especially asked for the people living in the region to be directed to specific areas for support. The investigation authorities also determined that the applicant responded to the requests of the terrorist. Therefore, regard being had to the facts above and the content of the communication, it is concluded that the investigation authorities' assessments those communications had been made within the scope of the terrorist organizational activities had factual basis.

The investigation authorities also established that in her various speeches, the applicant referred to the PKK terrorists killed during the armed

conflicts as "comrades" and "martyrs", and she described those situations as "massacres" and "executions". She also used the expressions "*We will be in the pursuit of the rights of our martyrs until the end*". In this way, the applicant praised the armed terror of the PKK and used the words legitimizing this terror and told that she was grateful to the terrorists who were killed. The applicant made those speeches during a time when the PKK increased its terrorist attacks in many parts of the country, including in Mardin which is the electoral district of the applicant. Accordingly, the applicant made those speeches in a fragile time that the security of the country was under high risk due to such terrorist activities. In this respect, given the applicant's political position, the content, time, and place of her speeches, it cannot be said that consideration of these speeches by the investigation authorities as a strong indication of guilt was unfounded.

Therefore, it must be concluded that there is a strong indication of guilt on the part of the applicant.

Following this assessment as to the prerequisite for detention, it must also be examined whether the grounds for detention are present in the concrete case.

The detention order issued in respect of the applicant was based on the severity of the penalty provided in the law for the alleged membership of an armed terrorist organization and on the fact that the offence was among the catalogue crimes. "Membership of an armed terrorist organization" and "inciting to commit an offence" on accounts of which the applicant was arrested are the types of offences as a result of which heavy penalties would be imposed under the Turkish criminal law. Given the severity of the punishment set forth in the law for the imputed offence, it may be concluded that the risk of fleeing exists. Furthermore, the membership of an armed terrorist organization is among the offences enumerated in the Law that the ground for detention may be presumed *ipso facto*. In addition, the Diyarbakır Chief Public Prosecutor's Offices summoned the applicant many times on different dates for the purpose of taking her statement, however, she failed to comply with these summons. After the constitutional amendment proposal concerning the parliamentary immunity had been brought before the GNAT, the Co-Chairperson of the HDP expressly said in his speech that absolutely no MP would appear before the prosecutor's offices for giving statement. Accordingly, it can be said that this attitude of the applicant was beyond a personal approach; it was rather a planned political attitude that

aimed at obstructing the investigation and prosecution processes, and this attitude of the applicant was likely to continue at the subsequent stages. As a result, it is concluded that the grounds for the applicant's detention due to the risk of fleeing had factual basis.

Lastly, it must be determined whether the detention order issued in respect of the applicant was proportionate or not.

In this scope, the applicant stated that her detention prevented her from carrying out political activities. Referring to certain judgments of the Constitutional Court, the applicant also maintained that her detention was disproportionate.

The Constitutional Court has not given any judgment that the detention of an incumbent MP would be unlawful. In this Court's previous judgments in the applications of *Kemal Aktaş and Selma Irmak*, *Faysal Sarıyıldız* and *İbrahim Ayhan,* no examination was made concerning this peculiar aspect, given that those applicants were elected to the Parliament after they were detained on remand and that theydid not submit any allegation as to the "lawfulness of their initial detention". Furthermore, in the applications of *Mehmet Haberal* and *Mustafa Ali Balbay,* who were also elected as MPs after detention, the Court found the applicants' claims that they were detained despite "the lack of required conditions and without the existence of strong suspicion" manifestly ill-founded.

In its previous judgments concerning MPs' detention on remand, the Constitutional Court only examined the complaints concerning "the unreasonable length of detention"in connection with the rights to be elected and to carry out political activities. In those judgments finding a violation of the right to personal liberty and security concerning MPs, the length of the detention period was taken into account together with the public interest inherent in the exercise of the right to be elected and to carry out political activities (4 years 3 months and 22 days in the application *Mehmet Haberal*, 4 years and 5 months in the application*Mustafa Ali Balbay*, 4 year 8 months and 16 days in the application *Kemal Aktaş and Selma Irmak*, 4 years 6 months and 15 days in the application *Faysal Sarıyıldız*, 3 years 2 months and 26 days in the application *İbrahim Ayhan*, and 3 years 10 months and 5 days in the application *Gülser Yıldırım*).

There is no constitutional provision providing that MPs cannot be detained on remand in the event that parliamentary immunity is lifted or that a

constitutional exception has been introduced in this regard as is the case before us. Contrary to what the applicant submitted, the Constitutional Court did not make any assessment in the above-mentioned judgments that the MPs could not be detained. Accordingly, being an MP does not constitute in itself a protection against detention. Nevertheless, in cases where there are serious allegations that the acts imputed to the MPs fall into the scope of the right to carry out political activities, the courts ordering detention must apply a higher scrutiny in determining the existence of strong criminal suspicion.

Similarly, the European Court of Human Rights ("the ECtHR") made no assessment that the detention measure cannot be applied in respect of the MPs under any circumstances or that such a detention would be automatically disproportionate. On the contrary, in the application *Sakık and Others v. Turkey* (no. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94 and 23883/94, 23/5/1996), the European Commission of Human Rights ("the Commission") pointed out that the applicants, whose legislative immunities were lifted and who were subsequently detained while serving as MPs on charges of disrupting the unity and the integrity of the State, were convicted of making separatist propaganda and/or membership of an armed organization, and, therefore, it rejected the allegation as to the unlawfulness of detention. In the course of the examination before the ECtHR, the applicants stated that they accepted the conclusion reached by the Commission. According to the ECtHR, it was explicit that Article 5 § 1 of the European Convention on Human Rights was not violated (see *Sakık and Others v. Turkey*, no. 23878/94-23879/94-23880/94, 26/11/1997, § 40).

Furthermore, as a detention order was issued a long time after the date of the alleged offences, it must be examined in the present case whether the detention –as an element of the principle of proportionality– was "necessary" or not during the investigation.

First of all, it must be borne in mind that pursuant to the first sentence of Article 83 § 2 of the Constitution, the applicant could not be detained when she enjoyed parliamentary immunity. The constitutional amendment introducing an exception to parliamentary immunity for the pending motions entered into force on 8 June 2016. Thereafter, the investigation files against the applicant were sent to the relevant chief public prosecutor's offices. The applicant was detained for approximately 5 months after the entrance into force of the provisional article in question. It appears that after the provisional article became effective, the necessary actions were taken

in due time: motions were drawn up concerning the existing investigation files initiated at various jurisdictional districts, the files were sent to the competent Prosecutor's Office and were joined; and summons were issued for taking statement of the applicant. Hence, the public authorities, in particular the investigation authorities, cannot be said to have remained inactive during the investigation process.

Regard being had to the above-mentioned facts as to the proportionality, the competent court's conclusion that the detention measure is proportionate and conditional bail would remain insufficient on the basis of the severity of punishment prescribed for the imputed offences and the gravity of the acts committed by the applicant cannot be regarded as unfounded or arbitrary.

For these reasons, the Constitutional Court declared this part of the application inadmissible for being manifestly ill-founded.

Alleged Violations of the Freedom of Expression, the Rights to be Elected and to Carry out Political Activities

Taking into consideration its assessment as to the alleged unlawfulness of detention, the Constitutional Court declared the applicant's allegations under this heading inadmissible for being manifestly ill-founded.

Alleged Unlawfulness of Apprehension

The Constitutional Court declared the applicant's allegations under this heading inadmissible for non-exhaustion of domestic remedies.

Allegations on Restriction of Access to the Investigation File

The Constitutional Court declared this allegation inadmissible for being manifestly ill-founded.

7. The judgment on detention of the applicant who is a member of Parliament (Ayhan Bilgen)

***Ayhan Bilgen Judgment* [PA], (App. No. 2017/5974, 21/12/2017)**

The Facts

The applicant is currently a member of the Parliament. He was elected from the Kars district as the candidate of the HDP on 7 June 2015 and 1 November 2015.

An investigation was conducted against the applicant by the Ankara Chief Public Prosecutor's Office for certain offences allegedly committed by him

when he was an MP, and two separate motions were drawn up for lifting his parliamentary immunity.

In the meantime, a provisional article was added to the Constitution for lifting parliamentary immunities for the pending motions (Law no. 6718, Article 1, published in the Official Gazette on 8 June 2016). Provisional Article 20 provides that parliamentary immunity shall not be applicable to motions for lifting immunities submitted to competent authorities by 20 May 2016, the date of adoption of this provisional article by the Grand National Assembly of Turkey ("the GNAT").

Because the investigation files against the applicant also fell within the scope of the provisional article, they were sent to the Ankara Chief Public Prosecutor's Office for necessary action. Afterwards, the investigation files were referred to the Diyarbakır Chief Public Prosecutor's Office ("the Prosecutor's Office") for lack of jurisdiction.

On 29 January 2017, the applicant was taken into custody and subsequently taken to the Prosecutor's Office. On the same date the Prosecutor's Office referred the applicant to the Diyarbakır 4th Magistrate Judge's Office with a request for his detention. The applicant was charged with the call made on behalf of the Central Executive Board –he is a member of this board– through the social media account of the HDP within the scope of "the 6-7 October events". The Judge's Office dismissed the request for the applicant's detention on the ground that "there was no evidence indicating that the applicant had been involved in posting the tweet nor did he give instruction in this respect, therefore it would not be proportionate to detain him in at this stage".

The Prosecutor's Office contested the decision of the Judge's Office. On 30 January 2017 the Diyarbakır 5th Magistrate Judge's Office accepted the claim of the Prosecutor's Office and held that an arrest warrant would be issued against the applicant.

On 31 January 2017, the applicant appeared before the Diyarbakır 5th Magistrate Judge's Office where his detention was ordered for his alleged membership of an armed terrorist organization.

On 8 February 2017, the Prosecutor's Office indicted the applicant for the offences of membership of an armed terrorist organization, inciting to commit an offence and contravening the Law on Meetings and Demonstrations.

On 8 September 2017, the 5th Chamber of the Diyarbakır Assize Court released the applicant.

The case against the applicant was pending before the first instance court as of the date when the individual application lodged by him was examined by the Constitutional Court.

The Applicant's Allegations

Maintaining that there was no strong indication of guilt on the part of him nor there was a concrete evidence showing that he committed an offence; that the investigation authorities failed to investigate whether he had attended the meeting of the Central Executive Board held at the material time or whether it had been decided at the relevant meeting that a call would be made for committing an offence; and that the detention order and the dismissal of the request for review of this order were unreasoned, the applicant claimed that his right to personal liberty and security was violated.

The applicant also alleged that the detention order did not aim at preventing offences, but preventing his political activities as a HDP's MP and reducing the opposition to silence.

The applicant also complained that his access to investigation file was restricted.

The Constitutional Court's Assessment

Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, certain circumstances under which individuals may be deprived of liberty are set forth, also provided that the conditions of detention must be prescribed by law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies

with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Strong indication of guilt appears only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case.

In line with these general principles, it must primarily be assessed whether there is a strong indication of guilt on the part of the applicant in the present case.

Having regard to the calls made on behalf of the Central Executive Board through the social media account of the HDP within the scope of "the 6-7 October events" and the applicant's being a member of the Central Executive Board, the Diyarbakır 5th Magistrate Judge's Office ordering the applicant's detention concluded that there was strong criminal suspicion on the part of the applicant for the alleged membership of an armed terrorist organization, the PKK.

In its judgment in the case of *Gülser Yıldırım*, the Constitutional Court stated that the investigation authorities had relied on factual and legal grounds

while establishing a causal link between the calls made on behalf of the HDP's Central Executive Board and the calls made by the PKK before and/or during "the 6-7 October events", as well as between the calls and the violent acts in question. The Court also draw attention to the fact that the applicant had not argued that the call had been made out of her will; on the contrary, she had made statements that were in support of the call in question.

There is no doubt that a call was made on behalf of the Central Executive Board through the social media account of the HDP by provoking people to pour out into streets and clash with the security forces and that the applicant was a member of the Central Executive Board. However, the applicant argued at all stages that he had had no will in the call in question. The applicant also consistently stated that no such decision had been taken at the meetings he had attended.

The investigation authorities have reached no factual finding as to the fact that the applicant was present at the meeting of the Central Executive Board when it was allegedly decided that the call in question would be made; that the applicant made statements in support of this call; and that therefore the call was made within his will. As a matter of fact, the Diyarbakır 4thMagistrate Judge's Office that dismissed the initial request for the applicant's detention also relied on the similar grounds.

Accordingly, in view of the available documents, it has been concluded that the investigation authorities could not find "a strong indication of guilt" in the present case.

In the presence of such a conclusion reached by the Constitutional Court, no separate examination is required for the applicant's other allegations as to whether the grounds for detention were present, whether the detention order issued against him was proportionate and whether his detention was unlawful.

For the reasons explained above, it must be held that the applicant's right to personal liberty and security under Article 19 § 3 of the Constitution was violated.

In addition, stating that due to his detention, he was restrained from taking part in legislative activities, which was directly related to his right to be elected, and he was unable to carry out political activities, the applicant alleged that his right to be elected in conjunction with his right to personal liberty and security was also violated. The Constitutional Court concluded

that as regards the applicant's main complaint, his right to personal liberty and security was violated. Therefore, in view of the circumstances of the present case, no separate examination was deemed necessary as to the applicant's right to be elected.

Alleged Restriction of Access to the Investigation File

The Constitutional Court Court declared this allegation inadmissible for being manifestly ill-founded.

8. The judgment on detention of the applicant who is the co-chairperson of the People's Democratic Party and a member of the Parliament (Selahattin Demirtaş)

***Selahattin Demirtaş Judgment* [PA], (App. No. 2016/25189, 21/12/2017)**

The Facts

The applicant is currently a member of the Parliament and the Co-Chairperson of the HDP. He was elected from the İstanbul district as the candidate of the HDP on 1 November 2015. A number of investigations were conducted against the applicant by various chief public prosecutor's offices for certain offences allegedly committed when he was an MP, and thirty one separate motions were drawn up for lifting his parliamentary immunity.

In the meantime, a provisional article was added to the Constitution for lifting parliamentary immunities for the pending motions (Law no. 6718, Article 1, published at the official gazette on 8 June 2016). Provisional article 20 provides that parliamentary immunity shall not be applicable to motions for lifting immunities submitted to competent authorities by 20 May 2016, the date of adoption of this provisional article by the Grand National Assembly of Turkey ("the GNAT").

Because the investigation files against the applicant also fell within the scope of the provisional article, the necessary action was taken, and those files were joined and handled by the Diyarbakır Chief Public Prosecutor's Office ("the Prosecutor's Office").

The applicant was summoned by the investigation authorities for taking his statement. Numerous summons issued to that end were served on the applicant on 12 July, 15 July, 28 July, 12 August, 6 September and 11 October 2016. However, he failed to comply with these summons. Furthermore, after

the constitutional amendment proposal concerning the parliamentary immunity had been brought before the GNAT, the applicant expressly noted in his speech that absolutely no MP would appear before the prosecutor's offices for giving statement.

On 4 November 2016, the applicant was taken into custody at his house located in Diyarbakır and subsequently taken to the Prosecutor's Office. On the same date the Prosecutor's Office referred the applicant to the Diyarbakır 2nd Magistrate Judge's Office with a request of his detention. By the decision of the Judge's Office dated 4 November 2016, the applicant's detention was ordered for his alleged membership of an armed terrorist organization and for public incitement to commit a criminal offence.

On 11 January 2017, the Prosecutor's Office indicted the applicant for the offences of establishing or managing an armed terrorist organization, making propaganda of a terrorist organization, praising an offence and offender, publicly inciting hatred and hostility, provocation to disobey the Law, organizing, conducting and participating in unlawful meetings and demonstration marches, participating in unlawful meetings and marches without arms and not dispersing willingly despite warnings, publicly inciting to commit an offence, and inciting unlawful meetings and demonstration marches.

On 2 February 2017, the 8th Chamber of the Diyarbakır Assize Court applied to the Ministry of Justice for the transfer of the applicant's case for public security reasons. The 5th Criminal Chamber of the Court of Cassation, upon examining the Ministry's request to that end, referred the case to the 19th Chamber of the Ankara Assize Court. The case was joined with another file, and then separated. Following these processes, the case was pending before the first instance court as of the date when this individual application is examined by the Constitutional Court. The applicant is still detained on remand within the scope of the case-file no. E. 2017/189.

The Applicant's Allegations

The applicant maintained that his detention was unlawful and that his right to liberty and security was breached on the ground that the acts committed by him fell into the scope of freedom of expression and the right to carry out political activities. He claimed that while the speeches he had made on different dates during the events such as meetings, press statements or conferences should have been considered under the freedom of expression

as he was a political figure, they were mistakenly regarded to constitute an offence.

Noting that the detention order and the dismissal of the request for review of this order were unreasoned and that his allegations were not discussed therein, the applicant claimed that he was deprived of liberty without being provided with a justification as to the ground of his detention and an explanation as to why conditional bail would remain insufficient.

Stating that he was unable to carry out his political activities as an MP for being detained on remand, the applicant also alleged that the detention order aimed at preventing his political activities as a HDP's MP and the Co-Chairperson of the party and punishing him due to these activities.

He also complained that his apprehension was unlawful and that his access to investigation file was restricted.

The Constitutional Court's Assessment

Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, certain circumstances under which individuals may be deprived of liberty are set forth, also provided that the conditions of detention must be prescribed by law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in

every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Strong indication of guilt appears only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In cases where there are serious claims that the acts imputed to the suspect or to the accused fall within the scope of the fundamental rights and freedoms, which are indispensable for democratic social order, such as freedom of expression, freedom of the press, freedom of assembly and the rights to elect, to be elected and to carry out political activities, or in cases where such a situation is evident from the circumstances of the concrete case, the judicial authorities ordering detention must apply a higher scrutiny in determining the existence of strong criminal suspicion.

In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case.

In line with these general principles, it must be primarily assessed whether there is a strong indication of guilt on the part of the applicant in the present case.

Referring to the facts within the scope of the "6-7 October events", "ditch events", the applicant's certain speeches and his activities within the Democratic Society Congress (DTK), the Diyarbakır 2nd Magistrate Judge's Office ordering the applicant's detention concluded that there was strong criminal suspicion on the part of the applicant for the alleged membership of an armed terrorist organization, the PKK, and for publicly inciting to commit an offence.

In the present case, the investigation authorities found that when an armed conflict erupted in Kobani between the PYD —considered to be the PKK's

Syrian wing— and the DAESH during the Syrian civil war, a call was made on 5 October 2014 through a social media account associated with the PKK to provoke people to defend Kobani and to occupy cities in Turkey for this cause. The next day, a public statement was made through the HDP's social media account that its Central Executive Board had convened with the agenda of Kobani events. Through this statement people were also called to take immediate action and to pour out into the streets for supporting those who had been already fighting to protect regions. It was also stated therein "Everywhere is Kobani from now on. We call you to RESIST FOR AN INDEFINITE PERIOD OF TIME". In the meantime and thereafter, continuous announcements and calls were made through a web site operating under the PKK's guidance urging people to uprise and engage in armed conflicts on streets with security forces. Upon these calls, mass violent acts took place. These violent acts —which created a great public disturbance and resulted in a great number of casualties including many dead and vandalizing of public and private property—started on 6 October 2014, lasted for days and spread to many regions of the country. The applicant did not denounce this call or stated that it was made outside his will; on the contrary, he stated that he stood behind the call in question.

The applicant should have foreseen that the call made for uprising in favour of a terrorist organization upon the conflicts that took place in Kobani between two terrorist organizations might have led to widespread mass violent acts in Turkey, which would undoubtedly disturb the public order. It is also clear that the civil war in Syria posed a heavy threat to the national security of Turkey due to its location. It is undeniable that in this atmosphere, such a call, which was made from the social media account of the HDP on behalf of the HDP's Central Executive Board, would highly influence a certain part of the community. As a matter of fact, the mass violent acts started on right after these calls were made and spread gradually over time. Accordingly, the investigation authorities relied on factual and legal grounds while establishing a causal link between the calls made on behalf of the HDP's Central Executive Board and the PKK, as well as between the calls and the violent acts in question.

Furthermore, during the period when the terrorist events known as "ditch events" occurred, the PKK tried to gain dominance over some parts of the provinces located in the east and south-eastern regions of Turkey. To that end, the PKK dug ditches, constructed barricades and planted bombs and

explosives in these barricades. The security officers carried out operations for the purpose of filling these ditches and removing the barricades, thereby returning the life to normal. During these operations, many heavy weapons and explosives were seized, the ditches were filled, the barricades were removed, and many terrorists were neutralized.

During this period, the applicant made speeches generally in places where the relevant events intensified. Furthermore, in his speeches on different dates, the applicant used expressions affirming the terrorist activities caused by the PKK. In this respect, given the applicant's political position, the content, time, and place of his speeches, it cannot be said that consideration of these speeches by the investigation authorities as a strong indication of guilt was unfounded.

Lastly, regard being had to the contents of the phone conversations alleged to have taken place between Sabri Ok, one of the high-level heads of the PKK terrorist organization and K.Y., who is stated to be a head of the terrorist organization, and between the applicant and K.Y., as well as in view of some other evidence, the consideration of the relevant authorities that the applicant has acted in accordance with the instructions of the heads of the terrorist organization cannot be said to be devoid of factual basis.

Therefore, it must be concluded that there is a strong indication of guilt on the part of the applicant.

Following this assessment as to the prerequisite for detention, it must also be examined whether the grounds for detention are present in the concrete case.

The detention order issued in respect of the applicant was based on the severity of the penalty provided in the law for the alleged membership of an armed terrorist organization and on the fact that the offence was among the catalogue crimes. "Membership of an armed terrorist organization" and "inciting to commit an offence" on accounts of which the applicant was arrested are the types of offences as a result of which heavy penalties would be imposed under the Turkish criminal law. Given the severity of the punishment set forth in the law for the imputed offence, it may be concluded that the risk of fleeing exists. Furthermore, the membership of an armed terrorist organization is among the offences enumerated in the Law that the ground for detention may be presumed *ipso facto*.

In addition, the Diyarbakır Chief Public Prosecutor's Offices summoned the applicant many times on different dates for the purpose of taking

his statement, however, he failed to comply with these summons. After the constitutional amendment proposal concerning the parliamentary immunity had been brought before the GNAT, the applicant expressly said in his speech that absolutely no MP would appear before the prosecutor's offices for giving statement. Accordingly, it can be said that this attitude of the applicant was beyond a personal approach; it was rather a planned political attitude that aimed at obstructing the investigation and prosecution processes, and this attitude of the applicant was likely to continue at the subsequent stages. As a result, it is concluded that the grounds for the applicant's detention due to the risk of fleeing had factual basis.

Lastly, it must be determined whether the detention order issued in respect of the applicant was proportionate or not.

In this scope, the applicant stated that his detention prevented him from carrying out political activities. Referring to certain judgments of the Constitutional Court, the applicant also maintained that his detention was disproportionate.

The Constitutional Court has not given any judgment that the detention of an incumbent MP would be unlawful. In this Court's previous judgments in the applications of *Kemal Aktaş and Selma Irmak*, *Faysal Sarıyıldız* and *İbrahim Ayhan,* no examination was made concerning this peculiar aspect, given that those applicants were elected to the Parliament after they were detained on remand and that theydid not submit any allegation as to the "lawfulness of their initial detention". Furthermore, in the applications of *Mehmet Haberal* and *Mustafa Ali Balbay,* who were also elected as MPs after detention, the Court found the applicants' claims that they were detained despite "the lack of required conditions and without the existence of strong suspicion" manifestly ill-founded.

In its previous judgments concerning MPs' detention on remand, the Constitutional Court only examined the complaints concerning "the unreasonable length of detention" in connection with the rights to be elected and to carry out political activities. In those judgments finding a violation of the right to personal liberty and security concerning MPs, the length of the detention period was taken into account together with the public interest inherent in the exercise of the right to be elected and to carry out political activities (4 years 3 months and 22 days in the application *Mehmet Haberal*; 4 years and 5 months in the application*Mustafa Ali Balbay*; 4 year 8

months and 16 days in the application *Kemal Aktaş and Selma Irmak*; 4 years 6 months and 15 days in the application *Faysal Sarıyıldız*; 3 years 2 months and 26 days in the application *İbrahim Ayhan*; and 3 years 10 months and 5 days in the application *Gülser Yıldırım)*.

There is no constitutional provision providing that MPs cannot be detained on remand in the event that parliamentary immunity is lifted or that a constitutional exception has been introduced in this regard as is the case before us. Contrary to what the applicant submitted, the Constitutional Court did not make any assessment in the above-mentioned judgments that the MPs could not be detained. Accordingly, being an MP does not constitute in itself a protection against detention. Nevertheless, in cases where there are serious allegations that the acts imputed to the MPs fall into the scope of the right to carry out political activities, the courts ordering detention must apply a higher scrutiny in determining the existence of strong criminal suspicion.

Similarly, the European Court of Human Rights ("the ECtHR") made no assessment that the detention measure cannot be applied in respect of the MPs under any circumstances or that such a detention would be automatically disproportionate. On the contrary, in the application *Sakık and Others v. Turkey* (no. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94 and 23883/94, 23/5/1996), the European Commission of Human Rights ("the Commission") pointed out that the applicants, whose legislative immunities were lifted and who were subsequently detained while serving as MPs on charges of disrupting the unity and the integrity of the State, were convicted of making separatist propaganda and/or membership of an armed organization, and, therefore, it rejected the allegation as to the unlawfulness of detention. In the course of the examination before the ECtHR, the applicants stated that they accepted the conclusion reached by the Commission. According to the ECtHR, it was explicit that Article 5 § 1 of the European Convention on Human Rights was not violated (see *Sakık and Others v. Turkey*, no. 23878/94-23879/94-23880/94, 26/11/1997, § 40).

Furthermore, as a detention order was issued a long time after the date of the alleged offences, it must be examined in the present case whether the detention –as an element of the principle of proportionality– was "necessary" or not during the investigation.

First of all, it must be borne in mind that pursuant to the first sentence of Article 83 § 2 of the Constitution, the applicant could not be detained

when he enjoyed parliamentary immunity. The constitutional amendment introducing an exception to parliamentary immunity for the pending motions entered into force on 8 June 2016. Thereafter, the investigation files against the applicant were sent to the relevant chief public prosecutor's offices. The applicant was detained for approximately 5 months after the entrance into force of the provisional article in question. It appears that after the provisional article became effective, the necessary actions were taken in due time: motions were drawn up concerning the existing investigation files initiated at various jurisdictional districts, the files were sent to the competent Prosecutor's Office and were joined; and summons were issued for taking statement of the applicant. Hence, the public authorities, in particular the investigation authorities, cannot be said to have remained inactive during the investigation process.

Regard being had to the above-mentioned facts as to the proportionality, the competent court's conclusion that the detention measure is proportionate and conditional bail would remain insufficient on the basis of the severity of punishment prescribed for the imputed offences and the gravity of the acts committed by the applicant cannot be regarded as unfounded or arbitrary.

For these reasons, the Constitutional Court declared this part of the application inadmissible for being manifestly ill-founded.

Alleged Violations of the Freedom of Expression, the Rights to be Elected and to Carry out Political Activities

Taking into consideration its assessment as to the alleged unlawfulness of detention, the Constitutional Court declared the applicant's allegations under this heading inadmissible for being manifestly ill-founded.

Alleged Unlawfulness of Apprehension

The Constitutional Court declared the applicant's allegations under this heading inadmissible for non-exhaustion of domestic remedies.

Allegations on Restriction of Access to the Investigation File

The Constitutional Court declared this allegation inadmissible for being manifestly ill-founded.

E. THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. The judgment concerning that the applicant's being forced to leave work due to HIV infection violated the rights to protect the individual's material and spiritual entity and to respect for private life

***T. A. A. Judgment* (App. No: 2014/19081, 1/2/2017)**

The Facts

On 14 February 2005, the applicant started to work as a pipe profile manufacturing operator in a company operating in the field of plastic pipe and profile manufacturing. He was diagnosed with the human immunodeficiency virus (HIV) in December 2006.

The on-site doctor asked the Medical Faculty of the Ege University, where the applicant being suspended from work for six months in spite of being paid was receiving treatment, whether his situation constituted an impediment to work. In the response given it was noted that the health condition of the applicant did not constitute any obstacle to work at any job and he had no disabilities in respect thereof.

On 26 January 2009, the applicant left work by submitting a resignation letter, and signed a certificate of quittance declaring he had no receivables from the relevant workplace.

By his petition of 5 November 2009, the applicant filed an action of debt against the company he used to work before the 2nd Chamber of the Karşıyaka Labor Court ("the Labor Court"). The Labor Court qualified the action as an action for debt and compensation for non-pecuniary damage based on Article 5 of the Law No. 4857.

By the decision of the Labor Court dated 24 February 2011, it was noted that the applicant's allegation that his private life had been violated was not substantiated and accordingly rejected his claim for non-pecuniary compensation. In terms of the compensation claimed for the prohibition of discrimination, the Labor Court indicated in its decision that it was found established that the applicant was paid his salary although he was not caused to work for five or six months, and that the applicant's being precluded from performing his obligation to work and being suspended

from work, as well as in employment relation the employer's liability to pay salary, were discriminatory in nature. It was consequently held that the employer had contravened the obligation of equal treatment, and the compensation claimed was partially accepted.

The decision was quashed, upon the appeal of the parties, by the judgment of the 9th Civil Chamber of the Court of Cassation dated 1 October 2013, by considering that "the employer acted with the motive of protecting his other employees…"

Upon the retrial held following the quashing judgment, the Labor Court complied with the quashing judgment and dismissed the action with its decision of 20 March 2014.

This decision was upheld by the 9th Civil Chamber of the Court of Cassation by its judgment of 24 September 2014.

The Applicant's Allegations

The applicant alleged that he was primarily suspended from his workplace and subsequently dismissed from work wrongfully on the ground of his health condition and this situation constituted a discriminatory treatment. He also maintained that the grounds on which the judicial authorities relied in their decisions dismissing the action would pose an obstacle for him to find work, which may cause serious problems to be in breach of the right to life and the right to have access to treatment with respect to the treatment of his disease requiring a high cost. He accordingly alleged that his rights enshrined in the Articles 10, 17, 20, 35, 36, 40 and 49 of the Constitution were violated. He further maintained that in case of a public trial, his work life would end up permanently and he accordingly requested that his trial be held closed to the third parties due to his fear that his case, which was not common in nature, may attract attention of the public especially of the journalists. However, his request was rejected by the domestic court without any justification. He therefore alleged that Articles 20 and 36 of the Constitution were violated and there was a breach of his right to a fair trial as his trial was not concluded within a reasonable time.

The Court's Assessment

In brief, the Constitutional Court made the following assessments within the scope of the allegations:

a. Alleged violation of the right to respect for private life and the right to protect and develop material and spiritual entity assessed in conjunction with the principle of equality due to the dismissal of the action brought for receiving compensation for discrimination

Even if it may be asserted that the applicant was subject to a different treatment which was not shown to any of his workmates and which was more convenient and even advantageous for him given the fact that the applicant was paid his salary during the period he was not allowed to work and got his receivables when he left work, it must be in the first place recalled that the applicant, who requires a continuous and regular income to cover his lifelong treatment, lost his job by which he could obtain this income not due to the legal reasons stipulated in the Law No. 4857 but for suffering from HIV positive. Therefore, it turns out that the applicant was subject to a different treatment in a negative sense.

In their decisions, the Court of Cassation and the Labor Court focused on the "contagious" nature of the applicant's disease and therefore considered that the only solution to prevent this risk from occurring was to suspend the applicant from work. However, in the relevant decisions, it was not taken in consideration whether the employer had the obligation to assess the opportunity to make the applicant work in another position that would not pose a risk to the other workers. Whereas according to witness statements, both the on-site doctor gave suggestions to the employer to employ the worker in another position and the Manager of the Staff and Financial Affairs informed the employer that the applicant may be tasked with performing sales calls in an outside position. It was also indicated in the report of the expert assigned by the court that the employer's duty was to charge the work in another position which was not risky for his health condition. However, it appears that the employer failed to make an assessment as to whether there was such a position at the workplace and if any, whether the applicant's qualifications were sufficient for this position. Besides, it has been observed that in the decisions of the Court of Cassation and the Labor Court, no assessment as to the obligation to look for alternative positions at the workplace was done and no fair balance was therefore struck between the conflicting interest of the employer and the employee.

Consequently, it has been established in the first place that the applicant's founded allegation that he was unjustly forced to leave work was not dealt with in the decisions of the first instance court and in the second

place that there was no assessment, in these decisions, concerning the obligation to look for alternative positions at the workplace. It has been therefore concluded that the public authorities failed to fulfill their positive obligations in respect of the protection of the material and spiritual entity of the person and the right to respect for private life.

For the reasons mentioned above, the Constitutional Court has held that the applicant's right to protect his material and spiritual entity guaranteed under Article 17 of the Constitution and his right to respect for private life guaranteed under Article 20 thereof were violated.

b. Alleged violation of the right to respect for private life due to the rejection of the applicant's request for holding of his trial closed to the third parties

Considering that people with HIV infection are a weak group that has been exposed to prejudice and condemnation for a long time and that in case of being subject to exclusion, stigmatization and prejudice especially in the business life, its effects on people may be much more devastating, the applicant's request for confidentiality is of reasonable and defensible nature within the scope of the right to respect for private life.

Although it is stated by the Labor Court that the request for confidentiality is denied due to the nature of the complaint petition, the relevant statement is ambiguous and is far from explaining the concrete reasons why the confidentiality decision was not given. It appears that although same allegations were put forth at the appellate stage, any justification on this matters was not included in the appellate judgment. In this sense, it must be accepted that the decision and judgment in question did not include relevant and sufficient justification on the matter.

For the reasons mentioned above, the Constitutional Court held that the applicant's right to protection of personal data, which is one of the elements of the right to respect for private life guaranteed under Article 20 of the Constitution, was violated.

c. Alleged violation of the right to a fair trial due to the unreasonable length of proceedings

Given the pre-designated principles such as the complexity of the proceedings and the level of jurisdiction, the attitudes shown by the parties and the relevant authorities in the proceedings and the nature of the applicant's benefit in expeditious conclusion of the proceedings and the

judgments rendered by the Constitutional Court in similar applications, it has been concluded that the length of proceedings lasting for 4 years and 10 months in the present incident is not reasonable.

For the reasons stated above, the Constitutional Court held that the right to a trial within a reasonable time guaranteed under Article 36 of the Constitution was violated.

2. The inadmissibility decision concerning the dismissal of the applicant who was a judge from profession, within the scope of the measures taken following the coup attempt

***Murat Hikmet Çakmakcı Judgment* (App. No. 2016/35094, 15/2/2017)**

The Facts

While serving as the Judge of Sarıevler, it was decided within the scope of the Decree Law no. 667 and the decision of the High Council of Judges and Prosecutors ("the HCJP) dated 31 August 2016 that the applicant was found established to be in cohesion or connection with the FETÖ/PDY. He was not therefore found eligible to remain in profession and accordingly dismissed from his office, within the scope of the measures taken following the coup attempt taking place at the night of 15 July 2016.

The applicant applied to the HCJP for the revocation of the decision and requested its re-examination. The applicant's request was rejected by the decision of the Plenary Assembly of the HCJP dated 29 November 2016.

The applicant filed an individual application on 15 December 2016.

After the filing of the individual application, the Decree Law no. 685 on the Establishment of the Commission for the Examination of the State of Emergency Procedures was entered into force after being promulgated in the Official Gazette on 23 January 2017. The mentioned Decree Law includes provisions about the members of the judiciary who were dismissed from profession, according to Article 3 of the Decree Law no. 667, like the applicant himself.

The Applicant's Allegations

In brief, the applicant alleged that his right of access to a court and the right to an effective remedy were violated as there was no remedy by which he could challenge the decision on his ineligibility to remain in his profession

and his dismissal from profession. He also maintained that there was a breach of the presumption of innocence, the right to a fair trial, the right to respect for private and family life, the right to protect his honor and dignity and the right to labor and social security in the same vein for different grounds.

The Court's Assessment

In brief, the Constitutional Court made the following assessments within the scope of the allegations:

By the subsidiarity nature of the individual application, it is obligatory to primarily exhaust all legal remedies before lodging an individual application with the Constitutional Court. Pursuant to this principle, the applicant is to duly inform the relevant administrative and judicial authorities of his complaint primarily and on time, present, in a timely manner, all information and evidence at his hand on this matter to the authorities and also show due diligence to pursue his case and application.

In the Decree Law no.685 it is stated that those who were found ineligible to remain in profession and therefore dismissed from profession according to Article 3 § 1 of the Decree Law no.667 may apply to the Supreme Administrative Court, as the first instance court, within 60 days following the finalization of the decision on their dismissal and that pending actions which were previously brought before the administrative courts or actions which were concluded would be referred to the Supreme Administrative Court. So it is clearly stipulated that those members of the judiciary who have been removed from profession pursuant to Article 3 of the Decree Law no.667 may bring an action against this decision before the Supreme Administrative Court, and the uncertainty in practice about which jurisdiction in the administrative judiciary was competent to solve the disputes were removed. Also, provisions ensuring referral of the actions previously brought are included therein.

Accordingly, it has been concluded that the legal remedy formulated in the Decree Law no. 685 is an effective remedy appropriate for the applicant's circumstance, and that the examination of the application without the exhaustion of this remedy is incompatible with the subsidiarity nature of the individual application.

Consequently, the Constitutional Court declared the application inadmissible for not having exhausted all legal remedies.

The First Section of the Constitutional Court rendered an inadmissibility decision on 16 February 2017 in the application of *Hacı Osman Kaya,* which is of similar nature.

3. The inadmissiblity decision on dismissal from public office by virtue of a decree-law under the state of emergency

***Remziye Duman Judgment* (App. No. 2016/25923, 20/7/2017)**

The Facts

Following the coup-attempt of 15 July, the competent bodies within the state declared a state of emergency due to the ongoing threat and decided to take measures against all terrorist organizations and illegal structures posing a threat to the democratic constitutional order and the individuals' fundamental rights and freedoms and national security, notably the Fetullahist Terrorist Organization/the Parallel State Structure (the FETÖ/PDY).

Accordingly, the Decree-Law no. 672 on the Measures Taken under the State of Emergency Concerning the Public Officials, which was adopted on 15 August 2016 by the Council of Ministers convening under the chairmanship of the President ("the Decree-Law"), entered into force after being promulgated in the Official Gazette dated 1 September 2016 and (Repeated) no. 29818. The applicant, who was a social studies teacher, was dismissed from office by virtue of the Decree-Law.

After the applicant lodged an individual application, the Decree-Law on 685 concerning the Establishment of the Inquiry Commission on the State of Emergency Measures, which was adopted on 2 January 2017 by the Council of Ministers convening under the chairmanship of the President ("the Decree-Law"), entered into force after being promulgated in the Official Gazette dated 23 January 2017 and no. 29957. Pursuant to Article 1 of the Decree-Law no. 685, the Inquiry Commission on the State of Emergency Measures ("the Commission") was established in order to carry out an assessment of, and render a decision on, the applications related to certain acts and actions directly performed by virtue of the state of emergency decree-laws. Article 2 also sets out that the Commission shall have the authority to conduct an examination as to the measures concerning "dismissal or discharge from public office, profession or other organizations".

The Applicant's Allegations

The applicant maintained that her certain rights enshrined in the Constitution had been breached for being dismissed from her public office (teaching profession) pursuant to the Decree-Law no. 672 within the scope of the state of emergency and due to legal consequences thereof.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The Constitutional Court primarily assessed the Provisional Article 1 § 3 of the Decree-Law no. 685 in which it is set out that with respect to those who previously lodged an application with, or filed an action before, a judicial authority for the matters which fall within the scope of duty of the Commission, their actions before the judicial authorities shall be transferred to the Commission for examination without seeking a new requirement for application. According to the Constitutional Court, this provision relates to the ordinary legal remedies. However, as the individual application mechanism is not an ordinary legal remedy, the individual applications previously lodged are outside the scope of the above-cited Provisional Article 1 § 3. Therefore, the present application must be examined not pursuant to this provision but according to the admissibility criteria of the individual application.

The Constitutional Court made the following assessments in brief, with a view to determining as to whether the application has met the admissibility criteria:

The question as to whether the legal remedies have been exhausted is, in principle, assessed according to the existing circumstances prevailing on the date of individual application. However, in certain circumstances, the Constitutional Court may also decide that new legal remedies established after lodging an individual application must be exhausted. Especially in cases where a new remedy has already been established with a view to finding solutions for structural and systemic problems in a certain field, the subsidiarity principle may require that alleged violations of the relevant fundamental rights and freedoms must be examined primarily by the administrative and judicial authorities.

In case of establishment of a new legal remedy after an individual application has been lodged, it is for the Constitutional Court to assess whether the legal remedy – in the way it was established – is *a priori* accessible or not

and whether it is capable of affording reasonable prospect of success and sufficient redress for the alleged violations.

Given the applicant's alleged violations, it has been concluded that examination of an individual application lodged without exhaustion of an available remedy appearing to be *a priori* accessible and capable of affording a reasonable prospect of success and sufficient redress for the alleged violations (the Commission) would be contrary to the subsidiarity nature of the individual application mechanism.

For these reasons, the application has been declared inadmissible for non-exhaustion of available remedies.

Moreover, on 19 July 2017, the First Section of the Constitutional Court declared inadmissible the individual applications, which were lodged by *Sait Orçan* (no. 2016/29085) concerning dismissal from studentship directly through the state of emergency decree-laws and lodged by *Ramazan Korkmaz* (no. 2016/36550) concerning the closure of a private educational institution, for non-exhaustion of available remedies.

As the Constitutional Court does not consider the individual application mechanism to fall into the scope of the Provisional Article 1 § 3 of the Decree-Law no. 685, it shall not *ex officio* send to the Commission the above-mentioned individual applications and the other applications of similar nature, which would be found inadmissible for non-exhaustion of available remedies. Therefore, the applicants in respect of whom measures were directly taken through the state of emergency Decree-Laws and who have lodged an individual application with the Constitutional Court are required to apply to the Commission –if considered necessary by them– in accordance with the rules concerning the procedure of application before the Commission.

4. The judgment concerning that broadcasting of a celebrity's images on the balcony did not violate the right to respect for her private life

***Birsen Berrak Tüzünataç Judgment* (App. No. 2014/20364, 5/10/2017)**

The Facts

The applicant, who is a famous actress, developed an intimacy with another prominent actor (Ş.G.) at her terrace, and video images of this intimacy were

broadcasted through a television channel. The applicant brought an action for compensation against the media outlets before the 13th Chamber of the Istanbul Civil Court ("the Civil Court"). Emphasizing that she was a high-profile individual, the applicant alleged that her honour and dignity were tarnished due to broadcasting of her private video images and photos which had been recorded and taken by zoom-in method without her consent when she was at her terrace and that unacceptable allegations were made in the broadcast, which harmed her reputation.

The Civil Court dismissed the action on the grounds that the applicant was a well-known actress in the art world and her life style and reputation were of interest to magazine programmes; that there was proportionality between the impugned incident and the way in which it was broadcasted; that the news reflected the truth; and that the broadcast did not contain any statements that would impair the applicant's honour and dignity. In its dismissal decision, the Civil Court also underlined that these video images were recorded not by means of trespassing on her house, but from a street which was open to public. This first instance decision was upheld by the Court of Cassation.

The Applicant's Allegations

The applicant maintained that terrace was not considered as a public area by the Court of Cassation and that while making comments and informing public, the media must not infringe personal rights of other individuals. She further asserted that she had suffered from psychological breakdown due to broadcasting of these video images, which went beyond the limit of the freedom of the press and damaged her personal rights. She accordingly alleged that there was a breach of the right to respect for her private life.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

Broadcasting in the present case is a dispute between the applicant and the private TV channel establishment and there exists no action attributable to the State. Therefore, the present case must be examined within the scope of the positive obligations imposed on the State by virtue of Article 20 of the Constitution.

In principle, the right to respect for private life enshrined in Article 20 of the Constitution not only prohibits the State from interfering with this right but

also imposes on the State the positive obligation to protect private life of an individual against interferences by third parties.

It is explicit that the video records belonging to the applicant fall within the scope of her private life which is a part of her personality. Broadcasting of these video images through a TV programme constitutes an interference with the applicant's right to respect for her private life. However, this interference results from the enjoyment of the rights to make news and to criticise, which fall into the scope of the freedom of the press. Therefore, in determining whether the interference constitutes a violation, it must be assessed whether a balance was struck between the applicant's right and the freedom of the press, which is the ground for this interference.

The applicant is a famous actress. It is a known fact that a certain part of the society is curious about the private lives of celebrities. Therefore, making news and criticisms about their private lives to a certain extent must be welcomed with tolerance in a democratic society. It must be remembered that the safeguards to be provided for a celebrity with respect to her/his private life are lesser than those provided for an ordinary person. Accordingly, it can be said that there is a public interest in making news and criticisms about the private life of a celebrity by means of media outlets in order to satisfy the curiosity of some part of the society. However, this cannot be construed to mean that all details of the private life of a celebrity can be subject to news. The fact that a celebrity is a public figure does not lead to the conclusion that her/his private life falls out of the protection of Article 20 of the Constitution. At this point, in the present case, the applicant's own act and conduct and the manner in which the applicant's images were obtained are of great importance.

In the examination of the video images, it can be seen that they were recorded from downstairs and showed a very small part of the terrace which can be seen from below. In this case, there is no reason to depart from the conclusion reached by the Court that the video images were recorded from the street. It can be understood that the applicant's intimacy with her partner at that part of the terrace could be seen without a special effort by the people standing at the point where the camera was recording. Regard being had to the fact that the applicant, of her own accord, preferred to develop an intimacy with her partner at a part of the terrace that could be seen from the outside, it is considered that the applicant did not act responsibly enough to protect her privacy and failed to fulfil her responsibility.

It is acceptable that the reporter found the intimacy between the applicant, who is a celebrity, and Ş.G. newsworthy. Recording of the video images constitutes a sensitive issue in terms of the applicant's personal rights. However, considering that the video images were recorded from a public area (street) –without entering the applicant's house– and that the recorded persons were celebrities, the act of the reporter is found to fall into the scope of the freedom of the press. Furthermore, when the content of the images is examined, it is seen that they only showed the intimacy between the applicant and Ş.G., and it did not contain elements leading them to feel discomfort to an unacceptable extent.

In this sense, in view of all assessments above and the margin of appreciation enjoyed by the relevant courts while balancing different interests, it was concluded that the positive obligations set out in Article 20 § 1 of the Constitution were complied with and a reasonable balance was struck between the applicant's right to protection of her private life and the respondent party's freedom of the press.

In conclusion, the Constitutional Court held that the applicant's right to respect for her private life safeguarded by Article 20 of the Constitution was not violated.

F. THE FREEDOM OF EXPRESSION

1. The judgment finding a violation of the freedoms of expression and press due to sentencing the chief editor of a website to imprisonment in consequence of the news he reported

Orhan Pala Judgment **(App. No. 2014/2983, 15/2/2017)**

The Facts

The applicant is a journalist and the chief editor of the website, www.borsagundem.com, through which live broadcasts and news concerning capital markets are made and periodic articles are published.

On 5 November 2012, the website managed by the applicant published a piece of news concerning two persons who are shareholders and board members of some companies shares of which were traded at the Istanbul Stock Exchange and also owners of an intermediary firm (the complainants).

In the news in question, it is noted that the complainants were previously convicted of manipulation; however, the conviction decision against them did not finalize due to statute of limitations; and that they were currently prosecuted before the Istanbul Criminal Court for contravening the Capital Market Law, fraud, supplying arms for an armed terrorist organization, membership of an armed terrorist organization, membership of an organization to commit an offence and establishing an organization to commit an offence. In the remaining part of the news, information is provided about the companies the complainants have recently taken over, and it is alleged that they are living in luxury and source of their fortune is issue of concern.

The complainants filed a criminal complaint against the applicant, alleging that the information in the news was distorted and not accurate, as a result of which their reputation had been tarnished, and that shares of their companies listed in the Istanbul Stock Exchange decreased in value due to this news. In his defence submissions during the criminal proceedings against him, the applicant indicated that the information therein was accurate and submitted the indictment drawn up in the previous proceedings conducted against the complainants. He also provided the relevant court with a document which included information about the proceedings conducted against the complainants on the publication date of the news and which

was alleged to be taken from the National Judiciary Informatics System (UYAP).

At the end of the proceedings, the applicant was sentenced to 2 months and 27 days' imprisonment for insulting; however, the court suspended the pronouncement of the judgment. The challenge against the criminal court's decision was dismissed by the magistrate court on 24 January 2014.

The Applicant's Allegations

The applicant maintained that a news source delivered him the impugned news based on an UYAP document; however, the relevant court failed to check the UYAP data, which was in breach of his right to a fair trial. He further asserted that as the complainants were the managers and shareholders of publicly-held companies and intermediary firms, the proceedings conducted against them were of particular concern to the public and that publication of such news through a website providing news and information about the stock exchange and capital markets was also to the interest of the public. The applicant accordingly alleged that his freedom of expression was violated.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The applicant's argued before the first instance court that the source of information was a document obtained from NJNS and that this document was presented to the first instance court in good faith.The court, however, failed to take any action with a view to determining whether the document was authentic or not. Besides, although the applicant submitted a sound factual basis, the court also refused to assess this evidence. The relevant Ministry confirmed that it was indeed a copy of the original UYAP screen shot and noted that the UYAP data were updated afterwards. Although the applicant based his allegations on an official record, it could not be concluded that the content the news, which had sufficient factual basis, were falsified in bad faith or by means of altering the truth.

Expecting the journalists to act as a prosecutor to verify the accuracy of a statement imposes a heavy burden of proof on them, and such a liability may give rise to unfair consequences at the end of the proceedings where they stand as an accused or a defendant. Therefore, in the present case, it must be acknowledged that the applicant, as a journalist, had acted in an adequately responsible manner.

Besides, it is explicit that sentencing the applicant to imprisonment due to a press offence would not be compatible with the freedoms of expression and press. Such a sentence may be justified only in exceptional cases. Even if a person suffering pecuniary or non-pecuniary damage on account of a publication may be entitled to bring a civil claim for damage against the journalist publishing inaccurate information about him, it must be acknowledged that an imprisonment sentence, which is highly severe in terms of ordinary defamation cases as in the present application, inevitably has a chilling effect on the freedoms of expression and press.

In addition, the criminal court decided to suspend the pronouncement of the judgment and subjected the applicant to probation for five years. In his capacity as a chief editor, the applicant always faces the risk of execution of his sentence within this probation period. The fear of being sanctioned has a suspensive effect on the individuals, and even if an individual may complete the probation period without being further convicted, such a suspensive effect may restrain disclosure of his thoughts or his press activities.

Consequently, the Constitutional Court found a violation of the freedoms of expression and press safeguarded by Articles 26 and 28 of the Constitution.

2. The judgment declaring the application - in which the alleged violation to be arising from the reduce in scope of the terrestrial broadcast was ill- founded – inadmissible

***Sabah Yıldızı Radio Judgment* [PA], (Application No: 2014/12727, 25/5/2017)**

The Facts

The applicant, namely Sabah Yıldızı Radyo ve Televizyon Yayın İletişim Reklam Sanayi ve Ticaret Anonim Şirketi ("the Radio"), has been radio-broadcasting since 2006, by virtue of its regional terrestrial radio broadcasting license, at the provincial centres of Isparta, Kahramanmaraş, Antalya, Hatay, Mersin, Adana and in the districts of Kaş, Kemer, Alanya and Iskenderun. On 10 August 2011, the Radio and Television Supreme Council ("the RTUK") performed an administrative act requiring the applicant company to suspend its broadcasts for the provincial centres of Isparta, Burdur and Kahramanmaraş as the RTUK considered that the broadcasting license belonging to the applicant did not cover broadcasting in the above-mentioned provinces.

In the action brought by the applicant radio with the allegation that the administrative act in question was unlawful, the 14th Chamber of the Ankara Administrative Court found the impugned administrative act lawful by its decision of 27 April 2012 and therefore dismissed the action. This decision was upheld by the judgment of the 13th Chamber of the Supreme Administrative Court dated 30 January 2014. The applicant's request for the rectification of the judgment was dismissed by the decision of 12 June 2014 delivered by the same Chamber.

The Applicant's Allegations

The applicant maintained that it was the holder of a broadcasting license issued for the Mediterranean Region; and that the above-mentioned provinces, namely Isparta, Burdur and Kahramanmaraş, were located in that region. The applicant alleged that there had been a breach of Articles 2, 5, 10, 22, 26, 28, 29 and 35 of the Constitution as it was not allowed to broadcast in these provinces.

The Court's Assessment

In brief, the Constitutional Court made the following assessments within the scope of this allegation:

The applicant merely and abstractly maintained that scope of the terrestrial broadcasting license had been determined erroneously. The Constitutional Court does not have a duty to determine the scope of a broadcasting license, as in the present application. The applicant failed to demonstrate that the restriction, which was considered to be imposed due to certain technical grounds, was applied contrary to the conditions set out in Article 26 §§ 1 and 2 of the Constitution and in breach of the freedom of expression.

In the present application, the applicant did not fulfil the obligations to adduce evidence with respect to the alleged violation and to make explanations as to which rights falling into the scope of individual application had been violated and as to the reason thereof. The applicant therefore failed to justify its allegations.

For these reasons, the Constitutional Court declared the application inadmissible for being manifestly ill-founded.

3. The judgment finding a violation of the freedoms of expression and press due to the news director's conviction to imprisonment without sufficient grounds

***Hakan Yiğit Judgment* (App. No. 2015/3378, 5/7/2017)**

The Facts

The applicant is the news director of a web-site, namely *memurlar.net*. Following the 17-25 December investigations, tape recordings alleged to belong to Fetullah Gülen or persons who are in close relationship with him were broadcasted or reported as news via many web-sites. Subsequently, the news portal, *memurlar.net*, broadcasted these tapes with the heading "Conversation between Gülen and the top *Abi* ("top brother") is now available on the Internet".

The tape in question relates to the phone conversations held between Fetullah Gülen and a person who was defined by the web-site as "the top *abi*" and whose full identity information was not given. During these conversations, the unidentified person provided Fetullah Gülen with information –generally classified– about several bureaucrats, politicians and businessmen, informed Fetullah Gülen of the relations between the group which is led by Fetullah Gülen and which would be subsequently called as the FETO/PDY, as well as received instruction from Fetullah Gülen.

Following the broadcast of the news, Fetullah Gülen filed a criminal complaint against the applicant as well as the media outlets broadcasting the impugned news for insulting his personal rights and breaching the confidentiality of communication.

Thereupon, the Ankara Chief Public Prosecutor's Office brought a criminal case against the applicant for unlawfully disclosing the contents of the communication and insulting persons through internet. According to the prosecutor's office, the imputed offence results from the broadcast of the relevant contents through media outlets and is a type of offence which is separate from the offences of breach of the confidentiality of communication and recording of the contents thereof. The prosecutor's office noted that commission of the offence in question was completed by way of notifying or announcing the contents of the communication to the person or persons who is/are not a party thereto.

During the criminal proceedings, the applicant maintained; that they had acted in line with the responsibility of the press; that the news is within the

press freedom to make news and that the impugned tapes were removed from the web-site one day later upon the request of the complainant's lawyer.

By the decision of the 24th Chamber of the Ankara Criminal Court, the applicant was acquitted of the offence of insulting but sentenced to 1 year and 8 months' imprisonment for breaching the confidentiality of communication. However, the criminal court decided to suspend the pronouncement of the judgment and to subject the applicant to probation for a period of 5 years. According to the criminal court, publication of a phone conversation between persons –even if socially prominent ones–, which enables everyone to learn the content thereof, is sufficient for the offence to occur. The applicant's challenge to the criminal court's decision was dismissed by the 6th Chamber of the Ankara Assize Court.

The Applicant's Allegations

The applicant, who is a news director in one of the most followed news sites, stated that the impugned video and tape recordings had already been broadcasted by several video hosting sites and by hundreds of web-sites and that these tape recordings were reported as news by his team. He indicated that the chief public prosecutor's offices rendered a decision of non-prosecution or relevant courts gave a decision of acquittal in respect of the officials of the other media outlets broadcasting the same tapes. He submitted some of these decisions to the Constitutional Court. The applicant accordingly alleged that his freedoms of expression and press were violated.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

Failing to strike a balance between the applicant's freedoms of expression and press and the other individuals' right to protect their honour and dignity, the first instance court found that the latter absolutely outweigh the former when these two rights are competing. However, a conclusion reached without striking a balance between the individuals' rights and freedoms by means of handling the case as a whole within the scope of the principles set by the Constitutional Court cannot be regarded as being compatible with the principles set out in Articles 26 and 28 of the Constitution.

First of all, the contents of the communication served for discovering and forming an opinion regarding the thoughts and attitudes of the

complainant, who is undeniably a prominent person, and the political, social and economic activities of the group led by him. Therefore, there is no doubt that broadcasting of these tapes contributed to a significant public discussion.

Secondly, the complainant did not allege that the applicant had reported falsified news by altering or adding to the facts. Nor did the first instance courts make such an assessment in their decisions.

Thirdly, in its decision convicting the applicant, the criminal court did not take into consideration the fact that it was not the applicant who had for the first time broadcasted the relevant contents. As a matter of fact, at the date when the news was broadcasted, these contents had already been known to the public.

Finally, it was not also indicated that the officials of the other media outlets had been punished for broadcasting of the same contents. On the other hand, according to the documents submitted by the applicant, the Ankara Chief Public Prosecutor's Office rendered a decision of non-prosecution in respect of at least four press officers who had broadcasted the same contents. Nor was it maintained that the other press officers publishing the same contents had been punished for broadcasting these tapes.

In light of the foregoing, it has been concluded that the inferior courts' purpose to protect the complainant's freedom of communication is not sufficient for the justification of the restrictions imposed on the applicant's freedoms of expression and press set out in Articles 26 and 28 of the Constitution. The inferior courts failed to strike a fair balance between the protection of the freedom of press and protection of the freedom of communication constituting an element of the private life.

The applicant, who is the news director of a news portal, is always under the risk of execution of his sentence as long as being subject to probation. Therefore, for the fear of being subject to a sanction, he would be at risk of refraining from disclosing his thoughts or performing his press-related activities. Accordingly, the applicant's conviction to 1 year and 8 months' imprisonment and the suspension of his conviction on probation for a period of 5 years are disproportionate to the aim pursued, which is, in the present case, the protection of the complainant's private life.

Consequently, the Constitutional Court found a violation of the freedoms of expression and press safeguarded by Articles 26 and 28 of the Constitution.

4. The judgment finding no violation of the freedom of expression due to sentencing the soldier engaging in political propoganda before the staff

Engin Kabadaş Judgment **(App. No. 2014/18587, 6/7/2017)**

The Facts

The applicant, who was a staff colonel, was serving as the Deputy Commander of the Çankırı 28th Mechanized Infantry Brigade at the relevant time. In November and December 2007, he gave a series of lectures on the Ataturk's system of thought –where attendance was compulsory–, in line with the instructions received from his superiors, with a view to "informing" and "raising awareness" of the incumbents in the command and their families.

In April 2011, the voice records and slides from the lectures given by the applicant were broadcasted through several web-sites. In June 2011, the Military Prosecutor's Office of the Turkish Land Forces Command filed a criminal case against the applicant for carrying out political activities. In April 2012, the military court imposed a sentence on him for the same act. However, the 2nd Chamber of the Military Court of Cassation quashed the conviction decision under its procedural aspect.

During the proceedings following the quashing judgment, the applicant denied the slide images and maintained that the voice was of his own; however, the content of his speech was altered through cut-paste methods and that the available evidence was unlawful. Receiving the expert's report and hearing the witnesses, the military court re-sentenced the applicant for carrying out political activities by its decision of 22 April 2014.

The military court concluded in its decision that the records broadcasted through the web-sites cannot be taken as a basis for the judgment. However, the military court relied on various witnesses' statements and slide images taken from the applicant's computer in the command. Although the applicant maintained that he had not prepared these slides, the military court established that the date when the file was created on the computer coincided with the date of offence and accordingly rejected the applicant's objections.

As found established by the military court, during the lectures organized for military staff and their spouses, the applicant made comments about

general political course of the country, criticized President Abdullah Gül, who was elected in 2007, and the then members and policies of the Government, claimed that the Government engaged in reactionary activities and complained of certain politicians' wives wearing headscarf. The military court accordingly concluded that the applicant aimed at influencing political preferences and opinions of the audiences through his presentations and words, which constituted the offence of carrying out political activities. He was then sentenced to a judicial fine of 780 Turkish Liras.

The 2nd Chamber of the Military Court of Cassation rejected the applicant's request for appellate review and upheld the military court's decision.

The Applicant's Allegations

The applicant asserted that the video with voices and slide images, which was broadcasted through internet, was unlawful evidence and that all other evidence subsequently obtained could not be taken as a basis for the judgment. Therefore, the applicant maintained that his right to a fair trial was violated. He also alleged that his being sentenced on account of his words was in breach of the freedom of expression.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The applicant did not allege that the evidence other than the video was obtained through unlawful methods. The military court did not take the video as a basis for its judgment. Besides, there is no indication of arbitrariness in the military court's assessment as to the admissibility of the other evidence. Therefore, assessments as to whether an interference with the freedom of expression is necessary and proportionate in a democratic society must be made over the criminal court's acknowledgement of the concrete facts by relying on the other evidence.

First of all, the applicant was sentenced not on account of his expressions about Ataturk's principles and reforms but his statements about the then politicians taking office in the Government and current political issues.

Secondly, applications similar to the present one cannot be assessed independently from the history of military-political relations in Turkey. The history of democracy in our country has, to a certain extent, aimed at improving and preserving political institutions in order to preclude a few persons from coming to power through undemocratic means. In this

respect, it may be expected that criminal investigations and prosecutions be initiated against those who are carrying political activities in their capacity as a military officer and through the military means.

Thirdly, the applicant, who is a colonel, is expected to be much diligent while expressing his views about current politics in an organization where attendance of his subordinates and their spouses was compulsory.

For these reasons, it cannot be concluded that sentencing the applicant to a relatively small fine on account of his political expressions is not necessary for and proportionate to the protection of the democratic society, which is one of the fundamental elements of the Turkish Republic.

Consequently, the Constitutional Court found no violation of the freedom of expression safeguarded by Articles 26 of the Constitution.

5. The judgment finding a violation of the freedom of expression and press due to failure to fix the date for radio frequency auction

***Bizim FM Radio Broadcasting and Advertising Inc. Judgment* [PA], (App. No. 2014/11028, 18/10/2017)**

The Facts

In Turkey, private radio broadcasting started in 1989, despite the constitutional and legal obstacles. Private radio broadcasting has gained a legal basis with the amendment made to Article 133 of the Constitution in 1993. Subsequently, the former (now repealed) Law no. 3984 on the Establishment of Radio and Television Enterprises and their Broadcasts was enacted in 1994, and the Law was followed by the secondary regulations. During this transitional period, then-existing radios that satisfied the criteria set by the Radio and Television Supreme Council (RTÜK) were allowed to continue broadcasting until a frequency auction was made. However, despite the imperative provisions of the above mentioned Law and Law no. 6112 on the Establishment of Radio and Television Enterprises and their Media Services which entered into force in 2011, no auction has been made by the administration until today. The current terrestrial radios in Turkey are the radios that started broadcasting before 1995 or that were granted broadcast permission with certain administrative or judicial orders after 1995. In other words, since 1995, no radio has started broadcasting upon allocation of channel and frequency through a frequency auction.

The applicant company voluntarily suspended its broadcast that was made under a license issued in 1995. Afterwards, the applicant requested from the RTÜK a (R3) licence in order to be able to make local radio broadcast. However, its request was rejected without any justification.

The applicant contested the RTUK's decision before the Administrative Court (the court). The applicant maintained that the administration's failure to hold a frequency auction for a long time resulted in inequality between the companies that were actually broadcasting and the companies that wanted to broadcast for the first time.

The court dismissed the case. In its decision, it pointed out that until a frequency auction and channel and frequency allocations would be made in accordance with the provisional Article 6 of the former Law no. 3984, the companies that were broadcasting on the date of entry into force of the Law would be able to continue their broadcasts, as limited to the residential areas where they had been permitted to broadcast. According to the court, as the applicant company had previously suspended its broadcasts voluntarily, the provisional Article would not be applied with respect to it. The frequency auction which would enable new broadcast applications was not held yet. Therefore, rejection of the application for a licence did not contravene the law.

Upon appeal, the 13th Chamber of the Council of State (the Chamber) quashed the judgment of the court. According to the Chamber's judgment, while the administration that was liable to allocate, as soon as possible, the channels and frequencies by holding frequency auction, it caused the continuation of the transition period by not doing so, which would give rise to unequal practices between the pre-existing radios and the new companies that wanted to go into radio broadcasting. The Chamber also held that the rejection of applications based on an auction to be held on an unknown date violates the freedom of expression and dissemination of thought safeguarded by the Constitution, and in this regards it also violate the constitutional provision set therein that radio and television stations shall be established and operated freely.

However, the Chamber accepted the rectification request lodged by the respondent administration and upheld the judgment of the first instance court. The Chamber gave no explanation as to the reason why it reversed its previous judgment.

The Applicant's Allegations

Arguing that the fact that administration did not make a frequency auction since 1995 and that an expected auction's date was indefinite, led to unequal practices between the pre-exiting radios and new companies that wanted to go into the radio broadcasting business, and thereby restricted the right to broadcast, the applicant alleged that its rights safeguarded by Articles 2, 5, 10, 26, 36 and 138 of the Constitution were violated, and in this regard, it requested retrial.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The freedoms of expression and press are of vital importance for proper functioning of democracy. Given this vital importance of the freedoms of expression and press, the State is expected to provide the highest safeguards with regard to these freedoms. As a matter of fact, Article 28 § 3 of the Constitution imposes on the State an obligation to take the necessary measures to ensure the freedom of press and information. In addition, the phrases "*subjecting broadcasts to a system of licensing*" which is set forth in Article 26 § 1 and "*regulatory provisions concerning the use of means to disseminate information and thoughts*" set forth in Article 26 § 1 allow the State to organize the press and broadcasting and to monitor them through licencing, along with the obligation of maintaining the order in this sector and removing obstacles and to eliminate the obstacles which make it difficult or impossible to enjoy the freedoms of expression and press.

In this context, the obligation of the State to ensure pluralism in the sector of radio and television broadcasting is underlined in the reasoning of the amendment made to Article 133 of the Constitution in 1993 by setting forth that "*Radio and television stations shall be established and operated freely in conformity with rules to be determined by law*". It is also stated therein that in the case of failure to provide pluralism, there could be no mention of democracy. It is obvious that the aim of the relevant constitutional amendment and the legal arrangements in this regard is to develop the freedoms of expression and press in our country. Therefore, it cannot be said that those constitutional and legal provisions aim to make the existing transition period permanent.

The former Law no. 3984 does not contain any provision as to the date of the frequency auction to be held. As a matter of fact, the auction was not

made until 2011 when the new Law came into force. As for Law no. 6112, there is an explicit provision for frequency planning and allocation, and the deadline for the frequency auction for the terrestrial radio broadcasting is set forth as 3 September 2015 therein; however, no step has been taken in this respect until today. For this reason, the broadcasting companies that will broadcast for the first time or those wishing to broadcast again as in the present application have been waiting for approximately 24 years, as a frequency auction has not been held yet.

The rejection of the applications for radio broadcasts due to the lack of a frequency auction constitutes a structural problem that adversely affects the right to broadcast, which is an important means in ensuring the transmission and dissemination of thoughts. Even if it is assumed that there existed some legal and technical difficulties with regard to licencing and regulation in the early days of the private radio broadcasting, it has not been asserted either by the administration or the courts that such an obligation would impose an unfair burden on the State. Nor any other reason has been submitted to justify the failure of frequency allocation. The current situation leads to major problems in many respects.

First, continuation of the transition period that started running in 1995 has led to unequal practices between the broadcasting companies that has been broadcasting from the beginning of this period and the companies that want to broadcast. This situation is still ongoing.

Second, the date when a radio frequency will be allocated to the applicant for broadcasting is indefinite in terms of legislation and practice.

Third, the administration and the courts have failed to provide adequate safeguards against the arbitrariness arisen due to non-enforcement of the laws with respect to the applicant and the others who want to make radio broadcast.

Fourth, the current situation may also lead to problems in terms of competition in the radio broadcasting sector. It is clear that the lack of measures to maintain pluralism in the national media for a very long period of 24 years has prejudiced the freedoms of expression and press that are of vital importance in a democratic society.

All these points reveal that the State has failed to fulfil its obligation to carry out the necessary legal and administrative regulations in order to ensure effective pluralism in the media and to secure the freedom of press

and information, besides its obligation to enforce the existing legislation effectively.

In the event that the territorial radio broadcasting is not organized and the frequencies in this respect are not allocated on an equitable basis in spite of the constitutional rules and the laws, the available structural problem will continue, leading to continuous violations of the freedoms of expression and press safeguarded by Articles 26 and 28 of the Constitution.

Consequently, the Constitutional Court found a violation of the freedoms of expression and press safeguarded by Articles 26 § 1 and 28 § 1 and 3 of the Constitution, respectively.

In addition, the Constitutional Court held that the judgment be sent to the RTÜK — the relevant public institution— in order to eliminate the violation as regards the structural problem and its consequences.

6. The judgment finding a violation of the freedom of expression and press due to blocking of access to online news articles

***Ali Kıdık Judgment* (App. No. 2014/5552, 26/10/2017)**

The Facts

The applicant, owner and chief editor of a web-site publishing in the aviation sector, published five news articles on his web-site in March and April 2014 about O.Y., then chairman of the Turkish Aeronautical Association ("the TAA"). Titles of these news articles are as follows: "*If you cause TAA to go bankrupt, I would not leave you in peace*", *"This document would make you shocked", "Full of ambition for undeserved money! When would you be satisfied"* and *"Turkish Aeronautical Association is on the edge of cliff"*. It was asserted therein that a meeting was held with O.Y. without touching upon the content thereof, and in brief, the following claims were made: the TAA was managed improperly, policies to the detriment of the association had been pursued, friends of O.Y. granted undeserved profit, total debt of the TAA exceeded 410 million Turkish liras according to the data provided by the Turkish Central Bank, and O.Y. provided employment for 110 of his relatives. Certain documents were published in support of these claims. The applicant was of the opinion that the TAA should focus on its fundamental duties and should be managed by professionals.

Upon O.Y.'s request, the 5th Chamber of the Ankara Magistrate's Court ordered blocking of access to the impugned news and articles. In his column that he wrote immediately upon the court's order, the applicant directly targeted O.Y. and maintained that a jet-aircraft and a helicopter of the TAA were rented out, with very low rates, to a political party chairman in the course of the local election campaigns, also recalling that his previous claims had not been refuted yet. The same court accepted O.Y.'s request and once again ordered blocking of access to this article. The objections raised by the applicant against these orders were dismissed by the 14th Chamber of the Ankara Criminal Court.

The Applicant's Allegations

Maintaining that disclosing corruptions taking place in a prominent public association served high public interest, that all his claims in the articles were concrete and supported by documents, and that the courts issued their orders on the very same day of the criminal complaint filed by O.Y., the applicant complained that his freedoms of expression and press were violated.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The freedoms of expression and press are of vital importance for proper functioning of democracy. These freedoms not only cover the content of information but also the means through which such information is disseminated. Therefore, all kinds of restrictions imposed on web-sites or measures such as blocking of access to news available on web-sites have a real bearing on the freedom of receiving and imparting information. It must be borne in mind that the press affords one of the best means for conveying different ideas and positions in terms of forming public opinion. However, the freedoms of expression and press are not absolute and may be subject to restrictions, provided that the requirements set out in Article 13 of the Constitution are complied with.

The Constitutional Court concluded that the freedoms of expression and press were interfered in the present case. It also considered that the interference complied with the requirements of "being prescribed by law" and "legitimate aim" enshrined in the Constitution. Therefore, the Court turned to elaborate on the condition of "being compatible with the

requirements of a democratic society" and "proportionality". Accordingly, the Constitutional Court made the following assessments:

First of all, Article 12 of the Constitution imposes certain "duties and responsibilities" on the individuals –including the press– in the enjoyment of the fundamental rights and freedoms. For the press, these duties and responsibilities become more of an issue in cases when the dignity and rights of others may be impaired and especially when reputation of a person whose name is released is at stake. The freedom of press requires journalists to respect professional ethics, to impart accurate and reliable information, and to act in good faith. Malicious distortion of the facts is likely to exceed the limits of acceptable criticism. In the present case, in ordering blocking of access to impugned news and articles, the competent court relied on the fact that the applicant's allegations made on the news website about O.Y. were not found established by a court decision, that these allegations reflected the applicant's personal thoughts, and that, therefore, the limit was exceeded in breach of O.Y.'s personal rights. However, O.Y. did not claim before the competent courts that the applicant had reported falsified news by altering or adding to the facts or had acted in bad faith or the way in which he obtained information was unacceptable.

Second, as also previously emphasized in the Constitutional Court's judgments, requiring journalists to prove full accuracy of a statement like a prosecutor would put an excessive burden on them. Such a requirement may lead to unfair consequences in the proceedings where the journalists are involved. In the present case, the first instance court stated that the claims asserted in news articles may be published only after being found established by a court decision. However, seeking for such degree of certainty in reporting news and expressing opinions leads to complete disregard of the freedoms of expression and press.

Third, the higher the degree of public interest such a news article carries in informing the public, the more tolerance the person concerned must bear. The impugned news and articles concern a prominent institution of Turkey in the aviation sector and the chairman of this institution. Therefore, it is beyond any doubt that the publication of the claims asserted in these news and articles has contributed to a matter of high public interest.

Fourth, it must be taken into consideration that the freedom of expression safeguards not only the substance of the news and information but also

the form through which they are conveyed. The news articles in question are neither insulting nor amount to an arbitrary personal attack. The issue is more of the polemical style and aggressive language used in the news articles, which nevertheless falls within the protection of the freedom of expression.

Fifth, in interfering with the freedom of expression for the protection of honour and dignity, due regard must be also paid as to whether the person whose honour and dignity sought to be protected has the opportunity to respond to the statements. In his capacity as the chairman of one of the prominent institutions in the aviation sector, certain opportunities were available to O.Y. for informing those concerned and the public of his counter-opinions in this respect.

Sixth, as also noted in the previous judgments of the Constitutional Court, certain freedoms that are of vital importance in a democratic society such as the freedom of communication, the freedom to impart ideas and expressions, and the freedom to receive news or ideas and the freedom of economic enterprise, are exercised by individuals through the internet. It is therefore necessary for the courts and relevant public authorities to act responsibly in interfering with the sphere of internet.

Seventh, in blocking access to the concerned websites the first instant courts relied in Article 9 of the Law no. 5651 (titled "*the Regulation of Publications on the Internet and Combatting Crimes Committed by means of Such Publication*"). This law, however, prescribes blocking of access to websites only in the case of unlawful interference with personal rights and for the purpose of immediately halting the infringement of the individual's honour and dignity. The aim of the measure of blocking access to a website is to strike a delicate balance between the freedom of press and personal rights through preventing an apparent and continuing interference with personal rights by blocking access to online publications unjustly harming individuals and by halting dissemination of untrue information about them and thereby ceasing tarnishing their reputation. Therefore, this remedy must be applied in a manner which would not encroach on the essence of the freedom of press and which also affords protection to the interests of the concerned individual.

In case of an interference with the personal rights through internet, one of the remedies available in the Turkish legal system for the protection of the

personal rights is the non-adversarial judicial remedy before the magistrate judge's offices, which is prescribed in Article 9 of the Law no. 5651 and applied in the present case. However, under this remedy media outlets to be affected by the court order are not provided any safeguards or allowed to interfere. Therefore, it is difficult to strike a balance between the competing rights in the application of this remedy. The order for blocking access to a certain online content also serves to inform the public that the relevant (blocked) content constituted an attack on individuals' honour and dignity. It must be recalled that such an order may be entered at the end of a non-adversarial trial only in cases where the unlawfulness and the interference with the personal rights are so explicitthat would require an immediate action.

Besides, as is the case in the present application, in the absence of a further criminal investigation or prosecution and, therefore, re-examination of this measure, blocking access turns to a continuous measure. It is obvious that such restrictions for an indefinite period of time poses major threats to the freedoms of expression and press. For these reasons, it must be acknowledged that this measure must be applied only in exceptional circumstances compared to the other remedies available in the legal system for the protection of the individual's honour and dignity.

In the present case, the first instance court ordered blocking access to the impugned news and articles for interfering with O.Y.'s personal rights. However, it failed to demonstrate the need for the immediate removal –before adjudication of the dispute in adversarial proceedings– of the unlawful interference with the complainant's honour and dignity.

Regard being had to all above-mentioned circumstances of the case, it has been concluded that the interference with the freedoms of expression and press, enshrined in Articles 26 and 28 of the Constitution, in a way of blocking access to certain online news neither meets a pressing social need nor is necessary in a democratic society.

Besides, in a democratic constitutional state, any interference with the fundamental rights and freedoms must be proportionate, regardless of the aim pursued. Even blocking access to a website with a view to temporarily suspending the interference with the personal rights may be acceptable, such a measure with the possible consequences of lasting for an indefinite period of time and lacking sufficient justification cannot be considered

to be proportionate. In the present case, the Constitutional Court found that access to the online news articles were blocked indefinitely without providing a justification.

For these reasons, the Constitutional Court found a violation of the freedoms of expression and press safeguarded by Articles 26 and 28 of the Constitution.

7. The judgment finding a violation of the freedoms of expression, science and art, and press due to a literary work deemed to be obscene without sufficient reasoning

İfran Sancı Judgment **(App. No. 2014/20168, 26/10/2017)**

The Facts

The applicant is the director and partner of a publishing firm which published the Turkish translation of "The Soft Machine", a novel written by the American novelist and essayist William S. Burroughs.

The press office of the relevant chief public prosecutor's office found that there were detailed depictions of homosexual intercourses in twenty separate sections of the novel and that there was no warning on the book cover for the protection of minors. Thereupon, the novel was sent to the Board for the Protection of Minors from Sexually Explicit Materials of the Prime Ministry ("the Board") for receiving its opinion in this respect.

An examination was made by the Board consisting of eleven members –most of whom are elected from various public institutions– and assigned with the duty of assessing whether printed works would have an unfavourable effect on minors (under 18 years of age). Accordingly, the Board has found the novel obscene on the grounds that especially homosexual intercourses between men are explained in the novel to the extent that would tarnish the senses of shame and modesty; that it is not a literary work; that it would not make any additional contribution to the reader's knowledge and it would incite the readers to perform criminal acts; that the content of the novel is in conflict with the social norms of the society and is immoral. In the report, it is underlined that an obscene novel will also be primarily detrimental, that the novel impairs the people's senses of shame and modesty and is immoral in nature which arouses and exploits sexual desires, and that it is in breach of Article 226 of the Turkish Criminal Code no. 5237.

The chief public prosecutor's office filed a criminal case against the applicant and the translator for acting as an intermediary for the publication of obscene works. In the indictment, the literary movement "Beat Generation" is discussed, and it is also indicated that those supporting the movement and called as "Beatniks" are defending personal salvation, spiritual purification and enlightenment by way of reaching intense sensorial awakening through drugs, jazz music, sexuality or Zen Buddhism, while displaying their strangeness towards the traditional or "closed-minded" section of the society. It is also emphasized therein that the author William S. Burroughs is one of the prominent members of this generation and has aimed at breaking several taboos and reaching a limitless freedom, as a consequence of the thoughts adopted by the movement.

The indictment further indicates that several sections of the novel include detailed depictions of sexual organs and homosexual intercourses as a result of which readers do not get the impression of eroticism. As no measure was taken in the novel for the protection of minors, the translator and the applicant publishing the novel were requested to be sentenced, in the capacity of the owner of the work.

In his defence arguments, the translator maintained that the author is a widely-known, best-seller and a popular author in the world; that the impugned sections of the book appearing to be immoral are for breaking taboos; and that it is not proper to assess the novel merely from the ethical aspect.

In his defence arguments, the applicant noted; that the novel must be assessed as a whole as it was not proper to consider the work as obscene by means of extracting only some sentences or paragraph therein; that the author who was the pioneer of the "Beat Generation" movement had so far influenced several authors, musicians, film-makers and artisans; and that the work was written by the cut-up method, which was well-accepted by the literary world, and therefore, it was not possible to expect a work to be coherent whose author rejects stereotypes.

The competent criminal court had a report issued by a panel of experts consisting of a criminal law lecturer and two lecturers from the department of English language and literature. In this report, it is indicated that the novel is one of the worldwide prominent literary works and is studied in the universities; that it is praised by prominent authors; that its content does not

consist of merely social criticism but it has also exerted influence by its literal method; that sexuality is one of the means serving for the author's social criticism and must not be considered to constitute the offence of obscenity.

The criminal court ordered suspension of the criminal proceeding and rendered the applicant subject to probation for three years pursuant to the Law no. 6352 on the Amendment to Certain Laws for Increasing the Efficiency of Judicial Services and the Suspension of Prosecution and Penalties Regarding Crimes Committed through Press, which entered into force after the issuance of the above-cited report.

The criminal court indicated in its decision that the decision was appealable before the Court of Cassation. However, following the appellate review, the Court of Cassation remitted the case-file to the inferior court on the ground that the decision was indeed non-appealable.

The applicant's challenge to the Assize Court was dismissed.

The Applicant's Allegations

The applicant maintained that the impugned novel is an artistic work and that although he should have been acquitted of the charges, he was subject to a three-year probation, which was in breach of the freedoms of expression and labour. He accordingly requested re-trial and compensation.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The freedoms to freely express and disseminate science and arts are specifically safeguarded by Article 27 of the Constitution. Those who create, print and publish the literary works make significant contributions to the dissemination of ideas. Therefore, artistic works are of great importance for a democratic society. States must act more delicately in respect of the obligation to prevent any unnecessary inferences in the freedom of expression of the creators of artistic works.

However, the Constitution does not provide an unlimited freedom of expression in terms of artistic works. The protection of public morality is enumerated as one of the grounds for restricting the freedom of expression. Moreover, in Article 41 of the Constitution, the State is required to take all kinds of measures for the protection of minors and for protecting them against all kinds of abuse and violence.

Nevertheless, in interfering in the publication of a literary work due to obscenity, a complex and ambiguous concept, the courts must, in their assessments, take into consideration as a whole characteristics of the field of art or of the artistic work in question; the context in which the parts considered to be obscene are expressed; identity of the author; time and aim of creation of the work; identities of targeted group and their sense of aesthetics; potential impacts of the work; and the remaining expressions within the work.

In the present case, it must be taken into account that in spite of non-existence of an already finalized conviction decision against the applicant, there is an official report which indicates that the applicant's work is not an artistic work; that the applicant was directly influenced by the investigation and prosecution conducted against him for about four years; and that in his capacity as a publisher, he would be at risk of being exposed to investigation and prosecution once again in the future. For these reasons, it must be acknowledged that ordering the suspension of the applicant's criminal proceedings and subjecting the applicant to probation for three years constitutes an interference with his freedoms of expression, art and press.

As in the present incident, it appears that the reports issued by the Board has a significant bearing on the obscenity cases. However, an assessment by a panel of eleven members who are generally bureaucrats, without a preliminary examination made by experts depending on the type of work, leads to the issuance of reports in which the works –required to be indeed considered as intellectual, social or artistic– are found to be deprived of these qualifications. Therefore, declaring a work obscene by virtue of decisions which are issued by a penal not including even a pedagogue and sexual health professional and which are imprecisely formulated with general and abstract expressions poses a threat to the freedoms of expression and press.

In the instant case, the Board, the Istanbul Chief Public Prosecutor's Office and the Panel of Experts stated that in the impugned novel, homosexual intercourses between men are depicted in an explicit and detailed manner. Nevertheless, the Istanbul Chief Public Prosecutor's Office and the Panel of Experts also acknowledged the novel as a literary work.

The novel does not contain any representations such as picture or drawing required to be avoided by individuals. Given also the author's complex

discourse, it is rarely likely for minors to be exposed to its content. The novel is open to public access; however, its design is not of a nature which would attract everyone's attention.

On the other hand, it has been concluded that in spite of its intellectual and artistic nature, the impugned novel is not appropriate for the whole society, and it may aggrieve those who are not familiar with the issues mentioned therein. Given its topic and discourse, this novel is classified as a specific publication targeting at a certain group of the society. Regard being had to the fact that it is a literary publication addressing to a small group of the society and to its obscene nature, it must be acknowledged that preventive measures to be taken for preventing access of certain groups, especially minors, to this publication –such as an expression or sign indicating that it is detrimental to the minors under 18– may amount to a pressing social need.

Therefore, following the determination of the artistic and literary nature of the work, the inferior courts must assess as to whether a measure is required to be taken for the protection of minors and whether a measure taken is proper or not. In the present case, the relevant court focused merely on the artistic and literary nature of the work without handling any matter with respect to the protection of minors. In its decisions, failing to demonstrate that it elaborated whether the impugned novel was compatible with the principle of the protection of minors, the court ordered the suspension of the applicant's prosecution and rendered him subject to a three-year probation.

In case of a dispute with regard to works in which obscene elements are found and which are alleged to be of scientific, artistic or literary nature, primarily the authorities exercising public power and then the inferior courts must determine whether the impugned works have any scientific, artistic or literary value. If these works are deemed to have such qualifications, it must be then considered whether the measures for the protection of minors have been taken during the presentation, publication and dissemination of the artistic and literary works, except for the scientific ones, and if taken, whether these measures are proportionate. Thereafter, a decision must be taken in light of such determinations. In the present case, it was not assessed whether the impugned novel was a literary work. Nor was it considered whether any measure must be taken for the protection of minors. The grounds relied on by the relevant courts are not relevant and sufficient.

Consequently, the Constitutional Court found a violation of the freedoms of expression, science and art, and press safeguarded by Articles 26, 27 and 28 of the Constitution.

8. The judgment finding a violation of the freedom of expression due to imposition of a disciplinary sentence on a soldier in consequence of his complaint to BIMER

***Adem Talas Judgment* [PA], (App. No. 2014/12143, 16/11/2017)**

The Facts

The applicant serves as a non-commissioned officer in the Turkish Armed Forces ("the TAF"). After working in the Turkish General Staff Electronic Systems Command ("GES") for approximately twenty years, he has been assigned to the Edirne 54th Mechanized Infantry Brigade Communications Electronics and Information Systems Division ("MEBS") as a supply sergeant.

The applicant alleges that in the brigade where he has been assigned, besides his service as a supply sergeant, he has also been given responsibilities concerning the notebooks in the brigade; the buildings, lands and trees in the barracks; and the LCD television, ammunition, gas station, boiler room, generator, dishwashing room and fuel purchasing-consuming in the nursery of the military lodgements. The applicant maintains that it is unfair. The applicant further argues that he has been punished many times due to the responsibilities given to him in an area where he does not have adequate information and skills; hence, he has been mentally depressed.

The applicant applied to the Prime Ministry Communication Centre ("the BIMER") with a complaint petition in which he stated that: although he had expressed the difficulties he experienced in his new duty and his excuses in his defences, petitions of objection and appointment request forms, which he had submitted prior to the punishments imposed on him, he could not get any answer to some of these applications and that he could not get a positive answer to some of them; in addition, he stated that he subjected to discrimination, that he was tortured, that although he had not been given any punishment during his twenty years in office, he was given many punishments for the last two years, that this situation affected his psychology and that this negative effect was also reflected to his family.

Thereupon, the applicant was given a warning punishment by his superior upon decision of the Edirne 54th Mechanized Infantry Brigade Electronics and Information Systems Division Command, on ground of "irregular application and complaint to the BIMER".

The applicant's petition against the punishment was dismissed by his superior.

The applicant maintains that pursuant to the Turkish Armed Forces Disciplinary Law no. 6413, he does not have a right to lodge an application with the court against the warning punishment in question.

The Applicant's Allegations

The applicant has maintained that imposition of a warning punishment on him for his application to the BIMER in order to obtain his constitutional rights has violated his freedom of thought and opinion.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

Article 26 of the Constitution safeguards the freedom of expression of "everyone". Public officials, including soldiers, also enjoy the freedom of expression, like all individuals. This freedom, however, is not absolute and may be subject to restrictions.

The disciplinary punishment imposed on the applicant due to expressing his complaints must be considered as an interference with his freedom of expression.

However, the interference with the freedom of expression must be provided by law and must be in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence, as well as it must not be contrary to the spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality, which are set forth in Article 13 of the Constitution.

There is no matter regarding the legal ground and the legitimate aim of the interference with the applicant's freedom of expression.

In the assessment as to whether the interference was in compliance with the requirements of the democratic order of the society, the reason of the applicant's complaint, its legal and factual basis, the manner in which he

complained, the probable comments he made in his complaint, its effect to the public institution and the punishment imposed on the applicant must be taken into account. The nature of the applicant's public service and the specific position of the institution he is assigned, which is directly related to the national security, and the existence of the special rules regulating the internal order and hierarchical structure of the TAF must also be paid regard.

The Constitutional Court will consider the facts as a whole in order to determine whether a balance has been struck between the interference with the freedom of expression of the public officials of certain categories and their obligation to comply with the rules of military hierarchy to ensure that their expressions "are compatible with the institutional discipline", "do not disclose any secret" and "are balanced".

In addition to this, the existence of reasonable procedures in order to be able to discuss within the institution the issues brought to the BİMER and to notify them to the higher authorities, the extent to which the statement owner complied with these procedures and the extent to which the internal information would be disclosed to the public in the event of not complying with these procedures must be taken into consideration.

A soldier's ability to express his personal or service related problems as a requirement of the rule of law is prescribed as a right in military laws, and the use of this right has been regulated by adopting a certain method in military discipline and hierarchical order. In this scope, for military personnel, it is stipulated that complaints and requests must firstly be submitted to the superiors by the latter's ranks in the framework of the Turkish Armed Forces Internal Service Law no. 211, with the exception of the applications to be lodged with the Grand National Assembly of Turkey. In case of not complying with this procedure, a disciplinary punishment is required under Law no. 6413.

When the applicant's petition of complaint is evaluated as a whole, it is seen that it contains his requests for help and expressions emphasizing his desperateness, rather than an aggressive style. The applicant, in particular, expressed that he faced unfairness in terms of the areas where the other military personnel were held responsible and the areas where he was held responsible, and tried to explain that in disciplinary punishments he was especially targeted, that his health problems were ignored and that his defence submissions were not taken into consideration. He was

given disciplinary punishment for his acting contrary to the procedure of complaint.

It has been understood that the issues raised by the applicant can be solved by his superiors within the military structure; that they are not such complaints that might cause damage with respect to the military authorities or cause a loss of reputation on the part of them; that the BIMER to which the petition was submitted is a public institution; and that the content of the petition was not disclosed to the public.

In conclusion, it cannot be said that existence of certain procedures of complaint applicable to those who are within the military hierarchy and discipline and existence of disciplinary punishments in this respect are not necessary in a democratic society. However, regard being had to the points above and in the circumstances of the present application, it has been concluded that imposition of a "warning" punishment on the applicant on account of his sending a petition to the BIMER, which is a public institution affiliated to the Prime Ministry, as a result of his not being able to receive a response from his superiors concerning his complaint about his personal problems and certain unfair practices regarding his service was not a necessary interference in a democratic society.

Consequently, the Constitutional Court has found a violation of the applicant's freedom of expression safeguarded by Article 26 of the Constitution.

The Constitutional Court awarded the applicant TRY 4.000 for non-pecuniary damages.

F. JUDGMENTS RELATED TO THE RIGHT TO FORM AN ASSOCIATION

1. The judgment finding no violation of the right to form an association due to closure of an association engaging in cock fighting

***Hint Aseel Animals Protection and Training Association and Hikmet Neğuç Judgment* (App. No. 2014/4711, 22/2/2017)**

The Facts

In the present case lodged by the Hint Aseel Animals Protection and Training Association ("the Association")operating in the province of Düzce and its chair Hikmet Neğuç, the Association and its members were subject to numerous criminal investigations for organizing unauthorized Hint Aseel cocks fighting events under the Charter of the Association.

The application lodged by the Association for organizing a cock fighting event was rejected in April 2012 by the Directorate General for Nature Conservation and National Parks for being contrary to the Animal Protection Act and the Law of Associations.

However, three reports issued by the police in 2013 revealed that the applicant Association continued fighting cocks in its building in spite of this decision. A criminal case was filed by the Düzce Chief Public Prosecutor's Office against the applicant and his three friends for contravening the Law of Associations. On 12 November 2013, the Düzce Criminal Court sentenced the applicant and his three friends individually to ten months' imprisonment and ordered dissolution of the Association. The applicant's petition against this decision was dismissed by the Düzce Assize Court.

The Applicants' Allegations

The applicants maintained that the Association was established in accordance with the Law and that one of its specified activities was to organize fights between Hint Aseel cocks. The applicants alleged that the police intervention in their fight events and the penalties imposed on the Association and its members were in breach of the freedom of association enshrined in Article 33 of the Constitution. The applicants requested finding of a violation and re-trial.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The applicants indicated; that although their application was rejected, they continued organizing activities, which were not permitted by the relevant administration, under the name of "event"; that these activities did not amount to an animal fighting which was prohibited by law but were a competition among animals.

It is not the Constitutional Court's duty to make assessments of the impugned facts within the scope of the criminal law. In both the police reports and the relevant court's decisions, it is acknowledged that the activity engaged in by the applicants is animal fighting. Nevertheless, the applicants failed demonstrate what kind of "an event" their activity was in the proceedings before the Constitutional Court. Therefore, there is no ground for disregarding the fact that the Association engaged in animal fighting described in the Animals Protection Act.

The applicants maintained that in certain circumstances, cock events should be allowed as a part of cultural heritage. However, the present application relates not to the matter of permitting for a traditional sports competition where all kinds of inspection and control measures have been taken, but to the closure of an association found to organize cock fighting events in an illegal and uncontrolled manner. In this respect, the relevant court's assessment as to the fact that the association's field of activity comprises of acts and actions contrary to the Animals Protection Act was found justified.

Besides, it must be acknowledged that, irrespective of differences of opinion on animal-human relationships, it is both morally and legally wrong to abuse animals merely for making fun or getting pleasure. It is out of question to consider such an abuse necessary.

Accordingly, it was observed that the competent courts decided on the most reasonable sanction on the matter. Regard being had to the fact that it is the legislator's authority to determine the penalty prescribed in the laws for the imputed offence and to the margin of appreciation afforded to the courts, it was concluded that closure of the Association and subjecting the other applicant to probation for a certain period by suspending his imprisonment sentence were necessary and proportionate in a democratic society.

Consequently, the Constitutional Court found no violation of the applicants' freedom of association safeguarded by Article 33 of the Constitution.

H. THE RIGHT TO PROPERTY

1. The judgment finding a violation of the right to property of the property owner whose rental income decreases for blocking of the street

Recep Tarhan and Afife Tarhan Judgment **(App. No. 2014/1546, 2/2/2017)**

The Facts

"Kahraman Kadın" Street, where the real property of which the applicants are the co-owners is located, was closed to vehicles or pedestrians by the decision of 15 March 2001 rendered by Ankara Transportation Coordination Center (ATCC) with a view to providing the security of the Embassy of Israel. Upon the application lodged by the community dwellers, the TCC decided that the blocks and barriers in the street be removed. Yet, this decision has not been executed.

The applicants and the other two community dwellers requested, through the petitions they filed to Ankara Governor's Office, that the necessary procedures be carried out in order for the decision of ATCC to be executed. Upon the fact that this request was not answered but rejected implicitly by the Governor's Office, the applicants filed an action with the 3rd Chamber of Ankara Administrative Court for the cancellation of the act of implicit rejection of the request. The decision of 23 February 2007 rendered by the court on the dismissal of the action was upheld on 21 October 2009 by the 8th Chamber of the Supreme Administrative Court; and the request for the rectification of the decision was rejected on 20 January 2010.

Meanwhile, during the meeting of the Plenary Assembly of ATCC held on 30 December 2005, it was decided that the Ankara Governor's Office be inquired of whether there was a security problem or not in the area where the Embassy of Israel was located. After the Ankara Governor's Office had delivered such an opinion that the removal of blocks and barriers would constitute a security vulnerability, it was decided by the Plenary Assembly of ATCC on 26 May 2006 that those blocks and barriers which had been determined to be removed previously should remain in place.

According to the statements in the application petition, once the street was closed by barriers on 1 December 2003, the applicants who had earlier

rented their real properties located in the aforesaid place for 3,000 TRY ("Turkish Liras") per month had to reduce the rental price to TRY 1,000 with a view to settling with the tenant. Even though the applicants reset the rental price which they had received as TRY 1.000 for 49 months as 3.000 TL as of 1 January 2008, the rental contract was terminated on 31 August 2008 and the real property was evacuated *de facto* since the tenant could not do any business.

The applicants lodged an application with the 9th Chamber of the Ankara Administrative Court and requested the cancellation of the procedure carried out by ATCC on 26 May 2006 and of the decision rendered by the Governor's Office which constituted the basis of this procedure. The Court decided on the cancellation of the procedure through its decision of 31 March2010. It was underlined in the reasoning of the decision that implementation of the measure of closing the street by barriers without a detailed research and examination by the administration, without predicating on concrete facts justifying the restriction but merely considering the existence of the potential danger, was contrary to law. It is indicated in the decision appealed by the defendant Administration that occurrence of certain serious incidents which would point out the necessity of the afore-mentioned measures found, by the judgment of 6 May 2011 rendered by the 8th Chamber of the Supreme Administrative Court, to be taken –without any hesitation - for ensuring the security of the Embassy of Israel, and making of concrete assessments would be contrary to the ordinary flow of life and the nature of diplomatic relations.

The first instance court, having abided by the judgment rendered by the Chamber, rendered a dismissal decision on the same grounds. The request of appeal filed against the mentioned decision was rejected on 4 June2013 and the request for the rectification of the decision was rejected on 6 November 2013; and the decision then became final.

The applicants brought a full remedy action before the 15th Chamber of the Ankara Administrative Court against the Ankara Governor's Office and the Ankara Metropolitan Municipality and claimed pecuniary and non-pecuniary damages of TRY 210,000 and TRY 5,000 respectively, plus any statutory interest. The first instance court decided to dismiss the action through its decision of 15 June 2011. In the decision, the liability of the administration based on fault (tort liability) was discussed but no discussion was held as to whether principles of absolute liability would be applied in the incident or not.

The 8th Chamber of the Supreme Administrative Court, rejecting the applicants' request of appeal through its judgment of 1 November 2012, upheld the decision. The request for the rectification of the decision where the same allegations of the applicants were set forth was also rejected by the same Chamber by its judgment of 6 November 2013.

The Applicants' Allegations

The applicants alleged that their property rights were violated, stating that their rental income obtained from the real property was reduced since the street where their real property they rented as a place of work was located was closed to vehicles or pedestrians.

The applicants asserted that closing a street to vehicles and pedestrians with a view to protecting an Embassy of a foreign state did not comply with the principle of the social state of law, and in case of an obligation to take any measure for this reason, the consequences thereof should be compensated in accordance with the principle of balancing equity.

The applicants complained that even if they asserted in the trial process that the damages arising from the acts and actions of the administration should be compensated without seeking the condition of fault (tort) pursuant to the last paragraph of Article 125 of the Constitution, they complained that this issue was discussed neither in the decision rendered by the first instance court nor in the judgments rendered by the Supreme Administrative Court.

The Court's Assessment

In brief, the Constitutional Court has made the following assessments in the context of this allegation:

The key criterion in terms of proportionality (*ölçülülük*) assessment of the interference with regard to the incident constituting the subject matter of the application is proportionality (*orantılılık*). It is apparent that decrease in the economic value obtained from the rented real property due to the reduction of the rental income lays a burden on the applicants. To provide redress for this burden imposed on the applicants through the measure of closing the street where the Embassy of Israel is located to vehicles and pedestrians, which is applied as a requirement of the international legal obligations of the state of the Turkish Republic, is a necessity of the principle of proportionality. However, the action was dismissed by the first instance court without providing the applicants with the opportunity to prove the

existence of the damage and the causal link between the damage and the act/procedure, on the ground that the administration has no service-related fault regarding the incident. The interpretation of the court which limits the liability of the administration to the condition of existence of its fault has prevented the burden imposed on the applicants from being lightened and balanced.

However, the right to property guaranteed in Article 35 of the Constitution entails providing certain opportunities which balance the interest of the proprietor even in legal interferences. These opportunities set for the purpose of the protection of the interest of the proprietor might include the payment of compensation under the particular circumstances of the concrete case. However, it is not a requisite. While whether it is necessary to pay compensation or not is at the discretion of the instance court, depending on the conclusion reached with respect of the existence of damage and of the causal link between the damage and the measure constituting interference; subjecting the compensation to the condition of existence of fault inhibits from the very beginning the conduct of proportionality review which is a requirement of Article 35 of the Constitution.

On the other hand, in accordance with the principle of balancing sacrifices which has been implemented for many years, it is possible to compensate for the damages suffered by the ones due to the administrative acts and actions, even if those are legal. However, no discussion was made as to whether the conditions for the implementation of this principle have appeared or not even though the applicants had such an allegation in the concrete case.

With regard to the action brought for compensation for the damage alleged to have occurred due to closing of the street to vehicles and pedestrians, the applicants were deprived of receiving compensation by proving the damage they had suffered and the existence of the causal link between the act of the administration and the damage, and thus they were deprived of the opportunity to balance the burden imposed on them, since the court made such an interpretation that the conduct of review of the damage and the causal link depends on the condition of the existence of the administration's fault. That the applicants are caused to face with the obligation to tolerate the burden arising from that measure which is for the benefit of the whole society results in the upset of the reasonable balance required to be struck between the public interest goal and the proprietor's right to property to

the detriment of the proprietor, and renders the interference with the right to property disproportionate.

Consequently, the Constitutional Court has held that the right to property guaranteed in Article 35 of the Constitution was violated.

2. The judgment finding a violation of the right to property due to rejection of the claim lodged for return of the property abandoned to the municipality for road construction, whereupon it was turned into residential area

***Süleyman Oktay Uras and Sevtap Uras Judgment* (App. No. 2014/11994, 9/3/2017)**

The Facts

The applicants purchased a property in 1990, which was a zoning lot located in the Dikilitaş Neighbourhood of Beşiktaş/İstanbul. They applied to the Municipality for restoration of the three-storey building located on the property. The Municipality stipulated that a total of 154.54 m^2 of the property would be abandoned to the Municipality free of charge for construction of a road. The applicants accepted the stipulation set by the Municipality on the basis of a contract drawn up by the notary on 18 August 1992. The relevant part of the property was registered in the name of the Municipality on 16 September 1992. The applicants built a five-storey building on the remaining part of the property in accordance with a building licence they were granted on 7 October 1992.

The area of 80 m^2 of the abandoned land, which had initially been designated as "street", was turned into "residential area" by an amendment made to the implementary development plan on 9 August 2007 and merged with the adjacent parcel no. 36. On 17 December 2009. Subsequently, the applicants claimed the return of the property and requested that it be merged with the parcel no. 37 owned by them. However, the Municipality rejected their claim.

The suit brought by the applicants before the 6th Chamber of the İstanbul Administrative Court ("the Administrative Court") for return of the 80 m^2 land in question was dismissed on 23 September 2011 for being time-barred. The decision was quashed by the 6th Chamber of the Council of State on 21 February 2013. The administrative court abided by the judgment of the Council of State and annulled the administrative action for merging

the property with the parcel no. 36 on 29 January 2016, after the date of the individual application. However, the administrative court rejected the claim for return of the property for lack of jurisdiction. The applicants have appealed against the judgment and their appeal is still pending.

The applicants brought an action before the 4th Chamber of the İstanbul Civil Court ("the Civil Court") requesting the registration of the 80 m^2 land in their names by ½ shares and the discontinuation of the interference. In its decision dated 24 January 2013, the Civil Court stated that the former owners of the property, who gave consent to the reservation of their property for public services and facilities, did not have right to claim title, and therefore, it was not possible to register the property in the name of them free of charge. It was also reminded in the decision that merging of the parcels by the Municipality was an administrative act. The 5th Civil Chamber of the Court of Cassation upheld the Civil Court's decision on 12 November 2013. The applicants' request for rectification of the judgment was rejected by the same Chamber on 26 May 2014.

The Applicants' Allegations

The applicants maintained that their property had been abandoned to the Municipality for road construction, however, due to a subsequent amendment to the development plan, the property in question was turned into residential area and merged with another parcel. In this respect, they alleged that as the property in question was not returned to them, their right to property was violated. The applicants also complained that merging of the 80 m^2 property in question with the adjacent parcel no. 36 would damage their own property, as well as, the owner of the parcel no. 36 would derive an improper profit.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The applicants donated their property to the Municipality for road construction. However, due to an amendment made by the Municipality to the development plan, the property was turned into residential area. Therefore, the Municipality violated the obligation set forth in the donation contract. The infringement of this obligation created a legitimate expectation on the part of the applicants for return of the property to them.

The existence of a legitimate expectation does not necessarily require the

return of the property to the applicants in any case. However, it requires an assessment as to whether the return of the property is required within the frame of the principle of proportionality. It is seen that the legal issue in the present application has resulted from an established case-law which provides that Article 35 of Law no. 2942 prevents the return of the properties, which are abandoned for the purpose of public services with the consent of their owners, even if they are used for the purposes other than the public interest.

In the present application, it is beyond dispute that depriving the applicants of the right of return imposed a significant burden on them. On the other hand, the Municipality derived significant economic benefit from the property donated for the purpose of public interest. Turning the property into residential area and the economic benefit derived by the Municipality as a result of this process led to consequences that undermined the principle of confidence in the State.

In addition, the public interest in turning the property into residential area is relatively low when compared to the burden imposed on its owner. In other words, not returning the property to its former owner and making it the Municipality's private property impaired the reasonable balance that must be struck between the public interest and the individual's right to property to the detriment of its owner. In this case, there was a disproportionate interference with the applicant's right to property.

Consequently, the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

3. The judgment finding a violation of the right to property due to the failure to reimburse the depreciation in the retirement bonus

***Ferda Yeşiltepe Judgment* [PA], (App. No. 2014/7621, 25/7/2017)**

The Facts

The applicant was serving as a public officer at the General Directorate of Youth and Sports between 1968 and 1982 and at the Izmir Provincial Directorate of Youth and Sports between 1986 and 1988. During these periods, she was covered by the State Retirement Fund. She also worked in various private companies during the period between 1982 and 1986, and

in 1988 when she was covered by the Social Insurance Institution ("the SII"). On 1 October 1988, the applicant was entitled to a pension by the SSI.

By its decision dated 5 February 2009 and no. E.2005/40, K.2009/17, the Constitutional Court annulled the phrase "those who were retired while serving in the positions under the coverage of the State Retirement Fund and" specified in Article 12 of the Law on Unifying the Services under the Social Security Institutions, which is dated 24/5/1983 and no. 2829, for being in breach of Articles 2 and 10 of the Constitution. The applicant submitted a petition to the Social Security Institution ("the SSI") on 22 June 2010 and requested to be granted retirement bonus for the periods when she was covered by the State Retirement Fund. By its letter of 20 July 2010, the SSI rejected her request.

On 21 February 2011, the applicant brought an action before the 16th Chamber of the Ankara Administrative Court and requested the revocation of the administrative act rejecting her request and the payment of the impugned retirement bonus, plus any legal interest. On 28 November 2012, the administrative court ordered the revocation of the administrative act in question. It also ordered the payment, by the defendant SSI to the applicant, of the retirement bonus to be calculated on the basis of the ratios applicable on the date of her entitlement to pension, plus any legal interest to accrue.

Upon being contested, the administrative court's decision was upheld with a minor amendment to the counsel fee, by the decision of the 1st Board of the Ankara Regional Administrative Court ("the Board") dated 24 December 2013. The SSI notified that the retirement bonus of TRY 2.27 calculated on the basis of applicable ratios and legal interest of TRY 0.54 accruing based on the date of her request, and the payment was made to the applicant on 8/3/2013.

The Applicant's Allegations

The applicant primarily maintained that her right to request the execution of a judicial decision within the scope of the right to a fair trial was violated on the ground that the SSI failed to execute the decision of the Regional Administrative Court. Secondly, she alleged that her right to property was violated as her retirement bonus was not paid on the basis of ratios applicable at the date of payment. She was of the opinion that taking not the payment date but the date of her entitlement to a pension as a basis for the payment of the retirement bonus led to depreciation in the amount of her receivable.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

A. Alleged Violation of the Right to Request the Execution of a Judicial Decision

In the present case, the Constitutional Court found out that the decision of the Regional Administrative Court did not include any judgment and ground specifying that the retirement bonus would be paid by the ratios applicable at the payment date, which is to the contrary what the applicant stated. Accordingly, there was no indication of the fact that the court's decision was deficiently or erroneously executed by the SSI. Consequently, the Constitutional Court declared the alleged violation of the right to request the execution of a judicial decision, which falls into the scope of the right to a fair trial, inadmissible for being manifestly ill-founded.

B. Alleged Violation of the Right to Property

In brief, the Constitutional Court made the following assessments:

With regard to the alleged interference with the applicant's right to property due to the non-payment of her retirement bonus, the relevant courts ordered the payment of retirement bonus to the applicant by taking into account the annulment decisions rendered by the Constitutional Court. Besides, the SSI paid the retirement bonus awarded at the end of the proceedings. Accordingly, the circumstances leading to the applicant's suffering have been eliminated. However, such a payment does not *per se* remove the applicant's victim status, which can be removed only when the alleged violation is redressed in a timely manner and by also taking into account the period when the victim was deprived of her right.

In the individual application *Hüseyin Remzi Polge* (no. 2013/2166), the Constitutional Court noted that the applicant's request for taking the ratios of the payment date as a basis in the calculation of his retirement bonus is devoid of any concrete ground; and that it is within the inferior court's discretionary power to decide on the calculation method and procedures. However, this Court also stated therein that it is a requisite to assess whether the interference is proportionate or not by taking into account the applicant's complaint that "the amount of his retirement bonus" was depreciated.

In the present case, the competent courts determined that the applicant was entitled to receive retirement bonus by 1 October 1988 when she was

entitled to a pension. As a matter of fact, her bonus was calculated on the basis of the ratios applicable at that time. However, according to the data provided by the Central Bank, the amount to compensate the depreciation in the applicant's receivable of TRY 2.27, which falls into the scope of her right to property, is TRY 10,369.73. However, the amount of interest paid to her is only TRY 0.54. The increase in inflation until the payment date is 456.792%. Therefore, the interest payment made to the applicant does not compensate for the depreciation in the amount of the applicant's receivable due to inflation.

Given the inflation rates during a period of 25 years from the date when the applicant was entitled to a retirement bonus to the date of actual payment, the payment which falls under the property right was made in the depreciated amount. Considering the amount of depreciation in question, the Constitutional Court reached the conclusion that the interference imposed a personally excessive and extraordinary burden on the applicant, which impaired, to the applicant's detriment, the fair balance required to be struck between the public interest and the applicant's right to property.

Consequently, the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

4. The judgment finding no violation of the right to property due to the liability of legal representative for unpaid public receivables

***Ahmet Uğur Balkaner Judgment* [PA], (App No. 2014/15237, 25/7/2017)**

The Facts

Between 17 September 1996 and 17 December 1999, the applicant was a board member of the Derby Lastik Fabrikaları Anonim Şirketi ("the Company"). The Company is a shareholder, with 10% shares, of the Yurtbank Anonim Şirketi ("the Yurtbank") that was handed over to the Savings Deposit Insurance Fund ("the Fund") on 21 December 1999. Furthermore, 99% of the shares of the Company is owned by the Balkaner Group which is the controlling shareholder of the Yurtbank. The applicant was also a board member of the Yurtbank between 31 December 1998 and 21 December 1999.

On 30 April 1994, 30 August 1994 and 24 April 1995, the Company received loans from the Yaşarbank Anonim Şirketi ("the Yaşarbank"). However, it did not repay the loans. A legal action was taken in this respect on 2 August 2000.

The Yaşarbank was also handed over to the Fund together with the Yurtbank on 21 December 1999 with the same Decree of the Council of Ministers. The loans obtained by the Company from the Yaşarbank were assigned and transferred to the Fund with a contract dated 10 August 2001.

On 20 May 2008, a payment order was issued pursuant to the repeated Article 35 of Law no. 6183 on the Collection Procedure of Public Receivables, dated 21 July 1953, for the purpose of collecting from the applicant the public receivables that could not be collected from the Company. On 30 December 2009, the applicant brought an action before the 8th Chamber of the İstanbul Administrative Court ("the administrative court") for annulment of the payment order.

The administrative court dismissed the case on 16 November 2011. In the decision, it was underlined that the unpaid loans were characterized as public receivables upon their transfer to the Fund. It was concluded in the decision that in accordance with the additional Paragraph 5 of the repeated Article 35 of Law no. 6183 (added by Article 4 of Law no. 5766 dated 4 June 2008), the legal representatives were severally liable to pay for the public receivables that could not be collected from the company; therefore, the applicant was liable to pay the unpaid debts of the Company.

The applicant appealed against the decision. Having examined the applicant's request, the 13th Chamber of the Council of State ("the Chamber") upheld the administrative court's decision on 3 October 2012. The Chamber noted in its judgment that in cases of receiving loans from the banks, the legal representative of the company receiving the loans would be liable for the debts which were characterized as public receivables, during the period from the date when the loans were obtained until its repayment. The Chamber concluded that as the applicant was the legal representative of the Company during the period allowed to repay the loans, he was liable for the unpaid debts.

The Applicant's Allegations

The applicant maintained that he was a board member of the Company only between 17 September 1996 and 17 December 1999, and that he was not a board member on 10 August 2001 when the Company's debts were

characterized as public receivables, therefore, he should not be held liable for the debt. The applicant argued that if the additional Paragraph 5 of the repeated Article 35 of Law no. 6183 was not applied, the liability would only be imposed on the legal representative who was on active duty during the repayment period of the debt, and the debt would not be able to be collected from himself. The applicant complained that pursuant to Provisional Article 1 of Law no. 5766, the mentioned Paragraph 5 was applied retroactively to cover the public receivables not collected until its entry into force. Recalling that Provisional Article 1 had been annulled by the Constitutional Court, the applicant claimed that the retroactive application of Paragraph 5 of Article 35 impaired the right to property and the principle of the state of law.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

According to the Constitutional Court, the legislator may extend the liability for the purpose of securing the public receivables and increasing the possibility of their collection, as well as it may set forth a several liability.

Legal acts and actions of the trading companies have no real personality. They have been granted legal entity status by law, and their activities are carried out by real persons who are responsible for their management and administration on their behalf. These real persons who are regarded as legal representatives of the companies have the opportunity and power to carry out the legal actions of the legal entity they are representing, to manage its personnel and assets, to determine the direction of its investments and activities and to take the measures required by virtue of its economic and financial situation. In connection with these, carrying out the duties of a company and paying its public debts within the prescribed term are also among the primary duties of its legal representative. A legal representative is the person who bears the ultimate responsibility of the actions or acts of the company. He is a company official with the greatest authority, carrying power to prevent acts or omissions that may lead to non-payment of public receivables. Put another way, they have power to ensure the payment of these public receivables. Therefore, a legal arrangement may be made to hold the legal representatives, who manage trading companies and carry out their acts and actions, severally liable for paying public receivables that cannot be collected from the company. Considering the authority granted to the legal representatives and the duties assigned to them, it is understood

that holding the legal representatives severally liable for the unpaid public debts does not impose, as a rule, an excessive and extraordinary burden on them.

However, no liability beyond the powers and opportunities entrusted to the legal representatives may be imposed on them. Holding a legal representative liable for the payment of public receivables arising from certain acts and actions carried out during a period when he has no chance to intervene or prevent them and especially to rule the company's activities may result in a disproportionate burden on him in the circumstances of the concrete case.

The case that gave rise to the public receivables had resulted from the loans received from the Yaşarbank on 30 April 1994, 30 August 1994 and 24 April 1995. The applicant was not the legal representative of the Company at the material time. However, as also understood from the judgment of the Chamber, the applicant was the legal representative of the Company on the payment date of the loans. It is the legal duty of the legal representative to repay the loans on behalf of the Company with the money obtained from the Company's assets. Where the legal representative fails to perform this duty, a liability arises on the part of him. However, the liability of the legal representative to pay the debt of the Company does not mean that he must pay the debt by using his own assets but the Company's assets. If the Company does not have sufficient assets to cover the debt, imposing liability on the legal representative whose only act is his failure to pay the debt –except for the cases where he has contributed to the Company's default– may cause damage to justice and equity.

The applicant has no allegation as to the fact that between 17 September 1996 and 17 December 1999, when he was the legal representative of the Company, the assets owned by the Company were not sufficient to cover the loans received in the previous period. In addition, it appears that the applicant was a member of the Balkaner family, one of the controlling shareholders of the Yurtbank, and he also took office in the management of the latter. According to the audit report dated 7 March 2000, the Yurtbank granted loans to 23 companies within the Balkaner Group, directly or indirectly, in high amounts, and they were not paid back. Regard also being had to these facts, holding the applicant, who –as a legal representative– failed to fulfil his duty to pay the debt of the Company, liable for the public receivables that resulted from this debt does not place an excessive and disproportionate burden on him.

The applicant alleges that the liability imposed on him has increased due to the retroactive application of the law that entered into force subsequently. Repeated Article 35 § 1 of Law no. 6183 on the basis of which a payment order was issued in respect of the applicant had also been in force before the date when the Company's debts were characterized as public receivables. The aim of the additional Paragraph 5 of Article 35 of Law no. 6183 is to eliminate interpretation differences between the relevant chambers of the Council of the State as regards the disputes concerning tax-related public receivables. By the additional Paragraph 5, no amendment has been made regarding Paragraph 1 where the liabilities of legal representatives are regulated. The amendment is related to the interpretation of the article. A legal arrangement aimed at eliminating different interpretations cannot be said to have increased the applicant's liability alone.

In addition, with reference to the annulment of Paragraph 5 of the repeated Article 35, it cannot be concluded that the payment order issued under this provision led to a violation. In order to be able to make an assessment on this issue, both the grounds relied on by the Constitutional Court in the annulment of the relevant paragraph and the circumstances of the case must be taken into account. The Constitutional Court annulled the additional Paragraph 5 on the ground that in accordance with this paragraph, the legal representatives, who fulfilled their tax-related and other duties and liabilities completely and timely, would be held severally responsible for any act that occurred in a period when they did not take office and had no chance of intervention. The Constitutional Court underlined that holding a legal representative severally liable for the acts and failures of others, which did not result from his own faults, would be incompatible with the justice and equity.

In the present case, the applicant was not held liable for an act which occurred after the date on which his term of office in the capacity of legal representative had expired or after a time that he had no chance of intervention but for the failure to pay the debt that was due on his term. Accordingly, given the particular circumstances of the case, the annulment of Paragraph 5 of the repeated Article 35 of Law no. 6183 had no effect on the applicant's situation.

Consequently, holding the applicant liable for the public receivables that resulted from his failure to pay the debts of the Company where he was the legal representative, which could not be collected from the Company's

assets, did not impose an excessive and disproportionate burden on the applicant. Therefore, the interference with the applicant's right to property did not impair the balance to be struck between the public interest and the applicant's right to property to the detriment of the applicant.

In conclusion, the Constitutional Court held that the applicant's right to property safeguarded by Article 35 of the Constitution was not violated.

5. The judgment finding the alleged violation of the right to property due to the annulment of the right to housing inadmissible for lack of jurisdiction ratione materia

***Mehmet Şentürk Judgment* [PA], (App. No. 2014/13478, 25/7/2017)**

The Facts

Following an earthquake occurring in the Gölcük District of Kocaeli on 17 August 1999, a housing was allocated to the applicant pursuant to the report indicating that the applicant's house, which was "under construction", was "ruined". However, as a result of the comprehensive inquiries, the applicant's entitlement for the housing was annulled on the ground that the ruined structure "was under construction during the earthquake".

The applicant then brought an action before the administrative court during which he maintained that he had been residing in the house in question since 7 May 1999 and accordingly submitted the address transfer certificate issued by the mukhtar's office (elected responsible person of a neighbourhood). In the letters received from the relevant municipalities, it was indicated that utility bills (electric, telephone, gas) were not available in the region where the applicant was residing as the relevant data could not be updated due to the earthquake. However, according to the subscription list of water service, the building in question was inhabited before the earthquake without obtaining the necessary occupancy permit.

The expert's report issued at the end of the on-site inspection carried out by the relevant Magistrate's Court for establishing the evidence reveals that there was a shed built with bricks on the immovable in question.

The administrative court found no indication of unlawfulness in the annulment of the applicant's entitlement for the housing, which had been erroneously granted, by taking into consideration the failure to submit utility bills of the applicant's house for the period before the earthquake; the

facts that his house was under construction when the earthquake occurred and that he did not raise an objection to the damage assessment report which revealed that the building was under construction; and the fact that it is not possible to acknowledge the applicant's ownership by relying merely on the address transfer certificate which was approved by the local administrative authority. The administrative court's decision was upheld by the Council of State.

The Applicant's Allegations

The applicant maintained that his right to property was violated as there was no public interest in the annulment of his entitlement seven years later and that neither the principle of proportionality was complied with nor the fair balance was struck in such an annulment.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

It is obvious that there might be difficulties, in certain cases it might be even impossible to obtain and submit utility bills after the natural disasters such as earthquake. However, the difficulties or impossibilities experienced in submission of the bills do not relive the applicant of his burden of proof. Besides, the applicant failed to submit any concrete document proving that he could not submit the utility bills or real estate tax statement due to the earthquake. On the other hand, it is the inferior courts' duty to assess whether the other evidence submitted by the applicant has probative force. Within the scope of the individual application mechanism, it is not the Constitutional Court's duty to examine the inferior courts' assessments as to the material facts and the evidence unless there is a manifest error or an explicit arbitrariness. In the present case, it has been concluded that there is no manifest error in the assessment of the evidence and no arbitrariness in the conclusion –reached on the basis of the damage assessment report which was not contested by the applicant– that the immovable could not be qualified as "an inhabitable housing" for being "under construction" before the earthquake.

Article 35 of the Constitution does not safeguard access to property or acquisition of property on an abstract ground but an existing property or legitimate expectation. In the present case, the applicant whose house does not meet the condition of the housing entitlement under relevant law that

a building demolished or severely damaged due to the earthquake must be inhabitable before the earthquake, failed to demonstrate a legal provision, an established case-law or an administrative practice proving that he had a legitimate expectation within the scope of the above-cited Law.

Consequently, in the present case, the applicant has neither an existing property within the scope of his right to property safeguarded by Article 35 of the Constitution nor a legitimate expectation based on a sufficient legal ground for his acquisition of a housing due to the disaster.

For this reason, the Constitutional Court declared the application inadmissible for lack of jurisdiction *ratione materia*, without making a further examination as to the other admissibility criteria.

6. The judgment finding a violation of the right to property due to low appraisal of the amount of the expert fee awarded to the applicant

***Yasemin Balcı Judgment* [PA], (App. No. 2014/8881, 25/7/2017)**

The Facts

The applicant took part in a total of 104 autopsy processes between 2 November 2001 and 20 June 2003 upon the request of the Public Prosecutor's Office, by virtue of a contract between the university hospital where she served as a forensic expert and the Ministry of Justice. The autopsy fee was not set forth in the contract. The applicant's request to be paid for the autopsies was implicitly rejected by the Public Prosecutor's Office. Thereupon the applicant filed a case with the first instance court but she could not receive a favourable result. Following the applicant's appeal, the Council of State quashed the judgment, and the first instance court awarded the applicant 265.83 Turkish liras (TRY). Upon finding the amount low, the applicant filed a case requesting to be paid TRY 15,600 based on the current values. Following, the Chief Public Prosecutor's Office made an additional payment of TRY 499.31 to the applicant.

The applicant brought an action for damages before the same court for the remainder of the total amount she requested. However, her action was dismissed. The applicant's appeal against this judgment was also rejected by the Regional Administrative Court.

The Applicant's Allegations

The applicant complained about the insufficiency of the amount paid to her for the autopsies she had performed compulsorily, upon the request of the Chief Public Prosecutor's Office, at the university hospital where she served as a forensic expert. In this respect, the applicant maintained that the prohibition of forced labour, as well as her right to property were violated.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

Carrying out autopsies by getting use of the personnel and infrastructure of the university hospital due to the need that arouse in the Forensic Medicine Branch Office is a type of social solidarity. In conducting the autopsies, the applicant was not asked to carry out a service outside of her expertise. In fact, these processes provided the applicant with some advantages in terms of contribution to her professional development and did not impose an excessive burden on her. In view of these considerations, the Constitutional Court concluded that the prohibition of forced labour safeguarded by Article 18 of the Constitution was not violated.

On the other hand, in the price schedule the Court demanded from the Forensic Medicine Institution, the autopsy fee is indicated as TRY 390. Although this price schedule is not absolutely binding, it gives an opinion about the financial value of the effort made by a forensic expert while performing autopsy. The applicant was paid a low price in comparison to the price schedule. Indeed, it also appears in the documents annexed to the applicant's individual application that the she has been paid TRY 150/per autopsy for a portion of autopsies she performed, while she received only TRY 7.36 per autopsy for the rest. Accordingly, the amount of TRY 7.36 per autopsy awarded to the applicant was considerably lower than the average. There is no information or document in the case file as to the reason why the amount of the expert fee awarded to the applicant was too low.

Therefore, it has been concluded that the amount of the expert fee awarded to the applicant, which was considerably lower than the fee set forth in the mentioned price schedule, was not sufficient to cover the applicant's efforts and work. Accordingly, the interference with the applicant's right to property was not proportionate.

Consequently, the Constitutional Court found a violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

I. THE RIGHT TO A FAIR TRIAL

1. The judgment finding a violation of the right to a reasoned decision as the allegations asserted during the criminal proceedings were rejected without sufficient grounds

***Ali Önal Judgment* [PA], (App. No. 2015/11798, 25/5/2017)**

The Facts

The applicant is a self-employed lawyer in Antalya. A.D. was working in the applicant's office at the time of the incident. On 5 March 2010, A.D., who was also co-accused with the applicant, referred a promissory note (bond) to the Serik 1st Debt Enforcement Office against the debtor, in his capacity of the representative of his father M.D. The beneficiary of the bond amounting to 150,000 Euro (EUR) was himself, the endorser was M.D. and the debtor was M.G. (the intervening party). In response to the execution proceedings, M.G. brought a negative declaratory action, and an interim decision was taken pending the action. M.G. submitted a complaint petition of 19 March 2010 to the Antalya Chief Public Prosecutor's Office and filed a criminal complaint against the applicant, and A.D. and M.D. whose names were noted in the bond. In his complaint petition, M.G. maintained in brief: He and B.A., a real estate agent, visited a lawyer (the applicant) in order to receive legal assistance against his son-in-law F.A. and those accompanying F.A. who had defrauded him while purchasing an immovable in return for EUR 1,450,000. He agreed with the lawyer in return for EUR 150,000. The applicant then had M.G. sign the contract consisting of the counsel's fee of EUR 150,000, M.G.'s name and printed notes (Counsel's Fee Contract-Certificate of Authority). Although he demanded one copy of this contract, the applicant did not deliver it. He had not signed any other promissory note. After he had signed the contract, he paid 30,000 Turkish Liras (TRY) to the applicant. He further remitted an amount of TRY 130,000 to different persons upon the applicant's request. However, the applicant did not answer his phone. Thereupon, he dismissed the applicant on 22 February 2010 as the applicant failed to pursue the necessary actions and continuously demanded money. After the applicant was discharged, his signature in the contract amounting to EUR 150,000 was then used in a bond (the contract was turned into a bond); that he had no legal relationship with the person commencing the execution proceedings and the creditor in the bond; and that he saw the creditor A.D. in the applicant's office and A.D. was introduced him as the guard of the lawyer.

The applicant noted the followings: He and M.F. had engaged in contract of power of attorney in the amount of EUR 150,000. But M.G. had paid only an amount of TRY 30,000. They had not made any other contract for power of attorney. As M.G. failed to make payments for the actions pursued by him on behalf of M.G. and he was dismissed by M.G., he commenced execution proceedings against M.G. before the Serik 1st Debt Enforcement Office in order to collect the counsel's fee. The charges against him were not accurate.

The Serik Chief Public Prosecutor's Office conducting the investigation took the statements of the suspects, the complainant and the witnesses and examined the file of the enforcement proceedings, the impugned bond, the file of the negative declaratory action before the civil court and the report issued, with respect to the impugned bond, by the Physics Specialization Board of the Forensic Medicine Institute. The Prosecutor's Office requested initiation of a final investigation against the applicant. By its decision dated 27 December 2011, the 1st Chamber of the Alanya Assize Court ordered a final investigation into the forgery of official documents, aggravated fraud and professional misconduct before the 1st Chamber of the Manavgat Assize Court. The co-accused persons A.D. and M.D. gave statements confirming the applicant's defence arguments. By its decision of 24 April 2013, the competent court convicted the accused persons of forgery of official documents and aggravated fraud.

The applicant appealed the decision. Although the Chief Public Prosecutor's Office of the Court of Cassation was of the opinion that the decision be quashed, the 15th Criminal Chamber of the Court of Cassation upheld the decision, by its judgment of 27 May 2015, relying on the grounds compatible with those of the first instance court. Upon the applicant's request of 4 December 2004, the Chief Public Prosecutor's Office of the Court of Cassation challenged the chamber's judgment. The relevant chamber then decided, by its judgment of 1 July 2015, that the review of the challenge be conducted by the General Assembly of Criminal Chamber of the Court of Cassation ("General Assembly"). By its judgment of 4 October 2016, the General Assembly concurred with the chamber's judgment and rejected the challenge by majority of votes.

Since the date of application, the applicant has been excluded from profession as per the decision of the Antalya Bar Association dated 30 April 2013.

The Applicant's Allegations

The applicant maintained; that the evidence collected throughout the proceedings and the challenges against the evidence and the counter-evidence were not discussed to the extent and of the nature which would be in pursuit of justice; that sufficient and reasonable ground was not established; that only the intervening party's allegations were taken into consideration; and that there were no reasonable grounds explaining the reason as to why the defence evidence was not relied on. The applicant alleged that his rights to a reasoned decision and a fair trial were violated and accordingly requested re-trial.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

In its examination as to the merits, the relevant court discussed the reason for drawing up the bond in question. It was then acknowledged that the bond was drawn up beyond the drawer's own will for the following two reasons: Firstly, A.D.'s and M.D.'s economic and social conditions were not sufficient for purchasing an immovable in value of EUR 300,000. Secondly, the failure to make a "purchase and sale contract" –even if not valid– in a sale transaction with an advance payment of EUR 150,000 in which title deed was not transferred is not compatible with the ordinary course of life. Therefore, it was concluded that there was no contract signed between A.D. and M.G. with respect to the sale and purchase of an immovable. On the other hand, the relevant court acknowledged that although it accepted the findings in the forensic report in which the copied document alleged to be faxed to M.G. by the applicant's officer was compared with the impugned bond, such an acknowledgement did not have any bearings on the conclusion reached on the basis of the previous assessments that the offence was proven to be committed.

The Constitutional Court has observed that as to the various allegations and defence arguments such as the facts that the signature on the impugned bond was of M.G. and that the reason of signing was allegedly an power of attorney contract or immovable sale contract, the issues included in the letters of notification and objection issued by the Chief Public Prosecutor's Office of the Court of Cassation and in the dissenting opinions annexed to the judgments of the General Assembly were not expressly discussed in the reasoned decision, which was a substantial element for the impugned proceedings.

Regard being had to the acts imputed to the applicant, the issues that the applicant insistently requested for examination and the issues included in the conviction decision of the first instance court, the Constitutional Court has observed that in its decision, the relevant court failed to provide the grounds for the rejection of the applicant's requests about the witnesses' statements concerning the sale of immovable and for abuse of the signature in blank. For this reason, the Constitutional Court found a violation of the applicant's right to a reasoned decision, which is one of the elements of the right to a fair trial safeguarded by Article 36 of the Constitution.

2. The judgment finding a violation of the right of access to a court due to strict interpretation of the statute of limitations

***Yaşar Çoban Judgment* [PA], (App. No. 2014/6673, 25/7/2017)**

The Facts

The immovable property that is the subject of the present application was sold by auction to third parties with a title deed in 1944.Upon the establishment of forestry restrictions in 1946, the property remained within the boundaries of the forest. Therefore, during the forestry cadastre it was excluded from property registry. In 1974, certain part of the property that was designated as heathland in the title deed was purchased by the applicant. In 1975, by a practice called "2/B", the area where the property was located was separated from the forest on behalf of the Treasury and left in the forest cadastral parcel. In the cadastral work carried out in 1980, the property in which the applicant alleging to have a share was registered in the name of the State Treasury as a maquis shrubland.

Many persons, who unsuccessfully claimed title with respect to the property in question filed a law suit in 1982. The suit was concluded in 2006 following a lengthy trial process involving many stages.

The applicant was not a party to the suit and had not filed any other case in the past. However, after the finalization of the judgment rendered as a result of the case, the applicant brought an action for compensation in 2009, arguing that he sustained damage due to the registration of the property, which he had purchased relying on its title deed, in the name of the Treasury.

The first instance court dismissed the case in 2012. The Court of Cassation upheld the decision in 2013. According to the reasoning of the Court of Cassation; pursuant to Article 125 of the former Code of Obligations no. 818,

ten-year statute of limitations applies to the actions for damages to be filed due to the strict liability of the State under Article 1007 of the Turkish Civil Code no. 4721, however the applicant's case was not filed within the ten-year period. The applicant's request for rectification was dismissed in 2014, and the judgment became final.

The Applicant's Allegations

The applicant claimed that his right to property was violated in that the immovable property he had purchased relying on its title deed was registered in the name of the Treasury during a cadastral work and that the action for damages he brought in this sense was dismissed due to the expiry of statute of limitations.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The Chamber of the Court of Cassation acknowledged that pursuant to Article 125 of the Code no. 818, ten-year statute of limitations applies to the actions for damages to be filed under Article 1007 of the Law no. 4721. Accordingly, an action for damages must be brought within ten years after the property loss occurred as a result of cadastral process.

The Chamber noted that the applicant did not bring an action against the registration made in the name of the Treasury in 1980 and therefore the cadastral registration became final on the part of the applicant. As a result, the Chamber held that the statute of limitations had expired with respect to the case filed on 26 June 2009, and it dismissed the case.

There is no dispute as to the fact that the applicant did not bring an action against the cadastral registration of 1980. According to the decision of the Chamber, the applicant must have brought an action until 1990. However, the case-law of the Court of Cassation at the material time provided that Article 1007 of the Law no. 4721 did not cover the errors made during the formation of the land register. In other words, according to the case-law in question, the action for liability set forth in Article 1007 of the Law no. 4721 was not an efficient remedy for examining the applicant's claim for damages and, if necessary, awarding compensation to him. Following the new case-law of the Court of Cassation, dated 18 November 2009, this action has become an effective and efficient remedy for the examination of the applicant's claim for damages.

The assumption of the Chamber that the statute of limitations as regards the remedy which was created on 18 November 2009 started to run in 1980 made it meaningless for the applicant to make use of the remedy provided by Article 1007 of the Law no. 4721. Expecting the applicant to exhaust a remedy –which was not effective until 18 November 2009 in terms of his claim– before 1990 imposed an excessive burden on him. As a matter of fact, this remedy has been effective as from 18 November 2009 with respect to the applicant's claim.

This consideration of the Chamber is extremely formalistic and strict, and it renders the remedy of compensation provided by Article 1007 of the Law no. 4721 futile for the applicants in respect of whom the statute of limitations had expired before 18 November 2009. Acknowledgement of the fact that the statute of limitations to be applied to a remedy created on a subsequent date would start to run from a date which would make it absolutely impossible for the applicant to make use of the remedy is incompatible with the principle of exceptionality of restrictions. However, considering that the ten-year time-limit intends to provide legal certainty and stability as per Article 125 of the Law no. 818, it is clear that this period must not be completely ignored. A balance must be struck between the applicant's individual interest in his ability to enjoy the right to bring an action and the public interest in maintaining the principle of legal certainty and stability, which will not make it meaningless to set a time-limit for bringing an action. It must be underlined that this balance does not necessarily requires to accept that the ten-year time-limit will restart to run as from 18 November 2009, the date on which the remedy was created. Otherwise, setting a time-limit would be meaningless and the balance between the public interest and the individual interest will be impaired to the detriment of the public interest. The important point is that for the persons whose claims were out of time before 18 November 2009 must be provided with the opportunity to file a case under Article 1007 of the Law no. 4721 in a reasonable time.

In this case, providing a reasonable period for filing of the claims in respect of which the statute of limitations had expired before 18 November 2009 would be sufficient for striking a fair balance between the public interest and the protection of the individuals' right to property. There is no doubt that it is at the discretion of the domestic courts, in particular the Court of Cassation, to determine this period.

In brief, the burden imposed on the applicant due to the dismissal of his request on the ground that the remedy which became effective as from 18

November 2009 with regard to his claim impaired the fair balance that must be struck between the public interest and the individual's right of access to a court. Hence, the interference with the applicant's right of access to a court was disproportionate.

Consequently, the Constitutional Court found a violation of the applicant's right of access to a court safeguarded by Article 36 of the Constitution.

3. The inadmissibility decision finding that disputes relating to the exercise of the power of conscription do not fall into the scope of the right to a fair trial

***Yusuf Gürkan Judgment* [PA], (App. No. 2014/11067, 18/10/2017)**

The Facts

Having completed compulsory military service, the applicant, who had been initially found eligible for military service in the medical examination, started serving as a contracted infantry at the Turkish Armed Forces ("the TAF"). Afterwards, the applicant was diagnosed with Familial Mediterranean Fever (*37/B/5*) by the Medical Board report. In this report, he was also found unfit for the military service and, therefore, not eligible to serve for the TAF. The applicant's contract was terminated for health-related reason after this report had become final upon being approved by the Ministry of National Defence ("the Ministry").

He stated that he was innately unfit for military service due to his disease. However, he had to perform military service on account of the relevant administration's failure to provide him with sufficient medical examination and diagnose his disease. He then lodged an application for compensation with the relevant administration. As his application was implicitly rejected, he brought an action for damages before the Supreme Military Administrative Court ("the SMAC").

The SMAC dismissed his action as being out of time. The applicant's request for rectification of the decision was rejected by the SMAC.

The Applicant's Allegations

The applicant maintained; that despite being unfit for the military service, he was made to perform compulsory military service due to inadequate medical examination, and that dismissal of his action for damages by the SMAC for being out of time constituted a breach of his right to access to a court.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

As set forth in Article 148 § 3 of the Constitution, an individual application may be lodged with the Constitutional Court in case of an alleged violation of rights which are under the joint protection of the Constitution and the European Convention on Human Rights ("the Convention"). In addition, regard being had to the legislative intention of the concept of *"right to a fair trial"* added to Article 36 of the Constitution in 2001, Article 6 of the Convention must be taken into consideration in determining the scope and content of this right.

The Convention does not safeguard the right to a fair trial in respect of all rights and obligations which an individual may claim to have. In Article 6 of the Convention enshrining the right to a fair trial, the scope of this right is set by indicating that the rights and principles of a fair trial shall be applicable in the adjudication of "disputes about civil rights and obligations" or of "any criminal charge". Accordingly, an individual application may be lodged due to an alleged violation of the right to legal remedies only in case of any dispute about the individual's civil rights and obligations or in case of a criminal charge against him. Therefore, the alleged violation of the right to a fair trial, except for those asserted under the above-mentioned circumstances, cannot form the subject-matter of an individual application as being out of the joint protection of the Constitution and the Convention.

It is obvious that the present dispute does not relate to a criminal charge. At this point, it must be primarily determined whether this dispute may be considered to fall into the scope of "civil rights and obligations" and, therefore, whether it is entitled to the protection of the right to a fair trial under the joint realm of the Constitution and the Convention.

It is perceivable that military service may have certain bearings on an individual's corporal and spiritual entity or on his other rights protected in the domestic law. This is because military service by its very nature deprives the incumbent of certain civil rights. However, in an examination as to whether the dispute falls into the scope of "civil rights and obligations", the criterion to be taken into consideration is "the subject-matter" of the case. In determining the subject-matter, the "essence" of the relevant dispute must be discussed. If the State's "conscription order" or, in other words, its acts and actions with respect to the exercise of its power to conscript are to be dealt

with in a case –even in actions for damages–, this dispute can in no way be considered to be within the scope of civil rights and obligations.

The basis of the present application is conscription of a person for compulsory military service despite actually being ineligible for such service due to health reasons. The key issue to be discussed in resolution of his action is "the conscription order about the applicant". Therefore, the very essence of the dispute relates to the State's exercise of its power of conscription, which falls under its sovereign powers. In this respect, the dispute –which necessitates the discussion of "the conscription order" and, therefore, the State's sovereign power– cannot be considered to fall into the scope of civil rights and obligations.

On the other hand, the applicant did not complain of any damage to his corporal and spiritual entity, except for those which are inherent in military service. Regard being had to all these assessments, it is concluded that the dispute concerning the obligation of military service, which does not fall into the scope of civil rights and obligations, is not under the joint protection of the Constitution and the Convention.

Consequently, without further examination as to the other admissibility criteria, the Constitutional Court declares the application inadmissible as being incompatible *ratione materiae*.

J. JUDGMENTS RELATED TO THE RIGHT TO UNION

1. The judgment finding a violation of the right to labour union membership due to imposition of fine for a peaceful activity

***Union of Employees in Education and Science (Eğitim-Sen) Judgment* [PA], (App. No. 2014/920, 25/5/2017)**

The Facts

The Education and Science Workers Union ("*Eğitim ve Bilim Emekçileri Sendikası*") ("the EĞİTİM SEN"), the applicant, alleged that during the two years period before the date of application, its members were many times imposed administrative fines under the Misdemeanor Law due to union-related activities.

By a decision dated 3 June 2013, the Confederation of Public Employees Trade Unions ("*Kamu Emekçileri Sendikaları Konfederasyonu*") ("the KESK"), to which the EĞİTİM SEN is affiliated, decided to go on strike for two days on 4-5 June 2013. Twenty-one members of the applicant union made a press announcement in the yard of the Çanakkale Fine Arts and Sports High School and started a strike.

In two separate police reports issued against Telat Koç, one of the applicants, for personally attending the press announcement and being the provincial representative of the union, it was stated that the press announcement was made in the yard of the high school, which blocked the gate, and that the high school in question was not among the places allowed for a press announcement. Therefore a judicial fine was imposed on the applicant by the Provincial Security Directorate on 6 August 2013. Telat Koç's petition against the judicial fine was accepted by the 1st Chamber of the Çanakkale Magistrates' Court on 29 November 2013 and the fine was revoked.

The petition lodged by Telat Koç, on behalf of the applicant union, against the administrative sanction imposed on it on 2 October 2013 was dismissed by the 3rd Chamber of the Çanakkale Magistrates' Court on 2 December 2013.

Although the above-mentioned activity was exclusively mentioned in the application form, administrative sanctions were imposed on the members of the applicant union countrywide in the same period. According to the court decisions which were not mentioned in the application form but

included in the file, some of the administrative fines were revoked, but some others were not.

Gülhan Oktay, one of the applicants, as well as a member of the Batman Branch of the Union, attended the press announcement of this union held in front of the building of the Batman Provincial Directorate of National Education on 8 May 2013. She alleged that she was imposed administrative fine and that her petition against the relevant decision was rejected by the 2nd Chamber of the Batman Magistrates' Court. By its letter dated 17 February 2014, the Constitutional Court requested criminal records and other documents pertaining to Gülhan Oktay. Although, the applicant's representative submitted documents with respect to many members of the union, he did not submit documents concerning Gülhan Oktay.

The Applicants' Allegations

The applicants maintained that the union meetings and press announcements did not constitute an offence in terms of criminal law, however the administration considered their activities within the scope of Law no. 5326, therefore arbitrary punishments were imposed on them. They added that the administrative fines imposed on them were unpredictable and violated their right to demonstration and assembly. The applicants also argued that while the petitions against the administrative fines were accepted by many courts, their petitions were dismissed without justification, which resulted in a violation of their right to a fair trial. In this respect, the applicants requested that a violation would be found, pecuniary damage would be awarded to them and the administration would apologize to them.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The Constitutional Court cannot consider an action carried out against a proper order sufficient for an interference with fundamental rights and freedoms. Such an interference may be justified when it is demonstrated that public safety, public order or general health will deteriorate or might deteriorate. In cases where it cannot be demonstrated with relevant and sufficient evidence that the public order has deteriorated, any public power or action interfering with fundamental rights may violate fundamental rights and freedoms.

The administrative courts or the relevant magistrates' courts did not find that the press announcement made by the members of the applicant union in the school yard had disrupted the education, frightened and disturbed the students, deteriorated the public order or posed a risk in this sense. On the contrary, neither the law enforcement officers nor the administration needed to intervene in the press announcement, and it was after the press announcement that the law enforcement officers issued administrative fine for the applicant. As a matter of fact, the administrative fine imposed on Telat Koç was revoked by the first instance court that underlined the peaceful nature of the press announcement. The court stated that the press announcement did not contain violence.

In cases where the demonstrators are not involved in acts of violence, as in the present application, the public authorities must tolerate the right to organize meetings and demonstration marches to a certain extent. A peaceful demonstration or press announcement must, in principle, not be subject to a threat of criminal sanction.

In cases where the relevant right is restricted due to such reasons as the place of the demonstration or press announcement, it must be set out by the officials using public power in their decisions (for example, in the police reports) that the intervention to be made against the demonstrators in accordance with the orders of the competent authorities is necessary for maintaining the public order and that the sanctions have been imposed due to the deterioration or the risk of deterioration of the public order.

In the present application, a fair balance could not be struck between the measures deemed necessary to achieve the legitimate aims set forth in Article 51 § 2 of the Constitution and the rights of the applicant union under the same article. It was concluded that the administrative fine imposed on the applicant was not necessary for maintaining the order in the educational institution.

In conclusion, the Constitutional Court held that the applicants' right to labour union membership safeguarded by Article 51 of the Constitution was violated.

2. The judgment finding a violation of the right to labour union membership due to the employees' having been dismissed as they had intended to become members of a labour union

***Anıl Pınar and Ömer Bilge Judgment* (App No. 2014/15627, 5/10/2017)**

The Facts

The applicants' employment contracts were terminated on the ground of "underperformance". The applicants claimed that they were indeed dismissed because they had made attempts for membership of a labour union. In this respect, they brought actions before the Labour Court ("court") in order to ascertain that their employment contracts had been terminated for labour union-related reasons, and they demanded compensation in this regard.

Having underlined that the applicants' employer could not prove the alleged decrease in the applicants' performance, the court pointed out that; according to the witness statements the applicants had been dismissed as they had intended to become a member of a labour union, that the report drawn up by the Labour Inspection Board indicated that the representative of the employer had put pressure on the employees on union-related matters, that the applicants had been dismissed after the relevant labour union had started to collect members within the company, and that after the company had dismissed 1151 employees, there were no longer any employee being a member of the labour union there. In this respect, the court acknowledged the applicants' allegations that they had been dismissed for labour union-related reasons and held that the applicants be awarded compensation in the amount corresponding to their one-year gross wages.

The Court of Cassation concurred with the court in terms of its conclusion that the applicants' employment contracts had been terminated without any reasonable grounds. However, as the court could not rely on sufficient and convincing evidence showing that the employment contracts of the applicants –who had not become a member of a labour union yet– had been terminated for labour union-related reasons, the Court of Cassation quashed the court's decision in so far as it related to the compensation awarded to the applicants within the scope of their right to labour union membership.

The Applicants' Allegations

The applicants maintained that they had been dismissed as they had intended to become a member of a labour union. In this context, they submitted that the actions brought by other employees, who had been dismissed, were concluded in favour of the relevant employees and upheld by the Court of Cassation. However, the decision concerning three persons, including them, was quashed on the ground that it could not be proven that their employment contracts had been terminated due to their relation with the union activities. In this regard, the applicants also alleged that the principle of equality was breached.

The Constitutional Court's Assessment

In brief, the Constitutional Court made the following assessments:

The safeguards enshrined in Article 51 of the Constitution does not only cover the process following the membership of a labour union but also the period before becoming a member of a labour union, that is to say, the process during which an individual decides on being a member. Therefore, in case of the termination of an employment contract due to the employee's participation in the activities carried out by a labour union for the purposes of informing and persuading a target group, the employer will be considered to have interfered with the employee's right to labour union membership. In such a case, the State is required to take measures within the scope of its positive obligations.

It appears that the court relied on the witnesses' statements, the report issued by the Labour Inspection Board and the fact that the company had dismissed a total of 1151 employees. The witnesses heard by the court indicated in their statements that the applicants had been dismissed as they intended to become a member of a labour union and that the representative of the employer had promised to cover the notary costs likely to incur if the employees, who were currently a member of the relevant labour union, wished to resign from the company. Taking all of these facts into consideration, the court concluded that the applicants had been dismissed for the prevention of their membership to a labour union.

Stating that it cannot be sufficiently and convincingly proven that the applicants' employment contract had been terminated due to a labour union activity, the Court of Cassation quashed the court's decision. The Court of Cassation did not make any assessment as to the facts relied on by

the court (witnesses' statements, findings in the inspector's report, dismissal of a great number of employees from the company and the fact that there was no longer an employee being union member within the company). Nor did the Court of Cassation provide any other concrete or substantive reasoning against the court's assessment.

The first instance decision, which was rendered upon the examination of the relevant evidence and facts and had detailed justifications, was quashed by the relevant chamber of the Court of Cassation without any justification. It has been therefore concluded that the procedural positive obligations were not fulfilled in the present case on the ground that the Court of Cassation quashed the court's decision without any justification *vis-à-vis* the court's reasoning that was considered to be sufficient and convincing.

In conclusion, the Constitutional Court held the applicants' right to labour union membership safeguarded by Article 51 of the Constitution was violated.

3. The judgment finding a violation of the right to labour union membership due to administrative fine imposed for hanging banners within the scope of labour union activites

***Abdulvahap Can and Others Judgment* (App. No. 2014/3793, 18/11/2017)**

The Facts

Eğitim ve Bilim Emekçileri Sendikası ("the EĞİTİM SEN"), one of the applicants, is a labour union that carries out its activities with the aim of protecting and developing the economic, social, democratic and cultural rights of the employees working in the field of education and forming a free and democratic business life. The other applicants, who are real persons, are teachers working in the public sector. They are also members and heads of the Batman Branch of the EĞİTİM SEN.

At the beginning of the 2013-2014 school year, the Batman Branch of the EĞİTİM SEN, together with an association called Kurdi Der and the Batman Provincial Organization of the Peace and Democracy Party ("the BDP"), carried out activities themed education in mother tongue. Within the scope of these activities, banners themed "education in mother language" were put on fifteen billboards located in various places in the city centre, which

were operated by a company. Thereupon, following the processes initiated by the Batman Governor's Office, administrative fines were imposed on eight persons, including the applicants, in the amount of 1,500 Turkish liras (TRY).

The applicants contested the administrative fines before the –abolished– Batman 1st Magistrates' Court ("Magistrates' Court"). In their petition, the applicants argued that the administrative fine imposed with reference to a unilateral report issued by the police was unlawful. They maintained that they only hung banners and that it was not possible to hold them personally responsible for this. They added that although there had been a sole activity which could be regarded as a labour union activity, eight persons were imposed administrative fines in the amounts of higher than the minimum limit. Therefore, the punishment in question turned into a means of pressure against the labour union.

The official of the company operating the billboards submitted before the Magistrates' Court that the relevant banners had been hung with reference to a contract signed between the company and a member of the Provincial Organization of the BDP.

The Magistrates' Court dismissed the objections to the administrative fines with no right of appeal. It stated that within the scope of the event organized by the Batman Provincial Organization of the BDP, the Kurdi Der association and the EĞİTİM SEN –all had signatures on the banners–, an illegal demonstration march had been carried out without any notification to the relevant authority as stated in the banners. It therefore concluded that the administrative fines imposed in accordance with Article 42 of the Misdemeanour Law no. 5236 and Article 27 of the Law no. 2911 on Meetings and Demonstrations were lawful.

The Applicants' Allegations

Making the same arguments in their petitions, the applicants maintained that their right to labour union membership, freedom of expression, right to a fair trial and the principle of equality were breached.

The Constitutional Court's Assessment

The Constitutional Court examined the applicants' claims as a whole under the right to labour union membership, and in brief, it made the following assessments:

The right to labour union membership also guarantees that members of a labour union are not imposed sanctions due to their membership to the union or taking part in its activities. However, the right to labour union membership is not absolute, and it may be restricted in accordance with the criteria set forth in Article 13 of the Constitution.

In the present application, the Constitutional Court concluded that there was an interference with the right to labour union membership. However, it noted that the criteria of "being lawful" and "legitimate aim" were not prejudiced. The Court focused on the criterion of "compliance with the requirements of a democratic social order".

The public authorities must demonstrate reasonable grounds as to the fact that an interference with the freedom of expression within the scope of labour union activities, by means of punishment, was necessary in a democratic society.

In the present application, each applicant was imposed an administrative fine of TRY 1,500 for hanging banners without permission. It is understood that the applicants hung the banners within the scope of the activities themed education in the mother tongue carried out by the EĞİTİM SEN together with two other organizations. The public authorities neither established that the contents of the banners constituted an offence, nor did they submit an allegation in this respect.

There is no doubt that hanging a banner, themed "education in the mother tongue", that contains no criminal element is a way of expression of thoughts. In the present application, it was performed as part of labour union activities. Therefore it falls into the scope of the guarantees concerning the freedom of labour union membership and the freedom of expression, enshrined in the Constitution. However, the use of constitutional safeguards to express thoughts by hanging banners does prevent determining certain prerequisites for hanging banners. Determining such prerequisites does not lead to a violation of the right to labour union membership, unless it makes it impossible to enjoy the right or makes it meaningless to bestow the right.

The legislator has prescribed administrative fine for hanging banners without permission. According to the justification of the Law, the punishment aimed at preventing visual pollution. This cannot be regarded as an unnecessary measure. However, not taking a permission may not be sufficient alone to justify the punishment. As stated in the previous

judgments of the Constitutional Court, imposing punishment without a relevant and sufficient reason that the public order has deteriorated might lead to a violation of the right to labour union membership. In the present application, neither the administration nor the Magistrates' Court made any determination or assessment as to the fact that the banners led to a deterioration of the public order or that a risk emerged in this respect.

The Magistrates' Court did not also make an assessment concerning the allegations that no permission was required for putting banners on the billboards which were operated by a private company and rented by the Batman Provincial Organization of the BDP.

Therefore, it was concluded that an interference with the right to labour union membership by means of imposing administrative fine, without relevant and sufficient reasons, was not necessary in a democratic society. Moreover, the administrative fine imposed on the applicants may create a deterrent factor in terms of carrying out labour union activities.

In conclusion, the Constitutional Court held the applicants' right to labour union membership safeguarded by Article 51 of the Constitution was violated.

K. THE RIGHT TO ELECT, TO BE ELECTED AND TO ENGAGE IN POLITICAL ACTIVITY

1. The judgment concerning the alleged violation of the right to elect due to the supreme election council's decision of 16 april 2017 on the referendum

***Nurullah Efe and the People's Liberation Party ("Halkın Kurtuluş Partisi") Judgment* (App. No: 2017/20127, 7/6/2017)**

The Facts

While the referendum dated 16 April 2017 was going on, the Supreme Election Council announced, with the respect to the complaints that certain balloting committees had delivered the voting papers and envelopes to the electros without affixing the seal of these committees, that the voting papers and envelopes not bearing the balloting committees' seals were deemed to be valid unless it was proven that they had been obtained outside and used. The reasoned decision in respect thereof was published on the web-site of the Supreme Election Council on 18 April 2017.

The Applicants' Allegations

The applicants maintained that the decision taken by the Supreme Election Council with regard to the unsealed voting papers and envelopes was in breach of the Law, the principles of legal security and legal certainty. They accordingly asserted that there had been a violation of the right to elect enshrined in Article 67 of the Constitution and the right to an effective remedy in conjunction therewith.

The Court's Assessment

In brief, the Constitutional Court made the following assessments within the scope of this allegation:

In order to lodge an individual application within the scope of the right to participate in a referendum enshrined, as a constitutional right, in Article 67 § 1 of the Constitution, it is requisite that this right is also safeguarded by the Convention or its additional protocols to which Turkey is a party. The European Court of Human Rights ("the ECtHR") noted that the safeguards afforded by the right to free elections enshrined in Article 3 of the Additional Protocol no. 1 of the Convention must be applicable not only in the national

parliamentarian elections but also in the elections of the other organs, national or international, which are - by their *sui generis* nature - considered to enjoy legislative power, given the nature of powers such organs have. Moreover, pursuant to the well-established case-law of the ECtHR, the safeguards afforded by the right to free elections enshrined in the above-mentioned article are, in essence, limited to the elections of the organs having legislative power, and referendums do not fall into the scope of Article 3 of the Additional Protocol no. 1 to the Convention.

In this sense, the alleged violation of the right to free elections as a result of the impugned referendum, which falls outside the scope of Article 3 of the Additional Protocol no. 1, does not concern a right which is under the joint protection of the Constitution and the Convention.

On the other hand, as the decisions of the Supreme Election Council are excluded from judicial review pursuant to Article 79 § 2 of the Constitution, the applicant's allegations cannot be subject-matter of an individual application, also pursuant to Article 45 § 3 of the Law on the Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011 and numbered 6216 which prescribes that acts and actions that have been excluded from judicial review by the Constitution cannot constitute subject-matter of an individual application.

Consequently, the Constitutional Court declared the application inadmissible for lack of jurisdiction *ratione materiae*, without making further examination as to the other admissibility criteria

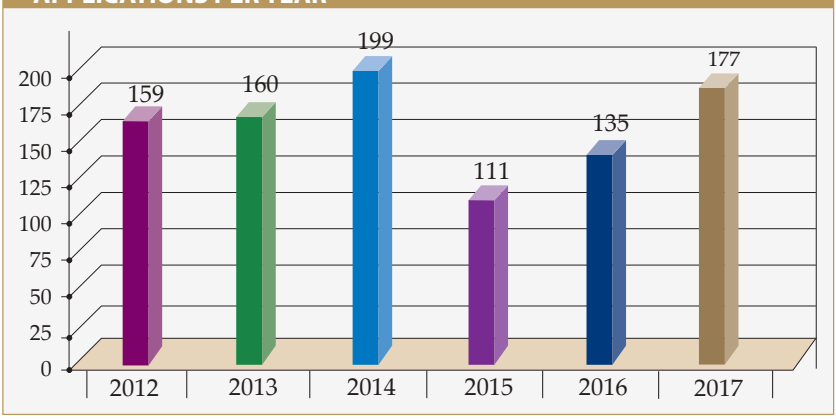
CHAPTER SIX

STATISTICS

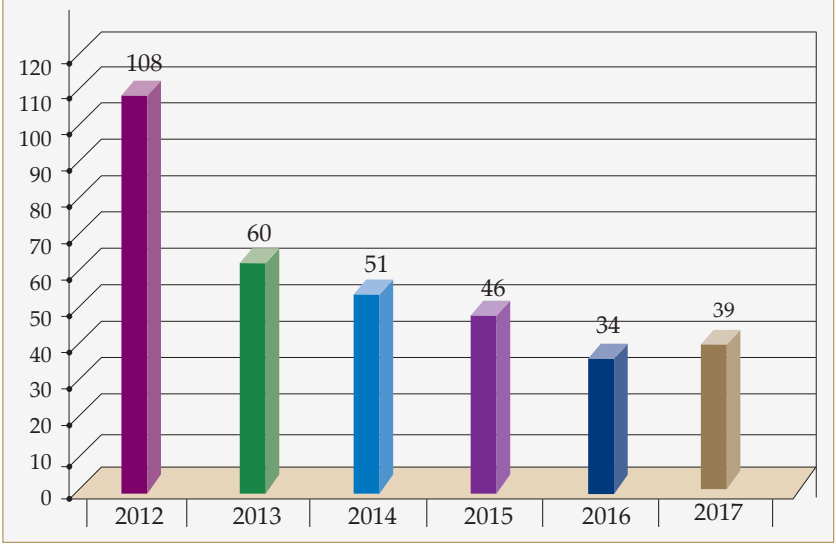
I. STATISTICS ON CONSTITUTIONAL REVIEW

In 2017, 39 cases were taken over from the previous year 2016.
In 2017 177 abstract and concrete review cases were received.
176 out of total 216 cases were concluded in 2017, 40 of the total were forwarded to 2018.

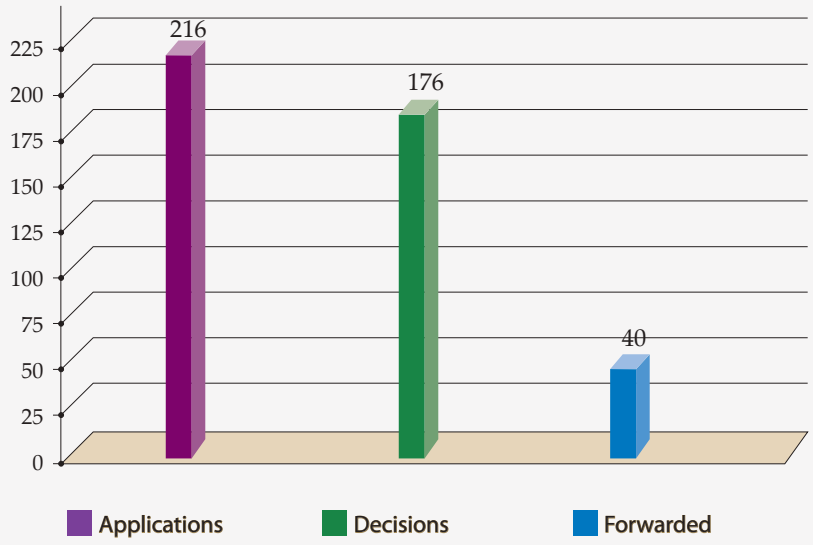
1- NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS PER YEAR



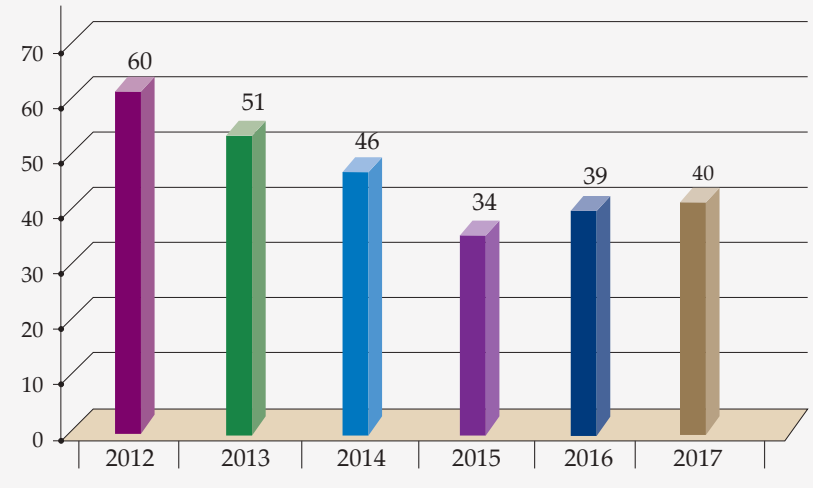
2- NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS FROM PREVIOUS YEARS



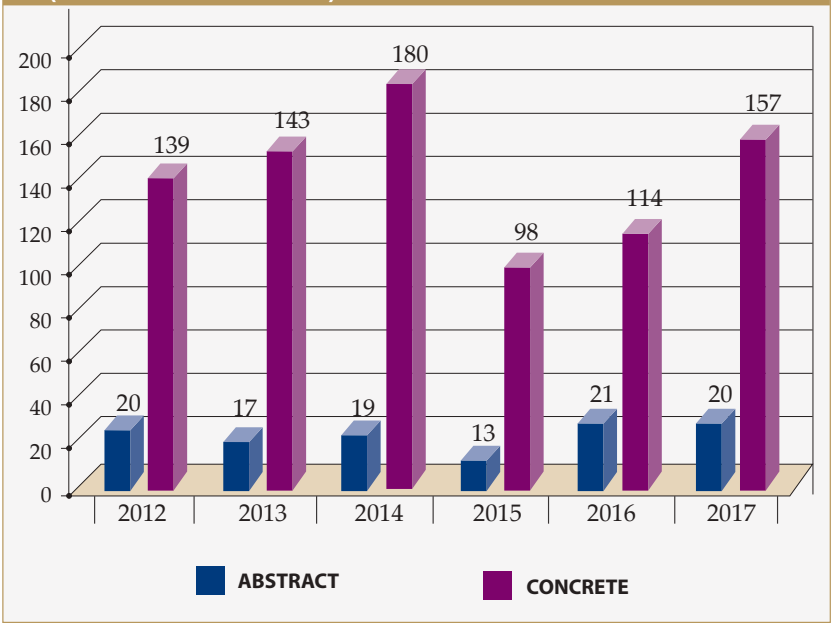
3- TOTAL NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS AND DECISIONS IN 2017



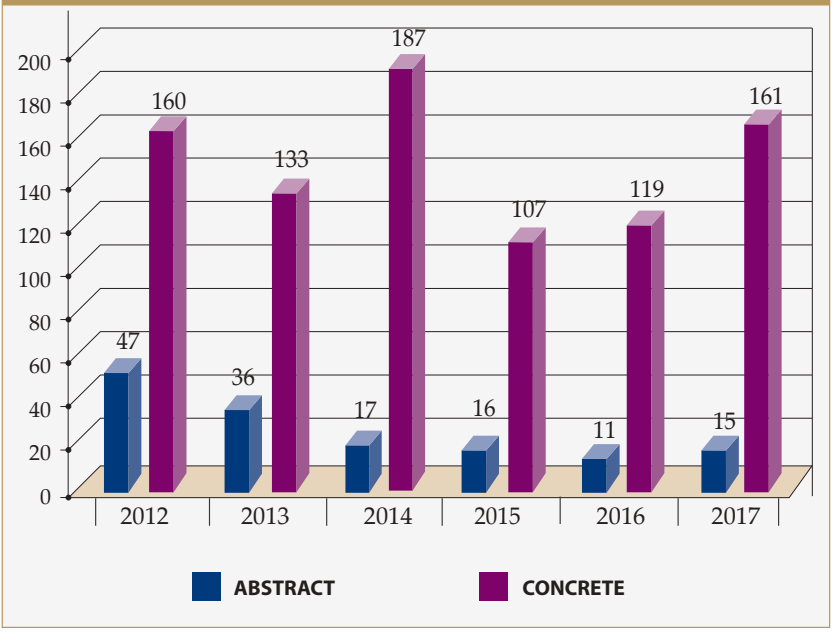
4- NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS FORWARDED TO THE NEXT YEAR



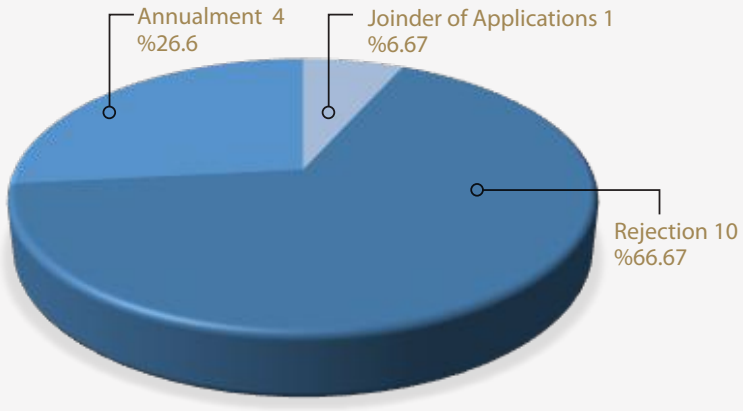
5- DISTRIBUTION OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS INCOMING PER YEAR



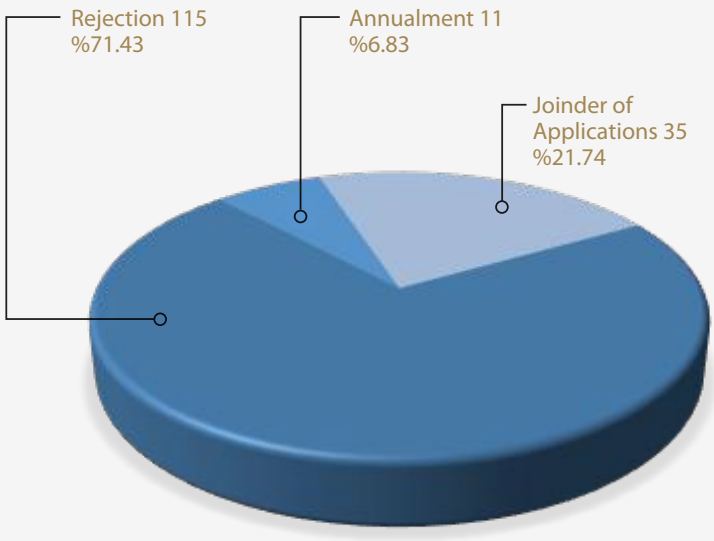
6- DISTRIBUTION OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS DECIDED PER YEAR



7- DECISIONS IN ABSTRACT REVIEW CASES IN 2017



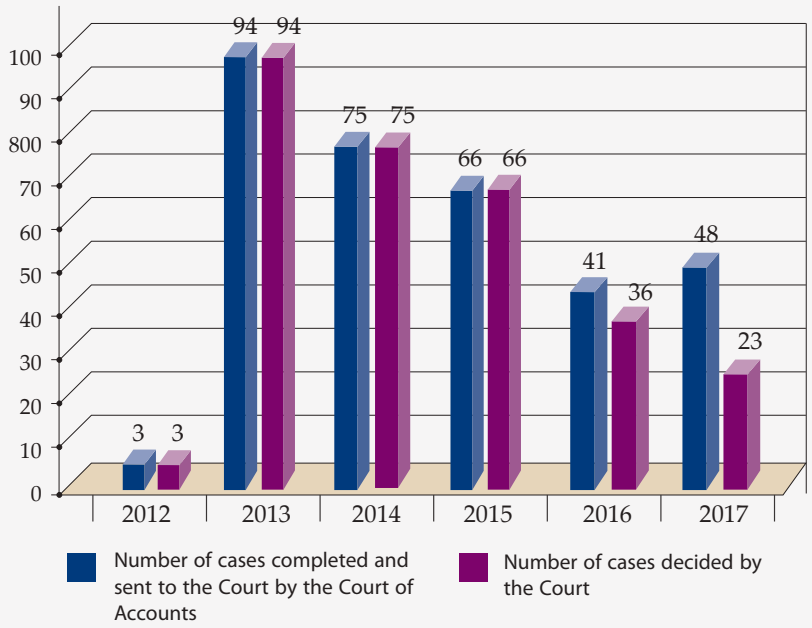
8- DECISIONS IN CONCRETE REVIEW APPLICATIONS IN 2017



II. STATISTICS ON FINANCIAL AUDIT OF POLITICAL PARTIES

In 2017, 23 out of 48 audits on financial reports completed and sent by the Court of Accounts were decided and 25 audits on financial reports that were not decided have been put on the agenda.

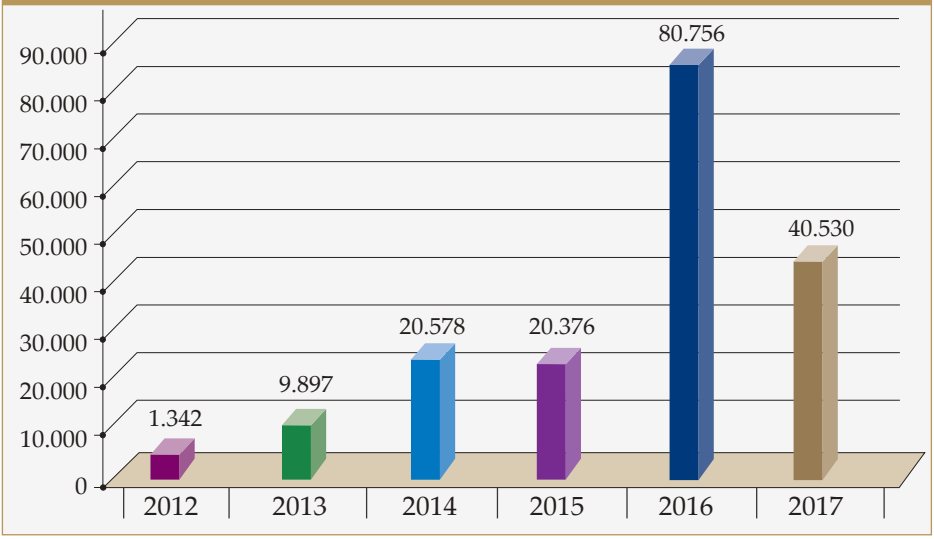
1- POLITICAL PARTY AUDIST FILED AND CONDUCTED PER YEAR



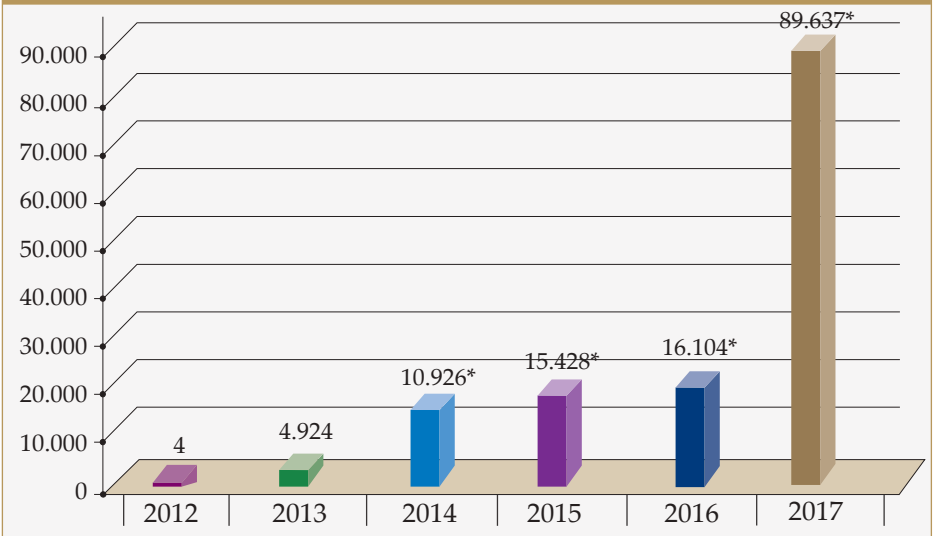
III. STATISTICS O THE INDIVUDIAL APPLICATION REVIEW IN 2016[1]

The Court decided on 89.637 individual applications out of 126.101 applications 40.530 of which were received in 2017 and 85.563 were taken over from the previous years.

1. NUMBER OF APPLICATIONS PER YEAR



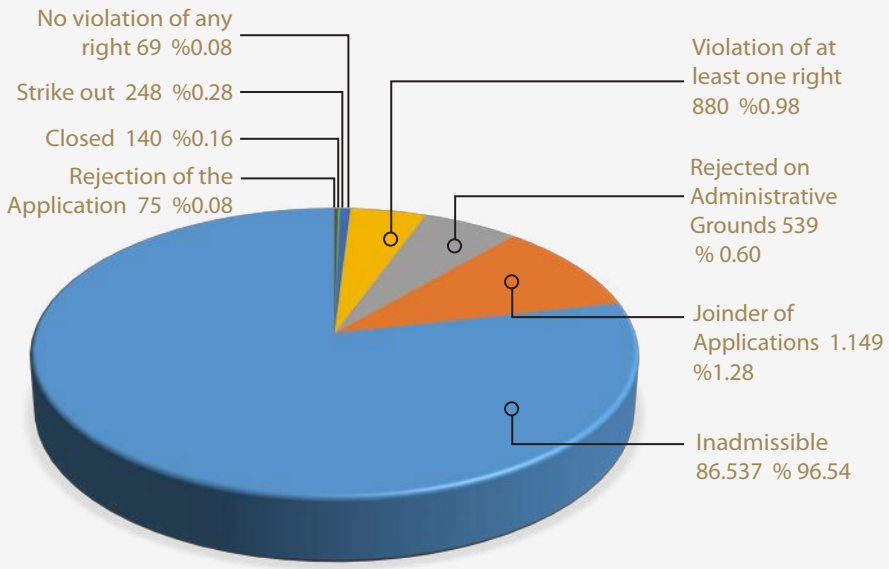
2. NUMBER OF APPLICATIONS DECIDED PER YEAR



** As the cases that were reopened upon the acceptation of the objection to the administrative rejection are taken out of the decided cases, this data varies at a very low rate compared to those in 2015.*

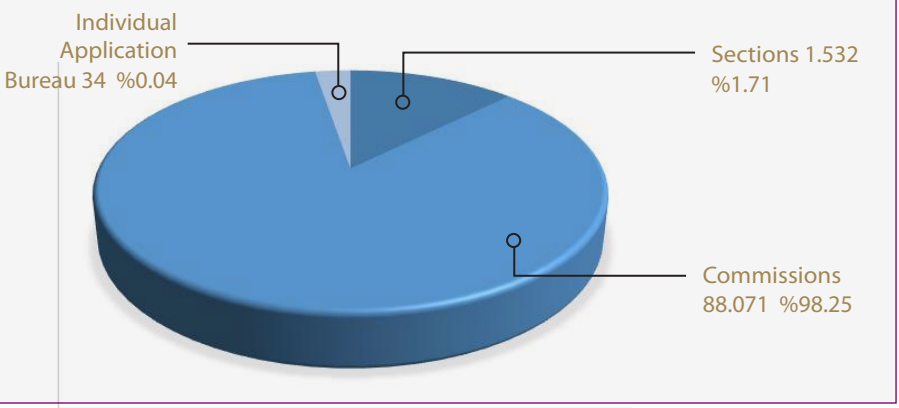
[1] ***NOTE:*** *The figures for 2017 may be subject to updates.*

3. DECISIONS RENDERED IN 2017

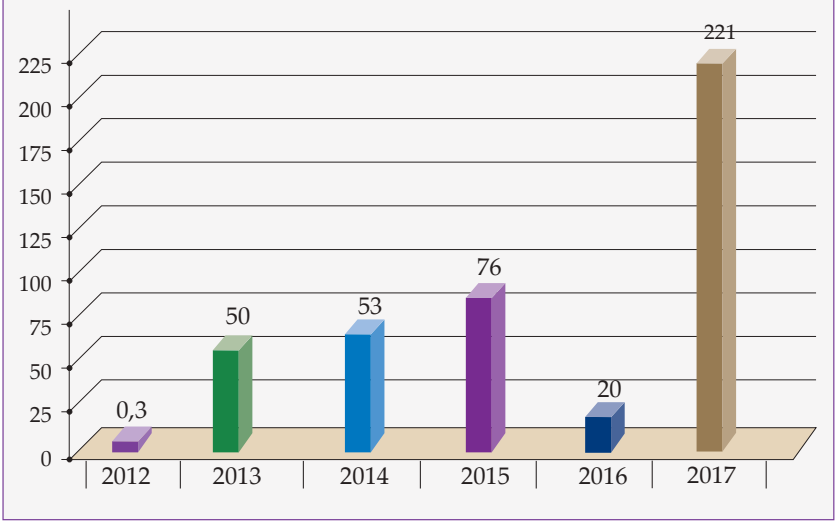


The Court declared 86.537 applications inadmissible, decided for joinder of 1.149 applications, rejected 539 applications on administrative grounds, found a violation of at least one right in 880 applications and no violation of any right in 69 applications, decided to strike out 248, close 140 and reject 75 applications in 2017.

4. NUMBER OF APPLICATIONS DECIDED BY EACH UNIT OF THE COURT IN 2017

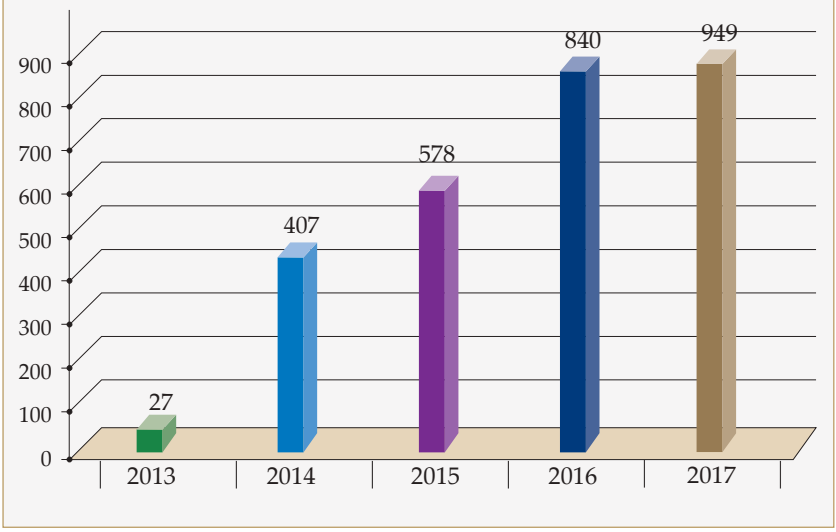


5- ANNUAL RATIO OF FILED APPLICATIONS AGAINST DECIDED APPLICATIONS (%)

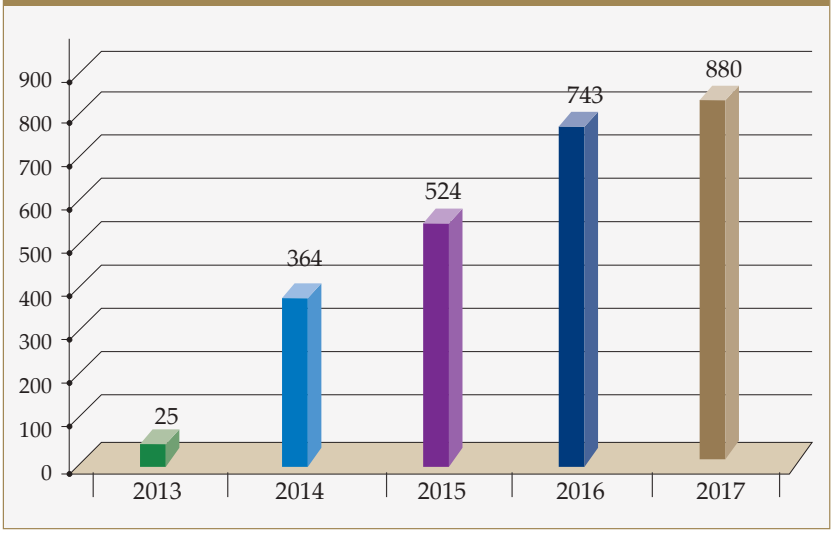


The ratio of the individual applications decided in 2017 to the number of applications received in the same year is 220%.

6- NUMBER OF APPLICATIONS EXAMINDED ON THE MERITS PER YEARI

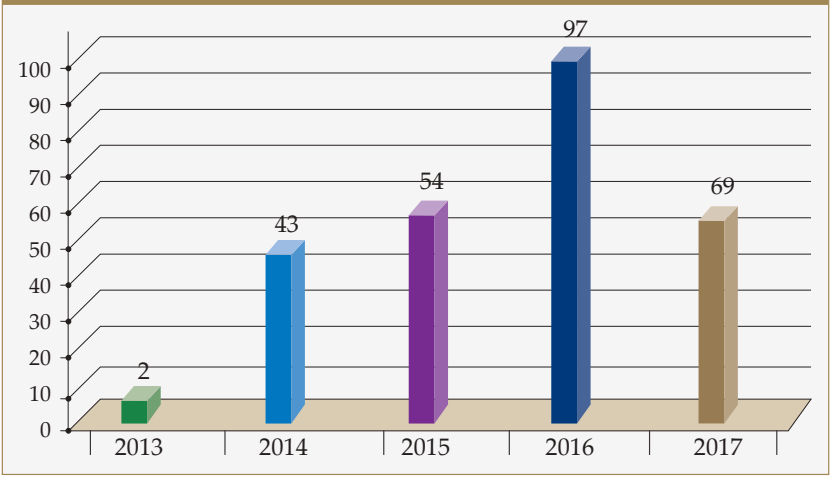


7- ANNUAL NUMBER OF APPLICATIONS DECIDED ON VIOLATION OF AT LEAST ONE RIGHT



Of 859 applications examined on the merits by the Plenary and the Sections, the Court rendered decisions on violation of at least one right in 808 applications and no violation of any right.

8- ANNUAL NUMBER OF APPLICATIONS DECIDED ON NO VIOLATION OF A RIGHT



9. DIVERSITY AND INCREASE OF DECISIONS ON VIOLATION IN THE YEAR 2017

With regard to the decisions on violation, the decisions of the right to a fair trial stand out with the number of 705 decisions.

YEAR	2013	2014	2015	2016	2017	Total	Percentage
Right to life	2	5	11	19	14	51	2,0%
Prohibition of torture and ill-treatment	0	3	11	27	8	49	1,9%
Right to liberty and security of person	8	35	28	19	4	94	3,7%
Right to a fair trial	13	302	384	624	705	2028	78,8%
Freedom of expression	0	8	21	5	10	44	1,7%
Right to education	0	0	0	0	1	1	0,0%
Prohibition of discrimination	0	1	2	1	2	6	0,2%
Freedom of religion and conscience	0	1	1	0	0	2	0,1%
Protection of material and spiritual entity	1	1	3	8	2	15	0,6%
Private/family life	0	2	21	41	39	103	4,0%
Right to property	1	10	26	18	61	116	4,5%
Right to elect and to be elected	2	4	0	0	0	6	0,2%
Freedom of assembly and demonstration marches	0	0	2	0	1	3	0,1%
Right to union	0	2	28	2	2	34	1,3%
Principles of crimes and punishment	0	3	1	0	1	5	0,2%
Presumption of innocence	1	1	4	1	3	10	0,4%
Effective remedy	0	0	1	6	0	7	0,3%
Prohibition of torture and forced labor	0	0	0	0	0	0	0,0%
Other rights	0	0	0	0	0	0	0,0%
Total	**28**	**378**	**544**	**771**	**853**	**2574**	
Percentage	**1,1%**	**14,7%**	**21,1%**	**30,0%**	**33,1%**		

Not: The fact that the number of violations is higher than that of applications and decisions arises from the Court's finding violations with respect to more than one right in certain individual applications.

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