THE CONSTITUTIONAL COURT
OF
THE REPUBLIC OF TURKEY

Annual Report
2015

Annual Report

2015

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

PREFACE

One of the aims of a democratic state governed by the rule of law is to ensure that institutions and organizations providing public service observe the principles of accountability and transparency.

These principles apply to organs of judiciary as well as those exercising legislative and executive powers.

In this context, annual reports serve an essential function in ensuring the accountability and transparency of public services.

The first part of this report, prepared with a view to serving such function, provides brief information on the formation of the Court, its Plenary, Sections and Commissions.

The duties and powers of the Court's Plenary, Sections and Commissions is included in the second part of the report.

The third part deals with the changes and developments in the Court's formation, functioning, attitude and paradigm, press and public relations, publications and national and international relations.

The speech delivered at the opening of the ceremony on the occasion of the Court's 53rd Anniversary is available in the fourth chapter.

The fifth chapter of the report includes the brief summaries of the Court's leading judgments both in constitutional review cases and individual applications in 2015 with a view to revealing the case-law of the Court on various subjects. This part 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, especially

the academics and those administering justice. This part constitutes the backbone of the report as the judgments are the basic products of the Court.

The final chapter presents a year by year comparison of the Court's performance by providing various statistical data on Court's performance in 2015 in the form of graphics.

I sincerely wish that this first of its kind publication of the Constitutional Court serves to ensure accountability, transparency and the rule of law, development of law and increasing public awareness on fundamental rights and freedoms.

CHAPTER ONE

FORMATION OF THE COURT

FORMATION OF THE COURT

As per Article 146 § 1 of the Constitution and Article 6 § 1 of Law No. 6216 on the Establishment and Rules of Procedure of the Constitutional Court, the Constitutional Court consists of seventeen members.

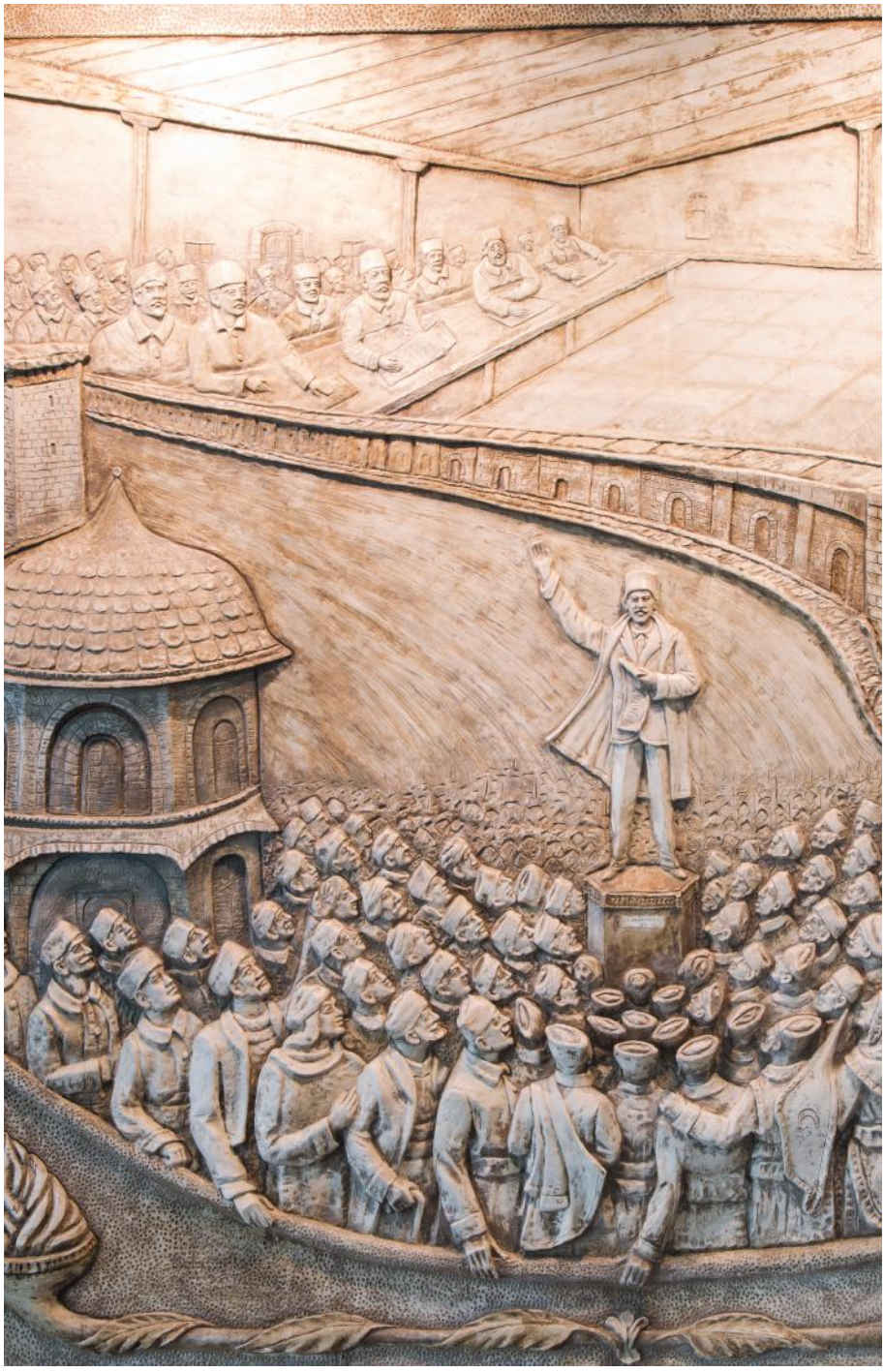
According to Article 146 § 2 and 3 of the Constitution and Article 7 of Law No. 6216, the Grand National Assembly of Turkey elects, by secret ballot, two members from among three candidates nominated for each vacancy by the General Assembly of the Court of Accounts amongst their presidents and members and one member from among three candidates to be nominated by the Chairmen of Bar Associations amongst private lawyers. The President of the Republic elects 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 (at least two of these candidates must be from the field of law) 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.

As per Article 146 § 3 of the Constitution and Article 6 § 2 of Law No. 6216, 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 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 category judges and prosecutors)

Article 146 § 6 of the Constitution and Article 12 of Law No. 6216 stipulate that 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 original 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. 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 a Plenary, Sections and Commissions.



I- FORMATION OF THE PLENARY

According to Article 21 § 1 of Law No. 6216 and Article 24 of the Court's Rules of Procedure, the Plenary shall consist of seventeen members of the Court. The Plenary shall convene with the participation of twelve members at least and shall be chaired by the President or a Vice-President to be designated by the President.

As of 31/12/2015, the members of the Plenary are as follows:


Prof. Dr. Zühtü ARSLAN
President


Burhan ÜSTÜN
Vice-President


Prof. Dr.
Engin YILDIRIM
Vice-President


Serdar ÖZGÜLDÜR
Justice


Serruh KALELİ
Justice


Osman Alifeyyaz
PAKSÜT
Justice


Recep KÖMÜRCÜ
Justice

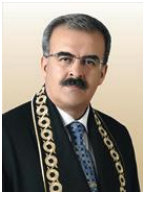

Dr. Alparslan ALTAN
Justice


Nuri NECİPOĞLU
Justice


Hicabi DURSUN
Justice


Celal Mümtaz AKINCI
Justice


Prof. Dr. Erdal TERCAN
Justice


Muammer TOPAL
Justice


M. Emin KUZ
Justice


Hasan Tahsin GÖKCAN
Justice


Kadir ÖZKAYA
Justice


Rıdvan GÜLEÇ
Justice

II- FORMATION OF THE SECTIONS

According to Article 22 of Law No. 6216 and Article 27 of the Court's Rules of Procedure, there shall be two Sections of the Court in order to examine individual applications and such Sections shall be composed of the members save for the President of the Court. Each Section shall consist of seven members and a vice-president. These sections shall be named "The 1st Section" and "The 2nd 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 his/her own request or demand by one of the Vice-Presidents.

According to Article 29 of the Court's Rules of Procedure, 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 attended 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 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 necessary arrangement 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 recommendation of the President of Section.

Pursuant to these regulations, the composition of the Sections, as of 31/12/2015, is as follows:

1st SECTION

RANK NO.	NAME SURNAME	TITLE
1	Burhan ÜSTÜN	President
2	Serruh KALELİ	Member
3	Nuri NECİPOĞLU	Member
4	Hicabi DURSUN	Member
5	Erdal TERCAN	Member
6	Hasan Tahsin GÖKCAN	Member
7	Kadir ÖZKAYA	Member
8	Rıdvan GÜLEÇ	Member

2nd SECTION

RANK NO.	NAME SURNAME	TITLE
1	Engin YILDIRIM	President
2	Serdar ÖZGÜLDÜR	Member
3	Osman Alifeyyaz PAKSÜT	Member
4	Recep KÖMÜRCÜ	Member
5	Alparslan ALTAN	Member
6	Celal Mümtaz AKINCI	Member
7	Muammer TOPAL	Member
8	M. Emin KUZ	Member

III- FORMATION OF THE COMMISSIONS

As per Article 149 § 1 of the Constitution, Commissions may be established to examine the admissibility of the individual applications. Within the frame of this constitutional provision, a number of Commissions have been established in accordance with Article 20 of Law No. 6216 and Article 23 of the Court's Rules of Procedure.

According to Article 32 of the Court's Rules of Procedure, three Commissions shall be established under each Section to examine the admissibility of the individual applications. Such Commissions shall be assigned a number 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, save 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 participated 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 necessary 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-established in line with the procedure stipulated in the above paragraphs.

CHAPTER TWO

DUTIES AND POWERS OF THE COURT

DUTIES AND POWERS OF THE COURT

I- OVERVIEW

As per Article 148 of the Constitution and Article 3 of Law No. 6216, 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 reviews 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 Republic, Speaker of the Grand National Assembly of Turkey, members of the Council of Ministers; the Presidents, Members and Chief Prosecutors of the Constitutional Court, the Court of Cassation, the Council of State, the Military Court of Cassation, the Military Supreme Administrative Court, Deputy Chief Public Prosecutors, the president and members of the High Council for Judges and Prosecutors and the Court of Accounts, the Chief of General Staff, Chiefs of Land, Naval and Air and Gendarmerie General Commander 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 Disputes amongst members of the Court.

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

» *Deliberation Hall of the Plenary*

The Court carries out these duties through a Plenary, two Sections and three Commissions affiliated to each Section (six Commissions in total) in pursuance of Article 149 of the Constitution, Article 20 and 22 of Law No. 6216 and Article 23, 27 and 32 of the Court's Rules of Procedure.

II- DUTIES AND POWERS OF THE PLENARY

The Plenary of the Court, which consists of seventeen members and convenes with the participation of twelve members at least chaired by the President or a Vice-President to be designated by the President in pursuance of Article 149 of the Constitution, Article 21 of Law No. 6216 and Article 23 of the Court's Rules of Procedure, shall perform the duties and have powers as follows in accordance with Article 149 § 2 of the Constitution, Article 21§ 2 of Law No. 6216 and Article 25 of Court's Rules of Procedure:

a) To deal with annulment actions, i.e. abstract and concrete norm review, 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 Disputes.

e) To resolve the conflicts between the decisions and judgments of the Sections in dealing with the individual applications.

f) To ensure the division of labor between the Sections.

g) To resolve, by request of the President, the disputes arising from division of workload 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,

» *Deliberation Hall of the Supreme Criminal Court*

j) To examine objections.

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

As per Article 149 of the Constitution, Article 65 of Law No. 6216 and Article 57 of 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

According to Article 149 of the Constitution, Article 22 of Law No. 6216 and Article 27 and 29 of the Court's Rules of Procedure, the Court has two Sections each presided by a vice-president and each with seven members in order to resolve individual applications. 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.

The duties and powers of the Sections are as follows in accordance with Article 49 of Law No. 6216 and Article 28 of Court's Rules of Procedure:

a) To carry out the examination on merits of the applications declared admissible by the Commissions.

b) 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.

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

» *Meeting Room of the Sections*

Section may relinquish from deciding that application. In that case, the chairperson of the Section shall bring this matter to the attention of the President to refer the application to the Plenary.

As per Article 149 of the Constitution, Article 22 of Law No. 6216 and Article 72 of the Court's Rules of Procedure, the Sections shall render its decisions by an absolute majority of participants.

According to Article 50 of Law No. 6216 and Article 79 of the Court's Rules of Procedure, after examination on the merits, a decision on violation or non-violation of the applicant's right is rendered. In case of a decision on violation, a judgment may be rendered on the actions to be taken in order to abolish the violation and its consequences. In case the violation has been caused by a court decision:

a) 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 the court 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 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

According to Article 149 of the Constitution, Article 22 of Law No. 6216 and Article 32 of the Court's Rules of Procedure, the Court, there are three Commissions affiliated to each Section in order to carry out the admissibility examination of individual applications. Such Commissions shall be assigned a number and named after the Section they are affiliated to. The President of the Section shall not take part in the Commissions and the senior member shall chair the Commission.

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

Pursuant to Article 48 § 3 of Law No. 6216 and Article 72 § 2 of the Court's Rules of Procedure, 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 concerned parties pursuant to Article 48 § 4 of Law No. 6216.

CHAPTER THREE

THE COURT IN 2015

THE COURT IN 2015

I- CHANGES IN THE FORMATION OF THE COURT

The year 2015 witnessed many changes in the Court. The first of such changes was election of Mr. Zühtü ARSLAN, who has been a member of the Court since 2012, as the new President of the Court on 10/2/2015.

In the same year, Grand National Assembly of Turkey elected Mr. Rıdvan GÜLEÇ, who had been a member of the Court of Accounts since 2009, as the member of the Constitutional Court during the parliamentary session on 13/3/2015.

Mr. Burhan ÜSTÜN and Mr. Engin YILDIRIM were elected as the new vice-presidents of the Court during the elections on 10/4/2015 and 19/10/2015 respectively. Mr. Nuri NECİPOĞLU was elected as Vice-President of the Court of Conflicts on 10/4/2015.

II- CHANGES IN THE PARADIGM OF THE COURT

The Court further maintained its rapid transition to a "rights-based" approach in 2015 and showed a significant progress in this direction. In line with such paradigm shift, the Court endeavored to ensure constitutional and individual justice through norm review and individual application and, thereby, started to function as an institution which became the guarantor of fundamental rights and freedoms.

This paradigm shift can be tracked down through the decisions and judgments of the Court. In such decisions, the Court adopted an approach to expand the field of protection and increase the standards for a series of fundamental rights and freedoms such as right to life, freedom of expression and association, right to liberty and security of person, freedom of religion and conscience right to fair trial and right to respect for private life.

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» *Deliberation Hall*

These judgments and decisions of the Court, rendered with a "rights-based" approach, served to improve the standards of human rights on one hand and they also increased the prestige of our court in international arena by providing us the opportunity to contribute to corpus of universal law.

III- CHANGES IN THE FIELD OF NORM REVIEW

In addition to being a year of ever increasing changes in the paradigm of the Court, the year 2015 witnessed certain novelties and changes in the field of both norm review and individual application as well. One of such changes is that the Court ceased to announce its decisions in annulment actions, i.e. abstract and concrete norm review, without a written justification. Thanks to this change, the Court itself has been abiding by the Constitution as an organ entrusted to protect the supremacy of the Constitution and announcing its decisions faster together with their justifications.

One of the other changes in the field of norm review is that the format of decisions

One of such changes is that the Court ceased to announce its decisions in annulment actions, i.e. abstract and concrete norm review, without a written justification. Thanks to this change, the Court itself has been abiding by the Constitution as an organ entrusted to protect the supremacy of the Constitution and announcing its decisions faster together with their justifications.

has been changed so as to replace the exact texts of "the application grounds submitted by the applicant authority or court" with the summaries of such grounds. The Court also started to designate numbers to the paragraphs of its decisions. These changes aim to ensure better comprehension of judgments and decisions and ease of reference to them.

The Court attaches utmost importance to spelling and grammar rules in drafting its decisions on both individual applications and norm review cases. Accordingly, the Court started this year to employ language specialists among its staff.

IV- CHANGES IN THE FIELD OF INDIVIDUAL APPLICATION

Taking into account the requests of the academic circles, the Court started this year the practice to designate specific names to each of decisions by the Plenary and the Sections in individual applications. The Court also designated specific names to its previous decisions and judgments, thereby, aimed to increase their memorability.

The Court faced an increased workload after the introduction of individual

Taking into account the requests of the academic circles, the Court started this year the practice to designate specific names to each of decisions by the Plenary and the Sections in individual applications. The Court also designated specific names to its previous decisions and judgments, thereby, aimed to increase their memorability.

One of the changes the Court implemented within this scope is that a Filtering Department has been established to ensure a more efficient filtering of applications.

application remedy in 2012 and implemented certain strategies to tackle such heavy workload. In this scope, the rapporteur-judges have been assigned on the basis of expertise on certain "freedoms and rights" and the applications have been classified accordingly. Then, the rapporteur-judges examined the applications that contain an allegation of violation related to the "rights and freedoms" in their field of expertise. This method aimed to ensure specialization on the basis of rights and the consistency of case-law, to increase the quality of decisions and to expedite the examination procedure of applications.

One of the changes the Court implemented within this scope is that a Filtering Department has been established to ensure a more efficient filtering of applications. Established on 14/12/2015, this department aims to ensure that *prima facie* inadmissible applications are examined and decided by the rapporteur-judges at once and, thereby, inadmissible applications are decided in a short period of time. By eliminating such applications from the registry, this method aims that the Sections conduct a more efficient review on the rest of the applications.

In 2015, with a view to ensure the consistency of the case-law and coordinate the works, the Court established groups of rapporteur-judges each specialized on certain rights and freedoms. Each group of rapporteur-judges has a coordination rapporteur who ensures the efficiency of group works.

Other changes and innovations implemented in this period to ease the workload and ensure the coordination are that the job descriptions were updated for the rapporteur-judges and other staff employed under Sections, working guidelines were prepared for individual application departments, the templates of decisions were shortened and more than one hundred template decisions were prepared for Commissions, a working schedule was prepared by the rapporteur-judges, "listing method" was used in drafting the template judgments, the flow of files and documents among the rapporteur-judges of the Commissions and Sections were conducted through UYAP(National Judiciary Network System), the rapporteur-judges of the Sections could draft template decisions on inadmissibility to be presented to the Commissions or they could refer such applications back to the rapporteur-judges of the Commissions, the number of rapporteur-judges employed under the Sections were increased, the modules of UYAP system, which were not used until then, were activated and opened to use of rapporteur-judges and new modules were created to address the needs and a new system was established for distributing the applications to the relevant rapporteur-judges.

V- CHANGES IN THE FIELD OF PRESS, PUBLICATIONS AND PUBLIC RELATIONS

This year, the Court started to publish on its website the press releases of the leading judgments in both norm review and individual application cases in Turkish and English languages. Such press releases, prepared in a comprehensible manner and simple language, aim to inform the public about the Court's judgments and decisions.

This year, the Court started to publish on its website the press releases of the leading judgments in both norm review and individual application cases in Turkish and English languages. Such press releases, prepared in a comprehensible manner and simple language, aim to inform the public about the Court's judgments and decisions. The Court's objective in implementing such practice is to contribute the rule of law, to increase the Court's accountability and to strengthen public awareness on fundamental rights and freedoms. Public announcement of decisions through such press releases led to increased news and broadcasts focusing on the Court's decisions. As a matter of fact, the number of news in the media relating to the Court's judgments and decisions is proportional to the number of press releases published in the Court's website.

The Court established a press department which indicates the particular importance it attaches to its relations with the press.

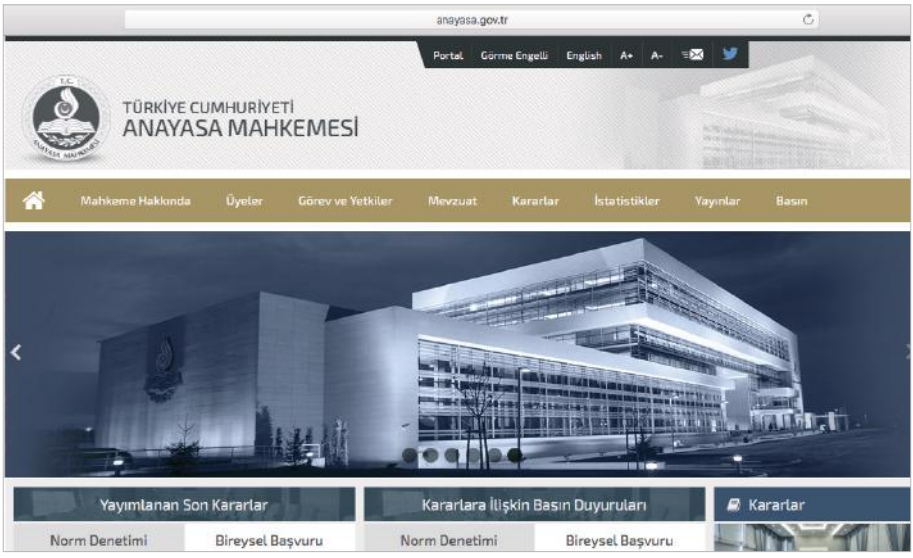
The Court established a press department which indicates the particular importance it attaches to its relations with the press. Accordingly, the press relations, which were previously handled by the Department of Publications and Public Relations, became a separate field of work. The press releases published on the Court's website are sent to the e-mail addresses of the journalists and press members monitoring the news related to judiciary and they are announced through the Court's twitter account as well. Thanks to such developments as the establishing of press department, publishing of the leading judgments in the form of press releases with a simplified and comprehensible language, comprehensive media monitoring and reporting, close monitoring of the news related to European Court of Human Rights(ECtHR) and instant and daily reporting of news, the Court developed an institutional communication with media in year 2015 and, thereby, the news in the press became more and more "*focused on decisions*" and the public received reliable information about the Court's judgments and decisions.

In order to provide reliable information to public, the website of the Court and its English version have been renovated and updated this year.

By launching a mobile application, the Court started to send sms notifications relating to the Court and, more specifically, relating to the press releases of the judgments and decisions.

In order to provide reliable information to public, the website of the Court and its English version have been renovated and updated this year. By launching a mobile application, the Court started to send sms notifications relating to the Court and, more specifically, relating to the press releases of the judgments and decisions. To ensure compatibility of this mobile application to all mobile phones, these applications are offered on both *"App Store"*, *"Google Play"* and *"Windows Store"* websites. The download links to these applications were also announced on the Court's website to ease direct access of potential users to such applications. This mobile application ensures that all persons following the decisions and announcements of the Court could receive instant, reliable and first-hand information.

In this period of time, the Court prepared, published and distributed many works within the scope of its publications and public relations activities. Within this scope, the Court published and distributed(domestic & international) the 51st



» *Webpage of the Constitutional Court*

issue of "Journal of Constitutional Court Decisions" in 6 volumes, a work in English language titled "*Individual Application to the Turkish Constitutional Court*", Turkish and English versions of "Selected Judgments on Individual Applications" in two volumes one for judgments in "2012-2013" and the other for those in "2014". The Court also published and distributed the boks in Turkish titled "Individual Applciation in 66 Questions", "Essays in Honor of Haşim KILIÇ" and "Procedure of Individual Application to the Constitutional Court and the Admissibility Criteria". Besides, the Court added 1.117 new publications to its library in year 2015.

Another innovation in this field is the preparation of a "book/published material request form". Filling out this form in electronic medium or through intranet portal of the Court, all personnel of the Court could contribute to the enrichment of the library by recommending the books and publications that they read before or by requesting the academic works which serve as reference resource. Thanks to this practice, the personnel could easily access to books and other published materials that they need.

VI- INTERNATIONAL ACTIVITIES OF THE COURT

1- OVERVIEW

The Constitutional Court of Turkey, being one of the oldest constitutional courts of the world, has always seen itself as part of the international legal order and the global community of constitutional courts. The Court has become a centre of interest in recent years due to its leading judgments in the field of human rights and constitutional interpretation.

Being the constitutional justice organ of Turkey, a countrywith unique geographic location, diverse cultural links and rich heritage of history, Turkish Constitutional Court is among the first members of both "Conference of the European Constitutional Courts" and "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.

2- COOPERATION WITH 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 Constitutional Court has always been an active member in the global community of constitutional courts. The Court is member to the following international organizations in the field of constitutional justice:

WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE

The World Conference on Constitutional Justice unites 98 Constitutional Courts and Councils and Supreme Courts in Africa, the America, Asia and Europe. It promotes constitutional justice-understood as constitutional review including human rights case-law-as a key element for democracy, the protection of human rights and the rule of law.

THE 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.

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.

Turkish Constitutional Court undertook the term presidency for the period between 2012-2014. As a member of the AACC, the Court has been organising the "Summer School" of the Association since 2013.

3- COOPERATION WITH NATIONAL CONSTITUTIONAL COURTS

In the last decade, the Court signed eighteen memoranda of understanding with other constitutional and 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 spiritof traditional Turkish hospitality and friendship. 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.

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

4- INTERNATIONAL RELATIONS IN YEAR 2015

As the Court attaches importance to its relations to both the high courts of other countries and international judicial organs and organizations, it maintained its mutual exchanges of visits with them in year 2015. Within this scope, the Court hosted delegations from Pakistan, Azerbaijan, Croatia, Indonesia, Kyrgyzstan,

Morocco and Ethiopia and the delegations of the Court paid visits to Kazakhstan, Tajikistan, Morocco, Azerbaijan, Kosovo and Uzbekistan. In this period, the Court hosted delegations of such international organizations as the Parliamentary Assembly of the Council of Europe, Organization for Security and Cooperation in Europe (OSCE) and the Parliamentary Assembly Of Turkic-Speaking Countries (TURKPA).

A delegation of the Constitutional Council of Algeria, headed by President Mr. Mourad MEDELCI, paid an official visit to our Court on 25–27 February 2015 and a Memorandum of Understanding on Bilateral Cooperation was signed between the Court and Constitutional Council of Algeria.

A delegation of the Court headed by Justice Mr. Osman Alifeyyaz PAKSÜT participated to the 9th Bureau Meeting of the World Conference on Constitutional Justice held in Venice on 21 March 2015.

The international symposium organized on the occasion of the 53rd Anniversary Activities of the Constitutional Court, titled "*Assessment of the Judgments on Individual Application- Challenges and Remedies*," was held on 27-28 April 2015 at the Grand Hall of the Court with the participation of the Presidents, Member Judges of the Constitutional Courts from 11 countries and the representatives of the European Court of Human Rights.

A delegation of the Court headed by Justice Engin YILDIRIM participated to the 3rd Congress of the Conference of Constitutional Jurisdictions of Africa held in Liberville-Gabon on 7-10 May 2015.

» *Visit by Mr. President, Justice Mr. Hicabi Dursun and accompanying delegation to the Supreme Court of Turkish Republic of Northern Cyprus*

» *Visit to the Constitutional Court by the President and accompanying delegation of the Supreme Court of Turkish Republic of Northern Cyprus*

President of the Court Mr. Zühtü ARSLAN, after his election to the presidency, paid his first official visit to Turkish Republic of Northern Cyprus (KKTC) on 15-16 May 2015. He was accompanied by Justice Mr. Hicabi DURSUN and a delegation from the Court. The President of the Supreme Court of Turkish Republic of Northern Cyprus and the accompanying delegation paid a return visit to the Court on 29 June 2015. Within the scope of the visit, a Memorandum of Understanding on Bilateral Cooperation was signed between the Court and the Supreme Court of Turkish Republic of Northern Cyprus.

A delegation of the Court headed by Justice Mr. Muammer TOPAL participated to the official ceremony held in Pristina on 16 June 2015 on the occasion of the retirement of Prof. Dr. Enver HASANİ, President of the Constitutional Court of Kosovo.

A delegation of the Court headed by Justice Mr. Kadir ÖZKAYA participated to the 5th Black Sea International Conference "Liberty and Security: Increasing the Effectiveness of the Constitutional Complaint" organized by the Constitutional Court of Georgia in Batumi on 27-28 June 2015.

A delegation of the Court headed by President Mr. Zühtü ARSLAN participated in the Board of Members Meeting of the Association of Asian Constitutional Courts and Equivalent Institutions and international symposium on "*Constitutional Complaint*", organized in the capital city of Jakarta, Indonesia on 14/8/2015. In the aforementioned meeting, decisions were delivered on the membership of Constitutional Chamber of Supreme Court of Kyrgyzstan and Constitutional Tribunal of Myanmar along with the consideration of the establishment of

» *Visit by Mr. President and accompanying delegation to Indonesia and participation to the conference titled "Constitutional Complaint"*

permanent secretariat of the Association during the meeting to be held in Bali in 2016. Furthermore, President Mr. Zühtü ARSLAN presented a paper titled "*Constitutional Complaint as an Instrument for the Protection of Fundamental Rights: Turkish Example*".

A delegation of the Court headed by Vice-President Mr. Alparslan ALTAN participated in the celebration ceremonies on the occasion of the 20th Anniversary of Kazakhstan Constitution and the international symposium "*Constitution: Unity, Stability, Prosperity*" organized in Astana on 28-29 August 2015.

» *3rd Summer School Program of Association of Asian Constitutional Courts and Equivalent Institutions (AACC)*

One of the annual activities organized by the Court within the scope of activities of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), 3rd Summer School Program was organized in Ankara and Istanbul on 30 August – 9 September 2015. Summer School Program was participated by rapporteur-judges, assistant judges, researchers, jurists and advisors from the constitutional courts of Azerbaijan, Algeria, Montenegro, Kyrgyzstan, Korea, Malaysia, Mongolia, Uzbekistan, Russia, Tajikistan, Thailand and Turkey. Some jurists and academics from the Constitutional Court of Spain and certain universities of Turkey gave lectures in the summer school program.

Upon invitation of the Ministry of Justice and Freedom of Morocco, a delegation of the Court headed by Justice Mr. Osman Alifeyyaz PAKSÜT participated to international symposium "*The Contention of Unconstitutionality in Reviewing Constitutionality of Laws*" held in Rabat on 15-16 September 2015.

» *Visit by Justice Mr. Osman Alifeyyaz PAKSÜT and accompanying delegation to Morocco.*

Justice Mr. Recep KÖMÜRCÜ and Justice Mr. Rıdvan GÜLEÇ, with an accompanying delegation, participated to the Judicial Year Opening Ceremony of the Supreme Court of Turkish Republic of Northern Cyprus on 15-18 September 2015. Justice Mr. Recep KÖMÜRCÜ extended a congratulations speech in the said program.

A delegation of the Court headed by Justice Mr. Hasan Tahsin GÖKCAN paid a working visit to Dushanbe, capital city of Tajikistan, to participate the international conference "*Constitutional Justice as a Guarantee of the Supremacy of the Constitution*" organized by the Constitutional Court of Tajikistan on 17-19 September 2015.

» *Visit by Justice Mr. Hasan Tahsin GÖKCAN and accompanying delegation to Tajikistan.*

A delegation of the Court consisting of Justice Mr. Celal Mümtaz AKINCI and Justice Mr. Muammer TOPAL, accompanied by a delegation, paid a study visit to Baku, capital city of Azerbaijan, on 1-4 October 2015 to participate in the international conference "*Protection of Human Rights and Freedoms by the Constitutional Court through Individual Application*", organized by the Constitutional Court of Republic of Azerbaijan. Justice Mr. Celal Mümtaz AKINCI delivered a presentation titled "*Individual Application in Turkey in the Third Year*" in the conference.

Within the scope of the Court's international activities, a delegation headed by the President of the Court Mr. Zühtü ARSLAN participated to the conference titled

» *Visit by Justice Mr. Celal Mümtaz AKINCI, Justice Mr. Muammer TOPAL and accompanying delegation to Azerbaijan*

» Visit by Mr. President, Justice Mr. Kadir ÖZKAYA and accompanying delegation to Strasbourg for a conference on Freedom of Expression and official visit to Mr. Thorbjørn JAGLAND, Secretary General of the Council of Europe.

"*Freedom of Expression: Still a Precondition for Democracy?*" organized by the Council of Europe in Strasbourg on 13-14 October 2015. Mr. President delivered an opening speech together with Mr. Thorbjorn JAGLAND, Secretary General of the Council of Europe, and touched upon the importance of the freedom of expression, the relationship of this freedom with democracy and the challenges in this field. Mr. President and the accompanying delegation met with Secretary General of the Council of Europe, Vice-President of the European Court of Human Rights, Section President of the European Court of Human Rights and Director General of Human Rights and the Rule of Law of the Council of Europe.

Vice-President of the Constitutional Court Mr. Burhan ÜSTÜN and Justice Mr. Erdal TERCAN, accompanied by a delegation of the Court, participated in the opening ceremony held in Prishtine on 15-17 October 2015 on the occasion of 6th Judicial Year of Constitutional Court of Kosovo upon the Court's invitation.

A delegation of the Court headed by Justice Mr. Hicabi DURSUN paid a study

» Visit by Vice-President of the Constitutional Court Mr. Burhan ÜSTÜN, Justice Mr. Erdal TERCAN and accompanying delegation to Kosovo.

» *Visit by Justice Mr. Hicabi DURSUN and accompanying delegation to Uzbekistan*

visit to Tashkent, capital city of Uzbekistan, on 21-22 October 2015 to participate in the international conference themed "*The Role of the Constitutional Court in Realization of the Principle of the Separation of Powers and Protection of Human Rights: Experience of Uzbekistan and Foreign Countries*", organized on the occasion of the 20th Anniversary of The Constitutional Court of the Republic of Uzbekistan. Justice Hicabi DURSUN delivered the presentation titled "*The Development of Constitutionalism in Turkey: Constitutional Judiciary & Individual Application*" in the conference.

The delegation consisting of the Vice-President Mr. Engin YILDIRIM and Justice Mr. Nuri NECİPOĞLU paid a study visit to Strasbourg, France between 27-30 October 2015 to participate in the international conference for Constitutional Courts and Equivalent Bodies from Central Asia held by the Venice Commission of the

» *Visit by Vice-President of the Constitutional Court Mr. Engin YILDIRIM, Justice Mr. Nuri NECİPOĞLU and accompanying delegation to Strasbourg*

Council of Europe on 28-29 October 2015. Prof. Dr. Engin YILDIRIM delivered the presentation titled "*Separation of Powers: Experience of the Republic of Turkey*" at the mentioned conference.

One of the most important activities of the Court in 2015 is the international project titled "*Project on Supporting the Individual Application to the Constitutional Court*", which was launched on 8/12/2015 and is co-organized with the Council of Europe for a period of 3 years. The Constitutional Court is the main beneficiary of the project while the stakeholders of the project are the Court of Cassation, the Council of State, the Ministry of Justice, the High Council of Judges and Prosecutors, the Military Court of Cassation, the High Administrative Military Court, the Union of Turkish Bar Associations and the Turkish Justice Academy. The project's objective is to contribute to supporting and strengthening individual application to the Constitutional Court of Turkey.

The following main results are expected to be achieved through the project: assurance of the rights and freedoms set forth in the Turkish Constitution and the ECHR is better secured at national level; capacity of judges, prosecutors and lawyers in Turkey on the individual application mechanism to the Constitutional Court and implementation of fundamental rights is increased; co-operation of national courts with the European institutions is increased; and awareness of Turkish public on the individual application mechanism to the Constitutional Court and implementation of fundamental rights is increased.

Within the scope of this project, a series of activities are planned such as roundtable meetings, case law discussion fora, preparation of training modules and materials for judges-prosecutors and lawyers, training of trainers, training activities for judges, prosecutors and lawyers, study visits, placements to the Council of Europe, ECtHR, European Court of Justice and such other organizations and awareness-raising activities.

CHAPTER FOUR

OPENING SPEECH ON THE OCCASION OF THE 53rd ANNIVERSARY OF THE COURT

SPEECH BY MR. PRESIDENT ON THE OCCASION OF THE 53rd ANNIVERSARY OF THE COURT

His Excellency Mr. President,

Esteemed guests,

I would like to welcome you to our ceremony on the occasion of the 53rd Anniversary of the Constitutional Court of the Republic of Turkey and oath-taking of our Court's newly-elected Member Judge. I greet you all with my deepest love and respect.

I would like to congratulate the new Member Judge of our Court Mr. Rıdvan Güleç, elected for the Court of Accounts quota by the Grand National Assembly of Turkey and started his office by taking his oath a while ago. I sincerely wish that his office will be auspicious to himself, his family, to our Court and our country. I firmly believe that his vast knowledge and experience that he accumulated during his service at the Court of Accounts will serve in the field of "constitutional justice" too and he will make great contribution to the strength of the Constitutional Court. I wish him every success in his office.

I would also like to congratulate our Member Judge Mr. Burhan Üstün for his recent election as Vice-President of our Court and Mr. Nuri Necipoğlu for his election as Vice-President of the Court of Conflicts. I wish them every success in their offices.

His Excellency Mr. President,

John Rawls, one of the leading philosophers of politics in the 20th century, says "Justice is the first virtue of social institution." The key principle of justice, which Rawls considers to be the basis of a proper-functioning constitutional order, is that everyone has equal share of fundamental rights and freedoms.

In this sense, justice can be defined that everyone takes his rightful share and gets his just reward. Mawlana Jalaluddin al Rumi makes a very sententious description for this aspect of justice. In Mawlana's opinion, justice is to put everything into its place. As he puts it, justice is "to irrigate the trees" whereas it is cruelty "to water the thorns".

> ***Justice, which is considered to be antonym of cruelty, has been accepted as basic principle of state and society in our lands for many centuries. Kınalızade Ali Çelebi, who lived in the 16th century, makes a description of justice in the end of his famous book "Ahlâk-ı Alâî". He emphasized the universal aspect of justice and its central importance in Ottoman state mentality by saying "It is justice that ensures the order and salvation of the world." Justice is the basis of not only the state but also the civilization. Justice is a sine qua non for the establishment and survival of a civilization to set an example to whole humanity.***

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Justice, which is considered to be antonym of cruelty, has been accepted as basic principle of state and society in our lands for many centuries. Kınalızade Ali Çelebi, who lived in the 16th century, makes a description of justice in the end of his famous book "Ahlâk-ı Alâî". He emphasized the universal aspect of justice and its central importance in Ottoman state mentality by saying "It is justice that ensures the order and salvation of the world." Justice is the basis of not only the state but also the civilization. Justice is a sine qua non for the establishment and survival of a civilization to set an example to whole humanity.

Justice is a merit that should apply not just for the laws but for their interpretation and implementation as well. In this sense, it is beyond any doubt that the judiciary is one of the most influential institutions in ensuring justice. That is why the buildings of the courts are called "adliye" (house of justice or palace of justice) in Turkish language. In many languages the word "justice" also means the "judge". As a matter of fact, judiciary plays a more significant role than all other organs in maintaining a fair political and legal order based on human rights and freedoms

Judiciary is going through one of the most critical and sensitive period in its history in Turkey. Judiciary bears a very heavy burden to administer the justice and, in order to get

> ***Judiciary is going through one of the most critical and sensitive period in its history in Turkey. Judiciary bears a very heavy burden to administer the justice and, in order to get through this burden and to serve its function, judiciary must confront the concept of "tutelage". The confrontation and self-criticism by the judiciary is not sufficient alone; but all other components of the political and legal system must make self-examination.***

> ***We must keep in mind that one cannot be a judge without a free reason and conscience. One cannot be a judge if he rents out his reason and conscience or if he puts his will under pledge. There cannot be a remote-controlled judge or judiciary in the rule of law.***

through this burden and to serve its function, judiciary must confront the concept of "tutelage". The confrontation and self-criticism by the judiciary is not sufficient alone; but all other components of the political and legal system must make self-examination.

The mentality of tutelage serves to neutralize the democracy and rule of law by rendering these notions meaningless and non-functional. The tutelage is based on the presumption that democratic political reason is insufficient. When it comes to an individual level, this mentality is fuelled by the idea that an individual cannot be left to his own decisions but must be guided so that he can make the correct decisions. In both cases, the political and individual reason is put under pledge. That is why Kant considers tutelage as the enemy of freedoms and puts the motto of Enlightenment as "Dare to use your own reason!"

Tutelage is the biggest threat against the free use of reason and conscience not only in the political domain but also in judicial sphere as well. Therefore, a genuine independence of the judiciary is a sine qua non for the rule of law. The independence of the judiciary requires the judiciary at institutional level to be free from any order, instruction and command of any person or organ. On other hand, the members of the judiciary at individual level must be able to use their reason and will freely without being subject to any form of tutelage.

We must keep in mind that one cannot be a judge without a free reason and conscience. One cannot be a judge if he rents out his reason and conscience or if he puts his will under pledge. There cannot be a remote-controlled judge or judiciary in the rule of law.

Indeed, the pathologic relation between the judiciary and the tutelage has two aspects; one is that the judiciary itself becomes an organ of tutelage and the other is that judiciary is subjected to tutelage. Both of these cases pose equal threat to

> ***Judiciary cannot and shall not act as an institution of tutelage attempting to social and political engineering. It is impossible to accept an understanding of judiciary that assumes itself as the owner and the final guardian of the system and, therefore, attempts to adjust all other persons or institutions accordingly. The role of the judiciary in a democratic society is not to impose and order to the society and the politics but to settle the conflicts by passing the legal rules through the filter of justice. This is the only way that a judge and the judiciary becomes the guaranty of the fundamental rights and freedoms.***

The judiciary must resist resolutely against all forms of tutelage to be established on itself

Both the politization of the judiciary and the judicialization of politics are equally dangerous to the democratic state of law.

If the judiciary exceeds beyond its power and attempts to design the political domain, then this contradicts with the separation of powers too. The juristocratic attitude of the judiciary and the illimitable attitude of the executive pose equal threat to democracy.

the democratic rule of law. The first is that judiciary cannot and shall not act as an institution of tutelage attempting to social and political engineering. It is impossible to accept an understanding of judiciary that assumes itself as the owner and the final guardian of the system and, therefore, attempts to adjust all other persons or institutions accordingly. The role of the judiciary in a democratic society is not to impose and order to the society and the politics but to settle the conflicts by passing the legal rules through the filter of justice. This is the only way that a judge and the judiciary becomes the guaranty of the fundamental rights and freedoms.

On the other hand, the judiciary must resist resolutely against all forms of tutelage to be established on itself. In other words, it is of vital importance to establish a true independence of the judiciary both at institutional and individual level. In conclusion, the biggest enormity against the judiciary would be to position it as an institution of tutelage or an institution under tutelage.

Similarly, there are two problematic aspects of the relations between the judiciary and the politics. It would be a great danger if the judiciary, in institutional sense, falls under the influence of political organs or if it dissociates on the basis of political opinions. The politization of judiciary would be the end of the rule of law. On the other hand, if the judiciary acts as an institution of tutelage and takes the decisions which must be taken by the politics, this would lead to judicialization of politics. The judicialization of politics would be the end of democracy. Therefore, both the politization of the judiciary and the judicialization of politics are equally dangerous to the democratic state of law.

It is beyond any doubt that the principle of separation of powers is one of the most important constitutional instruments to ensure independence of the judiciary and to normalize its relationship with the tutelage and the politics. The underlying basis for concept of separation of powers is the need to restrict power which is the very essence of constitutionalism. Fundamental rights and freedoms are at risk if the power is not restricted by law. As Montesquieu puts it, the accumulation of all powers, legislative, executive, and judiciary, in the same hands would be the end of freedoms

It must be noted that the restriction of power by law does not apply just for the legislative and executive but for the judiciary as well. If the judiciary exceeds beyond its power and

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attempts to design the political domain, then this contradicts with the separation of powers too. The juristocratic attitude of the judiciary and the illimitable attitude of the executive pose equal threat to democracy.

On the other hand, separation of powers is by no means a conflict or struggle of powers. Contrary, the Preamble of the Constitution defines the separation of powers as such: "The separation of powers … refers solely to the exercising of certain state powers and discharging of duties, and is limited to a civilized cooperation and division of functions."

Actually, no organ can solve its problems and succeed without the help and cooperation of other organs. In this sense, it must be noted that today we need cooperation among the organs of the state power more than ever.

I would like to emphasize that it is our joint responsibility to solve the current problems of the judiciary and to improve it to a better position. For this purpose, everyone and every institution must pay the necessary care and commitment. This is a serious matter that cannot be solved with some formal changes. It requires a series of radical and serious works and steps in a vast filed of such issues as legal education, court practices, legal ethics and the expectations of the society from the judiciary.

If we aim to establish an exemplary judicial system and to become one of the founders and actors of an international system based on justice and ethics, it is a sine qua non for us to have a well and effective functioning, independent and impartial judiciary trusted by the whole society.

His Excellency Mr. President,

I had the opportunity to represent our Court at an international conference organized in Mexico City in November 2012 and attended by the presidents and judges of various Supreme Courts from around the world. The title of my paper in that conference was "The New Turkish Constitutional Court" and the sub-title was "Towards a Paradigm Shift?" I placed a question mark to the end of the sub-title on purpose. Because, then it was not clear yet whether the Court could achieve this transformation and adopt a "rights-based paradigm". That paper discussed that the biggest challenge before the new Constitutional Court formed after the Constitutional amendments in 2010 was to realize this paradigm shift through the individual application system.

I am more than happy to express that the new Constitutional Court has shown a significant progress to achieve this paradigm shift in a period of approximately three years. Our Court strives to establish constitutional and individual justice through constitutionality review and individual application. Consequently, the Constitutional

Court has become the guarantee of fundamental rights and freedoms to a considerable extent.

This is what is expected of the Constitutional Court exactly. As a matter of fact, the constitutional courts emerged as a result of the idea that fundamental rights and freedoms must be protected against the elected legislative majority as well. The raison d'etre of these courts, which became a distinctive feature of constitutional democracy, is to ensure constitutional justice by carrying out the constitutionality review of laws. In countries where the mechanism of constitutional complaint or individual application is adopted, the constitutional courts examine whether fundamental rights and freedoms are violated by public power acts and thereby checks the constitutionality of actual practices.

This paradigm shift that we go through can be tracked down in our individual application judgments. In these judgments, the Constitutional Court adopted an approach which broadens the scope of protection and improves the standards for a series of rights from right to life to right to individual liberty and security, from the right to a fair trial to freedom of expression and association, from the right to a private life and to freedom of religion and conscience.

In this context, our Court ruled the judgments that led up to the release of detained members of parliament and these judgments emphasized the importance of the right to political representation in democratic societies. Likewise, the Court considered the removal of female judge wearing headscarf from the hearing room as a violation of freedom of religion and prohibition of discrimination.

Apart from these, we have hundreds of judgments identifying a violation of rights in such cases where a conviction is established without providing the defendant under custody with legal aid, cases where effective use of right to object to detention is impaired as the justified ruling for conviction is not prepared for a very long period of time, cases where the means and opportunities of the plaintiff or the prosecutor is not provided to the defendant, cases where the freedom of expression is infringed by banning social media and other platforms, cases where the public officers enjoying their union rights are inflicted a disciplinary punishment and many other cases.

> ***All these judgments ruled by our Court with a "right-based" approach serve to improve the standards of human rights in our country which is a long-awaited status. On the other hand, these judgments also increase the prestige of our country in international arena by providing us the opportunity to contribute to corpus of universal law. It is beyond any doubt that if Turkey internalizes such universal values as justice, equality, freedom and human rights and ensures peaceful co-existence of differences and thereby strengthens its democratic regime, then Turkey will become a very effective soft-power.***

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The new "rights-based" paradigm of the Constitutional Court makes significant contribution to the long-debated ideal of our country for co-existence of differences without resorting to violence. Actually, the most challenging task for all pluralistic democracies including that of us is to ensure and maintain the co-existence of differences.

As it is known to all, the key to co-existence with the "other" at social level is tolerance. Indeed, the concept of tolerance contains inequality and, perhaps, a certain degree of hierarchy in the relations between the individuals or groups. The one that shows tolerance assumes his/her own opinion and lifestyle to be superior or dear to that of the one s/he tolerates in any case but, even so, s/he displays the will to live together with the other.

However, the formula at political and legal level to ensure co-existence is "recognition" rather than tolerance. Recognition requires the acknowledgement of the ontological status of the other. In this sense, the responsibility of the state as a political and legal institution is not to tolerate different worldviews and lifestyles but to recognize them being equal to all others. Such a recognition is a prerequisite of a pluralistic democracy.

As a matter of fact, in one of its judgments in 2012 the Constitutional Court referred to the policy of recognition by stating "one of the main aims of the democratic and secular state is to establish political orders, where the individuals will live together in peace with the faiths they have by protecting the social diversity"

In one of its individual application judgments last year, our Court emphasized the requirements of recognition and the policy of pluralism as a consequence of recognition as follows:

"…"recognition" requires that the state accepts the existence of all religious and faith

> ***In the pluralistic society, the state shall be obliged to ensure that the individuals live as required by their own world views and faiths. The state does not have the authority to accept one of the views or life styles present in the society as "wrong". In this context, unless the reasons for limitation stipulated in the Constitution are present, making the differences exist together is a requirement of the pluralism although the majority or the minority does not like it."***

» *Program on the occasion of the 53rd Anniversary of the Constitutional Court*

groups as regards the state-individual relations… The pluralism is only possible when everyone takes part in the social and political life through his/her own identity and as himself/herself. The pluralism cannot be mentioned in a place where the differences and those, who are different, are not recognized and protected against the threats. In the pluralistic society, the state shall be obliged to ensure that the individuals live as required by their own world views and faiths. The state does not have the authority to accept one of the views or life styles present in the society as "wrong". In this context, unless the reasons for limitation stipulated in the Constitution are present, making the differences exist together is a requirement of the pluralism although the majority or the minority does not like it."

> ***Being the successors of a civilization that displayed good examples of living together in peace, the sources of inspiration that we need are present in our cultural codes. As expressed in Mawlana's words "Come, come, whoever you are… Come and come yet again..." and Haji Baktash Wali's words "The greatest book to read is the human being.", such a human oriented understanding will provide the intellectual climate required for the management of differences.***

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His Excellency Mr. President,

I would also like to state that our Court is yet at the very beginning of this paradigm shift. We are well aware of the fact that we have a long way to go and that we have to complete this transformation and ensure its consistency.

We all know that every transformation is painful. One of the major challenges that we face in this process is the increasing workload of the Court. The "rights-based" judgments of our Court, perhaps somewhat paradoxically, cause a continuous increase in the number of individual applications filed.

As of today, the number of individual applications in pending status is 18.009. We have concluded 20.689 applications since the actual introduction of individual application

445(%76,60) of the judgments for violation are on the right to fair trial, 48(%8,08) judgments on right to personal liberty and security, 26(%4,38) judgments on union rights, 18(%3,03) judgments on right to property and 12(%2,02) judgment on freedom of expression. When it is noted that more than eighty percent (80%) of violations of right to a fair trial are related to right to trial within a reasonable time, the role of the structural problems in the violation of fundamental rights and freedoms becomes clear.

on 23 September 212. Similar to the practices of such countries as Germany and Spain which adopted individual application, most the applications have been found inadmissible.

637 applications have been examined on merits and violation of at least one constitutional was identified in 572 cases. Accordingly, our Court has identified a violation of right in approximately 90% of the applications found worthy of examination on merits.

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Our Court continues its efforts to ease the workload of the individual application. We take and implement such measures as to increase the effectiveness of filtering system, to focus the Sections and the Plenary on applications for structural problems relating to the whole legal system and to classify the rapporteur judges on the basis of rights and to assign them to the applications according to their fields of expertise.

However, increasing the effectiveness of the functioning of the Constitutional Court is not sufficient alone in solving the problems. First of all, everyone must understand the fact that individual application does not provide for a new and "super" way of appeal after the exhaustion of other remedies. Secondly, a decrease in the number of individual applications or preventing the increase of applications to the extent that it blocks out

Everyone must understand the fact that individual application does not provide for a new and "super" way of appeal after the exhaustion of other remedies. Secondly, a decrease in the number of individual applications or preventing the increase of applications to the extent that it blocks out the system depends on a more delicate and sensitive conduct of administrative and judicial authorities. The subsidiarity principle of the individual application requires the reparation for violations of rights primarily before the courts of instance.

» *Program on the occasion of the 53rd Anniversary of the Constitutional Court*

On the other hand, it must be noted that every judgment of the Court ruled so far and to be ruled in future is open to criticism. The judges and the rulings of the courts are not sacred. Like all other persons, judges are liable to make mistakes and take wrong decisions. Therefore, the judiciary must welcome such criticisms as normal and take notice of these criticisms to correct possible errors.

the system depends on a more delicate and sensitive conduct of administrative and judicial authorities. The subsidiarity principle of the individual application requires the reparation for violations of rights primarily before the courts of instance.

Despite all the difficulties and problems, individual application plays a very important role in improving the standards of rights and freedoms in our country and in the transformation of the Constitutional Court and, perhaps, the whole judicial system. This situation is an important reflection of the cooperation among the state organs which was mentioned before. All the success of individual application practice is not in the sole possession of the Constitutional Court but it is also a success of other institutions and especially that of the legislative organ and our nation itself as the ultimate source of sovereignty. Taking this opportunity, I would like to express in the name of our Court my gratitude and appreciation to everyone and each and every institution who contributed to this success.

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not sacred. Like all other persons, judges are liable to make mistakes and take wrong decisions. Therefore, the judiciary must welcome such criticisms as normal and take notice of these criticisms to correct possible errors.

I would like to state that our Constitutional Court takes due consideration of all kinds of criticism. For instance, considering the criticisms to that end, we have abandoned our practice of announcing the decisions for annulment before preparing the grounds and justifications of such decisions. The purpose of this change is to ensure that the Constitutional Court, being an organ in charge of ensuring the supremacy of the Constitution, acts in accordance with the Constitution and to ensure that its reasoned decisions are announced faster than it used to be. In short, our Court benefits and will continue to benefit from fair and constructive criticisms.

His Excellency Mr. President,

In the final part of my speech, I would like to share my opinions on the issue of "new constitution" which is a permanent item of our country's agenda at principal level and under five clauses.

First of all, it must be noted that a new constitution emerges as a sine qua non for our country considering its level of economic and political development today. It is known to all that there is a very broad, if not a full, consensus in the society on the need for a new constitution. What we need today is an effective will and determination to be shown by all actors of the constitution-making process.

As it is known, a favorable climate is need for the making of a new constitution. The creation of such a climate requires a positive attitude which emphasizes dialogue and reconciliation rather polarization in discourse and actions, which does not exclude but embrace and which prefers constructive approach to destructive one. It is our joint responsibility to create a favorable climate for a new constitution together with all civil and political actors of society. The participation of all segments of the society to this process insofar as possible and the embracement of this "social contract" by all citizens of this country with a sense of "my constitution" totally depends on the fulfillment of this joint responsibility. Besides, the dialogue among the social and political actors in the constitution making process must be based on a healthy and undistorted communication and there must be a free platform of discussion where all kinds of views and opinions can be defended on condition that they does not contain violence and not intend to kill the existence of the other.

Secondly, the new constitution must broaden the domain of democratic politics by eliminating all components of the bureaucratic tutelage and must ensure a full protection of fundamental rights and freedoms by establishing all the rules and organs

The new constitution must broaden the domain of democratic politics by eliminating all components of the bureaucratic tutelage and must ensure a full protection of fundamental rights and freedoms by establishing all the rules and organs of a state of law.

of a state of law. In other words, a healthy constitutional democracy requires a social order where there are no conflicts of values between society and state organs, where the political majority comes to power but fundamental rights and freedoms of minority is guaranteed as well and, perhaps the most important of all, where all people deem themselves as equal and free citizens.

Thirdly, our positive and negative constitutional experiences must be taken into consideration in the new constitution making process. I must be noted that the pursuit of a new constitution is not an issue peculiar to today. This country has been seeking its constitution for more than 150 years. Midhat Pasha, who drafted the 1876 Constitution, defines the constitution as such in one of his articles in 1878 "it is the only cure for our diseases, the only advantageous instrument in our struggle against the domestic and foreign enemies".

Since the time of Midhat Pasha, excluding the amendments to constitutions, we have made five brand new constitutions. When we make a comparative reading of Kanun-i Esasi(our first constitution) and today's Constitution, we see that there are very significant continuities both at institutional and principal level. Briefly speaking, it is self-evident that such continuities and constitutional tradition must be taken into account in the making of a new constitution.

Fourthly, we must benefit from the experiences provided by the comparative constitutionalism in determining the content of the new constitution and making the

> ***We must benefit from the experiences provided by the comparative constitutionalism in determining the content of the new constitution and making the institutional choices accordingly. At this very point, we need to secure an optimum harmony between the universal principles of democratic constitutionalism and the sociological, political and cultural characteristics of our society.***

institutional choices accordingly. At this very point, we need to secure an optimum harmony between the universal principles of democratic constitutionalism and the sociological, political and cultural characteristics of our society.

It would be wrong to make a "copy-paste constitution" while it would also be wrong to attempt to draft a constitution without taking due notice of essential components of democratic constitutions such as separation powers, rule of law, human rights and

> ***It would be wrong to make a "copy-paste constitution" while it would also be wrong to attempt to draft a constitution without taking due notice of essential components of democratic constitutions such as separation powers, rule of law, human rights and pluralism.***

It has become more important in terms of social psychology to show that our people can make a new constitution with their own dynamics in an ordinary period of time than the contents of the new constitution to be made.

pluralism. In short, considering our social structure and political culture, it is possible to make a democratic and libertarian constitution which establishes a well and effective functioning system based on separation of powers.

Fifthly and finally, one of the major obstacles to a new constitution may be the demand for the involvement in the constitution of opinions and proposals that are extremely difficult to reconcile upon in spite of everything and everyone else. In such a situation, the actors of the process may be required to reconsider their maximalist demands and, perhaps, take a step back from their current position. As a matter of fact, it has become more important in terms of social psychology to show that our people can make a new constitution with their own dynamics in an ordinary period of time than the contents of the new constitution to be made.

On the other hand, the new constitution is a magic wand to provide one-touch solution to all the problems in a while. No constitution can solve problems by itself. In proper-functioning democracy, the constitutions are expected to provide a basis required for the solution of social, political, economic and legal problems. Therefore, regardless of how we shape the content of a new constitution, good interpreters and implementers of the constitution are equally, if not more, important than a good constitution.

After all, we understand that Turkey's pursuit of a new constitution will continue in upcoming period. Slavoj Žižek tells a witty story to explain the paradoxical nature of searching process. I would like to conclude this part of my speech by sharing this story as it resembles to our quest for a new constitution.

A conscript who tries to evade military service by pretending to be mad: he compulsively checks all the pieces of paper he can lay hands on, constantly repeating: 'That's not it!' They refer him to the psychiatrist and he continues to do the same thing at the psychiatrist clinic. He checks all the papers in the doctor's room, even those thrown into litter bin. The psychiatrist, finally convinced of his insanity, gives him a written certificate releasing him from military service: the conscripts casts a look at it and says cheerfully: 'That is it!'

Here Zizek tells on the basis of this anecdote that the failures in search process may yield success in finding what you are searching for. Accordingly, it is the process of search itself that creates what you are searching for. We sincerely hope that we will reach "the new constitution" at the end of our search process.

His Excellency Mr. President,

Taking this opportunity, I would like to extend our gratitude on behalf of our Court to our Member Judge Zehra Ayla Perktaş who retired previously this year and to

our former President Mr. Haşim Kılıç for all their contributions to our Court. Mr. Kılıç provided significant services to our Court and our country during his term of office as Member Judge, Vice-President and President of the Court and he was the pioneering leader of the paradigm shift that I have explained before. I wish them health, happiness and peace in their retired ages.

I would like to express my condolences to the relatives of Mr. Selahattin Metin, retired member judge of our Court who passed away last year, and Mr. Şevket Müftügil, retired president of our Court who passed away last week. May Allah rest their souls in peace!

I would also like to extend my thanks and appreciation to our Vice-Presidents, Member Judges, Rapporteur Judges, Assistant Rapporteur Judges, Directors and all other staff of our Court who work devotedly for an ideal of Constitutional Court which is the guarantee of our people's rights and freedoms, which deserves the trust and praise of our nation and serves as a model to the rest of the world.

Finally, our Courts judgments on individual applications will be discussed in details during the symposium in the afternoon and tomorrow with criticisms and proposals to be voiced. I would like to express in advance my thanks on behalf of our Court to all speakers and participants to contribute this symposium.

His Excellency Mr. President,

Esteemed Guests,

Ending my words, I would like to reiterate my thanks and appreciation for your participation our anniversary and oath-taking ceremony. I extend my wishes of health and prosperity.

CHAPTER FIVE

LEADING JUDGMENTS OF THE CONSTITUTIONAL COURT IN 2015

LEADING JUDGMENTS OF THE CONSTITUTIONAL COURT IN 2015

Year of 2015 was a period during which the Constitutional Court has introduced new principles and case-law in many fields and developed the current case-law. Within this scope, certain leading judgments rendered by the Court both in respect of the constitutionality review (actions for annulment of and applications for objection to certain provisions of law) and the individual applications should be dealt with in this activity report.

I- LEADING JUDGMENTS RENDERED BY THE CONSTITUTIONAL COURT IN THE CONSTITUTIONALITY REVIEW PROCESS

The leading judgments rendered by the Constitutional Court in 2015 in the constitutionality review process are as follows: the judgment on the establishment and the procedure of objection to the decisions of the Magistrate Judge's Offices(*"Sulh Ceza Hakimlikleri"*), the judgment on the offence of perjury, the Judgment on the requirement of identity authentication by means of biometric methods, the judgment on the trial procedure in respect of the cases dealing with the central and common exams, the judgment on the construction and renovation of facilities and procurement of services through public-private sector collaboration, the judgment on the offence of obscenity, the judgment on the expropriation of the intellectual and artistic works by issuing a decree of the Council of Ministers, judgment on the procedure for collection of the amounts awarded against the Social Security Institution ("the SSI"), the judgment on the offences for causing to perform or performing religious ceremony for marriage, the judgment on excluding the training centres (*"dershane"*) from the scope of the Private Teaching Institutions, the judgment on the influence of criminal convictions on the political rights, the judgment on the Capital Market Law, the judgment on the practice of electronic card and ticket in sports, the judgment on the courts' unanimous decisions concerning the security measures and on the actions for compensation to be brought in case of non-enforcement of the courts' decisions, the judgment on the internet service providers' obligations to deliver information and take measures requested by the Telecommunications Communication Presidency (*"TIB"*), the judgment on the provision which stipulates the existence of reasonable suspicion for issuing a search warrant and the judgment on the Law of the National Intelligence Organization (*"MIT"*).

1- Judgment on the establishment and the procedure of objection to the decisions of the Magistrate Judge's Offices (no. E.2014/164, E.2014/174, K. 2015/12)

The Court has emphasized that the principle of natural judge prevents the establishment of the judicial authorities and appointment of the judge after the offence is committed or the dispute occurs. It has however noted that the guarantee of natural judge should not be understood in the manner that the newly established courts or judges recently appointed to the existing courts can under no circumstances participate in proceedings concerning the offences previously committed; that on condition of not being limited to certain incidents, persons or community, dealing by the newly established courts or judges recently appointed to the existing courts with disputes which have occurred before the establishment or appointment date would not constitute a breach of the guarantee of legal judge; and that thinking contrary would result in failure to establish new courts.

One of the rules subject-matter of the objection is the establishment of the Magistrate Judge's Offices by the Ministry of Justice upon the approval of the High Council of Judges and Prosecutors in city centres and designated districts by having regard to the geographical conditions and workload of the regions with a view to rendering decisions that are required to be taken by a judge in the course of the judicial investigations, to carrying out necessary actions and examining the objections raised against these decisions and actions.

In the application lodged with the Constitutional Court, it has been maintained that outcome of the investigations conducted in Turkey is left to the initiative of the political power through limited number of judge's offices due to the contested provision and that this situation breaches the principle of the state of law, the rights to legal remedies and liberty and security of person, the principles of judicial independence and natural judge.

Rendering its judgment on this application on 14/1/2015, the Constitutional Court primarily emphasizes that it falls into the discretionary power of the legislator to determine the establishment, structure, functions and powers and operation and trial procedures of the courts as per Article 142 of the Constitution. Taking into account the legislative intent of the provision and its objective content, the Constitutional Court has established that the Magistrate Judge's Offices have been established with a view to enabling the magistrate judges specialized in such matters to take necessary decisions required to be taken at the investigation stage by a judge.

The Constitutional Court has noted that in practice, dealing with the cases is regarded as main task while the decisions required to be taken at the investigation

stage are regarded as subsidiary task and that there have been significant violations of rights as the actions required to be carried out at the investigation stage could not be adequately dealt with. The Court has also indicated that sitting of the judges, who have previously issued their opinions on the imputed offence and the suspect, in the court bench while dealing with the merits of the case is a practice that is also criticized by the European Court of Human Rights ("the ECtHR").

The Court has considered that in 2012, in order to overcome all of these matters, judge's offices called in practice as *"judge of freedom"* (*"özgürlük hakimi"*) have been established for the affairs falling into the jurisdiction of the courts (courts with special powers) authorized by Article 250 of the Code of Criminal Procedure no. 5271 where such violations have occurred in the severest manner, and that these judges are authorized to take decisions required to be rendered by the ordinary judges at the investigation stage in respect of the issues within the jurisdiction of the court with special powers. The Court has also noted that thanks to this legal arrangement, it is envisaged that decisions required to be taken by the judges or the courts at the investigation stage such as detention warrants, search warrants and warrants for interception of communication are not taken by the courts with special powers but by the judges of freedom, and that these judges of freedom are not assigned with any task and duty of dealing with the merits of the case and similar ones other than the above-mentioned ones. It has been accordingly held by its judgment dated 4/7/2013 and no. E.2012/100 and K.2013/84 that the provision in dispute was not unconstitutional.

Accordingly, the Court has observed that similar to the above-defined practice of the judge of freedom, the task of "taking decisions required to be rendered by the judge at the investigation stage" which was previously performed by the Magistrates' Courts has been assigned to the Magistrate Judge's Offices and that the establishment of Magistrate Judge's Offices, which are entrusted with only the task of giving decisions required to be taken by the judge at the investigation stage with a view to enabling such specialized judges to deal with only these decisions, has pursued the aim of ensuring public interest. It has been therefore concluded that the establishment of Magistrate Judge's Offices does not constitute any contradiction to the principle of the state of law.

The Court has emphasized that the principle of natural judge prevents the establishment of the judicial authorities and appointment of the judge after the offence is committed or the dispute occurs. It has however noted that the guarantee of natural judge should not be understood in the manner that the newly established courts or judges recently appointed to the existing courts can under no circumstances participate in proceedings concerning the offences previously committed; that on condition of not being limited to certain incidents, persons or community, dealing by the newly established courts or judges recently appointed to the existing courts with disputes which have occurred before the establishment or appointment date would not constitute a breach of the guarantee of legal judge;

and that thinking contrary would result in failure to establish new courts. In line with these explanations, the Court has concluded that the provision is not, in any aspect, in breach of the guarantee of legal judge by taking into account the facts that the contested provision does not aim to determine the place of jurisdiction where the relevant case would be handled after committing of a certain offence and that it has been applied in respect of all conflicts which fall into its scope following its entry into force.

Considering that the magistrate judges are appointed by the High Council of Judges and Prosecutors (the HCJP) and have the legal guarantee of judges enshrined in the Constitution as all other judges, the Constitutional Court has indicated that there is no ground which would lead to conclusion that these judge's offices are considered to have different status than other judges in respect of independency and that guarantees for their independence have been undermined.

The Court has examined the allegation that the Magistrate Judge's Offices are lack of impartiality and has indicated that it cannot be asserted that these Magistrate Judge's Offices are lack of objective impartiality *vis-a-vis* the regulations ensuring independency and included in the Constitution and law provisions to which these Magistrate Judge's Offices are subject and the guarantees ensuring independency and impartiality of judges to take office therein. It has also specified that the allegation of subjective independency which is completely associated with the personal conduct of the judge may only be asserted in the cases being dealt with on the basis of concrete, objective and plausible evidence, and that the matter of subjective impartiality which is discussed in the relevant procedural law falls outside the scope of the constitutional review.

Consequently, the Court has rejected the request for annulment of the provision relying on the above-mentioned grounds.

Other contested provisions set out that where there are more than one Magistrate Judge's Offices in the relevant place, the objections to a decision given by the magistrate judge's office shall be reviewed by the judge's office with the consecutive number while objections to any decision given by the judge's office of the last number shall be reviewed by the magistrate judge's office no. 1; and where there is only one magistrate judge's office in regions where there is no assize court, objections shall be reviewed by the magistrate judge's office located in district of jurisdiction of the relevant assize court and where there is only one magistrate judge's office in regions where there is an assize court, objections shall be reviewed by the magistrate judge's office in the region where the closest assize court is located.

In the application lodged with the Constitutional Court, it has been maintained that as any objection made to the decisions given by any of the magistrate judges in limited numbers are finally concluded by an authority within the same system, this would render the objection process ineffective, which is in breach of the principle of state of law, the principle of natural judge, the right to liberty and security of person

The Court has finally noted that the method in which an objection to the decisions given by the Magistrate Judge's Offices considered to become specialized in the security measures as they are entrusted independently with this duty is raised before and concluded by another Magistrate Judge's Office which has specialized in the same issue pursues the aim of public interest. The Constitutional Court has accordingly held that this provision is not unconstitutional.

and the right to a fair trial.

The Constitutional Court has noted that the right to legal remedies and the right to a fair trial are ones of the most efficient guarantees which would ensure proper enjoyment and protection of fundamental rights and freedoms and that the right to legal remedies falls into the scope of the right to a fair trial.

Emphasizing the requirement that the appeal courts are entitled to amend the decision being reviewed when necessary with a view to ensuring efficient implementation of the right to legal remedies guaranteed under Article 36 of the Constitution, the Court has ascertained that the Magistrate Judge's Offices are entitled to review the contested decision and give decision as to the merits of the case and it has therefore concluded that the legal remedy provided is an efficient one.

The Court has indicated that there is no constitutional norm which requires review of the objections to the decisions rendered by the Magistrate Judge's Offices by another court of higher jurisdiction and noted that the authority reviewing the contested decision must not be necessarily an authority of higher jurisdiction provided that an effective review is ensured.

On the other hand, the Court has indicated that conclusion of the objections to a court's decision by the court with the consecutive number in the same place is an established practice in both criminal and civil justice law. It has further reiterated that the provision which provides that in respect of the decisions on disciplinary imprisonment sentence given by the enforcement criminal courts in pursuance of Article 353 of the Enforcement and Bankruptcy Code no. 2004, an objection may be made to the relevant chamber of the enforcement court with consecutive number where the enforcement court has several chambers in the same place was not found in breach of the Constitution by its judgment dated 1/11/2012 and no. E.2011/64 and K.2012/168.

The Court has finally noted that the method in which an objection to the decisions given by the Magistrate Judge's Offices considered to become specialized in the security measures as they are entrusted independently with this duty is raised before and concluded by another Magistrate Judge's Office which has specialized in the same issue pursues the aim of public interest. The Constitutional Court has accordingly held that this provision is not unconstitutional.

2- Judgment on the offence of perjury (no. E.2014/116, K.2015/4)

The Constitutional Court has observed that as basic form of the offence of perjury, it is set out in Article 272 § 2 of the Code that any witness who makes a false statement before a Court or a relevant authority or committee legally authorized to hear the witness under oath shall be sentenced to a penalty of imprisonment for a term of between one year to three years while it is provided in Article 272 § 6 in which one of the aggravated forms of the offence is set out that where the victim has been sentenced to a penalty of imprisonment for a specific term, then the offender committing perjury shall be sentenced to a penalty of imprisonment for a term of two thirds of such penalty, The Court has specified that this situation has led to the fact the aggravated form of the offence requires much lighter penalty than basic form of the offence depending on the term of imprisonment sentence imposed on the victim.

The contested provision sets out that where the person against whom false statement has been given (the victim) is sentenced to imprisonment for a specific term, the witness who made false statement against him shall be sentenced to imprisonment for a term of two thirds of such penalty.

In the application lodged with the Court, it has been maintained that as the proceedings in respect of the victim had been still pending, the person who committed perjury was not aware of the sentence likely to be imposed on the victim, and therefore the offender of perjury could not foresee the sentence to be imposed on him while committing that offence. It has been also alleged that in pursuance of this provision, the offender was not imposed a sentence on the basis of the gravity of an act he had committed but on the basis of the gravity of an act performed by another person and that the amount of sentence to be imposed was determined according to the trial procedure and the discretionary power and practice of the judicial authority. To set an example, while the offender who committed perjury against the accused person sentenced to imprisonment for a term of 6 months would be sentenced to imprisonment for a term of 4 months in pursuance of the contested provision, the 6-month imprisonment sentence imposed on the accused person may be converted into a fine if he displays good behaviour during the proceedings. However, the offender of perjury would be sentenced to imprisonment for a term of between 3 and 7 years in pursuance of Article 272 § 8 of the Code no. 5237. Accordingly, it has been maintained that the provision in question is not foreseeable and definite and is in breach of Articles 2 and 38 of the Constitution.

Rendering its judgment on the application on 14/1/2015, the Constitutional Court has specified that in a state of law, provisions related to the penalties and

the security measures substituting the penalties are determined according to the criminal policy to be adopted by taking into account particularly main principles of the criminal law and the provisions enshrined in the Constitution concerning to the matter, as well as the social and cultural structures, ethical values and economic conditions of the country. It has accordingly underlined that although the legislator has the discretionary power as to which acts would be deemed as offence in a society, what kind of criminal sanction would be imposed and the extent of this sanction, what kind of circumstances would be deemed as the aggravating or mitigating factors in exercising its power of imposing penalty, while exercising such power, it has to pay regard to strike a fair balance between the offence and the penalty and to the fact that the penalty imposed is capable of attaining the aim pursued in imposition of this penalty.

In this scope, the Court has found that the legislator may take into account the gravity of the damage suffered by and the amount and type of sanction imposed on the victim as a result of the act of perjury while setting out the simple perjury and aggravated perjury and that in fact, Article 272 §§ 3 and 8 of the Code sets out the aggravated types of the offence which require aggravation of the penalty to be imposed compared to the first two paragraphs defining the basic types of the same act. However, the Court has also concluded that in paragraph 6 of the same article which is subject-matter of the objection raised, the penalty foreseen to be imposed on the offender if the victim of perjury is sentenced to an imprisonment for a specific term has led to consequences which are contrary to the equity principle.

The Constitutional Court has observed that as basic form of the offence of perjury, it is set out in Article 272 § 2 of the Code that any witness who makes a false statement before a Court or a relevant authority or committee legally authorized to hear the witness under oath shall be sentenced to a penalty of imprisonment for a term of between one year to three years while it is provided in Article 272 § 6 in which one of the aggravated forms of the offence is set out that where the victim has been sentenced to a penalty of imprisonment for a specific term, then the offender committing perjury shall be sentenced to a penalty of imprisonment for a term of two thirds of such penalty, The Court has specified that this situation has led to the fact the aggravated form of the offence requires much lighter penalty than basic form of the offence depending on the term of imprisonment sentence imposed on the victim. Considering that this situation, which becomes more apparent when the victim of perjury is sentenced to a short term imprisonment, has led to unfair consequences in ensuring equity in respect of penalties and that the fairness and equity principles that are to be born in mind by the legislator in exercising its discretionary power to determine the criminal policy are not complied with, the Court has held that the contested provision is in breach of Article 2 of the Constitution and therefore decided to annul it.

3- Judgment on the requirement of identity authentication by means of biometric methods (no. E.2014/180, K.2015/30)

> **Having emphasized that this method introduced by the contested provision can only be implemented in the health sector with a view to benefitting from this service and therefore, data obtained may only be stored limited to this aim and to the extent it is compulsory for continuity of the relevant service, the Court has specified that there is no uncertainty as to the subject-matter, objective and scope of the reasons for collection of such data and as to how and how long such data would be used.**

It is set out in the contested provision that identity authentication of those who are covered by general health insurance and their dependents is required to be made by means of showing any of their identity card, driving license, marriage certificate, passport or their official health card with a photo issued by the institution in which they are employed and / or by means of biometric methods when they visit the institutions such as hospitals with a view to benefitting from health services and other rights.

In the application lodged with the Constitutional Court, it has been maintained that the scope of obtaining and processing of personal data to be collected as a result of the identity authentication process by use of biometric methods and the principles and procedures concerning protection of such data are not definite and that the contested provision which permits collection of biometric data without the establishment of its main principles and setting of its framework by the legislative power was in breach of Articles 2, 13 and 20 of the Constitution.

Rendering its judgment on this application on 19/3/2015, the Constitutional Court has indicated that one of the fundamental principles of the state of law which are enshrined in Article 2 of the Constitution is "certainty" and that the principle of certainty does not only refer to the legal certainty but also judicial certainty in the broader sense. It has also noted that judicial certainty may be ensured through court's case-law and the regulatory actions of the executive power provided that they fulfil the qualitative requirements such as being accessible, available and foreseeable on the basis of a legal arrangement, and that what really matters is the existence of a norm which would enable the prospective addressees to foresee the results of a certain act under the current terms and conditions.

The Court has also established that Article 20 § 1 of the Constitution provides that everyone has the right to demand respect for his/her private and family life and privacy of private or family life shall not be infringed and that Article 20 § 3 sets out that the protection of personal data falls into the scope of the protection of the privacy of private life.

The Court has stated relying on Article 13 of the Constitution that fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their very essence, and that these restrictions shall not be contrary to the wording and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.

Noting that identity authentication by biometric methods is a means which ensures receiving service in a secure manner for avoiding unauthorized uses as data obtained through this method is personal; in an efficient manner for public institutions in respect of the corruptions and losses and damages suffered thereof and in a secure manner for persons covered by social security system, the Constitutional Court has underlined that the method introduced by the contested provision is an important security precaution which would prevent abuses in the health sector and avoid forgery in this respect. In this scope, the Court has also pointed out that it is indicated in the legislative intent of the contested provision that the aim of this method is to electronically conduct health services via electronic secure platforms and to prevent abuse of the health services caused by deficiencies of the conventional methods used in identification of the service beneficiaries. The Court has therefore found that effective implementation of this method introduced in the relevant provision would prevent obtaining unfair advantage from the Social Security Institution and that this provision serves for public interest.

In the light of the foregoing explanations, the Court has stated that the interference by the contested provision in the rights to request the protection of private life and personal data is proportional to the aim pursued, does not infringe on the very essence of the rights which have been interfered and does not constitute any contradiction to the requirements of a democratic social order. It has accordingly held that the contested provision is not, in any respect, in breach of the Constitution.

Moreover, having emphasized that this method introduced by the contested provision can only be implemented in the health sector with a view to benefitting from this service and therefore, data obtained may only be stored limited to this aim and to the extent it is compulsory for continuity of the relevant service, the Court has specified that there is no uncertainty as to the subject-matter, objective and scope of the reasons for collection of such data and as to how and how long such data would be used.

The Court has also noted that statutory guarantee is available in this respect as it is envisaged in the same provision that criminal penalties set out in the Turkish Criminal Code no. 5237 concerning the protection of the personal data shall be imposed on those who store and use data obtained through this method other than the prescribed aim and scope.

The Court has consequently held that the contested provision is not in breach of the Constitution and therefore decided to reject the application.

4- Judgment on the trial procedure in respect of the cases dealing with the central and common exams (no. E.2014/189, K.2015/32)

It is possible for the institutions holding central and common exams to employ qualified personnel who would prepare defence submissions for cases to be opened against these exams, as well as having possession of all kinds of information and documents pertaining to such exams. The Court has also noted that the period of three days provided for the above-mentioned institutions for making their defence cannot be deemed inadequate and unreasonable by taking into account the facts that such institutions possess the information and documents necessary for settlement of the cases opened against central and common exams and that they have the opportunity to employ qualified personnel who would prepare defence submissions on the basis of such information.

It is set out in one of the contested provisions that the period allocated for defence shall be three days as from the notification of the lawsuit petition and this period may be extended for only once and maximum three days in the cases opened with regard to the central and common exams held by the Ministry of National Education and the Assessment, Selection and Placement Centre ("ÖSYM"), the acts and actions pertaining to such exams and exam results.

In the application lodged with the Constitutional Court, it has been maintained that limiting the period for defence submissions to three days in cases opened against the exams held by the Ministry of National Education and the ÖSYM posed an obstacle for the right to legal remedies and led to inequality in respect of the enjoyment of the right to defence. It has been therefore alleged that this provision is in breach of Articles 2, 10, 13 and 36 of the Constitution.

Rendering its judgment on this application on 19/3/2015, the Constitutional Court has primarily indicated that in a state of law, the legislator has the discretionary power to make the required arrangement in respect of the formation, duties and powers, functioning and trial procedures of the courts on condition of being subject to the Constitutional provisions, and that this principle is prescribed in Article 142 of the Constitution by setting out *"the formation, duties and powers, functioning and trial procedures of the courts shall be regulated by law".*

Indicating that the provision, which determines the period for presenting defence submissions as three days in cases opened in respect of the central and common exams, is an arrangement to be dealt with within the scope of the trial procedures, the Court has therefore noted that the authority to determine the period for presenting defence submissions belongs to the legislator; however reminded that the legislator must enjoy such authority within the constitutional boundaries and by

taking into account the criteria of fairness, equity and public interest.

The Court has noted that providing the administrations with adequate period for defence submissions in order to enable them to submit information and documents concerning the settlement of the dispute and to make explanations concerning the material and legal facts is a requirement introduced by the public interest and the principle of the state of law. It has also pointed out that central and common exams held by the Ministry of National Education and the ÖSYM are a concern to a large section of the society in respect of its results; that in cases opened against such exams, the prolongation of the proceedings and consequently declaring these exams invalid may result in unjust suffering in respect of the acquired rights; that the legislator has introduced a special trial procedure with a view to accelerating the proceedings in cases opened against such exams; and that submission of defence petition is therefore limited to three days by this contested provision.

The Constitutional Court has stated in the light of the foregoing explanations that it is possible for the institutions holding central and common exams to employ qualified personnel who would prepare defence submissions for cases to be opened against these exams, as well as having possession of all kinds of information and documents pertaining to such exams. The Court has also noted that the period of three days provided for the above-mentioned institutions for making their defence cannot be deemed inadequate and unreasonable by taking into account the facts that such institutions possess the information and documents necessary for settlement of the cases opened against central and common exams and that they have the opportunity to employ qualified personnel who would prepare defence submissions on the basis of such information.

Pointing out that the period for presenting defence submissions may be extended for three days if the granted period is deemed inadequate, the Court has also underlined that the administrative judicial authorities are not bound by only the arguments included in the defence petition and also have the authority to *ex officio* perform all kinds of examinations deemed necessary by these authorities for settlement of the dispute as per the principle of *ex officio* examination.

Accordingly, the Court has held that limiting the period for defence submissions to three days with a view to immediately concluding the cases opened against the central and common exams held by the ÖSYM and the Ministry of National Education by paying regard to public interest is under the discretionary power of the legislator and that this provision does not, in any respect, contradict with the principles of the state of law.

Having examined the allegation concerning the breach of Article 10 of the Constitution, the Court has noted that addressee of the principle of equality enshrined in the Constitution is individuals and the community comprised of the individuals, and that any public authority is not the addressee of this right. It has been

also stated by the Court that it is under the legislator's discretionary power to determine the manner in which the public authorities' rights, powers, duties and responsibilities would be regulated and that therefore, keeping the period granted for the ÖSYM and the Ministry of National Education in cases opened against the central and common exams for making their defence shorter than those granted in respect of other administrative cases does not constitute any contradiction to the principle of equality.

For the above-mentioned reasons, the Court has held that the contested provision is not in breach of Articles 2 and 10 of the Constitution and therefore decided to reject the request for annulment thereof.

In the other provision in respect of which an objection was raised, it is set out that after the defence submissions are presented or the period for presenting such submissions is expired in cases opened in respect of the central and common exams held by the Ministry of National Education and the ÖSYM, the acts and actions pertaining to such exams and exam results, the case-file shall be deemed to have been completed, and the reply and second reply (duplicatio) stages in such cases have been abolished.

In the application lodged with the Court, it has been maintained that abolishment of the right to submit reply and the second reply petitions in cases opened in respect of the central and common exams is in breach of Articles 2, 10, 13 and 36 of the Constitution for the same grounds with the first contested provision.

Noting that all articles of the Constitution have the same effect and value; that there is no order of superiority among these articles and it is not therefore possible to give priority to any of them in practice; and that any of two Constitutional articles which are sometimes compulsorily applied together may set the boundaries of the other one, the Constitutional Court has underlined that Article 142 of the Constitution which provides that the formation, duties and powers, functioning and trial procedures of the courts shall be regulated by law and Article 141 of the Constitution which provides the proceedings must be concluded as quickly as possible should be taken into account in determination of the scope of the right to legal remedies although any reason for imposing restriction in respect of the right to legal remedies is not provided in Article 36 of the Constitution.

The Court has observed that the stages of submitting the reply petition and the second reply petition have been abolished in cases opened in respect of the central and common exams with a view to immediately concluding the proceedings and that accordingly, the parties of such cases may submit their allegations, defence submissions and evidence by only one petition so that the case-file may be completed immediately and a decision as to the merits of the case may be given. In this respect, the Court has noted that it is under the legislator's discretionary power to grant the parties the right to submit their allegations and defences in one peti-

The Court, which emphasizes that the legislator may subject the administrative acts to different trial procedures according to their significance and nature as per Article 142 of the Constitution, has considered in this framework that it is possible to provide a special trial procedure for acceleration of the proceedings in the cases opened in respect of the central and common exams in order to prevent unjust suffering likely to occur on account of the prolongation of the proceedings. In such cases, not providing the right to submit a second petition for the complainant is under the discretionary power of the legislator, and this provision is not, in any respect, in breach of the principle of equality.

tion by means of abolishing the stages of submitting the reply (*"cevaba cevap"*) and the second reply with a view to accelerating the proceedings in the cases opened in respect of the central and common exams.

The Court is of the opinion that this contested provision has revoked the complainant's right to submit the second petition, however, as per the principle of *ex officio* examination applied in the administrative trial procedure, the courts are entitled to request all kinds of information and documents which would have influence on the settlement of the dispute from the parties or the third parties. In this regard, not providing the right to submit the second petition in the cases opened in respect of the central and common exams held by the Ministry of National Education and the ÖSYM with a view to accelerating the proceedings by pursuing public interest is not considered to preclude or to a large extent, hamper the complainant's right to legal remedies.

On the other hand, the Court, which emphasizes that the legislator may subject the administrative acts to different trial procedures according to their significance and nature as per Article 142 of the Constitution, has considered in this framework that it is possible to provide a special trial procedure for acceleration of the proceedings in the cases opened in respect of the central and common exams in order to prevent unjust suffering likely to occur on account of the prolongation of the proceedings. In such cases, not providing the right to submit a second petition for the complainant is under the discretionary power of the legislator, and this provision is not, in any respect, in breach of the principle of equality.

Noting that the grounds requiring the rejection of the application made for the annulment of the provision which limits the period for presenting defence submissions to three days in cases opened in respect of the central and common exams are applicable, in exactly the same way, to the abolishment of the administrations' right to submit a second reply petition, the Court has accordingly held that the contested provision is not in breach of the Constitution.

5- Judgment on the construction and renovation of facilities and procurement of services through public-private sector collaboration (no. E.2013/50, K.2015/38)

Referring to its judgment dated 22/11/2007 and no. E.2004/114, K.2007/85, the Court has concluded that where Articles 47 and 128 of the Constitution are assessed together, it is not possible to qualify all health services as a public service which the state is obliged to carry out as per the general administration principles and therefore it cannot be held that whole health services are required to be carried out by only civil servants and other public officers. The Court has therefore held that enabling the private law persons to construct facilities needed by the Ministry of Health and its affiliated institutions, to restore the existing ones and to render consultancy, research & development services and certain services which require advanced technology or high financial resource is not, in any respect, in breach of the Constitution.

As per some of the provisions which are subject-matter of the annulment action, the facilities, which are needed by the Ministry of Health and its affiliated institutions, may be established on the immovable properties in the private ownership of the Treasury by means of establishing an independent and continuous right of construction on condition of not exceeding thirty years except for the fixed investment period specified in the contract; the current facilities may be restored and consultancy and research & development services thereof and certain services requiring advanced technology or high financial resource may be rendered through the model of public-private sector collaboration ("the PSC"). The PSC contract to be concluded in this scope shall be subject to the private law provisions.

In the additional petition, it has been maintained that the applicable provisions are contrary to Articles 2, 161, 162 and 163 of the Constitution for the following reasons: Through the PSC financing model prescribed in the Law, the state contracts an engagement for 30 years as the lessee and as the purchaser of treatment services, in return for an indefinite amount, within the framework of a contract to be signed by and between the parties for construction, restoration and renovation of all types of service and welfare buildings of the central and provincial organizations of the Ministry of Health and its affiliated institutions and for provision of equipments and devices used in the treatment services and for providing therapeutic health and auxiliary health services. A new model which binds the budget of the forthcoming 30 years has been adopted by abandoning the practice in which the health services are rendered by the public officials. No financial resource has been assigned for the burden to fall on the Treasury on account of this PSC model and the financial burden to be undertaken has not been calculated. Opinions of the Ministry of Finance and

the State Planning Organization or the Undersecretariat of the Treasury have not been received. This arrangement does not comply with the annualization of the budget, the unity and generality principles thereof and the principle of allocation of expenses, and blocking of the political preferences of the parliament for 30 years is inconsistent with the principle of democratic state. Furthermore, this arrangement does not serve for the public interest.

Rendering its judgment on the annulment action on 1/4/2015, the Constitutional Court has noted that as per Articles 47 and 128 of the Constitution, an arrangement may be made for enabling the administrations to carry out their services, other than their fundamental and continuous duties they are obliged to perform in pursuance of the general administration principles, through real and private-law legal persons on the basis of the private law contracts.

Referring to its judgment dated 22/11/2007 and no. E.2004/114, K.2007/85, the Court has concluded that where Articles 47 and 128 of the Constitution are assessed together, it is not possible to qualify all health services as a public service which the state is obliged to carry out as per the general administration principles and therefore it cannot be held that whole health services are required to be carried out by only civil servants and other public officers. The Court has therefore held that enabling the private law persons to construct facilities needed by the Ministry of Health and its affiliated institutions, to restore the existing ones and to render consultancy, research & development services and certain services which require advanced technology or high financial resource is not, in any respect, in breach of the Constitution.

In the Constitutional Court's opinion, Article 47 of the Constitution sets out which of the public services may be caused to be performed or assigned to real or legal persons through private law contracts; however, any restriction as to the legal characteristics of such contracts is not made therein. Therefore, to determine under which procedure and through what kind of private law contracts public services would be caused to be performed by private persons is under the legislator's discretion. However, in executing this discretionary power, the legislator must pay regard to the constitutional guarantees. The criterion that must be taken into account in this respect is attainment of public interest in an easier and more efficient manner. As a matter of fact, the question of under which procedure performance of public services would ensure public interest in an easier and more efficient manner is a matter of appropriateness and falls outside the scope of the constitutional review. In this respect, having the above-mentioned parts of the health services performed by the real and private-law legal persons within the framework of the PSC model is not, in any respect, in breach of the Constitution.

The Court has also noted that as there is no provision in the Constitution concerning the period of contracts to be signed for having the public services performed, determination of the period of a PSC contract as maximum thirty years in the

contested provisions falls under the discretionary power of the legislator.

Emphasizing that it is compulsory to carry out legislative acts with a view to ensuring not personal interests but the public interest in pursuance of the principle of the state of law enshrined in Article 2 of the Constitution, the Court has noted that the review it would make concerning the "public interest" in dealing with whether a provision constitutes any contradiction to the Constitution or not is limited to the determination as to whether the law has been enacted for public interest or not, and the review as to which extent the public interest could be ensured by this law would not fall into the scope of the constitutional review.

Pointing out that it is comprehended from the general intent of the Law that the PSC model has been adopted for provision of the health services by paying regard to the advantages it provides such as extending the expenses required for investments to long terms and rendering service in short terms, the Court has observed that it is for the public interest, and that the provision which enables the establishment of the right of construction on immovable properties under private ownership of the Treasury in favour of the contractor within the scope of the PSC model have been found to serve for public interest and therefore to comply with the Constitution.

For the above-mentioned reasons, the Court has held that the provision in dispute is not in breach of the Constitution.

In other provisions which have also formed a basis for the annulment action, the private sector is enabled to render *"services requiring advanced technology or high financial resources"* as well as establishing facilities needed by the Ministry of Health and its affiliated institutions, restoring the existing facilities and providing the consultancy and research & development services thereof within the scope of the PSC model.

It has been maintained in the petition submitted to the Court that nature, scope and boundaries of the services accepted to be performed by means of being assigned to companies by tenders or by means of procuring services are not specified in the law; that these matters are left to the discretion of the administration; that the legislator's granting authorization to the executive power without defining the fundamental principles and setting the framework would mean transfer of the legislative power; that one of the elements of the state of law is to ensure the legal certainty, and the principles of certainty and predictability must be complied with in ensuring the legal certainty; that as the provisions subject-matter of the annulment action are not compatible with the principle of the state of law for not being certain, general, intangible and predictable in nature, they are contrary to Articles 2, 7, 17 and 56 of the Constitution.

The Court has primarily noted that fundamental principles and framework provisions as to ensuring the construction of facilities needed by the Ministry of Health and its

affiliated institutions and renovation of the existing ones within the framework of the PSC model are set out in the Law dated 21/2/2013 and no. 6428 in which the provisions subject-matter of the annulment action are included.

According to the Court, which has observed that these contested provisions enable *"certain services requiring advanced technology or high financial resources"* to be performed by the private sector within the framework of the PSC model, the nature of the PSC model and characteristics of the services likely to be performed by the private sector through this model must be taken into account while determining the scope of certain services requiring advanced technology or high financial resources. In the PSC model introduced in the Law, the auxiliary services, other than the medical services, such as construction, maintenance and running of the hospital building are left to the responsibility of the private sector while the medical services, which in fact constitute the public service, are continued to be performed by the administration. It is obvious that certain services requiring advanced technology or high financial resources must be considered to fall into the scope of the other services except for the medical services which form the essence of the health services and are required to be performed by the Ministry of Health. As the determination as to which services fall into the scope of those requiring advanced technology or high financial resources is an administrative and technical matter, this determination is not necessarily made by law. Therefore, the relevant provision includes no element which is contrary to the principle of inalienability of the legislative power and which leads to any uncertainty.

For the above-mentioned reasons, the Court has held that the provisions in dispute are not unconstitutional.

As it is provided in the definition of cost in Article 2 § 2 (c) of the above-cited Law *"... in return for provision of certain services in the facility..."* and it is mentioned in Article 2 § 2 of the same Law concerning the services which may be caused to be performed by the Ministry of Health and its affiliated institutions *"...provision of certain services in the facilities..."*, it has been enabled that performance of certain services in the facilities owned by the Ministry of Health and its affiliated institutions may be subject-matter of the PSC contract and that an amount shall be paid to the contractor in return for such services.

It has been maintained in the petition submitted to the Court that *"certain services"* set out in the provisions in dispute are uncertain and that leaving such issues to the administration's discretion without defining the scope, nature, framework and boundaries thereof is not compatible with the principle of the state of law. It has been further alleged that the legislator's granting authorization to the executive power without setting the framework would mean assignment of the executive power and that this legal arrangement has enabled the health services and other services related thereto within the public health facilities to be assigned to contractors. It has

been therefore alleged that these provisions are in breach of Articles 2, 7, 17 and 56 of the Constitution.

Noting that in defining the scope of *"certain services"* specified in the provisions in dispute, the nature of the PSC model and the characteristics of the services likely to be caused to be performed by the private sector through this model must be taken into account, the Court has considered that in the PSC model introduced in the Law, the auxiliary services, other than the medical services, such as construction, maintenance and running of the hospital building are left to the responsibility of the private sector while the medical services, which in fact constitute the public service, are continued to be performed by the administration. It is obvious that "certain services" set out in the provisions in dispute must be considered to fall into the scope of the other services except for the medical services which form the essence of the health services and are required to be performed by the Ministry of Health. As the determination as to which services fall into this scope is an administrative and technical matter, this determination is not necessarily made by law. Therefore, the relevant provision includes no element which is contrary to the principle of inalienability of the legislative power and which leads to any uncertainty.

For the above-mentioned reasons, the Court has held that the provisions in dispute are not unconstitutional.

The contested first sentence of Article 4 § 4 of the Law sets out that the administration shall inspect or cause to inspect the contractor's activities falling into the scope of the contract at all stages.

In the Constitutional Court's opinion, although the provision in dispute allows for performance of the inspection activities, which only consist of the duty of determining material and legal facts and are of a preparatory action, by means of procuring services from the private persons, it does not specify the sanctions to be imposed and results thereof where it is determined that the persons who would inspect the contractor's activities under the contract have not properly fulfilled their qualifications and obligations or there has been an infraction of rules. The Court has noted that non-definition of the qualifications of the persons to perform the inspection, the sanctions to be imposed when these persons do not properly fulfil their obligations or infract the rules and the results thereof in a manner which would cast no doubt would lead to uncertainty. The Constitutional Court has therefore considered that the phrase "... or have them inspected..." included in the contested provision constitutes a contradiction to the principle of the state of law.

It has been maintained in the petition that the framework of the power entrusted to the administration for inspecting and causing to inspect the contractor's activities under the contract is not set and the fundamental principles thereof are not defined. It has been also alleged that non-determination of the fundamental principles concerning the principles and procedures of the inspection to be performed or caused to be performed leads to uncertainty in the relevant provision; and that this unconstitutional arrangement would not comply with the principles of the state of law, superiority and binding force of the Constitution. It has been therefore alleged that this provision is in breach of Articles 2 and 11 of the Constitution.

Indicating that the provision in dispute enables the administration to have the contractor's activities under the contract inspected by private persons at all stages and also sets out that a decision on the sanctions and actions which are considered to be necessary as a result of the inspection reports to be drawn up in this respect shall be given by the administration, the Court has concluded that as the authority to impose judicial and administrative measures prescribed in the Law as a result of such inspections still belongs to the administration, having the inspection duty, which is understood to consist of providing technical assistance and to be a preparatory action, performed by the third parties who are not civil servants and other public officers is not contrary to the Constitution in any respect.

In the Constitutional Court's opinion, although the provision in dispute allows for performance of the inspection activities, which only consist of the duty of determining material and legal facts and are of a preparatory action, by means of procuring services from the private persons, it does not specify the sanctions to be imposed and results thereof where it is determined that the persons who would inspect the contractor's activities under the contract have not properly fulfilled their qualifications and obligations or there has been an infraction of rules. The Court has noted that non-definition of the qualifications of the persons to perform the inspection, the sanctions to be imposed when these persons do not properly fulfil their obligations or infract the rules and the results thereof in a manner which would cast no doubt would lead to uncertainty. The Constitutional Court has therefore considered that the phrase *"... or have them inspected..."* included in the contested provision constitutes a contradiction to the principle of the state of law.

For the above-mentioned reasons, the Court has decided to annul the phrase *"... or have them inspected..."* in the contested provision as being in breach of Article 2 of the Constitution. The Court has held that remaining part of the provision is not unconstitutional.

6- Judgment on the offence of obscenity (no. E.2014/118, K.2015/35)

> **On the other hand, even if it may be considered that the concept of *"in anyother unnatural manner"* may vary from person to person or from society to society, it has been understood when the law text is assessed as a whole and legal interest desired to be protected is taken into account that such acts amount to sexual acts which cannot be accepted in any democratic society as a natural manner, which have adverse impacts on the moral standards of the democratic society and which is in itself accepted to be an offence such as those which are performed with use of force, with animals or a human corpse. It is beyond any doubt that the concept of *"unnatural manner"* shall be ascertained and gain meaning and scope in doctrine, practice and judicial decisions. Therefore, the provision in dispute is not in breach of the principles of "certainty" and "legality" in any aspect.**

In Article 226 § 4 of the Turkish Criminal Code no. 5237 which includes the contested provision, it is set out that any person who produces, conveys into the country, offers for sale, sells, transports, stores or offers for the use of others written or audio-visual materials of sexual acts performed with the use of force, with animals, a human corpse, or "*in anyother unnatural manner*" shall be sentenced to a penalty of imprisonment for a term of one to four years and a judicial fine of up to five thousand days. According to the contested provision, the same sentence shall be imposed on those who store written or audio-visual materials of sexual acts performed "*in anyother unnatural manner*".

In the application lodged with the Court, it has been maintained that the phrase of "*in anyother unnatural manner*" is open to comment, and as each judge may interpret this phrase differently and attribute different meanings to this phrase, it is not obvious. It has been also claimed that although sexual acts of two persons of opposite sex "*in anyother unnatural manner*" with their consent does not constitute an offence, disclosure of visual materials of such sexual acts constitute an offence, which leads to discrepancy. It has been therefore alleged that this provision is in breach of Articles 12,17, 20 and 42 of the Constitution.

Rendering its judgment on this application on 1/4/2015, the Constitutional Court has primarily indicated that the legal interest desired to be protected in the provisions concerning obscenity in both the comparative law and our national law is "public morality" which means right, reasonable and fair sense of moral and decency adopted by all society in a certain period of time. The Court has also noted that in determination of the acts against public morality, which is an abstract and variable concept, not the value judgment of the certain part of the society but the codes of conduct concerning the democratic social order must be relied on.

According to the Court, which has established that, within the scope of offence of obscenity, those who store written and audio-visual materials of sexual acts performed "*in anyother unnatural manner*" are subject to certain sanctions in pursuance of the contested provision, sexual acts to be performed "*in anyother unnatural manner*", which would breach the legal interest desired to be protected in the relevant provision, may occur in many different ways. Therefore, it is not possible for the legislator to foresee and list all acts falling into this scope. On the other hand, even if it may be considered that the concept of "*in anyother unnatural manner*" may vary from person to person or from society to society, it has been understood when the law text is assessed as a whole and legal interest desired to be protected is taken into account that such acts amount to sexual acts which cannot be accepted in any democratic society as a natural manner, which have adverse impacts on the moral standards of the democratic society and which is in itself accepted to be an offence such as those which are performed with use of force, with animals or a human corpse. It is beyond any doubt that the concept of *"unnatural manner"* shall be ascertained and gain meaning and scope in doctrine, practice and judicial decisions. Therefore, the provision in dispute is not in breach of the principles of *"certainty"* and *"legality*" in any aspect.

Moreover, indicating that the privacy and protection of private life is guaranteed under Article 20 of the Constitution, the Court has noted that Article 20 § 1 therein provides that everyone has the right to demand respect for his/her private and family life and privacy of private or family life shall not be violated; however, the conditions for imposing restriction on the right to privacy of private life are set out in Article 20 § 2 therein. The Court has therefore stated that this right is not absolute and unlimited in nature and may be restricted by law under certain terms and conditions as per Articles 13 and 20 of the Constitution on condition of not being contrary to the requirements of a democratic society and the principle of proportionality.

In this respect, the Court has referred to certain judgments rendered by the European Court of Human Rights ("the ECtHR") on this subject and underlined that the ECtHR does not also consider the criminal sanctions, which are provided in domestic law for preventing minors from having access to the obscene materials and the criminal sanctions for preventing adults from disseminating or making available such materials to others, other than personal use, without taking any special measures, as a breach of the European Convention on Human Rights.

According to the Court, when the principles of restrictions as to the concept of public morality are taken into account, it has been revealed that the optional act of *"store / storing"* specified in the provision means collecting the same type of any material in large numbers or creating an archive thereof not for personal use but with a view to disseminating or delivering these materials to others. Accordingly, the aim of imposing a criminal sanction on the act of storage of materials including sexual acts which are performed *"in an unnatural manner"* with a view to disseminating or delivering such materials to others is to protect public morality and therefore to

pursue public interest. As the interference is proportionate to the aim pursued and does not constitute any contradiction to the democratic social order, the provision in dispute cannot be declared unconstitutional.

For the above-mentioned reasons, the Court has held that the provision in dispute is not contrary to the Constitution.

7- Judgment on the expropriation of intellectual and artistic works by issuing a decree of the Council of Ministers (no. E.2014/177, K.2015/49)

The Constitutional Court has noted that dissemination and publication of intellectual and artistic works, which are the products of mental effort, must be assessed under the scope of the freedom of expression. The Court has concluded that expropriation of intellectual and artistic works after their authors' death restricts the heirs' right to determine the form and means of distribution and supply to public of the relevant work. The Court has therefore considered that the said provision constitutes interference in the freedom of expression and the freedom of science and arts.

The provision of law subject-matter of the constitutionality review is related to expropriation of rights on works, which are deemed significant for the culture of the country and performed in Turkey or by Turkish citizens outside of Turkey, after the death of the author and before the expiry of the term of protection by issuing a decree of the Council of Minister reserving the right holder's rights to demand an appropriate fee.

It has been maintained in the petition submitted to the Court that there is no public interest in expropriation of works, which are available in the market and cannot be claimed unavailable, through the payment of "an appropriate fee" to be determined unilaterally; and that such practice would restrict the property right of the author on the relevant intellectual or artistic work to an extent which infringes the essence of the right to property. It has been also alleged that monopolized supply of intellectual and artistic works, which can be accessed by the public without any obstacle, through methods and to the extent prescribed by the State constitutes a contradiction to the freedom of expression and dissemination of thoughts and the freedom to have access to these thoughts and opinions. Accordingly, the annulment of the relevant provision in dispute has been requested.

Rendering its judgment on this case on 14/5/2015, the Constitutional Court has established that expropriation of the economic and moral interests of authors' heirs in the intellectual and artistic works constitutes an interference to the right to property and emphasized that the right to property may be limited only in view of public interest in accordance with Article 35 of the Constitution.

The Court has concluded that expropriation of the authors' rights in the intellectual and artistic works aims to ensure the continued public supply of the works which are deemed important for the culture of the country and, therefore, it does not contradict with the public interest.

The Constitutional Court has underlined that the guarantees under Article 13 of the Constitution must be observed in restricting the right to property and has laid emphasis on the question whether the restriction imposed by the relevant provision is proportionate or not.

Indicating that the provision in dispute allows for expropriation, by issuing a decree of the council of ministers, of the rights on the works which are provided to the public without any problems, the Constitutional Court has noted that the expropriation, by issuing a council of ministers' decree, of rights on the works which can be accessed by public under the ownership of author's heirs, which deprives the owner of his property, does not constitute a necessary means to achieve the aforementioned aim.

The Court has also noted that, although the provision in dispute limits the "authority to expropriate by issuing a decree" to works which are deemed important for the culture of the country, the subjective aspect of the criterion *"being important for the culture of the country"* outweighs and, thereby, it paves the way for misuse of the said rule. The Court has stated that the relevant provision, in its current version, does not serve for achieving the pursued aim.

Although the relevant provision tries to strike a fair balance between the public interest and individual's interest by reserving *"the right to claim the payment of an appropriate fee"* of those deprived of their right to property, the Constitutional Court has emphasized that vesting only the right to claim instead of paying the economic value of the rights expropriated directly to the right-holder does not comply with the guarantees of the right to property under Article 35 of the Constitution. Taking all these issues into consideration, the Court has concluded that the restriction imposed by the provision subject-matter of the constitutionality review on the right to intellectual property is not proportionate and decided that the relevant provision is in breach of Articles 13 and 35 of the Constitution.

On the other hand, the Constitutional Court, making review on the relevant provision in terms of the freedom of expression and the freedom of science and arts, has noted that the freedom of expression set out in Article 26 of the Constitution means that everyone may freely access to news, information and others' opinions, that no one shall be blamed or accused because of thoughts and opinions that he holds and that he may freely express, defend and disseminate such thoughts and information either individually or collectively. The Court has underlined that all means to disseminate information and thoughts are under constitutional guarantees.

The Constitutional Court has emphasized that the freedom of science and arts guaranteed under Article 27 of the Constitution means everyone may freely engage in activities to create, promote, disseminate and present all kinds of scientific and arts works without any interference by the State or another third-party.

The Constitutional Court has noted that dissemination and publication of intellectual and artistic works, which are the products of mental effort, must be assessed under the scope of the freedom of expression. The Court has concluded that expropriation of intellectual and artistic works after their authors' death restricts the heirs' right to determine the form and means of distribution and supply to public of the relevant work. The Court has therefore considered that the said provision constitutes interference in the freedom of expression and the freedom of science and arts.

The Constitutional Court has established that the freedom of expression and the freedom of science and arts are essentials of a democratic society based on pluralism, tolerance and open-minded society. The Court has noted that, in a democratic society, these freedoms may be interfered to only if there are compelling reasons.

Although intellectual property rights are considered under the scope of the right to property, these rights are closely related to the freedom of expression which is an essential element of a democratic society. The Court has noted that, while carrying out a review on whether the interference to these rights is "necessary in a democratic society", the assessment to be applied must be different from that of other subjects of the right to property which have mere economic value. Accordingly, the Court has emphasized the need to address the issue of whether the interference in intellectual property rights is "necessary in a democratic society" with a different perspective.

In this context, the Court has noted that the discretion to determine the form, means and extent of publication of an intellectual and arts work, which are the product of a mental effort, shall belong to his/her heirs in the first place after the death of its author and this is an inseparable aspect of the right to disseminate thoughts and opinions which is an essential element of freedom of expression. The Court has recalled that the interference in such rights of the author's heirs may be justified only if there are compelling reasons. The Court has noted that a compelling reason may be mentioned of only if there are serious problems on publication of and public access to the relevant work due to certain legal or practical reasons.

The Court has stated that the provision in dispute allows for expropriation of works which are published and can be accessed by public without any problems and, as such works can be accessed without any public support or contribution, expropriation of these works cannot be considered to arise from a pressing social need.

Consequently, the Constitutional Court has reached to a conclusion that vesting the Council of Ministers with a discretionary power which may lead to expropriation of all works, which are deemed important for the culture of the country, after the death of their authors constitutes an interference in the freedom of expression and the freedom of science and arts which is incompatible with the requirements of a democratic social order. The Court has therefore decided that the provision in dispute is contrary to Article 13, 26 and 27 of the Constitution.

8- Judgment on the procedure for collection of the amounts awarded against the Social Security Institution ("the SGK") (no. E.2015/28, K.2015/42)

The Constitutional Court has noted that the legislator has made such an arrangement in order to relieve the creditors of initiating execution proceedings and prevent the Institution from paying redundant compulsory execution expenses. The Constitutional Court has considered that this arrangement serves for public interest. The Court has also observed that the legislator has already set forth that the creditor or his representative shall make an application to the Institution with supporting invoices and documents for the payment and notify the relevant bank account number and that the payment shall be made within thirty days by means of depositing the relevant amount to the notified account number in order to relieve the creditor of the burden of the compulsory execution proceedings and prevent the Institution from paying redundant execution expenses. In this respect, the Court has noted that payment of the principal amount, counsel's fee and court expenses to be awarded against the Institution to the account number to be notified by the creditor does not cause any damage in respect of the creditor's interest. It has also added that the complainant's obligation to notify his account number to the Institution must be considered as a reasonable and proportionate burden vis-a-vis the fact that the administration could not know the complainant's account number to which the payment would be made and therefore cannot be held responsible for any delay in payment of the amounts.

The provisions which are subject-matter of the constitutionality review set out that the amounts payable, counsel's fees and court expenses awarded against the Social Security Institution ("the Institution") shall be paid upon the application to be made by the creditor or his representative together with the supporting invoices and documents thereof to the bank account number notified by the creditor or his representative within thirty days as from the application date. It is provided in this provision that before the expiry of this period of thirty-day, no one can have resource to compulsory execution, and thereby making an application to the Institution has been rendered a compulsory remedy which must be exhausted before having recourse to execution proceedings with judgment ("*ilamlı icra*"). It is also set out that in the event that any payment could not be made within the specified period, the relevant amounts shall be collected within the boundaries of the general provisions.

In the application lodged with the Court, it has been maintained that introducing the necessity of primarily applying to the administration for collecting the principal amounts,

counsel's fee and court expenses awarded against the Institution is in contradiction with the main objective of the compulsory execution law and that granting such privileges for the amounts to be paid by the Institution undermined the principles of equality and the state of law. It has been also alleged that the right to legal remedies includes the execution of the court's orders and that the provision in dispute, which subjects the execution of a court's order to certain conditions, breaches the right to legal remedies and the right to property. It has been also alleged that as this legal arrangement suspended the execution of court's orders for a certain period of time, it is not compatible with the principles of judicial independence and the state of law, and that the provision in dispute is contrary to Articles 2, 9, 10, 35, 36 and 138 of the Constitution.

Rendering its judgment on this application on 22/4/2015, the Constitutional Court has noted that the legislator has made such an arrangement in order to relieve the creditors of initiating execution proceedings and prevent the Institution from paying redundant compulsory execution expenses. The Constitutional Court has considered that this arrangement serves for public interest. The Court has also observed that the legislator has already set forth that the creditor or his representative shall make an application to the Institution with supporting invoices and documents for the payment and notify the relevant bank account number and that the payment shall be made within thirty days by means of depositing the relevant amount to the notified account number in order to relieve the creditor of the burden of the compulsory execution proceedings and prevent the Institution from paying redundant execution expenses. In this respect, the Court has noted that payment of the principal amount, counsel's fee and court expenses to be awarded against the Institution to the account number to be notified by the creditor does not cause any damage in respect of the creditor's interest. It has also added that the complainant's obligation to notify his account number to the Institution must be considered as a reasonable and proportionate burden *vis-a-vis* the fact that the administration could not know the complainant's account number to which the payment would be made and therefore cannot be held responsible for any delay in payment of the amounts.

According to the Court, even if the administration intends to make the payment with its consent, it is obvious that the creditor would not immediately receive the relevant amount and may receive the relevant amount only after certain transactions are completed by the administration. Moreover, it is beyond doubt that where the creditor has directly recourse to the compulsory execution procedure, actual payment of the relevant amount to the creditor may be made only after a certain period of time as certain compulsory actions such as making the request to initiate enforcement proceedings, the notification of the execution order and granting the Institution a period of seven days for payment are performed. When these considerations are taken into account, the period of thirty days determined by the contested provision for enabling the Institution to pay its debt is not so long to the extent it would impose an excessive burden on the creditor and must therefore be deemed as reasonable. In fact, as per Article 28 § 2 of the Code of the Administrative Trial Procedure no. 2577, the administration is granted with a period of maximum thirty days for enabling the payment of compensations awarded by the administrative judicial bodies against the institution, as in the provision in dispute. Moreover, this period of thirty days is not a right which may be enjoyed by the Institution to the full extent and indicates the maximum period in which the payment must be made.

Consequently, the Court has considered that this provision, which stipulates that the principle amount, the counsel's fee and the court expenses awarded against the Institution would be paid within thirty days as from the date of the written application made to the Institution and that the creditor may only initiate compulsory execution proceedings if the Institution does not make the necessary payment within thirty days as from the application date, does not cause any delay in the implementation of the court's order as the given period is reasonable and does not constitute a disproportionate interference in the creditor's right to property and the right to a fair trial.

For the above-mentioned reasons, the Court has held that the provision in dispute is not contrary to the Constitution.

9- Judgment on the offences for causing to perform or performing religious ceremony for marriage (no. E.2014/36, K.2015/51)

> **The Constitutional Court has pointed out that decriminalization of only performing or causing to perform a religious ceremony for marriage does not render this relationship valid in a legal system and that performing a religious ceremony for marriage does not ensure establishment of conjugal union and the enjoyment of rights arising from such union. The Court has therefore noted that although there is no need in respect of the democratic social order; in other words, it is not required for protection of the family order which is the objective of the restrictions imposed in accordance with the contested provisions, criminalization of performing or causing to perform a religious ceremony for marriage, which falls into the scope of the right to respect for individuals' private and family lives and the freedom of religion and conscience, and subjecting these acts to penal sanctions by virtue of legal arrangements amount to a disproportional interference with the above-mentioned rights.**

The contested provision of law prescribes that those who marry by arranging a religious ceremony without pursuing official marriage procedures and those who conduct a religious marriage ceremony without seeing the official certificate of marriage are sentenced to imprisonment for a term of between two months and six months, and that both the criminal case initiated against them shall be discontinued and the sentence imposed thereof shall become null and void with all its consequences when the civil marriage ceremony is performed.

It has been alleged in the application lodged with the Court that the contested provisions of law criminalize the acts of performing or causing to perform religious ceremony for marriage without pursuing the official marriage procedure; however, getting married by performing or causing to perform a religious ceremony for

marriage is a matter falling in the scope of the private life and freedom of religion and conscience. It has been further maintained that criminalization of marriage by performing or causing to perform a religious ceremony in a legal system under which living together without an official marriage contract does not constitute an offence is in breach of the right to respect to private life and family life, the freedom of religion and conscience, the principle of equality before law and the right to protect and improve the individual's material and spiritual entity.

Rendering its judgment on 27/5/2015 in this respect, the Constitutional Court has emphasized that "the right to demand respect for private and family life" aims, on one hand, to protect the privacy of private and family life and to prevent it from being revealed to other; that is to say, the right to allow for all issues concerning his private life to be known to only himself or those to whom he wishes to reveal and disclose. On the other hand, it aims to prevent public authorities from interfering in individual's private life; i.e. it guarantees the individual's right to control and live his personal and family life according to his own sense and understanding. In this context, the Constitutional Court has noted the provision under Article 20 of the Constitution protects the individual's private and family life against the State, society and other persons save for the exceptional circumstances set out in the Constitution.

Having regard to the freedom of religion and conscience guaranteed under Article 24 of the Constitution, the Court has noted that this freedom as a fundamental right which is *"one of the foundations of a democratic society"* and *"ensures individuals to form their identities and their way of life"*, in principle, establishes an exclusive area for individuals in which neither the state nor other individual may interfere, as in respect of the right to respect for private life and family life.

On the other hand, noting that these rights guaranteed under Article 20 and 24 of the Constitution are not absolute, the Constitutional Court has stated that these rights may be subject to certain restrictions; however, these restrictions cannot infringe upon the very essence of these rights and be contrary to the requirements of a democratic social order and the principle of proportionality.

The Constitutional Court has noted that, under the principle of proportionality, with a view to interfering in the right to respect for private life and family life and the freedom of religion and conscience, there must be a pressing need in respect of the democratic social order and that there must not be any other means, other than the contested restriction in the present case, available to protect the rights of spouses arising from the establishment of conjugal community. The Court has however noted that the legal system allows for legal arrangements for the protection of individuals' rights arising from the establishment of conjugal community. Accordingly, the Court has also indicated that the relevant provisions of the Turkish Civil Code require the spouses to have their official marriage procedures completed in order to claim their rights arising from marriage; otherwise, they would be deprived of certain rights arising from conjugal community. That is to

say, the Court has noted that there are certain civil sanctions for those who do not pursue official marriage procedure and these sanctions are capable of ensuring individuals to get officially married. The Court has accordingly considered that there is no need to impose penal sanctions on individuals for their acts of getting married by performing or causing to perform a religious ceremony in pursuance of their religious beliefs.

The Constitutional Court has pointed out that decriminalization of only performing or causing to perform a religious ceremony for marriage does not render this relationship valid in a legal system and that performing a religious ceremony for marriage does not ensure establishment of conjugal union and the enjoyment of rights arising from such union. The Court has therefore noted that although there is no need in respect of the democratic social order; in other words, it is not required for protection of the family order which is the objective of the restrictions imposed in accordance with the contested provisions, criminalization of performing or causing to perform a religious ceremony for marriage, which falls into the scope of the right to respect for individuals' private and family lives and the freedom of religion and conscience, and subjecting these acts to penal sanctions by virtue of legal arrangements amount to a disproportional interference with the above-mentioned rights.

In the Court's opinion, in accordance with the principle of proportionality, it is not possible to choose a severe means of restriction where there is a lighter means which may realize the aim pursued by imposition of such restriction. In other words, while it is possible to *"protect the family order"* which is the aim of the restriction by means of making an interference in the individual's right to respect for private life and the freedom of religion and conscience through a lighter means of restriction within the scope of the provisions in dispute, having recourse to a more severe means of restriction does not comply with the principle of proportionality. The legal system currently has precautions for protection of the family order, which is also intended to be protected by the provisions in dispute, by means of not legally recognizing any type of unofficial marriages; in other words, by use of *"a civil means of sanction"*. Therefore, although such a precaution is prescribed by the current legal system, having recourse to *"means of offence and punishment"* which prescribes more severe sanction than the *"civil sanction"* is another aspect which indicates the non-proportionality of the restriction envisaged by the contested provisions.

In fact, this non-proportionality is clearly revealed when the fact that performing a religious ceremony for marriage on the basis the individuals' personal preferences and religious beliefs is criminalized although living together and even having children without holding any religious ceremony or any official marriage contract is not accepted as an offence and subject to any punishment within the context of the right to respect for private life is taken into account.

Consequently, the Court has indicated that although there is no need in respect of the democratic social order; that is to say, it is not required for the protection

of the family order, which is the aim pursued by the restriction prescribed in the contested provision, criminalization of performing or causing to perform a religious ceremony for marriage, an act falling into the scope of the right to respect for individuals' private and family lives and the freedom of religion and conscience, and subjecting these acts to penal sanctions by virtue of the contested provisions amount to a disproportional interference with the above-mentioned rights and therefore are contrary to the principle of proportionality. The Court has therefore decided to annul the provisions in dispute.

10- Judgment on the exclusion of private training centres from the scope of "Private Teaching Institutions" (no. E.2014/88, K.2015/68)

> **Within this scope, it is understood that the persons concerned are not granted with an option and they are only provided with an opportunity for access to information which is restricted with only the courses offered at schools. Thereby exclusion of private training centres from education system without providing alternative out-of-school opportunities to meet the need of preparation for attendance exams for an upper school and higher education is a disproportionate restriction imposed on the right to education and learning.**

In the contested provisions concerning the removal of the term "private training centres" (*"dershane"*) in Article 2 § 1 (b) of the Law on the Private Teaching Institution no. 5580 and the annulment of the paragraph (f) of the said article and concerning the Provisional Article 5 § 1, it is prescribed that private training centres shall be excluded from the scope of "private teaching institutions" included in the Law on the Private Teaching Institutions and that the existing private training centres shall continue performing their activities until 1/9/2015.

In the petition submitted to the Court, it has been briefly alleged that the contested provisions have not been introduced due to an pressing social need and that abolishment of the private tutoring centres which encompass the right to education and learning, the freedom of enterprise, the right to labour is disproportionate and infringes upon the very essence of these rights. It has been also maintained that the right to private enterprise is totally inhibited through the prohibition of private training whereas the State is obliged to strike a fair balance between the public interest expected from the restriction and individual rights and freedoms. It has been therefore alleged that these provisions are contrary to Articles 2, 5, 13, 17, 35, 42, 48 and 49 of the Constitution.

Rendering its judgment on 13/7/2015, the Constitutional Court examined the provisions in dispute under Article 42 of the Constitution entitled "right and duty of education and learning", Article 48 entitled "Freedom of labour and contract" and Article 13 entitled "restriction of fundamental rights and freedoms".

The Constitutional Court has considered in its assessment with regard to the right to education and learning that in democratic countries, the legislator has broad discretion over the determination of education policies and opting for institutional alternatives in terms of the materialization of these policies. The position of institutions offering preparatory education for exams in education policy as well as the law to which these institutions shall be subject and the power to determine its limits also fall into this scope.

Whereas the power to determine fundamental policies and means of their materialization is vested with the legislator, the legislator's power in respect thereof is limited by the Constitution, and the regulations to be introduced should not violate the Constitutional principles and fundamental rights and freedoms. The idea of protecting, despite the will of majority, the fundamental rights held by everyone inherently and due to being human, and even of not being able to raise these rights and freedoms as issues for voting underlies the basis of constitutional democracy. In this sense, fundamental rights and freedoms form the constitutional boundaries of democratic political powers. The duty and power of supervising whether these boundaries are abided by law is undoubtedly vested with the Constitutional Court.

Democratic society requires an order in which the individual can live freely, realise himself, freely make the decisions concerning himself and retain his individual autonomy in the face of all kinds of pressure. Perhaps the most significant indicator of freedom is the existence of the right to preference. There can be no mention of freedom in a place where the possibilities for persons to make a preference among different options are removed. In democracies, the duty incumbent upon the State is to enable the individual to have the opportunity to make a preference in a pluralist environment; notably, to refrain from attitudes targeting the elimination of this opportunity and to prevent negative interferences by others in this regard. While the right to preference can be restricted for legitimate purposes, this restriction should not be carried out in a way which shall eliminate this right of persons or render its exercise impossible.

Private training centres function with a view to preparing students for an upper school or exams held for attendance in higher education, improving them in the courses of their preference and raising their level of knowledge, and serve the purpose of remedying students' deficiencies or increasing their knowledge in the subjects included in school curricula. In other words, private tutoring centres satisfy a need towards obtainment of knowledge concerning subjects of school curricula. Utilization of persons of education services provided by private

enterprises in accordance with the law on the purpose of preparation for an upper school or attendance in higher education and thus receiving out-of-school education are within the scope of the right to education enshrined in Article 42 of the Constitution.

The right to education and learning in Article 42 of the Constitution is capable of enabling the person to retain and improve his material and spiritual entity, along with other rights. The duty of the State, which is responsible for the supervision and inspection of education in accordance with the same article, is to enable everyone to enjoy the right to education and learning in the best possible way. Regulation of sphere of activity of private enterprise offering service in the field of education is a requisite of the State's obligation to enable the proper and efficient functioning of education and learning.

It is obvious that the right to education as well as other fundamental rights imposes certain responsibilities on the State. The State should take the necessary measures in order to enable everyone to enjoy the right to education and learning. While the State is under no absolute obligation to establish institutions where out-of-school education can be received, it should refrain from arrangements giving rise to the total elimination of services offered by private sector in this field within the framework of legislation, unless there is an obligation. In other words; no arrangement which shall abolish education and learning rights of persons and eliminate the freedom of enterprise, render their exercise impossible or restrict them disproportionately, can be introduced.

As a matter of fact, out-of-school education provides an environment where individuals are able to act freely and where they can improve their material and spiritual entity in accordance with their preferences. The State should not interfere in this field, unless it is obligatory with regard to the democratic order of society. However, it is evident that the legislator has discretionary power in making arrangements in the field of out-of-school education, as Article 42 of the Constitution stipulates that education shall be conducted under the supervision and inspection of the State. This power of the State enables the legislator to introduce arrangements in matters such as the name, structure, sphere of activity of the mentioned institutions and the rules they are to obey.

When the arrangement introduced by the provision in dispute is examined, it is understood that no alternative solutions to satisfy the need of receiving out-of-school education are considered while the activities of private training centres are terminated through their exclusion from the scope of "*private teaching institutions*". As the stipulation of "not having the characteristics of preparation for attendance exams for secondary or higher education" is cited in the law while defining "various courses" classified as "private teaching institutions" and as it is noted in the definition of study centres that these institutions are to be established to conduct activities for students "*at and below the age of twelve*", it is obvious that it is

not possible to receive preparatory education for attendance exams for an upper school and higher education in the mentioned institutions. Within this scope, it is understood that the persons concerned are not granted with an option and they are only provided with an opportunity for access to information which is restricted with only the courses offered at schools. Thereby exclusion of private training centres from education system without providing alternative out-of-school opportunities to meet the need of preparation for attendance exams for an upper school and higher education is a disproportionate restriction imposed on the right to education and learning.

Seeking closure of private teaching centres, which is the need which has been formed by the system of education and exams and which have been granted with a legal status by the State, through a complete ban of these institutions by means of the rules in dispute, instead of taking measures to prevent the drawbacks they bring about, eliminates the possibility for persons to receive an educational support from out-of-school private institutions within the scope of preparation for exams. Accordingly, it violates the right to education and learning.

According to the Constitutional Court, making an assessment within the scope of the freedom of enterprise, this freedom guaranteed under Article 48 of the Constitution safeguards the right to economic enterprise of every real and legal person freely in the field of his choice. As expressed in the legislative intent of the Article, this freedom *"has been regulated as an economic and social right with a view to providing the individual personally with his economic peace and prosperity."* Again as provided therein, "Article 48 has both provided a guarantee for free enterprise, and has indicated in its second paragraph the restrictions that might be introduced." Accordingly, the State can impose restrictions on the freedom of private enterprise in cases of public interest and as required by the national economy, and for social purposes.

When it is considered that private training centres are enterprises which operate in the field of education, it is obvious that State supervision and inspection over them should be stricter. In this regard, it is possible for the administration to impose sanctions on the enterprises acting contrary to the laws and to cancel their work permits when the legal conditions require to do so. However, complete ban/shutdown of a private enterprise continuing its operation within the statutory framework for the reasons not stemming from free market conditions depending on supply and demand, hence, on the free will of the individual, without a pressing social need in respect of the democratic social order, leaves the freedom of private enterprise unprotected.

Private training centres operating in the field of out-of-school education with the status of private enterprise are closed by the provisions in dispute. Although training centres are provided with the opportunities to transform into private schools within this period, the activities of the enterprises which are not accepted

As provided in the explanations made within the scope of Article 42 of the Constitution, while making arrangements on private training centres by the legislator, different solutions should be offered in order to meet the needs of the individuals to receive out-of-school education in accordance with their choices. Without introducing an arrangement of the specified nature and putting forward a compelling reason in respect of the order of a democratic society and without resorting to less restrictive means which shall accomplish the purpose of restriction as well, closure of private training centres with a completely prohibitive method is a restriction on the freedom of enterprise, which is disproportionate and not necessary in the order of a democratic society.

in the program of transformation or which do not accept the transformation process are terminated. As provided in the explanations made within the scope of Article 42 of the Constitution, while making arrangements on private training centres by the legislator, different solutions should be offered in order to meet the needs of the individuals to receive out-of-school education in accordance with their choices. Without introducing an arrangement of the specified nature and putting forward a compelling reason in respect of the order of a democratic society and without resorting to less restrictive means which shall accomplish the purpose of restriction as well, closure of private training centres with a completely prohibitive method is a restriction on the freedom of enterprise, which is disproportionate and not necessary in the order of a democratic society.

Consequently, the Court has found that the provisions, which exclude private training centres from "private educational institutions" and allow the current training centres and study centres that does not transform to continue their activities until 1/9/2015, are contrary to Articles 13, 42 and 48 of the Constitution and has decided to annul these provisions.

The Constitutional Court has not found Article 37 § 8 of the Decree Law no. 652, which is in dispute and provides that Directors of Schools and Institutions shall be appointed by the Governor for a term of four years upon the proposal of the Provincial Director of National Education while Chief Deputy Directors and Deputy Directors shall be appointed by the Governor for a term of four years upon the letter of appointment by Directors of Schools or Institutions and upon the proposal of the Provincial Director of National Education and which stipulates that the other procedures and principles on termination of their appointments before expiration of term of office, re-appointment of the ones whose terms of office have ended and on implementation of this paragraph shall be regulated by a regulation, in breach of the Constitution and has held that the request for annulment of the mentioned provisions be rejected.

Furthermore, the Constitutional Court has not found the provisional Article 10 § 8 added to the Decree Law no. 652, which sets out that out of Directors, Chief Deputy Directors and Deputy Directors who have been taking office as from the date when the provisional Article 10 of the Decree Law no. 652 entered into force, employment of those whose terms of office are four years and more shall be discontinued without any other necessary procedure as of the end of 2013-2014 academic year and that employment of those whose terms of office are less than four years shall be discontinued as of the end of the first academic year following expiration of this period of four years without any necessity for another procedure, in breach of the Constitutional and has therefore held that the request for annulment of the mentioned provisions be rejected.

On the other hand, the provisional Article 10 § 3 added to the Decree Law no. 652, which provides that the office of those in the positions of Member of Turkish Education Board, Deputy Undersecretary, General Director, Head of Group of Construction and Estate and Head of Group within the central organisation of the Ministry of National Education and that of those in the positions of Provincial Director, Provincial Deputy Director of National Education and District Director of National Education within the provincial organisation of the Ministry shall be terminated, without any necessity for another procedure, upon the promulgation of this article and that those who are Member of Turkish Education Board, Deputy Undersecretary and General Director shall be assumed to have been appointed to the positions of Ministry Advisor formed in the annexed list no. (3), persons who are Head of Group and Provincial Director shall be assumed to have been appointed to the positions of Head of Group and Provincial Director formed in the annexed list no. (3), the others and those in the personal positions of Branch Chief on the basis of provisional article 3 shall be assumed to have been appointed to the positions of Education Expert formed in the annexed list no. (3), without any necessity for another procedure, retaining their grades of current positions and which envisages that the positions formed in the annexed list no. (3) shall be assumed to have been cancelled without any necessity for another procedure when they become vacant for any reason, is found by the Constitutional Court to be in breach of Article 2 of the Constitution and has been accordingly annulled, except with regard to the phrase "Head of Group."

The Constitutional Court has not also declared the provisions concerning the appointment of National Education Supervisors and National Education Deputy Supervisors in charge at the Ministry of National Education to the positions of Education Inspectors and Education Deputy Inspectors by means of the new arrangement and removal of the titles "National Education Supervisor" and "National Education Deputy Supervisor" from legislation unconstitutional and has held that the request for annulment of these provisions be rejected.

11- Judgment on the influence of criminal convictions on the political rights (no. E.2014/140, K.2015/85)

When the provision in dispute is examined, it is observed that it prescribes, regardless of whether they are held in the penitentiary institutions or not, those who are sentenced to imprisonment due to an intentional offence shall be deprived of their right to elect. The restriction imposed by this provision on the right to elect goes beyond the boundaries of "the right to vote" which is clearly defined in the Constitution as a manifestation of the right to elect. It restricts the right to elect categorically in cases of being sentenced to imprisonment due to an intentional offence without taking into account whether the convict is in the penitentiary institutions or not.

The provision which contains the phrase in dispute prescribes that a person may be deprived of *"his capacity to be elected"* as legal consequences of imprisonment sentence to be imposed on him for intentionally committing an offence.

In the application lodged with the Court, it has been stated briefly that although the constitutional provisions on eligibility to be a parliamentarian prescribe that persons who have been sentenced to imprisonment for one year or above, except for negligent offences, shall not be elected as a parliamentarian, the contested provision sets forth that persons may be deprived of *"their capacity to be elected"* even when they are sentenced to imprisonment for a term of less than one year. It has been therefore maintained that this provision is in breach of the Constitution.

Having rendered its judgment on 8/10/2015, the Constitutional Court has emphasized that being sentenced to imprisonment for a term of less than one year, except for the offences cited under Article 76 of the Constitution, is not prescribed as one of the reason to be disqualified from being elected as a parliamentarian. It has therefore annulled the provision containing the said phrase insofar as it contains the phrase *"capacity to be elected…"* in sub-paragraph (b) by finding it contrary to Article 76 of the Constitution as it sets forth that persons may be deprived of "their capacity to be elected" even when they are sentenced to imprisonment for a term of less than one year due to an intentional offence.

The provision which contains the other phrase in dispute prescribes that a person may be deprived of his capacity to elect, to be elected and his other political rights as legal consequences of imprisonment sentenced imposed on him due to intentionally committing an offence.

In the application lodged with the Court, it has been briefly alleged that the provision in dispute is unconstitutional as it contradicts with the basic constitutional

principles on political rights.

In the Constitutional Court's opinion, democratic society calls for a system where the citizens enjoy their right to elect to the greatest extent possible as a means of determining national will. The State shall not interfere with the right to elect unless it is compulsory for the democratic order of the society.Although this right may be restricted for legitimate aims, such restriction shall not be imposed in a manner which would eliminate the citizens' right to elect or render it dysfunctional.

A person who has the right to elect enjoys this right by casting vote. Accordingly, it is evident that the right to elect cannot be dissociated from the right to vote which may be defined as putting it into practice. Article 67 of the Constitution prescribes that convicts in the penitentiary institutions, except for those convicted of negligent offences, cannot vote. As the said provision regulates that only those who are held in the penitentiary institutions for committing an intentional offence cannot vote, there is no constitutional provision which prevents the convicts who are not held in the penitentiary institutions from casting votes.

When the provision in dispute is examined, it is observed that it prescribes, regardless of whether they are held in the penitentiary institutions or not, those who are sentenced to imprisonment due to an intentional offence shall be deprived of their right to elect. The restriction imposed by this provision on the right to elect goes beyond the boundaries of "the right to vote" which is clearly defined in the Constitution as a manifestation of the right to elect. It restricts the right to elect categorically in cases of being sentenced to imprisonment due to an intentional offence without taking into account whether the convict is in the penitentiary institutions or not.

Consequently, the Constitutional Court has annulled the provision containing the phrase in dispute insofar as it contains the phrase *"right to elect and…"* set out in sub-paragraph (b) of the same paragraph by finding it contrary to Articles 13 and 67 of the Constitution as the said provision of law constitutes a disproportionate restriction which is not necessary in a democratic social order.

The provision which contains the other phrase in dispute prescribes that a person may be deprived of enjoying his other political rights as legal consequences of being sentenced to imprisonment due to an intentional offence.

In the application lodged with the Court, it has been briefly stated that the provision in dispute is unconstitutional as it prescribes that a person may be deprived of enjoying his other political rights as legal consequences of being sentenced to imprisonment due to an intentional offence; however it is not clearly specified which rights they are and, thereby, leads to ambiguity.

In the Constitutional Court's opinion, political rights are fundamental rights that are related to the establishment and functioning of the State. These rights consti-

On the other hand, although Article 76 § 2 of the Constitution does not prescribe the status of "being sentenced to imprisonment for a period of less than one year" as one of the reasons for being disqualified from being elected a parliamentarian, the provision in dispute provides that those sentenced to imprisonment for less than one year due to an intentional offence may be deprived of the right to be elected. Therefore, this provision contradicts with the Constitution.

tute the basis of democracy as they provide the individuals with the ability to act directly to have an influence on the basic rules and structures of the society.

It has been observed that the restriction envisaged by the contested provision covers all political rights cited between Articles 66 and 74 of the Constitution except for the rights to elect and to be elected.Although one may accept that a criminal can be denied of certain rights which especially require the existence of trust, as stated in the legislative intent of the law, depriving the individual of all political rights enshrined in the Constitution cannot be considered necessary for the aims pursued with the said provision.

Consequently, the Constitutional Court has decided to annul the provision insofar as it relates to the phrase in dispute by finding it contrary to principle of proportionality.

The other provision in dispute prescribes that a person may not use his rights set out in Article 53 of the Law until the imprisonment sentence imposed on him is fully executed.

In the application lodged with the Court, it has been briefly stated that the provision in dispute is unconstitutional as it prescribes that a person may not use his right to elect and to be elected until execution of the imprisonment sentence imposed on him is fully completed even during the period he is conditionally released and therefore is not in the penitentiary institution, which constitutes contradiction to the explicit provision of the Constitution.

In the Constitutional Court's opinion, the provision in dispute which prescribes that a person may not use his right to elect until the imprisonment sentence imposed due to an intentional offence is fully executed contradicts with the explicit provision of Constitution by restricting the right to elect for a period which exceeds the actual execution period elapsing in the penitentiary institutions. It is therefore in breach of the Constitution in this respect.

On the other hand, although Article 76 § 2 of the Constitution does not prescribe the status of "being sentenced to imprisonment for a period of less than one year" as one of the reasons for being disqualified from being elected a parliamentarian,

the provision in dispute provides that those sentenced to imprisonment for less than one year due to an intentional offence may be deprived of the right to be elected. Therefore, this provision contradicts with the Constitution.

Consequently, the Constitutional Court has decided to annul the provision in dispute insofar as it relates to the phrase *"the capacity to elect and to be elected…"* included in sub-paragraph (b) of the first paragraph by finding it contrary to Article 67 and 76 of the Constitution .

The provision which contains another phrase in dispute prescribes that the persons who are sentenced to short-term imprisonment due to the offence they have intentionally committed and whose imprisonment sentence is suspended cannot be deprived of the rights set out in Article 53 § 1 of the Law.

In the application lodged with the Court, it has been briefly stated that, although Article 76 § 2 of the Constitution sets out that those who have been convicted for theft cannot be elected as a parliamentarian regardless of type, duration and suspension of the sentence imposed, Article 53 of the Law shall not be applicable for the persons whose short-term imprisonment sentence is suspended and, thereby, those whose short-term imprisonment sentence imposed for the offence of theft is suspended may obtain the right to be elected as a parliamentarian in spite of the arrangement set out in Article 76 of the Constitution. Accordingly, it has been maintained that this provision is in breach of the Constitution.

In the Constitutional Court's opinion, persons whose short-term imprisonment sentence is suspended shall not be deprived of the right to be elected by virtue of the provision in dispute. In this context, this provision has broadened the explicit and detailed arrangements set out in Article 76 of the Constitution on the eligibility to become a parliamentarian with regard to suspended short-term imprisonment sentences. However, the legislative intent of the provision set out in Article 76 of the Constitution is to ensure that those to exercise legislative power bear certain qualifications. In this context, the eligibility criteria for being elected as a parliamentarian may be changed only through a constitutional amendment. Therefore, the contested provision which may be regarded as an amendment to the provisions concerning the eligibility of being elected as a parliamentarian enshrined in the Constitution is unconstitutional insofar as it relates to the phrase *"…the capacity of being elected…"* mentioned in the second paragraph.

Consequently, the Constitutional Court has decided to annul the provision in dispute insofar as it relates to the phrase *"…the capacity of being elected…" cited* in sub-paragraph (b) of the first paragraph for being contrary to Article 76 of the Constitution.

12- Judgment on the Capital Market Law (no. E.2015/29, K.2015/95)

The provision in dispute, which provides that the capital market instruments which are not submitted until the end of the seventh year following the date they are started to be tracked shall be transferred to the ICC and that thereupon, the limited real rights thereof shall be deemed to have automatically terminated and these instruments shall be sold within three months following their transfer to the ICC, abolishes the individuals' right to property on the securities owned by them in an unlimited and indefinite manner and does not enable persons who would trade in the capital markets to make investments under full assurance. This provision does not also provide the individuals with the opportunity to dispose of their securities in an easy and secure manner and does not offer any compensatory means or redress mechanism in case of loss of the rights enjoyed by those trading at the capital markets. Therefore, this provision does not strike a fair balance between the public interest and the individuals' rights and freedoms, which amounts to disproportionate interference in the right to property and contradicts with the Constitution.

In the first, second and third sentences of Article 13 § 4 of the Capital Market Law, it is set out that capital markets instruments which are decided to be dematerialized are required to be submitted to the Investor Compensation Centre ("ICC") within the framework of the principles set out by the Capital Market Board and that those which are submitted shall automatically become null and void. It is also prescribed therein that the capital market instruments which are not submitted shall not be traded at the stock market following the decision for their dematerialization and that the stock brokers may not stand as a broker in trading of such capital market instruments. The provision in dispute provides that the participation certificates cannot be repurchased by the stock brokers; that capital market instruments which are not submitted until the end of the seventh year following the date they are started to be tracked shall be transferred to the ICC. It is also set out in the contested provision that thereupon, the limited real rights thereof shall be deemed to have automatically terminated and these instruments shall be sold within three months following their transfer to the ICC.

In the application lodged with the Constitutional Court, it has been briefly maintained that those who have purchased share certificates in return for a certain amount of money shall be *ad infinitum* deprived of their property rights at the end of the prescribed period and that their property rights may be terminated. It has been therefore alleged that this provision is contrary to Articles 2 and 35 of the Constitution.

Rendering its judgment on 22/10/2015 on this application, the Constitutional Court has indicated that securities, as owned capital market instruments, shall be classified as the right to receivable and fall into the scope of the right to property. The Court has therefore noted that as legal arrangements concerning the acquisition and use of these securities and for limiting or eliminating any right as to these securities fall within the ambit of the individuals' right to ownership and peaceful enjoyment of their possessions, they shall be regarded as an interference in the right to property.

In the Constitutional Court's opinion, it is obvious that this arrangement, which prescribes that capital market instruments as securities shall be recorded electronically by means of dematerialization and capital market instruments owned by the individuals shall be submitted, has been introduced in order to enable custody of securities with lower risks and costs, in order to save on printing, issuance, insurance and custody fees and prevent the securities from the risks of forgery, being lost and being stolen. Accordingly, imposing certain limitations on the individuals' right to property through these legal arrangements, which ensure recording of securities electronically by means of dematerialization and submission of the capital market instruments owned by the individuals, is based on legitimate grounds.

However, in spite of these legitimate grounds, a balance must be struck between the interference in the individuals' right to property and the legitimate aim pursued with this interference. Article 13 of the Constitution prescribes that the right to property may be restricted only for public interest and to the extent required by law in a democratic society. Moreover, these restrictions to be imposed cannot infringe upon the very essence of the right and be contrary to the wording and sprit of the Constitution, requirements of the democratic social order and the principle of proportionality.

The provision in dispute, which provides that the capital market instruments which are not submitted until the end of the seventh year following the date they are started to be tracked shall be transferred to the ICC and that thereupon, the limited real rights thereof shall be deemed to have automatically terminated and these instruments shall be sold within three months following their transfer to the ICC, abolishes the individuals' right to property on the securities owned by them in an unlimited and indefinite manner and does not enable persons who would trade in the capital markets to make investments under full assurance. This provision does not also provide the individuals with the opportunity to dispose of their securities in an easy and secure manner and does not offer any compensatory means or redress mechanism in case of loss of the rights enjoyed by those trading at the capital markets. Therefore, this provision does not strike a fair balance between the public interest and the individuals' rights and freedoms, which amounts to disproportionate interference in the right to property and contradicts with the Constitution.

Consequently, the Constitutional Court has decided to revoke the provision in dispute by finding it contrary to Articles 13 and 35 of the Constitution.

13- Judgment on the practice of electronic card and ticket in sports (no. E.2014/196, K.2015/103)

Having noted that vesting the federations with the authority to receive electronic card information for advertising and marketing purposes, which would lead to transfer of such data to third parties without consent, cannot be considered to be one of the measures required to be taken for democratic social order with a view to prevention of violence in sports, the Constitutional Court has indicated that the restriction imposed on the right of protection of private life and personal data by means of granting relevant authorization to the federation is not capable of attaining the aim of preventing violence at sports events. The Court has accordingly annulled the first sentence of the subparagraph (c) of the paragraph 11 which is in dispute.

The contested first sentence of Article 5 § 11 (c) of the Law no. 6222 on the Prevention of Violence and Disorder in Sports sets forth that the relevant federations shall be authorized for advertising and marketing of electronic card information on behalf of the sports clubs while the third sentence of the same paragraph sets forth that powers vested in the federations within the scope of Article 11 may be partially or wholly assigned to third parties.

In the application lodged with the Constitutional Court, it has been briefly maintained that the electronic card practice introduced in sports constitutes a breach of the private lives and family lives of those who purchase electronic card. It has been also maintained that vesting the federations with powers for advertising and marketing of the electronic card data, which is introduced for prevention of violence and includes personal data, on behalf of the clubs has rendered the electronic card and electronic card practice a commercial commodity. Accordingly, it has been alleged that although the state is obliged to eliminate the factors posing an obstacle before having access to sports, it has already formed an obstacle in respect thereof by introducing the electronic card practice. It has been therefore maintained that these provisions are in breach of the Constitution.

Rendering its judgment on 12/11/2015 on this case, the Constitutional Court has decided to reject the application for lack of jurisdiction insofar as it relates to the second sentence of Article 5 § 11 (c) of the Law as it is not applicable in the case handled by the court.

The Court has noted that personal data may only be shared with the third persons or public institutions and organizations that are legally authorized to get access to such data; and that such data must be required by relevant persons and institutions for being able to perform their duties and must be restricted with the performance of such duties. It has also observed that as per the contested provision, which provides the federations with the authority for advertising and marketing of electronic card information on

behalf of the clubs, personal data may be used by the relevant federation on behalf of the clubs for advertising and marketing purposes and, thus, personal data given for watching the sports competitions may be transferred to the third parties.

The Court has pointed out that giving personal data for obtaining electronic card does not mean that relevant persons have given consent to transfer of their personal data to the third parties. The Court has concluded that as Article 20 of the Constitution clearly sets out that personal data may be processed "*only in cases prescribed by law or with the person's explicit consent*", this provision, which ensures the transfer of electronic card information classified as personal data by the federations to the third parties for advertising and marketing purposes without taking the consent of the relevant persons, has imposed a restriction on the rights to respect for private life and protection of personal data. Having noted that vesting the federations with the authority to receive electronic card information for advertising and marketing purposes, which would lead to transfer of such data to third parties without consent, cannot be considered to be one of the measures required to be taken for democratic social order with a view to prevention of violence in sports, the Constitutional Court has indicated that the restriction imposed on the right of protection of private life and personal data by means of granting relevant authorization to the federation is not capable of attaining the aim of preventing violence at sports events. The Court has accordingly annulled the first sentence of the subparagraph (c) of the paragraph 11 which is in dispute.

As to the provision which enables the federations to partially or wholly transfer their powers set out under paragraph no. 11 to third parties, the Constitutional Court separately examined the legal arrangements enabling transfer of powers and has concluded that enabling the transfer of power of storing personal data at a central database does not make any contribution for the prevention of violence in sports, which is the aim pursued through the electronic card and ticket practice. It has been also observed that although the contested provision imposes restriction on the right to confidentiality of personal life and protection of personal data, it is lack of guarantees which would ensure resorting to such means of restriction in line with the aim pursued in such restriction and in a proportionate manner. Having noted that it is a disproportionate restriction which is not required in a democratic social order, the Constitutional Court has annulled the third sentence of subparagraph (c) of paragraph 11 insofar as it relates to the second sentence of subparagraph (a) of the same.

The Court has found that the delegation of authority for making central sales through a system enabling ticket organization, checks and inspections at the entry and exit points of the competition arenas, the establishment of central control system to that end and publication, sale and distribution of electronic cards and tickets to be sold within the scope of electronic card practice is in accordance with the Constitution. The Court has therefore rejected the request for annulment of the third sentence in subparagraph (c) of paragraph 11 with regard to the other provisions.

It is set forth in the contested second sentence of subparagraph (a) of paragraph 11 that personal information obtained for forming an electronic card shall be stored at

the central database established within the federation. The third sentence of the same subparagraph also allows the Ministry of Finance and the Ministry of Internal Affairs to get access to such personal information.

In the application lodged with the Constitutional Court, it has been briefly maintained that the relevant provisions are contrary to the Constitution as the practice of electronic card constitutes a breach of the confidentiality of private life and family life.

The Court has primarily underlined that "the right to request the protection of personal data" enshrined in Article 20 of the Constitution with a view to protecting the personal data within the scope of the confidentiality of private life is not an absolute and unlimited right and may be restricted by law in pursuance of Articles 13 and 20 of the Constitution without infringing upon the very essence of the right and on condition of not being contrary to the requirements of a democratic social order and the principle of proportionality.

The Court has observed that the contested provisions have been set out in order to meet the pressing social needs of a democratic social order such as preventing violence in sports, maintaining public order and security, maintaining security of life and property and preventing tax evasion. It has also indicated that although a restriction is imposed on the rights to request protection of private life and personal data by virtue of these provisions, this restriction falls within the ambit of the measures required to be taken in respect of a democratic social order and that the means used for the prescribed restriction is a method which would restrict the right and freedom in question to the minimum extent and is in line with the aim pursued. Considering that a reasonable balance has been struck between the public interest, which is protection of public order and security, and the right to request the protection of personal data, the Constitutional Court has also concluded that making the above-cited database available for the access of the Ministry of Finance and the Ministry of Internal Affairs, the institutions possessing more detailed and exclusive information about the citizens, would not lead to any problem in respect of the data security. It has also noted that there exist legal guarantees in this respect as criminal provisions which pertain to the protection of personal data and are set out in the Turkish Criminal Code no. 5237 shall be applied where the data obtained as a result of the applications made by those wishing to receive electronic card is stored and used for purposes other than the intended aim and scope. The Constitutional Court has therefore rejected the requests for annulment of the provisions in dispute.

Other certain provisions in dispute regulates the electronic ticket and card practice, information to be included on the electronic card, checks and inspections to be performed at the entry and exit points of the competition arenas and publication, distribution and sale of the electronic tickets.

In the application lodged with the Constitutional Court, it has been briefly stated that sports is a universal phenomenon and is, in itself, a fundamental right and freedom which also encompasses the rights to entertainment and rest, and that the legal arrangements introduced by the legislator for preventing violence have increased

The Court has observed that the contested provisions have been set out in order to meet the pressing social needs of a democratic social order such as preventing violence in sports, maintaining public order and security, maintaining security of life and property and preventing tax evasion. It has also indicated that although a restriction is imposed on the rights to request protection of private life and personal data by virtue of these provisions, this restriction falls within the ambit of the measures required to be taken in respect of a democratic social order and that the means used for the prescribed restriction is a method which would restrict the right and freedom in question to the minimum extent and is in line with the aim pursued. Considering that a reasonable balance has been struck between the public interest, which is protection of public order and security, and the right to request the protection of personal data, the Constitutional Court has also concluded that making the above-cited database available for the access of the Ministry of Finance and the Ministry of Internal Affairs, the institutions possessing more detailed and exclusive information about the citizens, would not lead to any problem in respect of the data security. It has also noted that there exist legal guarantees in this respect as criminal provisions which pertain to the protection of personal data and are set out in the Turkish Criminal Code no. 5237 shall be applied where the data obtained as a result of the applications made by those wishing to receive electronic card is stored and used for purposes other than the intended aim and scope. The Constitutional Court has therefore rejected the requests for annulment of the provisions in dispute.

the level of unjust suffering experienced by the victims of violence. It has been further maintained that violence cannot be prevented by means of restricting the individuals' fundamental rights and freedoms and that the practice of electronic card violates the rights of the real sports fans. It has been maintained that as those under legal disabilities could not receive cards on their own without the consent of their guardians, they are prevented from watching sports competitions and, thereby, rights of minors and those under legal disabilities are breached. It has been further stated that as this practice is only applied in football only at the super league and the premier league levels, it is contrary to the principle of equality. It has been further claimed that this practice constitutes a severe interference in the free will and the freedom of action. For the above-cited reasons, it has been alleged that these provisions are in breach of the Constitution.

The Court has underlined that positive obligations required to be fulfilled by the state under Article 59 of the Constitution may be realized only in an environment where

the public order is maintained; otherwise, the rights and freedoms cannot be enjoyed to the fullest extent. The Court has accordingly added that certain measures are required to be taken in order to prevent violence and offences in sports, and that any subject which is not prescribed in the Constitution may be regulated by virtue of the discretionary power of the legislator provided that it is not contrary to the fundamental principles and prohibitive provisions of the Constitution. It has been also stated that the Constitution does not include any provision concerning the checks and inspections to be performed at the entry and exit points of the sports arenas and concerning the publication, sale and distribution of tickets; that in this context, the legislator has, in its discretion, preferred the practice of electronic card by taking into account the threat posed on the society by the violence occurring at the sporting activities and the increase in the number of offences committed at the sporting activities. The Court has also observed that these provisions are necessary and sufficient for solving the problem of violence in sports and ensuring the sports fans comply with the relevant rules; and that as Article 5 § 4 of the Law does not make any distinction in terms of the sports branch, this practice is applicable for all sports branches. It has also indicated that the conditions prescribed in respect of minors and those under legal disabilities do not stem from the provisions in dispute but from other legal provisions concerning the capacity to have rights and the capacity to act. For the above-mentioned grounds, the Constitutional Court has rejected the request for annulment of the provisions in dispute.

14- Judgment on the courts' unanimous decisions concerning the security measures and on the actions for compensation to be brought in case of non-enforcement of the courts' decisions (no. E.2014/86, K.2015/109)[1]

> **The Constitutional Court has pointed that the issues such as determination of the courts to rule on the security measures, examination procedures of these courts, whether the decisions would be taken by a single judge or the panel of judges - unanimously or by a majority vote - and which method would be pursued in case of an objection fall within the scope of the legislator's power to determine the formation, duties, powers and trial procedures of the courts under Article 142 of the Constitution. In this context, making legal arrangements in respect of the courts to assess the requests for such security measures and the trial procedures to be applied in these courts is not, in any aspect, in breach of the principle of the state of law.**

1. Applications for objection with numbers E.2014/84, 2014/98, 2014/102, 2014/105, 2014/106, 2014/109, 2014/110, 2014/111, 2014/125, 2014/132, 2014/135, 2014/145, 2014/150, 2014/153 were joined by this annulment action.

In certain parts of the provisions in dispute, it is set out that seizure of immovable properties, rights, claims and other assets, legal wiretapping and recording of communications of the suspect or the accused person via telecommunication, assessment to be made on the basis of mobile phone signals and appointment of civil servants as confidential investigators may be performed only by the decision to be unanimously rendered by an assize court.

In the petition submitted to and application lodged with the Court, it has been briefly stated that the provisions in dispute, which prescribe that the afore-mentioned measures, which were previously decided to be taken by a single judge, may be taken only by an unanimous decision to be given by the assize court, contradict with the principle of legal judge. It has been also noted that whereas a single judge or majority of the panel of judges may give decision in respect of convictions likely to entail more severe results, seeking unanimity condition in deciding the implementation of security measures leads to inequality in terms of the offenders. It has been also alleged that as this process would cause prolongation of the proceedings, this would hinder the proper enjoyment of the right to legal remedies and that this process would make it impossible to rapidly conclude the proceedings with minimum costs. It has been finally maintained that designation of a court which is not the competent authority in the pending case as a decision-making mechanism and of conducting proceedings on the basis of evidence obtained through security measures taken by another court are not compatible with the principle of independency of courts. For the above-mentioned grounds, it has been therefore alleged that these provisions are unconstitutional.

Rendering its judgment on 25/11/2015 on the annulment action which joined the applications for objection lodged with the Court, the Constitutional Court has pointed that the issues such as determination of the courts to rule on the security measures, examination procedures of these courts, whether the decisions would be taken by a single judge or the panel of judges - unanimously or by a majority vote - and which method would be pursued in case of an objection fall within the scope of the legislator's power to determine the formation, duties, powers and trial procedures of the courts under Article 142 of the Constitution. In this context, making legal arrangements in respect of the courts to assess the requests for such security measures and the trial procedures to be applied in these courts is not, in any aspect, in breach of the principle of the state of law.

Although it may be considered that the procedure introduced by these provisions is likely to lead to prolongation of the proceedings, it cannot be concluded that these provisions impose disproportionate restriction on the principle of the concluding the proceedings as rapidly as possible and with minimum costs and on the enjoyment of the right to legal remedies when it is taken into account that these provisions intend to protect the principle of the state of law, the right to property, the confidentiality of private life and freedom of communication in a more efficient manner.

Besides, certain courts may be authorized in respect of certain procedures in the criminal proceedings. It must be therefore accepted that authorization of the assize courts in rendering such security measures is an arrangement in respect of powers vested with the courts, according to the rules on division of labour, in certain proceedings such as "assessment concerning objection to the detention" and "assessment concerning the request for challenge of judge (*"reddi hakim"*) which fall into the scope of the Code of Criminal Procedure no. 5271. The authority which would render the final decision in respect of the accused person or persons on the basis of the evidence obtained, upon the decision-making process has ended on security measures, is the regular court dealing with the case. Therefore, granting such an authorization to the assize courts for carrying out certain procedures during the proceedings is neither contrary to the principle of legal judge; nor does it constitute any interference in the independency of the courts.

On the other hand, provisions concerning the unanimous decisions rendered by the assize court do not amount to the establishment of a new court. Upon the entry into force of the Law, these provisions regulate the powers and conditions with regard to the issuance of decisions of seizure in respect of immovable properties, rights, claims and other assets. Accordingly, these rules are not contrary to the principle of legal judge in any aspect.

Consequently, finding the provisions in dispute in line with the Constitution, the Court has decided to reject the request for annulment thereof.

In contested Article 28 § 4 of the Code of the Administrative Trial Procedure no. 2577 which was amended by Article 18 of the Law no. 6526, it is set out that in the event that the court orders are not executed by the civil servants within the prescribed period, an action for compensation may be brought only against the relevant administration.

In the Constitutional Court's opinion, Article 129 § 5 of the Constitution, which reads as follows *"actions for compensation concerning damages arising from faults committed by civil servants and other public officials in the exercise of their duties shall be filed only against the administration in accordance with the procedure and conditions prescribed by law, provided that they are recoursed to for compensation",* clearly sets out that the addressee in respect of the actions for compensation to be brought on account of all kinds of faults caused by the civil servants in performing their duties shall be the relevant administration. However, this provision does not relieve the civil servant causing damage to the administration on account of his faults of the liability in respect thereof. Article 129 of the Constitution stipulates having recourse to the relevant civil servant for reimbursing the relevant amount of damage.

In the petition submitted to the Court, it has been briefly stated that not acting in accordance with the orders of the court is a personal fault attributable to the relevant civil servant, and that this provision, which removes the preventive mechanism preventing arbitrary non-execution of the courts' orders by the civil servants, is not compatible with the principle of the state of law. It has been therefore alleged that this provision is in breach of Article 2 of the Constitution.

In the Constitutional Court's opinion, Article 129 § 5 of the Constitution, which reads as follows *"actions for compensation concerning damages arising from faults committed by civil servants and other public officials in the exercise of their duties shall be filed only against the administration in accordance with the procedure and conditions prescribed by law, provided that they are recoursed to for compensation",* clearly sets out that the addressee in respect of the actions for compensation to be brought on account of all kinds of faults caused by the civil servants in performing their duties shall be the relevant administration. However, this provision does not relieve the civil servant causing damage to the administration on account of his faults of the liability in respect thereof. Article 129 of the Constitution stipulates having recourse to the relevant civil servant for reimbursing the relevant amount of damage. Indeed, the legislative intent of the relevant article provides *"holding the public officials responsible for damages caused by them to the administration on account of their faulty acts and activities in the exercise of their duties is a repetitive clause of a principle which has been currently applied".*

Moreover, Article 138 of the Constitution prescribes that legislative and executive organs and the administration shall comply with the court's orders; these organs and the administration shall neither alter them in any respect, nor do they cause delay in their execution. The fact that the action for compensation may be brought only against the administration if the orders of the administrative jurisdiction are not executed within the prescribed period does not relive the civil servant, who has not executed the order, of his legal liability. The constitution-maker's relying on the fact that the fault has been committed by the civil servant in the course performing one of his duties regardless of the nature of the fault committed by the civil servant and agreeing that an action may be brought only against the administration on account of such faults of the civil servants does not terminate the legal liability of the relevant civil servant by virtue of the relationship between the civil servant and the relevant administration for reimbursement of the amount paid.

Furthermore, holding the administration liable for redressing the damage caused by the faults committed by civil servants in the exercise of their duties is considered as a guarantee for compensation of the damage suffered by the complainants given the possibility of the civil servants' inability to pay the whole amount of compensation awarded in due time.

The Constitutional Court has consequently decided to reject the application for annulment of the provision in dispute by not finding it unconstitutional.

15- Judgment on the internet service providers' obligations to deliver information and take measures requested by the Telecommunications Communication Presidency ("TIB") (no. E.2014/87, K.2015/112)

Article 20 § 3 of the Constitution provides as follows: *"personal data can be processed only in cases envisaged by law or with the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law".* It is not clearly defined in the Law no. 5651 what these "cases envisaged by law" for the protection of personal data in the above-cited Article of the Constitution are comprised of. The provisions in dispute enable that all kinds of personal data, information and documents pertaining to individuals shall be unconditionally submitted to the TIB without being subject to adequate restriction in terms of subject-matter, aim and scope in spite of the guarantee prescribed in the Constitution. In this way, individuals are caused to remain unprotected against the administration.

In some of the provisions in dispute, the content, hosting and access providers are obliged to deliver any information requested by the Telecommunications Communication Presidency ("TIB") in the manner required by the TIB and to take measures requested by the TIB.

In the petition lodged with the Constitutional Court, it has been briefly maintained that the provisions which are requested to be annulled have been introduced in order to enable the TIB to obtain communication data of all internet users without being subject to any legal restriction or obstacle; and that any arrangement which would restrict access of the TIB to personal information to be delivered by the content, hosting and access providers to the TIB when requested is not prescribed in these provisions. It has been also stated that although the provisions in dispute hold the content, hosting and access providers liable to take measures requested by the TIB, it is not clearly set out what these measures are and therefore they are ambiguous in nature. For the above-mentioned reasons, it has been alleged that these provisions are in breach of Articles 2, 13, 20, 36 and 40 of the Constitution.

Rendering its judgment on the action for annulment on 8/12/2015, the Constitutional Court examined the provisions in dispute under Article 2 of the Constitution, in which the principle of the state of law is prescribed under Article 13 of the same entitled "*restrictions of fundamental rights and freedoms*", and under Article 20 of the same, which is entitled *"the confidentiality of private life*".

In the Constitutional Court's opinion, it is inevitable that the TIB needs certain information and documents including personal data in order to regulate publications

and broadcasts on the internet and fight against offences committed by means of such publications and broadcasts and in order to perform the duties assigned to it. However, the scope of the information to be requested by the TIB from the content, hosting and access providers with a view to performing its duties set out in the Law no. 5651 and framework of the liabilities which the TIB may impose are not set in the provisions which are requested to be annulled. In this context, scope of the TIB's power to demand information from the content, hosting and access providers is not restricted by means of ensuring guarantees necessary for the protection of personal data, and liabilities scope of which cannot be ascertained are imposed on the content, hosting and access providers for ensuring that they take the requested measures.

In Article 4 § 3 of the Law, which is requested to be annulled, a general definition is given by means of stating *"within the scope of the performance of the duties assigned to the Presidency by this Law and other Laws"*. However, this general definition is not set out in Article 5 § 5 and Article 6 § 1 (d) of the Law, which are requested to be annulled. In this context, the provisions requested to be annulled do not clearly set out under which conditions and for which grounds the information requested by the TIB shall be delivered to the Presidency by the content, hosting and access providers or how long the information provided shall be stored by the TIB as well as the content of the information requested and measures to be notified to the content, hosting and access providers. Therefore, the provisions are not definite and foreseeable.

The provisions in dispute allow for getting access to individuals' personal data without their explicit consent and processing and delivering such information to the TIB in spite of the guarantees introduced in Article 20 of the Constitution for the protection of private life. Article 20 § 3 of the Constitution provides as follows: *"personal data can be processed only in cases envisaged by law or with the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law"*. It is not clearly defined in the Law no. 5651 what these "*cases envisaged by law*" for the protection of personal data in the above-cited Article of the Constitution are comprised of. The provisions in dispute enable that all kinds of personal data, information and documents pertaining to individuals shall be unconditionally submitted to the TIB without being subject to adequate restriction in terms of subject-matter, aim and scope in spite of the guarantee prescribed in the Constitution. In this way, individuals are caused to remain unprotected against the administration. Therefore, as these provisions are not definite and foreseeable, they impose disproportionate restriction on the right to request the protection of personal data and are in breach of Article 20 of the Constitution.

Consequently, the Constitutional Court has found the provisions, which set out the internet content, hosting and access providers' liability to deliver the information requested by the TIB to the TIB and to take measures notified by the TIB, in breach of Articles 2, 13 and 20 of the Constitution and decided to annul these provisions.

In the contested Article 9 § 9 of the Law no. 5651 which was amended by Article 93 of the Law no. 6518, it is set forth that if publications or broadcasts which are subject-matter of the decision for denying access given by a judge under Article 9 and constitute

a breach of any personal right or any other publications or broadcasts of similar nature are also made available on other internet sites, the same decision shall be applied in respect of these internet sites if the relevant person makes an application to the Access Providers Union ("the Union").

In the petition submitted to the Court, it has been maintained that the provision requested to be annulled is in breach of Articles 2, 33, 36 and 40 of the Constitution.

In pursuance of the provision requested to be annulled, in the event that the same publication or broadcast, which is subject-matter of the decision for denying access and constitutes a breach of the personal right, or another publication or broadcast of the same content is made available on other web-sites, the Union shall make an assessment, and without any decision to be taken by the judicial body, the decision for denying access taken by the judge shall be also applied for these web-sites upon the application of the relevant person with the Union.

In the Constitutional Court's opinion, there is nothing to complain about the principle that the judge's decision for denying access to a certain content which constitutes a breach of a personal right shall be applied by the Union to other web-sites which publish or broadcast the same content. In such a case, applying of the existing court decision in respect of these web-site addresses only amounts to execution of the decision taken by the judge; because the web-site content in question has been already proven by the court to constitute a breach of the personal right. At this point, the Union shall only ascertain whether the content is the same with that of the one which is subject-matter of the court's decision and whether the content, which constitutes a breach, has been wholly or partially published or broadcasted on the relevant web-site. Moreover, if the same content is made available on different web-sites by only making minor amendments therein in order to render the court's decision ineffective, it must be accepted that it is same with the web-site content which has constituted a breach. The act to be performed by the Union at this stage is not to make a legal assessment; but to establish material facts. In this respect, as the web-site content in respect of which the decision on denying access would be applied is determined by a judicial decision, it is not possible to mention of any ambiguity and to establish that there has been an arbitrary or disproportionate restriction on freedom of expression.

However, in the event that *"publications and broadcasts of the same nature"* with the web-site content which is subject-matter of the judicial decision on denying access under Article 9 on account of constituting a breach of personal right are made available on other web-sites, the assessment as to the nature of the web-site contents shall also be made by the Union if an application is made by the relevant person. The determination as to whether the contents are similar is different from having the same content and requires an assessment to be carried out on the nature of this web-site content. *"Publications and broadcasts of the same nature"* are those which are not same with the web-site content, constituting a breach of personal right and subject-matter of the court's decision on denial of access; but which may constitute a breach of the personal rights of the relevant person in terms of the aim it pursues. The determination of scope of personal right and the acts which are considered to breach the personal

right requires to make an assessment on several legal matters such as social, economic, political and judicial positions of the relevant parties, the mass for which the web-site content in question is made available and whether this web-site content falls within the ambit of the freedom of expression and to give a decision on this basis. In this context, the power vested by the contested provision in the Union for denying access to web-site contents of the same nature does not meet the minimum requirement of the principle of legality which prescribes that the law must be comprehensible, clear and explicit, and scope and boundaries of this power is indefinite. Therefore, the provision in dispute is not definite and foreseeable insofar as it relates to the phrase, *"publications and broadcasts of the same nature"*.

On the other hand, this provision, which prescribes that in the event that *"publications and broadcasts of the same nature"* with the web-site content which is subject-matter of the judicial decision on denial of access on account of constituting a breach of personal right is made available on other web-site addresses, the Union shall apply the decision on denial of access in respect of also these web-sites, also imposes a disproportionate restriction on the freedom of expression as it also hinders utilization of these web-sites.

Consequently, the Constitutional Court has indicated that the phrase, *"publications and broadcasts of the same nature",* included in the contested provision is in breach of Articles 2, 13 and 26 of the Constitution and decided to annul it. It has also concluded that the remaining part of the provision is not unconstitutional and therefore rejected the request for annulment of the remaining part of the provision.

In the contested Article 9/A § 8 of the Law no. 5651 which was added by Article 94 of the Law no. 6518, in cases in respect of which any delay may pose a risk for constituting a breach of the confidentiality of private life, access shall be denied upon the order to be given by the President of the TIB.

It has been briefly maintained in the petition submitted to the Court that this provision amounts to a *"censorship"* and allows the TIB to directly give a decision on denial of access. It has been also alleged that as this provision prescribes that in cases in respect of which any delay may pose a risk for protection of the confidentiality of private life or the rights and freedoms of others, the President of the TIB may *ex officio* give a decision on denial of access without the existence of any notice, allegation, complaint

The Constitutional Court has noted that in this provision, the legislator provides the President of the TIB with the authority to give an order on denial of access, with a view to maintaining public order and public interest, in cases where there is a breach of the confidentiality of the individuals' private lives by taking into account the circumstances in respect of which any delay may pose a risk. The Court has accordingly stated that making such a legal arrangement is under the legislator's discretionary power within the boundaries set by the Constitution.

or application and request of any person, it is contrary to the principle of the law of state. In this respect, it has been claimed that this provision provides the President of the TIB with the authority to give an order on denial of the enjoyment of the "freedom of expression" by means of making a direct interference therein, which means that the freedom of expression has been subject to certain restrictions in an unlawful manner. It has been further maintained that this legal arrangement is not in accordance with the principle of proportionality and benefits intended to be protected. For these reasons, it has been alleged that this provision is in breach of Articles 2, 13, 22, 26, 28, 36 and 40 of the Constitution.

The Constitutional Court has noted that in this provision, the legislator provides the President of the TIB with the authority to give an order on denial of access, with a view to maintaining public order and public interest, in cases where there is a breach of the confidentiality of the individuals' private lives by taking into account the circumstances in respect of which any delay may pose a risk. The Court has accordingly stated that making such a legal arrangement is under the legislator's discretionary power within the boundaries set by the Constitution.

In the Constitutional Court's opinion, it is not possible for the legislator to ascertain the scope and nature of the phrases *"breach of the confidentiality of private life"* and *"circumstances in respect of which any delay may pose a risk",* which are included in the provision in dispute, one by one beforehand, and it is obvious that all of the circumstances in which there has been a breach of the confidentiality of private life may be considered as circumstances in respect of which any delay may pose a risk.

Beyond any doubt, the President of the TIB may exercise this power only in circumstances where there has been a breach of the confidentiality of private life and in respect of which any delay may pose a risk. Although it is not clearly set out in the relevant provision by which way the access would be denied, it is obvious that the principle set out in Article 9/A § 4 of the Law, which envisages that the web-site content constituting a breach of the confidentiality of private life shall be denied access by means of blocking access to such publication, section, part, image and video (blocking URL), shall also be applicable for the President of the TIB. As fundamental principles and legal framework of necessary terms and conditions for denial of access are defined in Article 9/A of the Law, this provision is definite and foreseeable.

Moreover, the order given by the President of the TIB under Article 9/A § 8 of the Law for denial of access is subject to judicial review under paragraph 9 of the same Article. The order given by the President for denial of access shall be submitted by the Presidency, within twenty-four hours, for the approval of the magistrate court who would render the final decision within forty-eight hours.

Consequently, the Constitutional Court has decided to reject the request for annulment of the provision by not finding it contrary to the Constitution.

16- Judgment on the provision which stipulates the existence of reasonable suspicion for issuing a search warrant (no. E.2014/195, K.2015/116)

The Constitutional Court has observed that guarantees which would prevent arbitrary interferences in the rights to respect for family life and to respect for home have been introduced by means of making comprehensive arrangements concerning the measure of conducting searches in the Constitution and in the Code no. 5271. It has subsequently held that finding existence of reasonable suspicion adequate for having recourse to the measure of conducting searches with a view to ensuring proper functioning of the criminal procedure and revealing the material facts does not lead to an interference which imposes disproportionate restriction on the rights to respect for private life and to respect for home. The Court therefore rejected the request for annulment of the relevant provision.

Pursuant to Article 116 of the Code of Criminal Procedure no. 5271, a search warrant may be issued only when there exists *"strong suspicion based on concrete evidence"* in respect of the possibility for the arrest of the accused person or suspect or for collection of criminal evidence. However, upon the amendment made by the provision in dispute thereto, existence of *"reasonable suspicion"* is found adequate for search warrants.

In the petition submitted to the Constitutional Court, it has been briefly maintained that reasonable suspicion envisaged in the relevant provision for issuing a search warrant is a subjective term and leads to arbitrary interference by the state authorities in confidentiality of individuals' private lives, family lives and the right to respect for home. It has been therefore alleged that this provision is contrary to Articles 2, 20 and 21 of the Constitution.

Rendering its judgment on 23/12/2015 on this annulment action, the Constitutional Court has pointed out that as reasonable suspicion required to exist for issuance of a search warrant would vary by circumstances of each case, it is not possible to foresee the circumstances under which it would occur beforehand. In this respect, the Court has added that the authority to ascertain whether there is reasonable suspicion by making a general assessment in pursuance of the provision in question is entrusted to the competent authority entitled to issue the arrest warrant. It has also underlined that the phrase of reasonable suspicion may be developed and vary in meaning and in nature by doctrine, practice and judicial decisions.

The Constitutional Court has indicated that finding reasonable suspicion adequate for issuing an arrest warrant instead of existence of strong suspicion based on concrete evidence ensures the search measure be applied in an easier manner in the course of investigations and prosecutions; however, this factor would not by itself render the provision unconstitutional. Determination as to whether the interference in the rights to respect for private life and the respect for home is proportionate or not should be made, as a whole,

Underlining that the investigation and prosecution stages constitute a whole in the criminal proceedings and that the right to a fair trial is applicable for both the investigation stage and the prosecution stage, the Constitutional Court has noted that, with a view to ensuring proper functioning of the investigation stage, the defence counsel's authority to examine the case-file may be restricted in a manner which would not hinder the enjoyment of the right to defence.

by taking into account other guarantees in the Law, as well as the existence of reasonable suspicion. The Court is of the opinion that the significant point that must be taken into account in making constitutionality review is whether or not this legal arrangement has led to arbitrary application of the measure of carrying out searches, by vesting the competent authorities with unlimited discretionary power for issuing a search warrant.

Consequently, the Constitutional Court has observed that guarantees which would prevent arbitrary interferences in the rights to respect for family life and to respect for home have been introduced by means of making comprehensive arrangements concerning the measure of conducting searches in the Constitution and in the Code no. 5271. It has subsequently held that finding existence of reasonable suspicion adequate for having recourse to the measure of conducting searches with a view to ensuring proper functioning of the criminal procedure and revealing the material facts does not lead to an interference which imposes disproportionate restriction on the rights to respect for private life and to respect for home. The Court therefore rejected the request for annulment of the relevant provision.

In another provision in dispute, it is set out that, in respect of the offences listed in Article 153 § 2 of the Code no. 5271, the defence counsel's authority to examine the content of the case-file or to take copies of documents included therein may be restricted in certain circumstances in which the intent of the investigation may be at risk upon the request of the public prosecutor and the decision of the magistrate court.

In the petition submitted to the Court, it has been maintained that imposing restriction, by virtue of the contested provision, on the defence counsel's authority to examine the content of the case-file or to take copies of documents included therein constitutes a breach of the right to legal remedies within the meaning of the principle of equality of arms. It has been therefore alleged that this provision is contrary to Articles 2, 19 and 36 of the Constitution.

Underlining that the investigation and prosecution stages constitute a whole in the criminal proceedings and that the right to a fair trial is applicable for both the investigation stage and the prosecution stage, the Constitutional Court has noted that, with a view to ensuring proper functioning of the investigation stage, the defence counsel's authority to examine the case-file may be restricted in a manner which would not hinder the enjoyment of the right to defence. In this context, in its judgment the Constitutional Court has also stated that the provision in dispute does not entrust the judge with an absolute authority for imposing restriction on the investigation file and that the decision for imposing restriction may be rendered only in respect of the offences listed in Article 153 § 2 of the Code in cases where the intent of the investigation may be put at risk and on condition of not infringing upon

the accused person's right to defence by taking into account the principles of equality of arms and adversarial proceedings.

The Constitutional Court has consequently held that with a view to proper functioning of the criminal investigations, imposing restriction on the defence counsel's right to examine the content of the case-file or to take copies of documents included therein in respect of the offences listed in Article 153 § 2 of the Code in cases where the intent of the investigation may be put at risk and by means of complying with the principles of equality of arms and the adversarial proceedings does not constitute a disproportionate interference in the right to a fair trial. The Court has therefore rejected the request for annulment of the provision in dispute.

17- Judgment on the Law of the National Intelligence Organization ("MIT") (no. E.2014/122, K.2015/123)

The Court has pointed out that although this provision has granted comprehensive authorization for extradition and exchange so as to cover the extradition of criminals, it does not include any guarantee which prescribes that those in respect of whom there is strong suspicion that, in case of being extradited, they may be exposed to torture, inhuman or humiliating sentence or treatment or their lives or liberty may be under threat for their race, religion, nationality and being a member of certain social group or their political opinions cannot be extradited. The Court has therefore noted that this may constitute a breach of the individuals' certain rights; notably the right to life, the freedom of thought, conscience and religion and the prohibition of discrimination, ill-treatment and torture which are guaranteed under the Constitution.

It is set forth in one of the provisions in dispute that the detainees or convicts, except for the Turkish citizens, may be extradited to another country or may be exchanged with those who are detained or convicted in any other country, in certain circumstances required by national security or the interest of the country, upon the request of the Minister of Foreign Affairs, the proposal of the Minister of Justice and the approval of the Prime Minister.

It has been briefly maintained in the petition submitted to the Constitutional Court that the provision in dispute enables the extradition of foreign persons who are detained or convicted in Turkey to any other country or their exchange with those who are detained or convicted in any other country, by an administrative decision, in cases required by the national security or interests of the country in a manner contrary to the principles and procedures set out in Article 18 of the TCC no. 5237. It has been accordingly alleged that this leads to impairment of the individuals' fundamental rights and freedoms by means of rendering guarantees prescribed in this article ineffective. It has

been consequently maintained that the provision in dispute is in breach of Articles 2 and 38 of the Constitution.

Rendering its judgment on the annulment action on 30/12/2015, the Constitutional Court has examined this provision under Articles 2 and 36 of the Constitution.

In the Constitutional Court's opinion, the right to legal remedies guaranteed under Article 36 § 1 of the Constitution is a means for the individual to attain justice, to obtain what he deserves and to eliminate unfairness as well as being one of the foundations which reinforce social peace. The right to legal remedies, which embodies the right to comprehensively provide legal facilities with a view to maintaining and developing the human entity with intangible and tangible values thereof and the right to avail of all means in this respect, is one of the indispensible requisites of the state of law and the contemporary democracies.

The Constitutional Court has observed that in pursuance of extradition procedures prescribed by the provision in dispute, a foreign person does not necessarily commit an offence abroad and that even if he has committed an offence at home, this provision enables him to be extradited. Noting that the foreign person may be extradited not only for his trial or execution of his sentence but also for purposes other than his trial and execution of his sentence, the Constitutional Court has also indicated that the provision in dispute differs from the extradition procedure set out in the international law and in Article 18 of the TCC, and that this provision thereby allows for ordinary extradition; in other words, extradition of foreign persons who have committed an offence abroad for being subject to trial or execution of their sentence and also the extradition to be performed for the purposes other than the above-cited ones.

In this context, the Court has pointed out that although this provision has granted comprehensive authorization for extradition and exchange so as to cover the extradition of criminals, it does not include any guarantee which prescribes that those in respect of whom there is strong suspicion that, in case of being extradited, they may be exposed to torture, inhuman or humiliating sentence or treatment or their lives or liberty may be under threat for their race, religion, nationality and being a member of certain social group or their political opinions cannot be extradited. The Court has therefore noted that this may constitute a breach of the individuals' certain rights; notably the right to life, the freedom of thought, conscience and religion and the prohibition of discrimination, ill-treatment and torture which are guaranteed under the Constitution.

On the other hand, the Constitutional Court has observed that although these procedures prescribed in the provision shall be subject to judicial review like all of other administrative procedures, prescribing judicial remedies in this respect would not be solely adequate as the matter in question is the extradition and exchange (surrendering the criminal to abroad) of the convicts and detainees. The Constitutional Court has emphasized that guarantees, which would enable the relevant persons to efficiently have recourse to this remedy and would prevent them from being extradited before the judicial remedies which they have recourse to are not concluded, must be ensured; otherwise, conducting judicial review after their deportation would make no sense.

Consequently, having stated that vesting such an indefinite power in the provision in dispute without prescribing the above-defined guarantees and similar assurances on the matter has breached the individuals' legal certainty and the right to legal remedies, the Constitutional Court has found the contested provision in breach of Articles 2 and 36 of the Constitution and decided to annul it.

> **The provision in dispute does not pay regard to this fact and prohibits the MIT members from standing as a witness in respect of issues which would not cause damage to the task performed by the state but would contribute the protection of the individuals' rights. This practice results in imposition of a disproportional interference with the right to examine witness without existence of any justified and reasonable ground and leads to impairment of the right to legal remedies, right to a fair trial and the principle of the state of law by means of hindering the establishment of material facts.**

In another provision in which the contested sentence is included, an amendment has been made to the provision which prescribes that the members of the MIT may be heard as witnesses in circumstances set out in Article 29 of the Law no. 2937 and required for the state's interests upon the permission of the Undersecretary of the MIT. Upon the amendment made, it is set forth that the members of the MIT and those who previously took office in the MIT cannot stand as a witness in respect of the matters concerning the duties and activities of the MIT, except for the circumstances required for the state's interests.

It has been stated in the petition submitted to the Constitutional Court that the provision in dispute prohibits the MIT members and those who previously took office in the MIT from standing as a witness in respect of the matters concerning the duties and activities of the MIT, which would hinder disclosure of the material facts concerning the above-mentioned matters. It has been accordingly alleged that this provision is in breach of Articles 2, 12 and 38 of the Constitution.

The Constitutional Court examined the contested provision under Articles 2, 13 and 36 of the Constitution.

In the Constitutional Court's opinion, it is beyond any doubt that the right to legal remedies, which embodies the right to comprehensively use the legal facilities and the right to avail of all means in this regard, also contains in itself the right to request disclosure of material facts by means of conducting an effective investigation and prosecution with regard to legal disputes. In this context, it is obvious that the provisions which hinder disclosure of material facts shall pose an obstacle before the justice and thereby impair the right to legal remedies and the principle of the state of law.

The witness statement is one of the means which ensure disclosure of material facts, and in this context, the individuals have the right to request those who have information concerning any conflict to be heard as witnesses.

On the other hand, in the legislative intent of the phrase *"fair trial"* which was added

by the amendments of 2001 to Article 36 of the Constitution setting forth the right to legal remedies, it is emphasized that the right to a fair trial which is also guaranteed by the international conventions has been incorporated into the law text. One of the guarantees as to the right to a fair trial which are set out in the European Convention on Human Rights, one of these international conventions, and the ECtHR's case-law is the right to call and examine witnesses.

For sure, this right is not an absolute one and may be restricted in case of the existence of certain justified and reasonable grounds and in accordance with the guarantees set out in Article 13 of the Constitution. In this context, although it is set out in Article 38 § 5 of the Constitution that no one shall be compelled to make a statement that would incriminate himself or his legal next of kin, certain restrictions may be imposed in this respect with a view to protecting the individuals' private lives or under circumstances required by virtue of the duties performed by the state in order to perform its obligations set forth in the Constitution.

The contested provision, in principle, forbids the MIT members from standing as a witness in all matters concerning the MIT's duties and activities; however, under certain circumstances required for state's interests, these persons may be heard as a witness in the said matters upon the permission of the competent authority. However, the MIT's scope of duties and the field of activity are very broad, and these duties and activities may include matters disclosure of which would not cause damage to the task performed by the state but which would make contribution for establishment of the material fact, thereby, for the protection of not only the state's interests but also the individual rights.

The provision in dispute does not pay regard to this fact and prohibits the MIT members from standing as a witness in respect of issues which would not cause damage to the task performed by the state but would contribute the protection of the individuals' rights. This practice results in imposition of a disproportional interference with the right to examine witness without existence of any justified and reasonable ground and leads to impairment of the right to legal remedies, right to a fair trial and the principle of the state of law by means of hindering the establishment of material facts.

The Constitutional Court has consequently concluded that the provision in dispute is in breach of Articles 2, 13 and 36 of the Constitution and decided to annul it.

The Constitutional Court has noted that the executive power is entrusted to the President of the Republic and the Council of Ministers and that, as per Article 8 of the Constitution, this power and duty shall be exercised and performed in accordance with the Constitution and the laws. The Court has accordingly stated that it could not be inferred from the general and abstract nature of the legal arrangement that the Council of Ministers has been granted the authority to vest the MIT with a duty which may be considered to be illegal.

In the other provision which is in dispute, it is set out that the MIT shall perform the duties entrusted to it by the Council of Ministers.

In the petition submitted to the Constitutional Court, it has been briefly maintained that in pursuance of this provision, the MIT has been entrusted by the Council of Ministers with the duties concerning the foreign security, counter terrorism and national security. However, scope and boundaries of these duties entrusted by the Council of Ministers are not set in the provision, which leads to legal uncertainty and arbitrariness in practice. It has been therefore alleged that the provision in dispute is in breach of the principle of the state of law set out in Article 2 of the Constitution.

In the Constitutional Court's opinion, one of the fundamental principles of the state of law is *"certainty"*. According to this principle, legal arrangements must be clear, explicit, comprehensible, applicable and objective so as not to lead to any hesitation and doubt in respect of both the individuals and the administration and must not also allow for arbitrary practices of the public authorities.

The Constitutional Court has emphasized that the provision in dispute sets out that the MIT shall perform the duties to be entrusted by the Council of Ministers and limits these duties to only matters with regard to foreign security, counter-terrorism and national security. The Court has therefore observed that scope, limits and nature of the duties to be entrusted are set forth in an explicit, comprehensible and applicable manner which would not cause any doubt in respect of the individuals and the administration.

The Court has further stated that the phrase *"duty"* included in the contested provision and the phrases *"foreign security", "counter-terrorism"* and *"national security"* used therein to define the scope of the duty are abstract and general concepts; however it does not mean that the provision is uncertain, and it is caused by the very nature of the law-making technique. It has indicated that the general and abstract nature of law provisions arise from the need for being capable of encompassing all solutions which may vary by the characteristics of each concrete case; in other words, the need for preventing the provision from being lack of any solution which would enable it to attain the pursued aim.

On the other hand, the Constitutional Court has referred to Article 117 of the Constitution, which sets out that *"the Council of Ministers shall be responsible to the Grand National Assembly of Turkey for national security and...",* and underlined in this respect that it is natural that the Council of Ministers, which is liable to ensure national security, is authorized to entrust the MIT with duties with regard to national security and *"foreign security"* and *"counter-terrorism"* that are directly related to the national security in order to fulfil its obligations imposed by virtue of the Constitution.

The Constitutional Court has noted that the executive power is entrusted to the President of the Republic and the Council of Ministers and that, as per Article 8 of the Constitution, this power and duty shall be exercised and performed in accordance with the Constitution and the laws. The Court has accordingly stated that it could not be inferred from the general and abstract nature of the legal arrangement that the Council of Ministers has been granted the authority to vest the MIT with a duty which may be considered to be illegal.

Consequently, the Constitutional Court has reached the conclusion that the provision

in dispute is not in breach of Article 2 of the Constitution and decided to reject the request for annulment thereof.

> **In the Constitutional Court's opinion, it is under the legislator's discretionary power to adopt a different type of investigation to be conducted in respect of the MIT members to enable them to perform their duties, in pursuance of its penal policy, prescribed by laws in the best and effective manner and to prevent the duties and activities which are concerning the national security and are required to be kept confidential from being disclosed and to prevent the services from being disrupted. Therefore, the provision in dispute does not constitute any contradiction to the principles of the state of law and the equality before the law.**

In the first sentence of Article 26 § 2 of the Law no. 2937, it is set forth that the public prosecutors shall inform the Undersecretariat of the MIT of any notice or complaint concerning the duties and activities performed by the MIT and its members when they receive such notice or complaint or they become aware of such situation. In the second sentence therein, which is in dispute, it is set out that in case the Undersecretariat of the MIT specifies and certifies that the subject-matter of the notice or complaint is concerning its duties and activities, any other judicial action shall not be taken and any security measure shall not be applied in respect thereof.

In the petition submitted to the Constitutional Court, it has been briefly maintained that the provision in dispute has abolished the public prosecutors' authority to conduct investigations and to bring a criminal case with regard to the acts and activities notified to fall into scope of the MIT's duties and activities, which is in breach of the principle of the state of law. It has been also stated that this provision grants the MIT a privilege which is not held by any other person and institution, which impairs the principle of equality. It has been also alleged that excluding the acts and actions which fall into the scope of the MIT's duties and activities from the judicial review breaches the constitutional provision which envisages that all acts and actions performed by the administration must be subject to judicial review. For these reasons, it has been maintained that the provision in dispute is contrary to Articles 2, 10 and 125 of the Constitution.

In the Constitutional Court's opinion, the provision in dispute pertains to the task-related offences and does not include any arrangement concerning personal offences, which are outside the scope of their duties and committed by the MIT members. However, it must be taken into account that making a distinction between the task-related offences and personal offences committed by the MIT's members is difficult compared to those committed by other public officials due to the fact that many of the duties performed by the MIT are confidential in nature, and it is not possible for those other than the MIT's officials to know these confidential duties. It has been inferred from the wording of the provision and the legislative intent of the article that the provision allows for the special procedure of investigation on account of such nature of the MIT's

duties and activities; and that it is thereby intended to prevent disclosure or hindrance of the MIT's duties and activities that are required to be kept confidential by virtue of national security.

The Constitutional Court has observed that adoption of this procedure leads to inclusion of personal offences committed by the MIT's members in the scope of task-related offences; that the procedure prescribed by the Law for a certain legal concern may be applied in another field which is not foreseen by this procedure; and that it may be accordingly considered that this may lead to arbitrariness in practice. However, the Court has noted in this respect that the Law includes legal guarantees which would avoid occurrence of such risk; and that necessary measures have been taken for, on one hand, avoiding the disclosure of the MIT's duties and activities required to be kept confidential and for, on the other hand, preventing this arrangement from leading to arbitrariness.

In this context, the Constitutional Court has specified in its judgment that it cannot be expected from any public institution in a democratic state of law to give an impression that personal offences committed by its members are a task-related offence. The Court has accordingly added that even if the MIT makes its member's personal offence perceived as a task-related offence, the public prosecutor's authority to conduct an investigation concerning the relevant member is not revoked. It has also stated that where the Prime Minister is requested to grant permission for investigation concerning an act informed to be a task-related offence pursuant to the *in fine* of Article 26 § 2 of the Law no. 2937 and the Prime Minister does not grant permission for investigation by considering the act as a task-related matter, it is possible to have recourse to the administrative remedies in respect thereof. It has been therefore indicated that such review of the Prime Minister and the subsequent judicial review have provided the necessary guarantee which is capable of preventing the acts falling into scope of personal offences from being considered to fall into scope of task-related offences.

In the Constitutional Court's opinion, it is under the legislator's discretionary power to adopt a different type of investigation to be conducted in respect of the MIT members to enable them to perform their duties, in pursuance of its penal policy, prescribed by laws in the best and effective manner and to prevent the duties and activities which are concerning the national security and are required to be kept confidential from being disclosed and to prevent the services from being disrupted. Therefore, the provision in dispute does not constitute any contradiction to the principles of the state of law and the equality before the law.

On the other hand, this legal arrangement does not exempt the acts and activities falling into the MIT's scope of duty from the judicial review; because the provision, which stipulates that an investigation in respect of the said persons may only be conducted upon permission, does not result in the conclusion that the offences committed by these persons shall be exempted from the judicial review.

Consequently, the Constitutional Court has concluded that the provision in dispute is not in breach of Articles 2, 10 and 125 of the Constitution and decided to reject the request for annulment of this provision.

II- LEADING JUDGMENTS RENDERED BY THE CONSTITUTIONAL COURT IN THE INDIVIDUAL APPLICATION PROCESS

The Constitutional Court rendered many judgments in 2015 in the individual applications lodged with the Court with regard to many constitutional rights such as the right to life, the obligation to protect life within the framework of the right to life, to obligation to conduct an effective investigation, the right to be informed before medical treatment, the practice of compulsory vaccination within the framework of the inviolability of physical integrity, the prohibition of torture and ill-treatment, the prohibition of treatment incompatible with human dignity, the right to liberty and security of person, the confidentiality of private life, the right to respect for family life, the right to request protection of honour and dignity, the prohibition of discrimination, the freedom of communication, the freedom of expression, the freedom of the press, the right to hold meetings and demonstrations, the freedom of religion and conscience, the rights to elect, to be elected, to carry out political activity and the right to political organization, the right to establish trade unions, the right to property and the right to a fair trial.

The judgments of *Mehmet KAYA and Others* and *"Meral EŞKİLİ"* are ones of the leading judgments which were rendered by the Court with regard to the right to life. The judgments of *"Adem ÜLGEN and Others"* and *"Mehmet DEMİR and Others"* are those rendered by the Court with regard to the obligation to protect life whilethe judgments of *"Filiz AKA"*, *"İlker BAŞER and Others"*, *"Fahriye ERKEK and Others"*, *"Mehmet KARABULUT"* and *"Yavuz DURMUŞ and Others"* are the ones rendered with regard to the obligation to conduct an effective investigation within the scope of the right to life.

Moreover, the judgments of *"Ahmet ACARTÜK"* and *"Halime Sare AYSAL"* are the leading judgments rendered by the Constitutional Court in 2015 respectively under the right to be informed before medical treatment and the practice of compulsory vaccination within the scope of the inviolability of the physical integrity.

The leading judgments rendered with regard to the prohibition of torture and ill-treatment are the judgments rendered in the individual applications of *"Şenol GÜRKAN"*, *"Hüseyin CARUŞ"*, *"Arif Haldun SOYGÜR"* and *"Hamdiye ASLAN"*.

The judgments of *"K. A."* and *"Mete Dursun"* are the ones rendered by the Court within 2015 within the scope of the prohibition of treatment incompatible with human dignity.

The judgments of *"Hikmet KOPAR and Others"*, *"Yavuz PEHLİVAN and Others"*, *"Doğu PERİNÇEK, Hikmet ÇİÇEK, Hasan Atilla UĞUR"*, *"Hidayet KARACA"* and *"İzzettin ALPERGİN"* may be set an example for the judgments rendered by the Court with regard to the right to liberty and security of person within the last year.

Furthermore, out of the judgments rendered in 2015, the judgments of *"Serap TOR-*

TUK" and *"Ata TÜRKERİ"* are the ones rendered with regard to the confidentiality of private life; the judgments of *"Hayriye ÖZDEMİR"* and *"Marcus Frank CERNY"* are the ones rendered in the field of the right to respect for family life; the judgments of *"Nurettin POLAT"* and *"Fetullah GÜLEN"* are the ones rendered by the Court with regard to the right to request protection of honour and dignity; the judgment of *"Gülbu ÖZGÜLER"* is a leading judgment in the prohibition of discrimination and the judgment of *"Esra Nur ÖZBEY"* is the one rendered with regard to the freedom of religion and conscience.

The outstanding judgments rendered with regard to the freedom of communication are the judgments of "*Mehmet Koray ERYAŞA*", *"Eren YILDIZ"* and *"Mehmet Seyfi OKTAY"*.

The outstanding judgments rendered within the same period by the Constitutional Court with regard to the freedom of communication are the judgments of *"Tuğrul CULFA"*, *"Kamuran Reşit BEKİR"*, *"Mehmet Ali AYDIN"*, *"Ali Rıza ÜÇER", "Tansel ÇÖLAŞAN"*, *"Radyo V. Y. A.Ş."* ve *"Ergun POYRAZ"* while the judgments of *"Bekir COŞKUN"* and *"Medya Gündem Dijital Gündem Yay. Tic. A.Ş."* are the leading judgments rendered in respect of the freedom of the press as well as the freedom of expression.

Moreover, the judgments of *"Ali Rıza ÖZER and Others"* and *"Osman ERBİL"* are the ones rendered by the Court under the right to hold meetings and demonstrations while the judgments of *"Metin BAYYAR and the People's Liberation Party"*, *"Atila SERTEL and Oğuz OYAN"* and *"the Grand Unity Party and the Felicity Party"* are the ones rendered by the Court with regard to the rights to elect, to be elected, to carry out political activities and the right to political organization in 2015.

Other leading judgments of the Constitutional Court rendered in 2015 are the judgment of *"Kristal-İş Union"* with regard to the right to union; the judgment of *"Servet SARAÇOĞLU and Others"* with regard to the right to property; the judgments of *"Yankı BAĞCIOĞLU and Others", "Ahmet SAYGILI and Şefika SAYGILI"*, *"Abdulselam TUTAL and Others"*, *"Baran KARADAĞ"*, *"Nurten ESEN"*, *"Deniz SEKİ"* and "*Aligül ALKAYA and Others"* with regard to the right to a fair trial;

A) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO LIFE

1- Judgment of Adem ÜLGEN and Others (Application No: 2013/6581)

> **In pursuance of the basic approach pursued by the Constitutional Court in respect of the state's positive obligations under the right to life, Article 17 of the Constitution requires the state, in the incidents of deaths for which the state may be held responsible, to take effective administrative and judicial measures which would ensure properly implementation of legal and administrative framework, which has been created in respect thereof, for the protection of those whose lives are under threat and which would, at the same time, ensure the elimination and penalization of the violations of the right to life by means of using all the facilities in its possession. This obligation is applicable to all kinds of activities, regardless of public or not, under which the right to life may be impaired, and the hazardous activities that are performed with a view to maintaining public security fall into the scope of this obligation. In this respect, the right to life also imposes the task of taking preventive measures for the protection of the individuals within its jurisdiction on the State.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 25/2/2015, the applicants Adem Ülgen, Ahmet Ülgen and Hanım Ülgen lodged an individual application with the Court as they had been wounded as a result of a mine explosion. The 12 year-old applicant, Adem Ülgen, who was feeding beasts around the mined terrain close to the military unit located at the Turkey – Syria border, entered into the mined terrain by following the sheep herd together with his friend. Adem Ülgen and two of his friends got wounded as a result of the mine explosion. Thereupon, the applicants brought an action for compensation for pecuniary and non-pecuniary damage against the Ministry of National Defence. The action for compensation was rejected on the ground that *"the complainants' son, who entered into the terrain known to be a mined field and having warning boards and wire fences around it and who fiddled around with the mine by his pocket-knife, and his parents, who did not properly fulfil their obligation to take care of and protect their son, have been proven to be fully negligent in respect of the incident taking place. Holding the administration liable for the damage suffered and awarding compensation against the administration would not be legally justified."*

The applicants have maintained that the incident of mine explosion took place as the necessary measures were not taken and as a result, the applicant, Adem Ülgen, got wounded. They have also alleged that the action for compensation brought by them was not concluded within a reasonable time.

According to the Constitutional Court, which primarily examined the individual application under the right to life, the right to life and the right to protect individual's material and

spiritual entity are inalienable and irrevocable rights which are closely interrelated and these rights impose positive and negative obligations on the state. In this respect, the state has a negative obligation not to end the life of any individual within its jurisdiction in an intentional and unlawful manner, as well as the positive obligation to protect the right to life of all individuals within its jurisdiction from all risks likely to result from the acts of the public authorities, other individuals and also the individual's own acts.

In pursuance of the basic approach pursued by the Constitutional Court in respect of the state's positive obligations under the right to life, Article 17 of the Constitution requires the state, in the incidents of deaths for which the state may be held responsible, to take effective administrative and judicial measures which would ensure properly implementation of legal and administrative framework, which has been created in respect thereof, for the protection of those whose lives are under threat and which would, at the same time, ensure the elimination and penalization of the violations of the right to life by means of using all the facilities in its possession. This obligation is applicable to all kinds of activities, regardless of public or not, under which the right to life may be impaired, and the hazardous activities that are performed with a view to maintaining public security fall into the scope of this obligation. In this respect, the right to life also imposes the task of taking preventive measures for the protection of the individuals within its jurisdiction on the State.

In the present incident, the Constitutional Court has stated that the anti-personnel mines which led to the wounding of the first applicant were planted with a view to protecting the Ziyaret Border Police Station which is located at the Turkey – Iran border. The letter of the relevant administration, which is included in the case-file of the individual application no. 2013/6585 lodged with the Court by Salih Ülgen, one of the children wounded in the explosion, provides the following information: The mined terrain is not used by the local residents as a pastureland, and animals are fed in the regions which are at least 100 meters away from the border of the mined terrain. The mined terrain is surrounded with barbed wire of one meter in height, and there are warning boards which indicate that the relevant terrain is planted with mines. The local community has been informed of the mines terrains. The necessary instructions thereof have been served on them, and those who are around these terrains to carry out activities on their own lands or feed their animals have been informed of the mined terrains.

The Constitutional Court has emphasized that the measures informed to be taken by the authorities and warnings of the sentry did not prevent the applicant and his friends, who may not be expected to behave as an adult aware of their responsibilities from entering into the mined terrain; and that even the sheep herd climbed over the wire fences. Taking into account these findings and considerations, the Constitutional Court has reached the conclusion that the security measures required to be taken for the prevention of the occurrence of a such mine explosion, as a result of which the application Adem Ülgen got wounded, were not at the adequate level in the present incident. Accordingly, the Court has held that there has been a breach of the right to life guaranteed under Article 17 of the Constitution.

On the other hand, the Constitutional Court has emphasized that the measures informed to be taken by the authorities and warnings of the sentry did not prevent the applicant and his friends, who may not be expected to behave as an adult aware of their responsibilities from entering into the mined terrain; and that even the sheep herd climbed over the wire fences. Taking into account these findings and considerations, the Constitutional Court has reached the conclusion that the security measures required to be taken for the prevention of the occurrence of a such mine explosion, as a result of which the application Adem Ülgen got wounded, were not at the adequate level in the present incident. Accordingly, the Court has held that there has been a breach of the right to life guaranteed under Article 17 of the Constitution.

On the other hand, having examined the individual application with regard to the right to a fair trial, the Constitutional Court has observed that the action for compensation brought for indemnification of pecuniary and non-pecuniary damages is not complex in nature and in number of the persons involved therein. The Court has accordingly held that the judicial proceedings lasting for six years and seven months was not concluded within a reasonable time. The Constitutional Court has consequently held that there has been a breach of the right to a fair trial guaranteed under Article 36 of the Constitution.

2- Judgment of Mehmet KAYA and Others (Application No: 2013/6979)

> **Within the framework of the basic approach adopted by the Constitutional Court with regard to the positive obligations incumbent on the state, the Court has noted that under certain special conditions, the state is also obliged 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. It has been also indicated that in order to mention of such an obligation, which is also applicable for the death incidents taking place in the prisons, it must be primarily ascertained whether the prison officers have been aware of or ought to be aware of the real risk that a person under their control may kill himself, and if there is such a risk, it must be examined whether they have performed all necessary acts and actions expected from them for elimination of this risk within the framework of reasonable limits and within the scope of their powers.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 20/5/2015, Erkan Kaya, who is the son of two of the applicants and brother of the remaining ones, set his bed on fire in the room where he was placed in the prison as a convict on 7/1/2013. After his bed had started burning, his body was exposed to burn diseases. Thereupon, Erkan Kaya was immediately taken to the hospital by the prison officers; but on 19/1/2013 he died in the hospital to which he was referred.

The Chief Public Prosecutor's Office initiated an *ex officio* investigation into this incident. The applicants intervened in this investigation as the complainants. In the witness statements taken within the scope of the investigation, it has been noted that the deceased had psychological problems and had previously performed similar acts of setting fire.

On 8/5/2013, the Chief Public Prosecutor's Office gave a decision for non-prosecution by taking into account the facts that the prison officers had responded to the fire in a short time and took the fire under control; that there was no negligence or delay which was attributable to the institution personnel in the incident taking place; and that the applicant died of burns on his body and acute pneumonia which developed as a complication thereof. The objection made by the applicants to the decision for non-prosecution was rejected.

The applicants have maintained that their next-of-kin died as the officers had failed to take the necessary measures although he had suffered physiological problems and had previously caused such acts of setting fire. They have also alleged that the guardians ill-treated and tortured the deceased; however, an investigation was not initiated against the officers who had ill-treated the deceased, and the decision for non-prosecution was rendered in respect of the officers who caused his death by their negligence. Accordingly, the applicants have alleged that there has been a breach of the right to life, the prohibition of ill-treatment and torture, the right to a fair trial and the right to an effective remedy.

The Constitutional Court primarily examined the allegations that the applicants' next-of-kin had been exposed to torture or ill-treatment in the prison and has concluded that there is no adequate evidence capable of substantiating these allegations; and that the applicants' allegations under Article 17 § 3 of the Constitution are comprised of abstract and unproven complaints. The Court has accordingly declared this part of the individual application inadmissible.

The allegations asserted within the scope of the right to life were examined in its substantive aspect. Within the framework of the basic approach adopted by the Constitutional Court with regard to the positive obligations incumbent on the state, the Court has noted that under certain special conditions, the state is also obliged 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. It has been also indicated that in order to mention of such an obligation, which is also applicable for the death incidents taking place in the prisons, it must be primarily ascertained whether the prison officers have been aware of or ought to be aware of the real risk that a person under their control may kill himself, and if there is such a risk, it must be examined whether they have performed all necessary acts and actions expected from them for elimination of this risk within the framework of reasonable limits and within the scope of their powers.

Having assessed the present incident, the Constitutional Court has observed that the deceased displayed aggressive behaviours during the last six months he stayed in the prison; that as he had problems with the prison officers and other prisoners, he received several punishments and the wing where he stayed was changed; that he was receiving medical treatment due to physiological disorders he suffered within the same period of time; and that in August 2012, he once again attempted to set his bed on fire. Taking into account these considerations, the Constitutional Court has concluded that it must be acknowledged that the prison authorities were aware of or, at least, ought to be aware of

The Court has paid regard to the facts that the place where Erkan Kaya, who had stayed in the prison, was decided on the basis of his own appreciations; that he had only received drug treatment due to his physiological disorders; that there is no information indicating that an assessment as to the type and place of his treatment was made by and between the prison's administrative personnel and relevant doctors serving in the prison and other institutions by taking into account the degree of disorder suffered by the convict; and that the prison officers failed to prevent the convict from finding a lighter in order to set his bed on fire, the act which he had previously attempted. Having regard to the foregoing conditions as a whole, the Constitutional Court has concluded that the prison officers did not take necessary measures for the prevention of Erkan Kaya's death within the framework of their duties and powers and, thereby, the obligation to protect life was breached in the present case.

the facts that the deceased should have been kept under custody in a more severe manner and that there was a risk in respect of the deceased to harm or kill himself or other persons in the prison.

In this regard, the Court has stated that the prison officers may be expected to take measures which would minimize the possibility of a detainee's or convict's causing harm to himself, regardless of his own will, in the matters as to keeping his state of health under control and determining the place where he would stay as per the relevant legislation.

The Court has paid regard to the facts that the place where Erkan Kaya, who had stayed in the prison, was decided on the basis of his own appreciations; that he had only received drug treatment due to his physiological disorders; that there is no information indicating that an assessment as to the type and place of his treatment was made by and between the prison's administrative personnel and relevant doctors serving in the prison and other institutions by taking into account the degree of disorder suffered by the convict; and that the prison officers failed to prevent the convict from finding a lighter in order to set his bed on fire, the act which he had previously attempted. Having regard to the foregoing conditions as a whole, the Constitutional Court has concluded that the prison officers did not take necessary measures for the prevention of Erkan Kaya's death within the framework of their duties and powers and, thereby, the obligation to protect life was breached in the present case.

The Court secondly examined the investigation conducted into the incident within the scope of the right to life. It has accordingly noted that the state's failure to conduct an effective investigation for ascertaining the cause of death in case of each unnatural death and, if any, for identification of those responsible for the death may result in breach of the obligation to conduct an effective investigation. The Court has underlined that conducting an effective investigation into the death incidents constitutes the guarantee for the implementation of the legal and administrative framework established for the protection of the right to life.

Accordingly, the Constitutional Court has pointed out that, as a fundamental principle,

in order to render an investigation to be conducted within the scope of the right to life effective and sufficient, the investigation authority must take an action *ex officio,* and all evidence capable of revealing the death incident and identifying those who are responsible for the death must be collected. For the same reasons, there must be a sufficient element of public scrutiny of the criminal investigation or its results to secure accountability in practice as well as in theory, and the next-of-kin of the deceased must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

In the light of the foregoing explanations, the Constitutional Court has concluded that as the judicial investigation conducted into the incident dealt with and made an assessment only as to whether there had been any negligence on the part of the prison authorities in responding to the fire taking place, all aspects of the incident giving rise to death could not be revealed; those who were responsible could not be identified and the next-of-kin of the deceased were not enabled to involve in the procedure to the required extent to safeguard his or her legitimate interests. Consequently, the Court has held that there has been a breach of the obligation to conduct an effective investigation within the scope of the right to life.

3- Judgment of Filiz AKA (Application No: 2013/8365)

> **As a fundamental principle, the Court has indicated that in order to render an investigation to be conducted within the scope of the right to life effective and sufficient, the investigation authority must take an action *ex officio,* and all evidence capable of revealing the death and identifying those who are responsible for the death must be collected. For the same reasons, the investigations to be conducted must be concluded with a reasonable expedition. The Court has also noted that the State must not allow for the impunity of acts which clearly jeopardize the life and of the severe attacks against the individual's material and spiritual entity on condition of taking into account the specific conditions of the present case.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 10/6/2015, the applicant's husband died on 12/2/2005 as a result of the accident in which a vehicle driven by a person whose driving license had been previously suspended for drunk driving and who was also drunken and was driving his vehicle far above the speed limit and run the red light at the relevant time collided with a commercial taxi in which the applicant's husband was.

The Chief Public Prosecutor's Office initiated an *ex officio* investigation into the accident and, on 15/2/2005, brought an action against those who had caused the accident with the allegation that they gave rise to the death of one person and the injury of another person by imprudence. The applicant involved in this action as an intervening party.

The applicant has maintained that the action brought against the person who had caused the death of her husband was decided to be discontinued at the end of the period lasting

for 8 years and 1 month, and therefore, her right to a fair trial was breached in the present incident.

The Constitutional Court associated the applicant's allegation with Article 17 of the Constitution and examined the individual application in respect thereof.

The Court has primarily emphasized that the state's failure to conduct an effective investigation capable of revealing the cause of death even if not caused by the State itself and, if any, identifying those who are responsible may result in a breach of the obligation to conduct an effective investigation.

As a fundamental principle, the Court has indicated that in order to render an investigation to be conducted within the scope of the right to life effective and sufficient, the investigation authority must take an action *ex officio,* and all evidence capable of revealing the death and identifying those who are responsible for the death must be collected. For the same reasons, the investigations to be conducted must be concluded with a reasonable expedition. The Court has also noted that the State must not allow for the impunity of acts which clearly jeopardize the life and of the severe attacks against the individual's material and spiritual entity on condition of taking into account the specific conditions of the present case. In this context, another significant issue that must be dealt with is to determine whether an examination has been made in the course of the proceedings with due diligence, as required by Article 17 of the Constitution. The sensitivity to be displayed in this matter shall prevent the judicial system's role in the prevention similar incidents likely to occur afterwards from being tarnished.

In the instant case, necessary actions were carried out with due diligence at the investigation and prosecution stages. The appeal procedure in respect of the first instance decision was concluded within approximately two years and five months, and the first instance decision was quashed only on the ground that there was a fault in the application of the provisions set out in Article 53 of the Turkish Criminal Code no. 5237 and entitled *"being deprived of enjoying certain rights".* In the course of the trial conducted subsequent to the quashing of the decision, the first instance court reached the same conclusion. Thereupon, at the end of the appellate review lasting for two years and five months, it was decided on 11/3/2013 that the action in question be discontinued for being time-barred.

Indicating that the proceedings, which lasted for more than eight years on account of the delays in the appeal procedure, is not capable of – regardless of the outcome of the decision taken - maintaining the applicant's and, in general, the society's confidence in the rule of law by taking into account the benefit in rapid conclusion of the legal actions, the Constitutional Court has emphasized that this may give the impression that illegal acts and actions have been tolerated or ignored.

> **In the Court's opinion, in the present application, apart from the excessive length of the total period of proceedings, giving a decision for discontinuance of the action which is directly related to the prolongation of the proceedings and in a manner so as to remove the means of reaching a precise conclusion has led to the impunity of an act which is explicitly alleged to pose a threat to an individual's life.**

In the Court's opinion, in the present application, apart from the excessive length of the total period of proceedings, giving a decision for discontinuance of the action which is directly related to the prolongation of the proceedings and in a manner so as to remove the means of reaching a precise conclusion has led to the impunity of an act which is explicitly alleged to pose a threat to an individual's life.

Consequently, the Constitutional Court has held that there has been a breach of the right to life guaranteed under Article 17 of the Constitution by paying regard to the applicant's interest in rapid and effective conclusion of the action in the course of the proceedings and to the fact that this action, which is not complex in nature, was concluded by a decision for discontinuance of the action at the end of the period over eight years for certain reasons that did not result from the applicant.

4- Judgment of İlker BAŞER and Others (Application No: 2013/1943)

The Constitutional Court has noted, with regard to the allegations of violation caused by medical negligence, that the relevant party could no longer claim to have victim status in respect of the constitution if the administrative authorities and first instance courts find a violation by means of taking any action or decision in favour of the applicants and this violation is indemnified in an appropriate and sufficient manner by the decision taken. On condition that these two requirements are fulfilled, there would be no need for the review by the Constitutional Court due to the subsidiary nature of the individual application mechanism. The Court has concluded that in the present case, the applicants had at their disposal an administrative remedy which found a violation in respect of the complaints concerning the obligation to protect life and awarded a reasonable amount of compensation paying regard to the certain principles, and thereby, the applicants' victim status has been removed.

In the present incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 9/9/2015, Meliha Başer, whose medical controls during her pregnancy were conducted by a healthcare facility in Ankara, gave birth to İlker Başer on 5/11/2002. Upon observing that the baby displayed abnormal behaviours during the postpartum period, it was diagnosed that the baby was born with a birth defect called "agenesis of the corpus callosum".

The action brought by the applicants for pecuniary and non-pecuniary damages against the Ministry of Health and the physician before the Civil Court of First Instance was dismissed. Thereupon, the applicants brought a full remedy action against the Ministry of Health, and on 4/2/2013, the Administrative Court awarded the applicants pecuniary damage and non-pecuniary damage on the grounds that tests and treatments performed in the hospital were not carried out with due diligence and care and that there was deficiency in delivery of the medical service.

The applicants have stated that the pregnancy could have been terminated if the physician had made the right diagnosis when the fact that the birth defect, "agenesis of the corpus callosum", could continue developing until 20th week of pregnancy and dimension of the defect were taken into consideration; however, as this diagnosis was not made due to the physician's negligence, the baby was born with a birth defect. They have accordingly alleged that the right to life and the right to protect the individual's material and spiritual entity were violated. They have also alleged that their right to a fair trial was violated by stating that the decision rendered in respect of the actions for pecuniary and non-pecuniary damages they brought thereupon included contradictions; that the judgment of the Court of Cassation was unreasoned; that their request for holding a hearing was not taken into account; and that the action for compensation they had brought was concluded within a period of more than 7 years.

In the Constitutional Court's opinion, in pursuance of the right to life enshrined in Article 17 of the Constitution, the State has a negative obligation not to intentionally and unlawfully end the life of any individual within its jurisdiction as well as a positive obligation to protect the right to life of all individuals within its jurisdiction against the risks likely to result from acts of public officials, other individuals or the individual himself. These obligations may be, under certain circumstances that must be separately considered for each case, attributed to the state even if there is no loss of life in the relevant case. In this respect, where the state has not taken measures likely to prevent an individual's life from undergoing a direct risk or from being exposed to third parties' acts which could potentially cause his death or to any fatal disease, the obligations to protect the individual's life and, in conjunction thereof, to conduct an effective investigation into the acts and negligence alleged to have led to this incident may arise in respect of the state even if there is no loss of life.

The Constitutional Court has noted, with regard to the allegations of violation caused by medical negligence, that the relevant party could no longer claim to have victim status in respect of the constitution if the administrative authorities and first instance courts find a violation by means of taking any action or decision in favour of the applicants and this violation is indemnified in an appropriate and sufficient manner by the decision taken. On condition that these two requirements are fulfilled, there would be no need for the review by the Constitutional Court due to the subsidiary nature of the individual application mech-

The applicants' complaint that their trial proceedings were not finalized within a reasonable time period, which has been asserted by them within the scope of right to a fair trial, was reviewed by the Constitutional Court under the scope of the obligation to conduct an effective investigation as required by Article 17 of the Constitution. The Constitutional Court has noted, in respect of the alleged violations caused by medical negligence, that being aware of the negligent acts performed at the health institutions is of great importance as it enables these institutions and the medical personnel to eliminate their potential deficits and to prevent recurrence of similar negligent acts. Therefore, conducting speedy investigations into and trials concerning such kinds of incidents is extremely important for all individuals receiving medical services.

anism. The Court has concluded that in the present case, the applicants had at their disposal an administrative remedy which found a violation in respect of the complaints concerning the obligation to protect life and awarded a reasonable amount of compensation paying regard to the certain principles, and thereby, the applicants' victim status has been removed.

The applicants' complaint that their trial proceedings were not finalized within a reasonable time period, which has been asserted by them within the scope of right to a fair trial, was reviewed by the Constitutional Court under the scope of the obligation to conduct an effective investigation as required by Article 17 of the Constitution. The Constitutional Court has noted, in respect of the alleged violations caused by medical negligence, that being aware of the negligent acts performed at the health institutions is of great importance as it enables these institutions and the medical personnel to eliminate their potential deficits and to prevent recurrence of similar negligent acts. Therefore, conducting speedy investigations into and trials concerning such kinds of incidents is extremely important for all individuals receiving medical services.

The Constitutional Court has therefore held that the period of proceedings, as a whole, which lasted for approximately ten years before civil and administrative judiciary was excessively long and during the proceedings, speedy and sufficient examinations were not carried out as required by Article 17 of the Constitution by taking to account the applicants' interest in finalization of the proceedings before civil and administrative courts in a speedy and efficient manner, the applicants' having no substantial role in the delay taking place and not very complex nature of the action brought.

Having regard to the established case-law of the Constitutional Court, the remaining part of the complaints maintained by the applicants within the scope of the right to a fair trial have been found to be manifestly ill-founded.

5- Judgment of Fahriye ERKEK and Others (Application No: 2013/4668)

The aim of the criminal investigations conducted within the scope of the right to life is to ensure effective application of the provisions set out in the legislation protecting the right to life and ensure those who are responsible to account for the death of the relevant person. It is an obligation of means, and not one of result.

In the present incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 16/9/2015, M.E., who was born in 1979 and is son of the applicant Fahriye Erkek and brother of other applicants, was residing at the same domicile with the applicants at the relevant time.

While the applicants and M.E. were living in their village in Diyarbakır in 1990s, they immigrated to the province of Izmir and continued living there as they were subject to oppression of and threatened by a terrorist organization carrying out armed activities in the region and during those times for aiding or joining to this terrorist organization.

On 10/10/2011, at the morning hours, M.E. left the house where he lived together with the

applicants by saying his family members that he would look for a job. As from that time, any information could not be heard of his whereabouts. After the applicants had reported this incident to the law enforcement officers, an investigation was initiated concerning this incident by the Chief Public Prosecutor's Office. Within the scope of the investigation conducted, M.E. was started to be sought. On 18/12/2011, M.E. was found to be hung on a tree on a forestland.

At the end of the investigation, the Chief Public Prosecutor's Office gave a decision for non-prosecution by concluding that M.E. died as he had committed suicide.

The applicants have maintained that an effective investigation was not conducted into the death of their next-of-kin as the investigation authority was prejudiced that the death had occurred on account of suicide.

In the Constitutional Court's opinion, in case an unnatural death takes place, the State is liable to investigate the causes of death and identify and punish those who are responsible within the scope of the right enshrined in Article 17 of the Constitution. In the event that this procedural obligation is not fulfilled, it could not be ascertained whether the state's negative and positive obligations under the right to life have been fulfilled or not. Therefore, the obligation to conduct an effective investigation constitutes the guarantee for the state's obligations within the scope of the right to life.

The aim of the criminal investigations conducted within the scope of the right to life is to ensure effective application of the provisions set out in the legislation protecting the right to life and ensure those who are responsible to account for the death of the relevant person. It is an obligation of means, and not one of result.

The obligation to conduct an investigation does not mean that every investigation must reach a conclusion that is compatible with the statements of the victims. Indeed, in principle, the investigation must be capable of ascertaining the conditions under which the incident has taken place and leading to identification and punishment of those who are responsible if the allegations are proven to be true. Any deficiency which undermines the probability of ascertaining the cause of death or identifying those who are responsible may constitute a contradiction to the obligation to conduct an effective investigation.

The Court has pointed out that, in spite of the applicants' allegations that their next-of-kin might have been killed by a third person and specific circumstances of the incident, any step was not taken for investigation of these allegations in the course of the investigation

The Court has pointed out that, in spite of the applicants' allegations that their next-of-kin might have been killed by a third person and specific circumstances of the incident, any step was not taken for investigation of these allegations in the course of the investigation conducted into the present incident; and that instead of taking all reasonable measures likely to be taken for the collection of all evidence thereof, including the examinations to be conducted by the experts concerning the incident, the investigation authority ignored the probabilities and allegations concerning the incident since the very beginning of the investigation stage.

conducted into the present incident; and that instead of taking all reasonable measures likely to be taken for the collection of all evidence thereof, including the examinations to be conducted by the experts concerning the incident, the investigation authority ignored the probabilities and allegations concerning the incident since the very beginning of the investigation stage.

The Constitutional Court has considered that the negligence displayed within the scope of the investigation was caused by the prejudice that the death had resulted from suicide. It has been accordingly underlined that in the investigation in dispute, there are certain deficiencies which undermine the opportunity for revealing of the cause of death and if any, identification of those who are responsible and which may have significant influence on the deepening of the investigation in this respect.

Consequently, the Constitutional Court has held that there has been a breach of the right to life guaranteed under Article 17 of the Convention under its procedural aspect for failure to conduct an effective investigation.

6- Judgment of Mehmet DEMİR and Others (Application no: 2013/1579)

> **The Court has noted that the positive obligation is to be interpreted in such a way so as not to impose an excessive burden on the authorities; and that for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual; and that, if so, they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 15/10/2015, the applicants' next-of-kin, Evin Demir and Şilan Demir, died as a result of the explosion of a bomb placed by terrorists nearby the wall of the Koşuyolu Park in Diyarbakır on 12/9/2006.

As a result of the investigation initiated into this incident, a legal action was brought against three accused persons before the Assize Court on the basis of the bill of indictment of the Chief Public Prosecutor's Office dated 9/6/2009. It was requested in the indictment that the accused persons be sentenced for the offences of disrupting the unity and territorial integrity of the state, intentional killing, attempted intentional killing, unauthorized possession or transfer of hazardous materials and causing damage to property. On 17/5/2012, at the end of the proceedings, the Assize Court sentenced the accused persons to imprisonment for various terms for the above-mentioned offences.

The applicants lodged an application with the administration, pursuant to the Law no. 5233 on the Compensation of the Damages Resulting from Terrorism and the Fight against Terrorism, for the pecuniary and non-pecuniary damage they suffered due to the death of Şilan Demir and Evin Demir. By its decision dated 18/5/2007, the Presidency of the

Damage Determination Committee of the Governor's Office awarded a total amount of TRY 36,000.00 to the applicants as pecuniary damage due to the death of their next-of-kin. The applicants did not accept the payment of above-mentioned amount and brought two separate cases before the Administrative Court for the death of their next-of-kin. The Administrative Court decided to dismiss these cases. The Administrative Court's decisions, which had been appealed by the applicants, were upheld by the Council of State.

The applicants have maintained that their next-of-kin lost their lives on account of a bomb which was easily planted and blasted at a place where a large number of persons were present; that the state has not properly fulfilled its duty to maintain public security; that the compensation amount awarded is insufficient; that the proceedings were not concluded within a reasonable time. They have further alleged that those who died in the incident were of Kurdish origin and therefore, they were especially targeted; and that in the actions for compensation brought against the administration for negligence, those who lost their lives in the incidents taking place in different regions have been awarded much higher compensation and, thereby, the administration has led to discrimination. For these reasons, the applicants have maintained that there has been a breach of the right to life, the right to an effective remedy and the principle of equality.

As to the allegations under the right to life, the Court has recalled its case-law, which provides that within the scope of the right to life guaranteed in Article 17 of the Constitution, the state has a negative obligation not to intentionally and unlawfully end the life of any individual within its territory, as well as the positive obligation to protect the right to life of all individuals within its jurisdiction from all risks likely to result from the acts of public officials, other individuals or the individual himself. The Court has noted that the positive obligation is to be interpreted in such a way so as not to impose an excessive burden on the authorities; and that for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of

In its examination as to whether the state has fulfilled its positive obligation under the right to life or not, the Court has observed that it was found established by the first instance decision rendered subsequent to an effective criminal investigation and proceedings that the incident in question had taken place as a result of a terrorist action; and that the explosion in question was a single terrorist action and any notice or intelligence was not given to the competent authorities before the incident. The Court has therefore concluded that the present incident is an unforeseeable one. It has been also indicated that there was only a period of 40 minutes which is not considered as long between the time when the bomb set-up was planted nearby the park and the time when the bomb was blasted by the offender; and that just before the explosion, a police vehicle was patrolling in the incident scene. By having regard to all of these considerations, the Constitutional Court has reached the conclusion that there does not exist any negligence or fault which would require the public authorities to be held responsible for the explosion which resulted in the death of the applicants' next-of-kin.

an identified individual; and that, if so, they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

In its examination as to whether the state has fulfilled its positive obligation under the right to life or not, the Court has observed that it was found established by the first instance decision rendered subsequent to an effective criminal investigation and proceedings that the incident in question had taken place as a result of a terrorist action; and that the explosion in question was a single terrorist action and any notice or intelligence was not given to the competent authorities before the incident. The Court has therefore concluded that the present incident is an unforeseeable one. It has been also indicated that there was only a period of 40 minutes which is not considered as long between the time when the bomb set-up was planted nearby the park and the time when the bomb was blasted by the offender; and that just before the explosion, a police vehicle was patrolling in the incident scene. By having regard to all of these considerations, the Constitutional Court has reached the conclusion that there does not exist any negligence or fault which would require the public authorities to be held responsible for the explosion which resulted in the death of the applicants' next-of-kin. The Court has also assessed that there is no explicit disproportionality between the compensation amount determined by virtue of the Law no. 5233 and the damage suffered by the applicants, as well as the circumstances of the case.

In the light of the foregoing explanations, the Constitutional Court has held that there has been no breach of the right to life which is enshrined in Article 17 of the Constitution.

As to the allegations concerning the right to a trial within a reasonable time, the Court has emphasized that the disputes arising in respect of the civil rights and obligations must be concluded within a reasonable time pursuant to Article 36 of the Constitution and Article 6 of the European Convention on Human Rights. In this context, the Constitutional Court has concluded that the proceedings, which are subject-matter of the individual application, are not complex in nature by taking into account the number of parties involved in the cases and subject-matter of the claim. The Court has therefore held that this amounted to an unreasonable delay in the proceedings lasting for over five years and ten months.

The Constitutional Court has accordingly held that there has been a breach of the applicants' right to trial within a reasonable time guaranteed under Article 36 of the Constitution.

As to the alleged violation of the principle of equality and the allegations that the right to an effective remedy was breached, the Court has held that these allegations must be declared inadmissible for non-exhaustion of the available remedies and for being manifestly ill-founded, respectively.

7- Judgment of Meral EŞKİLİ (Application No: 2013/7586)

> **It has been established that there has been negligence on the part of the prison authorities as the deficiencies in provision of the suitable means for responding to the fire taking place in the prison in a manner so as to prevent the inmates from getting damaged were not eliminated; and that these acts of negligence go beyond simple carelessness or an error of assessment.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 4/11/2015, thirteen persons including the applicant's son, who was a detainee at the relevant time, lost their lives in the fire taking place in the E-Type Prison at night on 16/6/2012. On the date of incident, there was no automatic fire alarm system in the relevant prison; 18 inmates were staying in the wing of seven persons in capacity and the fire extinguisher hose did not reach up to the wing in question. Moreover, it is also known that as one of the convicts had been previously transferred to another wing, the convicts in the other wing had reacted to the prison's administration, and there were conflicts among the prisoners including the applicant's son.

At the end of the forensic examination and autopsy performed on the dead bodies of the applicant's son and other persons who had died, it was established that the cause of death was carbon-monoxide intoxication and asphyxiation from smoke inhalation. The Chief Public Prosecutor's Office was of the opinion that the fire was started by the prisoners with a view to putting the prison administration in trouble; however the fire, which was thought to be easily extinguished, spread in an unexpected manner. The Chief Public Prosecutor's Office accordingly gave a decision for non-prosecution in respect of the suspects who were convicts and public officers. This decision became final after the objection made thereto had been rejected.

Upon the objections made, the disciplinary penalties imposed on the prison's authorities on account of this incident were removed. The siblings and the mother, the applicant, of the deceased Y.E. agreed with the Ministry of Justice on the compensation.

The applicant has maintained that her son, Y.E., who died in the fire, had submitted a petition to the administration ten days before the fire and informed the authorities that a fight had taken place in the wing and he had been afraid and worried of what would happen to him. Although his son had requested the authorities to change his place, any investigation was not carried out by the Public Prosecutor's Office on this matter. She has also alleged that she was denied access to the investigation file for a long time; and that the prison's administration was faulty as it did not take the measures to prevent the occurrence of the fire and did not timely respond to the fire. She has accordingly maintained that an effective investigation was not carried out under these circumstances, and a decision for non-prosecution was rendered. Finally stating that her objection to this decision was rejected without any justification, the applicant alleged that her rights guaranteed under the Constitution have been violated.

Primarily having examined the allegation that necessary measures were not taken in order to protect the life, the Constitutional Court has underlined that under certain special circumstances, the state is entrusted with the obligation to take necessary measures with a view to protecting the individual's life from the risks likely to be caused by his own acts; and that in this context, it must be ascertained whether any fault going beyond a simple negligence or an error of assessment is attributable to the authorities or not.

In the present case, it has been revealed that the prisoners had decided to start a fire a short time ago and put into practice their plan. It has been also noted that this fact does not pose an obstacle for making a separate assessment concerning the measures required to be taken at the prison in case of a fire. Besides, when the facts that there had been frequently disciplinary irregularities in the C-15 wing where the incident took place and that the wing

had been overcrowded at the time of the incident are taken into consideration, the Court has concluded that the incidents likely to occur are foreseeable; and that this has increased the authorities' obligations to show caution and diligence for the protection of the prisoners' lives.

The Court has pointed out that this obligation is concerning the measures required to be taken independently from the possible risks likely to occur by the prisoners' deliberate actions or omissions; and that in this context, the relevant public authorities would be expected to take necessary measures with regards to the construction and organization of the prisons, regulation of internal affairs and technical and physical capacity thereof.

Certain deficiencies likely to be expected to be foreseen by the authorities in the fire taking place in the prison are indicated in the Constitutional Court's judgment. Accordingly, it has been noted that the expert reports refer to the rapid combustion and poisoning characteristics of certain materials; and that regard must be paid in selection of the materials to be allocated for use of the prisoners for preventing them from posing any risk. It has been further stated that although the non-existence of any security cameras in the prison's rooms and wings is accepted to serve for the aim of the protection of private life, non-existence of any camera system in the corridors may hamper the rapid detection of and response to any possible threat; and that the prison did not have any alarm system capable of detecting a fire.

As to the failure of the fire extinguisher hose to reach the wing, it has been considered that this failure might have been detected in the course of the fire drill notified to be lastly conducted six month ago; and that in this respect, a fault may also be attributed to the authorities for their failure to eliminate this deficiency.

When all of these considerations are assessed as a whole, it has been established that there has been negligence on the part of the prison authorities as the deficiencies in provision of the suitable means for responding to the fire taking place in the prison in a manner so as to prevent the inmates from getting damaged were not eliminated; and that these acts of negligence go beyond simple carelessness or an error of assessment.

Consequently, the Constitutional Court has noted that failure to take necessary measures for the protection of life cannot be redressed by a compensation to be awarded in favour of the applicant; and accordingly held that there has been a breach of the obligation to protect life under the right to life which is enshrined in Article 17 of the Constitution.

With regard to the allegation that the criminal investigation conducted within the scope of the right to life was not effective, the Court has pointed out that the procedural aspect of

In the Constitutional Court's opinion, the investigating authorities must be independent from those who have involved or suspected to be involved in the incidents not only in hierarchical and institutional positions but also in concrete terms. Moreover, impartiality requires the investigation or results thereof to be subject to public scrutiny and requires the next-of-kin of the deceased to properly get involved in this procedure with a view to securing their legitimate interests.

the right to life enshrined in Article 17 of the Constitution allows for ascertaining whether the positive and negative obligations required by this right have been fulfilled or not. The Court has further noted that with a view to securing efficiency and adequacy of the investigation to be conducted, the authorities must take necessary actions *ex officio* and all evidence capable of clarifying the death and identifying those who are responsible must be collected. The Court has further stated that deficiencies to hinder the clarification of the incident giving rise to death and identification of those who are responsible may pose a risk for an effective investigation.

In the Constitutional Court's opinion, the investigating authorities must be independent from those who have involved or suspected to be involved in the incidents not only in hierarchical and institutional positions but also in concrete terms. Moreover, impartiality requires the investigation or results thereof to be subject to public scrutiny and requires the next-of-kin of the deceased to properly get involved in this procedure with a view to securing their legitimate interests.

The Court, which also examined that allegations that an effective investigation was not conducted into the incident; that access to the investigation file was illegally denied and that the objection to the decision rendered at the end of the investigation was rejected without any justification, has reached the conclusion that personal circumstances of the prisoners held in the C-15 wing, behaviours displayed by them during the period they were placed in the prison, the incidents they had got involved and possible effects of these incidents on the cause of the fire were investigated in the course of the investigation conducted. The Court has also observed that an assessment was made on the nature and sufficiency of the measures taken by the prison administration in case of any fire; and that subsequent to the incident, reports drawn up by the experts specialized in their fields were received concerning the cause of fire and the measures required to be taken for responding to the fire more effectively. The Court has also emphasized that a disciplinary investigation was conducted against the prison officers separately from the criminal investigation conducted against those who were considered to be faulty in the present incident.

Observing that there have been certain severe acts of negligence in respect of the state's obligation to protect the lives of the prisoners within its jurisdiction depending on certain deficiencies which might be expected to be foreseen with a view to effectively responding to the fire, and thereby discharging the prisoners from the hazardous areas when circumstances of the fire taking place in the prison were taken into account, the Court has stated that the investigation conducted into the present incident was not capable, in scope and results thereof, of clarifying the acts of negligence in question and punishing those who were responsible.

The Court has therefore noted that a new investigation to enable the clarification of the negligence and deficiencies therein and identification of those who were responsible for the fire resulting in the death of the prisoners including the applicant's son must be carried out; and that there has been a breach of the right to life, which is guaranteed under Article 17 of the Constitution, under its procedural aspect.

8- Judgment of Mehmet KARABULUT (Application No: 2013/512)

The Court has considered that although the deceased killed himself by his own will, the provocative sentence *"you are dishonest if you do not shoot yourself"* uttered by one of the persons who were present at the incident scene when the deceased put his riffle to his head may be considered to be a factor reinforcing the deceased's tendency to commit suicide; and that therefore, possible effects of this phrase on the deceased's death should have been investigated. Accordingly, the Court has noted that it was not adequately investigated who had uttered these words during the incident and an assessment on the possible effects of this provocative words on the deceased's death was not made within the scope of the investigation. It has been accordingly held that there has been a breach of the obligation to conduct an effective investigation under the right to life guaranteed in Article 17 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 5/11/2015, a quarrel took place between the applicants' son, Mazlum Karabulut (M.K.), who was performing his military service as an infantry, and Mus. K., who was an infantry giving orders whilst being drunk to M.K. and other soldiers who were there for change of the guard duty. M.K., who excessively got angry on account of this quarrel, committed suicide by taking a contact shot at the right part of his head with his riffle. One of the persons who were present in the incident scene when the deceased put his riffle to his head said him *"you are dishonest if you do not shoot yourself"*. According to the result of the autopsy, it has been revealed that M.K. was also drunk at the relevant time. The eye witnesses of the incident gave statements which were consistent with each other. The Military Prosecutor's Office gave a decision for non-prosecution, and the applicant's objection to this decision was rejected by the military court.

The applicant has maintained that the report concerning the post-mortem examination performed after the incident and the autopsy report issued by the Forensic Medicine Institute included contradictions as to the places of the entry and exit holes of the bullet; that such contradictions were not addressed at the investigation stage; that as the incident scene investigation team counted the bullets without fingerprinting, the fingerprints on the riffle were removed. The applicant has further stated that 28 bullets were found in the cartridge clip subsequent to the incident while the number of bullets must be 30; that although only one bullet hit the head of his son, any investigation was not carried out concerning the aftermath of the missing bullet. He has also maintained that it must be investigated how his son could freely carry his riffle whereas he had to deliver it following the guard duty. Accordingly, he has therefore alleged that there has been a breach of the right to life and the right to legal remedies.

Pointing out that the external post-mortem examination performed following the death is based on external visual observations while the autopsy report drawn up by the Forensic Medicine Institute is based on the experts' findings, the Court has observed that the autopsy report concerning the present incident is prepared in a sufficiently detailed manner

and considered that the investigation sufficiently clarified the incident taking into account the fume residuals and powder tattooing found on the right part of the deceased's head and the witnesses' statements supporting these findings.

The Court has observed that the empty case of one of two bullets which were not found in the cartridge clip of the riffle used in the incident was found at the incident scene whereas the second empty case was found nearby the booth where the deceased had performed the guard duty before the incident. The Court has thereby reached the conclusion that there was no missing in the ammunition. The Court has also considered that there is no causal link between the complaints that the deceased freely carried his riffle after his guard duty and his death.

The Court has considered that although the deceased killed himself by his own will, the provocative sentence *"you are dishonest if you do not shoot yourself"* uttered by one of the persons who were present at the incident scene when the deceased put his riffle to his head may be considered to be a factor reinforcing the deceased's tendency to commit suicide; and that therefore, possible effects of this phrase on the deceased's death should have been investigated. Accordingly, the Court has noted that it was not adequately investigated who had uttered these words during the incident and an assessment on the possible effects of this provocative words on the deceased's death was not made within the scope of the investigation. It has been accordingly held that there has been a breach of the obligation to conduct an effective investigation under the right to life guaranteed in Article 17 of the Constitution.

9- Judgment of Yavuz DURMUŞ and Others (Application No: 2013/6574)

> **The Court has observed that any examination was not conducted as to whether there was any person witnessing to the incident; and that statements of those who were performing duties at the same place with the deceased or at the military zone where the deceased's dead body was found were not taken. It has been also found out that four persons who are distant relatives of the deceased were interrogated as suspects two years and eight months after the incident. Indicating that the reasonable method of investigation in the present incident is to investigate the probability that the murder might have been committed by the terrorist organization at the first stage of the investigation, and if any supporting information or document is not available in this respect, then to proceed with the investigation by paying regard to the question as to whether this murder was committed due to other reasons such as personal hostility. Accordingly, the Court has stated that lack of these efforts in the present case is the deficiencies of the investigation stage which undermines the probability for revealing the cause of death or identifying those who were responsible.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 16/12/2015, the applicants' father, Yaşar Durmuş, was found death as being hung on a tree in the military zone while he was returning from leave during the period he was performing his military service. On the tree on which the

deceased was hung, there was a cloth banner on which it was written *"Here is the penalty for the betrayal. We would wipe out it. Long live Apo. PKK".* At the end of the autopsy performed on his dead body, it was revealed that the cause of his death was being hung on a tree, by others, with a rope around his neck. The Public Prosecutor's Office gave a decision for non-prosecution in respect of those who were asserted to be suspects on the grounds that there was no evidence in this respect, that the offenders could not be identified and that the twenty-year limitation period expired.

The applicants have maintained that the investigating authorities did not act diligently and rapidly at the investigation stage; that the investigation file was kept awaited for two years in the non-competent public prosecutor's office; that any effort was not exerted in order to clarify the link between the murder and the organization; that it was not investigated whether the public officials got involved in the murder or not; that the statements of the suspects and the complainants were not taken for many years. They have also alleged that a decision for non-prosecution was rendered in respect of the suspects for lack of adequate evidence and in respect of the incident for expiry of the limitation period.

The Court has observed that any examination was not conducted as to whether there was any person witnessing to the incident; and that statements of those who were performing duties at the same place with the deceased or at the military zone where the deceased's dead body was found were not taken. It has been also found out that four persons who are distant relatives of the deceased were interrogated as suspects two years and eight months after the incident. Indicating that the reasonable method of investigation in the present incident is to investigate the probability that the murder might have been committed by the terrorist organization at the first stage of the investigation, and if any supporting information or document is not available in this respect, then to proceed with the investigation by paying regard to the question as to whether this murder was committed due to other reasons such as personal hostility. Accordingly, the Court has stated that lack of these efforts in the present case is the deficiencies of the investigation stage which undermines the probability for revealing the cause of death or identifying those who were responsible.

In the Constitutional's Court opinion, it is uncertain that on the basis of which factors and assessments the Chief Public Prosecutor's Office proceeded with the investigation even without taking the statements of the above-mentioned four persons in respect of whom there were complaints in this respect within the first critical phase of the investigation of two and a half years. With regard to the incident scene investigation process, there is no information indicating that the public prosecutor arrived in the incident scene where the dead body was found, and any examination for collection and securing of the evidence capable of revealing the incident such as fingerprint, footprint, tire track was not carried out on either the deceased's dead body or at the incident scene. Moreover, the fact that the Chief Public Prosecutor's Office clearly stated that there had been certain deficiencies at the investigation stage may be regarded to confirm the applicants' allegations.

Taking into account that the case was discontinued for being time-barred in a manner which would hinder reaching to a final conclusion, the Court has concluded that due caution and diligence required to be paid at the investigation stage were not shown in the present case; and that the investigating authority did not act rapidly in the course of the investigation.

Consequently, the Constitutional Court has held that there has been a breach of the obligation to conduct an effective investigation as required by the right to life guaranteed under Article 17 of the Constitution.

B) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO PROTECT AND DEVELOP THE MATERIAL AND SPIRITUAL ENTITY AND THE INVIOLABILITY OF PHYSICAL INTEGRITY

1- Judgment of Ahmet ACARTÜRK (Application No: 2013/2084)

As to the applicant's allegation that he had not been informed of the medical treatment, the Constitutional Court has noted that the individuals' rights to get involved in the selection of medical treatment provided for them and upon giving consent, to obtain necessary information with a view to assessing the risks they might be exposed to fall within the scope of the right to protect the individual's material and spiritual entity, which is enshrined in Article 17 § 1 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 15/10/2015, the applicant underwent an operation for the extraction of his sperms within the scope of the in-vitro fertilization treatment. Thereupon, he brought an action for compensation for pecuniary and non-pecuniary damage on 23/8/2006 by maintaining that he suffered from certain diseases subsequent to this operation due to the fault of his physician and that he had not been informed of the risks inherent in this operation.

The case was dismissed by the decision of the Civil Court of General Jurisdiction dated 27/4/2010 on the ground that according to the expert report, the operation had been performed in accordance with the medical requirements. This decision was upheld by the relevant Chamber of the Court of Cassation on 14/11/2011.

The applicant has stated that his sperms were extracted for the in-vitro fertilization treatment; and that after the operation, he has been suffering certain diseases such as failure to secrete testosterone hormone, osteoporosis and workforce loss on account of the fault of the physician performing his operation. He has also maintained that he was not adequately informed about the operation before undergoing it; and that if he had been informed adequately, he might have discontinued the in-vitro fertilization treatment. He has therefore alleged that his physical integrity and his right to lead a healthy life were infringed upon the operation. The applicant has consequently maintained that the right to protect material and spiritual entity, which is enshrined in Article 17 of the Constitution, and that the right to a fair trial, which is enshrined in Article 36 therein, have been breached for the above-mentioned reasons and for the non-conclusion of the case within a reasonable time, respectively.

As to the applicant's allegation that he had not been informed of the medical treatment, the Constitutional Court has noted that the individuals' rights to get involved in the selection of medical treatment provided for them and upon giving consent, to obtain necessary information with a view to assessing the risks they might be exposed to fall within the scope of the right to protect the individual's material and spiritual entity, which is enshrined in Article 17 § 1 of the Constitution. The Court is of the opinion that failing to take the consent of the relevant individual before the medical intervention may constitute interference in the individual's right to protect his material and spiritual entity. Save for the exceptional

The Court is of the opinion that it is beyond doubt that the liability to prove that the patients have been informed of each procedure and treatment to be applied and have given informed consent thereto is incumbent on the physician or the hospital. It has been revealed that any document indicating the applicant's informed consent was taken after being informed of medical results, risks and potential complications of the operation which the applicant underwent was not submitted in the course of the proceedings. Besides, any assessment concerning the applicant's allegation that he had not been informed of the said operation is included neither in the first instance decision nor the judgment of the supreme courts. Therefore, the Court has reached the opinion that the applicant did not give consent to the said operation freely and in an informed manner.

circumstances, a medical intervention may be performed only after the relevant person is informed in this regard and his consent is taken. The patients must be informed of the treatment they would receive and the associated risks thereof in order to enable them to take a decision being aware of the situation. In addition, there must be an appropriate period of time which would allow the patient to reach a sound conclusion between the informing procedure and the medical intervention.

In the present case, the Court has observed that the applicant and his wife signed a document indicating that they permitted for the in-vitro fertilization (IVF-ET) and embryo transfer; that this document includes the medical effects and results of the IVF-ET procedure. The Court has underlined that although the processes which the applicant's wife would undergo and the risks likely to occur thereof are stated therein, there is no information or explanation concerning the operation applied to the applicant. The Court is of the opinion that it is beyond doubt that the liability to prove that the patients have been informed of each procedure and treatment to be applied and have given informed consent thereto is incumbent on the physician or the hospital. It has been revealed that any document indicating the applicant's informed consent was taken after being informed of medical results, risks and potential complications of the operation which the applicant underwent was not submitted in the course of the proceedings. Besides, any assessment concerning the applicant's allegation that he had not been informed of the said operation is included neither in the first instance decision nor the judgment of the supreme courts. Therefore, the Court has reached the opinion that the applicant did not give consent to the said operation freely and in an informed manner.

The Constitutional Court has consequently held that there has been a breach of the right to protect and develop the individual's material and spiritual entity, which is enshrined in Article 17 § 1 of the Constitution.

The Court, which also dealt with the allegation that the proceedings were not concluded within a reasonable period, has concluded that the length of the proceedings lasting for six years and seven months as a whole is not reasonable by taking into account the applicant's interest in finalization of his case in a rapid and an effective manner and the facts that the case was not very complex in nature and the applicant had no effect on the delay which took place.

The Constitutional Court has accordingly reached the opinion that there has been a breach

of the right to trial within a reasonable time under the scope of the right to a fair trial, which is guaranteed in Article 36 of the Constitution.

2- Judgment of Halime Sare AYSAL (Application No: 2013/1789)

> **The Court is of the opinion that Article 17 of the Constitution generally secures the physical and mental integrity, and the second paragraph therein, which sets out that *the physical integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent,* explicitly indicates that individuals are entitled to reject a medical intervention and to make decisions on their own bodies save for exceptional circumstances.**

In the incident giving rise to the individual application which was concluded by the Constitutional Court in its plenary sitting on 11/11/2015, it was requested by the Uşak Provincial Directorate of the Ministry of Family and Social Policies that a health measure be applied in respect of the child-applicant, whose parents did not allow her to be vaccinated during her babyhood, in pursuance of Article 5 § 1 (d) of the Law no. 5395.

The Civil Court of General Jurisdiction decided to apply health measure in respect of the child in question by indicating that children who were not allowed by their parents to be vaccinated despite of the explanations and training provided to emphasize the importance of the vaccines included in the *"Enhanced Immunization Program"* must be accepted as children in need of protection pursuant to Article 3 § 1 (a) of the Law no. 5395.

In the application lodged with the Constitutional Court, it has maintained that although the parents did not accept the administration of the babyhood vaccines to their child who was under their guardianship and there was no explicit legal foundation for the compulsory vaccination procedure, the first instance court's decision for applying a health measure in respect of this child infringed the child's physical integrity. It has been accordingly alleged that the right to protect and develop the individual's material and spiritual entity defined in Article 17 of the Constitution was breached.

The Court is of the opinion that Article 17 of the Constitution generally secures the physical and mental integrity, and the second paragraph therein, which sets out that *the physical integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent,* explicitly indicates that individuals are entitled to reject a medical intervention and to make decisions on their own bodies save for exceptional circumstances.

The consent is considered as the fundamental condition in the national and international legislation provisions concerning the medical interventions. Accordingly, in respect of the interventions to the minors or persons under legal disability who are under guardianship and curatorship, consent of their legal representatives is substituted for the consent of the subject of the medical intervention, and the conditions deemed as exceptions to the consent requirement are generally limited to the circumstances which are medically required in the context of the emergency cases and the circumstances specified in the law.

The provision which is set out in Article 13 of the Constitution and provides that the funda-

The provision which is set out in Article 13 of the Constitution and provides that the fundamental rights and freedoms may be restricted only by law occupies an important position in the constitutional jurisdiction. In case of any interference with any right or freedom, the matter which must be primarily ascertained is whether or not there is any provision permitting the interference in question; that is to say, whether the interference has any legal foundation or not.

mental rights and freedoms may be restricted only by law occupies an important position in the constitutional jurisdiction. In case of any interference with any right or freedom, the matter which must be primarily ascertained is whether or not there is any provision permitting the interference in question; that is to say, whether the interference has any legal foundation or not.

In this context, the content, aim and scope of a legal arrangement must be definite and explicit in a manner which would enable the addressees to foresee their legal status. Although it is possible to leave certain level of discretionary power to the legal practitioners by the provision interfering in any right or freedom, certainty must be ensured in the wording and interpretation of the law which forms a basis for the interference with a view to effectively protecting the right.

Legal arrangements must explicitly specify under which conditions and boundaries the public authorities are authorized to interfere in the fundamental rights and freedoms and, in this context, enable those exposed to interference to foresee the conditions and results of the interference.

Accordingly, the Constitutional Court has noted that the legal arrangements, which are set out in the sub-clause 1 of Article 3 § 1 (a) and in Article 5 § 1 (d) of the Law no. 5395 and are relied on as the legal foundation of the interference in the present case and which in general prescribe that a health measure may be decided to be applied without providing any explanation as to type and scope of the medical intervention to be applied, are not foreseeable in nature.

In the Court's judgment, it is also stated that there is no arrangement which would form a legal foundation for the compulsory vaccination procedure within the scope of the Law no. 1593, as well as the above-cited provisions. It is further indicated that the Decree-Law on the Organization and Duties of the Ministry of Health and Its Affiliated Institutions, which is shown as the legal foundation of the Circular concerning the *"Enhanced Immunization Program"*, cannot serve as a foundation for any restriction or interference in any fundamental right.

The Constitutional Court has consequently noted that there is no foreseeable legal arrangement concerning the compulsory vaccination procedure within the above-cited scope and purposes and accordingly held that there has been a breach of Article 17 of the Constitution.

The Constitutional Court has consequently noted that there is no foreseeable legal arrangement concerning the compulsory vaccination procedure within the above-cited scope and purposes and accordingly held that there has been a breach of Article 17 of the Constitution.

C) JUDGMENTS RENDERED IN RESPECT OF THE PROHIBITION OF TORTURE AND ILL-TREATMENT

1- Judgment of Şenol GÜRKAN (Application No: 2013/2438)

In its examination as to the state's obligation to protect the individuals' physical and mental integrity through administrative and legal statutes under the prohibition of torture and ill-treatment, the Court has reached the conclusion that rendering a decision on the suspension of the pronouncement of the judgment in respect of the suspects committing the offence of torture is not capable of causing deterrent effect likely to prevent the occurrence of such acts. The Court has therefore held that the state's obligation to protect the individuals has been breached.

In the incident giving rise to the present individual application which concluded by the First Section of the Constitutional Court on 9/9/2015, the applicant who had been taken into custody on 6/6/2001 was detained on remand after being held in police custody for six days. In his petition for objection to his detention, he maintained that he had been subject to ill-treatment under custody. In the complaint made by the applicant before the Chief Public Prosecutor's Office after his release, he reiterated his allegations.

The forensic examination report issued in respect of the applicant on 12/6/2001, at the end of his custody period, indicated that there were ecchymotic bruises which might have occurred three or four days ago and would hinder him from performing his basic daily activities for three days as from the date when the incident took place.

As a result of the investigation initiated within the scope of the applicant's allegations, a case was opened against nine police officers with the request that they be sentenced for the offence of ill-treatment. At the end of the prosecution carried out, as it was found established that four police officers had committed the offence of torturing with a view to making the relevant person confess the offence, the court decided to sentence each of these police officers to imprisonment for a term of 10 months and subsequently decided to suspend the pronunciation of the judgment.

The applicant has maintained that during the period he was held in police custody, he was placed in isolation and under oppressive conditions; that he was forced to give statement; that his eyes were covered with a black band; that he was subject to various swear words during his statement; that he was beaten by the officers; that his clothes were removed and he was harassed and also threatened with rape; and that he was tortured by being exposed to pressurized water. Accordingly, he has alleged that the prohibition of torture and ill-treatment has been violated.

As to the examination on the substantive aspect of the prohibition of torture and ill-treatment, the Court has observed in line with the forensic examination reports taken prior to and subsequent to his custody period that, within the period during which he

had been under the control of the public officers, the applicant had been injured in a manner which would hinder him from performing his daily basic activities for three days. Taking into account that any reasonable explanation could not be provided as to how the applicant was injured, the Constitutional Court has concluded that this treatment may be regarded as torture given the aim, duration and effect thereof and that the state's negative obligation has been infringed.

In its examination as to the state's obligation to protect the individuals' physical and mental integrity through administrative and legal statutes under the prohibition of torture and ill-treatment, the Court has reached the conclusion that rendering a decision on the suspension of the pronouncement of the judgment in respect of the suspects committing the offence of torture is not capable of causing deterrent effect likely to prevent the occurrence of such acts. The Court has therefore held that the state's obligation to protect the individuals has been breached. In this respect, the Court has concluded that there has been a breach of the prohibition of torture and ill-treatment guaranteed under Article 17 § 3 of the Constitution under its substantive aspect.

In its examination as to the procedural aspect of the prohibition of torture and ill-treatment, the Court has observed that the public authorities did not immediately take an action upon the applicant's allegations of torture and ill-treatment; that due diligence was not paid for the finalization of the investigation and prosecution in a rapid and effective manner; that due diligence was not paid for sentencing those who were responsible to penalties that are proportionate to their acts and for ensuring sufficient redress in respect of the victim as the decision on suspension of the pronouncement of the judgment was rendered in respect of those who were responsible. The Court has also indicated that the authorities did not conduct an adequate investigation into the applicant's allegations of ill-treatment which was capable of leading to identification of those who were responsible. Accordingly, the Constitutional Court has reached the conclusion that there has been a breach of the prohibition of torture and ill-treatment guaranteed in Article 17 § 3 of the Constitution under its procedural aspect.

2- Judgment of Hüseyin CARUŞ (Application No: 2013/7812)

> **There is also procedural aspect of this positive obligation incumbent on the state within the scope of the right to protect the individual's material and spiritual entity. Within the framework of this procedural obligation, the state is to conduct an effective investigation capable of leading to identification and punishment, if required, of those who are responsible for all kinds of physical and mental assault. The main aim of such an investigation is to assure effective implementation of law and to ensure those who are responsible to account for these incidents.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 6/10/2015, on 25/6/2011 between 06:30 and 07:00 p.m., the applicant who was residing in Diyarbakır and born in 1992 came

across with a crowded group of persons who gathered to hold a demonstration while he was walking on the street in order to visit one of his relatives. Subsequently, he was injured on his left eye in a manner which would lead to perforation as a metal material hit his eye due to the explosion taking place.

In the investigation initiated by the Chief Public Prosecutor's Office into this incident, a warrant for *"Permanent Search"* was issued on 23/10/2012 as the offender or offenders of the incident could not be identified.

It has been revealed that by the date of this individual application, any action has not been taken within the scope of the investigation other than the written information submitted to the Chief Public Prosecutor's Office by the law enforcement officers at certain intervals that the offenders are still sought.

The applicant has maintained that an effective investigation was not conducted by the Chief Public Prosecutor's Office into the incident; and that the offenders of the incident could not be identified and a warrant for *"Permanent Search"* was issued within the scope of the investigation. The applicant has therefore alleged that the prohibition of torture and ill-treatment guaranteed under Article 17 of the Constitution and Article 3 of the European Convention on Human Rights has been breached. He has accordingly requested the Court to find the violation in question, to ensure an effective investigation and to award pecuniary and non-pecuniary damage in this respect.

In the Constitutional Court's opinion, under the right enshrined in Article 17 of the Constitution, as a positive obligation, the state is liable to protect the rights to protect material and spiritual entity of all individuals within its jurisdiction from risks likely to be resulted from the acts of public authorities, other individuals and the individual himself. The state is liable to protect the individual's material and spiritual entity from all kinds of dangers, threats and violence.

There is also procedural aspect of this positive obligation incumbent on the state within the scope of the right to protect the individual's material and spiritual entity. Within the framework of this procedural obligation, the state is to conduct an effective investigation capable of leading to identification and punishment, if required, of those who are responsible for all kinds of physical and mental assault. The main aim of such an investigation is to assure effective implementation of law and to ensure those who are responsible to account for these incidents.

Within the scope of the state's positive obligation, failure to conduct an investigation or failure to conduct an effective investigation may be sometimes considered as ill-treatment. Therefore, regardless of the conditions, the authorities are to take an action upon an official complaint made. In case any complaint is not raised but there are adequate precise indications of ill-treatment, it must be ensured that an investigation be initiated. In this respect, an investigation must be initiated immediately; must be meticulously and rapidly conducted in an independent manner and being subject to public scrutiny and must be effective as a whole.

In respect of the investigations into the complaints concerning ill-treatment, it is of importance that the authorities must act rapidly. Nevertheless, it must be accepted that there may be grounds or difficulties hindering the progress of the investigation under certain circumstances. However, in investigations into allegations of ill-treatment, the

In this context, the Court has observed that all reasonable measures for enabling the collection of evidence likely to be obtained for identification of those who were responsible by means of making a detailed research for material evidence in the incident scene and for preventing material evidence likely to be collected at the incident scene from disappearing were not taken in the present investigation. It has further indicated that the investigation did not canalize into the meeting and demonstration held; and that any examination was not made on the metal material which hit the applicant's eye and reported to be still in his eye in the medical examination carried out subsequent to the incident. The Court has accordingly emphasized that there were certain deficiencies in the investigation which undermined the probability of revealing the cause of incident and identifying those who were responsible and which affected the efficiency thereof to a significant extent.

authorities must conduct such investigations with maximum speediness and diligence in order to ensure loyalty to the state of law, to avoid giving impression that unlawful acts are tolerated or such acts are encouraged, not to permit any illegitimacy and to maintain the public confidence.

In this context, the Court has observed that all reasonable measures for enabling the collection of evidence likely to be obtained for identification of those who were responsible by means of making a detailed research for material evidence in the incident scene and for preventing material evidence likely to be collected at the incident scene from disappearing were not taken in the present investigation. It has further indicated that the investigation did not canalize into the meeting and demonstration held; and that any examination was not made on the metal material which hit the applicant's eye and reported to be still in his eye in the medical examination carried out subsequent to the incident. The Court has accordingly emphasized that there were certain deficiencies in the investigation which undermined the probability of revealing the cause of incident and identifying those who were responsible and which affected the efficiency thereof to a significant extent.

Moreover, the Court has pointed that the investigation in present case was conducted within an unreasonable period according to the specific circumstances of the investigation; and that any action other than the written information submitted, at certain intervals, by the law enforcement officers to the Prosecutor's Office that necessary actions have been carried for identification of the offenders was not performed within the scope of the investigation in the last three-year period.

The Court has accordingly concluded that in the present case, an investigation has been carried out without endeavouring to eliminate certain significant deficiencies which may impair the efficiency of the investigation and in a manner which would give the impression that any action is not taken in respect of unlawful acts and actions that have been performed.

For these reasons, the Court has reached the conclusion that a rapid and effective

investigation capable of leading to identification of those who were responsible was not conducted into the applicant's allegation of ill-treatment. It has been accordingly held that there has been a breach of the prohibition of torture and ill-treatment guaranteed under Article 17 § 3 of the Constitution under its substantive aspect.

3- Judgment of Arif Haldun SOYGÜR (Application No: 2013/2659)

> **Taking into account the injuries of the applicant - who was subject to an interference without displaying any conduct requiring physical force - which were specified in the medical report and the incident as a whole, the Constitutional Court has observed that due diligence and caution was not paid to the applicant's physical integrity and the interference by the police officers may lead to insulting and humiliating effect on the relevant person. The Court has accordingly held that there has been a breach of the substantive aspect of the prohibition of treatment incompatible with human dignity which is set out in Article 17 § 3 of the Constitution.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 15/10/2015, the applicant entering the opposite lane with his vehicle quarrelled with two police officers who made him stop. Afterwards, the applicant was pinned to the ground, handcuffed and made to wait in the police vehicle for a while. Subsequently, the police commander arriving in the incident scene removed the applicant's cuffs. The applicant was taken to the police station with a view to taking legal action in respect of him.

In the forensic examination report drawn up in respect of the applicant, it was stated that there were an abrasion of 2 cm on the right writs; a scratch of 3 cm on the left knee; ecchymosis all around the left wrist which was compatible with the handcuff scar; that the applicant had back pain and headache; and that injuries sustained by the applicant could be treated with simple medical intervention. An action was brought against the police officers for the offence of torturing and against the applicant for the offence of insulting. At the end of the proceedings, it was decided that the police officers be acquitted of the charges while the applicant be sentenced for the offence of insulting a police officer in charge. The decision acquitting the police officers was upheld by the Court of Cassation.

The applicant has maintained that he was subject to violence when he was stopped by the security officers for having breached a traffic rule; that he was handcuffed and taken into custody; that although his injuries resulting from the violence he was exposed to were indicated in the medical report, the security officers were decided to be acquitted of the charges at the end of the action brought against them whereas a penalty was imposed on him for the offence of insulting public officials; that the police officers brought an action for compensation by relying on

the above-cited decision. He has therefore alleged that there has been a breach of the prohibition of torture and ill-treatment and the right to liberty and security of person.

Taking into account the injuries of the applicant - who was subject to an interference without displaying any conduct requiring physical force - which were specified in the medical report and the incident as a whole, the Constitutional Court has observed that due diligence and caution was not paid to the applicant's physical integrity and the interference by the police officers may lead to insulting and humiliating effect on the relevant person. The Court has accordingly held that there has been a breach of the substantive aspect of the prohibition of treatment incompatible with human dignity which is set out in Article 17 § 3 of the Constitution.

When it is taken into account the facts that two witnesses heard at both the investigation and prosecution stages were fellow workers of the accused police officers and that they stated that they had not witnessed to the incident, the Court has observed that the officials did not research whether any evidence likely to reveal how the present incident took place could be obtained or not; that only statements of the parties formed the basis of the decision given; that it was not explained which statement was or was not relied on; and that although it was alleged by the applicant that when he was pinned to the ground by the police officers, they kicked him in his back, these allegations were not investigated and the acts performed by the police officers were regarded to be limited with forcing the applicant to the ground and handcuffing him. Accordingly, the Court has also emphasized that although the sentence imposed on the applicant by the first instance decision, which was upheld by the Court of Cassation, was reduced due to the existence of reciprocal insult, any assessment was not made as to the police officers' acts deemed as insult in the decision rendered in respect of the police officers.

The Court has indicated that all of these factors required for rendering an investigation effective and adequate have casted doubt on the requirements that the investigating authorities *ex officio* take an action and obtain all evidence capable of revealing the incident and indentifying those who were responsible; that the investigations be conducted in an impartial, independent, rapid and comprehensive manner and that the authorities endeavour to earnestly find out the facts. Accordingly, the Constitutional Court has held that there has been a breach of the procedural obligation to conduct an effective investigation guaranteed in Article 17 § 3 of the Constitution and incumbent on the state under the prohibition of ill-treatment.

4- Judgement of Hamdiye ASLAN (Application No: 2013/2015)

The Court has underlined that not to give the impression that the acts constituting torture, torment and humiliating treatment are tolerated forms the minimum level for the proportionality of the punishments imposed on account of such acts. Accordingly, the Court has considered that the imprisonment sentence of 10 months imposed on the accused persons is not proportionate by taking into account the nature and severity of the acts found established by the first instance court. Moreover, the Court has observed that as it was decided that pronouncement of the imprisonment sentence imposed on the accused persons be suspended, the imprisonment sentence would never be executed and would not be reflected in their criminal and civil service records by deeming that this sentence has never been imposed on condition that the accused persons do not commit an offence within the probation period. Therefore, the Court has reached the conclusion that this practice does not have a deterrent effect to the extent which would ensure the prevention of such unlawful acts. Accordingly, it has been concluded that in the present case, the state did not fulfil its positive obligations to protect the applicant's physical and mental integrity through statutes and that there has been a breach of the substantive aspect of the prohibition of torture and ill-treatment guaranteed under Article 17 § 3 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 4/11/2015, the applicant who was taken into custody on 5/3/2002 and taken before the public prosecutor subsequent to the two-day custody period maintained in her statement before the public prosecutor that she had been tortured by the relevant law-enforcement officers. Upon the applicant's statements, the Chief Public Prosecutor's Office initiated an investigation against the relevant officers. On the other hand, the applicant was detained on remand by the court on 7/3/2002 within the scope of the investigation conducted against her. After her lawyers stated that she further alleged to be exposed to sexual assault by use of truncheon, in addition to the allegations asserted in her previous statement, the public prosecutor once again heard the applicant.

The reports drawn up in respect of the applicant prior to and subsequent to her police custody did not indicate any sign of battery and physical coercion; however, the report issued in respect of her before she was admitted to the prison upon her detention on remand indicated that there were *"widespread ecchymosis on the inner part beneath the left axillary to the elbow… ecchymosis beneath the right axillary"*. In the report dated 12/3/2002 and issued by the Branch Office of the Forensic Medicine Institute in respect of the applicant, it was noted that *"there are former ecchymotic area which are in different sizes and shapes on an area of 10x5 cm from the right humeral region, internal lateral side proximal to the axillary and have turned into light green-yellow in colour, which are still subject to resorbtion and thought to be caused 6-8 days ago; and there are former ecchymotic areas which are in different sizes and shapes on an area of 7x4 cm from the left humeral region, internal lateral side proximal to the*

axillary and have turned into light green-yellow in colour, which are still subject to resorbtion and thought to be caused 6-8 days ago". It was also noted that *"although the relevant person has complained of subjective pains on various parts of her body, any traumatic lesion finding has not been found on her body. The system examinations have revealed no abnormality, and any anatomic deficiency or functional symptom considered as limb disability or loss of limb has not been detected".* It was further noted that *"…and the traumatic disorder resulting in the defined ecchymosis has not posed a threat to her life and would impede her from performing her basic daily activities for five days; and there is no anatomic deficiency or functional symptom considered as limb disability or loss of limb".*

On 16/1/2013, the first instance court found established that the accused persons had committed the offence defined in Article 243 § 1 of the Abolished Turkish Criminal Code no. 765 and sentenced them to imprisonment for a term of 10 months and decided to deprive them of the public services for the same period. Finally, the first instance court decided to suspend the pronouncement of the judgment rendered in respect of the accused persons.

The applicant has maintained that as she denied the charges against her during the period when she was under police custody, she was exposed to acts of torture in various manners; that she was raped by means of using truncheon; that she has been experiencing indefinable distress for 11 years on account of the torture she was exposed to; that she expect these officers be punished with a view to holding on to the life once again. She has further noted that the first instance court sentenced the relevant officers to a light imprisonment sentence for a term of 10 months and even decided to suspend the pronouncement of that judgment, which means that this sentence would not be reflected in their personal record. She has accordingly stated that this situation led her to be degraded for the second time. She has finally maintained that although the proceedings lasted for 11 years, any effective and adequate decision was not taken by the court. For these reasons, she has alleged that there has been a breach of Articles 10, 17, 36 and 40 of the Constitution.

In its assessment as to the substantive aspect of the prohibition of torture and ill-treatment, the Court has emphasized the requirement for ascertaining the classification of the acts to which the applicant was exposed according to those acts' degree of severity within the framework of the prohibition of torture and ill-treatment guaranteed under Article 17 of the Constitution. In the Court's opinion, the state must classify the acts constituting torture and ill-treatment and impose more severe punishments for those classified as torture than the other acts.

The Court has observed that the course of the incidents does not clearly verify that the acts towards the applicant which caused her to experience suffering and distress were performed in order to lead her to make a confession and/or a statement concerning the facts addressed to her, to intimidate to lead her to behave in a certain manner or consciously for any other reason based on discrimination. The Court has also stated that it cannot be undoubtedly inferred from the first instance decision and specific circumstances of the case that the acts towards the applicant were performed for a definite purpose or in line with a definite motive. However, the Court is of the opinion that the acts performed are deemed sufficient for classifying the ill-treatments to which the applicant was exposed as *"torment".*

The Court has underlined that not to give the impression that the acts constituting torture, torment and humiliating treatment are tolerated forms the minimum level for the proportionality of the punishments imposed on account of such acts. Accordingly, the Court has considered that the imprisonment sentence of 10 months imposed on the accused persons

Within the scope of the examination on the procedural aspect of the prohibition of torture and ill-treatment, the Court has primarily criticized the practice in which the police officer who performed his duty under the same hierarchical structure and even in the same building with the accused persons and who was also a potential eye-witness of the alleged torture and ill-treatment in the present case as he took the applicant's fingerprints and photo in the detention room was appointed as a legal expert for the case at the prosecution phase by paying regard to the requirement that the experts to participate in the investigation and prosecution processes must be independent and impartial. Moreover, having regard to the trial process lasting for 11 years, the Court has considered that the proceedings before the instance courts were not concluded rapidly with due diligence.

is not proportionate by taking into account the nature and severity of the acts found established by the first instance court. Moreover, the Court has observed that as it was decided that pronouncement of the imprisonment sentence imposed on the accused persons be suspended, the imprisonment sentence would never be executed and would not be reflected in their criminal and civil service records by deeming that this sentence has never been imposed on condition that the accused persons do not commit an offence within the probation period. Therefore, the Court has reached the conclusion that this practice does not have a deterrent effect to the extent which would ensure the prevention of such unlawful acts. Accordingly, it has been concluded that in the present case, the state did not fulfil its positive obligations to protect the applicant's physical and mental integrity through statutes and that there has been a breach of the substantive aspect of the prohibition of torture and ill-treatment guaranteed under Article 17 § 3 of the Constitution.

Within the scope of the examination on the procedural aspect of the prohibition of torture and ill-treatment, the Court has primarily criticized the practice in which the police officer who performed his duty under the same hierarchical structure and even in the same building with the accused persons and who was also a potential eye-witness of the alleged torture and ill-treatment in the present case as he took the applicant's fingerprints and photo in the detention room was appointed as a legal expert for the case at the prosecution phase by paying regard to the requirement that the experts to participate in the investigation and prosecution processes must be independent and impartial. Moreover, having regard to the trial process lasting for 11 years, the Court has considered that the proceedings before the instance courts were not concluded rapidly with due diligence.

Noting that such and similar deficiencies lead to the impression that the investigation is not capable of ensuring the prevention of acts of torment and punishment of the offenders; and the final conclusion reached in respect of the offenders leads to the impression that public officials who have involved in such acts are tolerated, the Court has underlined that this may encourage the officers who are in tendency to perform such kinds of acts and may also tarnish the individuals' confidence in the state and judicial mechanism.

For the above-mentioned reasons, the Court has concluded that there has also been a violation of the prohibition of torture and ill-treatment guaranteed under Article 17 § 3 of the Constitution under its procedural aspect.

D) JUDGMENTS RENDERED IN RESPECT OF THE PROHIBITION OF TREATMENT INCOMPATIBLE WITH HUMAN DIGNITY

1- Judgment of K. A. (Application No: 2014/13044)

Making an assessment on the conditions of the Kumkapı Centre during the period when the applicant stayed in line with the applicant's allegations, taking into account the reports issued on this matter by the Human Rights Institution of Turkey and the Human Rights Investigation Commission of the Grand National Assembly of Turkey, the opinions of the relevant ministries, the international conventions and the standards relating to this matter and the case of the ECtHR, the Constitutional Court has considered that the overcrowding nature of the Centre where living space per person was less than three square meters and the conditions to which the applicant was exposed when he stayed in the Centre may be considered to lead to going beyond the level of treatment incompatible with human dignity which is prohibited in Article 17 of the Constitution. The Court has also reached the conclusion that apart from the places where he accommodated in the Centre, common use areas were inadequate, and more importantly, the opportunity provided for the applicant for outdoor exercise was very limited; and that this situation made the applicant's conditions in the Centre more difficult. The Court has also held that the applicant's being subject to an administrative detention for more than eight months under such conditions has been in breach of Article 17 of the Constitution.

In the incident giving rise to the individual application which was concluded by the Constitutional Court in its plenary sitting on 11/11/2015, the applicant who is a Syrian citizen and entered into Turkey on 15/12/2013 due to the civil war in his own country was arrested on 25/4/2014 upon the order of the Kızıltepe Chief Public Prosecutor's Office within the scope of the criminal investigation when he was in Istanbul. After his statement had been taken, he was sent to the Kumkapı Foreigners' Removal Centre (the Kumkapı Centre) by the relevant unit of the Security Directorate although the public prosecutor had previously ordered his release. Upon the Security Directorate's action dated 28/4/2014 in respect of the applicant, the applicant was decided to be deported and be subject to administrative detention for 6 months on the ground of "*posing a threat to public order or public security or public health*".

During the period when the applicant was detained at the Kumkapı Centre, the Kızıltepe Chief Public Prosecutor's Office rendered a decision of non-prosecution on 13/6/2014 in respect of the applicant. On 25/6/2014, the applicant lodged an application with the Istanbul Governor's Office for international protection status and requested his release from the Kumkapı Centre. By provisional Article 1 of the Provisional Protection Regulation which entered into force on 22/10/2014, the citizens of the Syrian Arab

Republic are taken under provisional protection.

The applicant lodged four applications for objection with the Magistrate Judge's Offices on various dates on the grounds that the decision on administrative custody given in respect of him was unlawful; was not executed properly and the changes in his legal status posed an obstacle for maintenance of this measure in respect of him. The applicant's objections were finally rejected by the magistrate judges on the ground that there was no *"infraction of rules"* in the decision on administrative detention which was taken on the basis of the deportation procedure.

Within the same period, the applicant lodged applications with the Istanbul Security Directorate and the Directorate General of the Migration Authority to be released from the Kumkapı Centre and not to be deported for similar reasons.

The first application of the applicant, who lodged three individual applications with the Constitutional Court on the same matter, was lodged with the Court upon the rejection of his first objection to the decision on administrative detention by the magistrate judge on 24/6/2014.

The action for annulment brought by the applicant against the decision on his deportation was dismissed by the decision of the Istanbul 1st Administrative Court dated 18/9/2014. Upon the notification of the first instance court's decision to the applicant, the applicant lodged an application with the Constitutional Court for the second time requesting for an interim measure. The applicant's request for an interim measure in respect of his deportation was accepted by the Constitutional Court on 10/12/2014, and the Court decided to suspend the execution of the decision on deportation unless a further judgment would be rendered in this respect.

Upon the interim measure ordered by the Constitutional Court, the fifth objection of the applicant to the decision on administrative detention was accepted by the decision of the magistrate judge on 31/12/2014, and the administrative detention procedure applied in respect of the applicant was ended on 6/1/2015. The applicant was held under administrative detention for approximately eight months and nine days between 26/4/2014 and 6/1/2015.

The applicant lodged another application with the Constitutional Court for the third time following the decision on his release. These two applications lodged with the Constitutional Court by the applicant were joined in the individual application no. 2014/13044 by taking into account the procedural economy.

The applicant has maintained that he was taken under administrative detention in order to be deported relying on the information that he was a member of a terrorist organization; that as the administrative action opened against this procedure was dismissed, he became a person likely to be deported; that the court gave its decision on the basis of the defence submissions of the administration; that although a decision for non-prosecution was rendered in respect of him at the end of the criminal investigation, the instance court did not take into account this decision; and that although he applied for being granted international protection status and granted a temporary protection status accordingly, he was unlawfully continued to be subject to administrative detention. He has further alleged that in case of being deported, he would face the risks

of being killed, being subject to torture and ill-treatment; and that he was detained in the Kumkapı Centre in a manner which would infringe his material and spiritual integrity and under the conditions incompatible with human dignity. He has therefore maintained that there has been a breach of the right to life, the prohibition of torture and torment, the right to legal remedies and the right to liberty and security of person.

In its examination as to the allegation that there has been a breach of Article 17 of the Constitution as the applicant would face the risk of being killed or being subject to torture and ill-treatment in case of being deported, the Court has observed that there exists any decision on deportation which was executed or has been currently executed in respect of the applicant who is under temporary protection. The Court has therefore concluded that the applicant could no longer claim victim status with regard to the allegations that these rights have been breached.

Making an assessment on the conditions of the Kumkapı Centre during the period when the applicant stayed in line with the applicant's allegations, taking into account the reports issued on this matter by the Human Rights Institution of Turkey and the Human Rights Investigation Commission of the Grand National Assembly of Turkey, the opinions of the relevant ministries, the international conventions and the standards relating to this matter and the case of the ECtHR, the Constitutional Court has considered that the overcrowding nature of the Centre where living space per person was less than three square meters and the conditions to which the applicant was exposed when he stayed in the Centre may be considered to lead to going beyond the level of treatment incompatible with human dignity which is prohibited in Article 17 of the Constitution. The Court has also reached the conclusion that apart from the places where he accommodated in the Centre, common use areas were inadequate, and more importantly, the opportunity provided for the applicant for outdoor exercise was very

Having examined the allegation that placing him under administrative detention was unlawful within the scope of the right to liberty and security of person, the Constitutional Court has observed that there was no substantial deficiency in the first decision on administrative detention given in the present case within the framework set by the Law no. 6458. However, the Court has taken into account the fact that the question as to whether the changes which are determinant for the execution of the deportation procedure and lead to the release of the applicant at an earlier date (lodging an application to request for international protection and being taken under temporary protection) were adequate for deciding the continuation of the administrative detention was not evaluated by the administrative and Magistrate Judge's Office as per the above-cited Law. Accordingly, the Constitutional Court has held that the administrative detention process applied in the course of the deportation procedure was not carried out with "due diligence" and did not provide protection against the arbitrariness in deprivation of liberty and therefore was not *"lawful"*.

limited; and that this situation made the applicant's conditions in the Centre more difficult. The Court has also held that the applicant's being subject to an administrative detention for more than eight months under such conditions has been in breach of Article 17 of the Constitution.

The Court has concluded at the same time that, under the specific circumstances of the present case, there was no effective remedy prescribed in Article 40 of the Constitution with regard to the alleged violations resulting from his detention conditions.

Having examined the allegation that placing him under administrative detention was unlawful within the scope of the right to liberty and security of person, the Constitutional Court has observed that there was no substantial deficiency in the first decision on administrative detention given in the present case within the framework set by the Law no. 6458. However, the Court has taken into account the fact that the question as to whether the changes which are determinant for the execution of the deportation procedure and lead to the release of the applicant at an earlier date (lodging an application to request for international protection and being taken under temporary protection) were adequate for deciding the continuation of the administrative detention was not evaluated by the administrative and Magistrate Judge's Office as per the above-cited Law. Accordingly, the Constitutional Court has held that the administrative detention process applied in the course of the deportation procedure was not carried out with "due diligence" and did not provide protection against the arbitrariness in deprivation of liberty and therefore was not *"lawful"*.

Relying on the facts that the decisions on placing the applicant under administrative detention and on the continuance of this measure were not notified to the applicant in due time and that the remedies did not provide an opportunity for an effective examination on the developments likely to allow for the release of the applicant, the Court has also held that there has been a breach of the rights guaranteed under Article 19 §§ 4 and 8 of the Constitution.

2- Judgment of Mete DURSUN (Application no: 2012/1195)

Dealing with matters as to the determination of the conditions to be required for a convict suffering from health problems on the basis of an expert opinion and as to the transfer of the convict to a place suitable for his health within the scope of the state's positive obligation, the Constitutional Court has observed that seeking for a prison which was suitable for the applicant's state of health, the process which started when the applicant was transferred from the Aydın E-Type Closed Prison to the Izmir for the first time and which subsequently continued, resulted from the state's failure to take all necessary measures in providing all facilities which are capable of meeting the needs of the convict suffering from health problems. Therefore, the Constitutional Court has stated that the minimum threshold for the prohibition of treatment incompatible with human dignity prescribed in the scope of Article 17 of the Constitution was exceeded.

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 18/11/2015, the applicant suffering from allergic asthmatic bronchitis was transferred from the Aydın Prison to the Izmir F-Type Closed Prison no.1 as the Aydın Prison where he was placed had reached full capacity. When it was revealed that the region where the Izmir F-Type Prison was located adversely affected the applicant's disease, the applicant was transferred to the Nazilli E-Type Closed Prison and respectively to the Antalya L-Type, Denizli D-Type, Ödemiş M-Type, and Izmir F-Type Closed Prison no. 2 due to his disease or for security purposes.

The applicant was ultimately transferred to six different prisons between 16/2/2011 and 2/4/2014. While the applicant was serving his imprisonment sentence in the Denizli D-Type Closed Prison, his room was changed for four times upon his request due to his disease. The applicant also complained of the last room he was placed as it was humid and small. The applicant requested to be transferred to an appropriate prison by maintaining that he was isolated, despite the report drawn up in respect of him, in the Izmir F-Type Closed Prison no. 2 where he was transferred for the last time although conditions therein were made suitable for his health. He was continuously referred to hospitals from the prisons where he was placed. He suffered from five attacks requiring him to be taken to the hospital within two months in the prison he was lastly placed. According to the diagnosis specified in the medical reports drawn up by a panel of physicians, he also suffered from hypertension and hyperlipoidaemia, as well as his current diseases.

The applicant has maintained that he is a patient with severe asthma and bronchitis; that he has been kept in a single room like a cell; that the instruction stated in his medical report and indicating that ventilation must be continuously on in his room were not complied with; that he is continuously exposed to cigarette smoke as he has to use the same ventilation with the convicts smoking; that in case of having an asthma attack, the measures to enable immediate treatment were not taken; and that although he requested improvement of his accommodation conditions in line with the reports including such sentences *"it has been found appropriate not to make him stay in a single room"* and *"he ought to avoid dusty and humid environments and pollens"* and he stated that the prison's conditions have deteriorated his health status, his request was unjustly rejected by the Execution Judge's Office. He has further alleged that his complaints continued after lodging the individual application; that the medical board report drawn up by the Pamukkale University indicated that he was under risk posing a threat for his life; his disease progressed; that any action was not taken against the prison director who intentionally ill-treated him; and that although it was stated that his life was under threat, he was not transferred to an appropriate place. For these reasons, the applicant has maintained that there has been a breach of the right to life and the right to protect his material and spiritual entity.

The Court has noted that the state is obliged to protect the individual's material and spiritual entity from all kinds of danger, threat or acts of violence; that this obligation imposed the duty of taking measures which would prevent the individuals from being subject to any punishment or treatment incompatible with the human dignity on the state; and that in line with the obligation to protect, the State may be held responsible

under Article 17 § 3 of the Constitution in the event that the authorities do not take reasonable measures in order to prevent the occurrence of any threat of ill-treatment of which they are or ought to be aware.

Dealing with matters as to the determination of the conditions to be required for a convict suffering from health problems on the basis of an expert opinion and as to the transfer of the convict to a place suitable for his health within the scope of the state's positive obligation, the Constitutional Court has observed that seeking for a prison which was suitable for the applicant's state of health, the process which started when the applicant was transferred from the Aydın E-Type Closed Prison to the Izmir for the first time and which subsequently continued, resulted from the state's failure to take all necessary measures in providing all facilities which are capable of meeting the needs of the convict suffering from health problems. Therefore, the Constitutional Court has stated that the minimum threshold for the prohibition of treatment incompatible with human dignity prescribed in the scope of Article 17 of the Constitution was exceeded.

Taking into account the fact that the applicant may be obliged to sustain the same risks until the date when he would be released in the event that he is placed under the conditions preventing him from taking part in any of the social activities and, at the same time, posing a risk for his life, the Constitutional Court has reached the opinion that there has been a breach of the prohibition of treatment incompatible with human dignity, which is prescribed in Article 17 of the Constitution.

E) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO LIBERTY AND SECURITY OF PERSON

1- Judgment of Hikmet KOPAR and Others (Application no: 2014/14061)

In the present individual application lodged by the person, who was taken into custody and subsequently detained on remand, with the allegation that the police custody period prescribed in legislation was exceeded, the Court has observed that such a violation would not have any effect on his personal status and even if the police custody period was exceeded, finding a violation or rendering a judgment concerning the fact that the police custody period was exceeded would not itself enable the *"detained"* person to be released as this person was detained on remand upon an order of the judge. In this respect, the Court has noted that the questions as to whether the legal custody period was exceeded or not and whether the period during which the applicant was questioned was lawful or not may be dealt with in a case to be opened under Article 141 of the Code no. 5271 without waiting for the decision on the merits of the case. The Court has therefore concluded that this part of the application must be declared inadmissible for non-exhaustion of available remedies.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 8/4/2015, two separate investigations were initiated by the Chief Public Prosecutor's Office against the applicants, who were security members, with regard to their duties. One of these investigations is concerning the allegation that the wiretapping of the communication for preventive purposes performed by the Intelligence Bureau was unlawful, and the other one is concerning the alleged acts of unlawfulness performed within the scope of an investigation alleged to be conducted with regard to an illegal organization.

The applicants were taken into custody on 22/7/2014 and some of them were detained on remand subsequent to their questioning between 25 July and 29 July 2014 for one or several offences such as forgery of official documents, wire-tapping and recording of the conversations among individuals, establishing an organization for committing an offence, and obtaining state's confidential information for political or military espionage. The investigations conducted against the applicants are still pending.

The applicants have maintained that the decision rendered, the actions taken and the procedures followed in respect of them within the scope of the investigation conducted into the *"parallel structure"* allegations were in breach of their rights enshrined in the Constitution.

In the present individual application lodged by the person, who was taken into

custody and subsequently detained on remand, with the allegation that the police custody period prescribed in legislation was exceeded, the Court has observed that such a violation would not have any effect on his personal status and even if the police custody period was exceeded, finding a violation or rendering a judgment concerning the fact that the police custody period was exceeded would not itself enable the *"detained"* person to be released as this person was detained on remand upon an order of the judge. In this respect, the Court has noted that the questions as to whether the legal custody period was exceeded or not and whether the period during which the applicant was questioned was lawful or not may be dealt with in a case to be opened under Article 141 of the Code no. 5271 without waiting for the decision on the merits of the case. The Court has therefore concluded that this part of the application must be declared inadmissible for non-exhaustion of available remedies.

On the other hand, according to the Court examining the allegations concerning the decisions on detention and on the objections thereto, those in respect of whom there is strong impression that they have committed an offence may only be detained on remand upon a judge's decision with a view to preventing them from fleeing, concealing or tampering with evidence or in certain circumstances, such as the above-mentioned ones, which require detention and other circumstances which are prescribed in law. In this context, a person may be detained on remand primarily relying on a strong suspicion that he has committed an offence. This is a condition *sine qua non* for having recourse to the detention measure. Therefore, the accusation must be supported with plausible evidence likely to be considered strong. Nature of facts and information which may be considered as plausible evidence is mainly based on the specific circumstances of each case.

Within this framework, for accusing a person, it is not absolutely necessary that adequate evidence must be available at the stage of his arrest or detention on remand. In fact, the aim of detention is to conduct the judicial process in a more reliable manner by means of substantiating or removing the suspicions forming a basis for detention on remand. Accordingly, the facts forming a basis for the suspicions on which the accusation is based and the facts which would be discussed at the subsequent stages of the criminal proceedings and which would be a basis for conviction must not be assessed at the same level.

In the instant case, the Court has observed that the decisions on the applicants' detention were justified by the wire-tapping records concerning the accusations whereas the applicants denied accusations against them.

Noting that an examination limited to the question as to whether there was plausible evidence indicating that the person has committed an offence and to the lawfulness of the deprivation of liberty in this scope was made in the judicial review concerning the first detention, the Court has indicated that existence of definite indications that an offence might have been committed in this context may be sufficient for the first detention.

The Court has noted that it cannot be accepted that there were no criminal suspicion and grounds for detention at this stage of the investigations in the present case when the grounds for the decision on their detention and other decisions rendered upon

The Court also examined the allegations asserted by some of the applicants that an arrest warrant was issued in respect of them in the absence of new evidence and that the decision on their detention which was given in conjunction with the arrest warrant was unlawful. It has indicated in this context that there is no link between the practice, in which the magistrate judge's decision for release may be subject to objection and in which an arrest warrant is issued by the authority dealing with the objections upon the public prosecutor's objection, and Article 91 § 5 of the Code no. 5271. It has been also noted that the arrest which is effected upon the order of the authority dealing with the objections is a part of the judicial procedure which has started when the suspect is taken into custody; that otherwise, the objection remedy would have no effect and be rendered ineffective; and that this practice is inherent in the nature of the review of the objection remedy and clearly set out in Article 98 of the Code no. 5271. The Court has therefore concluded that this part of the application is inadmissible for being manifestly ill-founded and must be rejected.

objection were taken into account. The Court has therefore declared this part of the application inadmissible for being manifestly ill-founded.

Having examined the applicants' allegations that they were decided to be detained on remand for an offence in respect of which an imprisonment period for a maximum period of six months was prescribed at the time of offence, the Court has underlined that one of the offences shown as a reason for the applicants' detention is *"wiretapping and recording of conversations among persons";* and that it has been alleged that many individuals were illegally wire-tapped and their conversations were recorded for an ongoing period of time. It has also emphasized that the matter as to whether the act, which continued for a certain period of time and has been alleged to fall into the scope of those acts in respect of which detention measure cannot be applied, was performed before the amendment to the law or not may be ascertained only after the proceedings.

Furthermore, noting that none of the applicants were detained on remand for only *"wiretapping and recording conversation among persons";* and that the applicants were detained not only on the basis of the above-mentioned offence but also for the offence of *"forgery of official documents by public officials"*, the Constitutional Court has held that this part of the application must be declared inadmissible for being manifestly ill-founded.

The Court also examined the allegations asserted by some of the applicants that an arrest warrant was issued in respect of them in the absence of new evidence and that the decision on their detention which was given in conjunction with the arrest warrant was unlawful. It has indicated in this context that there is no link between the practice, in which the magistrate judge's decision for release may be subject to objection and in which an arrest warrant is issued by the authority dealing with the objections upon the public prosecutor's objection, and Article 91 § 5 of the Code no. 5271. It has been also

The Court has noted that in the event that a provision does not intend to determine the jurisdiction which handles the case after a certain offence is committed and is applied to all cases falling into its scope following its entry into force, the principle of natural judge would be not impaired. It has accordingly underlined that it is not possible to accept that the judges sitting on the bench in deciding detention on remand or taking part in the examinations on the objection to the detention are not impartial on the basis of the decisions previously rendered by them in the matters which are not related to the applicants; and that the decisions rendered by and the votes casted by the judges cannot be considered as factors to cast any doubt on their impartiality. It has been therefore noted that these factors cannot be accepted as a justification for a challenge of judge *(reddi hakim)*.

noted that the arrest which is effected upon the order of the authority dealing with the objections is a part of the judicial procedure which has started when the suspect is taken into custody; that otherwise, the objection remedy would have no effect and be rendered ineffective; and that this practice is inherent in the nature of the review of the objection remedy and clearly set out in Article 98 of the Code no. 5271. The Court has therefore concluded that this part of the application is inadmissible for being manifestly ill-founded and must be rejected.

The Court also examined the applicants' allegations that the judicial authorities giving the decision on detention were incompatible with the principle of natural judge; and that there is a sufficient suspicion concerning the Magistrate Judge's Offices' being lack of independency and impartiality given the investigations initiated against them, the legal arrangements made within that period, the appointments to these offices and political discourse of that period. The Court has accordingly emphasized that the term of natural judge which is defined as the pre-determination of the jurisdiction to handle the case before an offence is committed or a dispute arises forms a basis for "*the right to be tried before a legal, independent and impartial court*" which is the most important element of the fair trial; and that the principle of natural judge prescribed in Article 37 of the Constitution does not allow for the establishment of the judicial tribunals after the offence is committed or the dispute arises or the appointment of the judge according to the accused and parties of the case. It has been underlined that this principle prohibits the handling of a case before a court to be established after the offence is committed and the establishment of a court specific to *"a person"* or *"a case"*.

In this context, the Court has noted that in the event that a provision does not intend to determine the jurisdiction which handles the case after a certain offence is committed and is applied to all cases falling into its scope following its entry into force, the principle of natural judge would be not impaired. It has accordingly underlined that it is not possible to accept that the judges sitting on the bench in deciding detention on remand or taking part in the examinations on the objection to the detention are not impartial on the basis of the decisions previously rendered by them in the matters which are not related to the applicants; and that the decisions rendered by and the

votes casted by the judges cannot be considered as factors to cast any doubt on their impartiality. It has been therefore noted that these factors cannot be accepted as a justification for a challenge of judge (*reddi hakim*).

Observing that in the present case, the relevant judges performed their duties on the basis of a general legal arrangement and subsequent to the appointment made by a competent board, the Court has concluded that it is not possible to accept that the relevant judges, who did not display any concrete prejudiced attitude towards the applicants, did not act independently and impartially for political and personal reasons by considering the facts of which reality and nature are not definitely established and the assessments and comments discussed in the course of political debates.

Having examined the applicants' allegations that they were denied access to the investigation file and they were not granted the right to defence within a reasonable time, the Court has observed that within the scope of the first investigations conducted against the applicants, the documents pertaining to the investigation were scanned and submitted to them in a CD. The Court has also indicated that they made their defence submissions in a detailed manner in accompany with their defence counsels by having possession of the documents and information forming a foundation for the accusation against them by taking into account their defence submissions before the Security Directorate, the Prosecutor's Office and during the questioning procedure.

The Constitutional Court has observed that relevant parts of the investigation file forming a basis for their detention were delivered to the defence counsels of the applicants who were detained on remand within the scope of the other investigation; that a report of 1292 pages which was drawn up by the inspectors of the Ministry of Internal Affairs was delivered to the applicants in a CD when they were in the police custody; however, approximately 200 pages of this report were not delivered to the suspects' defence counsels by virtue of the national security and the confidentiality of the individuals' private lives. The Court has accordingly concluded that the allegations that the applicants were denied access to the investigation file and were not granted a reasonable period of time for their defence submissions are manifestly ill-founded by taking into account that the applicants and their defence counsels were informed of the scope of the judicial review performed at the first stage of the period when the applicants were deprived of their liberty on suspicion of committing an offence as well as the main elements forming a basis for the accusations against them and that the applicants were provided with the opportunity to make an objection thereto.

The Court also examined the applicant's allegations that they were subject to trial through press which made numerous unfair and unsubstantial news in respect of them; that the judicial authorities likely to give a decision in their favour were described as *"parallel structure"* by the interference of the political power; and that the statements of the Prime Minister directly reflected them as guilty just in the custody period and thereby, the presumption of innocence was violated. In this context, the Court has emphasized that the presumption of innocence assures that a person must not be accepted as guilty without a final judicial decision indicating that he has committed the offence; and that hence, innocence of the individual is *"fundamental"* and therefore, no one may be declared guilty or may be treated like an offender by any of the judicial authorities and public authorities unless he is proven to be guilty.

In the instant case, the Court has observed that at the stage when the applicants had not been yet subject to any accusation concerning the offences by virtue of which they were decided to be detained on remand, the Prime Minister made general statements, without disclosing the applicants' names, concerning the illegal / unlawful wiretapping procedure within the scope of the political debates which were also on the public agenda; and that prior to the local administration elections held in the same period, there were extensive political debates in this regard and certain phone conversations wiretapped / audio surveillances were made available to public via internet. It has been also observed that the Chief Public Prosecutor's Office made a statement during which the names and professions of the applicants were not disclosed on 25/2/2014 due to the recent debates which were a direct concern to several individuals known to the public; and that the statement of the Chief Public Prosecutor's Office, which was the competent authority for the investigation in dispute, may not be considered to cause a direct link likely to be established with the applicants given the stage this statement was made and its content. Accordingly, the Constitutional Court has held that this part of the application must be declared inadmissible for being manifestly ill-founded.

2- Judgment of Yavuz PEHLİVAN and Others (Application no: 2013/2312)

The Court has underlined that the principles of *"equality of arms"* and *"adversarial proceedings"* must be complied with in the examinations on the requests for the continuance of detention or being released. The Court has noted that the principle of *"equality of arms"* means subjecting the parties of the case to the same conditions within the scope of the procedural rights and giving each party the reasonable possibility to present their claims and defence submissions before a court in those conditions that will not put one of the parties in disadvantage against the other party.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 4/6/2015, the applicants were detained on remand within the scope of the proceedings known to the public as the *"Izmir Military Spying Case"* with the allegation that they had committed the offences of *"being a member of an organization established for committing offences and obtaining information pertaining to the state's security"*, and a criminal case was brought against them. During the proceedings pending before the first instance court in which the applicants were held in detention on remand, the applicants requested to be granted images of the digital data which formed a ground for their detention and the criminal case against them and which was obtained from a third person. However, this request was rejected by the court on the ground that this digital database would be subject to an expert examination, and the court ordered continuation of their detention. After lodging an individual application, the applicants were released.

The applicants have maintained that their detention was not lawful and the periods of

In its examination on the present case, the Court has observed that the evidence shown as a basis for the accusations against the applicants was not obtained from the applicants and this evidence was digital materials obtained from the third parties; and that the judicial authorities did not allow the applicants detained on remand to examine these digital materials or to have them technically examined at the investigation and prosecution stages. In its judgment, the Constitutional Court has emphasized that failure to provide the applicants with adequate information concerning the content of the digital materials and documents and relevant adequate information which are of essential importance for enabling them to effectively raise objections to the unlawfulness of their detention and with the opportunity for having a technical examination performed on these digital materials violated the principle of equality of arms.

their detention were not reasonable; that as their access to the case-file was restricted, their rights to liberty and security of person were breached; and that being subject to trial by a court with special powers although the offences with which they were charged did not fall into the scope of a terrorist offence was in breach of the principle of legal judge.

In the Court's opinion, under Article 19 of the Constitution, persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for rapid conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful. The Court has underlined that the principles of *"equality of arms"* and *"adversarial proceedings"* must be complied with in the examinations on the requests for the continuance of detention or being released. The Court has noted that the principle of *"equality of arms"* means subjecting the parties of the case to the same conditions within the scope of the procedural rights and giving each party the reasonable possibility to present their claims and defence submissions before a court in those conditions that will not put one of the parties in disadvantage against the other party. The Court is of the opinion that the advantage which is accorded to one party while not accorded to the other party violates the principle of the equality of arms even if there is no evidence indicating that this situation has led to a *de facto* adverse outcome.

In its examination on the present case, the Court has observed that the evidence shown as a basis for the accusations against the applicants was not obtained from the applicants and this evidence was digital materials obtained from the third parties; and that the judicial authorities did not allow the applicants detained on remand to examine these digital materials or to have them technically examined at the investigation and prosecution stages. In its judgment, the Constitutional Court has emphasized that failure to provide the applicants with adequate information concerning the content of the digital materials and documents and relevant adequate information which are of essential importance for enabling them to effectively raise objections to the unlawfulness of their detention and with the opportunity for having a technical examination performed on these digital materials violated the principle of equality of arms.

In the Constitutional Court's opinion, the assessment as to whether the period of detention is reasonable or not must be made according to specific circumstances of each case. The continuation of detention may be justified only when there is more severe public interest *vis-a-vis* the right to liberty and security of person. The grounds for detention and continuation of detention must rely on the facts / evidence forming a basis for the accusation, and these facts must be explained with justifications in the decisions. The question as to whether the relevant and adequate evidence has been adduced for the continuance of detention must be assessed in conjunction with the question as to whether any material evidence forming a basis for the accusation has been obtained.

The Court has observed in the present case that the applicants could not reach the material evidence obtained from the third persons and forming a basis for the accusation, and, therefore, they could not effectively submit their requests for being released; and that in such a circumstance, their detention on remand for periods between approximately one year and two months and one year and nine months could not be found reasonable. It has been further noted that the justifications given in the decision on the continuation of detention and decisions rendered upon objection are not relevant and sufficient so as to justify the applicants' detention on remand for the above-mentioned periods when the circumstances of the present case are taken into account.

Consequently, the Constitutional Court has observed that the applicants' access to the material evidence was restricted; and that the period of their detention was not reasonable. It has therefore held that there has been a breach of the right to liberty and security of person guaranteed under Article 19 of the Constitution.

3- Judgments of Doğu PERİNÇEK, Hikmet ÇİÇEK, Hasan Atilla UĞUR (Application No: 2013/5885, 2013/5884, 2013/5924)

In the incidents giving rise to the present individual applications which were concluded by the Second Section of the Constitutional Court on 25/6/2015, the applicants Doğu Perinçek, Hikmet Çiçek and Hasan Atilla Uğur were taken into custody on 21/3/2008, 25/3/2008 and 1/7/2008, respectively. They were subsequently detained on remand on 29/3/2008, 24/3/2008 and 4/7/2008, respectively.

At the end of the investigation, a criminal case was brought against the applicants with the request of being sentenced within the scope of the case which was known to the public as *"Ergenekon Case"* and was handled before the assize court.

The Assize Court decided to convict the applicants for the offences they were charged with and ordered the continuation of their detention by its decision dated 5/8/2013.

The applicants have maintained that their rights to liberty and security of person were breached by stating that the period of their detention exceeded the maximum period prescribed in the law and the periods of their detention were not reasonable.

As to the allegations that the period of detention exceeded the maximum period prescribed in the law, the Court has noted that the applicants were detained on remand *"on the basis of an accusation against them"* for a period of over 5 years from the date when they were taken into custody to 5/8/2013 when the first instance proceedings ended. In

As to the allegations that the period of their detention exceeded reasonable time, the Court has noted that those in respect of whom there is strong impression that they have committed an offence may be detained on remand only for the purposes of preventing them from fleeing, concealing or tampering with evidence. The Court has indicated that even though the initial grounds for detention may be deemed sufficient for the continuance of detention until a certain period of time, it must be explained in the decisions on the extension of the detention period that the grounds for detention are still valid, as well as the justifications thereof. It has also noted that in the event that these grounds are found *"relevant"* and *"sufficient"* , an assessment must be made as to whether the proceedings were conducted with due diligence or not.

In the light of these considerations, the Court has noted that the justifications given in the decisions rendered with regard to the requests for being released and upon the objection to the detention are not *"relevant"* and *"sufficient"* in respect of the detention periods which were over five years. It has been therefore held that there has been a breach of the right to liberty and security of person guaranteed under Article 19 of the Constitution.

this context, the Court has pointed out that even though Article 10 § 5 of the Law no. 3713 was annulled on 4/7/2013, it was set out that the decision of annulment would enter into force one year after its publication in the Official Gazette; and that as the decision of annulment had not entered into force yet at the relevant time when the individuals applications were lodged with the Court, the maximum period of detention was 10 years as prescribed in Article 10 § 5 of the Law no. 3713, and therefore was not exceeded in the present cases.

As to the allegations that the period of their detention exceeded reasonable time, the Court has noted that those in respect of whom there is strong impression that they have committed an offence may be detained on remand only for the purposes of preventing them from fleeing, concealing or tampering with evidence. The Court has indicated that even though the initial grounds for detention may be deemed sufficient for the continuance of detention until a certain period of time, it must be explained in the decisions on the extension of the detention period that the grounds for detention are still valid, as well as the justifications thereof. It has also noted that in the event that these grounds are found *"relevant"* and *"sufficient"* , an assessment must be made as to whether the proceedings were conducted with due diligence or not.

In the light of these considerations, the Court has noted that the justifications given in the decisions rendered with regard to the requests for being released and upon the objection to the detention are not *"relevant"* and *"sufficient"* in respect of the detention periods which were over five years. It has been therefore held that there has been a breach of the right to liberty and security of person guaranteed under Article 19 of the Constitution.

4- Judgment of Hidayet KARACA (Application no: 2015/144)

Observing that in the present case, the relevant judges performed their duties on the basis of a general legal arrangement and subsequent to the appointment made by a competent board (the High Council of Judges and Prosecutors), the Court has concluded that it is not possible to accept that the relevant judges, who did not display any concrete prejudiced attitude towards the applicant, did not act independently and impartially for political and personal reasons by considering the facts reality and nature of which were not definitely established and the assessments and comments discussed in the course of political debates.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 14/7/2015, the applicant who was the General Manager of the Samanyolu Broadcasting Group, was taken into custody on 14/12/2014 within the scope of an investigation conducted by the Chief Public Prosecutor's Office and was detained on remand on 18/12/2014 for the offence of being a member of a terrorist organization. The investigation conducted against the applicant has not been concluded yet.

The applicant has maintained that the period of detention was exceeded; that the Magistrate Judge's Offices which were established for rendering a decision on detention and assessing the objections to detention are in breach of the principle of natural judge; that these offices are not independent and impartial; that his detention is not lawful; that he was denied access to the investigation file upon a decision of restriction given with regard to the investigation; that his sentences were interrupted during the period he was questioned at the Prosecutor's Office; that he was subject to ill-treatment during his custody period; and that this investigation has been conducted against him due to his professional activities. For these reasons, the applicant has alleged that his constitutional rights have been violated.

In the present individual application lodged by the applicant, who was taken into custody and subsequently detained on remand, with the allegation that the police custody period prescribed in the legislation was exceeded, the Court has observed that such a violation would not have any effect on his personal status, and even if the police custody period was exceeded, finding a violation or rendering a judgment in this regard would not *per se* enable the *"detained"* person to be released as this person was detained on remand by a judge.

In this respect, the Court has noted that the questions as to whether the legal custody period was exceeded or not and whether the period during which the applicant was questioned was lawful or not may be dealt with in a case to be filed under Article 141 of the Code no. 5271 without waiting for the decision on the merits of the case. Accordingly, the Court has concluded that this part of the application must be declared inadmissible for non-exhaustion of available remedies.

As to the allegations that the principle of natural judge was breached and that the judicial authorities were not impartial and independent, the Court has accordingly emphasized that the term of natural judge, which is defined as the pre-determination of the jurisdiction to handle the case before an offence is committed or a dispute arises, forms a basis for "*the right to be tried before a legal, independent and impartial court"* which is the most important element of the fair trial; and that the principle of natural judge prescribed in Article 37 of the Constitution does not allow for the establishment of the judicial tribunals after the offence is committed or the dispute arises or the appointment of the judges according to the accused and parties of the case. It has been underlined that this principle prohibits handling of a case before a court to be established after the offence is committed and the establishment of a court specific to *"a person"* or *"a case"*. In this context, the Court has noted that in the event that a provision does not aim at determining the jurisdiction which handles the case after a certain offence is committed and is applied to all cases falling into its scope following its entry into force, the principle of natural judge would be not breached.

Observing that in the present case, the relevant judges performed their duties on the basis of a general legal arrangement and subsequent to the appointment made by a competent board (the High Council of Judges and Prosecutors), the Court has concluded that it is not possible to accept that the relevant judges, who did not display any concrete prejudiced attitude towards the applicant, did not act independently and impartially for political and personal reasons by considering the facts reality and nature of which were not definitely established and the assessments and comments discussed in the course of political debates.

Therefore, it has been held that this part of the application must be declared inadmissible for being manifestly ill-founded.

As to the allegations concerning the decisions on detention, the Court has indicated that those in respect of whom there is strong impression that they have committed an offence may only be detained on remand upon a judge's decision with a view to preventing them from fleeing, concealing or tampering with evidence or in certain circumstances, such as the above-mentioned ones, which require detention and other circumstances which are prescribed in law. In this context, a person may be detained on remand primarily relying on a strong suspicion that he has committed an offence. This is a condition *sine qua non* for having recourse to the detention measure. Therefore, the accusation must be supported with plausible evidence likely to be considered strong. Nature of facts and information which may be considered as plausible evidence is mainly based on the specific circumstances of each case. Within this framework, for accusing a person, it is not absolutely necessary that adequate evidence be available at the stage of his arrest or detention on remand. In fact, the aim of detention is to conduct the judicial process in a more reliable manner by means of substantiating or removing the suspicions forming a basis for detention on remand. Accordingly, the facts forming a basis for the suspicions on which the

As to the allegations with regard to having access to the investigation file, the Court has underlined that any person who has been arrested must be informed of the main factual and legal grounds for his arrest in a non-technical and simple manner he may comprehend, and thereby, the arrested person must be provided with the opportunity to apply to the competent court for raising an objection as to the lawfulness of the arrest. The Court has also noted that in circumstances where the arrested person is detained on remand, if the relevant person has been informed of the main evidence while being heard by the prosecutor and the investigating judge and if this evidence has been referred to in the objection made by the defence counsel to detention, it must be accepted that this person has adequate information on the content of the documents forming a basis for his detention.

accusation is based and the facts which would be discussed at the subsequent stages of the criminal proceedings and which would be a basis for conviction must not be assessed at the same level.

The Court has observed that in the instant case, the grounds provided for the decision on the applicant's detention were the video records, dialogues broadcasted during a television series, newspaper reports and columns, phone conversations of the applicant and statements of the other suspects. The assessment made in the judicial review on the first detention on remand is limited to the question as to whether there are plausible grounds concerning the fact that a person might have committed an offence and to the lawfulness of the deprivation of liberty in this context. The existence of serious indications that an offence might have been committed may be sufficient for the procedure of the first detention. The Court has also stated that when the grounds for the decision on detention at this stage of the investigation were examined, it could not be accepted that there were no criminal suspicion and grounds requiring detention.

It has been therefore held that this part of the application must be declared inadmissible for being manifestly ill-founded.

As to the allegations with regard to having access to the investigation file, the Court has underlined that any person who has been arrested must be informed of the main factual and legal grounds for his arrest in a non-technical and simple manner he may comprehend, and thereby, the arrested person must be provided with the opportunity to apply to the competent court for raising an objection as to the lawfulness of the arrest. The Court has also noted that in circumstances where the arrested person is detained on remand, if the relevant person has been informed of the main evidence while being heard by the prosecutor and the investigating judge and if this evidence has been referred to in the objection made by the defence

counsel to detention, it must be accepted that this person has adequate information on the content of the documents forming a basis for his detention.

Having examined the applicant's defence submissions before the Public Prosecutor's Office and in the course of his questioning, the Court has observed that the applicant made detailed defence submissions in company with his defence counsels by having possession of basic information concerning the accusation against him; and that a detailed defence submission as to the procedural and substantive aspects was made while raising an objection to the applicant's detention.

Having observed that the applicant and his defence counsels were informed of the scope of the judicial review carried out at the first stage of the deprivation of liberty on suspicion that an offence had been committed and of main elements forming a basis for the accusations; and that the applicant was granted the opportunity to raise an objection to these grounds, the Court has held that it is not possible to accept the applicant's allegation that he was deprived of the opportunity to have access to the investigation file.

The Court has therefore held that this part of the application must be declared inadmissible for being manifestly ill-founded.

As to the applicant's allegations that he was subject to ill-treatment in the police custody and his words were interrupted during the period he was questioned before the Public Prosecutor's Office, the Court has noted that the applicant lodged an individual application before exhausting the ordinary remedies. The Court has also observed that the allegation that an investigation was conducted against him on account of his professional activities is manifestly ill-founded on the basis of the justifications given in the decision on detention. Accordingly, the Court has also declared these parts of the application inadmissible.

5- Judgment of İzzettin ALPERGİN (Application No: 2013/385)

> **Having observed that the applicant and his defence counsels were informed of the scope of the judicial review carried out at the first stage of the deprivation of liberty on suspicion that an offence has been committed and of main elements forming a basis for the accusations and that the applicant was granted the opportunity to raise an objection to these grounds, the Court has held that it is not possible to accept the applicant's allegation that he was deprived of the opportunity to have access to the investigation file only due to the restriction decision.**

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 14/7/2015, the applicant who was the Secretary-General of the Trade Union called "Tüm-Bel-Sen", which is affiliated to

the Public Labourer's Union ("KESK"), was taken into custody on 25/6/2012 within the scope of the investigation conducted by the Chief Public Prosecutor's Office with the allegation that he had performed activities within the Democratic Labour Platform (DEMEP) alleged to act within the framework of the illegal PKK/KCK organization. On 28/6/2012, he was detained on remand for the offence of being a member of the armed terrorist organization

In the course of the investigation, the applicant objected to the decisions on his detention and the continuance of his detention and requested to be released. However, his requests were dismissed, and it was ordered that his detention be continued.

A case was filed against the applicant with the bill of indictment of the Chief Public Prosecutor's Office dated 28/1/2013. After lodging the individual application, he was released by the Assize Court on 10/4/2013.

The applicant has maintained that he was detained on account of his union activities and his detention was not lawful; and that the decisions on the continuation of detention were unreasoned. He has also alleged that the period of his detention exceeded the reasonable period; and that he could not make an effective defence submission as a confidentiality order was given in respect of the investigation. He has finally maintained that he was not informed of the offences he was charged with during his arrest and the search carried out in his apartment; and that he was denied access to his lawyers. For these reasons, the applicant has alleged that there has been a breach of the right to liberty and security of person and the right to a fair trial.

In the instant case, the Court has found out that the qualification and nature of the offence with which the applicant was charged, the fact that the imputed offence fell into the scope of the offences listed in Article 100 § 3 of the Code no. 5271 and the existence of suspicions that the suspects may conceal the evidence and flee *vis-a-vis* the amount of sentence envisaged for the offence were indicated as the grounds for the decisions on detention given in respect of the applicant. Moreover, it has been observed that the applicant was decided to be detained on remand on the basis of the evidence concerning the imputed offence, included in the investigation file and specified in the bill of indictment.

In the Constitutional Court's judgment, it is stated that the applicant's allegation that he was detained on remand only for his union activities although there were no plausible grounds with regard to the offence was not reasonable; that the detention met the criterion of strong suspicion given the evidence adduced and the justifications in the decisions on detention, which thereby formed the grounds for the applicant's detention.

It has been therefore held that this part of the application must be declared inadmissible for being manifestly ill-founded.

As to the allegation with regard to having access to the investigation file, the Court has underlined that any person who has been arrested must be informed of the main

factual and legal grounds for his arrest in a non-technical and simple manner he may comprehend, and thereby, the arrested person must be provided with the opportunity to apply to the competent court for raising an objection as to the lawfulness of the arrest. The Court has also noted that in circumstances where the arrested person is detained on remand, if the relevant person has been informed of the main evidence while being heard by the prosecutor and the investigating judge and if this evidence has been referred to in the objection made by the defence counsel to detention, it must be accepted that this person has adequate information on the content of the documents forming a basis for his detention.

Having examined the applicant's defence submissions in the course of his questioning, the Court has observed that he was asked the acts he had performed during his statement-taking procedure at the Security Directorate and the Public Prosecutor's Office and, in this respect, he made detailed defence submissions in company with his defence counsel by being aware of the documents and information forming a basis for the accusation against him. The Court has also pointed out that the meetings during which the conversations were recorded were especially referred to in the objection to the applicant's detention, and thereby, it has been revealed that the applicant and his defence counsel had access to the documents forming a basis for his detention.

Having observed that the applicant and his defence counsels were informed of the scope of the judicial review carried out at the first stage of the deprivation of liberty on suspicion that an offence has been committed and of main elements forming a basis for the accusations and that the applicant was granted the opportunity to raise an objection to these grounds, the Court has held that it is not possible to accept the applicant's allegation that he was deprived of the opportunity to have access to the investigation file only due to the restriction decision.

The Court has therefore held that this part of the application must be declared inadmissible for being manifestly ill-founded.

As to the allegations of legal assistance and being informed of the accusation, the Constitutional Court has recalled that an individual application may be lodged

As to the allegations of legal assistance and being informed of the accusation, the Constitutional Court has recalled that an individual application may be lodged with the Constitutional Court only after all ordinary remedies are exhausted. In this respect, the Court has stated that the respect for fundamental rights and freedoms is a constitutional duty incumbent on all organs of the state; and that the administrative and judicial authorities are liable to redress the right violations resulting from the breach of this duty. The Court has therefore indicated that the allegations of a breach of fundamental rights and freedoms must be primarily brought forward before and must be dealt with and concluded by the instance courts.

with the Constitutional Court only after all ordinary remedies are exhausted. In this respect, the Court has stated that the respect for fundamental rights and freedoms is a constitutional duty incumbent on all organs of the state; and that the administrative and judicial authorities are liable to redress the right violations resulting from the breach of this duty. The Court has therefore indicated that the allegations of a breach of fundamental rights and freedoms must be primarily brought forward before and must be dealt with and concluded by the instance courts.

In the instant case, the Court has pointed out that the proceedings in respect of the applicant is still pending and therefore, these allegations asserted within the scope of the right to a fair trial may be examined in the course of the proceedings and through the ordinary remedies. Accordingly, as to the applicant's allegations that his right to a fair trial has been violated in that he was not informed of the imputed offences during his arrest and the search conducted at his apartment and that he was denied legal assistance, the Court has noted that the judicial remedies have not been exhausted and held that this part of the application must be declared inadmissible for non-exhaustion of ordinary remedies.

The Court also examined the allegation concerning the period of detention. In the Court's opinion, the assessment as to whether the period of detention is reasonable or not must be made according to specific circumstances of each case. The continuation of detention may be justified only when there is more severe public interest *vis-a-vis* the right to liberty and security of person. It has been also noted that the authorities may have recourse to detention measure only for purposes of preventing the individuals from fleeing, concealing or tampering with evidence, as well as in case of the existence of strong impression that they have committed an offence. The Court has indicated that even though the initial grounds for detention may be deemed sufficient for the continuance of detention until a certain period of time, it must be explained in the decisions on the extension of the detention period that the grounds for detention are still valid, as well as the justifications thereof. It has also noted that in the event that these grounds are found *"relevant"* and *"sufficient"* , an assessment must be made as to whether the proceedings were conducted with due diligence or not.

In the light of the foregoing considerations, the Court has held that there has been no breach of Article 19 § 7 of the Constitution by taking into account the nature of the offence with which the applicant was charged, the number of persons in respect of an investigation was conducted, the scope of the subject-matter of the investigation, the period of detention which lasted for 9 months and 15 days from the investigation period to the first hearing of the case and the evidence objectively establishing the existence of the suspicion concerning the imputed offence.

F) JUDGMENTS RENDERED IN RESPECT OF THE CONFIDENTIALITY OF THE PRIVATE LIFE

1- Judgment of Serap TORTUK (Application No: 2013/9660)

The Court has noted that in pursuance of Article 20 of the Constitution, everyone has the right to demand respect for his private and family lives, and privacy of private or family life shall not be violated. The Court has pointed out that the right to privacy of private life enshrined in this article of the Constitution corresponds to the right guaranteed within the scope of the right to respect for private life under Article 8 of the European Convention on Human Rights. Accordingly, the Court has indicated that the individual's privacy sphere and his acts and behaviours taking place in this sphere also fall into scope of the individual's private life. The Court therefore examined the right to privacy and the protection of the confidentiality of the information pertaining to this sphere under Article 20 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 21/1/2015, a disciplinary investigation was initiated against the applicant who was serving as a civilian nurse in the military hospital upon the unconfirmed information that sexually explicit images alleged to belong to the applicant were posted, on her behalf, via an account opened on a social networking site. At the end of the disciplinary investigation conducted, she was removed from her public office.

The case filed by the applicant before the Supreme Military Administrative Court with the request of the suspension and annulment of the execution of the disciplinary punishment was dismissed.

The applicant has maintained that these images were posted via a social networking account opened on her behalf; that she does not know who created this account; that these images did not belong to her; and that posting of these images via an account opened on her behalf was contrary to the ordinary flow of life. The applicant has also alleged that even if it is accepted that these images belonged to her, the discretionary power executed in the form of imposing a punishment on the applicant was not proper as these images are completely related to her private life.

In the Constitutional Court's opinion, the notion of private life is a broad term which does not have an absolute definition. In this context, the legal value which is under protection is principally personal independence. This protection, on one hand, indicates that everyone has the right to live free of all undesired interferences in an environment specific to himself whereas, on the other hand, sets forth that the notion of private life may not be construed in a way that everyone maintains

In the present case, the Court has observed that the applicant was not removed from public office as a result of a disciplinary investigation conducted for professional grounds; and that, as inferred from the disciplinary investigation process, the decision for removal of public office and the decisions given by the instance courts, especially the applicant's acts alleged to fall into scope of the private life are the determinant in the process which is subject-matter of this individual application. Accordingly, the Court has held that the applicant's removal of public office on account of the matters concerning her private life constituted an interference in the right to privacy of private life.

his personal life in the way he desires and isolates the external world from his own circle. In this respect, Article 20 of the Constitution guarantees maintenance of a private social life. Private life indicates a notional and physical field in which individuals may improve themselves and establish private relations with others. This privacy sphere consists of a private field in which the state may interfere, to the minimum extent, only for legitimate purposes. The space of the individual's right of privacy is, in principle, private sphere. However, the right to respect for private life may, in certain circumstances, extend to the public sphere.

Accordingly, the Court has noted that in pursuance of Article 20 of the Constitution, everyone has the right to demand respect for his private and family lives, and privacy of private or family life shall not be violated. The Court has pointed out that the right to privacy of private life enshrined in this article of the Constitution corresponds to the right guaranteed within the scope of the right to respect for private life under Article 8 of the European Convention on Human Rights. Accordingly, the Court has indicated that the individual's privacy sphere and his acts and behaviours taking place in this sphere also fall into scope of the individual's private life. The Court therefore examined the right to privacy and the protection of the confidentiality of the information pertaining to this sphere under Article 20 of the Constitution.

In the present case, the Court has observed that the applicant was not removed from public office as a result of a disciplinary investigation conducted for professional grounds; and that, as inferred from the disciplinary investigation process, the decision for removal of public office and the decisions given by the instance courts, especially the applicant's acts alleged to fall into scope of the private life are the determinant in the process which is subject-matter of this individual application. Accordingly, the Court has held that the applicant's removal of public office on account of the matters concerning her private life constituted an interference in the right to privacy of private life.

In this context, in the Court's opinion, in the course of the disciplinary investigation resulting in the punishment of removal of public office, the applicant had to reply to allegations concerning her private life instead of her professional life.

The allegations brought forward against the applicant was not pertaining to her profession; but mainly concerning her private life acts taking place in the privacy sphere. Therefore, the scope of the investigation which is in dispute went beyond the boundaries of professional life.

Stating that the balance applied to the restriction of all fundamental rights and freedoms in the Constitution by virtue of Article 13 of the Constitution must also be taken into account for restrictions to be imposed on the privacy of private life, the Court has indicated that the right to privacy of private life may be restricted; however, there must not be any disproportionality between the legitimate aim pursued in the restriction and the means of restriction. It has been further underlined that a fair balance must be struck between the general interest likely to be obtained through restriction and the loss sustained by the individual whose fundamental right and freedom has been restricted.

The Court has observed that the penalty imposed on the applicant at the end of the disciplinary procedure for her removal of public office has become more significant as this penalty has influenced her economic future, to the same extent with her professional life, for being deprived of her main source of income. The Court has accordingly reached the conclusion that, within the scope of the disciplinary penalty imposed on the applicant, a fair balance was not struck between the general interest likely to be obtained through the restriction and the loss sustained by the individual whose fundamental right and freedom was restricted. The Court has therefore concluded that there has been a breach of the applicant's right to privacy of private life guaranteed under Article 20 of the Constitution.

2- Judgment of Ata TÜRKERİ (Application No: 2013/6057)

The Court has pointed out that the applicant was dismissed from the Turkish Air Forces not at the end of the disciplinary investigation conducted for professional grounds but for indiscipline and moral conditions. In this scope, the Court has noted that it must be assessed whether the administrative or judicial interference in the right to respect for private life meets a pressing social need and accordingly, whether this interference is compatible with the requirements of a democratic social order and the principle of proportionality.

In the incident giving rise to the present individual application concluded by the First Section of the Constitutional Court on 12/12/2015, an investigation was initiated against the applicant, who was a staff member of the Turkish Air Force after an anonymous notice had been received concerning the allegations as to his private life. Within the scope of this investigation, the statements of the applicant and other

certain personnel were taken. Certain information concerning the sexual life of the applicant was obtained upon this statement. The applicant was heard without being informed that an administrative investigation had been initiated and also without being informed of the scope of his questioning. However, it has been revealed that the applicant replied to the questions addressed to him and signed his statement in which he explained his sexual life from his pupillage.

A penalty of being subject to obligatory retirement on account of moral conditions was imposed on the applicant. The case filed by him for the annulment of this penalty was rejected by the Supreme Military Administrative Court.

The applicant has maintained that his statement was taken under the name of an interview during which he was given the impression that he was heard as a witness, he was assured that he would not be subject to any disciplinary penalty and during which he was subject to moral coercion. He has also alleged that he was made to sign his statement without being allowed to read it; and that he was subject to obligatory retirement on the basis of information pertaining to his private life. He has therefore alleged that his constitutional rights have been breached.

The Court has pointed out that the applicant was dismissed from the Turkish Air Forces not at the end of the disciplinary investigation conducted for professional grounds but for indiscipline and moral conditions. In this scope, the Court has noted that it must be assessed whether the administrative or judicial interference in the right to respect for private life meets a pressing social need and accordingly, whether this interference is compatible with the requirements of a democratic social order and the principle of proportionality.

In the Constitutional Court's opinion, the notion of private life does not only mean the privacy sphere but also assures the individuals to maintain a private social life.

The Court has considered that there must be especially serious grounds for justification of the interference in private life. Taking the applicant's statement, which formed a basis for the disciplinary action against him, without mentioning of any definite and concrete acts and without providing any information as to for which legal action his statement would form a basis has casted doubt on it. The Constitutional Court has observed that the instance court's decision did not comprehensively deal with the conditions under which the statement had been taken in spite of the applicant's allegations and did not indicate under which conditions the applicant had explained his sexual life, the most intimate part of his private life, in a detailed manner as from his pupillage. It has been also observed that, when the allegations concerning the conditions of statement-taking are taken into account, the instance court's decision did not include any reasonable ground which would justify the interference in the applicant's right to privacy.

Especially, certain elements of the public officers' private lives which also become integrated with their professional lives may be subject to restrictions within the framework of the discretionary power of the administrative authorities. However, as in the restrictions imposed in respect of other individuals, these officers must avail themselves of the constitutional guarantees, and the administration's margin of discretion must be narrower in the matter of sexual privacy under the right to privacy of private life.

Moreover, the Court has considered that there must be especially serious grounds for justification of the interference in private life. Taking the applicant's statement, which formed a basis for the disciplinary action against him, without mentioning of any definite and concrete acts and without providing any information as to for which legal action his statement would form a basis has casted doubt on it. The Constitutional Court has observed that the instance court's decision did not comprehensively deal with the conditions under which the statement had been taken in spite of the applicant's allegations and did not indicate under which conditions the applicant had explained his sexual life, the most intimate part of his private life, in a detailed manner as from his pupillage. It has been also observed that, when the allegations concerning the conditions of statement-taking are taken into account, the instance court's decision did not include any reasonable ground which would justify the interference in the applicant's right to privacy.

Consequently, the Court has held that for the above-mentioned reasons, there has been a breach of the right to privacy of private life which is guaranteed under Article 20 of the Constitution.

G) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO RESPECT FOR FAMILY LIFE

1- Judgment of Hayriye ÖZDEMİR (Application No: 2013/3434)

Considering that there is no clear legal arrangement on the issue of changing surname of the child whose custody has been awarded to the mother upon divorce; and that there are different judicial decisions on this matter, the Court has stated that Article 321 of the Law no. 4721 shown as the legal basis for the interference in the present case has not met the criterion of certainty in the context of the interference resulting from the dismissal of the applicant's request for the replacement of the surname of the child under her custody; and that therefore, the interference failed to pass legality test . The Court has accordingly held that there has been a breach of the applicant's right to respect for family life guaranteed under Article 20 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 25/6/2015, the applicant filed a case for the replacement of the surname of her child, whose custody was awarded to her upon the divorce case, with her own surname instead of her ex-husband's surname.

The first instance court accepted the case on 16/4/2012 on the grounds that that the phrase *"in cases of termination of marriage or divorce, the child shall adopt the surname chosen/to be chosen by the father even if the child's custody has been granted to the mother"* , which was set out in Article 4 § 2 of the Surname Law dated 21/6/1934 and no. 2525, was annulled by the judgment of the Constitutional Court dated 8/12/2011 and no. E.2010/119, K.2011/165 and that the Constitutional Court's judgment on annulment was promulgated in the Official Gazette. By relying on the Constitutional Court's judgment on annulment, the first instance court found the applicant's request for the replacement of her children's surname with her own surname was justified.

The applicant's case was dismissed upon the quashing judgment of the Court of Cassation in which it was stated that, under Article 321 of Turkish Civil Code no. 4721, a child born as a result of the marriage shall bear the father's surname (family surname); that even if the child's custody is awarded to the mother upon divorce or the death of the father, it may not cause any change in the surname; and that the child's surname cannot be changed unless it is changed by a court's decision to be given at the end of a case duly filed. After the decision quashing the judgment, the first instance court dismissed the case.

The applicant has maintained that the case filed by her for the replacement of the

surname of her child, whose custody was awarded to her after the divorce, with her own surname was dismissed. She has also stated that, although her requests were based on the judgment of the Constitutional Court annulling the relevant part of Article 4 of the Law no. 2525, this issue was not sufficiently addressed in the court's decision and any justification was not provided therein. She has also maintained that upon the rejection of the request for rectification of the decision, a fine was imposed on her. She has accordingly alleged that there has been a breach of her right to a fair trial and right to respect for family life.

The Constitutional Court has noted that the right of custody is a formation which consists of the rights and obligations vested in the father and mother of the minor for the minor's care and custody. In this context, the Court has observed that this formation constitutes a legal basis for the child's care and education, legal representation, management of his assets and the protection of child's interests. The Court has accordingly noted that the applicant's request for the replacement of the surname of the child, whose custody was awarded to her, with her own surname is a legal issue related to the right of custody and the exercise of authority in this context and therefore must be considered under Article 20 of the Constitution.

The judgment of the Constitutional Court states that issues concerning the gender equality and gender-based discrimination, including the right of custody and the exercise of powers related thereto, are dealt with in various international legal documents concerning human rights; that the relevant provision of the Surname Law no. 2525, which set out that the child shall adopt the surname chosen/to be chosen by the father even if the child's custody was awarded to the mother in cases of the termination of marriage or divorce, was annulled by the Constitutional Court on 8/12/2011 finding it contrary to Articles 10 and 41 of the Constitution; and that besides, the Turkish legal system allows for making a change in the name or surname on the basis of certain grounds, and in this context, Article 27 of Law no. 4721 provides that the name may be requested to be changed by relying on justified reasons.

The Constitutional Court has concluded that the dismissal of applicant's case for changing the surname of the child whose custody was awarded to her has constituted an interference in the applicant's right to respect for family life.

The Court has noted that the criterion "fundamental rights and freedoms may be restricted only by law" has an important role in the constitutional jurisdiction and, in case of an interference in any right, it must be primarily ascertained whether there has been a provision which authorizes such interference. The Court has also indicated that laws restricting fundamental rights and freedoms require a substantive content as well. Emphasizing that the relevant legal arrangement must be certain in terms of its content, aims and scope and clear enough so that those concerned can comprehend their legal status, the Court has recalled that relevant provision may grant discretionary power, to a certain extent, to the legal practitioners. However, in order to provide an efficient protection of the fundamental rights, a minimum level of certainty must be ensured with regards to the wording and interpretation of the

provision constituting a basis of the interference. In the Court's opinion, it is possible to use concepts which may be defined through interpretation methods. However, if a uniform implementation is not ensured for the relevant provision, this may be considered as an indication of uncertainty.

The Constitutional Court emphasizes in its judgment that its duty is limited to reviewing the constitutionality of such interpretation and implementation; that the provision which was shown as the legal basis of the interference in the present case and which states that *"The child bears the surname of family if the mother and father are married (…). However, if the mother bears two surnames due to her previous marriage, then the child bears her maiden surname"* has become subject-matter of cases similar to the present case by the parents, who have been awarded the custody of the children upon divorce. The Court also notes in its judgment that the legality of such interference has been widely discussed and different legal interpretations have arisen in those proceedings.

Consequently, considering that there is no clear legal arrangement on the issue of changing surname of the child whose custody has been awarded to the mother upon divorce; and that there are different judicial decisions on this matter, the Court has stated that Article 321 of the Law no. 4721 shown as the legal basis for the interference in the present case has not met the criterion of certainty in the context of the interference resulting from the dismissal of the applicant's request for the replacement of the surname of the child under her custody; and that therefore, the interference failed to pass legality test . The Court has accordingly held that there has been a breach of the applicant's right to respect for family life guaranteed under Article 20 of the Constitution.

2- Judgment of Marcus Frank CERNY (Application No: 2013/5126)

Indicating that the acts of international child abduction by the parents constitute a significant group of cases which require making an assessment within the context of the respect for family life, the Constitutional Court has stated that the Hague Convention, a part of the Turkish law, includes guiding provisions for determination and implementation of positive obligations under the right to respect for family life; and that therefore, the provisions of this Convention must be taken into consideration in determination of positive obligations incumbent on the state within the scope of the right to respect for family life guaranteed under Articles 20 and 41 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 2/7/2015, the applicant who is

an American citizen (a citizen of the USA) and applied to the US Department of State, with the allegation that his child in common had been taken by his mother, who is a Turkish citizen, from the USA, the habitual residence of the child, and the child was not allowed to return to the USA, for initiation of the procedures to enable his child's return within the scope of the Hague Convention. The action for return of the child was brought after the applicant's request seeking the return of his child had been transmitted to the Ministry of Justice, the Directorate General for the International Law and Foreign Affairs.

The first instance court dismissed the applicant's request for the return of his child by stating that the conditions requiring prompt return of the child in question, which is set out in Article 12 of the Hague Convention, were not fulfilled and by taking into account the child's age and dependence on the mother. The first instance decision became final after being upheld through the available legal remedies.

The applicant has maintained that the process pursued with regard to the request for the return of the child did not have the required procedural guarantees as the parties' requests and allegations were not fulfilled; and that his personal relationship with his child was hindered as the instance courts interpreted the provisions of the Hague Convention, which list the exceptions to the return of the child, in a broader manner. The applicant has therefore alleged that there has been a breach of the right to a fair trial and the right to respect for family life.

Noting that the right to respect for family life is guaranteed under Article 20 § 1 of the Constitution, the Constitutional Court has underlined that, as the principle of constitutional integrity, Article 41 of the Constitution must also be taken into consideration especially within the context of the assessment on positive obligations with regard to the respect for family life. In the Court's opinion, the fundamental relations within the family life are those between the woman and the man and between the parents and the child. When it is taken into consideration that civil marriage unions are, in principle, guaranteed within the scope of the family life, the relationship between the child who was born during a civil marriage union and the applicant is sufficient for establishment of the family life.

Indicating that the primary element of the family life is the ability of developing the family relationships in a normal way and in this context, the family members' right to live together, the Court has observed that the family relationship between the parents and the child would continue even if the parents decide to terminate their marriage. The obligation incumbent on the state within the scope of the right to respect for family life is not only limited to abstaining from arbitrary interference in the designated right; but also includes the positive obligations to ensure effective respect for the family life.

It is emphasized in the Constitutional Court's judgment that Articles 20 and 41 of the Constitution include the parents' right to request measures to be taken for

ensuring his/her integration with the child and the public authorities' obligation to take such measures; and that these obligations are envisaged with a view to guaranteeing the respect for family life and require both the establishment of a regulatory judicial framework which protects the individuals' rights and taking of appropriate measures which would be *de facto* put into practice.

Indicating that the acts of international child abduction by the parents constitute a significant group of cases which require making an assessment within the context of the respect for family life, the Constitutional Court has stated that the Hague Convention, a part of the Turkish law, includes guiding provisions for determination and implementation of positive obligations under the right to respect for family life; and that therefore, the provisions of this Convention must be taken into consideration in determination of positive obligations incumbent on the state within the scope of the right to respect for family life guaranteed under Articles 20 and 41 of the Constitution.

The Court has observed that the Hague Convention provides a prompt return of the child and limited number of exceptions to the prompt return of the child in the acts of international child abduction by the parent and thereby, aims at ensuring the continuation of the relationships between the parent and the child without being impaired in the course of the process pertaining to the matters of custody and personal relationship disputes. The Court has accordingly noted that the restriction imposed with regard to the applicant's right to establish relationship with his child by means of dismissing the request for the return of the child amounted to an interference in the right to respect for family life; that the interference was understood to be relied on the Hague Convention and the Law no. 5717 entered into force in this respect, and therefore had a sufficient legal ground; and the instance courts pursued a legitimate aim, such as maintaining the child's health and security, in their decisions on dismissal of the return of the child.

The Court has observed that, in the decisions of the instance courts, any assessment was not made and explanation was not provided as to whether staying of the child in Turkey was lawful or not according to the provisions of the Hague Convention, on the determination of the habitual residence to be taken as a basis for the decision on the return of the child, on the provisions of the Hague Convention concerning the exceptions to the return of the child and as to whether these exceptional provisions may be applied to the applicant's case or not. Taking into account these factors, the Constitutional Court has found out that the grounds specified in these decisions were not relevant and sufficient within the scope of the right to respect for family life and accordingly held that there has been a breach of the right to respect for family life guaranteed under Article 20 of the Constitution.

Underlining that, in spite of the above-cited legitimate grounds, there must be proportionality between an interference in the individual's fundamental rights and the legitimate aim pursued within the scope of this interference, the Constitutional Court has indicated that in the present case, it is of importance to ascertain whether the state struck a fair balance among the competing interests of the child, the mother, the father and the public order within the scope of the discretionary power granted to it.

In this context, it has been noted that the Constitutional Court, which has the authority to assess whether the instance courts have used their discretionary power in a reasonable and prudent manner or not, examined whether the grounds put forth to justify the interference were relevant and sufficient.

Consequently, the Court has observed that, in the decisions of the instance courts, any assessment was not made and explanation was not provided as to whether staying of the child in Turkey was lawful or not according to the provisions of the Hague Convention, on the determination of the habitual residence to be taken as a basis for the decision on the return of the child, on the provisions of the Hague Convention concerning the exceptions to the return of the child and as to whether these exceptional provisions may be applied to the applicant's case or not. Taking into account these factors, the Constitutional Court has found out that the grounds specified in these decisions were not relevant and sufficient within the scope of the right to respect for family life and accordingly held that there has been a breach of the right to respect for family life guaranteed under Article 20 of the Constitution.

H) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO REQUEST THE PROTECTION OF HONOUR AND DIGNITY

1- Judgment of Nurettin POLAT (Application No: 2014/9053)

The Constitutional Court has primarily emphasized that three main preconditions must be jointly present for lodging an individual application with the Court. In the Court's opinion, these preconditions are fulfilled when *"any current right"* of the applicant is breached due to an act or action or negligence of the public power which is subject-matter of the application and is alleged to result in violation; when the applicant gets affected *"personally"* and *"directly"* on account of this violation and when the applicant claims to have *"victim status"*.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 7/7/2015, the applicant stated that he was a member of the group known to the public as the Gülen Community and brought an action for compensation by maintaining that his personal rights were infringed on account of the words *"we would enter into their caves; hypocrites ("takiyyeci"); those rotten to the core; decadent; devious virus; furious confidential organization; assassins ("haşhaşiler")"* uttered by the defendant towards the Gülen community. The first instance court dismissed the case on the ground that *"the condition of explicit addressing" (matufiyet şartı)* did not appear in the present case by stating that these words were the assessments made concerning the developments taking place in the 17 December investigation process; that these words were not directly addressed to any person; and that it was not found established that these words directly addressed to the applicant.

The applicant has maintained that the words uttered by the defendant constituted interference in his personal rights; and that dismissal of the action for compensation he had brought infringed his right to request the protection of his honour and dignity.

The Constitutional Court has primarily emphasized that three main preconditions must be jointly present for lodging an individual application with the Court. In the Court's opinion, these preconditions are fulfilled when "*any current right*" of the applicant is breached due to an act or action or negligence of the public power which is subject-matter of the application and is alleged to result in violation; when the applicant gets affected *"personally"* and *"directly"* on account of this violation and when the applicant claims to have *"victim status"*.

The Court has indicated that, in the debates in which the political circles, non-governmental organizations, media members, business worlds, the workers' and employers' organizations notably the trade unions are participated and which are mainly held through newspapers, broadcast media and social media, one of the parties involved in the debates or those who feel close to one of the parties, like the

The Court has indicated that in the present case, the first instance court decided that the defendant had not targeted to the applicant. In the Court's opinion, it could not be established that the defendant had depicted the community of which the applicant alleged to be a member and it cannot be indicated that the applicant got affected by the defendant's words in dispute *"personally"* and *"directly"*.

applicant, may feel sorrow. However, the Court is of the opinion that the sorrow felt by the individuals shall not exclusively remove the public interest function of these debates.

The Court has noted that in examination of the individual applications similar to the present one, three issues must be taken into consideration. The first issue is the assessments made by the instance courts as to whether the defendant's words directly addressed to the applicant or not. The second issue is the determination as to whether the words subject-matter of the present application were addressed to the community of which the applicant has alleged to be a member and which has certain distinct characteristics. The third and last issue is whether the applicant could demonstrate in an adequately explicit manner that he himself had affected by these words.

In the light of these explanations, the Court has indicated that in the present case, the first instance court decided that the defendant had not targeted to the applicant. In the Court's opinion, it could not be established that the defendant had depicted the community of which the applicant alleged to be a member and it cannot be indicated that the applicant got affected by the defendant's words in dispute *"personally"* and *"directly"*.

Consequently, the Constitutional Court has reached the conclusion that the applicant had no victim status; and that the application must be declared inadmissible for "*lack of jurisdiction ratione personae*".

On the other hand, the Constitutional Court has held that there has been a breach of the applicant's right to trial within a reasonable time for the prolongation of the proceedings for grounds not attributable to the applicant.

2- Judgment of Fetullah GÜLEN (Application No: 2014/12225)

As to the individual applications including the allegations of defamation by means of using hate speech, the Court has stated that, without having recourse to civil remedy, exhaustion of only the remedy of criminal procedure may be sufficient for lodging an individual application on condition of taking into consideration the specific circumstances of each case.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 14/7/2015, an interview made with the Vice Chairman of the Civilisation Foundation and entitled *"Sağlam: Life cycle of Gülen has expired"* was published on the web-site, "*www.haber10.com*". The applicant filed a criminal complaint before the Chief Public Prosecutor's Office with the allegation that the interview published constituted the offences of defamation, aspersion, inciting the public to malignity and hostility. The Chief Public Prosecutor's Office gave a decision of lack of venue. The other Chief Public Prosecutor's Office to which the investigation file had been referred gave a decision of non-prosecution at the end of the investigation. The objection made by the applicant to this decision was dismissed by the Assize Court.

The applicant has maintained that he was charged in the interview published on a web-site in an unjust and unfounded manner; that the presumption of innocence was infringed by means of being reflected as an offender on the basis of the allegations which were not subject-matter of any investigation or prosecution; that the phrases used in the interview fell into the scope of hate speech; and that his material and spiritual entity was impaired due to the phrases appearing in the press. He has also stated that the dismissal of his complaint violated his right to a fair trial as the interview in question was considered to fall into scope of the freedom of the press while failure to protect the attacks towards his honour and dignity violated the right to develop his material and spiritual entity.

The Constitutional Court examined the applicant's allegations within the scope of the right to protect the individual's spiritual entity set out in Article 17 of the Constitution.

As to the individual applications including the allegations of defamation by means of using hate speech, the Court has stated that, without having recourse to civil remedy, exhaustion of only the remedy of criminal procedure may be sufficient for lodging an individual application on condition of taking into consideration the specific circumstances of each case. In this context, for ascertaining whether

> **Noting that the notion of *"hate speech"* may be related to different situations; and primarily, the racial hatred, that is to say, incitement of hatred towards persons or groups for being from a certain race, must be assessed within the scope of the hate speech, the Court has stated that secondly, incitement of hostility for religious purposes between believers and non-believers must also be accepted as hate speech. By taking into consideration the Recommendation adopted by the Committee of Ministers of the Council of Europe, the Court has also underlined that apart from these two types of hate speech, there may be different types of hatred based on intolerance which are called as *"aggressive nationalism and ethnocentrism"*.**

In the instant case, the Court examined the interview in question as a whole and has observed that the interviewee commented on the events taking place after the *"17-25 December Investigations"* which resulted in intensive public debates, were called as *"attempted coup d'etat towards the government"* by certain part of the public and resulted in polemics. In other words, the statements in respect of the applicant did not result from motivation concerning his relation with this community but were based on certain controversial incidents attributed by public to the movement led by him. Within this scope, it has been assessed that the phrases which were subject-matter of the complaint could not be characterized as *"hate speech"* as they are not disseminating, inciting, promoting or legitimizing types of hatred based on intolerance and as these phrases are not uttered only for the applicant's being a member of a certain group.

the available remedies were exhausted or not, the first step required to be taken in the present application is to assess whether the phrases used in the interview constituted hate speech or not.

Noting that the notion of *"hate speech"* may be related to different situations; and primarily, the racial hatred, that is to say, incitement of hatred towards persons or groups for being from a certain race, must be assessed within the scope of the hate speech, the Court has stated that secondly, incitement of hostility for religious purposes between believers and non-believers must also be accepted as hate speech. By taking into consideration the Recommendation adopted by the Committee of Ministers of the Council of Europe, the Court has also underlined that apart from these two types of hate speech, there may be different types of hatred based on intolerance which are called as *"aggressive nationalism and ethnocentrism"*.

In this context, in the Court's opinion, the categories of race and ethnic origin, gender identity and sexual orientation, disability, political belonging or age and the statements inciting hostility towards refugees, immigrants, foreign persons or other disadvantageous groups must be accepted to be included in the types of hate speech.

In the instant case, the Court examined the interview in question as a whole and has observed that the interviewee commented on the events taking place after the *"17-25 December Investigations"* which resulted in intensive public debates, were called as *"attempted coup d'etat towards the government"* by certain part of the public and resulted in polemics. In other words, the statements in respect of the applicant did not result from motivation concerning his relation with this community but were based on certain controversial incidents attributed by public to the movement led by him. Within this scope, it has been assessed that the

phrases which were subject-matter of the complaint could not be characterized as *"hate speech"* as they are not disseminating, inciting, promoting or legitimizing types of hatred based on intolerance and as these phrases are not uttered only for the applicant's being a member of a certain group.

Not including the statements subject-matter of the individual application in the scope of hate speech for the above-cited considerations, the Court has observed that the applicant had only recourse to the remedy of criminal procedure for the interferences in his honour and dignity by third parties and subsequently lodged an individual application without bringing an action for compensation, which was a more efficient way of redress for the present application. Therefore, the Constitutional Court has concluded that the condition of exhaustion of available remedies was not fulfilled in the present case.

For the above-mentioned reasons, the Constitutional Court has held that the application must be declared inadmissible.

I) JUDGMENTS RENDERED IN RESPECT OF THE PROHIBITION OF DISCRIMINATION AND THE FREEDOM OF RELIGION AND CONSCIENCE

1- Judgment of Gülbu ÖZGÜLER (Application No: 2013/7979)

> **The Court has noted that the applicant's relationship with her child must be handled within the scope of the family life. The Court has related the applicant's request for replacing her child's surname with her own surname to the right of custody and the use of powers in respect thereof and underlined that this matter must be assessed within the scope of the positive obligations pertaining to the right to respect for family life.**

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 11/11/2015, the applicant wished to change the surname of her child whose custody was granted to her. The decision on dismissal of the case opened by her to that end became final upon the appellate review.

The applicant has maintained that she herself met all special care and education costs of her sick child; and that her child whom the father did not take care of after divorce was unhappy for bearing different surname with the mother. The applicant has accordingly referred to the Constitutional Court's judgment dated 8/12/2011 and no. E.2010/119, K.2011/165 which has removed all obstacles before the mother to change the surname of her child under her custody. She has therefore alleged that her child's surname must be replaced with her own surname; and that the instance court decisions breached the right to respect for family life and the right to a reasoned decision.

The Court has noted that the applicant's relationship with her child must be handled within the scope of the family life. The Court has related the applicant's request for replacing her child's surname with her own surname to the right of custody and the use of powers in respect thereof and underlined that this matter must be assessed within the scope of the positive obligations pertaining to the right to respect for family life.

On the other hand, the Court has stated that discrimination based on gender constitutes an explicit contradiction to the principle of equality.

The Court has stated that the provision which provides that the husband is the head of the conjugal union was abolished by the Law no. 4721; and that the spouses have equal rights and obligations within the conjugal union. In this context, the Court has recalled the judgment on annulment of the first sentence of Article 4 § 2

The Court has primarily pointed out that the grounds requiring discrimination between woman and man with regard to the change of the child's surname after divorce were not indicated in the judicial decisions which are subject-matter of the present application and accordingly noted that the practice, in which it is not by any means possible to change the child's surname until the child attains maturity or the father changes his surname even if the woman-spouse has reasonable grounds in this regard, cannot be accepted to be proportionate. The Constitutional has therefore held that there has been a breach of the prohibition of discrimination set out in Article 10 of the Constitution read in conjunction of Article 20 therein.

of the Law no. 2525 in which it is underlined that the spouses are in the same legal position in respect of the rights and obligations they have in the conjugal union; and that as the right vested in the father to determine the surname of the child under his custody is not vested in the mother, this practice constitutes a discrimination based on gender with regard to the enjoyment of the right of custody.

The Court has primarily pointed out that the grounds requiring discrimination between woman and man with regard to the change of the child's surname after divorce were not indicated in the judicial decisions which are subject-matter of the present application and accordingly noted that the practice, in which it is not by any means possible to change the child's surname until the child attains maturity or the father changes his surname even if the woman-spouse has reasonable grounds in this regard, cannot be accepted to be proportionate. The Constitutional has therefore held that there has been a breach of the prohibition of discrimination set out in Article 10 of the Constitution read in conjunction of Article 20 therein.

2-Judgment of Esra Nur ÖZBEY (Application No: 2013/7443)

The Court has noted that the freedom of religion and conscience is one of the foundations of the democratic society as the religion is one of the primary resources to which the individuals have recourse while discovering and making sense of the life and performs a significant function in shaping the communal living. In the Court's opinion, no one shall be compelled to reveal their religious beliefs or convictions and worship or practise a religion in a certain manner and to participate in religious rites and ceremonies; and no one shall not be criticized, blamed or accused because of his religious beliefs and convictions and compelled to act otherwise.

In the incident giving rise to the present application which was concluded by the Second Section of the Constitutional Court on 20/5/2015, the applicant dressed up in a manner which would cover all parts of her body by virtue of her religious belief. At the time when the applicant entered into a courthouse, the officers performing security control requested the applicant to take off her topcoat. The applicant was not allowed to enter into the courthouse although she said that a woman officer could perform a body search on her after refusing to take off her topcoat due to her religious belief. She filed a criminal complaint as she was not allowed to enter into the courthouse. A decision for non-prosecution was rendered at the end of the investigation conducted.

The applicant has maintained that being forced to take off her topcoat, which she dressed up for her religious belief, has violated her right to freedom of religion and conscience.

The Court has noted that the freedom of religion and conscience is one of the foundations of the democratic society as the religion is one of the primary resources to which the individuals have recourse while discovering and making sense of the life and performs a significant function in shaping the communal living. In the Court's opinion, no one shall be compelled to reveal their religious beliefs or convictions and worship or practise a religion in a certain manner and to participate in religious rites and ceremonies; and no one shall not be criticized, blamed or accused because of his religious beliefs and convictions and compelled to act otherwise.

The Court is also of the opinion that the question as to whether an act has been performed by virtue of a religion or belief may be ascertained by members of the religion or belief and therefore, the applicant's belief that her dressing up topcoat and refusing to take off it during the security control were practices required to be performed by virtue of the Islamic religion must be based on. The Court has accepted that dressing of the women in a manner that would cover all parts of their bodies as required by the Islamic religion is a matter which may be assessed within the ordinary meaning of Article 24 of the Constitution.

In the present case, the Court has focused on the fact that a fair balance must be struck between the competing interests of the applicant's right to respect for freedom of religion and conscience and of the applicant's being compelled to take off her topcoat during a security control performed for *"the protection of others' rights and freedoms"* and *"the maintenance of public order"*. The Court has observed that certain measures are included in the legislation for striking a fair balance between these two competing interests.

The Court has, in the first place, indicated that as per the relevant provisions of the Code of Criminal Procedure and the Regulation on the Judicial and Preventive Searches, the individuals shall firstly be inspected manually without taking off any of their clothes and by the officers of the same gender and, if required, a body search shall be conducted thereupon. At the last stage, if there appears reasonable suspicion that any person bears any material prohibited by law and there is not any other

In the Court's opinion, imposing disproportionate restriction on prohibiting a certain religious practice for protecting others amounts to undermining the pluralism and tolerance. Indeed, the applicable legislation has been drawn up by an attitude which endeavours to protect the individuals' rights and has prescribed certain measures for ensuring the application of the security measures without completely eliminating the individuals' right to freely fulfil the requirements of their religions. The Court has also observed that it was not explained why the applicant's being compelled to take off her topcoat in a place where everyone might see and without taking other measures constituted a pressing social need.

means to duly perform the search, the body search may be conducted by means of making the relevant person take off his clothes. However, before carrying out such a practice, this person must be informed of the fact why this detailed search is deemed necessary and how it would be conducted. This search must be performed by an officer of the same gender and by means of taking measures not to allow any other person to witness the search carried out.

In the instant case, the Court has observed that the private security guards requested the applicant to take off her topcoat, which the applicant informed the guards that she was wearing it by virtue of her religious belief and she could not take off at the security point, and to put it on the electromagnetic device; that although there was a woman security guard and the applicant requested this woman guard to manually inspect her, she was not inspected manually; and moreover, "*the measure not to allow any other person to witness the search*", as prescribed in the legislation was not taken whereas the applicant was requested to take off her dress. In its judgment, the Constitutional Court notes that the applicant was compelled to take off her dress at the entrance door of the courthouse in the presence of so many people.

In the Court's opinion, imposing disproportionate restriction on prohibiting a certain religious practice for protecting others amounts to undermining the pluralism and tolerance. Indeed, the applicable legislation has been drawn up by an attitude which endeavours to protect the individuals' rights and has prescribed certain measures for ensuring the application of the security measures without completely eliminating the individuals' right to freely fulfil the requirements of their religions. The Court has also observed that it was not explained why the applicant's being compelled to take off her topcoat in a place where everyone might see and without taking other measures constituted a pressing social need.

Consequently, the Court has concluded that the interference in the applicant's right to freedom of religion and conscience was not necessary in a democratic society for maintaining the public order or protecting other individuals' rights and freedoms and held that there has been a breach of Article 24 of the Constitution.

J) JUDGMENTS RENDERED IN RESPECT OF THE FREEDOM OF COMMUNICATION

1- Judgment of Mehmet Koray ERYAŞA (Application No: 2013/6693)

The Court examined the applicant's allegations that he was prevented from making phone conversations with his lawyer and that the privacy of his communications with his family and other persons were infringed within the scope of the freedom of communication guaranteed under Article 22 of the Constitution whereas his allegations that his communication with his visitors and family by phone and during contact or non-contact visit were restricted and he was denied receiving phone calls outside were examined within the scope of the right to respect for his private and family life set out in Article 20 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 16/4/2015, the applicant was held on remand pending appeal *("hükmen tutuklu")* in the Special Type Military Prison and Detention House of the 3rd Army Corps at the time of incident. The applicant requested from the 3rd Army Corps to make a phone conversation with his lawyer concerning the pending trial against him. He underlined in his request that as his lawyer's office was located in Izmir, it was impossible for his lawyer to continuously visit him in the prison and therefore, it was important for him to make phone conversation with his lawyer. The applicant's request was dismissed on the grounds that whereas all phone conversations of the prisoners were wiretapped and recorded, the applicant's conversation with his lawyer could not be wiretapped and recorded for being prohibited; and that there was no right prescribed in the law providing the applicant with the right to make a phone conversation with his lawyer.

The applicant also requested from the Army Corps to allow him to receive contact (open) visits by means of removing the limitation on the period of visits as he complained that his rights to accept visitors had been restricted, to remove the restriction imposed on the number of person, day and time in respect of the phone conversations and to enable him to get access to internet which was needed by him to prepare his defence submissions. The applicant's requests were dismissed in pursuance of the provisions of the Regulation on the Administration of the Military Prisons and Detention Houses and Execution of the Sentences.

The applicant has maintained that his right to respect for private life and the freedom of communication were violated as his interviews with his lawyer and

family were restricted; that he was monitored and he was denied access to internet in spite of informing the authorities that he had to get access to internet for preparation of defence submissions in the Military Prison where he was held on remand pending appeal.

The Court examined the applicant's allegations that he was prevented from making phone conversations with his lawyer and that the privacy of his communications with his family and other persons were infringed within the scope of the freedom of communication guaranteed under Article 22 of the Constitution whereas his allegations that his communication with his visitors and family by phone and during contact or non-contact visit were restricted and he was denied receiving phone calls outside were examined within the scope of the right to respect for his private and family life set out in Article 20 of the Constitution.

The Court has emphasized that the prisoners, in principle, have all fundamental rights and freedoms except for the right to liberty and security of person, which may be considered as lawful detention under Article 19 of the Constitution. It has also added that these rights may be restricted where there are acceptable and reasonable requirements for maintaining order and security such as the prevention of offence and securing disciplinary, as an inevitable consequence of being held in a prison; however, the restrictions to be imposed on the rights vested in prisoners must comply with the guarantees set out in Article 13 of the Constitution.

In this context, noting that the legislator is required to make foreseeable arrangements which do not allow for arbitrariness in the field of fundamental rights and freedoms; and that vesting very broad discretionary power to the extent it would lead to arbitrary practices in the administration may be contrary to the Constitution, the Constitutional Court has stated that existence of the laws on the restriction of fundamental rights and freedoms in appearance cannot be deemed sufficient and nature of such laws must also be taken into consideration. The Court has underlined that the law must set the basic principles, rules and framework

In the instant case, the Court has observed that, in spite of non-existence of any prohibitive provision in respect of the applicant's interview with his lawyer on the phone, the applicant's freedom of communication was infringed on the ground that there was no provision in the legislation which allowed the prisoners to make phone conversations with their lawyers. The Court has stated in this context that the justification put forth by the administration cannot be considered reasonable *vis-a-vis* the explicit provision set out in Article 114 § 5 of the Law no. 5275 and on the Execution of Penalties and Security Measures; and that there was no adequate legal arrangement in the provisions of the applicable Law forming a basis for preventing the applicant, who was held on remand pending appeal, from interviewing with his lawyer through phone.

in its examination in pursuance of Article 20 of the Constitution, the Court dealt with the matter by examining the fair balance between the restriction imposed on the applicant's right to respect for his private life and family life as an inevitable and inherent consequences of being imprisoned and the public interest on the basis of the legitimate aims such as maintaining the order and security in prison and the prevention of offence. The Court has observed that it cannot be concluded the prison administration did not ensure the prisoners to meet with their families and other relatives within the scope of the legislation; and that nor did the applicant assert any allegation in this respect.

in respect of the matters which may be allowed to be restricted only by law, as prescribed in the Constitution; and that only after designating basic rules in this respect, the law may leave certain issues requiring specialization and concerning the practice to the executive power.

In the instant case, the Court has observed that, in spite of non-existence of any prohibitive provision in respect of the applicant's interview with his lawyer on the phone, the applicant's freedom of communication was infringed on the ground that there was no provision in the legislation which allowed the prisoners to make phone conversations with their lawyers. The Court has stated in this context that the justification put forth by the administration cannot be considered reasonable *vis-a-vis* the explicit provision set out in Article 114 § 5 of the Law no. 5275 and on the Execution of Penalties and Security Measures; and that there was no adequate legal arrangement in the provisions of the applicable Law forming a basis for preventing the applicant, who was held on remand pending appeal, from interviewing with his lawyer through phone.

Consequently, the Court has held that the applicant's freedom of communication guaranteed under Article 22 of the Constitution has been violated whereas there has been no breach in respect of the other allegations of the applicant.

On the other hand, in its examination in pursuance of Article 20 of the Constitution, the Court dealt with the matter by examining the fair balance between the restriction imposed on the applicant's right to respect for his private life and family life as an inevitable and inherent consequences of being imprisoned and the public interest on the basis of the legitimate aims such as maintaining the order and security in prison and the prevention of offence. The Court has observed that it cannot be concluded the prison administration did not ensure the prisoners to meet with their families and other relatives within the scope of the legislation; and that nor did the applicant assert any allegation in this respect. The Court has accordingly indicated that the applicant was entitled to have four visits, one of which was a contact visit, in a month and to make phone conversation for ten minutes in a week; and that it cannot be said that his status of being detained

on remand enabled him, by virtue of legislation, to have much broader facilities to get in contact with the outside world compared to the convicts. The Court has accordingly noted that the applicant's phone conversations and face-to-face communications with his family and other relatives were allowed to be held in the regular order. Consequently, the Constitutional Court has held that there has been no breach of the right to respect for private live and family life guaranteed under Article 20 of the Constitution insofar as relating to this part of the application.

2- Judgment of Eren YILDIZ (Application No: 2013/759)

> **In the Constitutional Court's opinion, while reviewing the interferences in the freedom of communication, the legislation forming a legal basis for the interference must be *"accessible"*, sufficiently explicit and *"foreseeable"* in respect of results led by a certain act. The Court has also emphasized that the interference in question must pursue *"a legitimate aim"*, must be proportionate and necessary in a democratic society.**

In the incident giving rise to the present individual application which was concluded by the Second Chamber of the Constitutional Court on 7/7/2015, the letter sent to applicant, who was a convict for the offence of *"attempting to change constitutional order by force and being a member of the Revolution Party of Turkey ("TDP")"*, was considered to be unfavourable by the Disciplinary Board of the Prison Administration and, therefore, the said letter was not handed out to the convict. The objection to this decision given by the disciplinary board was dismissed by the relevant courts.

The applicant has stated that the letter in question was sent by his friend who was also in prison at the relevant time; that if there had been any unfavourable statement in the letter, then the administration of the prison where his friend stayed would not have allowed it to be sent; and that he was deprived of his means to exchange opinions by the prison where he stayed. He has also stated that the decisions rendered did not clearly indicate which statements in the letter were found unfavourable. Accordingly, he has alleged that his freedom of communication was violated.

The Constitutional Court reviewed the applicant's allegations under the scope of the freedom of communication guaranteed under Article 22 of the Constitution. In the Constitutional Court's opinion, while reviewing the interferences in the freedom of communication, the legislation forming a legal basis for the interference must be *"accessible"*, sufficiently explicit and *"foreseeable"* in respect of results led by a certain act. The Court has also emphasized that the interference in question must pursue *"a legitimate aim"*, must be proportionate and necessary in a democratic society.

in respect of the second letter in which a convict mentioned of his days in prison, other convicts he was staying with, his family life and state of health, it could be deduced neither from the content of the letter nor from the justifications given by the Disciplinary Board of the Prison and the instance courts which statements included in the letter were found unfavourable. The Court has concluded that seizure of the second letter for the pursued aims was not necessary in a democratic society; and accordingly, that the applicant's freedom of communication has been violated in respect of the second letter.

In reviewing the present case, the Court has considered the seizure by the prison administration of the letters sent to the applicant as an interference in his freedom of communication. The Court has subsequently concluded that Article 68 of the Law No. 5275 constituting the basis of the interference in the present case met the criterion of "legality"; and that the interference pursued the legitimate aims of maintaining public order and preventing offences as set out in Article 22 of the Constitution. In its examination as to whether the said interference was proportionate and necessary in a democratic society, the Court has considered that there were two separate letters sent to the applicant in the same envelop by the same person.

In the Court's opinion, in the first letter sent to the applicant, the actions of an ex-leader of an illegal organization were praised and, while the said actions were described, the framework of the illegal organization's aims was set and the addressee were led to such aims. In line with these aims, the armed attacks, violent content of which were beyond dispute, were justified and qualified as "fight" and even "war". By indicating that this war was still going on, violence was being promoted by means of formulating the illegal acts and actions of the illegal organization leader as "ordinary course of conduct". Within the frame of these findings, the Constitutional Court has concluded that seizure of the first letter on the ground that it incited offence was not contrary to the requirements of the democratic order of society and the principle of proportionality. Accordingly, the Court has held that the applicant's freedom of communication has not been violated in respect of the first letter.

However, in respect of the second letter in which a convict mentioned of his days in prison, other convicts he was staying with, his family life and state of health, it could be deduced neither from the content of the letter nor from the justifications given by the Disciplinary Board of the Prison and the instance courts which statements included in the letter were found unfavourable. The Court has concluded that seizure of the second letter for the pursued aims was not necessary in a democratic society; and accordingly, that the applicant's freedom of communication has been violated in respect of the second letter.

3-Judgment of Mehmet Seyfi OKTAY (Application No: 2013/6367)

In the Constitutional Court's opinion, the records obtained as a result of the interception measure applied by the investigation authorities before a criminal action is not brought against the persons must be precisely protected, and upon a criminal action brought against the persons in respect of the above-mentioned measure has been applied, the court dealing with the proceedings must make meticulous examination to ascertain which of these records would be allowed to be publicized in the course of the proceedings. As the applicant's phone conversations were disclosed before the investigation conducted against him by the Chief Public Prosecutor's Office had not been completed yet, the allegations against the applicant became known to the public without preparation of the bill of indictment and assertion of the accusations and evidence. As the applicant did not have the opportunity to defend himself, the public authorities' failure to take necessary measures for the protection of the applicant's phone conversations recorded within the scope of the investigation conducted him had breached the applicant's freedom of communication under its substantive aspect.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 10/12/2015, the applicant in respect of whom a decision for interception of his communication was given within the scope of the investigation known to the public as *"Ergenekon investigation"* was released after having been taken into police custody. In the meantime, on certain national newspapers and TV channels, the applicant's phone conversations were published and broadcasted, and news reports and comments were published and broadcasted with regard to the allegations against him.

The applicant filed a criminal complaint against the journalists making the above-mentioned news reports and unknown officers who leaked the information within the scope of the investigation to the press. After the Fatih and Bakırköy Chief Public Prosecutor's Offices had given a decision for lack of venue, statements of thirty three law enforcement officers were taken by the Fatih Chief Public Prosecutor's Office. However, upon the legal arrangement which was subsequently introduced, the relevant Chief Public Prosecutor's Office dealing with the case gave a decision of non-prosecution. The objection made to this decision was dismissed.

The applicant has maintained that, on account of the news reports which appeared on the press, he was subject to defamation and aspersion as a former Minister of Justice; that his phone conversations recorded within the scope of the investigation conducted against him were leaked to the press and thereby, he was

reflected as an offender and tried to be degraded before the public; that he filed a criminal complaint against those who had leaked the information pertaining to the investigation for ensuring their identification and being punished; that the administrative investigation against those unknown persons was conducted by the Security Directorate to which the potential suspects were affiliated; and that the Chief Public Prosecutor's Office gave a decision of non-prosecution resulting from an insufficient and incomplete investigation. For these reasons, the applicant has alleged that there has been a breach of his fundamental rights and freedoms.

Stating that one of the guarantees enshrined in the Constitution provides that the public authorities shall not arbitrarily interfere in the individuals' freedom of communication and the privacy of their communications, the Court has underlined that monitoring of the content of the communication amounted to a severe interference in the privacy of the communication and, thereby, in the freedom of communication. Stating that the security measures applied in respect of the privacy of the communication, which entail the risk of being abused for being applied confidentially, its scope of application and procedure must be regulated by explicit law provisions, the Court has noted that the interference in the freedom of communication must be primarily prescribed by law; the relevant legislation must be *"accessible" "sufficiently clear"* and *"foreseeable"* in respect of consequences of a certain act.

The Court has underlined that in the second place, this interference must pursue *"a legitimate aim"* and be necessary in a democratic society and proportionate; and that the state has the positive obligations to prevent personal data or communication records from being disclosed and to conduct an effective investigation and punish those who are responsible in case of an interference in the privacy of communication by means of being published or broadcasted in the media.

In the Constitutional Court's opinion, the records obtained as a result of the interception measure applied by the investigation authorities before a criminal action is not brought against the persons must be precisely protected, and upon a criminal action brought against the persons in respect of the above-mentioned measure has been applied, the court dealing with the proceedings must make meticulous examination to ascertain which of these records would be allowed to be publicized in the course of the proceedings. As the applicant's phone conversations were disclosed before the investigation conducted against him by the Chief Public Prosecutor's Office had not been completed yet, the allegations against the applicant became known to the public without preparation of the bill of indictment and assertion of the accusations and evidence. As the applicant did not have the opportunity to defend himself, the public authorities' failure to take necessary measures for the protection of the applicant's phone conversations recorded within the scope of the investigation conducted him had breached the applicant's freedom of communication under its substantive aspect.

It is not also possible to accept that the investigation conducted by the Chief Public Prosecutor's Office upon the interference in the privacy of communication by means of publishing the records in question through media was not effective. At the stage of investigation conducted by the Prosecutor's Office and lasting for two years, any action was not taken other than taking the statement of the relevant law enforcement officers and press members. In other words, it has been observed that an effective investigation in which all aspects of the incident were revealed and which would enable identification of those who were responsible, if any, was not conducted; that the consequence obtained at the end of the investigation was not based on the comprehensive and objective analysis of the evidence obtained; and that reasonable measures likely to be taken for collection of all evidence including the legal expert's examinations concerning the incident in question were not taken, and therefore any concrete result as to how the leakage had occurred was not indicated. It has been further observed that the Public Prosecutor's Office who reached the conclusion that the confidential information was not disclosed by the law enforcement officers found this conclusion sufficient and did not carry out any investigation and examination concerning the probability that other public officers had performed the act of disclosure. Therefore, the Constitutional Court has reached the conclusion that an effective investigation was not conducted due to the above-mentioned deficiencies and, thereby, there has been a breach of the freedom of communication under its procedural aspect.

Consequently, the Court has held that the applicant's freedom of communication enshrined in Article 22 of the Constitution has been violated.

K) JUDGMENTS RENDERED IN RESPECT OF THE FREEDOM OF EXPRESSION

1- Judgments of Tuğrul CULFA (Application No: 2013/2593)

> **In the Constitutional Court's opinion, under Article 17 of the Constitution, the state is liable not to make arbitrary interferences in the individual's honour and dignity constituting one part of the individual's material entity and to prevent the attacks by the third parties. The interferences of the third persons in individual's honour and dignity may take place through media such as newspapers, as well as many other probabilities. Even if a person is criticized through a newspaper within the framework of a public debate, this person's honour and dignity must be considered as a part of his spiritual integrity. Therefore, in circumstances where it is alleged that enjoyment of the freedom of expression has impaired others' honour and dignity, a fair balance must be struck between the individuals' right to request protection of their honour and dignity and the freedom of expression.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 11/3/2015, the applicant took office as the Branch Chairperson of the Education and Science Workers' Union (*"Eğitim ve Bilim Emekçileri Sendikası"*) which operates in the fields of education and science. In the high school where the complainant was the director, certain persons had poured lead ("*to melt lead and pour it into cold water over the head of a sick person / thing in order to break an evil spell*") for the school on account of the unfortunate incidents having taken place. The applicant made statements for two national newspapers that the attempts to seek solution through superstitions rather than through scientific methods was intolerable; that the Ministry must initiate an investigation against those who were responsible; and that the director was aware of these acts but did not preclude these incidents. Upon the news reports published on the newspapers, the director brought an action for compensation against the applicant with the allegation that his personal rights were infringed. The first instance court awarded compensation against the applicant as he led to spreading of the news that the complainant had poured lead although he had not got involved in the act.

The applicant has maintained that as a penalty of indemnity was imposed on him due to his statements made to the newspapers, his freedom of expression has been violated.

In the Constitutional Court's opinion, under Article 17 of the Constitution, the state is liable not to make arbitrary interferences in the individual's honour and dignity

The Court has observed that the first instance court failed to make an assessment pursuing fair balance between the freedom of expression of the applicant, who was the source of the news reports having appeared on the national daily newspaper, and the complainant's right to respect for honour and dignity and did not deal with the matter as to whether the news report and article in question contributed to a debate concerning general interest or not; and that the conditions when the news reports were made were not taken into account. The Court has also indicated that although the allegations included in the news report, which is subject matter of the present application, were accusations based on facts, the first instance court did not sufficiently take into account the factual basis of these allegations, did not refer to the freedom of expression and freedom of the press and did not underline the restrictions imposed on these freedoms *vis-a-vis* the other individuals' personal rights.

constituting one part of the individual's material entity and to prevent the attacks by the third parties. The interferences of the third persons in individual's honour and dignity may take place through media such as newspapers, as well as many other probabilities. Even if a person is criticized through a newspaper within the framework of a public debate, this person's honour and dignity must be considered as a part of his spiritual integrity. Therefore, in circumstances where it is alleged that enjoyment of the freedom of expression has impaired others' honour and dignity, a fair balance must be struck between the individuals' right to request protection of their honour and dignity and the freedom of expression.

The Court has noted that in the present incident, the application would not be dealt with not only in respect of the decisions given by the instance courts but also by taking into consideration the facts that the applicant's sentences were not cited in quotation marks by those newspapers; and that the newspapers conveyed these incidents by journalist's language and as indirect speeches on the basis of information supplied by the applicant. Furthermore, the Court has considered that the writings including the statements that lead was poured at the school must be assessed from all aspects of the incident without being separated from the context.

In this context, the Court has observed that the first instance court failed to make an assessment pursuing fair balance between the freedom of expression of the applicant, who was the source of the news reports having appeared on the national daily newspaper, and the complainant's right to respect for honour and dignity and did not deal with the matter as to whether the news report and article in question contributed to a debate concerning general interest or not; and that the conditions when the news reports were made were not taken into account. The Court has also indicated that although the allegations included in the news report, which

is subject matter of the present application, were accusations based on facts, the first instance court did not sufficiently take into account the factual basis of these allegations, did not refer to the freedom of expression and freedom of the press and did not underline the restrictions imposed on these freedoms *vis-a-vis* the other individuals' personal rights.

Indicating that the more a news report or article intends to inform public, the more an individual must tolerate the publication of this news report or article, the Court has noted that it must be accepted that the opinions revealed by the applicant in the news report in question contributed to a public debate taking place on factual basis.

In the light of these explanations, the Court has emphasized that the first instance court failed to plausibly indicate that in which manner its interference in the applicant's freedom of expression on account the statements appearing in the newspaper met an urgent need and why the penalization of the interference in the complainant's honour and dignity outweighed the applicant's freedom of expression. The Court has also underlined that the first instance court failed to explain how the applicant's statements influence the complainant's career or private life.

Consequently, the Constitutional Court has held that there has been a breach of the applicant's freedom of expression guaranteed under Article 26 of the Constitution by indicating that any sufficient and relevant justification for the interference in the applicant's freedom of expression were not provided.

2- Judgment of Kamuran Reşit BEKİR (Application No: 2013/3614)

> **While making its examination, the Court has primarily indicated that, in principle, the prisoners have all of the fundamental rights and freedoms enshrined in the Constitution and, the prisoners' freedom of expression is protected in this respect. The Constitutional Court has also underlined that the prisoner's ability to reach the periodicals and non-periodicals falls into the scope of the norm sphere of the freedom of expression as a concrete reflection of the freedom of reach the information and convictions.**

In the incident giving rise to the present individual application which was concluded by the General Assembly of the Constitutional Court on 8/4/2015, the applicant was a convict held in the F-Type High Security Closed Prison. In the article published on the Azadiya Welat Newspaper dated 12/11/2012 ("Newspaper") and entitled *"manifestoya şoreşe",* it was announced that Abdullah Öcalan had been preparing a defence consisting of five volumes and entitled *"democratic society manifesto"*;and that one section of the fifth volume entitled *"Kurdistan Revolutionary Manifesto, the*

The Court has underlined that in determination of the periodicals and non-periodicals to be handed out the prisoners in the prison, the prison administration must rely on Article 62 of the Law no. 5275 on the Execution of Penalties and Security Measures which sets out that access to periodicals and non-periodicals which pose a threat to the prison security and obscene news reports, articles, photos and comments may be denied or restricted for the prevention of offence and maintenance of security and discipline. In this context, the Court has indicated the discretionary power vested in the prison administration is broad and that restrictions to be imposed on the freedom of reach the information and convictions must be interpreted in a broader manner.

Kurdish Questionand Democratic Nation Solution (Defending Kurds in the clamp of Cultural Massacre)" would be published as a column in the newspaper. As from the above-mentioned date, in 85 editions of the newspaper, certain parts of the above-cited book written by Abdullah Öcalan were published in Kurdish.

The Education Committee of the Prison (the Education Committee) decided that relevant parts of the said book be separately extracted from each edition of the newspaper upon the decision of the Diyarbakır Judge's Office no. 3 for seizure and recalling of the relevant book; and that the remaining parts be handed out to the applicant if requested by him.

The applicant has maintained that his freedom of expression has been breached as his access to the Azadiya Welat Newspaper sent to him was denied by the prison where he was held as a convict by means of extracting certain pages of the newspaper.

While making its examination, the Court has primarily indicated that, in principle, the prisoners have all of the fundamental rights and freedoms enshrined in the Constitution and, the prisoners' freedom of expression is protected in this respect. The Constitutional Court has also underlined that the prisoner's ability to reach the periodicals and non-periodicals falls into the scope of the norm sphere of the freedom of expression as a concrete reflection of the freedom of reach the information and convictions.

Observing that, in the present incident, the applicant's denial of access to newspaper to which he subscribed mainly resulted from the decisions of the Education Committee and the Execution Judge's Office, the Court has noted that although the prohibition decision of the Diyarbakır Judge's Office no. 3 did not directly result in the applicant's access to the newspaper, it formed a basis for the decision of the Execution Judge's Office. Accordingly, the Court has stated that the decisions of the Education Committee, the Execution Judge's Office and the

Diyarbakır Judge's Office no. 3 must be reviewed jointly and as a whole within the scope of the applicant's allegations.

The Court has underlined that in determination of the periodicals and non-periodicals to be handed out the prisoners in the prison, the prison administration must rely on Article 62 of the Law no. 5275 on the Execution of Penalties and Security Measures which sets out that access to periodicals and non-periodicals which pose a threat to the prison security and obscene news reports, articles, photos and comments may be denied or restricted for the prevention of offence and maintenance of security and discipline. In this context, the Court has indicated the discretionary power vested in the prison administration is broad and that restrictions to be imposed on the freedom of reach the information and convictions must be interpreted in a broader manner.

Noting that supervision of the periodicals and non-periodicals to be handed out to the prisoners is important especially in the high security prisons for maintaining the order, security and discipline in the prisons, the Court has considered that the Education Committee should have taken into consideration the fact that the applicant was convicted of offences he had committed as a member of the PKK terrorist organization and assessed whether allowing certain parts of a book written by the leader of the terrorist organization to be available for the prisoners through a newspaper posed a risk to the security and discipline or not. However, the Court has also underlined that the interference in the right even under such a circumstance must be justified in a relevant and sufficient manner.

The Court has observed that the sole justification given for the decisions taken by the Education Committee and the Sincan Execution Judge's Office for extracting the pages of the Newspaper including certain parts of the prohibited book was the decision of the Diyarbakır Judge's Office no. 3 on recalling of the extracted pages. Within this scope, the Court has emphasized that an assessment was made on the book, which was subject-matter of the decision on recalling of the Diyarbakır Judge's Office no. 3, by the judgment of the Constitutional Court rendered in its plenary sitting on 25/6/2014; and that it was held there had been a breach of the right to freedom of expression guaranteed under Article 26 of the Constitution. In this judgment, it was also stated that upon the Constitutional Court's judgment finding a violation, the Diyarbakır 2nd Magistrate Judge's Office, the competent authority to review the prohibition decision of the Diyarbakır Judge's Office no. 3, had annulled the decision on recalling and seizure of the book by relying on the violation judgment.

Consequently, the Constitutional Court has referred to the judgment rendered in its plenary sitting on 25/6/2014 and the above-cited decisions of the Diyarbakır 2nd Magistrate Judge's Office and held that the interference in the applicant's freedom of expression was not necessary in a democratic society and proportionate and, thereby, there has been a breach of the freedom of expression.

3- Judgment of Mehmet Ali AYDIN (Application No: 2013/9343)

> **In the Court's opinion, the concerns for being subject to sanctions have an interruptive effect on people and, although the person concerned may be ultimately acquitted from the charges against him, the person under the effect of such concerns may refrain him from expressing his opinions or engaging in press activities. In this respect, it must be taken into account that, as the applicant is a politician, he may have a risk to be subject to prosecution and proceedings due to the opinions he may express or due to his political activities in future and that the adjourned prosecution subject-matter of this application may be reinitiated as well. Therefore, it must be admitted that there is an interference in the applicant's freedom of expression within the framework of Article 26 of the Constitution.**

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary meeting on 4/6/2015, the applicant was the Diyarbakır Province Chairperson of the Peace and Democracy Party (BDP). The applicant made a press statement in Diyarbakır on 15.02.2010 at the anniversary of Abdullah Öcalan's arrest in Kenya and transfer to Turkey and criticized the government policies in solving the *"Kurdish question"*. According to the applicant, in solving the Kurdish question, the government was unwilling to accept Abdullah Öcalan as an addressee but, despite the negative attitude of the government authorities, Öcalan has become an important actor of the process today. The applicant also stated that, while the international powers were planning a chaos in the Middle East, Öcalan prevented these chaos plans by developing solution proposals under the negative prison conditions. The applicant called for improving the prison conditions of Öcalan, ceasing the military operations and taking into consideration of the suggestions of Öcalan by the government and securing the democratization.

The applicant was detained on remand upon this press statement with the allegations of committing offence on behalf of the illegal organization and making propaganda, and at the end of the investigation, a criminal case was filed against the applicant for the offences of *"making propaganda of an illegal organization"* and *"committing offence on behalf of an illegal organization without being its member"*.

In accordance with the Law no. 6352 which entered into force in the course of the proceedings, the court decided to adjourn the prosecution conducted against the applicant in respect of the offence of making propaganda of an illegal organization

and also decided in accordance with Law No. 6459 that there was no place for imposing a penalty for the offence of committing offence on behalf of an organization.

The applicant has alleged that as he was subject to release on probation on account of the opinions he expressed in his press statement, it has constituted a breach of his freedom of expression.

The Constitutional Court firstly examined whether the decision for the adjournment of the prosecution constituted an interference in the applicant's freedom of expression or not even if he was not convicted. In the Court's opinion, the concerns for being subject to sanctions have an interruptive effect on people and, although the person concerned may be ultimately acquitted from the charges against him, the person under the effect of such concerns may refrain him from expressing his opinions or engaging in press activities. In this respect, it must be taken into account that, as the applicant is a politician, he may have a risk to be subject to prosecution and proceedings due to the opinions he may express or due to his political activities in future and that the adjourned prosecution subject-matter of this application may be reinitiated as well. Therefore, it must be admitted that there is an interference in the applicant's freedom of expression within the framework of Article 26 of the Constitution.

The Court has noted that it is beyond any doubt that the freedom to deliver speeches and press statements in peaceful demonstrations is an integral part of the freedom of expression. The Court has pointed out that the opinions expressed by the applicant in his press statement were related to social issues concerning a part of the society; that the public authorities have limited discretionary power in restricting the political speeches on public interests or debates on social problems whereas they have a broader discretionary power on issues that set the borders of this freedom such as racism, hate speech, war propaganda, inciting violence/provocation, calling for insurgency or attempting to justify terrorist activities.

The Court has recalled that examination of statements in isolation of their contexts may be misleading in carrying out a reasonable assessment of the findings obtained. Therefore, the Constitutional Court examined the instant application as a whole together with the statements on PKK terrorist organization and Abdullah Öcalan and the context in which such statements were made, the identity of the speaker, the timing and the purpose of the statements subject-matter of the application, the identity of addressees, possible effects of the statements and other expressions in the press statement. The Court focused on the content of the opinions propounded in the said press statement and the context in which such opinions were expressed. The Court assessed whether the interference "compatible with the aims pursued" and whether the reasons put forth by the public authorities were *"relevant and sufficient"*.

The Constitutional Court examined the applicant's statements as a whole and has concluded that the statements of the applicant did not promote violence and terrorist activities or incite the persons to adopt terrorist methods, resort to violence, hatred, racism, take revenge or armed insurgency. In the Court's view, the opinions which are unpleasant to public authorities or a certain segment of society cannot be restricted unless they incite violence, attempt to justify the terrorist activities and support hatred.

In the Constitutional Court's opinion, the first instance court did not assess in its decision which statements of the applicant promoted violence or provoked and incited the persons to adopt terrorist methods, resort to violence, hatred, take revenge or armed insurgency. The Constitutional Court examined the applicant's statements as a whole and has concluded that the statements of the applicant did not promote violence and terrorist activities or incite the persons to adopt terrorist methods, resort to violence, hatred, racism, take revenge or armed insurgency. In the Court's view, the opinions which are unpleasant to public authorities or a certain segment of society cannot be restricted unless they incite violence, attempt to justify the terrorist activities and support hatred.

The Court has emphasized that, although a decision for the adjournment of the applicant's prosecution was rendered, the interference in the applicant's freedom of expression cannot be described as a restriction compatible with the legitimate aim pursued as the applicant's risk of being subject to prosecution or being punished still continued to exist. The Court has reached the conclusion that the said restriction was not necessary in a democratic society. Consequently, the Court has ruled that the applicant's freedom of expression guaranteed under Article 26 of the Constitution has been violated.

4- Judgment of Ali Rıza ÜÇER (Application No: 2013/8598)

The Court has observed that the interference in the applicant's freedom of expression in the present case was a part of the measures taken for *"the protection of other individuals' reputation or rights"*. In this context, the Court has considered that an assessment must be made as to whether a reasonable balance was struck in a democratic society between the applicant's freedom of expression and the protection of other individual's reputation or rights or not.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 2/7/2015, the applicant is a radiation oncology specialist and at the same time serving as the Secretary General of the Medicine Institution Association ("the Association").

In June 2008, a public debate took place concerning the arsenic ratio of the potable water in the province of Ankara, and the applicant and one of his friends, who was also a specialist, published three different press statements on the web-site of the Association of which he was a member. On the subsequent dates, these statements were reported as news by certain media organs.

The Ankara Metropolitan Municipality Mayor brought an action for compensation against the applicant with the allegation that the expressions included in the above-cited press statements were libellous. The Magistrate's Court in Civil Matters partially accepted the action for compensation and subsequently held that non-pecuniary damage of TRY 750.00 be paid by each of the applicant and other defendants to the complainant. The applicant lodged an individual application with the Constitutional Court against this decision which was final in respect of the amount awarded.

The applicant has maintained that the press statements were prepared completely on the basis of scientific data; that the relationship between the arsenic substance and cancer was researched by relying on reliable sources, and it was considered that potable water of the province of Ankara included this risk; and that the complainant's personal rights were not infringed by the press statements in question. It has been also alleged that disclosing the characteristics of water of the Kızılırmak River transferred to Ankara for water supply to public was not in any aspect unlawful; and that as he was ordered to pay compensation on account of his opinions delivered in the course of the press statement, his freedom of expression has been violated.

The Court has indicated that Article 26 § 1 of the Constitution does not impose any restriction on the content of the freedom of expression and this freedom, which is applicable for both the real and legal persons, covers all kinds of expressions such as revealing of political, artistic, academic and commercial opinions and convictions. Furthermore, the Court has noted that qualifying an opinion revealed and disseminated as *"worthy / worthless"* or *"useful / useless"* for individuals and the society by paying regard to its content would contain subjective elements; and that seeking to determine the boundaries of the freedom of expression with reference to such qualifications may result in arbitrary restrictions to be imposed on this freedom. In the Court's opinion, the freedom of expression contains the freedom of disclosure and dissemination of opinions which are deemed *"worthless"* or *"useless"* by others.

The Court has observed that the interference in the applicant's freedom of expression in the present case was a part of the measures taken for *"the protection of other individuals' reputation or rights"*. In this context, the Court has considered

that an assessment must be made as to whether a reasonable balance was struck in a democratic society between the applicant's freedom of expression and the protection of other individual's reputation or rights or not.

In the Court's opinion, the freedom of expression mainly aims at securing the freedom of criticism, and the severe expressions used in the course of disclosure or dissemination of the opinions must be deemed natural. On the other hand, it must be taken into account that the freedom of discussing the matters which are of particular concern to the public, as in the instant case, is *"the basic principle of all democratic systems"*. Article 26 § 2 of the Constitution prescribes certain restrictions, which are very limited in numbers, for the expressions which are concern to the public.

The applicant and another oncology specialist from the Association criticized the contradictions among the reports issued concerning the potable water of Ankara and non-performance of certain analysis required to be conducted in this regard. They also drew the attention to the chronic diseases likely to occur in Ankara.

In the Court's opinion, the applicant's criticisms addressed to the activities performed by the Ankara Metropolitan Municipality and remarks of the complainant who is a mayor. The Mayors must tolerate the severest criticism directed towards them by virtue of the public power vested in them. A sound democracy requires the supervision of a body exercising public power not only through judicial authorities but also by the non-governmental organizations, the media and the press or other actors of the political sphere such as political parties.

In the present case, the applicant, who is a medical practitioner, shared his doubts concerning the quality of the Kızılırmak water with the public through the press statement he made. The applicant's allegations relied on reports issued by certain institutions, and it was questioned how the ratios of hazardous substances, which were very low compared to the reports submitted by the applicant, had been reduced. The complainant raised an objection to the accuracy of the reports relied on by the applicant. In this respect, the applicant may be asked to submit the

In the Court's opinion, seeking for scientific certainty as a criterion for being involved in a public debate which is beyond any doubt a concern to the public interest would render the applicant's involvement in the public debate impossible and also precludes mentioning of an open society. The justification asserted for the interferences in the discussion of public concerns, with the thought that there is no scientific certainty in this respect, cannot be accepted as a relevant and sufficient justification. It must be also kept in mind that such kinds of sanctions may make public debates complicated and result in chilling effect on individuals.

The Court has noted that, as in the instant case, it is beyond any doubt that the disclosure of the information on matters which are of a particular concern to the public pursues public interest. The Court has also stated that the margin of criticism directed towards the bodies exercising public power and the politicians is wider than that of the private persons and therefore held that the interference in the applicant's freedom of expression was not necessary in a democratic society.

reports he relied on or it may be requested that an expert report be drawn up on this matter.

Notwithstanding, the essence of the first instance decision relies on the assumption that the applicant's allegations were not sufficiently precise rather than on their accuracy. In other words, the first instance court – according to its own point of view – sought for scientific certainty for enabling the applicant, as a scientist, to question the accuracy of the reports on potable water which was declared to the public by the municipality by relying on other reports prepared by certain institutions.

In the Court's opinion, seeking for scientific certainty as a criterion for being involved in a public debate which is beyond any doubt a concern to the public interest would render the applicant's involvement in the public debate impossible and also precludes mentioning of an open society. The justification asserted for the interferences in the discussion of public concerns, with the thought that there is no scientific certainty in this respect, cannot be accepted as a relevant and sufficient justification. It must be also kept in mind that such kinds of sanctions may make public debates complicated and result in chilling effect on individuals.

In the instant case, the applicant was ordered to pay compensation at the amount of TRY 750.00. The anxiety of being subject to a sanction even if a light one, which is experienced by those who have involved in the public debates, results in a chilling effect on them. Therefore, these individuals under such an effect may be under the risk of abstaining from disclosing and disseminating their opinions in future.

The Court has noted that, as in the instant case, it is beyond any doubt that the disclosure of the information on matters which are of a particular concern to the public pursues public interest. The Court has also stated that the margin of criticism directed towards the bodies exercising public power and the politicians is wider than that of the private persons and therefore held that the interference in the applicant's freedom of expression was not necessary in a democratic society.

Consequently, the Constitutional Court has concluded that there has been a breach of the applicant's freedom of expression guaranteed under Article 26 of the Constitution.

5- Judgment of Tansel ÇÖLAŞAN (Application No: 2014/6128)

The Court has pointed out that the freedom of expression is a right on which certain restrictions may be imposed and is subject to the restriction regime of the fundamental rights and freedoms set out in the Constitution. The Court has further noted that although the grounds for a restriction likely to be imposed on the freedom of expression are not specified in Article 26 § 2 of the Constitution, the criteria set out in Article 13 of the Constitution must be taken into account in restricting the fundamental rights and freedoms; and thereby, the restrictions imposed on the freedom of expression must be reviewed within the framework of the criteria set out in Article 13 and within the scope of Article 26 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 7/7/2015, the applicant is the Former President and the Former Chief Public Prosecutor of the Council of State. Following his retirement, he was elected as the Chairman by the General Assembly of the Ataturkist Ideology Association (*"Atatürkçü Düşünce Derneği"*) ("the AIA") on 14/6/2010 and has been still performing this duty.

The constitutional amendment by which amended twenty six articles of the Constitution was adopted upon the referendum held on 10/9/2010 after it had been ratified by the Turkish Grand National Assembly. By this amendment, certain amendments were made to the matters, which were of a particular concern to the public, notably the structure of the Constitutional Court and the High Council of Judges and Prosecutors. Debates had taken place for a long time between those who challenged to and those who supported the constitutional amendment.

In this scope, the applicant delivered a speech as the Chairman of the AIA in the panel entitled *"Where is Turkey heading to?"* and held by the Hatay Branch Office of the AIA on 19/9/2010, nine days after the referendum. In the course of his speech, the applicant invited the audience to think whether they had duly fulfilled their responsibility of being a member of the Turkish Nation or not. According to the applicant, the question was whether to live in a world where imperialism prevailed by receiving orders or to live in an independent manner. At this stage, the applicant invited everyone to reconsider Atatürk and his philosophy. In the applicant's opinion, the founding philosophy of the Republic was democracy. However, nowadays, the democracy imposed upon countries such as Turkey was an eviscerated one. According to the applicant, those who did not know the founding philosophy of Turkey were in power. The applicant then said the following words against which many case would be filed subsequently: *"The solutions are inherent in us; that is to say, in you. In other words, in our votes. If these votes are conscious*

ones, how nice! However, the unconscious votes; in other words, the votes other than 42%, are negligent, misguided and even traitors. We all know treason. I do not accuse those who have been here for their interests to batten upon us. They serve for their own countries. If ours also serve for their own countries, they do not become co-conspirator under the command of these imperialist powers".

The applicant also appeared in a program broadcasted through the Habertürk TV on 20/9/2010, a national broadcasting channel, and said in this TV program *"educated section of the society said no whereas uneducated section said yes".*

The parliamentarians who alleged that the applicant had insulted those who had given "yes" vote in the referendum and thereby had insulted them brought various actions for compensation against the applicant.

Four of the individual applications lodged with the Court resulting from the actions brought on account of the applicant's above-given phrases in quotation marks and his description of those giving "yes" vote in the referendum as uneducated were merged with the present application. The first instance courts accepted the first and second actions for compensation brought against the applicant and awarded compensation against the applicant whereas the third action for compensation was dismissed by the first instance court. However, the decisions were quashed by the Court of Cassation on the ground that a decision for reprimand should have been rendered in respect of the applicant. Thereupon, taking into account the grounds specified in the quashing judgment of the Court of Cassation, the first instance courts accepted the actions and decided that the applicant be subject to reprimand.

The applicant has maintained that as he paid compensation to the defendants on account of the words he uttered during his speech at a meeting, his freedom of expression enshrined in Article 26 of the Constitution has been breached.

The Court has pointed out that the freedom of expression is a right on which certain restrictions may be imposed and is subject to the restriction regime of the fundamental rights and freedoms set out in the Constitution. The Court has further noted that although the grounds for a restriction likely to be imposed on the freedom of expression are not specified in Article 26 § 2 of the Constitution, the criteria set out in Article 13 of the Constitution must be taken into account in restricting the fundamental rights and freedoms; and thereby, the restrictions imposed on the freedom of expression must be reviewed within the framework of the criteria set out in Article 13 and within the scope of Article 26 of the Constitution.

The Court has indicated that in the present case, it must be assessed whether a reasonable balance was struck in a democratic society between the applicant's freedom of expression and the protection of other individuals' reputation or rights while rendering a decision for "*reprimanding of his infringement*" against the applicant on account of the words uttered by him at a meeting.

The 4th Civil Chamber of the Court of Cassation concluded that the infringement

must be reprimanded when *"titles of the parties, nature of the words uttered, the atmosphere where they were uttered, the mass to whom the speaker addressed and potential effect of these words and the fact that the defendant party was not individually addressed to during this speech but referred to as a community"* were taken into account. According to the applicant, the words subject-matter of this individual application were uttered in order to *"emphasize the mistake made by the persons"* by means of casting a "yes" vote. In the Court's opinion, the applicant uttered these words in order to draw the attention to the dangerous situation which, in the applicant's opinion, posed a threat to the country and to the regime resulting from the constitutional amendment.

In the Constitutional Court's judgment, it is stated that the applicant used severe expressions towards the amendments making considerable changes in the Constitution as a result of the referendum, and on the other hand, the 4th Civil Chamber of the Court of Cassation decided that the thoughts delivered and the words uttered by the applicant, as a whole, amounted to an attack towards the honour and dignity of the defendants. In its judgment, the Constitutional Court also notes that it was possible for the Chamber of the Court of Cassation to accept that the original purpose of the applicant was to humiliate the complainants only when it assigned meanings to these words beyond the ones attributed by the applicant himself; and that the Chamber of the Court of Cassation must not assign meanings, beyond the ones attributed by the applicant, to the words uttered by the applicant.

Pointing out that tens of actions for compensation were brought against the applicant for the words he had uttered towards those who had given "yes" vote in the referendum; and that, in the present case, it was decided that the applicant be reprimanded for five times, the Constitutional Court has underlined that such sanctions may make the public debates complicated and have chilling effect on individuals; and that if those who have participated in public debates have worry for being subject to sanctions even the light ones, this would have an interruptive effect on them.

The Constitutional Court has observed that it is beyond any doubt that the applicant's analysis and criticism in his contested speech concerning the referendum held for the constitutional amendment are generally a concern for the public interest; and that the margin of criticism addressed towards the governments and the politicians are wider than that of the other individuals. Therefore, the Court has concluded that the interference in the applicant's freedom of expression was not necessary in a democratic society for the protection of *"other individuals' reputation and rights",* and accordingly held that the applicant's freedom of expression guaranteed under Article 26 of the Constitution has been breached.

Moreover, in the Court's opinion, acceptance of all actions brought by individuals of a certain section of the society for the disclosure of thoughts against this section at such an overlapping sphere, where it is extremely difficult to ascertain who the victim is, would also have a chilling effect on the freedom of expression. Under such an influence, the individuals may refrain from disclosing and disseminating their thoughts in future.

The Constitutional Court has observed that it is beyond any doubt that the applicant's analysis and criticism in his contested speech concerning the referendum held for the constitutional amendment are generally a concern for the public interest; and that the margin of criticism addressed towards the governments and the politicians are wider than that of the other individuals. Therefore, the Court has concluded that the interference in the applicant's freedom of expression was not necessary in a democratic society for the protection of *"other individuals' reputation and rights"*, and accordingly held that the applicant's freedom of expression guaranteed under Article 26 of the Constitution has been breached.

6- Judgment of Radyo V.Y. A.Ş. (Application No: 2013/1429)

> **In the Court's opinion, the freedom expression protects not only the content of thoughts and convictions but also the manner they are conveyed. In this context, it is beyond any doubt that radio and television broadcasts, which are more different and effective than the mass media likely to be reproduced by means of publication, are inseparable part of the freedom of expression. The freedom of expression may be subject to certain restrictions within the scope of the restriction regime applied to the fundamental rights and freedoms, and *"subjecting the broadcasts through radio, television, cinema or similar means to licence system"* appears as a manner of regulatory restriction specific to the freedom of expression. However, it is clearly emphasized in the Constitution that this restriction may be imposed *"on condition of not hindering the broadcast".***

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 14/10/2015, the applicant whose request made before the Supreme Board of Radio and Television ("RTÜK") for national terrestrial broadcasting licence (R1) was recorded in 1995 and which started broadcasting in the same year informed the RTÜK that it would suspend its broadcasting between 2000 and 2002. In pursuance of the decision taken by the RTÜK on 27/10/2008, *"the institutions which suspended their broadcasting and have subsequently started broadcasting without the permission and decision of the*

supreme board shall be warned that their broadcastings would be suspended without prejudice to the judicial decisions, and a legal action shall be initiated against those which continue broadcasting", the applicant's broadcastings were suspended on 11/11/2008.

The case opened by the applicant requesting the annulment of the RTÜK's administrative action of suspension was dismissed by the Administrative Court. Upon the appellate review and rectification of the decision, the above-cited dismissal decision became final.

The applicant has maintained that the petition concerning the suspension of the broadcastings were submitted to the RTÜK by a person having no representative authority; that all radios in the country have been broadcasting on the basis of the application made in 1995; that during the relevant process, no institution was granted license or release for terrestrial radio broadcasts; that the same court rendered an affirmative decision in respect of another radio having the same conditions; and that rendering of such contradictory decisions have impaired the principle of legal certainty. The applicant has also alleged that the RTÜK's decision, which prescribes that radios suspending their broadcasting cannot start broadcasting once again, was lack of legal foundation; and that as the owner of the company had different religious belief, he was subject to discrimination. Therefore, it has been alleged that the freedom of expression and the right to a fair trial have been breached in the instant case.

In the Court's opinion, the freedom expression protects not only the content of thoughts and convictions but also the manner they are conveyed. In this context, it is beyond any doubt that radio and television broadcasts, which are more different and effective than the mass media likely to be reproduced by means of publication, are inseparable part of the freedom of expression. The freedom of expression may be subject to certain restrictions within the scope of the restriction regime applied to the fundamental rights and freedoms, and *"subjecting the broadcasts through radio, television, cinema or similar means to licence system"* appears as a manner of regulatory restriction specific to the freedom of expression. However, it is clearly emphasized in the Constitution that this restriction may be imposed *"on condition of not hindering the broadcast"*.

The Constitutional Court has observed that, in the present case, the applicant made an application to obtain national terrestrial licence in accordance with the provisions of the Law no. 3984, which entered into force in 1994; that it started broadcasting in 1995 and suspended its broadcasting between 2000 and 2002. The Court has also indicated that, in the elapsed period, the *de facto* situation continued in this manner on account of the administration's failure to make tenders concerning the frequency allocation; and that in its current status, the applicant was not in the status of *"broadcasting without permission"* but in the status of *"suspending its broadcasts"*. The Court has also observed that besides the existence of different decisions rendered by the Council of State concerning other

Taking into consideration the applicant's status of radiobroadcaster *"suspending its broadcast",* the Court has noted that the justifications given in the decisions of the RTÜK, the regulatory and supervisory authority, and of the instance courts were not *"relevant and sufficient"*, and therefore, the interference in question was not appropriate for attaining the public aim pursued.

media organs in a similar position, different decisions were given in respect of the above-cited status.

Taking into consideration the applicant's status of radiobroadcaster *"suspending its broadcast",* the Court has noted that the justifications given in the decisions of the RTÜK, the regulatory and supervisory authority, and of the instance courts were not *"relevant and sufficient"*, and therefore, the interference in question was not appropriate for attaining the public aim pursued.

Consequently, reaching the conclusion that the interference subject-matter of the application was not necessary in a democratic society, the Court has held that there has been a breach of the applicant's freedom of expression guaranteed under Article 26 of the Constitution.

7- Judgment of Ergun POYRAZ (Application No: 2013/8503)

The Constitutional Court has noted that no restriction shall be imposed on the political expressions unless there are compelling reasons and emphasized that, in a sound democracy, the political power shall be supervised by not only the legislative and judiciary organs but also the other actors in the political sphere as well. Underlining that the politicians, unlike other persons, intentionally subject each of their words and acts to scrutiny and, therefore, must show broader tolerance to criticisms, the Court has noted that the politicians' such obligation of "broader tolerance" does not mean that their *"reputation and rights"* guaranteed under Article 26 § 2 of the Constitution would not be protected.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 27/10/2015, the applicant was ordered to pay a compensation to the complainant for his statements in his book entitled *"Musa'nın Gülü" ("The Rose of Moses")*.

The applicant has claimed in brief that his statements in the book subject -matter

of the case are consistent with the apparent truth; and that he was punished for the opinions he had expressed. Accordingly, he has alleged that his freedom of expression has been violated as well as his other rights.

The Constitutional Court reviewed the application from the point of the question whether the compensation awarded against the applicant was a necessary, legitimate and proportionate interference in his freedom of expression. The Constitutional Court has emphasized that all kinds of means of expressions are under the constitutional protection; and that the Constitution imposes no restriction on the contents of the freedom of expression. The Constitutional Court has accordingly expressed that categorization of an expressed or disseminated opinion as "worthy-worthless" or "useful-useless" on the basis of its content may lead to an arbitrary restriction on this freedom.

The Constitutional Court has noted that no restriction shall be imposed on the political expressions unless there are compelling reasons and emphasized that, in a sound democracy, the political power shall be supervised by not only the legislative and judiciary organs but also the other actors in the political sphere as well. Underlining that the politicians, unlike other persons, intentionally subject each of their words and acts to scrutiny and, therefore, must show broader tolerance to criticisms, the Court has noted that the politicians' such obligation of "broader tolerance" does not mean that their "*reputation and rights*" guaranteed under Article 26 § 2 of the Constitution would not be protected.

The Constitutional Court has noted that the allegations in the book in their entirety may be qualified to constitute an attack towards the defendant's honour and reputation only when the words used in the book and the picture on the cover of the book are ascribed a different meaning which is beyond assigned by the author himself. The Court has considered that the author's analysis on the certain stages of life, relations and statements of Abdullah Gül, who is one of the most important political actors of the country and was the Minister of Foreign Affairs and a presidential candidate on the publishing date of the book, is an issue related to public interest in general terms.

The Constitutional Court has noted that punishing the informative statements and criticisms towards the politicians may have a "chilling effect" and lead to silence different voices in the society; and that the fear of being punished may hinder the maintenance of a pluralistic society. The Court has stated that awarding compensation against the applicant in the present case may impair the environment of criticism which is a *sine qua non* for a democratic society.

Consequently, the Constitutional Court has concluded that the applicant's freedom of expression guaranteed under Article 26 of the Constitution has been violated as the interference in the applicant's freedom of expression does not meet the criteria of being necessary for the protection of "the others' reputation and rights" in a democratic society.

L) JUDGMENTS RENDERED IN RESPECT OF THE FREEDOM OF THE PRESS

1- Judgment of Bekir COŞKUN (Application No: 2014/12151)

> **In the Court's opinion, the article subject-matter of the application was penned as a part of the ongoing discussions in the press and media organs and political spheres on the date of the incidents. The applicant's expressions that led to his conviction criticize waggishly the reactions by some municipal officials and politicians against the protest of painting the cities' staircases initiated by individuals to draw attention in their way to the environmental problems subsequent to the incidents known as *"Gezi demonstrations"* which occupied the public agenda for quite a long period of time.**

In the incident giving rise to the present application which was concluded by the Constitutional Court in its plenary sitting on 4/6/2015, the applicant is a columnist in a nationwide daily newspaper called "Cumhuriyet" (*the Republic*). The applicant penned an article entitled *"Painted Stairs"* in the issue of the newspaper dated 4/7/2013 on the protests of painting the stairs which started in Istanbul and spread into nationwide. A criminal case was filed against the applicant on account of the said article with the allegation of "insulting public officers who were working as a committee". The Criminal Court of First Instance sentenced the applicant for the thoughts which he expressed in his article and subsequently decided to suspend the pronouncement of the judgment.

The applicant has alleged that his punishment for the thoughts he expressed in the article has been a violation of his freedom of expression and freedom of the press.

The Constitutional Court has noted that Articles 26 § 1 and 28 § 1 of the Constitution impose no restriction on the freedom of expression with regards to the content; and that the freedom of expression applicable for both real and legal persons includes all forms of expression such as political, artistic, academic or commercial opinions and convictions.

The Constitutional Court has found out that, in the present application, the interference in the applicant's freedom of expression was a part of the measures aiming the *"protection of the reputation or rights of others"*. The Court has recalled that its duty is to make an assessment on whether a fair balance was struck in a democratic society between the applicant's freedom of expression and the protection of the reputation or rights of others.

Reminding that before the publishing of the said article on the newspaper, a series of social protests publicly known as *"Gezi demonstrations"* took place in June 2013,

The Constitutional Court has emphasized that freedom of expression mainly guarantees the freedom of criticism and, therefore, the severe expressions used in the course of disclosure or dissemination of the opinions must be deemed natural; and that on the other hand, it must be taken into account that the freedom of political discussion is *"the basic principle of all democratic systems".*

the Court has indicated that the acts of painting staircases started in various places of Turkey for the alleged purpose of increasing the awareness on protecting the environment; and that on the date of incidents, some of the municipalities did not permit the act of painting staircases also called as *"rainbow protest"* and repainted staircases in their original colours.

In the Court's opinion, the article subject-matter of the application was penned as a part of the ongoing discussions in the press and media organs and political spheres on the date of the incidents. The applicant's expressions that led to his conviction criticize waggishly the reactions by some municipal officials and politicians against the protest of painting the cities' staircases initiated by individuals to draw attention in their way to the environmental problems subsequent to the incidents known as *"Gezi demonstrations"* which occupied the public agenda for quite a long period of time. Making a reference to news appearing in the media stating that colours of the General Assembly Hall of the Turkish Grand National Assembly, especially red colour of the seats, have a negative impact on the mood of the parliamentarians, the applicant has criticized that a colourful environment was not welcomed by the politicians.

The Constitutional Court has emphasized that freedom of expression mainly guarantees the freedom of criticism and, therefore, the severe expressions used in the course of disclosure or dissemination of the opinions must be deemed natural; and that on the other hand, it must be taken into account that the freedom of political discussion is *"the basic principle of all democratic systems"*.

Noting that the public authorities must tolerate the severest criticism directed towards them by virtue of the public power vested in them, the Constitutional Court has recalled that a sound democracy requires the supervision of a body exercising public power not only through judicial authorities but also by the non-governmental organizations, media and press or other actors of the political sphere such as political parties. Likewise, tolerable limits of criticism towards politicians are wider than that of other individuals. Unlike other individuals, a politician intentionally makes each of his statements and actions open to the public, as well as other politicians' scrutiny. That is why they must have a wider tolerance to criticism. Therefore, political expression must not be restricted unless there are compelling reasons.

In the Court's opinion, although the probationary measure was applied in respect of the applicant upon the pronouncement of the suspension of judgment, the applicant, who is a writer, would always face a risk of the execution of his sentences during this probation period. The anxiety for being subject to sanctions has an interruptive effect on people and, although the person concerned is likely to complete his period of probation without a new conviction, there is always a risk for the person under the effect of such anxiety to refrain from expressing his opinions or performing press activities.

Consequently, the Court has stated that the interference in applicant's freedom of expression and the freedom of the press for the purpose of the *"protection of the reputation or rights of others"* was not necessary in a democratic society. The Court has accordingly held that the applicant's freedom of expression and freedom of the press guaranteed under Articles 26 and 28 of the Constitution have been violated.

2- Judgment of Medya Gündem Dijital Gündem Yay. Tic. A.Ş. (Application No: 2013/2623)

Recalling that the web-site reporting may be considered to be under the scope of the freedom of the press as long as it performs its role of *"public watchdog"* which is the fundamental function of the press, the Court has underlined that the news report, subject-matter of the application, has fulfilled this function and therefore, denial of access to the news report published by the applicant constituted an interference in the freedom of expression; and that stating in the news report that the decreases in prices of the company's shares were found speculative cannot be accepted as a heavy insult which would constitute an arbitrary personal attack.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 11/11/2015, a news report published on the web-site *"borsagündem.com"* on 6/12/2012 dealt with the relations between a company whose shares were quoted on the stock exchange and another company serving as brokerage. Upon the application of the company in question and the chairman of the board of directors of this company, the news report was banned and discontinued being published by the decision dated 13/2/2012.

The applicant has maintained that the ban imposed on the above-cited news report breached the right to a fair trial protected under Article 36 of the Constitution; that assessments were made only on the basis of data and information included in the statements made by the complainant company; that as the content thereof was of particular concern to the company's future and, hence, the investors, the news report was newsworthy; and that denial of access to the news report was a breach of

Noting that elimination of the probability of dissemination of thoughts which are of a particular concern to the public without relying on any justification amounts to *"censorship"*, the Constitutional Court has pointed out that the article subject-matter of the application included commercial statements particularly concerning the public and pursuing public interest and concluded that the interference in the present case was not necessary in a democratic society.

the freedom of the press set out in Article 28 of the Constitution. The applicant has accordingly requested that the decision which imposed a ban on the news report be revoked and a re-trial be conducted by the first instance court.

Emphasizing that this matter must be assessed with regard to the requirements of a democratic social order, the Court has held that the complaints that the justification of the first instance decision was not sufficient are admissible by taking into account the principles that the reasoned decisions of the instance courts must include *"relevant and sufficient justifications"* which would justify the interference in the freedoms of expression and the press; and that there must be a reasonable balance between the aim of restriction and means thereof.

Recalling that the web-site reporting may be considered to be under the scope of the freedom of the press as long as it performs its role of "*public watchdog*" which is the fundamental function of the press, the Court has underlined that the news report, subject-matter of the application, has fulfilled this function and therefore, denial of access to the news report published by the applicant constituted an interference in the freedom of expression; and that stating in the news report that the decreases in prices of the company's shares were found speculative cannot be accepted as a heavy insult which would constitute an arbitrary personal attack.

The Court has indicated that in its decision, the first instance court did not clarify in whose personal rights, among the company or its Chairman of the Board of Directors requesting the denial of access to the relevant news report, an interference was made and on the basis of which allegation or comment the web-site content was decided to be removed. Accordingly, the Court has concluded that there was no *"relevant and sufficient ground"* to justify the interference in question.

On the other hand, noting that elimination of the probability of dissemination of thoughts which are of a particular concern to the public without relying on any justification amounts to *"censorship"*, the Constitutional Court has pointed out that the article subject-matter of the application included commercial statements particularly concerning the public and pursuing public interest and concluded that the interference in the present case was not necessary in a democratic society.

Consequently, the Court has held that there has been a breach of the freedom of expression and the freedom of the press which are guaranteed respectively under Articles 26 § 1 and 28 § 1 of the Constitution.

M) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO HOLD MEETINGS AND DEMONSTRATIONS

1- Judgment of Ali Rıza ÖZER and Others (Application No: 2013/3924)

Examining the alleged ill-treatment and the substantive and procedural aspects of the prohibition on the basis of the meetings and demonstrations, the Court has emphasized that police may use force during non-peaceful public protests only to the extend it is inevitable and on condition of not being excessive; and that unless it is compulsory, having recourse to physical force on account of the individuals' own behaviours and attitudes may breach the substantive aspect of the prohibition of ill-treatment. The Court has also noted that the use of pepper spray in social events would not *per se* constitute a violation of the prohibition of ill treatment.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 6/1/2015, the applicants serving as teachers and education inspectors were members of the Izmir Branch of the Education and Science Labourer's Union ("*Eğitim ve Bilim Emekçileri Sendikası"*), an association of public officers working in the education sector wished to join the demonstration to be held in Ankara on 28 and 29 March 2012 in order to express their objections to the *"the Bill on Making Certain Amendments to the Elementary School and Education Law and Various Other Laws"*, which proposed changes in the educational system and known to the public as "*4+4+4 bill"* upon the negotiations started in respect thereof in the Turkish Grand National Assembly. However, they were prevented by the security forces from doing so. Afterwards, in order to protest this prevention and the above mentioned bill, a group including the applicants held a press release and demonstration in Izmir on 27 and 28 March 2012. The applicants were injured during the police intervention in this meeting and demonstration. The Chief Public Prosecutor's Office considered that the intervention by the security forces fell within the limits of legal use of force and gave a decision for non-prosecution in respect of these security officers.

On the other hand, some of the applicants were prosecuted for allegedly violating the Law no. 2911 on Meetings and Demonstrations, and it was decided that there was no ground for imposing any punishment on them whereas in the case filed against these applicants for the offence of resisting the public officers for preventing them from performing their duties, they were decided to be acquitted.

The applicants have maintained that their prevention from participating in the press release and demonstration to be held in Ankara in order to raise their objections to the amendments to be introduced in the educational system (the first act) and having recourse to disproportionate force by the law enforcement officers in the course of the demonstration held by the group including the applicant for protesting the above-mentioned prevention (second act) violated the freedom of expression, the prohibition of ill-treatment and the right to hold meetings and demonstrations.

Examining the alleged ill-treatment and the substantive and procedural aspects of the prohibition on the basis of the meetings and demonstrations, the Court has emphasized that police may use force during non-peaceful public protests only to the extend it is inevitable and on condition of not being excessive; and that unless it is compulsory, having recourse to physical force on account of the individuals' own behaviours and attitudes may breach the substantive aspect of the prohibition of ill-treatment. The Court has also noted that the use of pepper spray in social events would not *per se* constitute a violation of the prohibition of ill treatment.

In its assessment on the procedural aspect of prohibition of ill treatment, the Court has stated that criminal investigations must be effective and sufficient so as to lead to the identification and punishment of those who are responsible; and that in order to qualify an investigation effective and sufficient, the investigation authorities must take an action *ex officio* and collect all evidence capable of revealing the incident and identifying those who are responsible.

In this context, the Court has held that there has been a breach of the prohibition

The Constitutional Court has pointed out in its assessment as to the right to hold meetings and demonstrations that, in a democratic society based on the rule of law, the individuals must be provided with the opportunity to express political ideas which are against the ongoing system and intended to be materialized via peaceful methods through the freedom of assembly and other legal means. Moreover, emphasizing that Article 34 of the Constitution guarantees the right to hold meetings and demonstrations so that ideas could be manifested peacefully without violence and attack, the Court has noted that the purpose of the freedom of assembly is to protect the rights of individuals who express their ideas peacefully and do not involve in violence. In the Constitutional Court's judgment, it is also stressed that it is of great importance that, in public protests where pepper spray is being used, individuals who are more susceptible to pepper spray due to age, pregnancy, and chronic diseases should be given warning prior to the use of spray.

of ill-treatment guaranteed under Article 17 § 3 of the Constitution under its substantive and procedural aspects in respect of the applicant Ali Riza Özer on account of the second act in which the law enforcement officers had recourse to force in the course of the demonstration held with a view to protesting a previous event when the participants had been prevented from participating into a press statement and demonstration in Ankara to raise objections to the amendments to be introduced in the education system. The Court has also held that there has been no breach of the prohibition of ill-treatment in respect of the applicants, Orhan Bayram, Veli İmrak and Özcan Çetin under its substantive and procedural aspects.

The Constitutional Court has pointed out in its assessment as to the right to hold meetings and demonstrations that, in a democratic society based on the rule of law, the individuals must be provided with the opportunity to express political ideas which are against the ongoing system and intended to be materialized via peaceful methods through the freedom of assembly and other legal means. Moreover, emphasizing that Article 34 of the Constitution guarantees the right to hold meetings and demonstrations so that ideas could be manifested peacefully without violence and attack, the Court has noted that the purpose of the freedom of assembly is to protect the rights of individuals who express their ideas peacefully and do not involve in violence. In the Constitutional Court's judgment, it is also stressed that it is of great importance that, in public protests where pepper spray is being used, individuals who are more susceptible to pepper spray due to age, pregnancy, and chronic diseases should be given warning prior to the use of spray.

Having examined the incidents subject-matter of the individual application in two main incidents which are the participants' being prevented from participating in the press release and demonstration to be held in Ankara in order to raise their objections against the amendments to be introduced in the educational system (the first act) and having recourse to disproportionate force by the law enforcement officers in the course of the demonstration held by the group including the applicant for protesting the above-mentioned prevention (second act), the Constitutional Court has held that there has been a breach of the right to hold meetings and demonstrations guaranteed under Article 34 of the Constitution in respect of all applicants on account of the first act; and that, in respect of the second act in which the applicants participated, there has been no breach of the applicant Orhan Bayram's right to hold meetings and demonstrations on the ground that the police intervention towards his violent acts was proportionate whereas there has been a breach of this right in respect of other applicants.

2- Judgment of Osman ERBİL (Application No: 2013/2394)

According to the Constitutional Court, the right to hold meetings and demonstrations prescribed in Article 34 of the Constitution aims at guaranteeing the opportunity for the individuals to assemble in order to jointly defend their common opinions and announce them to others. Therefore, this right is a special form of the freedom of expression set out in Articles 25 and 26 of the Constitution. The significance of the freedom of expression in a democratic and pluralist society is also valid for the right to hold meetings and demonstrations. The right to hold meetings and demonstrations guarantees the emergence, protection and dissemination of different opinions, which is essential in the development of pluralist democracies.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 25/3/2015, the applicant wished to make a press statement with a group of twenty-four persons in front of the Embassy of the United States of America (USA) with a view to protesting the custody of certain heads of the Labour Party and the Aydınlık Newspaper.

The police warned the group that an illegal demonstration was being held and they should disperse, or otherwise a legal action would be taken against them. In reply, some persons from the group said *"we can protest wherever we want. The law grants us the right to protest wherever we want without taking permission in advance, therefore we will continue our protest here"*, and the persons in the group did not willingly leave there.

Upon the police intervention, twenty-three persons including the applicant were taken into custody, and the applicant was released by the Public Prosecutor's Office on the following day. A criminal case was filed against the applicant and other persons within the scope of the Law no. 2911 and on Meetings and Demonstrations. The Criminal Court of First Instance sentenced the applicant to imprisonment in accordance with Article 32 §1 of the Law no. 2911 and decided the suspension of the pronouncement of the judgment at the end of the proceedings.

The applicant has alleged that they were prevented from conducting a peaceful meeting by noting that the police had intervened and dispersed the group and had taken them into custody as they had been about to make a press statement in front of the US Embassy with a view to protesting the custody of the heads of the Aydınlık Newspaper and the Labour Party, of which he was a member; that he was sentenced to imprisonment as a result of the criminal case filed against him; however, the court decided to suspend the pronouncement of the judgement; that the group gathered on peaceful purposes and there were no assault by the group against the police.

According to the Constitutional Court, the right to hold meetings and demonstrations prescribed in Article 34 of the Constitution aims at guaranteeing the opportunity for the individuals to assemble in order to jointly defend their common opinions and announce them to others. Therefore, this right is a special form of the freedom of expression set out in Articles 25 and 26 of the Constitution. The significance of the freedom of expression in a democratic and pluralist society is also valid for the right to hold meetings and demonstrations. The right to hold meetings and demonstrations guarantees the emergence, protection and dissemination of different opinions, which is essential in the development of pluralist democracies.

On the other hand; pluralism, tolerance and respect for opinions and beliefs of others are among the indispensable features of a democratic society. The superiority of the opinion of majority in all cases cannot be argued in pluralist democracies; besides, safeguarding minority or opposing opinions and guaranteeing expression of these opinions are indicators of respect for democratic values. Guaranteeing the opinions which are in the minority by safeguarding them even in case of being provocative or disturbing in the eyes of majority is a requisite for pluralism, open-mindedness, tolerance and democratic society.

The right to hold meetings and demonstrations and the freedom of expression are among the most fundamental values of a democratic society. The ability to resolve problems in an open platform for discussion lies at the core of democracy. Radical preventive measures for eliminating the freedom of assembly and expression, except for incitement to violence, may impair democracy, even in cases when officials deem the expressions and perspectives used in protests unacceptable or when protests are illegal. The opportunity of self-expression of political opinions, which object to the current order and intended to be materialized by peaceful methods, through freedom of assembly and by other legal means should be granted in a democratic society based upon the rule of law.

Noting that Article 34 of the Constitution guarantees the right to hold meetings and demonstrations with a view to putting forward opinions in an unarmed way without any assaults; in other words, in a peaceful manner, the Court has indicated that this right, which is exercised collectively, enables persons wishing to express their opinions to state thoughts by methods excluding violence; that demonstrations participated or organised by persons intending to use violence are out of the scope of the notion of peaceful assembly; that within this context, the aim of the right to assembly is to safeguard the rights of individuals who are not involved in violence and who put forth their opinions in a peaceful manner; and that apart from this, the purpose of a meeting or demonstration is of no importance.

The Court has also emphasized that as long as the meetings and demonstrations are subject to the procedures of permission or notification with a view to enabling the authorities to take reasonable and appropriate measures for securing proper conduct of all kinds of meetings, marches or other demonstrations, it would not, in principle, infringe upon the very essence of the right.

Stating that it must be assessed whether the practice of such a security zone, which could be deemed reasonable for ensuring the order of functioning and security of the Parliament, is proportionate for the realisation of this aim in terms of each concrete case, the Court has noted that an intervention in a demonstration or meeting cannot be deemed justified by, on the basis of a formal approach, only the ground of being contrary to applicable law; and that grounds for intervention should be *"relevant and sufficient"* within the framework of concrete circumstances of the case.The Court has also considered that it cannot be said that as a rule, being under the threat of penal sanction due to a peaceful demonstration has struck the balance between the necessary measures for realization of legitimate aims and the right to peaceful assembly.

In the incident subject-matter of the application, the group including the applicant gathered in front of the US Embassy located in an area one kilometre away from the Turkish Grand National Assembly ("the Parliament") without making any notifications forty-eight hours in advance under Article 10 of the Law no. 2911 and by acting in contrary to Article 22 of the same Law.

Stating that it must be assessed whether the practice of such a security zone, which could be deemed reasonable for ensuring the order of functioning and security of the Parliament, is proportionate for the realisation of this aim in terms of each concrete case, the Court has noted that an intervention in a demonstration or meeting cannot be deemed justified by, on the basis of a formal approach, only the ground of being contrary to applicable law; and that grounds for intervention should be *"relevant and sufficient"* within the framework of concrete circumstances of the case.The Court has also considered that it cannot be said that as a rule, being under the threat of penal sanction due to a peaceful demonstration has struck the balance between the necessary measures for realization of legitimate aims and the right to peaceful assembly.

Consequently, the Constitutional Court has concluded that the intervention by which the press statement participated by the applicant was ended on the ground that it was unlawful and the applicant was sentenced to imprisonment was not *"necessary in a democratic society"* and *"proportionate"* although it was decided that pronouncement of the judgement be suspended. Therefore, the Court has held that the right to hold meetings and demonstrations guaranteed in Article 34 of the Constitution has been violated in the instant case.

N) JUDGMENTS RENDERED IN RESPECT OF THE RIGHTS TO ELECT, TO BE ELECTED, TO PERFORM POLITICAL ACTIVITIES AND THE RIGHT TO POLITICAL ORGANIZATION

1- Judgment of Metin BAYYAR and the People's Liberation Party (Application No: 2014/15220)

Having indicated that the freedom of political organization falls in the joint protection sphere of the Constitution and the European Convention on Human Rights and is under the Constitutional Court's jurisdiction of individual application, the Court has held that the freedom of political organization of both applicants were directly affected from the administrative fine imposed; and that there is no ground for inadmissibility of the application in respect of both applicants.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 4/6/2015, the applicant Metin Bayyar was the chairman of the board of directors of the Bartın Provincial Organization of the People's Liberation Party ("*Halkın Kurtuluşu Partisi*"), which is the other applicant in the instant case. The Governor's Office imposed an administrative fine on the applicant in pursuance of Article 33 § 2 of the Law on Associations dated 4/11/2004 and no. 5253 on the ground that he failed to fulfil the obligation set out in Article 32 § 1 (b) of the same Law, which reads *"failure to convoke the general assembly in due course time and to hold general assembly meetings contrary to the provisions of the law and bylaw or at any place other than the one where the association headquarters is or which is specified in the bylaw".* The applicant's objection to this administrative fine was dismissed by the final decision of the Magistrate Judge's Office.

The applicants have maintained that the minimum number of members required for holding a provincial congress could not be reached yet, and also there is no provision in the relevant legislation which indicates that in case of failure to hold provincial congress, an administrative fine shall be imposed on those who are responsible. They have alleged that their rights to political organization and freedom of expression and the principle of *"legality of offence and penalties"* have been breached on account of the administrative fine imposed on the applicant Metin Bayyar; and that their right to a fair trial has been breached as the administration imposing the administrative fine did not take the applicants' defence submissions.

In its assessment as to the merits of the application, the Court has accepted that the administrative fine imposed on the applicant Metin Bayyar constituted an interference in the applicants' freedom of political organization. It has been emphasized that as to the matter whether this interference constituted a breach or not, it must be taken into account there is not any sufficiently clear provision in the law in respect of the competent authority to impose the administrative fine.

The Court has considered that the essence of the above-cited allegations was concerning the freedom of political organization and therefore decided to make an examination and assessment within this framework.

Having indicated that the freedom of political organization falls in the joint protection sphere of the Constitution and the European Convention on Human Rights and is under the Constitutional Court's jurisdiction of individual application, the Court has held that the freedom of political organization of both applicants were directly affected from the administrative fine imposed; and that there is no ground for inadmissibility of the application in respect of both applicants.

Addressing the inalienable nature of the political parties in respect of the pluralist democracies, the Constitutional Court has referred to the relevant principles of the Venice Commission on the regulations concerning the political parties.

In its assessment as to the merits of the application, the Court has accepted that the administrative fine imposed on the applicant Metin Bayyar constituted an interference in the applicants' freedom of political organization. It has been emphasized that as to the matter whether this interference constituted a breach or not, it must be taken into account there is not any sufficiently clear provision in the law in respect of the competent authority to impose the administrative fine.

Consequently, noting that the interference in the applicants' freedom of political organization failed to pass the legality test, the Court has held that the applicants' freedom of political organization guaranteed under Article 68 of the Constitution has been breached in the instant case.

2- Judgments of Atila SERTEL and Oğuz OYAN (Application No: 2015/6723, 2015/8818)

> **In this respect, having assessed the relevant part of Article 79 of the Constitution, which reads as follows *"no appeal shall be made to any authority against the decisions taken by the Supreme Election Board",* in conjunction with its legislative intent, which provides *"... As the decisions taken by the Supreme Election Board are final and there may be hesitations in abiding by these decisions, the principle that the decisions of the Supreme Election Board cannot be appealed before any authority has been incorporated into this provision",* the Constitutional Court has reached the conclusion that the constitution-maker intended to avoid the objections to be raised against the decisions of the YSK before any other authority including the Constitutional Court.**

In the incident giving rise to the present application which was concluded by the Constitutional Court in its plenary sitting on 14/7/2015, the applicant Atila Sertel was nominated as a parliamentary candidate by the Republican People's Party (the CHP) in the 6th degree within the Izmir Electoral District no.2 for the 25th Period General Parliamentary Election to be held on 7 June 2015. As the applicant did not resign from the membership of the general assembly of the Press Ad Agency ("*Basın İlan Kurumu")* and chairmanship of the Izmir Association of Journalists ("İzmir Gazeteciler Cemiyeti") and the Turkish Journalists' Federation ("*Türkiye Gazeteciler Federasyonu*") in due course of time, upon the complaint that the applicant could not stand as a parliamentary candidate, the Supreme Election Board ("the *YSK"*) cancelled the applicant's candidacy by means of accepting that being a member of the general assembly of the Press Ad Agency was a public service. The objection to that decision was dismissed by the YSK.

The applicant Oğuz Oyan, who was the Izmir parliamentarian of the CHP on the date of application, lodged an application with the YSK and maintained that the comments included in the speeches delivered by the President of the Republic on various occasions prior to the 25th Period General Parliamentary Election to be held on 7 June 2015 were contrary to the President's liability to perform his duties impartially and broadcasting of these speeches was contradictory to the broadcasting principles required to be observed in the course of elections and fairness of broadcasting and in breach of the principles of equality, independency and honesty required by the election law. He therefore requested that certain parts of the President's speeches which might have an influence, in any way, on

the election period and votes to be casted by citizens be not broadcasted through radio and television. The YSK dismissed the applicant's request.

The applicant, Atila Sertel, has maintained that cancellation of his parliamentary candidacy by the YSK on the ground that he did not resign from the membership of the general assembly of the Press Ad Agency, which was considered to be a public service, has breached his right to be elected.

The applicant, Oğuz Oyan, has alleged that as the YSK dismissed, for being non-competence, his request that the opinions and comments delivered by the President in the course of his speeches prior to the 25th Period General Parliamentary Election held on 7 June 2015 must not appear in the press because these opinions and comments impaired the impartiality of the President, his rights to elect, to be elected and to a fair trial have been breached.

The Constitutional Court examined these two applications in the light of the provision set out in Article 45 § 3 of the Law no. 6216 on the Establishment and Trial Procedures of the Constitution Court, which envisages that the procedures which are excluded by the Constitution from the scope of the judicial review cannot be subject-matter of the individual application, and the provision set out in Article 79 of the Constitution, which envisages that no appeal shall be made to any authority against the decisions taken by the YSK.

In this respect, having assessed the relevant part of Article 79 of the Constitution, which reads as follows *"no appeal shall be made to any authority against the decisions taken by the Supreme Election Board"*, in conjunction with its legislative intent, which provides *"... As the decisions taken by the Supreme Election Board are final and there may be hesitations in abiding by these decisions, the principle that the decisions of the Supreme Election Board cannot be appealed before any authority has been incorporated into this provision",* the Constitutional Court has reached the conclusion that the constitution-maker intended to avoid the objections to be raised against the decisions of the YSK before any other authority including the Constitutional Court.

Consequently, the Constitutional Court has observed that the subject-matters of the applications were concerning a procedure which is excluded from the judicial review by the Constitution and accordingly held that these applications must be declared inadmissible for lack of jurisdiction *ratione materiae*.

3- Judgment of the Grand Unity Party and the Felicity Party (Application No: 2014/8843)

> **In this respect, the Court has noted that the condition of receiving vote at the rate of 3% for benefitting from treasury grants which is introduced in the Additional Article 1 of the Law no. 2820 has constituted an interference in the right to be elected and to perform political activities by means of setting a limit. However, the Court, which has pointed out that in case of not setting a minimum limit, each vote to be received may be seen as an income channel on the basis of the state aid and therefore may significantly increase the number of political parties, has considered that it is expected from a legal arrangement made concerning the state aid to strike a fair balance between the political parties' function to strengthen the democratic pluralism and an excessive and non-functional party inflation. In other words, setting a proportionate limit is required for ensuring the efficiency of the right to be elected.**

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 10/12/2015, the applicants, the Grand Unity Party (*"Büyük Birlik Partisi"*) and the Felicity Party (*"Saadet Partisi"*), respectively received 0,75 % and 1,26 % of the valid votes in the 24th Period General Parliamentary Election held on 12 June 2011. As a result of the amendment made by the Law dated 2/3/2014 and no. 6529, to the Additional Article 1 of the Political Parties Act no. 2820, the condition envisaging that the political parties which have received more than 7% of the total valid votes may be granted state aid has been rearranged and the ratio was reduced to 3%. In the 25th Period General Parliamentary Election which was held on 7 June 2015 before the individual application was examined by the Court, the applicants-political parties formed political alliance and received votes at the rate of 2,06% under the roof of the Felicity Party whereas in the 26th Period General Parliamentary Election which was held on 1 December 2015, the Grand Unity Party received 0,53% and the Felicity Part received 0,68% of the votes.

The applicants have maintained that although Article 68 of the Constitution sets forth that the political parties may be granted financial aid at adequate level and on equitable basis, political parties that could not pass the election threshold are not granted state aid, which is contrary to the principles of fairness and equality and creates inequality of opportunity among political parties. They have also

stated that the principle which stipulates that the political parties receiving votes at the rate of 3% may be granted state aid is most probably applied in the elections to be held in 2015 and thereby their rights enshrined in the Constitution have been breached.

The Court examined the application with regard to the requirements of the pluralist democracy and has drawn the attention to the significant role of the political parties in democracies and to the fact that the rights to free election and the rights to elect, to be elected and to perform political activities must be exercised in practice and in an effective manner. In the Court's opinion, granting financial aid by the state to the political parties which have participated in elections and thereby undertaken to ensure the formation of national will as their fundamental rights and duties, to the extent required by the multi-party democratic order, would prevent them from facing with the threat of being under the influence and pressure of certain persons and institutions that are more powerful in financial terms.

In this respect, the Court has noted that the condition of receiving vote at the rate of 3% for benefitting from treasury grants which is introduced in the Additional Article 1 of the Law no. 2820 has constituted an interference in the right to be elected and to perform political activities by means of setting a limit. However, the Court, which has pointed out that in case of not setting a minimum limit, each vote to be received may be seen as an income channel on the basis of the state aid and therefore may significantly increase the number of political parties, has considered that it is expected from a legal arrangement made concerning the state aid to strike a fair balance between the political parties' function to strengthen the democratic pluralism and an excessive and non-functional party inflation. In other words, setting a proportionate limit is required for ensuring the efficiency of the right to be elected.

On the other hand, single income source of the political parties are not only the state aid directly granted to the parties. Apart from state aid, political parties have other sources of income, as specified in Article 61 of the Law no. 2820. The Court has further considered that the practice in question does not only provide treasury grants to political parties, which have passed the election threshold of 10% and are thereby represented in the Turkish Grand National Assembly; and reducing the minimum limit for receiving treasury grants to 3% far below the above-mentioned ratio is a proportionate interference in the right to be elected.

Consequently, the Constitutional Court has held that there has been no breach of the right to be elected and to perform political activities, guaranteed under Article 67 of the Constitution, of the applicants which could not pass the threshold of 3% in the 24th, 25th and 26th Periods General Parliamentary Elections and receive treasury grants.

O) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO UNION AND THE RIGHT TO PROPERTY

1- Judgment of Kristal - İş Union (Application No: 2014/12166)

In the Court's opinion, the right to union requires the freedom of forming an alliance and the freedom of association with a view to protecting the individual and common interests of the workers and constitutes a form or a special aspect of the freedom of association. The right to strike is accepted to be one of the most important means serving for the protection of the interests of the union members. The right to collective bargaining agreement must be considered as the primary element of the right to union.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 2/7/2015, the strike initiated by the applicant - the Union - as any agreement could not reached in the industry-wide bargaining was suspended for sixty days by virtue of the Decree of the Council of Ministers for the purposes of general health and public security. The applicant lodged an individual application after the action brought by the Union for annulment and its request for stay of execution had been dismissed by the Council of State. Although, on a subsequent date, the applicant objected to the dismissal of the request for stay of execution before the Council of State-the Plenary Sessions of the Chambers for Cases, this request was not accepted by the Council of State.

The applicant has maintained that in the event that the parties could not reach an agreement within the period during which the strike was suspended, the dispute would be settled by the High Board of Arbitration upon the application made by one of the parties and the decision to be given by the High Board would be final and have the force of collective bargaining agreement. The applicant has therefore alleged that the decision for suspension of the strike turned into a *de facto* ban on strike. The applicant has also maintained that the effective remedy in respect of the complaints in question is the request for stay of the execution.

Underlining that the remedies required to be exhausted are those which are likely to offer reasonable prospect of success for the applicant's complaints and provide the applicant with a solution and which are applicable and effective, the Constitutional Court is of the opinion that the procedure for stay of execution, which would enable the re-execution of the decision of strike held within the scope of a collective bargaining agreement, must be accepted as an effective remedy in the circumstances of the present incident.

On the other hand, observing that the applicant, which is a Union, lodged an individual application before objecting to the decision for dismissal of stay of execution request and without waiting for the result of its objection, the Constitutional Court

Indicating that the right to union may be subject to certain restrictions; however, the restrictions to be imposed on this right must be in accordance with the grounds set out in Article 51 of the Constitution and the criterion set out in Article 13 therein, the Constitutional Court has found out that the interference in the right to union passed the legality test; however, has not found necessary to make a separate examination on the legitimate aim by taking into account the assessments to be made concerning the matter as to whether the interference was necessary or not. In its assessment as to whether the interference was necessary in a democratic society and was compatible with the principle of proportionality or not, the Court has taken into consideration whether the instance courts had asserted plausible grounds in this respect.

has underlined that the procedural requirement that the applicable remedies must have been exhausted must not be construed in a manner which would prejudice to the right to access to the Court. Accordingly, the Court has concluded that the requirement for exhaustion of the available remedies have been fulfilled as the review of the objection made to the decision which dismissed the request for stay of execution was completed within the individual application process.

The Court examined the applicant's complaints within the framework of the right to union. In the Court's opinion, the right to union requires the freedom of forming an alliance and the freedom of association with a view to protecting the individual and common interests of the workers and constitutes a form or a special aspect of the freedom of association. The right to strike is accepted to be one of the most important means serving for the protection of the interests of the union members. The right to collective bargaining agreement must be considered as the primary element of the right to union.

Indicating that the right to union may be subject to certain restrictions; however, the restrictions to be imposed on this right must be in accordance with the grounds set out in Article 51 of the Constitution and the criterion set out in Article 13 therein, the Constitutional Court has found out that the interference in the right to union passed the legality test; however, has not found necessary to make a separate examination on the legitimate aim by taking into account the assessments to be made concerning the matter as to whether the interference was necessary or not. In its assessment as to whether the interference was necessary in a democratic society and was compatible with the principle of proportionality or not, the Court has taken into consideration whether the instance courts had asserted plausible grounds in this respect.

In its examination, the Court has emphasized that the dismissal decision given by the relevant Chamber of the Council of State included the relevant institutions' opinions on general health and national security; however, did not include the own assessment

of the Chamber of the Council of State on these issues. The Court has also stated in this respect that the statement included in the dismissal decision that the strike was covering the workplaces meeting the glass manufacturing needs at the rate of 90% may lead to impression that economic grounds were taken as a basis for the dismissal of the request for stay of execution.

Consequently, the Constitutional Court has held that the justifications given in the decision of the Council of State on the dismissal of the request for stay of execution of the decision on suspension of strike cannot be considered as relevant and sufficient; and that therefore, there has been a breach of the right to union guaranteed under Article 51 of the Constitution.

2- Judgment of Servet SARAÇOĞLU and Others (Application No: 2012/1281)

In the Court's opinion, the applicants have property rights, within the scope of Article 35 of the Constitution, on the immovable property which is left in the shore-edge line but title deed of which is registered in the name of the applicants. As the act of expropriation was carried out on the basis of the Acquisition Act no. 6830, the interference had a legal foundation, and as the immovable property was confiscated given the economic needs within the scope of the Second Five-Year Development Plan, the interference was served the legitimate public interest. Besides, an assessment must be made on the proportionality of the interference.

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 24/6/2015, the immovable property under the ownership of the applicants and acquired upon the court's decision in 1996 by way of acquisitive prescription was expropriated in 1968 for the construction of the Iskenderun 3rd Iron and Steel Plant.

Any expropriation price was not paid to the applicants for the immovable property which was under the applicants' ownership at the date of expropriation but transferred to the Iskenderun Iron and Steel Plant Enterprise for being registered in the name of the Treasury.

Although the solid waste and slag poured on the immovable property by the Iskenderun Iron and Steel Enterprises were not immediately removed from the property and it was continued to be occupied upon *de jure* acquisition of the immovable property, the applicants were not granted adequate payment for the occupation of the property (*ecrimisil*) and compensation. Thereupon, the applicants brought action for the prevention of the interference, the adequate payment for the occupation of the property and compensation. The Civil Court of First Instance dismissed the actions opened by the applicants on the grounds that the immovable property was expropriated in 1968 and thereby the ownership was transferred to the administration and there was no act of

confiscation without expropriation. This first instance decision was upheld by the Court of Cassation.

On the other hand, as a result of the shore-edge line determination made by the Governor's Office in 2007, the immovable property completely remained within the shore-edge line.

The applicants have maintained that although their immovable property had been occupied for over fifty years, any price was not paid to them; that the relevant administration neither ended its *de facto* occupation; nor did it consider coming to an agreement with them; that as the first instance court considered that the applicants' immovable property had been duly expropriated although the precedent expropriation procedures were declared null and void, the court allowed for the unlawful practice of the administration. They have further alleged that by the court's decision, the final decision dated 1996 and on the applicants' acquisition of the immovable property was revoked. For these reasons, the applicants have claimed that their rights to property and rights to a fair trial have been breached.

In the Court's opinion, the applicants have property rights, within the scope of Article 35 of the Constitution, on the immovable property which is left in the shore-edge line but title deed of which is registered in the name of the applicants. As the act of expropriation was carried out on the basis of the Acquisition Act no. 6830, the interference had a legal foundation, and as the immovable property was confiscated given the economic needs within the scope of the Second Five-Year Development Plan, the interference was served the legitimate public interest. Besides, an assessment must be made on the proportionality of the interference.

The Constitutional Court has stressed that the Court of Cassation the Plenary Assembly of Civil Chambers, the relevant Chambers of the Court of Cassation and the courts took into account the fact that immovable properties which were subject to the same expropriation procedure with the applicant's immovable property at the date of expropriation were registered in the name of the Treasury and declared the expropriation procedures in the precedent expropriation cases null and void. The Court has found out that the dismissal of the action brought by the applicants by deeming the expropriation procedure of the immovable property in dispute valid revoked the final decision which was given in 1996 and by which the applicants acquired the ownership of the property. The Court has indicated that making an assessment on the validity of the expropriation procedure in the present case different than the assessment on the similar disputes fell into the scope of the discretionary power of the instance courts; however, this procedure was not foreseeable in the circumstances of the present application and must therefore be justified. The Court has also noted that the ground relied on by the first instance court dealing with the proceedings and the relevant Chamber of the Court of Cassation upholding the first instance decision was not sufficient and satisfactory.

The Court has not made an inference as to how the applicants' action should be concluded; but indicated that the differences of interpretation between the established case-law of the Chambers of the Court of Cassation, the Plenary Assembly of Civil Chambers and the relevant chamber and the new case-law, which is included in the decision concerning the dispute and differs from the established one, have led to legal uncertainty during the

The Constitutional Court has held that the applicants' right to property has been breached in the instant case by taking into consideration the facts that the immovable property in dispute have been still used by the defendant iron and steel administration as, with regard to the validity of the expropriation procedure of the immovable property in question, the first instance court and the relevant Chamber of the Court of Cassation, which was the appellate authority, had reached a conclusion different than those reached in similar disputes; that as the said administration had poured factory waste and slag on the applicants' immovable property to the extent removal of which would require great financial burden, the applicants did not use their property; that the defendants occupied and currently occupies the immovable property, which they acquired without paying any price, after it had passed into the ownership of the applicants; and that the defendants have not made any adequate payment for the occupation of the property and paid any compensation for the ongoing *de facto* occupation; and that the administrative and judicial authorities failed to strike a fair balance between the public and the individuals, which has imposed an intolerable burden on the applicants.

process in which the actions of similar nature were concluded and was unforeseeable in respect of the applicants.

Consequently, the Constitutional Court has held that the applicants' right to property has been breached in the instant case by taking into consideration the facts that the immovable property in dispute have been still used by the defendant iron and steel administration as, with regard to the validity of the expropriation procedure of the immovable property in question, the first instance court and the relevant Chamber of the Court of Cassation, which was the appellate authority, had reached a conclusion different than those reached in similar disputes; that as the said administration had poured factory waste and slag on the applicants' immovable property to the extent removal of which would require great financial burden, the applicants did not use their property; that the defendants occupied and currently occupies the immovable property, which they acquired without paying any price, after it had passed into the ownership of the applicants; and that the defendants have not made any adequate payment for the occupation of the property and paid any compensation for the ongoing *de facto* occupation; and that the administrative and judicial authorities failed to strike a fair balance between the public and the individuals, which has imposed an intolerable burden on the applicants.

In addition, there has been a breach of the applicants' right to a trial within reasonable time for the prolongation of the proceedings due to reasons not attributable to the applicants.

P) JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO A FAIR TRIAL

1- Judgment of Yankı BAĞCIOĞLU and Others (Application No: 2014/253)

In the Court's opinion, in pursuance of the principle of *"equality of arms"*, a full equality must be ensured between the parties to the case in terms of the rights and obligations they have in the course of the proceedings, and this equality must be maintained in all procedures during the proceedings. All kinds of procedural actions and the acts of adducing evidence and counterevidence and asserting a claim and counterclaim, which are performed in the course of the proceedings, must also be conducted in compliance with the principle of *"equality of arms"*. The principle of *"equality of arms"* also covers the safeguard preventing the accused person from facing with any legal status against him.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 9/1/2015, upon the notices which had been received, searches were carried out at the apartments and workplaces of the applicants, a large number of whom are members of the military, upon the order given by the Chief Public Prosecutor's Office. At the end of the searches carried out, a great number of digital memory devices (CD, DVD, flash disk, hard disk and etc.) were seized. A criminal case was filed against the personnel of the Turkish Armed Forces with the allegation that some of the applicants were heads of a criminal organization whereas the remaining ones were the members of this criminal organization; that they illegally recorded personal data; that they obtained confidential documents pertaining to the state security and conveyed these documents to archive of the organization; that they engaged in espionage; and that they committed the offences of violating the confidentiality of private lives and communication. Elements forming a foundation for the charges against the applicants were the contents of the memory devices obtained through the searches.

The applicants' requests for being provided with the examination reports sent by the TUBITAK (the Scientific and Technological Research Council of Turkey), the Turkish General Staff and other institutions and drawn up by the law enforcement officers in the course of the proceedings, for having an expert examination made on CDs, flash disks, DVDs and hard disks and for being provided with the images thereof were rejected.

The Assize Court decided to sentence the applicants for the offences of being a

Consequently, the Court has held that rejection of the applicants' requests for having an expert examination made on digital data with a view to investigating the applicants' allegations that this evidence did not reflect the truth or for being provided with the images of such data on the grounds that contents thereof were in the scope of state secret and that this digital evidence was obtained through searches which were duly conducted has constituted, in respect of all proceedings, a breach of the right to a fair trial enshrined in Article 36 of the Constitution.

member of the organization, illegally supplying or obtaining personal data and obtaining confidential documents pertaining to the state security. These conviction decisions were upheld by the Court of Cassation.

In addition to their other allegations, the applicants have also maintained that their right to a fair trial has been breached as they were denied access to evidence forming a basis for the criminal case and relied on by the first instance court in the conviction decisions and an examination on this evidence was not allowed to be made.

In the Court's opinion, in pursuance of the principle of *"equality of arms",* a full equality must be ensured between the parties to the case in terms of the rights and obligations they have in the course of the proceedings, and this equality must be maintained in all procedures during the proceedings. All kinds of procedural actions and the acts of adducing evidence and counterevidence and asserting a claim and counterclaim, which are performed in the course of the proceedings, must also be conducted in compliance with the principle of *"equality of arms"*. The principle of *"equality of arms"* also covers the safeguard preventing the accused person from facing with any legal status against him.

Noting that technical examination to be made on digital data may be determinant for proving whether the offence was committed or not and establishing the link between the accused persons and these offences, the Court has stated that, in respect of the applicants' allegations that the documents in the digital evidence were not created or obtained by them, their access to this evidence must be ensured which would enable the applicants to make an effective defence submission, or the trial authority must have an examination performed to that end.

In this context, noting that the failure to provide an opportunity of access to and examination of evidence forming a basis for the accusation, which would render the defence ineffective, would lead to non-fulfilment of the basic function of the criminal proceedings, the Court has underlined that non-examination of the evidence forming a basis for the accusations with appropriate methods and by expert persons for establishing whether the offence has been committed or not would make the defence submissions ineffective and unnecessary.

Consequently, the Court has held that rejection of the applicants' requests for having an expert examination made on digital data with a view to investigating the applicants'

allegations that this evidence did not reflect the truth or for being provided with the images of such data on the grounds that contents thereof were in the scope of state secret and that this digital evidence was obtained through searches which were duly conducted has constituted, in respect of all proceedings, a breach of the right to a fair trial enshrined in Article 36 of the Constitution.

2- Judgment of Ahmet SAYGILI and Şefika SAYGILI (Application No: 2013/135)

> **The Court has pointed out that, in principle, the differences of interpretation and case-law between the judicial authorities of the same instance in respect of the legal rules and the differences of interpretation between the appellate authorities in respect of the requests and evidence concerning disputes cannot be*per se*accepted to constitute a breach of the right to a fair trial, which is also applicable for the different branches of judiciary.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 21/1/2015, the applicants' son, İsmail Saygılı, lost his life while performing his military service under the command of the Gölbaşı District Gendarmerie Commandership upon the rollover of the vehicle in which the applicants' son was travelling to Adıyaman with other soldiers to engage in a training to be held.

The applicants lodged an application with the Ministry of Internal Affairs and requested to be awarded pecuniary damage by stating that their son died in the accident taking place when the applicant was charged to engage in shooting practice. Their request was rejected on the ground that their application did not fall into the scope of the Law no. 2330 on the Payment of Compensation in Cash and Monthly Salary.

The case filed by the applicants before the Ankara 4th Administrative Court for the request of the annulment of the above-mentioned rejection procedure was dismissed on the ground that the Supreme Military Administrative Court ("the SMAC") had the jurisdiction over the case.

Thereupon, the case filed by the applicants before the Third Chamber of the SMAC was dismissed on the ground that *"...any duty which is performed for maintaining the security and order and set out in Article 1 of the Law no. 2330 did not give result to or have any influence on the occurrence of the traffic accident as a result of which the complainants' son lost his life; and broadening the scope of the practice by means of including the ordinary activities of the military service in the scope of the Law no. 2330 is not compatible with the legislative intent of the law"*.

On the other hand, the case filed by the relatives of a gendarme officer losing his life

In this scope, the Court has stated that variances appearing in the judicial decisions are deemed to be favourable as it reflects the capability of adaptation of dynamism of law to the developments taking place. On the other hand, the Court has noted that in case chambers of the supreme courts or courts of different branches of judiciary, which are expected to secure uniformity in practice, reach different conclusions in similar cases without showing a satisfying reason, this would be in breach of the principles of legal certainty and predictability.

in the same accident was accepted by the Ankara 8th Administrative Court, and this decision became final after being upheld by the Council of State.

The applicants have maintained that their request for being awarded compensation as their son had died in the accident taking place when he had been performing his military service was rejected whereas the case filed by relatives of the other gendarme officer losing his life in the same accident was accepted.

The Court has pointed out that, in principle, the differences of interpretation and case-law between the judicial authorities of the same instance in respect of the legal rules and the differences of interpretation between the appellate authorities in respect of the requests and evidence concerning disputes cannot be*per se*accepted to constitute a breach of the right to a fair trial, which is also applicable for the different branches of judiciary.

Indicating that the probability of rendering different decisions must be accepted to be an inevitable characteristic of the judiciary system comprising of various supreme courts and branches of judiciary, the Court has also underlined that the requirement of the protection of the individuals' confidence to a reasonable extent and the principle of legal certainty do not bestow a right which guarantees the uniformity in respect of case-law.

In this scope, the Court has stated that variances appearing in the judicial decisions are deemed to be favourable as it reflects the capability of adaptation of dynamism of law to the developments taking place. On the other hand, the Court has noted that in case chambers of the supreme courts or courts of different branches of judiciary, which are expected to secure uniformity in practice, reach different conclusions in similar cases without showing a satisfying reason, this would be in breach of the principles of legal certainty and predictability.

In the instant case, the Court has observed that it is clear that different conclusions were reached in the cases filed in respect of the same incident before the courts of different branches of judiciary; and that, in practice, there are certain mechanisms which would eliminate such situations; however, such mechanisms remained incapable and failed to offer an effective solution for the present incident.

For the above-mentioned reasons, the Court has reached the conclusion that as

different decisions were rendered by the courts of different branches of judiciary on the same incident, this resulted in legal uncertainty and lack of confidence in respect of the case filed by the applicants and was unpredictable in nature in respect of the applicants. The Court has accordingly held that there has been a breach of the right to a fair trial guaranteed under Article 36 of the Constitution.

3- Judgment of Abdulselam TUTAL and Others (Application No: 2013/2319)

> **In the Court's opinion, the right to assistance of a defence counsel points out that providing the persons who are charged with an offence only with the right to defence is not sufficient for a fair trial and that these persons must also have the opportunity to defend themselves. In this context, the right to assistance of a defence counsel which ensures effective exercise of the right to defence is a requirement inherent in the principle of *"equality of arms"* which is another element of the right to a fair trial. The right to assistance of a defence counsel covers everyone who faces with an accusation and applies at every stage of the criminal proceedings. However, enjoyment of this right depends on free will of the individuals and cannot be interpreted in a manner which would prevent the individuals from waiving the guarantees inherent in this right by their own will. In this framework, waiving from the right to assistance of a defence counsel may be valid and effective only when it is explicit to the extent which is beyond any doubt, includes minimum guarantees in respect of severity of its consequences, is not contrary to any significant public interest and when the consequences of waiving may be reasonably foreseen.**

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 8/4/2015, the applicants were taken into custody on 14/5/2004 on suspicion of having committed an offence of intentional killing in connection with the illegal the Great Eastern Islamic Raiders' Front ("the IBDA/C").

In their statements given before the public prosecutor on 18/5/2004 upon the police custody, the applicants stated that the record of statements drawn up by the police officers were signed under duress; that they were denied legal assistance; that their initiatives to consult a lawyer and receive legal assistance of a defence counsel were restrained; and that they did not accept these statements.

In the course of the statement-taking procedure dated 18/5/2004, the defence counsel of the applicant, Abdulselam Tutal, informed the public prosecutor conducting the investigation of the fact that he was not allowed to interview with the suspect in spite of his written petition which was referred by the public prosecutor on duty to the law

enforcement unit on 16/5/2004. The other applicant, Emin Koçhan, stated that in the security directorate, he had been compelled to give statement with a hand on his throat and being subject to various swearwords, and the following sentences had been said to him in the security directorate *"lawyer does not have any function here; there is no need for you to request a lawyer"*. The applicant, Selim Aydın, stated in his statement before the public prosecutor that he had been compelled to sign the statement which was taken under psychological pressure.

In the course of the proceedings during which the applicants were detained on remand, the applicants requested to be released by noting that they did not accept the contents of the records of statement taken in the police custody; that they compelled to sign the records of statement under duress and by way of deception; and that there was no material evidence concerning the offence they were charged with other than the contested statements taken in the police custody.

In the course of the hearing dated 18/10/2004, the first instance court did not give any decision concerning the allegations of ill-treatment by taking into account the medical reports drawn up subsequent to the police custody and noted that the applicants may lodge an application in this regard to the relevant authorities.

During the hearing dated 28/2/2005, S.A. and İ.K., who had been taken into custody as a suspect at the investigation stage and were subsequently heard as a witness, declared that they witnessed the ill-treatment which the applicants had been exposed to in the course of the police custody and the applicant, Abdulselam Tutal's signing a minute which indicated that he did not request a lawyer beneath a meal ticket.

In the hearing dated 11/7/2005, it was stated that as there had been renovations in certain parts of the building where the incident had taken place, it was requested that the workers be identified and heard as a witness. However, this request was rejected by the court.

In the course of the proceedings, the Chief Public Prosecutor's Office rendered a decision of non-prosecution in the investigation conducted into the complaints that they were subject to ill-treatment and duress under custody.

The Assize Court decided to convict five suspects including the applicants at the end of the proceedings on the ground that they had committed the offence they were charged with on behalf of the organization called the IBDA/C. The conviction decisions were upheld by the Court of Cassation.

The applicants have maintained that they were compelled to sign the records of statement under duress and upon threat in the police custody; that they were denied legal assistance; that they were not provided the opportunity to examine the witnesses during the proceedings; that their requests for investigation of the incident subject-matter of the proceedings were rejected; and that they were convicted, at the end of the proceedings during which the applicants were detained on remand, on the basis of their statements taken without the presence of a lawyer, as well as the failure of the court to take into consideration the evidence in favour of them. Relying on these grounds, the applicants have alleged that there has been a breach of the right to a fair trial.

In the Court's opinion, the right to assistance of a defence counsel points out that

providing the persons who are charged with an offence only with the right to defence is not sufficient for a fair trial and that these persons must also have the opportunity to defend themselves. In this context, the right to assistance of a defence counsel which ensures effective exercise of the right to defence is a requirement inherent in the principle of *"equality of arms"* which is another element of the right to a fair trial. The right to assistance of a defence counsel covers everyone who faces with an accusation and applies at every stage of the criminal proceedings. However, enjoyment of this right depends on free will of the individuals and cannot be interpreted in a manner which would prevent the individuals from waiving the guarantees inherent in this right by their own will. In this framework, waiving from the right to assistance of a defence counsel may be valid and effective only when it is explicit to the extent which is beyond any doubt, includes minimum guarantees in respect of severity of its consequences, is not contrary to any significant public interest and when the consequences of waiving may be reasonably foreseen.

The Court has stressed that in the instant case, the explanations which are included in the bill of indictment prepared in respect of the applicants and indicate how the offence was committed were generally based on the applicants' statements taken under custody; and that these statements were also relied on, to a decisive extent, in the conviction decisions.

Observing that any tangible finding which substantiated the applicants' allegations that they had been subject to ill-treatment under custody and therefore had signed the records of statement was not submitted; and that, on the basis of these allegations, there is no separate compliant that there has been a breach of the prohibition of treatment incompatible with human dignity, the Constitutional Court has noted that the applicants' failures to raise a separate complaint concerning the allegations of being subject to duress and compulsion and to reveal tangible facts in respect thereof would not preclude these conditions from being taken into consideration in the course of the examination to be made within the scope of the right to a fair trial.

Drawing the attention to the fact that the applicants, who had maintained in the course of the proceedings that they were innocent and there were no evidence establishing their relation with the offence, did not verify the accuracy of their statements taken by the law enforcement officers and who had also said before the public prosecutor and the judge who heard the applicants subsequent to the police custody that they had signed the

According to the Court, it is not beyond any doubt that the applicants accepted to give their statements without requesting legal assistance in a conscious and informed manner during the four-day police custody when the nature of the accusation, severity of the penalty and the defence submissions and statements subsequent to the police custody are taken into consideration. It could not be concretely established that the applicants were able to reasonably foresee the consequences of waiving from the right to assistance of a counsel.

records of statements under duress and by way of deception, the Court has found out that these statements were taken as a basis for the decisions without making any examination on the applicants' defence submissions, the statements of those who had been taken into custody but against whom a criminal case had not been filed and other allegations that the applicants had been denied legal assistance.

In this context, according to the Court, it is not beyond any doubt that the applicants accepted to give their statements without requesting legal assistance in a conscious and informed manner during the four-day police custody when the nature of the accusation, severity of the penalty and the defence submissions and statements subsequent to the police custody are taken into consideration. It could not be concretely established that the applicants were able to reasonably foresee the consequences of waiving from the right to assistance of a counsel.

Consequently, the Constitutional Court has stated that the statements which had not been acknowledged by the applicants formed a basis for their conviction; and that the legal assistance provided subsequently and other guarantees of the trial procedure could not redress the damage sustained in respect of the right to defence at the very beginning of the investigation. Accordingly, the Court has held that there has been a breach of the applicants' right to a fair trial set out in Article 36 § 1 of the Constitution.

4- Judgment of Baran KARADAĞ (Application No: 2014/12906)

> **it must assessed whether there are reasonable grounds for concealing the witness's identity and as to whether the anonymous witness's testimony is the exclusive or decisive main basis of the decision to be rendered, the Court has stated that in case the decision is mainly or exclusively based on the anonymous witness's statement, the proceedings must be subject to detailed examinations; and that in case the witness's testimony which has not been checked by the accused or the defence counsel for establishing its reliability and accuracy is the main evidence which the court's decision is based on or the decisive evidence and in case the defending party has not been provided with any balancing guarantees, there may be a breach of the right to a fair trial.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 7/5/2015, the Chief Public Prosecutor's Office conducted an investigation against the applicant for the offences of *"committing offence on behalf of the terrorist organization PKK/KONGRA-GEL without being its member, actively resisting an officer in charge within the scope of the activities performed by the terrorist organization and making propaganda of the terrorist organization"*. Within the scope of this investigation, statements of an anonymous witness were taken. Any justification was not given by the Chief Public Prosecutor's

Office for concealing the witness's identity.

A criminal case was filed against the applicant for the imputed offences before the Assize Court. The first instance court heard the anonymous witness whose statement had been taken at the investigation stage at a date and hour which were not notified to the applicant and his defence counsel. The first instance court did not also give any justification for concealing the witness's identity and did not provide any legal or factual grounds likely to be a basis for the decision. The public prosecutor was also present in the hearing during which the anonymous witness were heard.

The first instance court decided to sentence the applicant for the offences of committing offence on behalf of the terrorist organization without being its member, possessing explosive material without permission, intentionally jeopardizing general security and causing damage to property. The first instance court decided to suspend the pronouncement of the judgment except for the conviction decisions given in respect of the applicant for the offences of "*committing offence on behalf of the terrorist organization without being its member, possessing explosive material without permission*". This decision was upheld by the Court of Cassation for the offences in respect of which the court did not decide to suspend the pronouncement of the judgement.

The applicant has alleged that there has been a breach of his right to a fair trial defined in Article 36 of the Constitution by maintaining that at the end of the criminal case against him, he was convicted on the basis of the anonymous witness's statements which did not reflect the truth; that he denied assistance of a translator at the prosecution stage; that his right to defence was restricted; and that his request for having an expert examination carried out was rejected.

In the Court's opinion, the accused person has the right to examine the witnesses against him in a public hearing in an adversarial manner, as guaranteed in Article 36 of the Constitution and Article 6 of the European Convention on Human Rights. In order to enable the discussion of all evidence including the witness's evidence in the course of the proceedings, this evidence must be, in principle, adduced in a public hearing and before the accused person. However, in certain cases, if the accused persons know the identity of the witness, this may pose a threat for the witness himself or his relatives; and in this respect, those who would testify may have reasonable grounds for being afraid of sustaining damage on account of his testimony. Numerous interests of such persons such as their lives, liberties and securities may be under threat. Therefore, the witness has the right to request the protection of his own life, his relatives or properties on account of the information he has provided by performing his public service.

In this scope, in the Court's opinion, it is possible to conceal a witness's identity in the criminal proceedings for the purpose of fighting against organized offences; however, the conviction decision cannot be exclusively based on the testimony of the anonymous witness, and the anonymous witness's testimony cannot be regarded as the decisive evidence. The Court has also stated that the judicial authorities may have recourse to the anonymous witness's statements only when the defending party is

provided with the countervailing measures which secure the opportunity for checking the credibility and reliability of the anonymous witness and his testimony; when the right to defence is subject to restrictions at a minimum level and these restrictions are required for the protection of the anonymous witness. In other words, a balance must be struck between the accused person's interests and interests of the witness testifying against the accused person in that the defending party may be deprived of the opportunities of checking whether the person whose identity is concealed is a prejudiced person, acts with hostility or is reliable or not or of examining whether his statements are credible or not.

Noting that in such circumstances, it must assessed whether there are reasonable grounds for concealing the witness's identity and as to whether the anonymous witness's testimony is the exclusive or decisive main basis of the decision to be rendered, the Court has stated that in case the decision is mainly or exclusively based on the anonymous witness's statement, the proceedings must be subject to detailed examinations; and that in case the witness's testimony which has not been checked by the accused or the defence counsel for establishing its reliability and accuracy is the main evidence which the court's decision is based on or the decisive evidence and in case the defending party has not been provided with any balancing guarantees, there may be a breach of the right to a fair trial.

In the instant case, the Court has observed that the conviction decision concerning the offences of *"possessing explosive material and causing damage to property"* was substantially based on the anonymous witness's statements; that is to say, in respect of these offences, the anonymous witness's statements were used as the decisive evidence for the applicant's conviction. The Court has also indicated that the statements of the anonymous witness were taken by the public prosecutor at the investigation stage and by the court at the prosecution stage; that the anonymous witness was heard by the court during the break of the hearing and without informing the applicant in respect thereof; and that neither the Public Prosecutor's Office nor the court gave justification with regard to the concealment of the witness's identity; The Court has also observed that the applicant and his defence counsel were not present in the statement-taking process of the anonymous witness; that they could not examine the anonymous witness even by means of voice call; that they could not

Consequently, the Court reached the conclusion that any justification was not provided as to why the witness's identity had been concealed; that the decision was based, to a decisive extent, on the anonymous witness's statements and the guarantees provided by the court in favour of the applicant (the accused person) in this regard remained insufficient; and that therefore, a fair balance was not struck between the witness's interests and the accused person's right to defence. Accordingly, the Court has held that there has been a breach of the applicant's right to a fair trial guaranteed under Article 36 of the Constitution.

have the opportunity to get a personal impression about the anonymous witness's replies to the questions directed towards him; and that the defending party could not thereby check the reliability of the anonymous witness by way of examining him.

Consequently, the Court reached the conclusion that any justification was not provided as to why the witness's identity had been concealed; that the decision was based, to a decisive extent, on the anonymous witness's statements and the guarantees provided by the court in favour of the applicant (the accused person) in this regard remained insufficient; and that therefore, a fair balance was not struck between the witness's interests and the accused person's right to defence. Accordingly, the Court has held that there has been a breach of the applicant's right to a fair trial guaranteed under Article 36 of the Constitution.

5- Judgment of Nurten ESEN (Application No: 2013/7970)

The Constitutional Court has noted that failure to provide relevant and sufficient replies to an issue having an effect on the result of the case may constitute a breach of the right to a reasoned decision under the scope of the right to a fair trial.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 10/6/2015, the applicant's arm was amputated as a result of a traffic accident.

The applicant applied to the Provincial Directorate of the Social Security Institution (the SGK) and requested for invalidity pension. Thereupon, the applicant was referred to a hospital by the SGK and was granted invalidity pension as from April 2010 in pursuance of the report issued on 5/3/2010.

The applicant once again applied to the Provincial Directorate of the SGK and stated that she was granted pension in April 2010 although she had lodged her application on 8/7/2008. She therefore requested that she be paid pension as from the date she had lodged the application. The Provincial Directorate of the SGK notified the applicant that she was granted pension as of April 2010, the month following the date of the report certifying her invalidity.

The applicant brought an action before the Labour Court and stated that, although she applied for invalidity pension on 8/7/2008, she was granted this pension as from 1/4/2010; that she was not paid pension for a period of 20 months and no response was given with regard to her application. She accordingly requested the payment of her pension of 20 months which were not paid due to delay on the part of the SGK.

The first instance court dismissed the applicant's action by stating that, in accordance with Article 56 of Law No. 506, the applicant was granted pension as from the first month

following the date of the report, which was in accordance with the law. The applicant appealed against the decision; and thereupon, it was upheld by the Court of Cassation.

The applicant has stated that, although she requested for invalidity pension by applying to the SGK on 8/7/2008, she was granted invalidity pension on 1/4/2010; that she was not paid invalidity pension for a period of 20 months elapsed from the application date to the date when the applicant was granted pension; that the SGK took no step during this period of time; and that the court dismissed the action brought by her. The applicant has therefore alleged that her right to social security and the principle of social justice have been violated.

The applicant's allegations that there has been a breach of her right to social security and the principle of social justice were examined by the Constitutional Court under the scope of right to a fair trial. The Court has emphasized that one of the elements of the right to a fair trial is that the decisions of the court must be reasoned; and, especially, if the applicant's allegations as regards to procedure or merits which require a separate and clear response are left unanswered, this would constitute a violation of this right. The Court has also stated that the courts are obliged to indicate the basis on which they predicate their decisions in a sufficiently clear manner; and that, if the allegations and defence submissions which are asserted in a clear and concrete way during the proceedings have effects on the result of the case, then these matters which are directly related to the case must be replied to by the courts with a reasonable justification. The Court has also stated that the replies given to the allegations and defence submissions must be logical and consistent.

In the incident which is subject-matter of the application, the Court has drawn the attention to the facts that the applicant applied to the SGK on 8/7/2008 and requested for invalidity pension; but she was referred to hospital by the SGK on 16/2/2010 and was subsequently granted invalidity pension as from 1/4/2010. The Court has also pointed out that, in the action brought by the applicant on the ground that she must be paid the invalidity pension for the period of 20 months between the date she had applied to the SGK and the date she had been granted pension, the Constitutional Court has concluded that the applicant's right to a reasoned decision under the scope of the right to a fair trial, which is guaranteed under Article 36 of the Constitution, has been violated on the grounds that the first instance court failed to assess the applicant's main request and to discuss whether the defendant had taken any step during the alleged period of time or if any step had not been taken, whether there was any negligence attributable to the defendant during this period and that the applicant's case was dismissed by the first instance court only by relying on the fact the relevant procedures had been conducted in pursuance of Article 56 of the Law no. 506.

In this context, the Constitutional Court has noted that failure to provide relevant and sufficient replies to an issue having an effect on the result of the case may constitute a breach of the right to a reasoned decision under the scope of the right to a fair trial.

In the incident which is subject-matter of the application, the Court has drawn the attention to the facts that the applicant applied to the SGK on 8/7/2008 and requested for invalidity pension; but she was referred to hospital by the SGK on 16/2/2010 and was subsequently granted invalidity pension as from 1/4/2010. The Court has also pointed out that, in the action brought by the applicant on the ground that she must be paid the invalidity pension for the period of 20 months between the date she had applied to the SGK and the date she had been granted pension, the Constitutional Court has concluded that the applicant's right to a reasoned decision under the scope of the right to a fair trial, which is guaranteed under Article 36 of the Constitution, has been violated on the grounds that the first instance court failed to assess the applicant's main request and to discuss whether the defendant had taken any step during the alleged period of time or if any step had not been taken, whether there was any negligence attributable to the defendant during this period and that the applicant's case was dismissed by the first instance court only by relying on the fact the relevant procedures had been conducted in pursuance of Article 56 of the Law no. 506.

6- Judgment of Deniz SEKİ (Application No: 2014/5170)

> **As to the applicant's complaint that her guarantee of legal judge has been impaired, the Court has indicated that, in the instant case, the place of jurisdiction was not determined after the offence had been committed; on the contrary, it was ensured that the proceedings be continued before the courts that had been established prior to the commission of the offence by means of preventing the cases from being referred to courts which were established subsequent to the commission of the offence for lack of jurisdiction or lack of venue. The Court has noted that, in respect of the instant case, to avoid starting over with the cases, which have been lasting for a long time, and changing the place of jurisdiction subsequent to the commission of the offence was not, in any respect, contrary to the guarantee of legal judge.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 25/6/2015, an investigation was initiated against the suspects upon the notice that trade of narcotics and psychotropic substances was carried out within the framework of the activities performed by a criminal organization, and it was decided that their communications be intercepted.

After it had been established that the applicant made phone conversations with the members of the alleged organization, a warrant for *"interception, wiretapping and recording of her communication"* was issued on 13/11/2008 in respect of the applicant. Moreover, searches were carried out at the applicant's apartment and the hotel room where she was staying.

The Court examined the allegations concerning the outcome of the proceedings within the scope of the fourth instance allegations whereas the allegations of obtaining evidence through illegal methods were separately examined and found unsubstantiated. In this respect, as to the assistance afforded by a police officer, in accordance with the legislation, to the gendarmerie officers in the course of the searches conducted in respect of the applicant, the Court took into account the provisions of the legislation concerning the judicial police and has concluded that the search conducted did not impair the reliability of the evidence obtained; and that reliance on this evidence as a basis for the decision did not infringe the fairness of the proceedings.

At the end of the investigation, a criminal case was filed against the applicant by the Chief Public Prosecutor's Office with the allegation that she had committed the offence of trading narcotics. The applicant was convicted for the offence she had been charged with at the end of the proceedings conducted by the Assize Court authorized by Article 250 of the Code of Criminal Procedure no. 5271. This decision was then upheld by the Assembly of the Criminal Chambers of the Court of Cassation.

The applicant has maintained that the prosecution was carried out by the courts which were abolished and known to public as the courts *"with special powers"*, contrary to the guarantee of legal judge; that her conviction was based on evidence which was obtained illegally; and that her witnesses were not heard. The applicant has therefore alleged that her right to a fair trial has been violated.

As to the applicant's complaint that her guarantee of legal judge has been impaired, the Court has indicated that, in the instant case, the place of jurisdiction was not determined after the offence had been committed; on the contrary, it was ensured that the proceedings be continued before the courts that had been established prior to the commission of the offence by means of preventing the cases from being referred to courts which were established subsequent to the commission of the offence for lack of jurisdiction or lack of venue. The Court has noted that, in respect of the instant case, to avoid starting over with the cases, which have been lasting for a long time, and changing the place of jurisdiction subsequent to the commission of the offence was not, in any respect, contrary to the guarantee of legal judge.

On the other hand, underlining that the authority to assess the evidence concerning a certain case and to decide whether the evidence requested to be adduced is related to the case or not is essentially vested in the instance courts, the Court has stated that its duty is to assess whether the proceedings subject-matter of the application, as a whole, is fair or not. In this context, the Court has pointed out that it must be assessed whether the applicant was provided with the opportunity to object to the authenticity of the evidence and challenge to the use of this evidence or not.

The Court examined the allegations concerning the outcome of the proceedings within the scope of the fourth instance allegations whereas the allegations of obtaining evidence through illegal methods were separately examined and found unsubstantiated. In this respect, as to the assistance afforded by a police officer, in accordance with the legislation, to the gendarmerie officers in the course of the searches conducted in respect of the applicant, the Court took into account the provisions of the legislation concerning the judicial police and has concluded that the search conducted did not impair the reliability of the evidence obtained; and that reliance on this evidence as a basis for the decision did not infringe the fairness of the proceedings.

In the Court's opinion, there is no concrete fact indicating that the applicant was subject to a different treatment while adducing her evidence and in assessment of the evidence in her case; and the conviction decision against her was discussed in the hearing before the applicant and her defence counsel and supported with evidence. Nor has the Court found, in respect of the assessment of the evidence, any error of assessment or any finding which manifestly constituted arbitrariness. On the other hand, there is no evidence indicating that the applicant was not provided, during the proceedings, with the appropriate opportunities to adduce and examine her evidence and to challenge the evidence, which is in breach of the principles of *"equality of arms"* and *"adversarial proceedings"*.

With regard to the allegation that the right to examine witness, it has been noted that the applicant did not request for examining a witness by means of explaining the significance and necessity thereof to reveal the truth.

Consequently, the Constitutional Court has held that the application must be declared inadmissible as the allegations raised by the applicant are *"manifestly ill-founded"*.

7- Judgment of Aligül ALKAYA and Others (Application No: 2013/1138)

In the Court's opinion, failure to provide the applicant Aligül Alkaya with legal assistance while being held under custody has constituted a breach of his right to take legal assistance of a counsel at the investigation stage, which is guaranteed under Article 36 of the Constitution.

In the incident giving rise to the present individual application which was concluded by the Constitutional Court in its plenary sitting on 27/10/2015, the applicant, Aligül Alkaya, explained in detail how and with whom he had committed the offences he was charged with in his statement dated 12/4/2003 and taken by the law-enforcement officers in the absence of a counsel. He enjoyed his right to remain silent before the public prosecutor, and he denied the accusations against him before the Investigating Judge before whom he was brought in the absence of a counsel and he maintained that nothing had been asked to him at the Se-

curity Directorate; that the statements had been written by the law enforcement officers; and that he had been compelled to sign this record of statement. He also requested to retain a counsel.

Upon the applicant's allegations that he had been battered during his arrest and had been exposed to psychological pressure and ill-treatment, the Chief Public Prosecutor's Office initiated an investigation, and thereupon, a criminal case was filed against five police officers before the Criminal Court of First Instance on 20/2/2004. After the first instance court had acquitted the police officers of the charges against them on 26/7/2007, the applicant appealed against the decision. By the judgment of the Criminal Chamber of the Court of Cassation dated 18/3/2010, the case was decided to be discontinued on the ground that the period of limitation had expired.

The applicants, Hatice Duman, Ahmet Doğan and Hasan Özcan, denied the accusations against them.

The proceedings against the applicants were handled by the State Security Court. However, as the State Security Courts were abolished while the applicants' proceedings were pending, they were transferred to the Assize Court (authorized by Article 250 of the Code of Criminal Procedure).

At the end of the proceedings, it was found established that the applicant, Aligül Alkaya, had committed the offence of attempting to undermine or abolish, by use of force, the Constitution of the Republic of Turkey, in part or in whole, and the applicant was therefore sentenced to life imprisonment.

The applicant, Hatice Duman, was sentenced to life imprisonment for the offences of attempting to overthrow, by use force, the constitutional order as the member of the above-mentioned illegal organization.

It was stated that the applicant, Ahmet Doğan, sought within the scope of two separate investigations, had been arrested with a fake identity card on him by the law enforcement officers while trying to run away from the incident scene where an explosion had taken place nearby a police station on 12/3/2004. He was sentenced to life imprisonment for the offence of attempting to overthrow, by use force, the constitutional order as the member of the above-mentioned illegal organization.

The applicant, Hasan Özcan, was arrested on 16/11/2005 with a fake identity card on him. Any direct link between the applicant and the acts performed could not be established and his participation in these acts could not be proven. However, it was found established that he had been a memberin command of this illegal organization and he was sentenced to imprisonment.

The applicant, Aligül Alkaya, has alleged that he was exposed to physical and psychological coercion and tortured under custody; that he was given medicines which had weaken his self-control and was threatened with death; that he was threatened that his family and his wife Hatice Duman, who had been taken under

On the other hand, the facts that Aligül Alkaya's statements, which were taken in the absence of a counsel, were taken as a basis for his conviction; that his requests for hearing of a witness were not taken into consideration; and that any sufficient and reasonable grounds were provided for rejection of his requests for hearing of certain witness have, as a whole, led to the breach of his right to a fair trial.

custody, would be damaged. He has further maintained that he was denied legal assistance although he had requested assistance of a counsel in the course of his statement-taking procedure at the Security Directorate, the Public Prosecutor's Office and during his questioning before the court; that he had to admit the accusations against him as he was ill-treated during the custody; and that his statement taken by the police officers by using unlawful methods was relied on in the decision given in respect of him.

The applicant Aligül Alkaya and other applicants have maintained that their requests for hearing of the witnesses who would have an effect on the merits of the case were rejected without any justification; that they were deprived of the opportunity of confrontation; that certain witnesses, whose statements were shown as evidence in the bill of indictment and the first instance decision, were not heard during the hearing. They have also alleged that the panel of the first instance court was not impartial; and that the court gave its decision without waiting for the conclusion of the objection which was raised to the dismissal of the request for challenging of judge; that the establishment and functioning of the first instance court handling the proceedings were in contrary to the Constitution; that although the courts concluding the same types of disputes must be subject to the same rules, making a distinction in respect of the acts requiring severe penalty by classifying them as heavy sentence and specific heavy sentence has infringed the principle of "unity of the proceedings". They have further alleged that the interim decisions, the conviction decisions of the first instance court and the approval decision of the Court of Cassation were lack of legal grounds; and that their right to a fair trial was breached as the proceedings had not been concluded with a reasonable time.

In the Court's opinion, failure to provide the applicant Aligül Alkaya with legal assistance while being held under custody has constituted a breach of his right to take legal assistance of a counsel at the investigation stage, which is guaranteed under Article 36 of the Constitution.

On the other hand, the facts that Aligül Alkaya's statements, which were taken in the absence of a counsel, were taken as a basis for his conviction; that his requests for hearing of a witness were not taken into consideration; and that any sufficient and reasonable grounds were provided for rejection of his requests for hearing of certain witness have, as a whole, led to the breach of his right to a fair trial.

Observing that other applicants were convicted on the basis of the applicant, Aligül Alkaya's statements which were taken at the Security Directorate in the absence of a counsel, the Court has indicated that it found a breach of the applicant, Aligül Alkaya's right to take legal assistance of a counsel at the investigation stage, which is guaranteed under Article 36 of the Constitution, as his statement had been taken by the law enforcement officers in the absence of a counsel. Therefore, the Court has held that other applicants' right to fair trial has been breached in the present case by stating that the applicant Aligül Alkaya's statements taken in the absence of a counsel could not be *per se* relied on in the assessment of the accusations against the other applicants and that a conviction decision cannot be rendered in respect of the other applicants on the basis of these statements.

It has been also concluded that the facts that the requests of other applicants, apart from the applicant Aligül Alkaya, for hearing of their witness were not taken into consideration although these applicants requested to do so; that although statements of the witnesses heard by different courts were taken into consideration for a basis for the conviction of some of the applicants, these witnesses were not heard during the hearing; and that any sufficient and reasonable grounds for rejection of the request for hearing of certain witnesses were not provided; and that thereby the requirements of the right to examine a witness were not fulfilled have, as a whole, constituted a breach of the right to a fair trial.

In the light of these findings, the Constitutional Court has held that the applicants' right to a fair trial guaranteed in Article 36 of the Constitution has been breached as the proceedings conducted in respect of them were not fair as a whole.

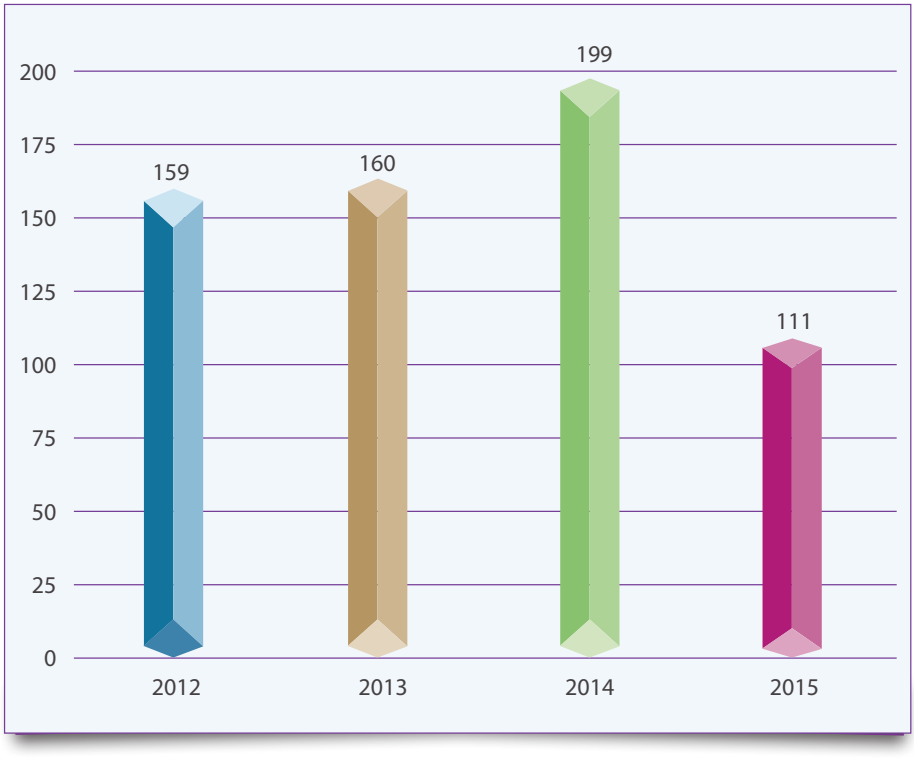
CHAPTER SIX

STATISTICS

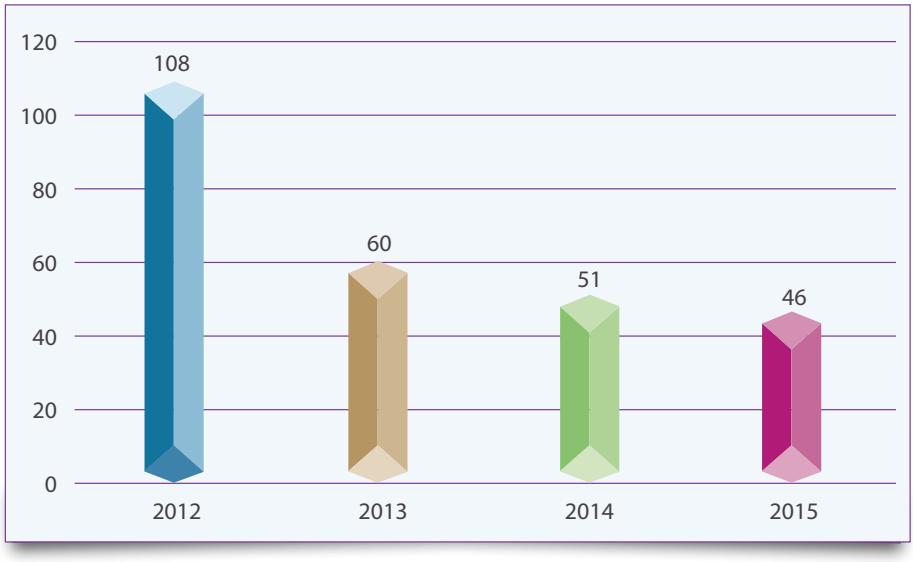
I- STATISTICS ON CONSTITUTIONAL REVIEW

The number of annulment cases, i.e. abstract or concrete norm review, filed in 2015 is 111 and the number of cases taken over from the previous year is 46. The Court concluded 123 out of 157 cases in 2015 and the number of cases forwarded to year 2016 is just 34 (9 abstract review and 25 concrete review cases). Of these 123 decisions, 16 are related to abstract norm review whereas 107 decisions are related to concrete norm review.

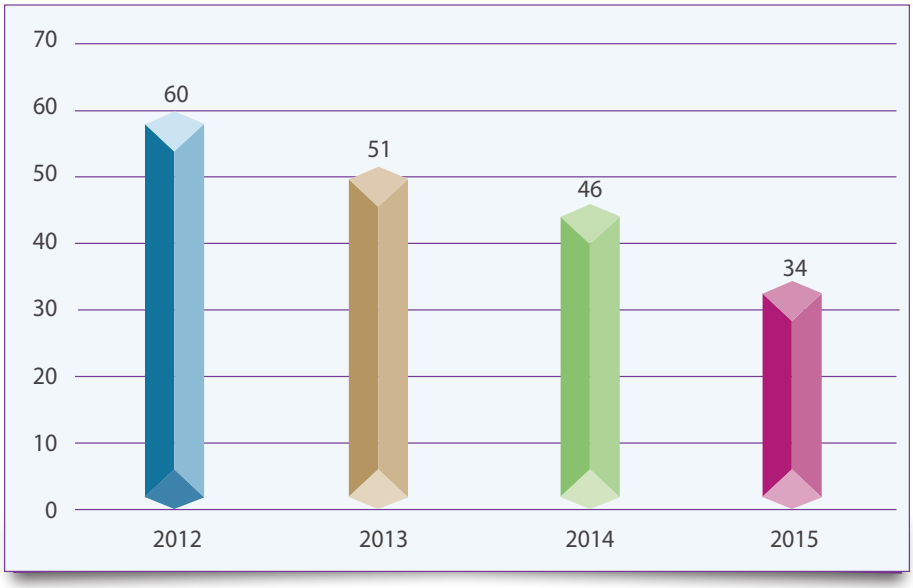
1- NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT & CONCRETE) APPLICATIONS PER YEAR



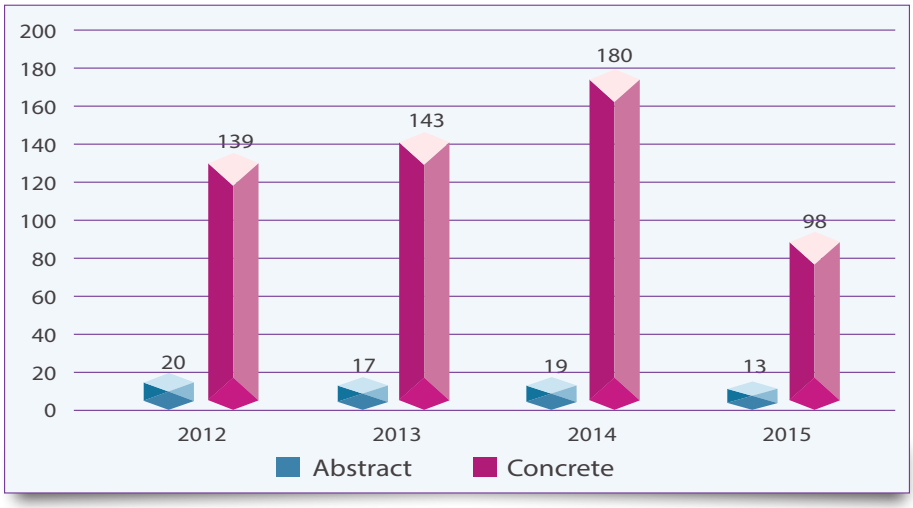
2- NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS FROM PREVIOUS YEARS



3- NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS TRANSFERRED TO NEXT YEAR

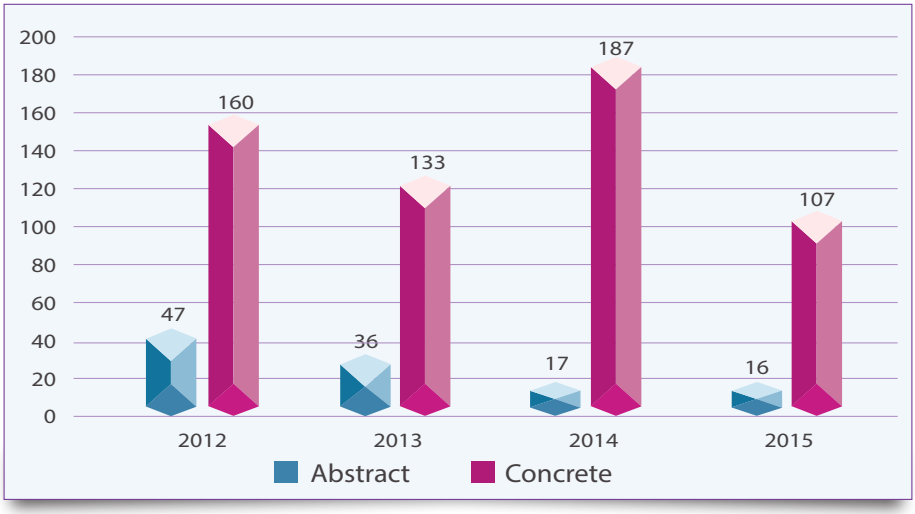


4- DISTRIBUTION OF CONSTITUTIONAL REVIEW (ABSTRACT & CONCRETE) APPLICATIONS INCOMING PER YEAR

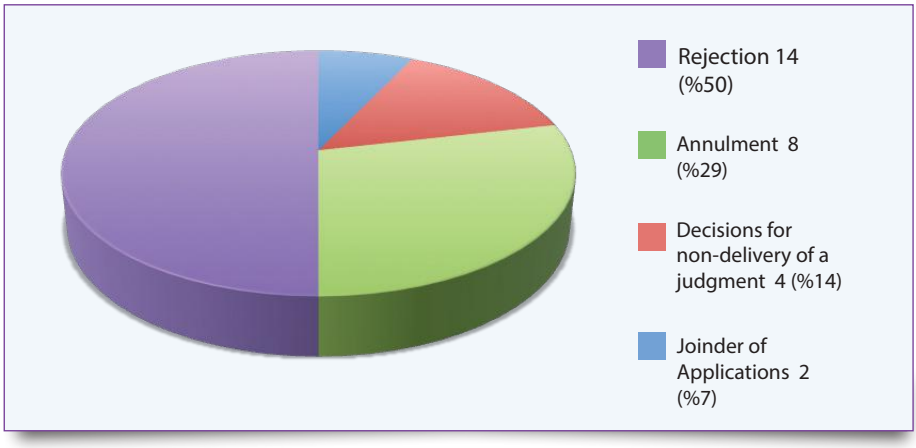


5- DISTRIBUTION OF CONSTITUTIONAL REVIEW (ABSTRACT & CONCRETE) APPLICATIONS DECIDED PER YEAR

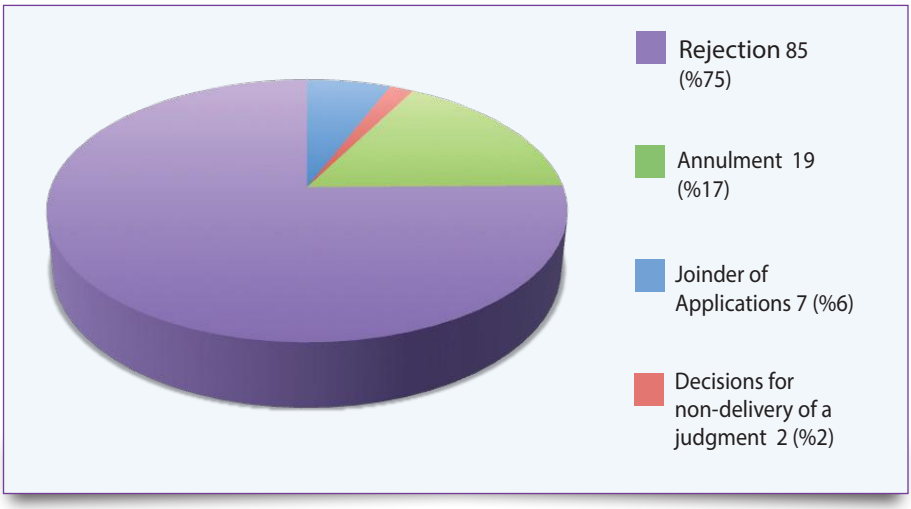
The Court has started an effective implementation of the rule that the decisions for annulment cannot be announced without justification in pursuance of Article 153 of the Constitution. Accordingly, the Court has completed the preparations of the justification for 69 decisions rendered in previous years and published these decisions in this year.



6- DECISIONS IN ABSTRACT REVIEW CASES IN 2015



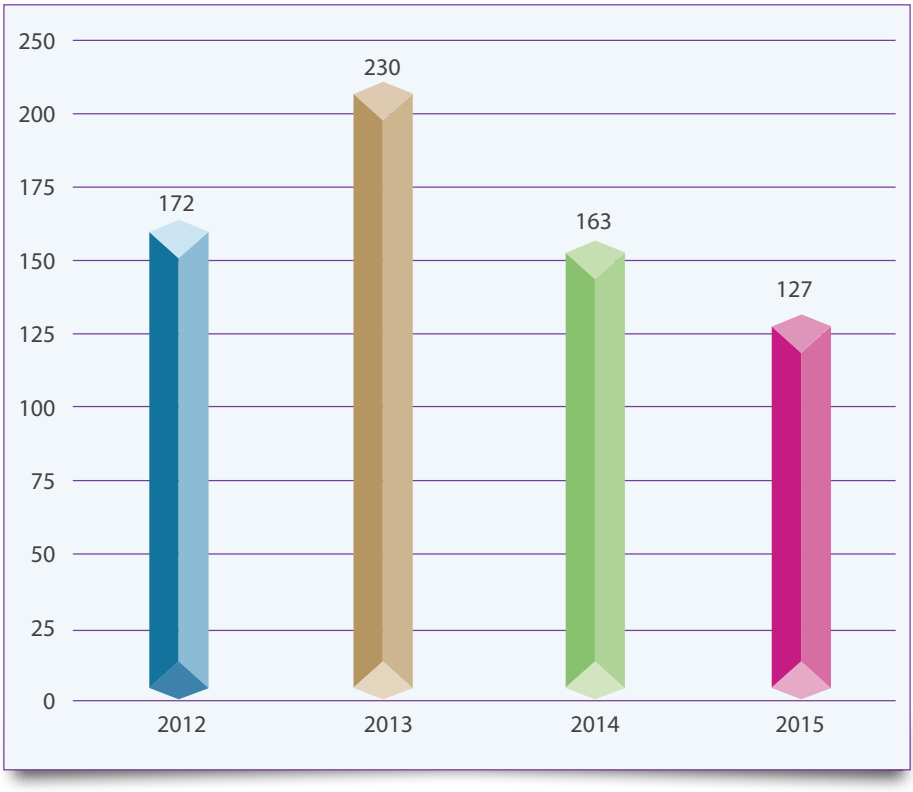
7- DECISIONS IN CONCRETE REVIEW APPLICATIONS IN 2015



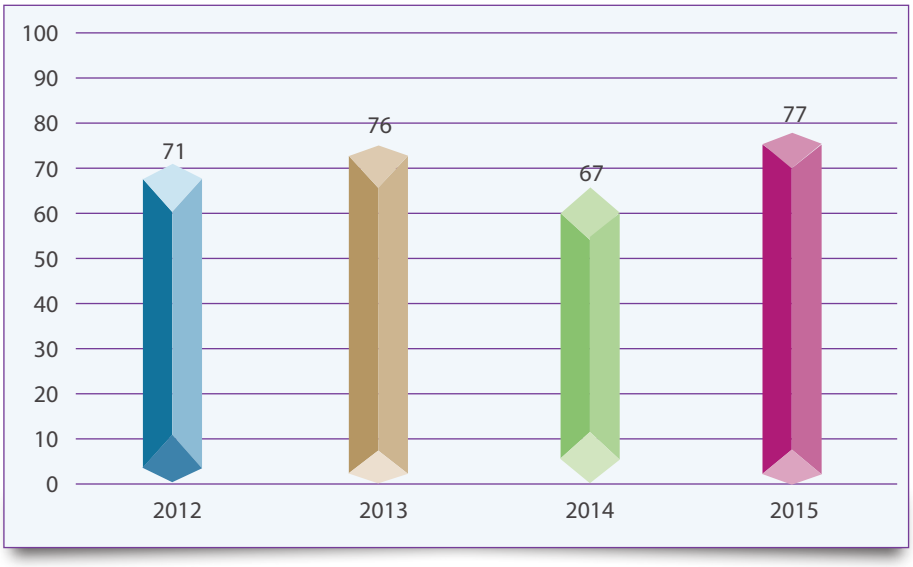
II- STATISTICS ON FINANCIAL AUDIT OF POLITICAL PARTIES

The Court, in 2015, has completed 83 out of 204 audits on financial review of political parties. Of these 204 audits, 77 were related to this year's proceedings and 127 were transferred from the previous year.

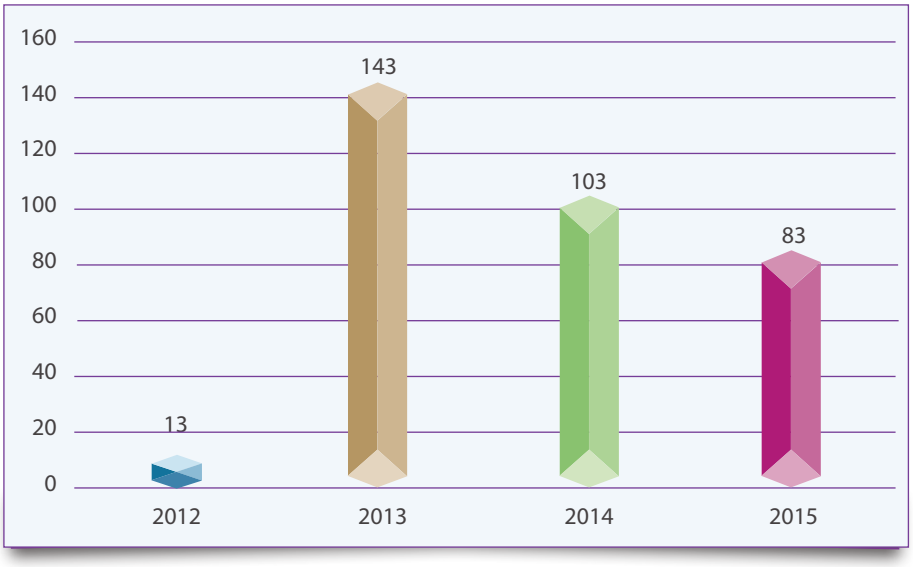
1- NUMBER OF AUDITS CONDUCTED ON CASES DEFERRED FROM PREVIOUS YEARS



2- NUMBER OF POLITICAL PARTY AUDITS FILED PER YEAR



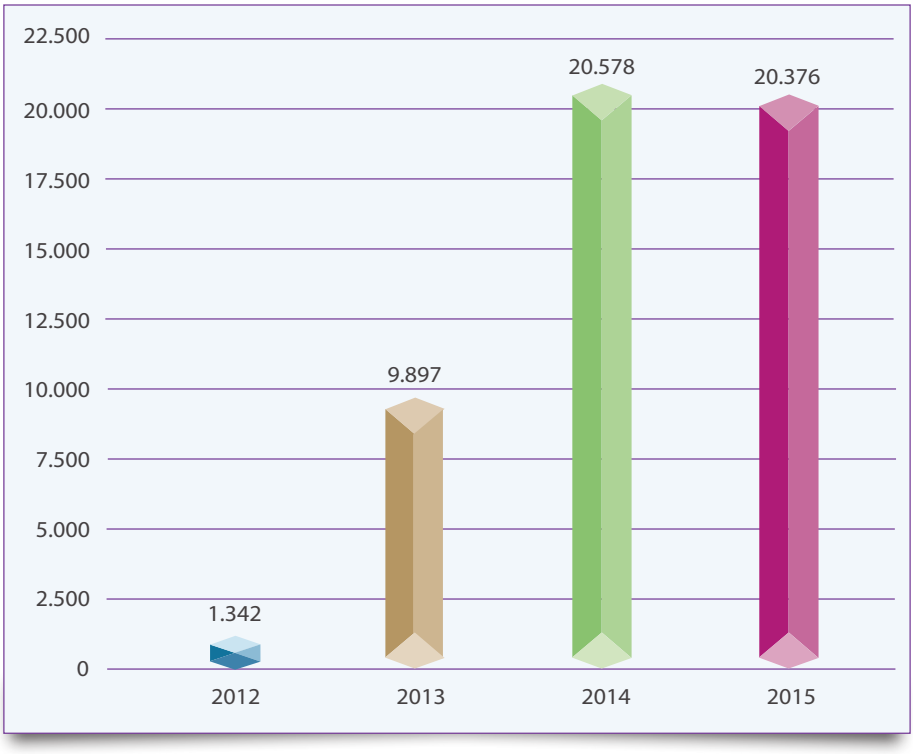
3- NUMBER OF POLITICAL PARTY AUDITS CONDUCTED PER YEAR



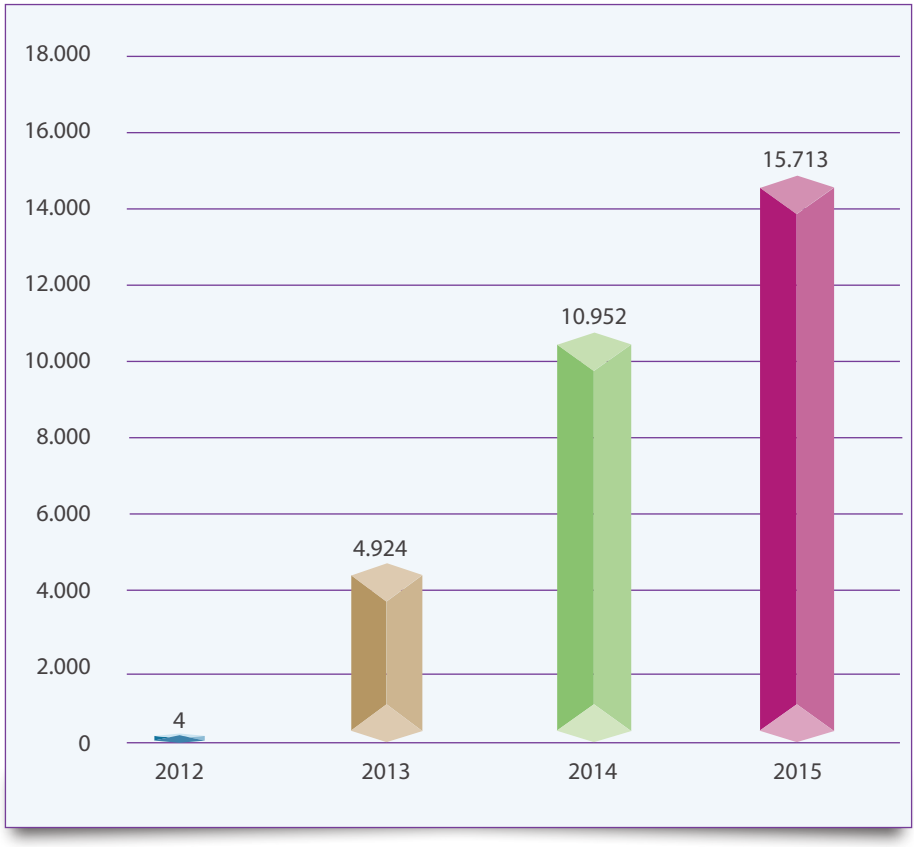
III- STATISTICS ON INDIVIDUAL APPLICATION REVIEW IN 2015

In year 2015, the Court decided on 15.713 individual applications out of 36.313 applications. Of these 36.313 applications, 20.376 were filed in 2015 and 15.937 were transferred from the previous years' applications.

1- NUMBER OF APPLICATIONS PER YEAR

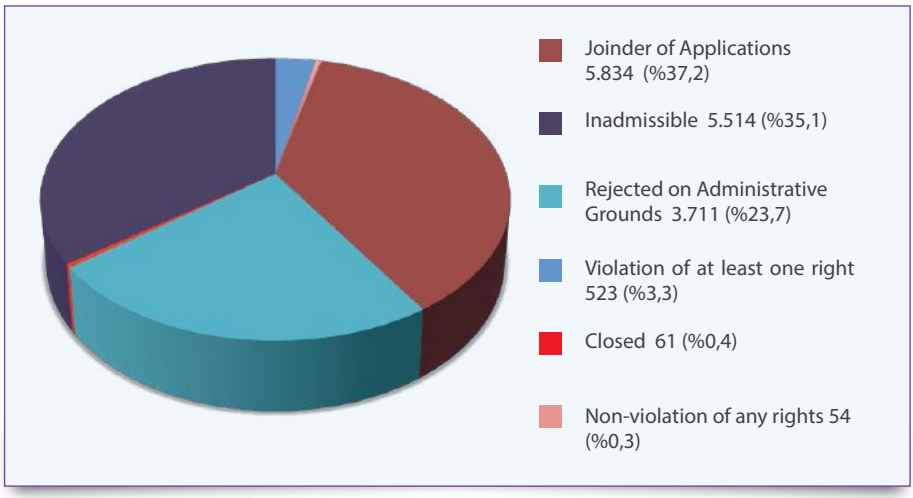


2- NUMBER OF APPLICATIONS DECIDED PER YEAR

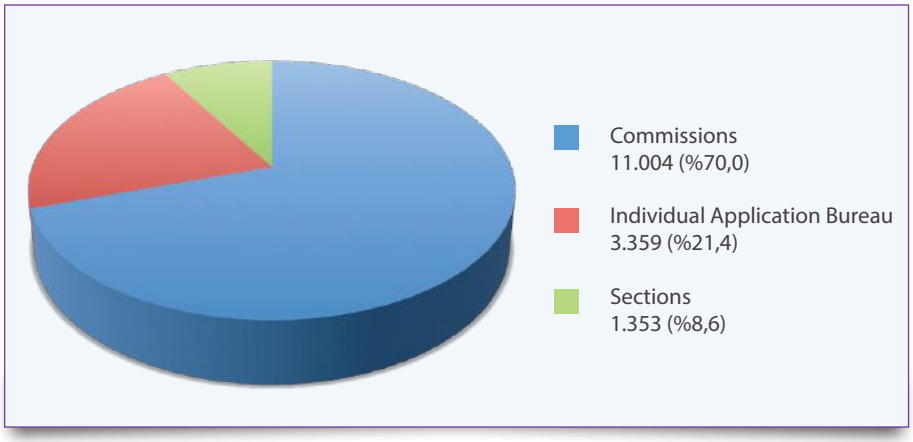


3- DECISIONS RENDERED IN 2015

The Court declared 5.514 applications inadmissible, decided for joinder of 5.834 applications and rejected 3.711 applications on administrative grounds. The Court established violation of at least one right in 523 applications and non-violation of any rights in 54 applications. The Court decided to strike out 16 applications and 61 applications were closed.

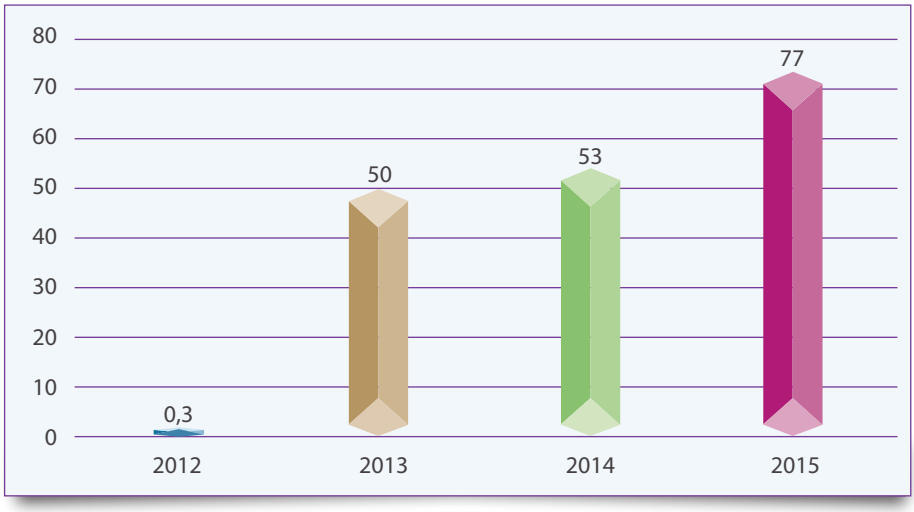


4- NUMBER OF APPLICATIONS DECIDED BY EACH UNIT OF THE COURT IN 2015

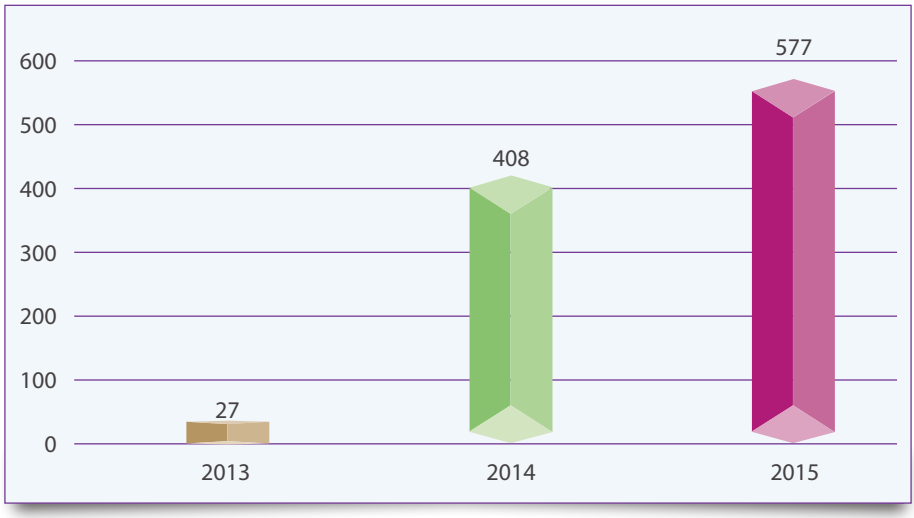


5- ANNUAL RATIO OF APPLICATIONS DECIDED AGAINST APPLICATIONS FILED

The ratio of the individual applications decided in 2015 to the number of applications filed in the same year is 77 %.

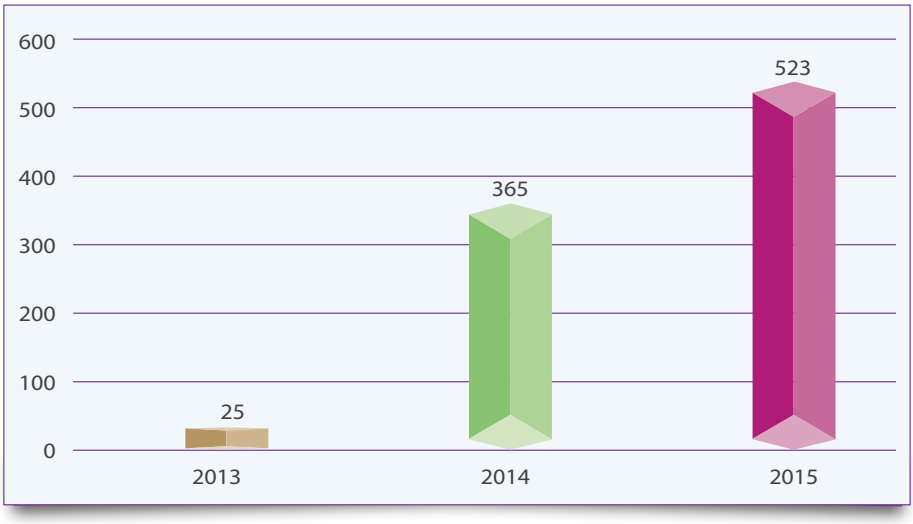


6- NUMBER OF APPLICATIONS EXAMINED ON MERITS PER YEAR

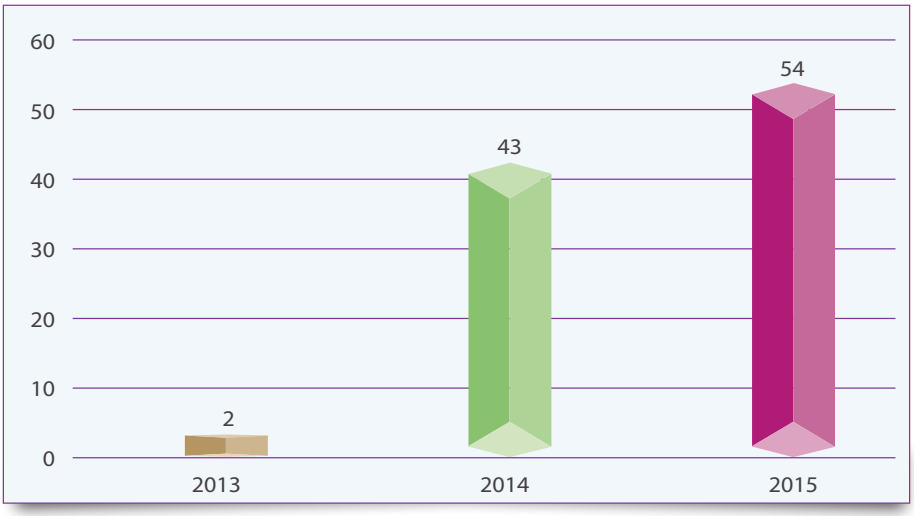


7- ANNUAL NUMBER OF APPLICATIONS DECIDED ON VIOLATION OF AT LEAST ONE RIGHT

Of 577 applications examined on the merits by the Plenary and the Sections, the Court rendered decision on violation of at least one right in 523 applications and non-violation of rights in 54 applications.



8- ANNUAL NUMBER OF APPLICATIONS DECIDED ON NON-VIOLATION OF A RIGHT



9- DIVERSITY AND INCREASE OF DECISIONS ON VIOLATION IN YEAR 2015

With regards to the decisions on violation, the decisions on violation of right to a fair trial stand out as the number of such decisions is 382. This right is followed by right to liberty and security of person and right to union with 28 decisions for each one of them. The number of decisions on violation in 2015 was 540 whereas this figure was 27 in 2013 and 379 in 2014.

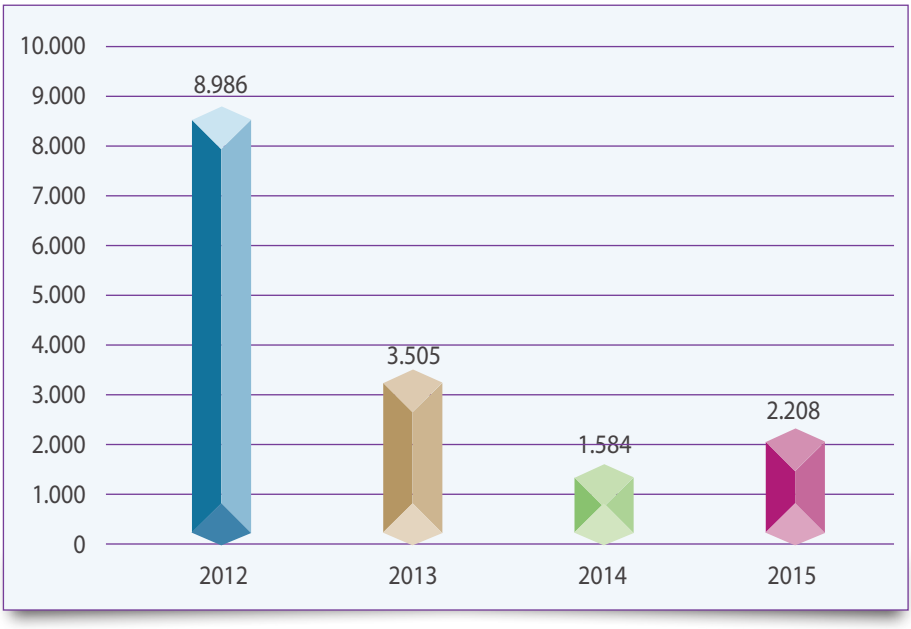
In addition to the increase in the number of decisions on violation in 2015, there has been a diversification in types of rights decided to have been violated. Accordingly, such rights as freedom of communication, right to hold meetings and demonstrations and freedom of association draw attention among the rights decided for the first time to have been violated.

	2013	2014	2015	TOTAL
Right to life	2	5	11	18
Prohibition of torture and ill-treatment	-	3	10	13
Right to liberty and security of person	7	35	28	70
Right to a fair trial	13	303	382	698
Freedom of expression	-	8	21	29
Freedom of communication	-	-	14	14
Prohibition of discrimination	-	1	2	3
Freedom of religion and conscience	-	1	1	2
Material and spiritual entity	1	1	3	5
Private/family life	-	2	6	8
Right to property	1	10	26	37
Right to elect and to be elected	2	4	-	6
Freedom of assembly and demonstration marches	-	-	2	2
Right to union	-	2	28	30
Freedom of association	-	-	1	1
Principles of crimes and punishments	1	4	5	10
Total	**27**	**379**	**540**	**946**

The Court may decide on violation of more than one right in a single application

10- ANNUAL NUMBER OF CASES FILED WITH THE ECtHR AGAINST TURKEY AND REFERRED TO A JUDICIAL FORMATION

The paradigm shift and the success of the individual application practice have made significant contributions to increasing the standards of human rights in Turkey. As it is specified in the legislative intent of the constitutional amendment adopted through a referendum in 12 September 2010, one of the most important raison d'etre for introducing the individual application into Turkish legal system is to resolve the disputes within our domestic law without requiring to apply to the European Court of Human Rights. The figures verify that we have achieved this goal to a considerable extent. The number of applications filed against Turkey to the European Court of Human Rights was 8.986 in 2012, 3.505 in 2013, 1.584 in 2014 and 2.208 in 2015.



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