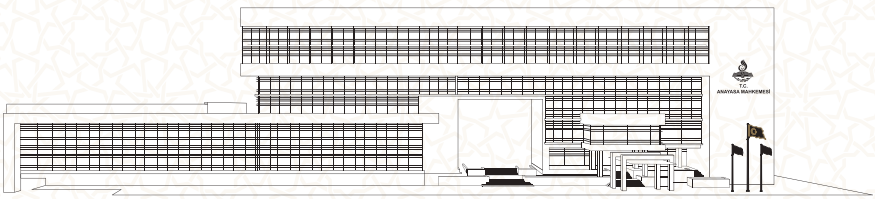
Annual Report

2018



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President, Constitutional Court of the Republic of Turkey

In their capacity as the guarantors of the binding nature and superiority of the constitution, the fundamental role of constitutional courts in democracies is to protect the constitutions as well as the fundamental rights and freedoms safeguarded therein. In this respect, the Turkish Constitutional Court renders decisions and judgments in the processes of both constitutionality review and individual application in order to ensure the constitutional justice.

The contribution made by the Constitutional Court, within its jurisdiction, to protect the supremacy of the Constitution as well as the fundamental rights and freedoms must be presented and brought to the public attention.

In this scope, the 2018 Annual Report of the Constitutional Court fulfils an important function in the pursuit of accountability and transparency.

The first chapter of the report provides brief information on the formation of the Plenary, Sections and Commissions.

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

The third chapter covers the Court's structure, functioning, approach, press and public relations, publications, as well as changes, developments and innovations in its national and international relations.

The fourth chapter includes the Opening Speech of the 56th Anniversary of the Constitutional Court and speeches delivered in other activities.

The fifth chapter of the Annual Report includes brief summaries of the Court's leading judgments in 2018 with a view to setting forth the

Court's case-law on various subjects. This chapter, which constitutes the backbone of the report, intends to present the paradigm of the Court on fundamental rights and freedoms and to guide all those pursuing the Court's case-law, notably academicians and jurists.

The final chapter contains a year by year comparison of the Court's performance in 2018 by providing various statistical data with graphics.

I hope that the 2018 Annual Report of the Constitutional Court will be useful for those concerned.

CHAPTER ONE

FORMATION OF THE COURT

I. FORMATION OF THE COURT

The Constitutional Court is comprised of fifteen members.[1]

The Grand National Assembly of Turkey shall elect, by secret ballot, two members from among three candidates to be nominated by and from among the president and members of the Court of Accounts, for each vacant position, and one member from among three candidates nominated by the heads of the bar associations from among self-employed lawyers. In this election to be held in the Grand National Assembly of Turkey, for each vacant position, two thirds majority of the total number of members shall be required for the first ballot, and absolute majority of total number of members shall be required for the second ballot. If an absolute majority cannot be obtained in the second ballot, a third ballot shall be held between the two candidates who have received the greatest number of votes in the second ballot; the member who receives the greatest number of votes in the third ballot shall be elected.

The President of the Republic shall appoint three members from High Court of Appeals, two members from Council of State from among three candidates to be nominated, for each vacant position, by their respective general assemblies, from among their presidents and members; three members, at least two of whom being law graduates, from among three candidates to be nominated for each vacant position by the Council of Higher Education from among members of the teaching staff who are not members of the Council, in the fields of law, economics and political sciences; four members from among high level executives, self-employed lawyers, first category judges and public prosecutors or rapporteurs of the Constitutional Court having served as rapporteur at least five years. In the elections to be held in the respective general assemblies of the High Court of Appeals, Council of State, the Court of Accounts and the Council of Higher Education

1 The Constitutional Court had comprised of seventeen members, but has been reduced to fifteen with the Article 17 of the Law no. 6771 dated 21/1/2017 regarding the Amendment of the Constitution of the Republic of Turkey. As per the provisional Article 21 § D which was incorporated into the Constitution by Article 16 of the same law, *"those who have been appointed as the members of the Constitutional Court from the Military Court of Cassation and the Supreme Administrative Military Court shall continue acting as the members of the Court until the termination of their offices for any reason*" and therefore as of 31.12.2018 the Court is comprised of sixteen members.

for nominating candidates for membership of the Constitutional Court, three persons obtaining the greatest number of votes shall be considered to be nominated for each vacant position. In the elections to be held for the three candidates nominated by the heads of bar associations from among self-employed lawyers, three persons obtaining the greatest number of votes shall be considered to be nominated

To qualify for appointments as members of the Constitutional Court, members of the teaching staff shall be required to possess the title of professor or associate professor; lawyers shall be required to have practiced as a lawyer for at least twenty years; high level executives shall be required to have completed higher education and to have worked for at least twenty years in public service, and first category judges and public prosecutors with at least twenty years of work experience including their period of candidacy, provided that they all shall be over the age of forty five

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.

The Constitutional Court shall elect a president and two deputy presidents from among its members for a term of four years by secret ballot and by an absolute majority of the total number of its members and those whose term of office ends may be re-elected. According to Article 149 of the Constitution and Article 20 of Law No. 6216, The Constitutional Court functions in the form of the Plenary, Sections and Commissions.

I. FORMATION OF THE PLENARY

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

As of 31.12.2018 the members of the Plenary are as follows:

President
Prof. Dr. Zühtü ARSLAN

Vice-President
Burhan ÜSTÜN

Vice-President
Prof. Dr. Engin YILDIRIM

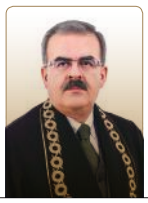
Justice
Serdar ÖZGÜLDÜR

Justice
Serruh KALELİ

Justice
Recep KÖMÜRCÜ

Justice
Hicabi DURSUN

Justice
Celal Mümtaz AKINCI



Justice
Muammer TOPAL

Justice
M. Emin KUZ

Justice
Hasan Tahsin GÖKCAN

Justice
Kadir ÖZKAYA

Justice
Rıdvan GÜLEÇ

Justice
Assoc. Prof. Dr.
Recai AKYEL

Justice
Prof. Dr.
Yusuf Şevki HAKYEMEZ

II. FORMATION OF THE SECTIONS

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

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

Each Section convenes with four members under the chair of a vice-president. In absence of the Vice-President, the most senior member shall chair the meeting of the Section. In order to determine the formation of the Section, all 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 proposal of the President of Section.

The composition of the Sections, as of 31.12.2018, is as follows:

1. FIRST SECTION

Pursuant to Article 29 of the Internal Regulations of the Constitutional Court, the list of the Justices who served in rotation in the meetings of the First Section in 2018 is as follows.

No	Name SURNAME	Title
1	Burhan ÜSTÜN	President
2	Serruh KALELİ	Justice
3	Nuri NECİPOĞLU[1]	Justice
4	Hicabi DURSUN	Justice
5	Hasan Tahsin GÖKCAN	Justice
6	Kadir ÖZKAYA	Justice
7	Rıdvan GÜLEÇ	Justice
8	Yusuf Şevki HAKYEMEZ	Justice

2. SECOND SECTION

Pursuant to Article 29 of the Internal Regulations of the Constitutional Court, the list of the Justices who served in rotation in the meetings of the Second Section in 2018 is as follows.

No	Name SURNAME	Title
1	Engin YILDIRIM	President
2	Serdar ÖZGÜLDÜR	Justice
3	Osman Alifeyyaz PAKSÜT[2]	Justice
4	Recep KÖMÜRCÜ	Justice
5	Celal Mümtaz AKINCI	Justice
6	Muammer TOPAL	Justice
7	M.Emin KUZ	Justice
8	Recai AKYEL	Justice

1 Mr. Nuri NECİPOĞLU has retired on 2 July 2018
2 Mr. Osman Alifeyyaz PAKSÜT has retired on 3 November 2018

III. FORMATION OF THE COMMISSIONS

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

For the purpose of forming the Commissions, the members of a Section, except for the Vice-President, shall be listed according to their seniority. The least senior member shall not participate in the first month's meetings of the Commissions. In the following months, it shall be ensured that each member who has not 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, the reserve member of the Section shall substitute the absent member of that Commission.

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

CHAPTER TWO

DUTIES AND POWERS OF THE COURT

I. OVERVIEW

The duties and powers of the Court are as follows:

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

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

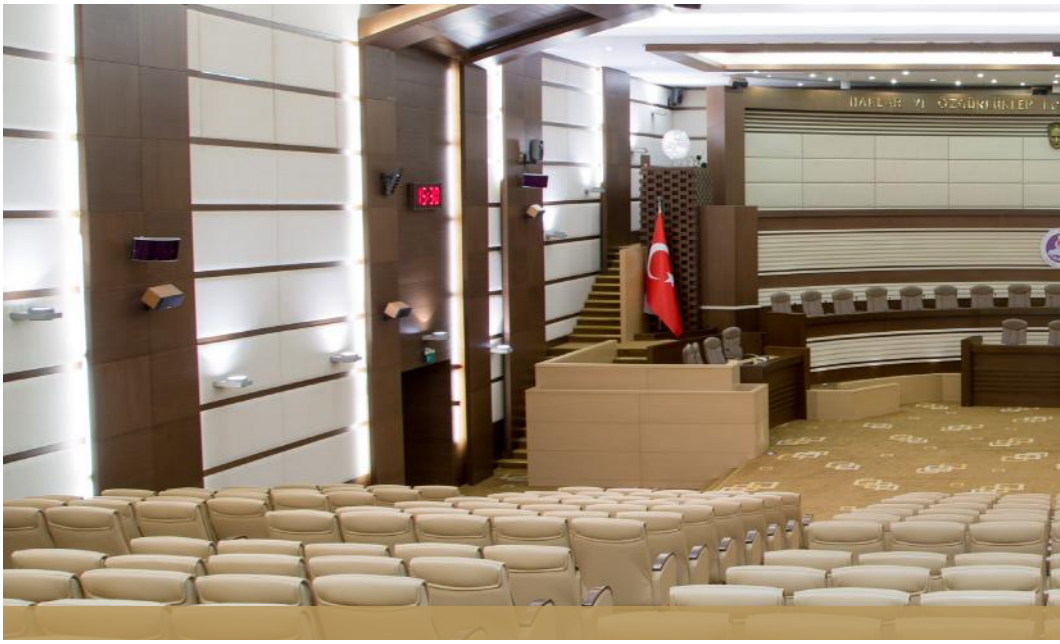
c) To conclude individual applications filed pursuant to Article 148 of the Constitution.

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

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

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

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



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

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

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

II. DUTIES AND POWERS OF THE PLENARY

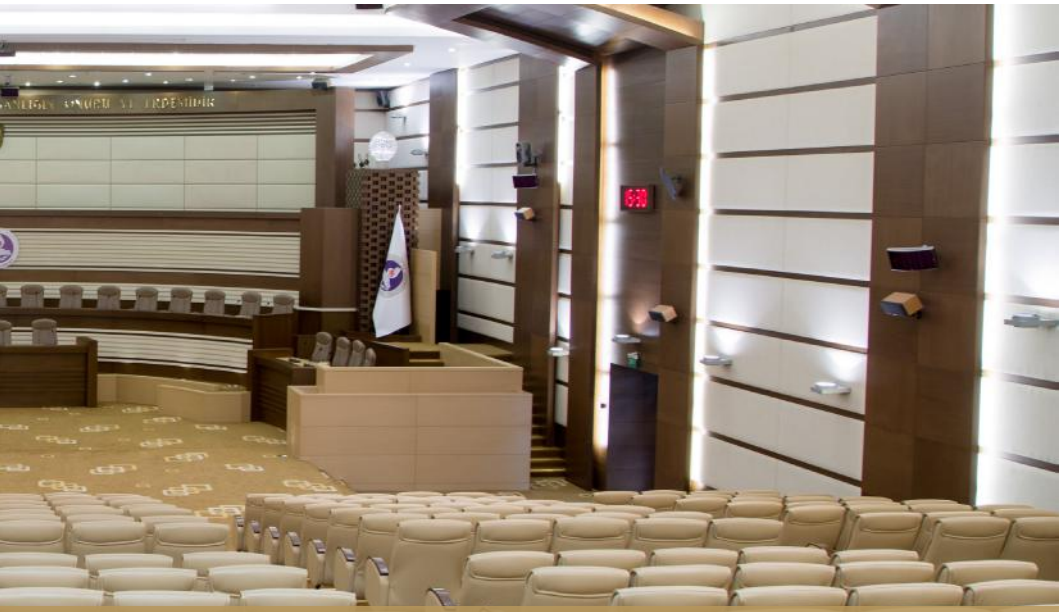
The Plenary of the Court shall perform the duties and have powers as follows:

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

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

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

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



Hall of the Supreme Criminal Court (The Grand All)

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

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

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

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

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

j) To examine objections.

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

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

III. DUTIES AND POWERS OF THE SECTIONS

The duties and powers of the Sections are as follows:

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

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.

Meeting Room of the Sections

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

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

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

a) If it is determined that the violation arouse from a court judgment, the file is forwarded to the concerned court in order to renew the judicial procedure so that the violation and its results will be cleared up. The

relevant court shall carry out a retrial in such a way as to remove the violation and its consequences as explained by the Section's decision determining the violation and shall urgently make a decision based on the file if possible.

b) In case of a decision on violation, where any legal interest is not seen with renewal of judicial proceedings, it can be decided payment of a reasonable compensation in favour 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 bring lawsuits before general courts.

IV. DUTIES AND POWERS OF THE COMMISSIONS

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

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

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

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

CHAPTER THREE

THE COURT IN 2018

I. DEVELOPMENTS AT THE COURT IN 2018

The Court continued its approach to broaden the protection field and rise the standart of fundamental rights and freedoms in the decisions given in 2018.

The new practices in the field of norm review and individual application that were launched in 2015 and the positive results of which were observed were also continued in 2018.

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

Considering the increase in the number of individual applications and the problems encountered in this process and the amendment of some articles in the Law No. 6771 dated 16/4/2017 and the Constitution, amendments were made in the Internal Regulation of the Constitutional Court. With the amendment of the Internal Regulation it was aimed to increase the quality of the applications and prevent overlooking mentioned claims, receive the information of the relevant persons quicker and accurate, classify the applications and to operate the Individual Application Office more effective and to eliminate some hesitations encountered during practice.

In order to establish and develop the relationship of the Court with the academic world, a unit named Constitutional Jurisdiction Research Centre (AYAM), which is responsible for conducting research and activities and preparing publications in the field of constitutional jurisdiction, was established.

According to the Constitutional Courts Press Unit's Directive dated 18/05/2018 upon this date the Press Unit started to not only publish press releases about individual applications but also norm review. In the year 2018, 100 press releases, 80 related to individual application and 20 to norm review decisions/judgments were prepared and submitted to the public through different communication channels.

Efforts have been made for the more effective use of social media. For the first time a live broadcast was made and the 56th Anniversary of the Constitutional Court was broadcasted live for the first time on Twitter via *scope* on April 25, 2018.

Within the framework of archiving the archive of the Anatolian Agency was screened and 750 new photographs of the Court were provided.

The TRT Archives Department was also screened for the image of the Constitutional Court those considered necessary have been saved at our institution. All photographs and images have been classified and then archived.

Within the scope of the structuring of the institutional archive, as a result of the negotiations with the Presidency of State Archives, 254 folders with documents (personnel information and registry files) which were transferred from the State Archives were saved at the Constitutional Court physically and digitally. The archive layout plan as well as the "Historical Chronology of the Constitutional Court" were set out.

It was decided that the *Constitutional Jurisdiction,* a book having been published as the conference proceedings of the symposia held on the occasion of the Constitutional Court's anniversaries since 1984, will be published from the year 2019 and the number 36/1 on twice a year in a refereed scientific journal format and a call for papers was issued.

Again 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 on domestic and international level the 54th issue of the "Journal of Constitutional Court Decisions" of 2018. in 2 volumes and the 34.issue of the "Symposia Proceedings of Constitutional Justice" , Turkish and English versions of the "Annual Report 2017", "Selected Judgments on Individual Applications 2017", "Constitution of the Republic of Turkey –With Justifications-", "Frequently Asked Questions on the Individual Application" and "Frequently Asked Questions on the Individual Application-Brochure ". On the occasion of the 55th Anniversary of the Foundation of the Constitutional Court the "The Constitutional Court album" was also published.

Also within the scope of the joint project of the Constitutional Court and the Council of Europe titled "Supporting the Individual Application to the Constitutional Court in Turkey" the following six handbooks regarding the individual application were published in 2018: "Right to freedom and security", "Freedom of expression", "Freedom of association and demonstration",

"Right to a fair trial", "Right to life" and "Right to property".

Also in 2018 966 new publications were added to the Court's Library.

In 2018, the software required by the institutional intranet and the relevant service units was put into operation, thus contributed to increase the institutional communication, service quality and speed. The hardware, software and licences required for strengthening the server infrastructure and the computers and peripherals needed by our personnel were provided and deficiencies have been corrected. Work-related technical controls were carried out to ensure occupational safety.

II. INTERNATIONAL ACTIVITIES OF THE COURT

1. OVERVIEW

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

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

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

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

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

The "Symposium on the Evaluation of the Five Years of Individual Application" was organized within the framework of the 56th anniversary program of the Court and sessions were held on the "Effects of the Individual Application Judgments on the Interpretation of the Constitution", "Effects of the Individual Application Judgments on the Judicial System", "Effects of the judgments of the Constitutional Court on the judgments of the ECHR" and the "General Evaluation and Statistics on the individual application judgments".

2. COOPERATION WITH THE INTERNATIONAL ORGANIZATIONS

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

A. 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

Summer School themed "Right to Liberty and Security" organized by the Constitutional Court between 17 and 22 September 2018 within the scope of the activities of the Permanent Secretariat of the Association of Asian Constitutional Courts and Equivalent Institutions ("the AACC")

July of 2010 to promote the development of democracy, rule of law and fundamental rights in Asia by increasing the exchanges of information and experiences related to constitutional justice and enhancing cooperation and friendship between institutions exercising constitutional jurisdiction.

The Turkish Constitutional Court undertook the term presidency for the period between 2012 - 2014. It was unanimously decided at the 2nd Congress and Board of Members Meeting of the AACC in April 2014 in İstanbul, that the "Summer School of the AACC" would be hosted annually by our Court. Besides, at the 3rd Congress of the AACC organized in Indonesia's Bali Island in 2016, it was decided to establish the Permanent Secretariat and establish and launch the Centre for Training and Human Resources Development, one of the three pillars of the Permanent Secretariat, in Turkey. In this context, subsequent to the 4th Summer School, the 5th Summer School and the 6th Summer School was realized within the scope of the activities of this Centre.

The 6th Summer School was hosted by the Constitutional Court of Turkey in the scope of the activities of the Permanent Secretariat of the AACC on 17-22 September 2018.

Summer School themed "Right to Liberty and Security" organized by the Constitutional Court between 17 and 22 September 2018 within the scope of the activities of the Permanent Secretariat of the Association of Asian Constitutional Courts and Equivalent Institutions ("the AACC")

President Mr. Zühtü ARSLAN, delivering his speech at the Summer School themed "Right to Liberty and Security" organized by the Constitutional Court between 17 and 22 September 2018 within the scope of the activities of the Permanent Secretariat of the AACC

Among those who participated in the Summer School Program with the theme of "Right to Freedom and Security" are justices, rapporteur judges, researchers, speakers, legal experts and advisors from the constitutional courts or equivalent institutions of Azerbaijan, Albania, Bulgaria, Indonesia, Palestine, Georgia, Montenegro, Kazakhstan, Kyrgyzstan, Korea, Kosovo, Turkish Republic of Northern Cyprus, Malaysia, Mongolia, Tajikistan, Thailand and Turkey.

The 6th Summer School Program started with the inaugural speech delivered by the President of the Turkish Constitutional Court, Mr. Zühtü ARSLAN. The participants then proceeded to their presentations on the "Right to Freedom

and Security" in their respective country. The Ankara part of the program was completed with the General Evaluation Session and Certificate Ceremony on September 19.

The Program of the 6th Summer School ended with a cultural visit to the Konya Province between 20 -22 September.

B. Judicial Conference of Constitutional and Supreme Courts/Councils of the OIC member/Observer States

The Constitutional Court of the Republic of Turkey pioneered in holding "The First Judicial Conference of Constitutional and Supreme Courts/Councils of the OIC Member/Observer States" in the year 2018. Although there are many unions in the field of judiciary on of regional and linguistic basis, there is a lack of a platform where Islamic countries' constitutional and high courts can exchange their views and cooperate and therefore Constitutional and Supreme Courts/Councils of the Organization for Islamic Cooperation Member/Observer States convened in İstanbul between 14-16 December 2018.

The heads/representatives of the courts and some regional organizations having participated in the conference titled "The Role of Higher Judiciary in Protecting the Rule of Law and Fundamental Rights" and which was opened

Conference themed "The Role of the Higher Judiciary in Protecting the Rule of Law and Fundamental Rights" held in İstanbul between 14 and 16 December 2018 with the participation of the Constitutional and Supreme Courts/Councils of the Member/Observer States of the Organization of Islamic Cooperation

Conference themed "The Role of the Higher Judiciary in Protecting the Rule of Law and Fundamental Rights" held in İstanbul between 14 and 16 December 2018 with the participation of the Constitutional and Supreme Courts/Councils of the Member/Observer States of the Organization of Islamic Cooperation

with the Speech of the President of the Republic Mr. Recep Tayyip Erdoğan, recognizing the need for the founding of a common judicial forum and greater cooperation, agreed in principle to the following:

Convene regular conferences in order to discuss constitutional and human rights matters.

• Form a Working Committee at expert-level consisting of Turkey, Indonesia, Algeria, Pakistan, Gambia.

Conference themed "The Role of the Higher Judiciary in Protecting the Rule of Law and Fundamental Rights" held in İstanbul between 14 and 16 December 2018 with the participation of the Constitutional and Supreme Courts/Councils of the Member/Observer States of the Organization of Islamic Cooperation

• Preparation of a report on the possibilities to improve cooperation by this Working Committee to be submitted to the respective Courts.

• Hold the next Conference in 2020 in Indonesia under patronage of Indonesian Constitutional Court.

President of the Constitutional Court of the Republic of Turkey Prof. Dr. Zühtü Arslan met with the President of the Supreme Court of India Mr. Shri Ranjan Gogoi who was in Turkey in order to participate in the First Judicial Conference of the Constitutional/Supreme Courts of the Organization of Islamic Cooperation Member/Observer States (J-OIC).

3. COOPERATION WITH NATIONAL CONSTITUTIONAL COURTS

In the last decade, the Court signed twenty-six (26) memoranda of understanding with other constitutional and/or supreme courts in order to enhance bilateral cooperation activities. In this respect, the Court hosts foreign delegations, judges, researchers and staff members of constitutional courts with the spirit of traditional Turkish hospitality and amity. Such protocols of cooperation serve as a basis for mutually beneficial exchanges that we organize with our counterpart institutions for the benefit of both parties.

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

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

Algeria	The Constitutional Council of Algeria	26 February 2015
Turkish Republic of Northern Cyprus	The Supreme Court of Northern Cyprus	29 June 2015
Kosovo	Constitutional Court of Kosovo	27 April 2016
Iraq	Federal Supreme Court of Iraq	25 April 2017
Kazakhstan	Constitutional Council of the Republic of Kazakhstan	25 April 2017
Mongolia	Constitutional Court of Mongolia	25 April 2017
Georgia	Constitutional Court of Georgia	28 April 2017
Russia	Constitutional court of Russian Federation	30 March 2018
Bolivarian Republic of Venezuela	The Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela	10 May 2018
Somalia	Supreme Court of Somalia	19 December 2018

4. INTERNATIONAL RELATIONS IN 2018

The Court maintained its mutual exchanges of visits with both the supreme courts of other countries and international judicial organs and organizations in the year 2018.

In this purpose, the Secretary General of the Council of Europe Mr. Thorbjørn Jagland and his accompanying delegation was received on 15th February 2018.

Visit by the Secretary General of the Council of Europe Mr. Thorbjørn Jagland and his accompanying delegation to the Turkish Constitutional Court on 15 February 2018

In March Rapporteur Dr. Mücahit AYDIN participated at the Round Table Conference upon the invitation of the Parliamentary Assembly of the Council of Europe held between 12-14 March 2018 in Paris.

On 30 March 2018 a meeting was held in St.Petersburg upon the invitation of the Russian Constitutional Court. Following the meeting participated by the President of the Constitutional Court of Turkey Mr. Zühtü Arslan, Justices Hasan Tahsin Gökcan and Prof.Dr. Yusuf Şevki Hakyemez and the Deputy Secretary General Dr. Abdullah Çelik and held for the improvement of the cooperation between these constitutional courts a "Bilateral Memorandum of Cooperation" was signed between the Turkish and Russian Constitutional Courts.

A Delegation of the Constitutional Court attended the international conference held within the scope of the activities organized on the occasion of the 20th Anniversary of the Constitutional Court of the Kingdom of Thailand. President of the Turkish Constitutional Court Mr. Zühtü Arslan, Justice Mr. Serruh Kaleli and Rapporteur Judge Mr. Aydın Şimşek participated, on behalf of Turkey, in the international conference on "the Constitutional Court: Protector of the Rule of Law" held in Bangkok between 6 - 11 April 2018. In the conference, President Mr. Arslan made a representation titled "the Turkish Constitutional Court as the Defender of the Rule of Law and Human Rights".

In the same month the Justice of the Turkish Constitutional Court Mr. Rıdvan Güleç and Rapporteur Mr. Volkan have participated in the ceremony held on the occasion of the 25th Anniversary of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic Kyrgyzstan between 18 and 21 April 2018. Mr. Güleç made a presentation in the Conference titled "Constitutional Interpretation and the Binding Effect and Limits of the Constitutional Court's Interpretation".

Participation of President Mr. Zühtü ARSLAN and the accompanying delegation composed of the justices and rapporteur judges of the Turkish Constitutional Court in the international conference themed "the Constitutional Court: Protector of the Rule of Law" held on the occasion of the 20th Anniversary of the Thai Constitutional Court in Bangkok between 6 and 11 April 2018

The Constitutional Court of Turkey organized an international symposium held on the occasion of the 56th Anniversary. Constitutional Court Presidents and Justices from 20 countries participated at the symposium titled "Symposium on the Evaluation of the Five Years of Individual Application".

A bilateral memorandum of cooperation has been signed between the Turkish Constitutional Court and the Venezuelan Supreme Tribunal of Justice on 30 May 2018.

56th Anniversary of the Constitutional Court of the Republic of Turkey

President Mr. Zühtü ARSLAN, delivering his speech at the 56th Anniversary of the Constitutional Court of the Republic of Turkey

Symposium themed "Evaluation of the Five Years of the Individual Application" held on the occasion of the 56th Anniversary of the Constitutional Court of the Republic of Turkey between 25 and 26 April 2018

Mr. Muammer Topal, Member of the Constitutional Court and Mr. Mustafa Kadir Atasoy, Director of the International Relations Department participated at the VIII. International Legal Forum organised by the Constitutional Court of the Russian Federation, which took place between 14 - 18 of May, 2018 in St Petersburg.

Organised under the Presidency of the Constitutional Court of Georgia, Mr. Celal Mümtaz Akıncı, Justice of the Constitutional Court and Mr. Hüseyin Turan, Rapporteur of the Constitutional Court, represented our Court at the 3'rd Congress of the Association of the Constitutional Justice of the Countries of the Baltic and Black Sea Region which took place between 15 – 17 May 2018 in Tbilisi.

Dr. Mücahit Aydın, Rapporteur of the Constitutional Court participated at the conference titled "Jurisdictions and Organization of AACC Members" organized by the Secretariat for Research and Development of the Association for Asian Constitutional Courts and Equivalent Institutions (AACC) between 29 May and 1 June 2018, in Seoul, Korea.

Dr. Mücait Aydın, participated at European Court of Human Rights' Superior Court's Network's 2.Focal Points Forum on 8 June 2018 in Strazburg, France.

The Rapporteur of the Constitutional Court Mr. Mücahit Aydın participated at the 17.Meeting of the Joint Council on Constitutional Justice organized by the European Commission for Democracy through Law (Venice Commission) between 27-28 June 2018 in Lausanne, Switzerland.

Participation of Justice Mr. Celal Mümtaz AKINCI and the accompanying delegation in the 3rd Congress of the Association of the Constitutional Justice of the Countries of the Baltic and Black Sea Region held in Tbilisi

Participation of Justice Mr. Serdar ÖZGÜLDÜR and the accompanying delegation in the conference themed "Rule of Law and Constitutional Law and State Administration: Values and Priorities" held on the occasion of the 20th Anniversary of the Constitutional Court of the Republic of Azerbaijan

The conference on "The Rule of Law and Constitutional Law and State Administration: Values and Priorities" was held on the occasion of the 20th Anniversary of the establishment of the Constitutional Court of the Republic of Azerbaijan. Turkey was represented by the Constitutional Court Justice Serdar Özgüldür and Rapporteur-Judge Melek Karali Saunders at the international conference organized by the Constitutional Court of Azerbaijan in Baku on 6 July 2018.

Turkey was represented by Vice-President of the Constitutional Court of the Republic of Turkey Mr. Prof. Dr. Engin Yıldırım and Rapporteur Mr. Fatih Şahin at the conference organized by the Constitutional Court of the Republic of Kazakhstan held on the occasion of the Constitution Day between 27 and 30 August 2018 in Astana.

Participation of Vice-President Mr. Engin YILDIRIM and the accompanying delegation in the international conference held by the Constitutional Council of the Republic of Kazakhstan in Astana between 27 and 30 August 2018

Participation of Justice Mr. Osman Alifeyyaz PAKSÜT and the accompanying delegation in the international conference themed "Constitutional Justice and Democracy" held on the occasion of the 30th Anniversary of the Constitutional Court of Korea

Turkey was represented by Justice of the Constitutional Court of the Republic of Turkey Mr. Osman Alifeyyaz Paksüt and Deputy Secretary General of the Constitutional Court Mrs. Ayşegül Atalay at the international conference on "Constitutional Justice and Democracy" held on the occasion of the 30th anniversary of the Constitutional Court of the Republic of Korea.

During the visit held upon the invitation of the Constitutional Court of the Republic of Macedonia, Mr. Arslan was accompanied by Justices Mr. Recep Kömürcü, Mr. Hasan Tahsin Gökcan and Rapporteur Mrs. Şermin Birtane. Within the scope of their contacts within Macedonia, Mr. Arslan and the accompanying delegation paid a visit to the International Balkan University located in the country's capital, Skopje. The President delivered a lecture on the topic "Constitutional Justice in Turkey: Past, Present and Future". During

Visit by President Mr. Zühtü ARSLAN, Justices Mr. Recep KÖMÜRCÜ, Mr. Hasan Tahsin GÖKCAN and the accompanying delegation to Macedonia and Bosnia-Herzegovina within the scope of bilateral memorandum of cooperation

Visit by President Mr. Zühtü ARSLAN, Justices Mr. Recep KÖMÜRCÜ, Mr. Hasan Tahsin GÖKCAN and the accompanying delegation to Macedonia and Bosnia-Herzegovina within the scope of bilateral memorandum of cooperation

the visit, President Arslan convened President of Macedonia Mr. Gjorge Ivanov and President of the Constitutional Court of Macedonia Mr. Nikola Ivanovski. Having completed their meetings in Macedonia the delegation visited Bosnia Herzegovina. The delegation of the Constitutional Court negotiated with President of the Constitutional Court of Bosnia Herzegovinia Mr. Zlatko M. Knežević and Justices of the Court on "Implementation of the Decisions of the Constitutional Court and Problems arising in regards to Implementation". After the meeting, the delegation convened Chair of the Presidency of Bosnia and Herzegovina Mr. Bakir Izetbegović.

Vice-President of the Turkish Constitutional Court Mr. Burhan Üstün, President of the Court of Jurisdictional Disputes and Justice of the Constitutional Court Mr. Hicabi Dursun and Rapporteur of the Constitutional Court Mr. Yılmaz Çınar attended the events held on the occasion of the opening of the new court year in the Turkish Republic of Northern Cyprus between 16 and 18 September 2018.

Participation by Vice-President Mr. Burhan Üstün and President of the Court of Jurisdictional Disputes and Justice of the Constitutional Court Mr. Hicabi Dursun in the opening ceremony of the 2018-2019 court year of the Turkish Republic of Northern Cyprus (TRNC)

The 6th Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions was hosted by the Constitutional Court of the Republic of Turkey between 17-22 September 2018. During the event of the 6th Summer School of the AACC, the participants made presentations concerning the "Right to Liberty and Security" in their countries. Within the scope of the activities, a General Assessment Session and Certificate Ceremony were held on 19 September. The event of the 6th Summer School of the AACC was ended with the social program during which the participants paid a visit to Konya between 20-22 September.

The Constitutional Court President Zühtü ARSLAN, Justice Recai AKYEL and Rapporteur Dr. Mücahit AYDIN participated in the conference titled "Access to Constitutional Judiciary: New Problems on Corrective (A Posteriori) Constitutional Review" organized by the Constitutional Court of Morocco in Marrakech between 26 - 29 September 2018.

The Constitutional Court's Vice President Engin YILDIRIM and Rapporteur Mr. Recep KAPLAN attended the Conference titled "Constitutionalism and Constitutional Courts in Political Dynamics" held in Jakarta, Indonesia between 29 September and 5 October 2018 for the member courts of the AACC.

President of the Turkish Constitutional Court Mr. Zühtü Arslan and the accompanying delegation paid a visit to Hungary and Croatia within the scope of the Joint Project on Supporting the Individual Application to the Constitutional Court between 1 – 5 October 2018. President Mr. Zühtü Arslan

Visit by the delegation composed of the President and the justices to Hungary and Croatia between 1 and 5 October 2018 within the scope of the Joint Project on Supporting the Individual Application to the Constitutional Court (SIAC)

Visit by the delegation composed of the President and the justices to Hungary and Croatia between 1 and 5 October 2018 within the scope of the Joint Project on Supporting the Individual Application to the Constitutional Court (SIAC)

was accompanied by Vice-President Mr. Burhan Üstün, Justices Mr. Serdar Özgüldür, Mr. Recep Kömürcü, Mr. Hicabi Dursun, Mr. Celal Mümtaz Akıncı, Mr. Muammer Topal, Mr. Hasan Tahsin Gökcan, Mr. Rıdvan Güleç, Mr. Recai Akyel and Mr. Yusuf Şevki Hakyemez and other Court officials. In the meetings, the structure of the Turkish, Hungarian and Croatian Constitutional Courts, the working procedures and the application of the individual application were discussed.

President Mr. Zühtü Arslan, and Rapporteur Dr. Mücahit Aydın attended the Judicial Conference of the Highest Courts of the G20 (J20) held in Argentina. Mr. Arslan delivered a presentation titled "Role of the Turkish Constitutional Court in the Protection of State of Law in Turkey" at the meeting organized by the Supreme Court of Argentina in Buenos Aires on 8-10 October 2018.

Participation by President Mr. Zühtü ARSLAN and the accompanying delegation in the Judicial Conference of the Highest Courts of the G20 (J20) held in Argentina

Welcoming by President Mr. Zühtü ARSLAN of Hungarian Minister of Justice László Trócsányi at the Turkish Constitutional Court on 1 November 2018

The Constitutional Court Rapporteur Mr. Volkan Has attended the "Turkish German Lawyers" forum organized by Erfurt University between 11 - 14 October 2018 in Germany.

Mr. Zühtü Arslan, President of the Constitutional Court of the Republic of Turkey, welcomed Ms. Dunja Mijatović, Council of Europe Commissioner for Human Rights, at the Turkish Constitutional Court on 18 October 2018.

President Mr. Zühtü Arslan participated at the ceremony, held to commemorate the 15th death anniversary of Alija Izetbegović, the first President of the newly-independent Bosnia Herzegovina. During the memorial conference held in the University of Sarajevo, President delivered a lecture.

Justice Rıdvan Güleç and Rapporteur Mr. Sadettin Ceyhan represented the Turkish Constitutional Court at the 9.Opening Year Anniversary of the Constitutional Court of the Republic of Kosovo on 25 - 26 October 2018.

President of the Turkish Constitutional Court Mr. Zühtü Arslan, welcomed Hungarian Minister of Justice Mr. László Trócsányi at the Turkish Constitutional Court on 1 November 2018.

The 19th International Conference of Chief Justices of the World was held in India. In representation of the Constitutional Court of the Republic of Turkey, Justice Mr. Celal Mümtaz Akıncı and Chief Rapporteur Mr. Murat Şen attended the Conference. The Turkish Constitutional Court's delegation also paid a visit to the Supreme Court of India.

Participation by Justice Mr. Celal Mümtaz Akıncı and the accompanying delegation in the 19th International Conference of Chief Justices of the World between 14 and 20 November 2018

President of the Constitutional Court of the Republic of Turkey Mr. Zühtü Arslan met with President of the Supreme Court of Pakistan Mr. Mian Saqip Nisar on 17 December 2018. During the meeting held in Ankara information was exchanged on the functioning of the judicial systems of both countries and the parties discussed enhancement of cooperation between two courts.

President of the Constitutional Court of the Republic of Turkey Mr. Zühtü Arslan met with President of the Supreme Court of Somalia Mr. Bashe Yusuf Ahmed on 19 December 2018. After the meeting, a bilateral memorandum of cooperation was signed between the courts of both countries.

Meeting of President Mr. Zühtü Arslan with President of the Supreme Court of Pakistan Mr. Mian Saqip Nisar on 17 December 2018

CHAPTER FOUR

PRESIDENT'S SPEECHES

I. Welcome Address in the Occasion of the 56th Anniversary of the Turkish Constitutional Court

His Excellency Mr. President,

Esteemed Guests,

I would like to welcome you to the ceremony held on the occasion of the 56th Anniversary of the Constitutional Court of Turkey, and I would like to extend you my most sincere greetings.

Among us today are the President of the Venice Commission, the Secretary General of the Conference of Constitutional Jurisdictions of Africa, as well as Presidents and/or Justices of constitutional courts of twenty countries. I would like to further thank them for joining us today in celebrating such a significant event.

The theme of this year's symposium has been determined as the evaluation of the five years of the individual application. Through the symposium, we want to discuss the individual application mechanism in Turkey thoroughly, and in a sense, we want to make a stock taking of the five years' experience. Therefore, I dedicated my speech, to a considerable extent, to this subject. However, before elaborating on this subject, I deem it useful to provide an insight on the conceptual and historical background of the constitutional justice, which also includes the individual application.

Supremacy of the constitution is the underlying principle of the constitutional justice. Accordingly, constitutions are a body of binding rules located at the top of the hierarchy of norms. The constitutional provision that "laws shall not be contrary to the Constitution" reflects the principle of supremacy of the constitution.

Constitutions, as a body of superior and binding rules, have two basic functions; first, to safeguard fundamental rights and freedoms of individuals, and, second, in the pursuit of this goal, to map out the governmental power, that is, to set the limits of state authority.

These two functions of constitutions particularly require the independence of judiciary from legislature and executive. At this point, the relation of judiciary with legislature and executive, which form the sphere of politics, is of vital importance. The establishment of the relation between judiciary and politics on a sound basis and its maintenance depend on ensuring judicial independence and impartiality, on one hand, and judicial abstention from

56th Anniversary of the Constitutional Court of the Republic of Turkey

substantive review and activism by observing the constitutional and legal boundaries, on the other.

The objective of constitutions to safeguard fundamental rights and to restrict the state authority to that end, along with incorporation of the principle of supremacy of the constitution, has instituted the constitutional jurisdiction in the next step. Constitutional courts are established to put the principle of supremacy of the constitution into action effectively. In other words, constitutional courts are intended as institutions empowered to oversee whether the governmental power map is infringed, with a view to protecting constitutional rights and freedoms.

The establishment and spread of constitutional courts historically corresponds to the post World War II era to a great extent. The underlying reason behind this progress was extensive human rights violations before and during the war. Therefore, the establishment of constitutional courts at national level and the signing of the European Convention on Human Rights as well as the establishment of the European Court of Human Rights at the regional level were the outcomes of the reaction against systematic violations of human rights resulting in a tragedy.

In spite of being established in a different historical context and with a different mission, the Turkish Constitutional Court currently carries out its constitution-

assigned duties, namely constitutionality review, examination of individual applications, and the other duties. In the context of these constitutional duties, raison d'être of the Court is to safeguard individuals' constitutional rights and freedoms.

His Excellency Mr. President,

It would be appropriate to classify the fifty-sixyear history of the constitutional jurisdiction in Turkey into two parts as the first fifty years and the last six years. Indeed, the individual application mechanism introduced into the Turkish legal system with the constitutional amendment of 2010 —and being in force since 2012— has triggered a new era in our constitutional jurisdiction. In this new era, the Turkish Constitutional Court has adopted a "rightoriented" approach based on fundamental rights and freedoms and on the notion "let man flourish and the state will also flourish".

Indeed, this paradigm shift reflects the constitutionmaker's will as well. As indicated in the Report of the Constitutional Committee on the constitutional amendment of 2010, with the introduction of the right to an individual application, the Constitutional Court, which had been perceived as an institution "protecting the State and the prevailing system with a statist understanding", would be regarded as a body "[from then on] rendering judgments that promote and safeguard freedoms".

I would like to note with pleasure that the individual application mechanism has today become a fundamental instrument of a paradigm defending freedoms in the direction pointed by the constitution-maker. On the other hand, the Court has faced with a heavy workload through the individual application mechanism to the extent that could not be compared with those of other constitutional courts with similar jurisdictions, yet it has successfully overcome this workload.

The Court has continued delivering judgments with a "right-oriented" understanding even during the state of emergency. Moreover, the Court has accomplished to deal with the excessive number of applications lodged as a result of the state of emergency. In my speech delivered at this hall last year, I stated that we had faced with an overwhelming workload following the coup attempt of July 15th; and that we were in the process of reducing this workload as well as rendering leading judgments.

In this context, in its leading judgment of 20 June 2017, the Constitutional Court primarily noted that it has the authority to examine the alleged violations suffered due to the measures taken when the extraordinary administration procedures are in force. This judgment also laid out the basic principles as to the examination of individual applications relating to the state of emergency under Article 15 of the Constitution. The Constitutional Court thereby established, for the first time, basic parameters of the individual application mechanism in cases of a state of emergency.

Developing these principles in the subsequent applications concerning detained judges and prosecutors, journalists, and other occupational groups, the Constitutional Court has delivered its leading judgments to the most extent. Besides, the Court adjudicated many of the applications lodged by the members of parliament who were detained on remand. It is obvious that the preparatory work of such leading and principle judgments requires a greater effort and therefore much longer time compared to the other judgments.

At the same time, the number of individual applications had exceeded 100.000 by this time last year. Indeed, thanks to the measures employed by the Court, the number of pending applications has been substantially decreased. Following the July 15th, the Court demonstrated a substantial effort and has concluded approximately 103.000 individual applications out of 120.000 in total. Thus, 86% of the individual applications lodged so far have been adjudicated by the Court during the state of emergency. There are currently

39.000 pending individual applications before the Court, and approximately 9.000 of them concern the measures taken under the state of emergency.

Besides concluding a great number of individual applications relating to the emergency measures in a short time, the Court has also continued examining individual applications filed before the emergency period. In this scope, the Court delivered violation judgments in many human rights issues including but not limited to the right to life, the right to a fair trial, the right to respect for private life and the freedom of expression.

His Excellency Mr. President,

The individual application is a novel mechanism in our country. Five years' experience of this practice is of course important but does not suffice for proper understanding as well as duly and effective implementation of this mechanism.

This novel mechanism has also brought the Constitutional Court's relation with the inferior courts to a different dimension. The requirement of exhaustion of ordinary administrative and legal remedies has, in practice, caused this mechanism to become a remedy which is resorted, to a large extent, against courts' decisions.

This situation leads to certain problems from time to time despite the implementation of the "subsidiarity principle" in a careful manner. Let me state right away that these problems are not peculiar to us, and similar situations are experienced by other countries adopting the individual application mechanism. Further, while introducing this remedy, the constitution-maker also foresaw that such kind of problems might have taken place; however, it noted that the individual application mechanism deriving from a social demand was a necessary institution which would improve and find its own course in progress of time.

As we have previously stated on different occasions, this mechanism has not transformed the Constitutional Court into an appellate authority. When examining applications, the Constitutional Court does not review lawfulness, appropriateness or fairness of decisions of inferior courts. The Constitutional Court's examination is limited to the determination as to whether a fundamental right safeguarded by the Constitution has been violated or not and, if violated, how it would be redressed.

As provided in the Constitution, the issues to be considered in appellate review cannot be examined within the scope of the individual application. Moreover,

President Mr. Zühtü ARSLAN, delivering his speech at the 56th Anniversary of the Constitutional Court of the Republic of Turkey

in cases where a violation is found, the law provides that no decision can be rendered on the merits of the case when ordering the required steps for redress of the violation.

In its judgment of 15 March 2018, the Constitutional Court also made an assessment as to how the ban of "appellate review" and "substantive review" should be interpreted. The Constitutional Court considers that this ban does not relate to the constitutional safeguards concerning fundamental rights but to the allegations of unlawfulness falling outside the scope of the individual application. Accordingly, "an assessment based on the safeguards provided in the Constitution as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated or not cannot be regarded as an assessment of an issue to be considered in 'appellate review' or as 'a substantive review'".

In the same judgment, it was also noted that otherwise, the Constitutional Court's power and duty to adjudicate individual applications would not be functional, and this would not be in conformity with the objective of this mechanism as an effective remedy in protecting fundamental rights.

At this point, the binding effect and execution of the Constitutional Court's judgments in the individual application arise as a matter of concern that needs to be addressed. As also underlined in the abovementioned judgment of the Court, pursuant to Article 153 of the Constitution, "the judgments of the Constitutional Court shall be binding on ... the legislative, executive and judicial bodies, administrative authorities, and natural and legal persons." This is also a natural consequence of Article 11 of the Constitution in which the binding effect and supremacy of the Constitution are enshrined.

This provision, as distinct from Article 138 thereof that generally provides the binding effect of the court judgments, states that in addition to the legislative and executive bodies and administrative authorities, the judgments of the Constitutional Courts are binding on "judicial authorities" as well. Therefore, non-execution of the Constitutional Court judgments cannot be imagined in the presence of explicit constitutional provisions.

Indeed, the individual application mechanism can be considered as an effective remedy only if a found violation and its consequences are redressed. Undoubtedly, the discretionary power as to how the violation and its consequences will be redressed belongs, in principle, to the public authorities and especially to the inferior courts at first place. However, in some exceptional cases, the nature of the violation found may leave only one option for the authorities to redress the consequences of the violation. In such cases, the Constitutional Court explicitly points out the measure for redressing the violation and its consequences, and the relevant authority employs that measure.

His Excellency Mr. President,

The Constitutional Court also takes into consideration the European Convention on Human Rights and its binding interpretation by the European Court of Human Rights when reviewing whether the constitutional rights and freedoms have been violated or not. As is known, Turkey, one of the founders of the Council of Europe, had been involved in the preparation process of the European Convention on Human Rights and was among the first countries to sign the Convention in 1950.

Taking into consideration the Convention and the case-law of the European Court of Human Rights in the individual application is not merely a preference but rather a constitutional requirement for at least three reasons.

First, in our country, the European Convention on Human Rights has been considered in drafting the constitutional provisions regarding the fundamental rights and freedoms, since the Constitution of 1961. This is especially the case for the constitutional amendments of 1995, 2001, 2004 and 2010. For example, the single-sentence stated reason of the amendment made in 2001 to Article 13 of the Constitution of 1982, which sets out the regime of restriction of fundamental rights and freedoms, is that the provision "being rearranged in accordance with the principles set forth in the European Convention on Human Rights". Moreover, Article 15 of the Constitution, which lays out the principles and safeguards concerning the restriction of fundamental rights in times of emergency, almost repeats Article 15 of the Convention.

Second, Article 148 of the Constitution makes a clear reference to the European Convention on Human Rights in determining the rights and freedoms that may be subject to the individual application. Accordingly, the individual application is not a remedy applicable to all constitutional rights, but to the rights and freedoms falling into the common protection area of both the Constitution and the European Convention on Human Rights.

The third and practical reason for taking into consideration the case-law of the European Court of Human Rights is the function laid by the constitutionmaker on individual application. Indeed, both in the justification of the amendment made to Article 148 of the Constitution and in the Report of the Constitutional Committee it is clearly stated that the function of this mechanism is to "reduce the number of applications [to be lodged with the Strasbourg Court] and resolve the matters by means of the domestic law".

The implementation of this remedy over five years demonstrates that this aim has been achieved, and, following the launch of the individual application to the Constitutional Court, there has been a significant decrease in the number of applications lodged with the European Court of Human Rights, as well as in the number of violation judgments against our country. Besides, thanks to introduction of this mechanism, during the emergency period in the aftermath of the July 15th more than 100.000 applications have been brought before the Constitutional Court, either concluded or still pending, without resorting to the Strasbourg Court.

Thus, the individual application has made a significant contribution to the development of the democratic state of law in Turkey by enabling the redress of violations suffered by individuals without applying to an international court.

All these demonstrate that the individual application is a great achievement with respect to the protection of fundamental rights and freedoms. I have no doubt that the future generations will be grateful to those who introduced this mechanism into the constitutional system in 2010 and to those who contributed to its successful implementation.

His Excellency Mr. President,

A major part of the violation judgments rendered by the Constitutional Court relates to the right to a fair trial. This points out how essential an effective judicial system is in order to ensure the benefit expected from the individual application.

In this last part of my speech, I want to briefly mention the three virtues an ideal judicial system must have. An effective judicial system is based on three basic pillars: mind, morals and justice. Indeed, neither a judiciary nor a civilization can be envisaged without these notions.

The mind is one of the most important features that distinguish human being from other living creatures. The mind, which gives the ability to think and comprehend, provides human being with the knowledge of things. The mind requires responsibility, and therefore independence. For exactly this reason, Kant formulated the motto of the enlightenment as "dare to know/ have the courage to use your own understanding". As a matter of fact, those who cannot use their minds become the means and captives of the minds of others. In this context, the judicial mind entails the existence of free and independent consciences.

According to Ibn Rushd, good morals come first among the characteristic of an ideal judge. A judge with a bad moral character cannot act justly. Morality requires both insight and responsibility, which naturally necessitates the freedom. Those who do not have freedom do not have responsibility, either. Therefore, as the deceased Alija Izetbegović stated, "Morality is inseparable from freedom. Only free conduct is moral conduct."

In addition, freedom is also the distinctive feature of human dignity that constitutes the basic virtue of human and moral existence. Mehmet Tahir Münif Pasha, who lived in the last period of the Ottoman Empire, describes the relationship between freedom and human dignity very well in his book Hikmet-i Hukuk (Philosophy of Law) published in 1884. According to Münif Pasha, "Freedom is the witness of human dignity; if there is no liberty, there will be no dignity; the acts of a man who is deprived of his liberty are not his own acts."

Justice is the most fundamental value upon which the earth and the sky are built. "Justice", as again stated by Alija, "is one of those few things that need no proof. To prove the need for justice and fairness is either superfluous for those who have a heart or useless for those who do not."

Therefore, we must talk about what justice requires, rather than the need for justice. Justice, in the simplest term, requires to provide everyone what they are entitled to and what they deserve.

In addition, justice is not a discourse, but a matter of action. Furthermore, it does not suffice "to provide everyone what they are entitled to and what they

deserve" in establishing justice but it must also be known and visible that it has been done so. This is so because the observation and expression of justice strengthen the confidence in the State, on one hand, and in the judiciary that is in charge of dispensing justice, on the other.

His Excellency Mr. President,

Despite all difficulties and traumas that the judicial system has encountered in the aftermath of the coup attempt of the July 15th, 2016, the functioning of the judicial system, and in particular the functioning of the individual application mechanism, is valuable in itself. Certainly, as is also the case with other institutions, erroneous judgments may be rendered in the judiciary. However, such mistakes will be corrected within the judicial system, and indeed, they are being corrected.

Taking this opportunity, I extend my appreciation to all members of the judiciary who serve devotedly and deliver judgments "on behalf of the Turkish Nation" in accordance with the Constitution, and I wish them success in this onerous and honourable mission. I would also like to extend my special thanks to our Court's vice-presidents, justices, rapporteurs and assistant rapporteurs as well as all personnel at all levels for all their devoted efforts.

On this occasion, I would like to commemorate our late retired Justice and President of the Court of Jurisdictional Disputes, Mr. Ahmet Akyalçın. May God bless him and our other deceased members. I also wish good health and prosperity to all members of the Court.

Finally, I wish that the symposium that starts this afternoon on the theme of the assessment of the five years of the individual application be fruitful and successful. I would like to express in advance my thanks to all distinguished academicians and members of the judiciary who will contribute to this symposium with their presentations.

His Excellency Mr. President,

Esteemed Guests,

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

II. Welcome Address, The First Judicial Conference of Constitutional and Supreme Courts/Councils of the OIC Member/Observer States

His Excellency Mr. President,

Esteemed Guests,

I would like to welcome you to the ceremony held on the occasion of the 56th Anniversary of the Constitutional Court of Turkey, and I would like to extend you my most sincere greetings.

Among us today are the President of the Venice Commission, the Secretary General of the Conference of Constitutional Jurisdictions of Africa, as well as Presidents and/or Justices of constitutional courts of twenty countries. I would like to further thank them for joining us today in celebrating such a significant event.

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These two functions of constitutions particularly require the independence of judiciary from legislature and executive. At this point, the relation of judiciary with legislature and executive, which form the sphere of politics, is

of vital importance. The establishment of the relation between judiciary and politics on a sound basis and its maintenance depend on ensuring judicial independence and impartiality, on one hand, and judicial abstention from substantive review and activism by observing the constitutional and legal boundaries, on the other.

The objective of constitutions to safeguard fundamental rights and to restrict the state authority to that end, along with incorporation of the principle of supremacy of the constitution, has instituted the constitutional jurisdiction in the next step. Constitutional courts are established to put the principle of supremacy of the constitution into action effectively. In other words, constitutional courts are intended as institutions empowered to oversee whether the governmental power map is infringed, with a view to protecting constitutional rights and freedoms.

The establishment and spread of constitutional courts historically corresponds to the post World War II era to a great extent. The underlying reason behind this progress was extensive human rights violations before and during the war. Therefore, the establishment of constitutional courts at national level and the signing of the European Convention on Human Rights as well as the establishment of the European Court of Human Rights at the regional level were the outcomes of the reaction against systematic violations of human rights resulting in a tragedy.

In spite of being established in a different historical context and with a different mission, the Turkish Constitutional Court currently carries out its constitution-assigned duties, namely constitutionality review, examination of individual applications, and the other duties. In the context of these constitutional duties, raison d'être of the Court is to safeguard individuals' constitutional rights and freedoms.

His Excellency Mr. President,

It would be appropriate to classify the fifty-sixyear history of the constitutional jurisdiction in Turkey into two parts as the first fifty years and the last six years. Indeed, the individual application mechanism introduced into the Turkish legal system with the constitutional amendment of 2010 —and being in force since 2012— has triggered a new era in our constitutional jurisdiction. In this new era, the Turkish Constitutional Court has adopted a "rightoriented" approach

based on fundamental rights and freedoms and on the notion "let man flourish and the state will also flourish".

Indeed, this paradigm shift reflects the constitutionmaker's will as well. As indicated in the Report of the Constitutional Committee on the constitutional amendment of 2010, with the introduction of the right to an individual application, the Constitutional Court, which had been perceived as an institution "protecting the State and the prevailing system with a statist understanding", would be regarded as a body "[from then on] rendering judgments that promote and safeguard freedoms".

I would like to note with pleasure that the individual application mechanism has today become a fundamental instrument of a paradigm defending freedoms in the direction pointed by the constitution-maker. On the other hand, the Court has faced with a heavy workload through the individual application mechanism to the extent that could not be compared with those of other constitutional courts with similar jurisdictions, yet it has successfully overcome this workload.

The Court has continued delivering judgments with a "right-oriented" understanding even during the state of emergency. Moreover, the Court has accomplished to deal with the excessive number of applications lodged as a result of the state of emergency. In my speech delivered at this hall last year, I stated that we had faced with an overwhelming workload following the coup attempt of July 15th; and that we were in the process of reducing this work-load as well as rendering leading judgments.

In this context, in its leading judgment of 20 June 2017, the Constitutional Court primarily noted that it has the authority to examine the alleged violations suffered due to the measures taken when the extraordinary administration procedures are in force. This judgment also laid out the basic principles as to the examination of individual applications relating to the state of emergency under Article 15 of the Constitution. The Constitutional Court thereby established, for the first time, basic parameters of the individual application mechanism in cases of a state of emergency.

Developing these principles in the subsequent applications concerning detained judges and prosecutors, journalists, and other occupational groups, the Constitutional Court has delivered its leading judgments to the most extent. Besides, the Court adjudicated many of the applications lodged by the

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members of parliament who were detained on remand. It is obvious that the preparatory work of such leading and principle judgments requires a greater effort and therefore much longer time compared to the other judgments.

At the same time, the number of individual applications had exceeded 100.000 by this time last year. Indeed, thanks to the measures employed by the Court, the number of pending applications has been substantially decreased. Following the July 15th, the Court demonstrated a substantial effort and has concluded approximately 103.000 individual applications out of 120.000 in total. Thus, 86% of the individual applications lodged so far have been adjudicated by the Court during the state of emergency. There are currently 39.000 pending individual applications before the Court, and approximately 9.000 of them concern the measures taken under the state of emergency.

Besides concluding a great number of individual applications relating to the emergency measures in a short time, the Court has also continued examining individual applications filed before the emergency period. In this scope, the Court delivered violation judgments in many human rights issues including but not limited to the right to life, the right to a fair trial, the right to respect for private life and the freedom of expression.

His Excellency Mr. President,

The individual application is a novel mechanism in our country. Five years' experience of this practice is of course important but does not suffice for

proper understanding as well as duly and effective implementation of this mechanism.

This novel mechanism has also brought the Constitutional Court's relation with the inferior courts to a different dimension. The requirement of exhaustion of ordinary administrative and legal remedies has, in practice, caused this mechanism to become a remedy which is resorted, to a large extent, against courts' decisions.

This situation leads to certain problems from time to time despite the implementation of the "subsidiarity principle" in a careful manner. Let me state right away that these problems are not peculiar to us, and similar situations are experienced by other countries adopting the individual application mechanism. Further, while introducing this remedy, the constitution-maker also foresaw that such kind of problems might have taken place; however, it noted that the individual application mechanism deriving from a social demand was a necessary institution which would improve and find its own course in progress of time.

As we have previously stated on different occasions, this mechanism has not transformed the Constitutional Court into an appellate authority. When examining applications, the Constitutional Court does not review lawfulness, appropriateness or fairness of decisions of inferior courts. The Constitutional Court's examination is limited to the determination as to whether a fundamental right safeguarded by the Constitution has been violated or not and, if violated, how it would be redressed.

As provided in the Constitution, the issues to be considered in appellate review cannot be examined within the scope of the individual application. Moreover, in cases where a violation is found, the law provides that no decision can be rendered on the merits of the case when ordering the required steps for redress of the violation.

In its judgment of 15 March 2018, the Constitutional Court also made an assessment as to how the ban of "appellate review" and "substantive review" should be interpreted. The Constitutional Court considers that this ban does not relate to the constitutional safeguards concerning fundamental rights but to the allegations of unlawfulness falling outside the scope of the individual application. Accordingly, "an assessment based on the safeguards provided

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in the Constitution as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated or not cannot be regarded as an assessment of an issue to be considered in 'appellate review' or as 'a substantive review'".

In the same judgment, it was also noted that otherwise, the Constitutional Court's power and duty to adjudicate individual applications would not be functional, and this would not be in conformity with the objective of this mechanism as an effective remedy in protecting fundamental rights.

At this point, the binding effect and execution of the Constitutional Court's judgments in the individual application arise as a matter of concern that needs to be addressed. As also underlined in the abovementioned judgment of the Court, pursuant to Article 153 of the Constitution, "the judgments of the Constitutional Court shall be binding on ... the legislative, executive and judicial bodies, administrative authorities, and natural and legal persons." This

is also a natural consequence of Article 11 of the Constitution in which the binding effect and supremacy of the Constitution are enshrined.

This provision, as distinct from Article 138 thereof that generally provides the binding effect of the court judgments, states that in addition to the legislative and executive bodies and administrative authorities, the judgments of the Constitutional Courts are binding on "judicial authorities" as well. Therefore, non-execution of the Constitutional Court judgments cannot be imagined in the presence of explicit constitutional provisions.

Indeed, the individual application mechanism can be considered as an effective remedy only if a found violation and its consequences are redressed. Undoubtedly, the discretionary power as to how the violation and its consequences will be redressed belongs, in principle, to the public authorities and especially to the inferior courts at first place. However, in some exceptional cases, the nature of the violation found may leave only one option

President Mr. Zühtü ARSLAN, delivering his speech at the Conference themed "The Role of the Higher Judiciary in Protecting the Rule of Law and Fundamental Rights" held in İstanbul between 14 and 16 December 2018 with the participation of the Constitutional and Supreme Courts/Councils of the Member/Observer States of the Organization of Islamic Cooperation

for the authorities to redress the consequences of the violation. In such cases, the Constitutional Court explicitly points out the measure for redressing the violation and its consequences, and the relevant authority employs that measure.

His Excellency Mr. President,

The Constitutional Court also takes into consideration the European Convention on Human Rights and its binding interpretation by the European Court of Human Rights when reviewing whether the constitutional rights and freedoms have been violated or not. As is known, Turkey, one of the founders of the Council of Europe, had been involved in the preparation process of the European Convention on Human Rights and was among the first countries to sign the Convention in 1950.

Taking into consideration the Convention and the case-law of the European Court of Human Rights in the individual application is not merely a preference but rather a constitutional requirement for at least three reasons.

First, in our country, the European Convention on Human Rights has been considered in drafting the constitutional provisions regarding the fundamental rights and freedoms, since the Constitution of 1961. This is especially the case for the constitutional amendments of 1995, 2001, 2004 and 2010. For example, the single-sentence stated reason of the amendment made in 2001 to Article 13 of the Constitution of 1982, which sets out the regime of restriction

of fundamental rights and freedoms, is that the provision "being rearranged in accordance with the principles set forth in the European Convention on Human Rights". Moreover, Article 15 of the Constitution, which lays out the principles and safeguards concerning the restriction of fundamental rights in times of emergency, almost repeats Article 15 of the Convention.

Second, Article 148 of the Constitution makes a clear reference to the European Convention on Human Rights in determining the rights and freedoms that may be subject to the individual application. Accordingly, the individual application is not a remedy applicable to all constitutional rights, but to the rights and freedoms falling into the common protection area of both the Constitution and the European Convention on Human Rights.

The third and practical reason for taking into consideration the case-law of the European Court of Human Rights is the function laid by the constitutionmaker on individual application. Indeed, both in the justification of the amendment made to Article 148 of the Constitution and in the Report of the Constitutional Committee it is clearly stated that the function of this mechanism is to "reduce the number of applications [to be lodged with the Strasbourg Court] and resolve the matters by means of the domestic law".

The implementation of this remedy over five years demonstrates that this aim has been achieved, and, following the launch of the individual application to the Constitutional Court, there has been a significant decrease in the number of applications lodged with the European Court of Human Rights, as well as in the number of violation judgments against our country. Besides, thanks to introduction of this mechanism, during the emergency period in the aftermath of the July 15th more than 100.000 applications have been brought before the Constitutional Court, either concluded or still pending, without resorting to the Strasbourg Court.

Thus, the individual application has made a significant contribution to the development of the democratic state of law in Turkey by enabling the redress of violations suffered by individuals without applying to an international court.

All these demonstrate that the individual application is a great achievement with respect to the protection of fundamental rights and freedoms. I have no doubt that the future generations will be grateful to those who introduced this mechanism into the constitutional system in 2010 and to those who contributed to its successful implementation.

His Excellency Mr. President,

A major part of the violation judgments rendered by the Constitutional Court relates to the right to a fair trial. This points out how essential an effective judicial system is in order to ensure the benefit expected from the individual application.

In this last part of my speech, I want to briefly mention the three virtues an ideal judicial system must have. An effective judicial system is based on three basic pillars: mind, morals and justice. Indeed, neither a judiciary nor a civilization can be envisaged without these notions.

The mind is one of the most important features that distinguish human being from other living creatures. The mind, which gives the ability to think and comprehend, provides human being with the knowledge of things. The mind requires responsibility, and therefore independence. For exactly this reason, Kant formulated the motto of the enlightenment as "dare to know/ have the courage to use your own understanding". As a matter of fact, those who cannot use their minds become the means and captives of the minds of others. In this context, the judicial mind entails the existence of free and independent consciences.

According to Ibn Rushd, good morals come first among the characteristic of an ideal judge. A judge with a bad moral character cannot act justly. Morality requires both insight and responsibility, which naturally necessitates the freedom. Those who do not have freedom do not have responsibility, either. Therefore, as the deceased Alija Izetbegović stated, "Morality is inseparable from freedom. Only free conduct is moral conduct."

In addition, freedom is also the distinctive feature of human dignity that constitutes the basic virtue of human and moral existence. Mehmet Tahir Münif Pasha, who lived in the last period of the Ottoman Empire, describes the relationship between freedom and human dignity very well in his book Hikmet-i Hukuk (Philosophy of Law) published in 1884. According to Münif Pasha, "Freedom is the witness of human dignity; if there is no liberty, there will be no dignity; the acts of a man who is deprived of his liberty are not his own acts."

Justice is the most fundamental value upon which the earth and the sky are built. "Justice", as again stated by Alija, "is one of those few things that need

no proof. To prove the need for justice and fairness is either superfluous for those who have a heart or useless for those who do not."

Therefore, we must talk about what justice requires, rather than the need for justice. Justice, in the simplest term, requires to provide everyone what they are entitled to and what they deserve.

In addition, justice is not a discourse, but a matter of action. Furthermore, it does not suffice "to provide everyone what they are entitled to and what they deserve" in establishing justice but it must also be known and visible that it has been done so. This is so because the observation and expression of justice strengthen the confidence in the State, on one hand, and in the judiciary that is in charge of dispensing justice, on the other.

His Excellency Mr. President,

Despite all difficulties and traumas that the judicial system has encountered in the aftermath of the coup attempt of the July 15th, 2016, the functioning of the judicial system, and in particular the functioning of the individual application mechanism, is valuable in itself. Certainly, as is also the case with other institutions, erroneous judgments may be rendered in the judiciary. However, such mistakes will be corrected within the judicial system, and indeed, they are being corrected.

Taking this opportunity, I extend my appreciation to all members of the judiciary who serve devotedly and deliver judgments "on behalf of the Turkish Nation" in accordance with the Constitution, and I wish them success in this onerous and honourable mission. I would also like to extend my special thanks to our Court's vice-presidents, justices, rapporteurs and assistant rapporteurs as well as all personnel at all levels for all their devoted efforts.

On this occasion, I would like to commemorate our late retired Justice and President of the Court of Jurisdictional Disputes, Mr. Ahmet Akyalçın. May God bless him and our other deceased members. I also wish good health and prosperity to all members of the Court.

Finally, I wish that the symposium that starts this afternoon on the theme of the assessment of the five years of the individual application be fruitful and successful. I would like to express in advance my thanks to all distinguished academicians and members of the judiciary who will contribute to this symposium with their presentations.

His Excellency Mr. President,

Esteemed Guests,

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

CHAPTER FIVE

LEADING JUDGMENTS/DECISIONS OF THE CONSTITUONAL COURT IN 2018

I. LEADING DECISIONS IN THE CONSTITUTIONALITY REVIEW PROCESS

1. Decision on certain provisions concerning the Turkey Wealth Fund

(E.2016/180, K.2018/4, 18 January 2018)

A. Transfer of surplus revenues, resources and assets in possession of the State institutions and organizations to the Turkey Wealth Fund or management of these by the Company shall be decided by "the Council of Ministers"

Grounds for the Request for Annulment

In the petition, it is maintained that the provision aims at engaging in portfolio management by liquidating the State assets, that these provisions do not serve the public interest, that the limits of the power delegated to the Council of Ministers has not been set, and therefore, it is unclear, that the resources to be collected and used amount to a secondary public financing pool (the secondary treasury) in the budget and public financial system, and that conferring this authority upon the Council of Ministers contravenes the budgetary right of the Parliament and the relevant constitutional provisions. In this respect, it has been argued that the provision in question is incompatible with Articles 2, 6, 7, 8, 87, 161 and 163 of the Constitution.

Contested Provision

Article 4 § 1 (b) of the Law provides that among the surplus revenues, resources and assets in possession of the State institutions and organizations, those decided "by the Council of Ministers" to be transferred to the Turkey Wealth Fund or to be managed by the Company shall be among the resources of the Fund. The phrase "...by the Council of Ministers..." set forth therein is the provision requested to be annulled.

The Court's Assessment

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

The contested rule empowers the Council of Ministers to decide on the transfer of surplus revenues, resources and assets in possession of the State institutions and organizations to the Turkey Wealth Fund in order to provide resource and financing for the Turkey Wealth Fund and the Company in the fastest manner.

Surplus revenues, resources and assets in possession of the State institutions and organizations are not needed for carrying out their main activities and services as set forth in their legislations. There is no doubt that the rule is intended on the one hand to make a contribution to the economy with surplus revenues, resources and assets in possession of the State institutions and organizations, and on the other hand to enable the Turkey Wealth Fund to gain strength in terms of resources and financing, thereby taking a more effective role in achieving the purposes desired.

In addition, the decisions to be taken by the Council of Ministers in accordance with the contested provision shall be subject to the audit of the administrative jurisdiction. Furthermore, regard being had to the fact that Article 6 of the Law stipulates a three-stage audit for the Company, sub-companies and sub-funds established pursuant to Law no. 6741, the public resources within this scope will not go without inspection.

The redundant revenues, resources and assets in possession of the State institutions and organizations may change depending on time and the economic, social and strategic situation and conditions of the country. As it is understood, upon determining basic rules, the legislator has conferred authority to make decisions to the executive body, in accordance with the changing situations and conditions. Therefore, because the contested rule determines basic rules and sets the limits of powers conferred upon the executive to make decisions on transfer or management of the revenues, resources and assets, it cannot be considered to be vague or in contradiction of the principle of non-transferability of legislative powers.

The issues that cannot be regulated with budgetary legislation are set forth in Article 161 of the Constitution. The fact that application of a provision will result in income or expenditure does not necessarily mean that the provision relates to the budget. The budgetary legislation regulates the appropriation amount allocated to the relevant institutions for the year and the expenditure procedures and principles; however, it cannot be said that all general and

abstract rules concerning appropriations are related to the budget. In this scope, the provisions pertaining to the rules concerning the disbursement or transfer of the appropriations allocated to the public institutions by budget cannot be considered to relate to the budget, and there is no constitutional obstacle for these issues to be regulated by non-budgetary law. Therefore, as the contested provision does not directly relate to the budget within the meaning of Article 161 of the Constitution, it does not contravene the provisions of the Constitution concerning the budget.

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

B. Non-application of the provisions of the Law on the Court of Accounts, dated 3 December 2010 and numbered 6085, to the Turkey Wealth Fund, the Company, the Sub-funds and Sub-companies

Grounds for the Request for Annulment

In the petition, it is maintained that the Company to be established by Article 6 of the Law, the other companies to be established by the Company, the Turkey Wealth Fund and the sub-funds affiliated to it must be audited by the Grand National Assembly of Turkey ("the GNAT") as they are established completely with the public assets and resources, that the auditing authority on behalf of the GNAT has been granted to the Court of Accounts by the Constitution, therefore, the Turkey Wealth Fund must be audited by the Court of Accounts; and that the audit procedure prescribed by the Law with respect to the Fund has no relevancy with the audits set forth in Articles 160 and 165 of the Constitution. In this respect, it has been argued that the provision in question is incompatible with Articles 2 and 160 of the Constitution.

Contested Provision

The contested rule sets forth that the provisions of the Law on the Court of Accounts, dated 3 December 2010 and numbered 6085, shall not be applied with respect to the Turkish Wealth Fund, the Company, the sub-funds and the other companies established by the Company.

The Court's Assessment

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

As it is understood, the Turkey Wealth Fund and the Company have significant financial and structural objectives and expectations, and, therefore, it has been granted a special status with exemptions and exceptions in many regards. They are subject to the provisions of the Turkish Commercial Code no. 6102, but they are not in the form of public corporation. A special procedure has been adopted for Turkey Wealth Fund and the Company in order to ensure the speed and manoeuvre abilities required by the market economy in achieving the objectives and expectations. In this context, the Fund, the Company, the sub-funds and the other companies to be established by the Company are not among the public administrations and the social security institutions using the central government budget that shall be audited by the Court of Accounts in accordance with Article 160 of the Constitution. In addition, the audit of those funds and companies have not been assigned to the Court of Accounts, as this decision remains within the discretionary power of the legislation. Furthermore, given the fact that the Fund and the Company in question do not receive a direct fund transfer from the general budget, the contested provision, which provides that the Law no. 6085 on the Court of Accounts shall not be applicable for the Turkey Wealth Fund, the Company, the sub-funds and the other companies established with a special status, does not violate Article 160 of the Constitution.

Article 6 of Law no. 6741 headed "Audit" provides that the Company, the other companies to be established by the Company, the Turkey Wealth Fund and the sub-funds to be established within the Turkey Wealth Fund are subject to independent audit, that the Company will comply with the institutional management regulations within the scope of the Capital Market Law no. 6362, that the independently audited annual financial statements and operations of the Company, the other companies to be established by the Company, the Turkey Wealth Fund and the sub-funds shall be audited by at least three central audit personnel assigned by the Prime Minister, who are experts in the fields of capital markets, finance, economy, treasury, banking and development, pursuant to the independent audit standards, that the report to be drafted as a result of the audit shall be presented to the Council of Ministers annually by the end of June, that the financial statements and operations of the Company, the other companies to be established by the Company, the Turkey Wealth Fund and the sub-funds in the previous year shall be audited each year in October, based on the audit reports drafted by the Planning and Budget Commission of the Grand National Assembly of Turkey within the scope of Article 6 §§ 1 and 2 of Law no. 6741.

As it is understood, the audit in question is assigned to the Grand National Assembly of Turkey with respect to the Turkey Wealth Fund and the sub-funds. In this respect, the principles pertaining to the audit to be carried out by the Grand National Assembly of Turkey, as set forth in Article 165 of the Constitution, shall be regulated by law.

Furthermore, certain provisions of the Capital Market Law no. 6362, being in the first place Article 14 therein, contain detailed regulations concerning independent audit. Pursuant to Article 6 of Law no. 6741, the Company will comply with the institutional management regulations in this scope. Accordingly, as Law no. 6741 and the other relevant laws contain detailed regulations regarding multi-faceted and effective audit of the Fund, the Company, the sub-funds and the other companies to be established by the Company that have been excluded from the audit of the Court of Accounts in accordance with the contested provision, it cannot be said that they shall not be subject to audit or that the audit in question is insufficient. In addition, pursuant to Article 160 of the Constitution, it is at the discretion of the legislator to assign audit duty to the Court of Accounts and determine the scope of the audit. In this context, the fact that the legislator has stipulated an audit procedure other than the audit by the Court of Accounts with respect to the Fund, the Company, the sub-funds and the other companies to be established by the Company does not violate Article 2 of the Constitution.

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

2. Decision on the rule exclusively authorizing the First Instance Civil Boards of the Turkish Football Federation to resolve certain disputes

(E.2017/136, K.2018/7, 18 January 2018)

Grounds for the Request for Annulment

In the petition, it is maintained in brief; that the contested provision exclusively authorizes the first instance civil boards established within the TFF to resolve the disputes falling into the scope of their duties and authorities; that according to Article 59 of the Constitution, only the decisions of sports federations relating to administration and discipline of

sportive activities must be challenged through compulsory arbitration; that the disputes related to the rights arising out of the football contracts do not fall into this scope and according the general provisions, they must be examined by judicial authorities; that this issue is clearly set forth in the reasoning of the amendment made to Article 59 of the Constitution; that however, it is provided in the contested provision as well as in the Dispute Resolution Board Instruction that the disputes related to the rights arising out of the football contracts may only be resolved through arbitration; and that therefore, the disputes in question have been excluded from judicial examination. In this context, it is claimed that the contested provision is in breach of Articles 9, 10, 11, 36, 59 and 142 of the Constitution.

Contested Provision

According to the contested provision, the first instance civil boards of the Turkish Football Federation (TFF) are exclusively authorized to make decisions concerning the club licence as well as to resolve the disputes related to the Law, the TFF Statute, instructions and regulations of the TFF and decisions to be taken by the other authorized boards and bodies of the TFF.

The Court's Assessment

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

One of the basic principles of a state governed by rule of law that is set forth in Article 2 of the Constitution is "certainty". According to this principle, legislative regulations must be clear, precise and enforceable, avoiding any hesitation or doubt on the part of both individuals and the administration.

Considering the difficulty of enumerating all types of disputes falling into the scope of a law exclusively and the possibility of missing out certain issues, deferring the details to further specific regulations would not contravene the principle of certainty as long the basic rules are determined by the legislator. In that case, the basic rules set out in the legislation must be as such to provide sufficient guidance for determination of details.

In the contested provision, a reference is made to the TFF Status and the instructions and regulations of the TFF for determination of the disputes falling into the scope of the duties and authorities of the first instance civil

boards, therefore, the determination of the scope of the disputes is left to the will of the TFF. Also, given the fact that the regulations in question may always be amended by the TFF, there might be a change in the scope of the disputes excluded from judicial examination at the will of the TFF. In this respect, the provision is not definite and foreseeable for individuals.

In addition, one of the main elements of the freedom to claim rights is the right of access to a court. This right comprises the right to bring a legal dispute before a court authorized to give a decision on the matter.

However, Article 13 of the Constitution provides that the 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 essence.

The Constitutional Court reiterated in its judgment dated 6 January 2011 and numbered E.2010/61, K.2011/7 that the legislator may impose an obligation to apply to the Arbitration Board before applying to the competent court in order to resolve the disputes in the field of football, and that, however, after this stage, the judicial remedy must be accessible to the party who were not satisfied with the decision. The Court therefore annulled the relevant part of Article 6 § 4 of Law no. 5894 regulating the duties and authorities of the Arbitration Board, where it was provided that the decisions of the Arbitration Court cannot be challenged through judicial remedies, on the ground that the relevant provision was in breach of Articles 9 and 36 of the Constitution.

Following this judgment of the Constitutional Court, an amendment was made to Article 59 of the Constitution with Law no. 6214 and it has been provided that the decisions of sports federations relating to administration and discipline of sportive activities may be challenged only through compulsory arbitration and that the decisions of the Board of Arbitration are final and shall not be appealed to any judicial authority.

Taking together the contested provision, which stipulates that the first instance civil boards are exclusively authorized, and the second sentence of Article 59 § 3 of the Constitution, which provides that the decisions of these boards shall not be appealed to any judicial authority, it is understood that the first instance civil boards are the only authorities with regard to the relevant disputes and that the issues falling into the scope of the duties and

authorities of the first instance civil boards cannot be challenged through any legal remedy other than arbitration.

Although Article 59 of the Constitution stipulates that the decisions of sports federations relating to only administration and discipline of sportive activities may be challenged through compulsory arbitration and that the decisions of the Board of Arbitration shall not be appealed to any judicial authority, the contested provision does not set forth such a distinction. The fact that the first instance civil boards are exclusively authorized to settle all disputes arising out of the decisions of the boards and bodies of the TFF and that the decisions of the first instance civil boards cannot be appealed to any judicial authority, as set forth in the relevant legislation, do not comply with the procedure enshrined in Article 59 of the Constitution. In addition, the right of access to a court on the part of the relevant parties is prevented and the essence of the freedom to claim rights is impaired.

In view of the reasons explained above, the contested provision is in breach of Articles 2, 13, 36 and 59 of the Constitution. Therefore, it is annulled.

3. Decision annulling the provision that renews restriction time on the immovables allocated for public use through zoning practices

(E.2016/196, K.2018/34, 28 March 2018)

Contested Provision

Article 18 of the Zoning Law no. 3194 and dated 3 May 1985 sets forth that if the total of land readjustment shares is less than the total surface of lands required to be allocated for public use, the municipality or the governor's office shall complement the missing surface of land by way of expropriation.

Article 10 of the same Law envisages that such lands allocated for public use shall be expropriated by the relevant public agencies within five years; and that funds necessary for expropriation shall be assigned to the annual budgets of expropriating agencies.

In Additional Article 1 of Law no. 2942, it is set out that the five-year period shall start running from the date when zoning plans take effect. This article imposes on the administration an obligation to expropriate immovables use

of which are legally restricted or to amend zoning plans to the extent that would remove the restriction impeding the enjoyment of the right to property within this five-year period. It is also set forth that in case of non-fulfilment of these procedures within that period, the property owner may bring an action against the relevant expropriating administration after applying to the administration and upon the expiry of the mediation process.

In the contested Provisional Article 11 of the same Law, it is envisaged that as regards the immovables which fall into the scope of the Additional Article 1 and use of which are legally restricted before the entry into force of Article 11, the said five-year period shall start running from its entry into force. Expiry of the five-year period is prescribed as a pre-requisite for bringing an action against the appropriation of immovable by way of zoning. In the second paragraph of the contested provision, it is set forth that the Additional Article 1 § 3 of this Law shall also apply to proceedings with regard to immovables that are under the scope of this article.

The contested provision leads to non-consideration of the restriction periods elapsed before its entry into force. Therefore, this legal arrangement resets the beginning of the five-year period to apply to the administration and to bring an administrative action for the enjoyment of rights granted by Additional Article 1 of the Law to the property owners as regards the immovables on which certain restrictions are already imposed.

Grounds for the Request for Annulment

In brief, it is maintained in the requests for annulment that the contested provision, which impedes reaching a decision on the merits of pending cases and leads to prolongation of restrictions imposed on the right to property, impairs the right to property, the right to legal remedies and the principle of state of law; and that it is therefore in breach of Articles 2, 5, 9, 35 and 36 of the Constitution.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

Upon being ratified, zoning plans bear legal consequences in respect of the administration and individuals. The ratified zoning plans introduce the obligation, especially for all zoning and construction activities to be carried

out within an area, to act in accordance with zoning plans and programs, to obtain permission from the relevant administration for all types of construction and to construct buildings in compliance with the rules set in the permission. As a matter of fact, allocation of immovables for public use in a zoning plan does not remove the right to property as neither expropriation nor de facto appropriation has been made. However, such allocations restrict, to a significant extent, the owner's powers inherent in his right to property. In this respect, allocation of an immovable as public area not only make construction on the land unfeasible but also adversely affects its market value and related transactions such as its sale, donation or establishment of limited property rights on it. Therefore, it is explicit that zoning practices and, in this context, designation of immovables as public area constitute an interference with the right to property.

The right to property prescribed in Article 35 of the Constitution is not an unlimited right and may be restricted by law in pursuit of the public interest. When interfering with this right, Article 13 of the Constitution, which sets out general principles as regards the restriction of fundamental rights and freedoms, must be also taken into consideration.

As set forth in Article 35 of the Constitution, the right to property may be restricted only for the objective of the public-interest. There is no doubt that allocation, by zoning plans, of certain parts of immovables for public use in the course of land arrangements pursues the public interest objective.

However, the interference with the right to property must not only pursue an aim in the public interest but also be proportionate. The principle of proportionality consists of three sub-principles namely efficiency, necessity and commensurateness.

It cannot be said that land and lot arrangements in order to ensure planned and orderly urbanization and, to that end, allocation of necessary immovables for public use are inefficient means in terms of the contested provision. In addition, public areas are necessity for people in a neighbourhood for socializing. Therefore, it can neither be said that the interferences with the right to property by way of allocation of immovable for public use within the scope of the contested provision are unnecessary.

However, it must be also examined whether the interference caused by the contested provision is commensurate or not. An excessive and

incommensurate burden must not be imposed on the property owner by way of allocating immovable as public area through the zoning practices.

The legislator prescribes five years for completing the expropriation procedure for the reason that zoning practices cover large areas and with the intent of assigning adequate funds for the expropriation. The legislator has discretionary power as regards such interferences with the property. Within the scope of this power, the property owner may be expected to bear such restrictions for a reasonable and defined period of time due to factual and legal difficulties in realization of the public interest at stake. However, prolongation of this restriction would increase the burden imposed on the property owner. Besides, the failure to provide the property owner with any redress which could cover the damage sustained due to such prolongation would also lead to imposition of an excessive burden on the property owner.

In the contested provision, it is envisaged that the five-year period prescribed for the restriction imposed within the scope of zoning practices shall re-start from the date the provision takes effect. In other words, the provision results in renewal –therefore in prolongment– of the five-year period required to elapse for the property owner, who is restricted from enjoying his right to property, to receive expropriation payment or to re-enjoy his right to property through removal of the restriction. The legislator has not introduced any arrangement for redressing or eliminating the damages sustained by the property owner due to this period. Besides, no legal provision has been envisaged for consideration of damages arising from the owner's deprivation of the use of property during restriction period. In addition, the contested provision leads to non-consideration of the restriction periods elapsed prior to its entry into force, which results in an excessive burden on the property owner and upsets the fair balance required to be struck between the public interest and the owner's right to property to the detriment of the property owner. Therefore, the interference stipulated by the contested provision with the right to property is not commensurate and therefore contravenes the principle of proportionality.

For the reasons explained above, the Court annulled the first paragraph of the contested provision for being contrary to Articles 13 and 35 of the Constitution and thus its second paragraph which is no longer applicable due to the annulment of the first paragraph.

4. Decision annulling the provision which exempts the administration from liability for certain measures

(E.2018/2, K.2018/43, 2 May 2018)

Contested Provision

According to the first and second sentences of Article 26 § 5 of Law no. 5996; despite scientific uncertainties, if a food or feed is assessed to pose risk of harm on health based on available information, the Ministry of Food, Agriculture and Livestock ("the Ministry") may apply precautionary measures such as suspending the production or delivery of the food or feed or its recall from the market until further scientific data is gathered to enable a comprehensive risk assessment. The contested third sentence therein provides that the Ministry cannot be held liable for the consequences of these measures and that no compensation can be requested from the Ministry.

Grounds for the Request for Annulment

In the petition, it is maintained that the contested provision, which provides that the administration cannot be held liable, is in breach of Articles 2 and 125 of the Constitution.

The Court's Assessment

Article 125 § 1 of the Constitution provides that recourse to judicial review shall be available against all actions and acts of the administration, and Article 125 § 7 provides that the administration shall be liable to compensate for damages resulting from its actions and acts. Thus, the administration's adherence to the law has effectively been ensured by virtue of judicial review and those subject to administration have been protected against unlawful and arbitrary acts of the administration. Administrative acts and actions cannot be excluded from judicial review, save for the exceptional cases listed in the Constitution.

This provision of the Constitution requires that the judicial authorities must examine and decide whether the administrative acts and actions of the competent administrative bodies to carry out public services have been performed in accordance with the rules and procedures stipulated by the law, as well as in line with the purpose of the law.

The measures such as "suspending the production or delivery of a food or feed or its recall from market", which are exempted from administrative liability by the contested provision, are administrative acts.

In the contested provision, although there is no specific expression that the precautionary measures of the Ministry cannot be subject to judicial review, it is provided therein that the Ministry cannot be held liable for the application of the precautionary measures and that no compensation can be requested from the Ministry. Therefore, in cases to be filed on account of the precautionary measures in question, the review of the lawfulness of the administration's acts will be prevented and they will implicitly be excluded from judicial review.

In addition, although it is provided in the Constitution that the administration shall be liable to compensate for damages resulting from its actions and acts, the contested provision, which excludes such acts and actions from judicial review, also fails to ensure compensation for the damages resulting from the precautionary measures applied by the administration.

In view of the reasons explained above, the Constitutional Court has annulled the contested provision that is found to be in breach of Article 125 of the Constitution.

5. Decision dismissing the request for annulment of certain provisions of the Election Law

(E.2018/69, K.2018/47, 31 May 2018)

A. Registration of the Voters Living in the Same Building in Different Polling Stations

Contested Provision

According to the contested provision, the voters living in the same building may be registered in different polling stations, on the condition that their household's entirety is protected and that they remain within the same electoral district.

Grounds for the Request for Annulment

In the petition, it is maintained that the contested provision eliminates the possibility for the voters who live in the same building and know each other

to check the voter lists and causes difficulties in accessing ballot boxes. Therefore, it is in breach of Articles 67 and 79 of the Constitution.

The Court's Assessment

The expression of "in conformity with the conditions set forth in the law" in formulation of the right to vote and to be elected in Article 67 points out that the exercise of these rights might be subject to certain conditions and regulations. The laws in accordance with Article 67 must also be in conformity with Article 13 of the Constitution, which sets out the legal regime for restricting fundamental rights and freedoms.

The contested provision empowers the authorities with discretion to register voters living in the same building in different polling stations. However, the provision entails two conditions. Although the voters who live in the same building may be registered in different polling stations, the entirety of their households must be protected and these different polling stations must be within the same electoral district.

According to Article 4 of Law no. 298, it is clear that each neighbourhood shall be regarded as one electoral district, and that given that the voters living in the same house will be registered in the same polling station, registration of the voters living in the same building in a different polling station in the same neighbourhood cannot be considered as an arrangement which hinders the right to vote or restricts it to the extent that renders it futile.

Furthermore, it cannot be said that registration of the voters who live in the same building in different polling stations would cause exposure of electoral choices of voters and therefore would adversely affect vote of their own free will. Consequently, the contested provision does not contravene the principle of free election.

Consequently, the Court has dismissed the annulment request as it has found no violation of Articles 13, 67 and 79 of the Constitution.

B. Relocation of the Ballot Boxes for Election Safety

Contested Provision

The contested provision stipulates that in cases where it is considered necessary for election safety and the Governor or the Head of the Provincial

Security Directorate makes a request at least a month before the election date, the Supreme Election Board (YSK) shall have discretion to decide on relocating the ballot boxes to the nearest electoral district, merging the electoral districts and making mixed lists of voters–except for elections of neighbourhood head.

Grounds for the Request for Annulment

In the petition, it is maintained that the contested provision grants a wide discretion to the administration which would make it difficult to access the ballot boxes and to audit electoral process is in breach of Articles 7, 13, 67 and 79 of the Constitution.

The Court's Assessment

As the contested provision grants power to the YSK that may subject a voter to a ballot box that is located in a different and farther place from the default, it is clear that exercise of this power will result in the restriction of the right to vote.

The reason for this restriction is the safety of election.

However, it does not suffice that the restriction on the right to vote pursues a legitimate aim, it must also be proportionate.

It is explicit that it is the State's duty to remove the obstacles before the exercise of the right to vote; and that in this context, it is a requisite to take necessary measures in respect of difficulties likely to occur in case of relocation of ballot boxes and merging of ballot boxes or electoral districts. Besides, ballot boxes may not be relocated to any electoral district but only to the closest electoral districts (neighbourhood unit). Electoral districts may be merged only when they are within the same electoral constituency. Moreover, the measures specified in the provision may be resorted only if required for securing the safety of elections and in proportion to the gravity of the threat to electoral safety. Therefore, it has been concluded that the restriction envisaged in the contested provision on the right to elect is proportionate and does not impose an excessive burden on individuals.

For the reasons explained above, the Constitutional Court found that the contested provision is not contrary to Articles 7, 13, 67 and 79 of the Constitution and dismissed the request for its annulment.

C. Validity of Ballot Papers and Envelopes Not Bearing the Seal of Balloting Committee

Contested Provision

In the last paragraph of Article 98 § 4 of Law no. 298, it is set out that ballot envelopes bearing no seal of the balloting committee shall be deemed valid if they bear the YSK's watermark and logo as well as the seal of the district election board. The phrase of "...in spite of not bearing..." in the said sentence constitutes the contested provision.

In the sub-paragraph 7 added to Article 101 § 2 of Law no. 298, it is set forth that if ballot papers sent by the authorized election boards and bearing the YSK's watermark have no seal on the reverse side due to negligence of the balloting committees, they shall not be deemed invalid. The phrase of "if ballot papers ... have no seal on the reverse side due to the negligence of the balloting committees" constitutes the second contested provision.

Grounds for the Request for Annulment

It is maintained in the requests for annulment that the contested provisions deem sufficient the YSK's watermark and logo as well as the seal of the district election board, however, these cannot afford the assurance provided by seal of the balloting committee– and the provisions are incompatible with the principles of free election and fairness and therefore in breach of Articles 67 and 79 of the Constitution.

The Court's Assessment

The principles of free election and electoral fairness necessitate not only establishment of an environment that enables voters to cast a vote of their own free will but also taking of measures to secure and soundly determine the electoral results. The measures to be taken in this respect are within the discretionary power of the legislator. However, such measures must be efficient and sufficient for securing, sound determination and materialization of the voters' free will.

The contested provisions do not abolish the requisite that ballot envelopes bear the seal of the balloting committee but introduce an exception to this requisite only under certain circumstances. The legislator has introduced the

contested provision by considering that the voters must not be burdened with the consequences to occur due to negligence on the part of the balloting committee. Nevertheless, head and members of the balloting committee are still liable for non-fulfilment of their legal obligation to seal the ballot papers and envelopes.

Moreover, it appears that further measures with regard to pre-, during and post-election period are introduced in Law no. 298 in order to ensure securing and sound determination of the voters' will.

Considering all measures envisaged for securing, sound determination and materialization of the voters' will, particularly the measures concerning each electoral stage to prevent electoral fraud and infraction such as use of forged ballot papers or change of ballot papers and also the watermark and logo of YSK as well as seal of the district election board on ballot envelopes, it has been concluded that accepting as valid the ballot envelopes lacking the balloting committee's seal is not in contradiction with the principles of free election and electoral fairness.

For the reasons explained above, the Court concluded that the contested provisions are not contrary to Articles 67 and 79 of the Constitution and accordingly dismissed the requests for annulment.

6. Decision dismissing the request for nullification of the name and logo of the Workers' Party of Turkey and its erasure from registry

(E.2018/1 (Miscellaneous Work), K.2018/9, 21 June 2018)

Ground for the Request

The Chief Public Prosecutor's Office of the Court of Cassation requested the nullification of the name and logo of the Workers' Party of Turkey and its erasure from registry for being essentially the same of a party which was permanently dissolved by the Constitutional Court.

The Court's Assessment

The principle, which sets out that political parties cannot use the names of the political parties that have been permanently dissolved by the Constitutional

Court and that they cannot declare themselves to be the continuation (follower) of the dissolved parties, was introduced through the amendment to Article 96 of the Political Parties Act no. 2820 by Article 8 of the Law no. 3821. This principle took effect on 3 July 1992. As such a prohibition was not previously in force, a new party was founded in 1975 under the name of the Workers' Party of Turkey that was dissolved by the Constitutional Court in 1971. However, it was then dissolved, along with the other parties, by virtue of the Law on the Dissolution of Political Parties numbered 2533 and dated 16 October 1981.

Therefore, the Workers' Party of Turkey is a political party that was dissolved by the Law no. 2533 issued by the National Security Council. The Law no. 3821 allows for the re-foundation of political parties dissolved by virtue of the Law no. 2533 and for use –by the other parties– of names, logos and emblem of the parties that are founded outside of a specified period. Regard being had to the explicit authorization in the Law no. 3821, there is no obstacle for the Workers' Party of Turkey founded in 2017 to use the name and logo of the Workers' Party of Turkey which was dissolved by the Law no. 2533.

For the reasons explained above, the Court rejected the request for the nullification of the name and logo of the Workers' Party of Turkey and its erasure from registry.

7. Decision dismissing the request for annulment of certain provisions including the Rules on the Utilization of Public Housing

(E.2018/7, K.2018/80, 5 July 2018)

A. Paragraph added to Article 6 of Law no. 3213 by Article 47 of Law no. 7061

Contested Provision

The contested provision stipulates certain incentive rules for the mining activities to be carried out in public forests and vests the Council of Ministers with the power to make decisions as incentives.

Grounds for the Request for Annulment

It was maintained that with the contested provision; certain amounts to be paid to the public administrations due to the mining activities carried out in

forests would not be charged or less amounts would be charged; this situation would lead to a rapid decline in forests as well as to environmental pollution, contrary to the fundamental aims and duties of the State; and the executive authority was vested with a power in an unspecified area with no definite borders. In this scope, it was claimed that the abovementioned situations did not comply with the principle of certainty which is a requirement of the rule of law and that therefore the contested provision was in breach of Articles 2, 5, 56 and 169 of the Constitution.

The Court's Assessment

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

Pursuant to Article 169 of the Constitution, the State shall be entrusted with the duty to enact the necessary legislation for the protection and extension of forests. Acts and actions that might damage forests shall not be permitted. In addition, public forests shall not be subject to easement, unless the public interest is served.

It is at the discretion of the legislator to decide on certain incentives for spread and development of mining activities and to determine the scope and nature of these incentives, provided that the constitutional principles and rules are complied with. Review of whether the public interest will be served with the regulations in this respect or the extent to which it will be served falls into the scope of substantive review, but not the constitutional review.

According to the reasoning of the relevant article, the contested provision aims at making the mining site tenders and investments attractive and improving the investment environment. In accordance with this expression, it cannot be said that the contested provision pursues a special purpose other than the public interest.

While the contested provision encourages mining, it also ensures the protection of forests and environment by preserving the public interest and the necessity elements required for carrying out mining activities in public forests and §by prescribing that the forestation price required for afforestation of the permitted area shall be collected in any case. Thus, the legislator has struck a balance between the two conflicting public interests.

The contested provision does not prevent the conduct of mining activities in forests under certain conditions and within certain limits stipulated in the

legislation concerning these activities. Nor does it prevent the collection of the forestation price in any case or collection of a deposit payment as a guarantee for securing the mineral rights duty and additional mineral rights duty, as well as the debts and commitments stated in the written contract. In addition to these, also considering that the expenses related to the protection and reclamation of the forests may also be covered by the appropriations to be specified in the budget laws, it cannot be said that the rules, which are laid down by the legislator and stipulate certain incentives that vary according to the characteristics of the mining sites and are set for a definite period of time, do not comply with the State's obligation to protect and improve the forests and the environment.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution, and therefore dismissed the request for annulment.

B. Paragraph added to Article 4 of Law no. 4706 by Article 58 of Law no. 7061

Contested Provision

The contested provision provides that except for those used by the officials holding office in defence, security, judicial and intelligence services, the public housing owned or utilized by the general public administrations, the revolving funds, the funds, other public administrations established under special laws -except for the professional organizations with public institution status-, the state economic enterprises and their subsidiaries and establishments, as well as, the other associations and companies, more than 50 percent of whose funds are publicly owned, shall be introduced into the economy. In this scope, the incumbent administrations shall be authorized for conducting any acts and actions regarding the housing owned by the local administrations, while the Ministry of Finance shall be authorized regarding the others.

Grounds for the Request for Annulment

It was maintained; that there was no public interest in selling the public housing; that the concepts specified in the provision were not clear and understandable; that thus, the contested provision vested the Ministry of Finance with an indefinite discretionary power –the basic principles and framework of which was not determined and which may be used arbitrarily– concerning the public housing. It was therefore claimed that the contested provision was in breach of Articles 2, 6, 7, 8, 123 and 127 of the Constitution.

The Court's Assessment

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

The institutions whose public housing will be introduced into the economy, the manner of this process and the competent administrations are clearly specified in the contested provision which includes no uncertainty. Therefore, the provision is not in breach of the principles of legal certainty and inalienability of the legislative power.

It is at the discretion of the legislator to extend or reduce the allocation and use of public housing and to envisage different regulations in this respect by considering certain services, provided that the principles and rules set out in the Constitution are complied with. In the constitutionality review of such regulations, the Constitutional Court confines itself to examine whether the relevant provision serves the public interest.

Regard being had to the reasoning of the relevant article, it appears that the contested provision pursues no special purpose other than the public interest.

Besides, it is at the discretion of the legislator –as a matter of political preference– to decide whether the introduction of the public housing into the economy complies with the requirements of the public sector and serves the public interest. Thus, this issue falls into the scope of substantive review, but not the constitutional review.

Given the contested provision, it cannot be said that introducing into the economy the public housing which is afforded to the personnel as an estate opportunity and does not have a direct relation with the fulfilment of the local services for which they are responsible as part of their duties constitutes an interference with the financial autonomy of the local administrations. Besides, regard being had to Article 4 § 7 of Law no. 4706 which provides that the revenue to be obtained by selling the public housing shall be recorded as revenue in the relevant administration's budget, it is understood that there will be no decrease in the assets of the local administrations. The introduced regulation solely provides that the real properties shall be turned into cash.

The issue as to the introduction into the economy of the public housing owned or utilized by the decentralized administrations is also at the discretion of the

lawmaker, therefore it is clear that the provision as to the introduction of the public housing into the economy does not affect the autonomy of the relevant institutions and is not in breach of the Constitution.

In addition, although it was maintained that the contested provision was in breach of the principle of the integrity of the administration, which represents the relationship between the central administration and the decentralized administrations, as well as the authorities granted to the central administration in this respect, it is clear that the contested provision, which grants no authority to the central administration in this respect and which stipulates that, save for exceptions, the public housing owned or utilized by the central administration and the decentralized administrations shall be introduced into the economy, is not contrary to the principle of the integrity of the administration enshrined in Article 123 of the Constitution.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution, and therefore dismissed the request for annulment.

C. Provisional Article added to Law no. 4749 by Article 71 of Law no. 7061

Contested Provision

The contested provision stipulates that the net debt utilization amount applicable in 2007 –being effective as of 1 January 2017– shall be calculated by adding 37 billion Turkish liras (TRY) to the net debt utilization amount increased by the Minister and the Council of Ministers to which the Undersecretariat of Treasury is attached.

Grounds for the Request for Annulment

It was maintained that with the contested provision; the executive authority was allowed to use additional borrowing irrespective of the income and expense figures set out in the budget; while the authority to use additional borrowing should have been granted to the executive authority by the additional budget law, it was granted by an ordinary law, which was contrary to the budgetary discipline; the accountability was prevented; arbitrary expenditures were encouraged; and the power of the purse enjoyed by the Grand National Assembly of Turkey ("the GNAT") was taken away. In this scope, it was claimed that the contested provision was in breach of Articles 2, 87, 161 and 163 of the Constitution.

The Court's Assessment

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

The net debt utilization limit shall be determined by taking into consideration the original appropriations set out in the budget law of the year and the estimated revenues. It is not directly specified in the budget law. In fact, it is prescribed in Article 5 of Law no. 4749, which is general and not provisional, that the said limit shall be determined according to the budget law of the year.

Although the amounts of the original appropriations of the year, as well as the estimated revenues shall be determined by the budget laws, general and abstract rules regarding the determination of the net debt utilization limit are not required to be included in the said law.

Accordingly, the provision which prescribes that the net debt utilization amount shall be increased for 2017 is not in contradiction with the budgetary provisions of the Constitution.

In addition, pursuant to Law no. 6085 on Turkish Court of Accounts of 3 December 2010, all types of domestic and foreign borrowing on the part of the public administrations shall be audited by the Court of Accounts. The contested provision which has introduced no amendment in this respect cannot be said to prevent accountability and to encourage arbitrary expenditures.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution, and therefore dismissed the request for annulment.

8. Decision annulling certain provisions of the Law on the Establishment of the Turkish-Japanese Science and Technology University

(E.2017/144, K.2017/179, 5 July 2018)

The Agreement on the Establishment of the Turkish-Japanese Science and Technology University in the Republic of Turkey was signed by and between the Turkish Government and the Japanese Government on 30 June 2016. The

Agreement was ratified by the Grand National Assembly of Turkey by Law no. 6742 and dated 19 August 2016.

In addition to the Agreement on the Establishment of the University and Law no. 6742 ratifying the Agreement, the issues concerning the establishment of the University and the Foundation are regulated by Law no. 7034.

Therefore, there is no obstacle before the judicial review of the impugned provisions which were enacted independently of the Agreement and the Law ratifying the Agreement.

A. Article 6 of Law no. 7034

Contested Provision

In the impugned provision, it is set forth that the Travel Expense Law, the Press Announcement Agency Law, the Vehicle Law, the State Procurement Law, the Public Procurement Law, the Public Procurement Contracts Law, the Public Housing Law, the Public Finance Management and Control Law, the Law on the Court of Accounts as well as the Decree-Law no. 631 whereby financial and social rights of public officials are regulated shall not apply to the University and the companies founded by the University as well as subsidiaries and affiliates that are affiliated to them for directly or indirectly holding shares therein.

Grounds for the Request for Annulment

In the petition, it is maintained that although Article 130 of the Constitution explicitly sets out that universities and their attached units are under the supervision and inspection of the State, the Turkish-Japanese Science and Technology University (University) and its affiliates are exempted from the State's inspection; that the University is thereby given independence, which is beyond autonomy; and that this has caused inequality between the University and the other State universities. It is accordingly claimed that the provision is in breach of Articles 10 and 130 of the Constitution.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

In Article 1 of the Agreement on the Establishment of the Turkish-Japanese Science and Technology University, it is set forth that the University shall

be established as a State university. Accordingly, the said University is subject to regulations that are concerning institutions of higher education and prescribed in Article 130 of the Constitution. In this sense, the State has supervision and inspection authority over the University, as it is over the other universities.

There is no constitutional provision which necessitates implementation of the laws specified in the impugned provision in exercising of this authority by the State. Nor is there any constitutional exigency which requires the Court of Account to have the task of supervising the lawful use of the public funds transferred to the University.

The University is exempted from the laws specified in Article 6 of the Law for being established on the basis of an international agreement. Such exemption is within the legislator's discretionary power, and therefore, no aspect of the disputed provision is found unconstitutional.

For the reasons explained above, the Court found that the contested provision was not contrary to the Constitution and accordingly dismissed the request for its annulment.

B. Article 7 of Law no. 7034

Contested Provision

In the impugned provision, it is set forth that budget of the University and other issues as to financial management shall be regulated by the University.

Grounds for the Request for Annulment

In the petition, it is maintained that the disputed provision is in breach of Articles 10 and 130 of the Constitution for the same grounds raised as regards Article 6 of the Law.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

Although it is possible to exempt the University from certain laws for being established on the basis of an international agreement, basic rules are to be regulated by law in order for the State to perform its task to inspect and supervise the University, as a requirement of Article 130 of the Constitution.

By virtue of the Agreement, the University is exempted from all applicable legislation on higher education and the University Council is entitled to make all internal regulations with respect to academic, financial and administrative issues of the University. It is exempted from the State's inspection and supervision in terms of financial issues including the budgetary approval and control process.

Establishment of the university by virtue of an international agreement does not eliminate the requirement that the provisions of its law must comply with the constitutional provisions regulating the institutions of higher education and superior bodies of these institutions.

Accordingly, the impugned provision has caused deviation from the system prescribed in the Constitution for university budgets and exempted the University from the State's supervision and inspection, which is incompatible with the provisions concerning the institutions of higher education and enshrined in Article 130 of the Constitution.

Therefore, the Court found the contested provision unconstitutional and annulled it.

C. Provisional Article 1 § 2 of the Law

Contested Provision

In the impugned provision, it is set forth that immovables registered in the name of the Treasury –including those classified as forests– are deemed to have been allocated, free of charge, to the University without the need for any further action.

Grounds for the Request for Annulment

In the petition, it is maintained that allocation of forest land to the University by virtue of the provision, without designating the terms of use and prescribing any guarantee for the protection of the forest land, will cause deforestation on forest lands that are under the State's protection; and that there is no exigency requiring the allocation of the forest land to the University. It is accordingly alleged that the contested provision is in breach of Articles 2 and 169 of the Constitution.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

In principle, Forest Law no. 6831 prohibits any construction on forest lands. Pursuant to Article 169 of the Constitution, buildings and facilities that are subject to easement may be constructed on public forests only on condition that allocation of these forest lands to such services is necessitated by public interest. It is clear that there is a public interest in allocation of the forest land to the University for educational purposes. However, the existence of public interest is not per se sufficient for the use of forest lands for another purpose. In this regard, the public interest in construction of buildings and facilities belonging to the University on public forests must also necessitate the allocation of the forests to these services.

The impugned provision does not include any exigency in this respect but only prescribes allocation of immovables of the Treasury, which are classified as forests, to the University. Accordingly, the University may use the forest land either by preserving its original form as a forest or for another purpose without any exigency. Therefore, use of the allocated forest land for another purpose is completely left to the discretion of the University.

Allocation, to the University, of the forest lands belonging to the Treasury without setting any exigency criterion is incompatible with the State's liability to protect and extend forests that is enshrined in Article 169 of the Constitution.

For the reasons explained above, the Court found the contested provision unconstitutional and annulled it.

9. Decision annulling the sentence added to the Law on Opticianry

(E.2018/15, K.2018/78, 5 July 2018)

A. Phrase in Provisional Article 4 § 2 of the Law

Contested Provision

The provision including the contested phrase sets forth that the first general assembly meeting of the Opticians Association of Turkey (Association) shall

convene, upon the convocation of the Ministry of Health, within four months following entry into force of this provision.

Grounds for the Request for Annulment

In the petition, it is maintained that rendering the first general assembly meeting of the Association subject to the convocation of the Ministry of Health amounts to exceeding of power of tutelage enshrined in the Constitution; and that the provision is therefore in breach of the Constitution.

The Court's Assessment

In order for the Association to be regarded as a legal entity, the first general assembly meeting must be held and the relevant bodies must be constituted during this meeting.

The power and duty assigned to the Ministry of Health for convocation does not include any supervisory process as to the acts and actions performed by the Association. Within the scope of the power of tutelage granted, pursuant to the principle of administrative integrity, to the central administration over the local service institutions, the Ministry of Health may be assigned with the power and task to convoke the general assembly of the Association for the first meeting. Besides, the legislator is undoubtedly entitled to enact a law on any particular issue, on condition of not being unconstitutional, pursuant to the principle of generality of the legislative power. Therefore, vesting the Ministry of Health –as the relevant authority– with the task to convoke the first general assembly meeting with a view to ensuring formation and activation of the bodies of the Association is not unconstitutional.

For the reasons explained above, the Court found that the contested provision was not contrary to Article 135 of the Constitution and dismissed the request for its annulment.

B. Second Sentence of Provisional Article 4 § 3 of the Law

Contested Provision

In the first sentence of Provisional Article 4 § 3 of the Law, it is set forth that the Central Board of Directors of the Association shall convene and issue regulations within one month following the election. In the contested second sentence, it is set out that these regulations shall be promulgated in the

Official Gazette and thereby put into force, upon the approval of the Ministry of Health, within two months following the election.

Grounds for the Request for Annulment

In the petition, it is maintained that making entry into force of the regulations issued by the Central Board of Directors of the Association subject to approval of the Ministry of Health has caused the limits of power of tutelage to become vague, and that there has been an interference with the autonomy afforded to the Association. It is accordingly claimed that the contested provision is in breach of the Constitution.

The Court's Assessment

By Article 135 of the Constitution, it is set forth that the power of tutelage exercised by the central administration over the professional organizations in the capacity of public institutions shall be prescribed by law, and that such power shall be limited to issues that fall under administrative and financial supervision. The discretionary power on this issue is exercised by the legislator on condition of not falling foul of the constitutional principles.

By granting autonomy to the professional organizations in the capacity of public institutions, it is guaranteed that these organizations will perform their activities in compliance with requirements of the service as well as with public interest. As an autonomous institution, the professional organizations are entitled, independently of the central administration, to appoint their decision-making and executive bodies, to take and implement decisions binding on their members and organs as being limited to the relevant professional activities, to determine principles and rules to be followed by members of the professions and to impose disciplinary sanctions on their members.

However, these professional organizations do not have an unlimited autonomy and are subject to administrative and financial supervision of the State. Nevertheless, such power of tutelage does not allow for regulations that would render ineffective the autonomy afforded to these organizations. In reviewing a provision of law concerning the power of administrative tutelage, the Court must undoubtedly determine the extent to which this provision affects the administrative autonomy of these professional organizations and whether it renders this autonomy ineffective.

In the contested Provisional Article 4 § 3, it is set forth that the regulations to be issued by the Central Board of Directors of the Association may be promulgated in the Official Gazette and may take effect only upon the approval of the Ministry of Health. Unless approved by the Ministry of Health, these regulations cannot be promulgated in the Official Gazette and thereby cannot take effect. Accordingly, such an approval procedure is in the form of an authority to confirm vested in the administration.

The contested provision, in this sense, vests the Ministry with an "approval" authority in regulations concerning almost all acts and actions of the Association. Such a broad power of administrative tutelage cannot be said to be compatible with the autonomy of the professional organizations in the capacity of public institutions. Therefore, this provision renders ineffective the administrative autonomy afforded to the Association by virtue of the Constitution.

For the reasons explained above, the Court found the contested provision in breach of Article 135 of the Constitution and therefore annulled it.

10. Decision annulling the phrase in Article 278 of the Enforcement and Bankruptcy Law

(E.2018/9, K.2018/84, 11 July 2018)

A. Phrase in Article 278 § 3 (1) of the Law

Contested Provision

The contested provision provides that the properties transferred by the debtor (in return for a payment) to his relatives up to the third degree (including this degree) shall be accepted as donation.

Grounds for the Request for Annulment

It was argued that the regulation restricting the right to property for the purpose of preventing any damage to the creditor did not serve the public interest, that it impaired the essence of the right to property and that it did not comply with the principle of proportionality, which was in breach of the Constitution.

The Court's Assessment

According to the contested provision, the debtor shall also subsequently be liable for his transactions on his property, which were carried out during the period when his authority to dispose of the property was not restricted in legal terms, and the third party to whom the property was transferred shall be liable to bear the compulsory enforcement procedures. Therefore, the contested provision is in breach of the debtor's and the third party's right to property.

The interference with the right to property must not only pursue a legitimate aim, but it must also be proportionate and not impose an excessive and disproportionate burden on the owner of the property.

The contested provision, which provides that the properties transferred by the debtor (in return for a payment) to his relatives up to the third degree (including this degree) shall definitely be accepted as donation, does not provide the parties with the opportunity to submit their claims and defence regarding these issues, as well as to submit evidence, information and documents to prove thereof. In this sense, the regulation that disturbs, to the detriment of the property owner, the reasonable balance to be struck between the interference with the right to property and the aim sought to be achieved by the interference cannot be regarded as proportionate.

The contested provision leads to the restriction of the right to property and the right to legal remedies disproportionately, by disturbing the balance between public and personal interests.

For the reasons explained above, the phrase "... through ancestry or ..." was annulled for being in breach of Articles 13, 35 and 36 of the Constitution, and it was decided that the annulment decision would enter into force nine months after being published in the Official Gazette.

B. Article 278 § 3 (2) of the Law

Contested Provision

The contested provision provides that the contracts where the debtor accepted a price much lower than the value of the property he transferred shall be regarded as donation.

Grounds for the Request for Annulment

It was argued that the contested provision did not serve the public interest, that it impaired the essence of the right to property and that it did not comply with the principle of proportionality, which was in breach of the Constitution.

The Court's Assessment

The main characteristic of the transactions falling into the scope of the contested provision is that although the property is transferred in return for a payment, the financial interest acquired by the debtor is not equivalent to the advantage afforded to the other party. This provision enables the creditor to prove that in the transaction, the debtor accepted a price much lower than the value of the property he transferred. Therefore, this situation is sufficient to consider the transaction as donation.

It is possible to claim and prove the contrary, as well as it is also possible for the debtor or the third party to whom the property was transferred to prove that the property was transferred at its true or approximately true value, to make claims and defence in this respect and to prevent the cancellation of the transaction by submitting relevant information, documents and evidence. Accordingly, it cannot be said that the contested provision disturbed the fair balance between the public interest and the individual's rights and freedoms and that it did not comply with the principle of proportionality.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution and therefore dismissed the request for annulment.

11. Decision Annulling The Provision Stipulating That Individuals Who Do Not Obey The Order On The Execution Of The Interim Injunction Or Act Contrary To The Interim Injunction Shall Be Imposed Disciplinary Imprisonment

(E.2018/1, K.2018/83, 11 July 2018)

Contested Provision

The contested provision provided that the individuals who did not obey the order on the execution of the interim injunction or act contrary to the interim injunction would be imposed disciplinary imprisonment from one month to six months.

Grounds for the Request for Annulment

It was argued that although the trial court was a civil court, the decision rendered within the scope of the contested provision had conclusions falling into the scope of criminal law; that in accordance with the legality of crime, the acts to be punished, the legal elements of the crime and the aggravated circumstances were not specified clearly; and that there was no regulation as regards the course of the proceedings and the legal remedies that can be used after the decision.

The Court's Assessment

According to the principle of *certainty*, which is one of the basic elements of the rule of law, legal regulations must be clear, explicit, understandable, applicable and objective in a way that will cause no hesitation or doubt for both individuals and the administration. They must also include protective measures against the arbitrary practices of public authorities.

The principle of legal certainty, which aims to ensure the legal security of individuals, requires that the legal norms be foreseeable, that the individuals have confidence in the State in all their acts and actions and that the State refrain from methods impairing such sense of confidence while making legal regulations.

In terms of its authority to give punishment, the legislator has discretion in determining the acts that constitute offence, the type and gravity of the punishment to be imposed, whether the minimum limit will be set for punishments and the aggravating and extenuating circumstances. Examination to be made as to the appropriateness of the rules laid down by the legislator in this respect falls outside the scope of the constitutionality review.

The contested provision regulated the punishment to be imposed in case of failure to abide by interim injunction that was among the temporary legal protections. In this regard, the acts to be punished and the type, as well as the minimum and maximum limits of the punishment were clearly specified. Therefore, length and type of the punishment to be imposed in case of committal of the acts specified in the law could be foreseen and known. Accordingly, there was no uncertainty as regards the acts to be punished, as well as the type and amount of punishment.

With the interim injunction, it was aimed that the decision to be rendered at the end of the proceedings would always be enforceable, and thereby an effective legal protection would be ensured within the scope of the right to legal remedies. In this regard, imposition of punishment for failure to abide by an interim injunction cannot be regarded as inappropriate and unnecessary.

However, Law no. 6100 contains no explicit provision on the trial procedures and principles concerning the disciplinary imprisonment to be imposed as a result of failure to abide by the interim injunction, as well as on the legal remedies to be used against the disciplinary imprisonment.

It has been understood; that there are various case-law concerning the legal remedy to be used against the disciplinary imprisonment imposed due to failure to abide by the interim injunction; that decisions can be appealed, or challenged in accordance with Law no. 6100 or the Code of Criminal Procedure no. 5271; and that there is no stable and assuring practice indicating the legal remedy to be used against the disciplinary imprisonment.

In this scope, the contested provision is neither precise nor foreseeable in terms of the trial procedures and principles concerning the disciplinary imprisonment to be imposed as a result of failure to abide by the interim injunction, as well as the legal remedies to be used.

Although the disciplinary imprisonment does not have the characteristics of prison sentence and falls outside the concept of crime that is the subject matter of the criminal proceedings, there is no doubt that the disciplinary imprisonment, which is regulated by the contested provision, will be given by a court and restrict the individual's freedom. Given these aspects of the disciplinary imprisonment, the uncertainty as regards the trial procedures and principles concerning the disciplinary imprisonment to be imposed as a result of failure to abide by the interim injunction, as well as the legal remedies to be used against the interim injunction will damage the individuals' legal security, as well as their right to legal remedies.

For the reasons explained above, the contested provision was annulled for being in breach of Articles 2 and 36 of the Constitution, and it was decided that the annulment decision would enter into force nine months after being published in the Official Gazette.

12. Decision dismissing the request for annulment of certain provisions of the Notary Act

(E.2017/163, K.2018/90, 6 September 2018)

Contested Provision

The impugned provision concerns the joint current account of the notary offices and distribution of income on the basis of this procedure.

Grounds for the Request for Annulment

In the petition, it is maintained that notaries who deal with and perform more actions make more contributions to the common account, expend more labour and incur more expenses than the other notaries with less volume of work; and that accordingly the procedure whereby the income obtained through the notarial actions is collected in a joint account and subsequently distributed is in breach of the Constitution.

The Court's Assessment

Office of notary is a public service. Such services are continuous and regular activities which pursue public interests. These services may therefore be determined by the legislator, without any restriction, considering the requirements and necessities of the relevant office as well as the country. Notary offices cannot be regarded as a private enterprise and cannot therefore be subject to provisions concerning private enterprises.

Given the facts that notaries receive a certain rate of fees paid for notarial actions, that they equally utilize the incomes obtained through notarial actions performed by the notaries of the same classification, and that all notaries are of the same status, it has been observed that the procedure of common current account has not led to benefitting from an individual's labour without making an endeavour. Therefore, it is not possible to define this procedure as forced labour.

It is set out in the legislative intent of the relevant Article that by virtue of the contested provisions, the legislator intended to prevent competition and eliminate excessive income disparity among notaries of the same degree who are operating within the same province, district or metropolitan municipality. It has been accordingly concluded that the contested provisions impose a restriction on the right to property in order for attaining a public-interest aim.

This restriction on the right to property does not concern incomes of the notaries, but rather the amount to be calculated over a certain rate of their incomes, which are subject to a fee or stamp duty, and to be transferred into a common current account.

Accordingly, it has been concluded that the restriction imposed by the contested provisions does not hamper the enjoyment of the right to property to a significant extent; that the means for restriction is compatible with and proportionate to the aim pursued thereby; and that the reasonable balance between the public interest of preventing competition as well as of eliminating excessive income disparity among notaries and the right to property was struck.

In this sense, it cannot be said that the restriction impairs the very essence of the right to property. Nor can it be concluded that it is incompatible with the requirements of a democratic society and state of law as well as with the principle of proportionality.

For the reasons explained above, the Court found that the contested provisions were not contrary to the Constitution and dismissed the request for annulment.

13. Decision annulling certain provisions of the Rules of Procedure of the Grand National Assembly of Turkey

(E.2017/162, K.2018/100, 17 October 2018)

A. Phrase "...on condition of being fulfilled by a member of parliament (MP) from another political party group..." included in the fourth sentence of Article 37 § 2 of the Rules of Procedure amended by Article 3 of the Resolution

Grounds for the Request for Annulment

In the petition, it is maintained that the motions –whereby it is offered that legislative proposals submitted by independent MPs or MPs who have not formed a group yet, be directly put on the agenda of the General Assembly of the Parliament– cannot be put into process, which is alleged to be in breach of Articles 2, 10, 87 and 88 of the Constitution.

Contested Provision

In the provision, it is set forth that the motions for putting the legislative proposals on the agenda of the General Assembly of the Parliament shall be put into process *provided that proposals be submitted by one MP from a separate political party group* every week.

The Court's Assessment

One of the fundamental tenets of the state of law, which is set forth in Article 2 of the Constitution, is *certainty*.

Provisions of the Rules of Procedure must be certain but must not prevent MPs from participating in legislative and auditing activities as well as duly performing such activities.

In the said article of the Constitution, the principle of a democratic state is also enshrined as one of the requirements of the Republic. This principle entails fulfilment of conditions necessary for ensuring MPs to duly participate in legislative and auditing activities.

Regardless of being a member of a political party group, all MPs are entitled to submit a legislative proposal pursuant to Article 88 of the Constitution. The MP submitting the proposal may be independent or a member of a political party having no group. As a matter of fact, taking into consideration this probability, the Parliament sets forth in Article 37 that all MPs submitting a proposal may, without any exception, file a motion for ensuring their proposals that were not deliberated within due time to be directly put on the General Assembly's agenda.

Prescribing that every week, a proposal submitted by an MP from a separate political party group shall be put into process, the impugned provision has caused uncertainty in issues as to through which procedure and at which stage the motions, submitted by independent MPs or those member of a political party which has not formed a group yet, will be put into process, and even whether they will be put into process.

In this respect, it has been concluded that although political party groups have no right to submit a legislative proposal and thereby file a motion for directly putting the proposals –that are not deliberated within the prescribed

period– on the agenda of the General Assembly, the criterion of political party group is sought for the deliberation of such motions, which makes it difficult, to a significant degree, for MPs who are a member of a political party not having a group yet or independent MPs to take part in legislative activities. Therefore, the impugned provision was found incompatible with the principle of democratic state.

Besides, the condition of being a member of a political party group, which is sought for the deliberation of the motions given for putting an item on the agenda of the General Assembly, is also in breach of the equality principle. This is because there is no difference among MPs in terms of the authority to submit a legislative proposal, regardless of whether they are a member of political party group. Treating differently MPs of the same legal status, who are a member of a political party having no group yet or who are independent, during the proceedings whereby their motions for directly putting their proposals on the General Assembly's agenda are put into operation is not also compatible with the equality principle.

For the reasons explained above, the Court found the provision in breach of Articles 2, 10 and 88 of the Constitution and annulled it.

B. Phrases "...subject to deliberation" and "... of discussion of provisions of law and ..... all of them" included in Article 57 § 2 of the Rules of Procedure, which was amended by Article 6 of the Resolution;

Grounds for the Request for Annulment

In the petition, it is maintained that the disputed provision is in breach of Articles 87 and 96 of the Constitution on the grounds that the authority to ask for a roll call during the voting, by show of hands, of provisions of law and resolutions not subject to deliberation has been removed, which thereby renders impossible determination of quorum.

Contested Provision

In the impugned provision, it is set forth that during the voting of motions subject to deliberation and during the discussion of provisions of law and voting all of them, at least twenty MPs might ask for a roll call by standing up or tabling a motion during deliberations.

The Court's Assessment

Article 96 of the Constitution sets forth that the Parliament shall convene with at least one-third of the total number of members for all its affairs.

Prior to the impugned provisions, it was possible to ask for a roll call during all voting processes by show of hands without any exception. However, the provisions limit the circumstances when a roll call may be asked to motions subject to deliberation as well as discussion of provisions of laws and voting all of them by show of hands. Pursuant to these provisions, it is not possible to ask for a roll call during the voting process of motions not subject to deliberation as well as of provisions of law.

The only means for MPs to raise their objections to, and hesitations about, the question whether the quorum for meeting, the decisive factor for the constitution of the parliamentary will and properness of resolutions taken by the parliamentary, is to ask for a roll call. The limitation imposed on this means was not found compatible with the constitutional provision entailing the establishment of quorum for meeting.

Therefore, the Court found the contested provisions in breach of Article 96 of the Constitution and annulled them.

C. Paragraph, added by Article 16 of the Resolution, following Article 163 § 4 of the Rules of Procedure

Grounds for the Request for Annulment

In the petition, it is maintained that making MPs subject to risk of deduction of their appropriations and travel allowances prevents them from duly taking part in the legislative activity and pursuing their electors' rights and demands; and that prescribing a fine as a disciplinary sanction is also contrary to legislative immunity. It is therefore claimed that the provision is in breach of Articles 2, 67, 83, 86 and 87 of the Constitution.

Contested Provision

In the impugned provision, it is set forth one-third of the one-month appropriation and travel expense of an MP receiving a reprimand and two-thirds of the one-month appropriation and travel expense of an MP temporarily suspended from the Parliament shall be deducted.

The Court's Assessment

The impugned provision was also examined also in terms of Articles 13 and 26 of the Constitution.

Pursuant to Article 95 of the Constitution, the Parliament is entitled to regulate its affairs; however, such an authority is to be enjoyed by introducing precise, fair and equitable regulations as required by Article 2 of the Constitution.

The aim pursued by the legislative immunity enshrined in the Constitution is to prevent MPs from being held liable for expressions and thoughts as well as for their votes that they have disseminated or they have casted while performing their tasks related to the parliamentary affairs. In this respect, legislative immunity is a parliamentary privilege which enables MPs to perform their legislative and auditing tasks freely and without any fear.

This immunity does not eliminate the requirements of the legislative order and exempt MPs from obeying the provisions of the Rules of Procedure. In this respect, holding MPs liable for disciplinary actions and making them subject to disciplinary penalties, with a view to ensuring proper conduct of the parliamentary affairs, are not contrary to the legislative immunity.

It must be separately determined whether the disciplinary action and penalty are in breach of the legislative immunity and freedom of expression underlying it.

Pursuant to the impugned provision, one of the reasons requiring deduction of two-thirds of the MP's one-month appropriation is expressions that are contrary to the administrative structure of the Republic of Turkey set forth in the Constitution under the principle of the indivisible integrity with its territory and nation. This reason is defined in a vague, abstract and unpredictable manner which may be also irrelevant to the intent to ensure proper conduct of the parliamentary affairs.

Due to the vague nature of the above-mentioned definition, the majority of the Parliament shall decide whether the expressions used during the parliamentary deliberations fall into this scope, which would cause particularly the opponent MPs to face the risk of being punished by the majority as well as prevent them from duly participating in legislative and auditing activities. Therefore, the provision, which may lead to silencing of

opponent MPs facing the risk of being punished, is not compatible with the principle of a democratic state.

In addition, Articles 26 and 83 of the Constitution also safeguard that MPs are entitled to use expressions and make assessments which are contrary to or different from the ones concerning the administrative structure embraced by the majority. In a democratic state, everyone particularly MPs must have the freedom to defend any kind of disseminated thoughts and opinions on condition of being peaceful and to use any kind of expressions no matter how improper they are. Otherwise, it is impossible to mention of a pluralist democracy.

Freedom of expression is important especially for elected persons who represent electors, express their demands, worries and thoughts at the political arena and defend their interests.

It is of course obvious that freedom of expression may be restricted if expressions include any content involving racism, hate speech, war propaganda, incites to or encourages violence, calls for riot or justifies terrorist acts which cannot be under protection in a democratic state.

It appears that pursuant to the provision, an MP's such act, which is indefinite and unpredictable in nature, is considered a reason leading to a deduction in his appropriation and travel allowance. It has been accordingly concluded that the provision makes MPs subject to the risk of being punished at any time due to their expressions, and that it thereby renders useless and meaningless, in general terms, the freedom of expression and, in specific terms, the legislative immunity for MPs. It cannot be therefore said that the said provision is a restriction for meeting a pressing social need in a democratic society.

Besides, it has been concluded that the provision impedes, to a certain extent, the MP's freedom to perform legislative and auditing tasks freely and without any fear for breaching the freedom of expression and rendering dysfunctional the legislative immunity.

For the reasons explained above, the Court found the contested provision in breach of Articles 2, 13, 26, 83 and 87 of the Constitution and annulled it insofar as it concerned the phrase "...to perform acts that are contrary to administrative structure of the Republic of Turkey set forth in the

Constitution under the principle of the indivisible integrity of the Republic of Turkey with its territory and nation...", which is set out in Article 161 of the Rules of Procedure. However, it was not found unconstitutional insofar as it concerned other acts that will result in disciplinary sanctions of reprimand and temporary suspension from the Parliament.

C. Other Provisions

Finding the following phrases not unconstitutional, the Court dismissed the request for their annulment:

Second sentence of Article 3 § 5 of the Rules of Procedure, which was amended along with its heading by Article 1 of the Resolution;

The phrase "...five..." in the fourth sentence of Article 19 § 5 of the Rules of Procedure, which was amended by Article 2 of the Resolution, as well as the phrase "...three each..." in the fifth sentence of the same;

Fifth sentence of Article 37 § 2 of the Rules of Procedure, which was amended by Article 3 of the Resolution;

The phrase "...written..." in the first sentence of Article 58 of the Rules of Procedure, which was amended along with its heading by Article 7 of the Resolution;

The phrase "...three each ..." in the first sentence of Article 63 § 2 of the Rules of Procedure, which was amended by Article 8 of the Resolution;

Of the paragraph which was added by Article 16 of the Resolution and would follow Article 163 § 4 of the Rules of Procedure:

a. the phrase "...two-thirds of the one-month appropriation and travel expense of an MP temporarily suspended from the Parliament..." under the remaining part of Article 161 of the Rules of Procedure,

b. The remaining part.

The Court also found no ground to adjudicate on the request for annulment of the following phrases:

The phrase "...amendment..." in the heading of Article 58 of the Rules of Procedure, which was amended along with its heading by Article 7 of the Resolution;

The phrase "...written..." in the last paragraph of Article 73 of the Rules of Procedure, which was amended by Article 9 of the Resolution, on the ground that the provision including the said phrase was abolished by Article 25 of the Resolution Amending the Rules of Procedures of the Grand National Assembly of Turkey dated 9 October 2018 and numbered 1200;

The phrase "...and deduction..." in the heading –which was amended by Article 16 of the Resolution– of Article 163 of the Rules of Procedure.

14. Decision dismissing the request for annulment of a phrase in Article 188 of the Turkish Criminal Code

(E.2017/179, K.2018/106, 8 November 2018)

Contested Provision

The contested provision provides that in cases where the crimes related to drugs are committed in public buildings and facilities used for treatment, educational, military and social purposes such as school, dormitory, hospital, barrack or place of worship and in public places at a distance of less than two hundred meters from their boundaries, the penalty to be imposed shall be increased by one half.

Grounds for the Request for Annulment

It was maintained that the phrase *"...public buildings and ... used for ... social purposes ..."* in the contested provision was open to interpretation and therefore could lead to different assessments and penalty increase (or not an increase in the penalty) by the courts, which was in breach of the Constitution.

The Court's Assessment

In the contested provision, the phrase *"...public buildings and ... used for ... social purposes ..."* also covers the *"public buildings ... used for treatment, educational, military ... purposes"* and therefore constitutes a comprehensive rule also applicable to these. Therefore, the examination to be made as to the merits was limited to the phrase *"... and social ..."*.

One of the main principles of the rule of law specified in Article 2 of the Constitution is certainty. Legal certainty can also be achieved by the case-

law of the courts and the regulatory acts of the executive, provided that they meet the qualitative requirements such as being accessible and foreseeable, based on the legal regulations.

Today, where human rights and freedoms have come to the fore, "principle of legality in crime and punishment" enshrined in the Constitution constitutes one of the basic principles of criminal law. This principle, which is based on the opinion that individuals should know the prohibited acts or conducts beforehand, aims to guarantee fundamental rights and freedoms.

There is no doubt that the legislator can make legislative arrangements within the scope of his obligations to take the necessary measures in terms of the fight against drugs and his authority to determine the criminal policy, which are vested upon him by the Constitution. In this scope, the legislator, on condition of abiding by the basic principles stipulated in the Constitution, has discretion in determining which criminal acts and conducts shall be regarded as aggravating or extenuating.

The contested provision aims at protecting the public health. In this context, within the scope of his discretion, the legislator, considering that the committal of crimes in public buildings and facilities used for social purposes and in public places at a certain distance constitutes a factor that enables the spread of such acts to the society, acknowledged this as an aggravating circumstance and therefore aimed at preventing the spread of crime.

In our age where, especially, various economic, cultural and social relations prevail, it is not possible to specify respectively the public buildings and facilities located in public places and used for social purposes, as well as it is not possible for the legislator to foresee these. The legislator, specifying that the public buildings and facilities used for treatment, educational, military and social purposes may be schools, dormitories, hospitals, barracks or places of worship, and etc., only gives examples of the mentioned public buildings and facilities.

The fact that the phrase *"... and social ..."*, which is the subject matter of the examination carried out on the merits, is an abstract concept does not necessarily mean that it is uncertain. As regards the contested provision, whether the place of crime is a building or facility used for social purposes shall be determined by the judicial authorities having regard to the particular circumstances of the case and considering the examples enumerated in

the provision, and the provision shall be applied accordingly. Hence, the contested provision is not contrary to the principles of certainty and legality.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution and therefore dismissed the request for annulment.

15. Decision dismissing the request for annulment of certain provisions of the Turkish Maarif Foundation Law

(E.2016/159, K.2018/108, 6 December 2018)

A. Phrase *"... and facilities such as dormitories..."* included in Article 1 § 1 of the Law

Contested Provision

It is set out in the contested provision that the objective of the Turkish Maarif Foundation ("the Foundation") is to provide scholarships at all educational stages from the pre-school education to the university education and to open facilities such as schools, educational institutions and *dormitories* in order to provide and develop formal and informal education services abroad based on the common knowledge and values of humanity.

Grounds for the Request for Annulment

It was maintained in brief that all training and education centres were attached to the Ministry of National Education by the Law on Unification of Education. In accordance with the contested provision, certain powers of the Ministry was transferred to the Foundation, which was in breach of Articles 2, 10 and 174 of the Constitution.

The Court's Assessment

It is stipulated in Article 1 of the Law that the objective of the Foundation is to provide and develop formal and informal education services abroad based on the common knowledge and values of humanity. Accordingly, the Foundation's authority to open facilities are limited to the purposes specified in this Article.

In addition, as the Foundation has been established in order to provide formal and informal education services abroad, the facilities it will open to carry out

these services may vary according to the legislation of the country they will operate in. Therefore, it is not possible to predetermine and give a list of these facilities. Considering this situation, the legislator has specified these facilities in general terms by giving examples such as schools, educational institutions and dormitories, and has provided the Foundation with the authority to open such and similar institutions. Thus, the contested provision does not provide the Foundation with an indefinite authority to open facilities.

Subjecting the Foundation to the rules different from those applicable to the other foundations in order to enable it to achieve its founding objective does not contravene the principle of equality.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution, and therefore dismissed the request for annulment.

B. Phrase "... *in order to train educators, lecturers, consultants and academicians for educational institutions*..." included in Article 2 § 1 (e) of the Law

Contested Provision

The contested provision stipulates that the Foundation can train educators, lecturers, consultants and academicians for the educational institutions it will open abroad, through training programmes -including those inside the country- conducted by itself.

Grounds for the Request for Annulment

It was maintained in brief that it was the universities' duty to train educators, lecturers, consultants and academicians for the educational institutions. However, with the contested provision, the Foundation was directly granted an authority to train these personnel, as well as there were uncertainties in the provision. It was claimed that these situations constituted a violation of Article 2 of the Constitution.

The Court's Assessment

As a requirement of the principle of universality of the legislation, the legislator may regulate an issue not prescribed in the Constitution, making it foreseeable and enforceable, provided that it does not contradict with the basic principles and prohibitive provisions of the Constitution.

In this sense, the legislator is vested with the authority to determine the issues as regards the training of the educators who will take office in the educational institutions abroad, as well as their working conditions and titles.

The legislator is also entitled to grant authority to the Foundation to create positions for consultants in the educational institutions to be opened abroad by the Foundation and to organize training programmes for them.

It is clear that the educational institutions to be opened by the Foundation inside the country to train the personnel who will take office at the primary, secondary and higher educational institutions, as well as the informal education courses to be opened abroad by the Foundation shall be subject to both the national educational legislation and the legislative provisions on higher educational institutions. In this respect, it cannot be said that the Foundation has been granted an indefinite authority to train the personnel who will take office in educational institutions.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution, and therefore dismissed the request for annulment.

C. Phrase "... *also in cooperation with the legal and real persons...*" included in the first sentence of Article 2 § 2 of the Law and phrase "... *or by taking over companies*..." included in the third sentence thereof

Contested Provisions

The contested provisions stipulate that the Foundation may carry out the activities specified in the Law in cooperation with the legal or real persons, or if necessary, through the companies by taking over them.

Grounds for the Request for Annulment

It was maintained in brief that the contested provisions granted the Foundation the authority to get into partnership with the real or legal persons or to take over companies, without specifying any criteria, which was against the public interest. The said provisions also enabled the directors of the Foundation to allow the real and legal persons to use the public resources, in accordance with their own personal interests. Therefore, it was claimed that the contested provisions were in breach of Article 2 of the Constitution.

The Court's Assessment

There is no legal obstacle for the foundations to establish a company or to get into partnership with a company.

As the Foundation has been established for the purpose of providing and developing formal and informal education services abroad, it must operate in accordance with the legislation of the countries concerned. The legislation of the countries where it will operate may vary. While some countries may allow the Foundation to operate directly, the others may necessitate that the Foundation shall operate in cooperation with a local educational institution or a local company. It has been understood that the contested provisions allow the Foundation, where necessary, to operate in cooperation with the real and legal persons or by taking over companies to achieve its objectives. In this respect, the contested provisions are not against the public interest.

The objectives of the Foundation and the activities it will carry out to achieve these objectives are clearly specified in the Law. Hereby, except for these objectives and activities, the Foundation is not allowed to operate by getting into partnership or taking over companies. Therefore, the contested provisions did not grant an indefinite authority to the Foundation in terms of getting into partnership or taking over companies.

Whether the Foundation has operated in accordance with its founding objectives shall be subject to the supervision of both the General Directorate of Foundations and the Supervisory Board. Accordingly, the contested provisions do not enable the directors of the Foundation to allow the real and legal persons to use the public resources, in accordance with their own personal interests.

Consequently, the Court concluded that the contested provisions were not in breach of the Constitution, and therefore dismissed the requests for annulment.

D. Provisional Article 1 § 2 of the Law

Contested Provision

The contested provision stipulates that one million Turkish liras shall be allocated to the Foundation from the budget of the Ministry of National

Education in order to be used during the establishment process and that after the process shall be completed, the remaining amount shall be transferred to the Foundation.

Grounds for the Request for Annulment

It was maintained in brief that the contested provision stipulated no criteria for determining the amount of the fund to be allocated to the Foundation from the budget of the Ministry of National Education and that the legislator exercised an arbitrary discretion in terms of the transfer of the fund, which was in breach of Articles 2 and 10 of the Constitution.

The Court's Assessment

The legislator enjoys discretion in making arrangements in terms of providing financial support to associations, foundations, unions, institutions, organizations and funds, for the purposes of public interest, from the budgets of the administrations covered by the central administration budget, provided that the Constitution and the general legal principles are not infringed.

The Foundation has been established in order to provide and develop formal and informal education services abroad based on the common knowledge and values of humanity, to provide scholarships at all educational stages, to open facilities such as schools, educational institutions and dormitories, to train educators and carry out scientific research, as well as to issue publications. It has been understood that one million Turkish liras was transferred from the budget of the Ministry of National Education to the Foundation to enable it to complete the establishment process and start to operate as soon as possible to achieve its objectives. From this aspect, the contested provision is not against the public interest. The question as to whether the amount of the public fund to be transferred to the Foundation was reasonable and proportionate can be subject to substantive review, but not the constitutionality review.

In addition, whether the fund to be transferred to the Foundation from the budget of the Ministry of National Defence has been used properly shall be subject to the supervision of the General Directorate of Foundations and the Supervisory Board within the Foundation. Accordingly, whether the public fund transferred to the Foundation has been used properly has not lacked supervision.

Consequently, the Court concluded that the contested provision was not in breach of the Constitution, and therefore dismissed the request for annulment.

16. Decision dismissing the request for annulment of certain provisions of the Civil Registration Services Act

(E.2017/180, K.2018/109, 6 December 2018)

Grounds for the Request for Annulment

In the petition, it is maintained that vesting the authority exercised by marriage registry office in offices of mufti that are performing religious services required by Islam is contrary to the principle of secularism, which entails that the State is to be impartial towards all religious groups; that depriving the other religious groups within the society of such an opportunity leads to discrimination in terms of freedom of religion and conscience; and that the offices of mufti are thereby entrusted a task which is not specified in its particular law. It is therefore claimed that the provision is in breach of the Constitution.

Contested Provision

In the impugned provision, it is set forth that the Ministry of Internal Affairs is entitled to vest the provincial and district offices of mufti with the authority of marriage registry office.

The Court's Assessment

Both those who have different religious beliefs and those who have no religious belief are under the protection of the secular State which is impartial towards religions but not indifferent to meeting the religious needs of the society. The State is to take the necessary measures for ensuring the environment where freedom of religion and conscience may be exercised. As a matter of fact, no official religion is specified in the Constitution; however, the Presidency of Religious Affairs is therein prescribed to be established as a public institution under the general administration.

In Article 136 of the Constitution, it is set forth that the Presidency of Religious Affairs shall exercise its duties prescribed in its particular law, in accordance

with the principle of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity. The provincial and district offices of mufti, which are entrusted by the impugned provision with the authority of marriage registry office, are the provincial organizations of the Presidency. In the general legislative intention of the provision, it is stated that the provincial and district offices of mufti are also granted the authority of marriage registry office with a view to facilitating the marriage procedures and enabling citizens to be provided with more rapid service.

Substantive and formal conditions of marriage as well as principles and procedures required to be followed during the marriage procedure are set out in the Turkish Civil Code. Therefore, the official marriage processes bearing a legal consequence for individuals are carried out in accordance with the provisions of the Turkish Civil Code.

The authority of marriage registry office, which is granted to the offices of mufti by the impugned provision, is related to the performance of official marriage procedures. Muftis are obliged to perform official marriage procedures in accordance with the principles and procedures set out in the Turkish Civil Code. Entrusting the provincial and district offices of mufti –the provincial organization of the Presidency of the Religious Affairs which is a constitutional organization– with the authority of marriage registry office has in no way attributed a religious character to official marriage procedures bearing legal consequences for individuals. In this respect, there is no aspect in the provision which is contrary to Article 24 of the Constitution.

In addition, Article 143 § 2 of the Turkish Civil Code safeguards that individuals may hold religious marriage ceremony on condition of completing the official marriage procedure. By this paragraph where particularly the phrase of religious marriage ceremony is cited, not only those from a certain religious group but also individuals from different religions are provided with the opportunity to hold a ceremony in accordance with their own religious beliefs only after the official procedure is completed.

It appears that granting of such authority, by the impugned provision, to the offices of mufti that are the provincial organization of the Presidency of Religious Affairs carrying out acts and actions concerning the worship and moral principles of the Islam religion enables Muslims to hold a religious ceremony at the same place where their official marriage ceremony is held.

Thereby, muftis entrusted with this authority may also attend the religious marriage ceremony, if requested by the bridal couple, at the same place after the official religious process is completed pursuant to the Turkish Civil Code. Accordingly, it has been revealed that the impugned provision is a legal arrangement aiming to facilitate the practice of religious ceremony by Muslims within the scope of their freedom of religion and conscience.

In addition, the Act no. 5490 provides a choice for individuals to designate a registrar of marriage who would carry out the marriage process, and besides, there is no necessity requiring marriage procedures to be carried out only by the offices of mufti. Accordingly, the impugned provision does not have a compelling effect in respect of non-Muslims or those who are Muslims but do not wish to perform their marriage procedures at the offices of mufti.

Pursuant to the provisions of the Turkish Civil Code, as the official marriage procedure does not contain any religious element or ritual, there is also no situation requiring individuals to manifest their religious beliefs and convictions at any stage of the marriage procedure. Registrars of marriage are not entitled to question religious beliefs of the couples filing an application for marriage. It cannot be accordingly said that the impugned provision puts a pressure on individuals to manifest their religious beliefs and convictions.

Besides, measures and practices that facilitate the meeting of common and joint needs of individuals constituting the society in the field of the freedom of religion and conscience cannot be considered to be in breach of the principle of equality.

The impugned provision does not introduce a legal arrangement to the detriment of non-Muslims. Pursuant to the Act, individuals have the choice to designate the registrar of marriage who would perform their marriage ceremony, and there is no necessity for any section of the society also including non-Muslim minorities to have their marriage procedures conducted by the offices of mufti.

The authority exercised by marriage registry office, which is granted to the offices of mufti by the impugned provision, is related to official marriage procedures that are carried out in accordance with the Turkish Civil Code. The provision has introduced no change in respect of civil marriage principles. In order for the marriage to bear legal consequences, official marriage

procedures are to be carried out in accordance with the provisions of the Turkish Civil Code, and no privilege has been granted to any religious group in this respect.

For the reasons explained above, the Court found the impugned provision constitutional and accordingly dismissed the request for annulment.

17. Decision dismissing, for lack of jurisdiction, the request for declaration of that certain provincial and district organizations of a political party have lost their legal entity

(E.2018/13 Miscellaneous Works, K.2018/13, 27 December 2018)

Ground for the Request for Annulment

The Chief Public Prosecutor's Office of the Court of Cassation requested the declaration of the fact that certain provincial and district organizations of the Engelsiz Türkiye Partisi dissolved themselves, as they had not held their general meetings timely, and that thereby they lost their legal entity.

The Court's Assessment

The Constitutional Court's jurisdiction as regards the declaration of the dissolution of political parties concerns their legal entity, which covers their headquarters, as well as their provincial and district organizations. The Court shall not be authorized to declare the dissolution of the political parties' provincial and district organizations.

As a matter of fact, in the previous applications requesting the declaration of the dissolution of political parties, the Constitutional Court declared the dissolution of not only the general headquarters of the parties concerned, as well as their provincial and district organizations, but also the political parties' legal entity covering all these organizations.

Consequently, the Constitutional Court dismissed, for lack of jurisdiction, the request for declaration of the fact that certain provincial and district organizations of the Engelsiz Türkiye Partisi dissolved themselves and that thereby they lost their legal entity.

18. Decision Dismissing the Request for Annulment of The Allegedly Unconstitutional Provisions of The Forest Law Setting Out That Announcement By The Forest Cadastral Commission Shall Be Considered As A Notification And That No Action Can Be Brought With The Expiry Of Ten Years

E.2018/33 K.2018/113, 20 December 2018

Contested Provision

In the impugned provisions, it is set forth that announcement to be made through posting a list shall be considered as notifications addressed personally to those concerned; that reports and maps which have not been sued shall become final; and that any complaint and case cannot be filed, relying on the legal grounds prevailing before the cadastral survey, upon the expiry of 10 years as from the finalization date of the reports and maps issued by the forest cadastral commissions.

Grounds for the Requests for Annulment

In the petition, it is maintained that owners are not aware of the determination of the forest boundaries by the forest cadastral commissions, which lead to finalization of the forest cadastral report without the owners raising no objection to such determinations; and that upon the expiry of 10 years, no case may be filed in respect of the final reports. It is accordingly claimed that the contested provisions are unconstitutional.

The Constitutional Court's Assessment

It is obvious that the contested provisions constitute a restriction on the rights to property and to legal remedies. However, regard being had to the fact that these provisions do not completely preclude the right to sue against the cadastral determinations but rather impose certain restrictions in respect of the notification procedure and the term of litigation, it has been concluded that they do not infringe upon the essence of the right to access to court as well as the right to property. Accordingly, it must be assessed whether the imposed restriction is in compliance with the principle of proportionality.

In the event that any action is not brought against the reports and maps concerning the decisions taken by the forest cadastral commissions, which

have been announced by way of posting a list, within 30 days as from the posting date, these reports and maps will become final. Thereby, the boundaries of both forests and other immovables are re-assigned. It appears that the intent of notifying cadastral determinations to those concerned through posting a list is to end uncertainties concerning the ownership of all immovables located on the land where cadastral survey is carried out. Given the fact that forest cadastral survey concerns many plots of land and is carried out, in certain circumstances, also on lands with no records of land registry, the practice of notification through posting a list was found to be a convenient and necessary means for attaining the aim pursued.

In addition, although a period of thirty days as from the notification of the said reports and maps through posting a list is prescribed for filing an action before cadastral courts, expiry of this period does not prevent those concerned from bringing an action.

In this respect, those concerned may enjoy their right to sue before the general incumbent courts within ten years as from the finalization date of the reports and maps issued by the forest cadastral commissions. It cannot be said that these periods are short and insufficient to bring an action. For the balance between the general interest of the public order requiring legal certainty and stability in terms of the ownership of immovables and individual interest of individuals not being informed of their immovables for a long time, it can neither be alleged that setting a lapse of time of 10 years for the said claims is unnecessary, or that the period granted is insufficient.

Accordingly, the contested provisions introduced with a view to ensuring legal clarity in terms of the ownership of immovables and thereby maintaining legal certainty as well as stability can in no way be found to be unnecessary and inconvenient for attaining the aim pursued. It has been observed that the reasonable balance is struck, by these provisions, between the individuals' rights and the public interest; and that the provisions do not thereby constitute a disproportionate restriction on the rights to property and to legal remedies, as well as do not in any aspect breach the principle of state of law.

For the reasons explained above, the Court found the impugned provisions constitutional and accordingly dismissed the request for annulment.

19. Decision annulling the provision precluding the appeal of imprisonment sentences of up to two years ordered for the first time by the court of appeal

(E.2018/71 K.2018/118, 27 December 2018)

Contested Provision

In the impugned provision, it is set forth that any kind of decisions rendered by the court of appeal in respect of offences that are within the jurisdiction of the first instance courts and punishable by imprisonment sentence with an upper limit of two years as well as judicial fines imposed in relation thereto cannot be appealed.

Grounds for the Request for Annulment

In the petition, it is maintained that conviction decisions rendered by the penal chamber of the court of appeal on appeal of the acquittal decision given by the first instance court are unappealable, which precludes recourse to appeal remedy against the initial conviction decision. It is therefore claimed that the provision is unconstitutional.

The Court's Assessment

The right to legal remedies safeguarded by Article 36 of the Constitution is the primary indispensable legitimate means aiming at the protection of rights. The right to legal remedies also safeguards the right to request judicial review of the verdict which guarantees the opportunity to request review and control, by another judicial authority, of a verdict given to the detriment of a person.

It is within the legislator's discretionary power to decide whether the judicial review will be limited to only ascertaining whether the provisions of law have been implemented accurately or will also cover the assessment of material facts. In this respect, there is no constitutional obligation prescribing that judicial review of a verdict shall also cover the assessment of material facts. Vesting the judicial authority to carry out such review with the authority to inspect whether the provisions of law have been accurately implemented may be considered sufficient for the fulfilment of the constitutional obligation concerning the right to request judicial review of the verdict.

This right may be made subject to certain restrictions by the legislator provided that they are in compliance with the criteria set out in Article 13 of the Constitution.

Besides, it must be noted that the scope and limit of the right to request judicial review of the verdict in the field of criminal law will not be same with its scope and limit in the other fields. Accordingly, this right is widely applicable in the field of criminal law where there are more severe interferences with individuals' fundamental rights and freedoms, whereas it may be implemented in a more flexible manner in the other fields.

Pursuant to subparagraph (d) where the contested provision is set out, any kind of decisions rendered by the court of appeal in respect of offences that are within the jurisdiction of the first instance courts and punishable by imprisonment sentence of up to two years as well as in respect of judicial fines imposed in relation thereto cannot be appealed. The phrase *"any kind of decisions rendered by the court of appeal"* included in the provision indicates that there is no distinction in respect of the nature of the decisions. Accordingly, the contested provision both precludes the opportunity to appeal the upholding decision rendered upon the conviction decision of the first instance court and excludes, from the scope of appeal remedy, the upholding or conviction decisions rendered upon the acquittal decision.

The appellate review to be conducted by the court of appeal on appeal of the conviction decisions rendered by the first instance court and concerning offences punishable by imprisonment sentence of up to two years and judicial fines imposed in relation thereto affords a guarantee for the right to request judicial review of the verdict. Through this remedy, an individual may have a first instance decision against him reviewed by an upper court. Accordingly, not providing the accused with the opportunity to appeal the decision rendered by the court of appeal does not constitute a restriction for the right to request judicial review of the verdict.

However, that is not the case where the court of appeal renders a conviction decision against the accused upon the appeal of the acquittal decision rendered by the first instance court. In this case, there is no conviction decision that has been already rendered by the first instance court.

At a stage where there is not yet an unfavourable verdict, safeguards inherent in the right to request judicial review of verdict shall not be applicable.

Safeguards afforded by this right shall become effective only when an unfavourable verdict is given for the first time. Therefore, in cases where the acquittal decision is quashed by the court of appeal and the accused's conviction is ordered for the first time, the accused becomes entitled to the right to request judicial review of the verdict by another court. In this sense, it is obvious that making the initial conviction decision against the accused not subject to appeal restricts the right to request judicial review of the verdict.

The right to request judicial review of the verdict, which is safeguarded by Article 36 of the Constitution, is not for sure an absolute right which can in no way be restricted. This right may be restricted by virtue of the rights and freedoms enshrined in the other articles of the Constitution as well as duties imposed on the State. However, legal arrangements introducing restriction on this right must not infringe upon the very essence of the right as well as must comply with the grounds of restriction prescribed in the Constitution and be proportionate.

It appears that the intent of the contested provision, which entails that any kind of decisions rendered by the court of appeal in respect of offences that are within the jurisdiction of the first instance courts and punishable by imprisonment sentence of up to two years as well as in respect of judicial fines imposed in relation thereto cannot be appealed, is to ensure the conclusion of proceedings within a reasonable time and to comply with the principle of procedural economy.

It is of great importance that verdicts restricting liberty must be subject to review. As a matter of fact, certain verdicts ordering conviction may also result in the accused's deprivation of enjoying certain rights including becoming a civil servant. However, final nature of the convictions imposed on account of petty offences may be considered as a proportionate restriction in respect of the right to request judicial review of the verdict. Nevertheless, offences punishable by a sentence restricting liberty cannot be said to be petty.

It is obvious that even if for concluding the proceedings within a reasonable time and ensuring procedural economy, making the conviction decisions involving imprisonment sentence not subject to judicial review will put an excessive burden on the accused. The individual interest to be obtained through the review of the conviction decision restricting liberty is not outweighed by the right to a trial within a reasonable time and the principle of procedural economy.

In this respect, it has been concluded that the lack of opportunity to ensure review of the initial conviction decisions rendered by the court of appeal and restricting liberty imposes a disproportionate restriction on the right to request judicial review of the verdict.

The contested provision precludes appeal of not only the court of appeal's decisions upholding the acquittal decision of the first instance court, which does not restrict the right to request judicial review of the verdict, but also of its decisions which quash the acquittal decision of the first instance court and orders the accused's initial conviction.

Accordingly, the provision –which sets forth that any kind of decisions rendered by the court of appeal in respect of offences punishable by imprisonment sentence of up to two years (including two years) and judicial fines imposed in relation thereto cannot be appealed, without making any distinction between the decisions upholding the conviction decision of the first instance court and the decisions ordering initial conviction upon the quashing of the acquittal decision– must be annulled as a whole.

For the reasons explained above, the Court found the impugned provision in breach of Article 36 of the Constitution and accordingly annulled it.

II. LEADING JUDGMENTS RENDERED IN THE INDIVIDUAL APPLICATION PROCESS

A. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO LIFE

1. Judgment finding a violation of right to life due to failure to take necessary measures against dangers posed by a public building *Bedrettin Yalçın and Others* (no. 2014/16380, 9 January 2018)

The Facts

The applicants' relative E.Y., who was nine years old on the date of incident, had been residing in the Hüseyinoğlu Village of the Varto District of Muş. Together with his friends, he went to a single-storey derelict building made of reinforced concrete, which was located about five-hundred meters away from the village. He entered the building to tether his donkey. In the meantime, the donkey hit the wall and the building collapsed. E.Y. was trapped under one of the collapsed columns and died.

It has been understood that the building had been idle since its construction, as the public institutions and organizations had not used it.

The Varto Chief Public Prosecutor launched an investigation into the incident. The statements of the complainants and witnesses were taken, post-mortem examination and autopsy reports were issued, and on-site inspection, as well as, expert examination were carried out.

The Chief Public Prosecutor's Office rendered a decision of non-prosecution on the grounds; that according to the expert reports, the deceased E.Y., who had entered the building together with a bovine animal, thereby causing the building's collapse, died as a result of his own fault; that due the acts of the deceased and the persons destroying the building, no causal link could be established respecting the criminal liabilities of the PTT officers and the building contractor; and that there was no other person to whom fault might be attributed. In addition, it was concluded that there was no ground for a criminal action to be taken against the deceased's mother for her not fulfilling her obligation of care and custody of her child.

The applicants' petition against the decision of non-prosecution was dismissed by the Muş Magistrate Judge's Office.

The applicants' action for claim against the TRT as the owner of the building on the date of incident was also dismissed.

The 3rd Civil Chamber of the Court of Cassation quashed the decision on the ground that the criminal liability and the liability for damages were subject to different principles and that a decision must be rendered on the basis of an expert report compatible with appellate court standard which establishes proportional fault and liability of the parties separately.

The proceedings were continued following the judgment of the Court of Cassation.

The Applicants' Allegations

The applicants maintained that their relative's right to life, their right to a fair trial, and their right to an effective remedy were violated on the grounds that the investigation against the suspects who had fault and negligence in the collapse of the building was ineffective. The applicants further alleged that as the persons who had responsibility in their relative's death were not identified and punished, the prohibition of ill-treatment was also violated.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

The right to life protected under Article 17 of the Constitution, taken together with Article 5 of the Constitution, imposes positive obligations on the State, besides the negative obligations.

Within the scope of its positive obligations, the State has a duty to protect the right to life of all individuals under its jurisdiction against the risks that may arise from the acts of the public officials, the other individuals and even the individual himself. The State must in the first place make deterrent and protective legal arrangements against the risks posed to the right to life. It must not confine itself to these arrangements and must also take the necessary administrative measures. This obligation of the State also includes its duty to protect the individual's life from any danger, threat, or violence.

The positive obligations imposed on the State within the context of the right to life also encompasses a procedural aspect. This obligation requires the authorities to conduct an effective investigation capable of identifying

those responsible and, if necessary, punishing them in cases of unnatural death. Such an obligation may be satisfied if an investigation, criminal, civil or administrative depending on the nature of the incident, is conducted.

The obligation to conduct an investigation into the deaths resulting from unintentional acts does not necessarily entail bringing a criminal action in every case. Nevertheless, if the public authorities fail to take necessary measures within their power despite being aware of the probable outcomes of a dangerous situation or if they act based on erroneous judgment or fault going beyond mere inattention, a criminal investigation must be initiated against those putting the individuals' lives at risk even if the victims have resorted to other legal remedies.

In the present case, the collapsed building was a public property. The public authorities are liable to construct a building in compliance with technical requirements and in a safely manner. Afterwards, the public authorities are liable to have all kinds of maintenance and repair works of their buildings performed, to assess whether these buildings pose a threat to the protection of individuals' lives and physical integrity and, if necessary, to tear down risky buildings.

It has been concluded in the present case that transmitter building, which was ordered to be constructed by a public institution contrary to the construction standards and which was not subsequently made subject to maintenance and repair process for not being in service, was left ruined; that the building posed a real and imminent threat to the lives of the residents, which could be foreseen by the public authorities; and that the public authorities failed to take any measure which may be reasonably expected from them in order to avoid such threat.

Considering that the relevant public authorities should have been aware that the building, which had been constructed contrary to the construction standards and revealed to pose a serious threat to the individuals' physical integrities since its construction, was at risk of collapse from the beginning, it appears impossible at this stage to conclude that the complained death occurred as a result of mere erroneous consideration or inattention.

It is considered that compensation proceedings against those responsible for explicitly endangering the lives of vulnerable persons, notably minors, would

not be sufficient vis-à-vis the State's obligation to ensure an effective judicial protection for such incidents. It is further concluded that judicial response by the State against this incident is also important for avoiding the occurrence of similar ones. Accordingly, it has been concluded that compensation proceedings have no bearing on the exhaustion of legal remedies with respect to the applicant in terms of the right to effective judicial protection.

For these reasons, the Constitutional Court found a violation of the right to life safeguarded by Article 17 of the Constitution and awarded a net amount of 40,000 Turkish Liras jointly to the applicants in respect of non-pecuniary damages which could not be redressed by merely finding a violation and re-opening of the proceedings.

2. Judgment finding a violation of right to life due to failure to conduct an effective criminal ınvestigation into the incident in which a police officer used firearms

Cembeli Erdem **(no. 2014/19077, 18 April 2018)**

The Facts

On the date of incident, the hearing-impaired applicant, who resides in Diyarbakır, saw a crowd while he was going to his house. Then, he felt a pain on his back and fell to the ground.

It was noted in the incident scene investigation report that a bullet had been removed from the applicant's body and was secured by the university hospital.

The Security Directorate informed; that on the date of incident it had been informed that an armed terrorist organization had been preparing an attack; that some officers had fired warning shots to protect an old woman who had stayed between the officers and the terrorists; that having seen a person (the applicant) behind the group lying wounded on the ground, the officers called the ambulance; and that a police officer had also been wounded on his foot during the incident.

The Security Directorate described the injury of the applicant as an unsolved incident and stated that the cause of the injury could not be determined.

The applicant, who was paralyzed from the waist down due to spinal cord injury as a result of the incident, stated in his statement to the public prosecutor that a police officer had shot him.

Upon the instruction of the Chief Public Prosecutor's Office, criminal examinations were conducted on the guns of the police officers who had been at the scene, and it was determined that the bullet wounding the applicant and other bullets collected at the scene had been fired from the police officer R.Ç.'s gun.

The Governor's Office did not granted a permission for an investigation on R.Ç. on the ground that according to the examinations, the bullet had been deformed and the police officer in question had fired a warning shot, the applicant had been wounded by the bouncing bullet, and therefore there was no fault or negligence in the incident. This decision was revoked by the regional administrative court.

The Public Prosecutor's Office initiated a criminal case against the police officer for causing aggravated injury with probable intent. The court sentenced the accused police officer to 1 year and 8 months' imprisonment.

However, the court concluded that the accused did not have an intent or probable intent to injure the applicant and that it was just a reckless injury. Thereupon, the court suspended the pronouncement of the imprisonment sentence. The applicant's appeal against the court's decision was dismissed by the assize court.

The Applicant's Allegations

The applicant claimed that his right to life was violated because he suffered a permanent disorder due to shooting by a police officer and no effective investigation was conducted into the incident.

The Court's Assessment

The right to life protected under Article 17 of the Constitution, read in conjunction with Article 5 of the Constitution, imposes positive obligations on the State as well as negative obligations.

The positive obligations imposed on the State within the context of the right to life entails a procedural aspect in addition to the substantive aspect of

protection. This obligation requires the authorities to conduct an effective investigation capable of identifying those responsible and, if necessary, punishing them in cases of unnatural death. The essential purpose of such an investigation is to secure the effective implementation of the law that protects the right to life and to ensure the accountability of those responsible, if any.

Although the evidence concerning the injury of the applicant was secured and it was determined as a result of ballistic examinations that the bullet wounding the applicant had been fired by the police officer, there are certain aspects hindering the effectiveness of the investigation.

It was known that some of the police officers at the scene had fired their guns during the incident and it was also known that the bullet removed from the applicant's body had been taken by the incident scene examination unit a few hours after the incident. In light of this, it is inexplicable why the authorities had waited about six months to compare the police officers' guns with the bullet removed from the applicant's body. It is also inexplicable that the authorities had waited about six months to examine the footages. They had been deleted after being secured for two months.

Further, although it was accepted that the police officer who was involved in the incident had fired his gun into the air and that however the bullet had bounced off and hit the applicant's body, the incident was not reconstructed at the scene during the investigation process.

During the investigation, no research was carried out into the deformation of the bullet in question despite the request in this aspect, and it was assumed that the deformation had occurred before the bullet entered the applicant's body.

The most important point to be considered within the scope of the investigation is that the first statement of the suspected police officer was taken about three years after the incident, although there was no obstacle, and his gun was taken about two months after it was proven by an expert report that it had been used during the incident.

As a result, it has been concluded that the relevant authorities failed to take or they were late in taking the measures reasonably expected from them so as to reveal the material fact, in other words, to enlighten the incident.

Consequently, the Constitutional Court found a violation of the right to life, safeguarded in Article 17 of the Constitution, under its procedural aspect concerning the obligation to conduct an effective investigation.

3. Judgment finding violations of the right to life and the freedom of expression due to death threats and competent authorities' failure to punish the suspects effectively

Baskın Oran **(no. 2014/4645, 18 April 2018)**

The Facts

The applicant, who has conducted academic studies on foreign policy and human rights, was writing for two national newspapers on the date of the incident.

At the material time, the applicant was a member of the Prime Ministry Human Rights Advisory Board ("the Advisory Board") and the Chair of the Minority Rights and Cultural Rights Working Group of the Advisory Board ("the Working Group").

The applicant argued that following the release of the "Report on Minority Rights and Cultural Rights (2014)" prepared by the Working Group, he was targeted by violent expressions and verbal attacks in official and unofficial articles.

Following the murder of Hrant Dink, Editor-in-Chief of Agos newspaper, the applicant, who was writing for the same newspaper, was provided with an official guard due to the increasing threats against him.

In 2008, the newspaper received an e-mail from an organization, which contained a death threat against the applicant. Upon this threat, the applicant filed a criminal complaint with the public prosecutor's office. In the following days, the applicant received another threat message and reported it to the relevant authorities.

Ankara Chief Public Prosecutor's Office referred the complaint concerning the first threat message to İstanbul where the headquarters of the newspaper was located. The İstanbul Chief Public Prosecutor's Office sent the file to Adana due to the lack of competence, as the offence had been committed in Mersin.

The Adana Chief Public Prosecutor's Office charged the suspect B.Ş., while finding that there was no occasion for further investigation against the other suspects.

The Adana Assize Court sent the file to İstanbul due to the lack of competence on the ground that the offence took place in İstanbul where the message had been received. The file was subsequently sent to Ankara where the applicant was living.

The Ankara Assize Court sent the file to the magistrates' court for lack of jurisdiction. As the latter issued a decision of non-jurisdiction for lack of competence, the file was sent to the Court of Cassation for resolution of the dispute in question. The Court of Cassation lifted the decision of the magistrates' court. Thereafter, the magistrates' court sent the file to the relevant criminal court of first instance for lack of jurisdiction *ratione materiae*.

The assize court considered that the accused's act fell within the scope of Provisional Article 1 of Law no. 6352 that entered into force during the proceedings and accordingly decided to adjourn the proceedings.

The assize court accepted the applicant's appeal against the decision. Thereafter, the Criminal Court held a retrial and sentenced the accused to the minimum term of imprisonment. However, it suspended the pronouncement of the judgment. The applicant's appeal was rejected, therefore he lodged an individual application.

The Applicant's Allegations

The applicant maintained that the investigation launched into the death threats against him for his studies on minorities and cultural rights had not been concluded within a reasonable period of time; that the evidence had not been examined sufficiently; and that the accused was not punished effectively. He, therefore, claimed that his right to life and freedom of expression were violated.

The Court's Assessment

1. Alleged Violation of the Right to Life

In order for an application concerning the alleged violation of the right to life due to the acts of the public officials or private persons to fall within

the scope of this right, the impugned act must result in death or the act must include a real and imminent threat to the life of the person concerned. Accordingly, it must be regarded as a fortunate coincidence that the relevant person has been able to survive under these circumstances.

In the present case, it appears that there was a real and imminent threat to the life of the applicant, a notable person receiving harsh backlash from a marginal group because of his opinions, and that the relevant authorities were aware of the existence of such a threat. It must be acknowledged that the threats received by the applicant in writing had naturally caused worry to him.

The applicant's complaints that the authorities allegedly failed to impose a deterrent punishment on the perpetrator of the act, although they were informed of the threat to the applicant's life, must be examined in terms of the procedural aspect of the State's positive obligations deriving from the right to life.

The applicant complained that the person who had threatened him was not given a deterrent punishment. The Constitutional Court found noteworthy the applicant's complaints as to the authorities' failure to examine sufficiently the suspect's affiliation with the terrorist organization. Regard being had to the fact that the main reason for the applicant's complaint was that the legal qualification of the suspect's act and his punishment were not severe enough, it must be underlined that the failure to examine the suspect's ties with the organization affected the entire proceedings adversely.

The investigation and prosecution processes initiated upon the applicant's complaint lasted approximately six years. A large part of this period was spent in order to identify the suspect, and subsequently, to resolve the disputes in terms of competence and jurisdiction in the determination of the court that would carry out the proceedings.

The applicant also claimed that he could not effectively participate in the proceedings and that the first instance court gave its decision on the merits at the first hearing. Nevertheless, the applicant made no explanation as to why he could not participate in the proceedings, although he had the opportunity to do so.

The prolongation of the proceedings due to competence/jurisdiction-related disputes is clearly in breach of the procedural obligations of the public authorities under the right to life. It has therefore been concluded that the judicial authorities who failed to act with due speed were far from creating a deterrent effect on the threat against the life.

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

2. Alleged Violation of the Freedom of Expression

The State's positive obligations in terms of freedom of expression derives from Article 5 of the Constitution. In light of this article, it falls within the scope of the State's positive obligations in terms of the freedom of expression to provide an effective protection system to authors and journalists for full enjoyment of the freedom of expression, to take measures that will provide those who are concerned with the opportunity to express their opinions and thoughts without fear, and to create a proper environment for the people to participate in the public debates.

The applicant has conducted studies on minority rights during a significant part of his academic and literary life. He was conducting similar studies at the time of the events, and he currently continues to do so. The Constitutional Court is of the opinion that, considering the judicial authorities' failure to conduct an effective investigation and subsequent proceedings concerning the death threats against the applicant due to his studies on minority rights, there were no such circumstances for the applicant to carry out these studies safely. It has been acknowledged that the ineffective proceedings in question have had a deterrent effect on the applicant's expression of his thoughts. Accordingly, it has been concluded that in the present case, the State has failed to fulfil its positive obligations arising from the freedom of expression.

Consequently, the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution and awarded compensation to the applicant.

4. Judgment finding a violation of the right to life due to failure to conduct an effective criminal investigation into the death resulting from a mine accident

Naziker Onbaşı and Others **(no. 2014/18224, 9 May 2018)**

The Facts

The applicants' brother lost his life as a result of *inrush* (sudden eruption of gas and coal) *and methane gas poisoning* that occurred in a mine operated by a hard coal company affiliated to the Turkish Hard Coal Institution (TTK).

The Chief Public Prosecutor's Office launched an investigation into the incident. The applicants filed a complaint against those alleged to be responsible.

Within the scope of the investigation, a permission for investigation was requested from the Ministry of Energy and Natural Resources ("the Ministry") against the General Director of the TTK and five board members who held office at the material time. The Ministry refused to grant permission. The objection filed at Regional Administrative Court against the refusal was also dismissed.

Thereupon, the Chief Public Prosecutor's Office issued a decision of non-prosecution regarding the General Director of the TTK and five board members. The objection filed against this decision was dismissed by the competent court.

The Applicants' Allegations

The applicants claimed that the substantive aspect of the right to life was violated on the ground that in spite of the negligence attributed to the General Director of the TTK and board members in the expert report, no permission for investigation was granted and that the objection to this decision was dismissed without any justification.

The Court's Assessment

The obligation to carry out an investigation into the deaths that occurred due to unintentional acts does not necessarily require the provision of a criminal-law remedy in every case. Nevertheless, even if the act is not intentional, an

effective criminal investigation must be conducted if the death has resulted from the public authorities' mis-judgment or fault going beyond mere inattention.

Coal mining is a dangerous work because it involves certain risks for the lives and physical integrities of the workers in this industry. In such works, its obligation to protect lives requires the State to take the necessary measures in order to prevent deaths and injuries.

It is stated in the expert reports that many people lost their lives in similar incidents that occurred in previous years, the risk of a sudden explosion in the place of incident was known, and it was possible to take measures against this risk. In such a case, it cannot be said that an effective criminal investigation is not required.

As a matter of fact, the Chief Public Prosecutor's Office launched a criminal investigation in the present case. The expert reports taken within the scope of the investigation contained some information pointing out to –potential– responsibility of the Chairman and Members of the Executive Board of the TTK on the incident.

However, the Ministry did not grant permission for investigation with respect to these persons, which ended the judicial process regarding them. In this case, it is necessary to assess the consequences of the procedure of obtaining permission for investigation under Law no. 4483 on the effectiveness of the investigation.

The procedure of obtaining a permission for investigation serves the purpose of preventing the unnecessary accusations against the public officials, thereby preventing the disruption of public duty. Therefore, before a criminal investigation is launched against public officials for the offences they are alleged to have committed on account of their duties, a preliminary examination must be carried out, as well as a preliminary assessment must be made as to whether a criminal investigation is necessary or not. The procedure of obtaining permission for investigation should not be applied beyond the stated purpose, namely in a manner delaying the functioning of the proceedings and hindering the effective conduct of the investigation or creating an impression that public officials are exempted from criminal investigation.

In the present case, the refusal to grant permission for investigation was based on an assessment *in the expert report which stated that there was no direct causal link between the attributed fault and the inrush/sudden eruption in question.*

The obligation to conduct an effective investigation imposed on the State within the scope of the right to life requires conducting an effective criminal investigation capable of identifying those responsible and, if necessary, punishing them. In the present case where the expert report pointed out the negligence of the public authorities, the relevant administrative authorities made a decision as to whether there was a causal link between the negligence and the incident in terms of criminal law in evaluating the request to grant permission for investigation, which was not compatible with the effective investigation principles and terminated the judicial process.

Therefore, the Constitutional Court found a violation of the procedural aspect of the right to life safeguarded in Article 17 of the Constitution.

5. Decision finding inadmissible the allegation of violation of the right to life due to negligence of public officials

Kadri Ceyhan **[PA] (no. 2014/1924, 17 May 2018)**

The Facts

A military unit that was practicing shooting in the area where the applicant was living collected the unexploded ammunition in the area and recorded the ammunition that could not be found.

After about two months, the applicant found a metal part in the area. The metal part exploded, and the applicant was injured and suffered a loss of limb. The Military Prosecutor's Office launched an investigation, and the Gendarmerie issued a report upon examination of the incident scene. Another report received from the laboratory stated that the metal parts found might be "war ammunition".

The Military Prosecutor's Office filed a criminal case against two soldiers (accused) responsible for the unit practicing in the area, for the offence of misconduct on account of negligence and delay. While the proceedings were continuing, the applicant lodged an individual application alleging that the

investigation into the incident was not completed within a reasonable time and that a criminal case was not brought against those responsible.

After the individual application, the applicant joined the proceedings against the accused before the military court as an intervening party. The military court convicted the accused for misconduct. The applicant did not appeal against this judgment. As the accused appealed against the judgment, the case is still pending before the Court of Cassation.

The Applicant's Allegations

The applicant claimed that his right to life was violated on the ground that he sustained life-threatening injuries as a result of the explosion of the ammunition left in the area following the military exercise and that an effective criminal investigation was not conducted into the incident.

The Court's Assessment

Concerning the cases where the right to life safeguarded in Article 17 of the Constitution has not been violated intentionally, the positive obligation to establish an effective judicial system may be considered to have been fulfilled if civil, administrative and even disciplinary remedies are available to victims.

In the present case, the responsibility of the public authorities with respect to the incident was established by official investigation. Accordingly, there is no room left for ambiguity concerning the cause of the incident and the responsibility arising from the interference with the right to life.

The public officials considered to have responsibility in the incident were punished. The applicant did not appeal the sentence arguing that it was not severe enough or on any other grounds.

The Constitutional Court, having regard to the conditions under which the incident resulting in the applicant's injury occurred, has concluded that in order for the State to fulfil its positive obligation to establish an effective judicial system, it did not have an obligation to conduct a criminal investigation that would necessarily result in the punishment of the public officials alleged to have personal responsibility such as negligence.

The Constitutional Court considers that the civil remedy for damages, which has not been exhausted in the present case, would ensure the effective

judicial review and redress the alleged violation by compensating the pecuniary and non-pecuniary damages claimed by the applicant through individual application.

The authorities' failure to act with reasonable speed to punish those responsible does not affect the effectiveness of the action for damages that would enable determining the responsibilities in the incident and providing of appropriate and sufficient redress for the damage.

It has been concluded that within the scope of its obligation to establish an effective judicial system, –in addition to the criminal investigation which left no ambiguity regarding the responsibilities in the incident– the State provided the applicant with an effective civil remedy with regard to the incident. However, the applicant did not make use of this remedy and directly lodged an application with the Constitutional Court.

Consequently, the Constitutional Court found inadmissible the allegation of violation of the right to life for non-exhaustion of legal remedies.

6. Judgment finding no violation of the right to life due to detonation of a hand grenade found on a land

***Cemal Kılıç* (no. 2014/8722, 11 June 2018)**

The Facts

The applicant was injured as a result of the detonation of a hand grenade which he had found together with his friend on a land. He therefore suffered loss of limb.

The gendarmerie officers carried out an examination at the incident scene and issued a report indicating that the applicant and his friend found an object in a stream bed and the fuse was detonated as they tampered with it.

In the expert report prepared within the scope of the criminal proceedings, it is noted that the hand grenade was detonated as the applicant had pulled its pin. In the report, both the applicant and his friend were found to be at fault in different degrees.

The applicant filed an application with the Ministry of Internal Affairs, alleging that the administration was responsible for the incident as the explosive

substance was left on the land. After his request had been rejected, he successfully filed an action before the administrative court and was awarded compensation for his pecuniary and non-pecuniary damages.

This decision was appealed by the defendant administration and thereupon quashed by the State of Council.

At re-proceedings, the administrative court complied with the quashing judgment and accordingly dismissed the applicant's action. The request for rectification of the judgment was dismissed by the Council of State.

The Applicant's Allegations

The applicant maintained that his right to life was violated as he was wounded as a result of detonation of a hand grenade on an open terrain as well as his right to a trial within a reasonable period of time was violated due to the prolongation of the action for compensation.

The Court's Assessment

1. Alleged Violation of the Right to Life

Taken together with Article 5 of the Constitution, the right to life enshrined in Article 17 entails not only negative obligations but also positive obligations for the State.

However, the State's obligation to protect an individual's life is not unlimited in respect of those who have acted in an excessively reckless manner in case of a threat. Besides, such an obligation does not assure an absolute protection against the threat under all conditions and circumstances.

In the present case, the applicant was wounded as a result of detonation of a hand grenade which was on a land open to public access.

The terrain where the incident took place is neither an area for military exercise nor a mine field expected to be secured by the State. Therefore, the State is not liable to take special measures in the terrain. Besides, it has been revealed as a result of the examination of the incident that the applicant had an insight into the fact that the object found on the land might be an explosive substance.

It has been concluded that the applicant was not vulnerable to the threat, and he caused detonation of the explosive substance by tampering with it in spite of being aware that it constituted an explicit threat to his life.

For the reasons explained above, the Constitutional Court found no violation of the right to life safeguarded by Article 17 of the Constitution.

2. Alleged Violation of the Right to a Trial within a Reasonable Time

Article 36 of the Constitution secures everyone's right to a trial within a reasonable period of time.

In assessing whether the length of trial is reasonable, various matters are taken into account such as the complexity and level of the proceedings, the manner of the parties and the relevant authorities during the proceedings, and interest of the applicant in the speedy conclusion of the proceedings.

Given the above-cited principles and judgments rendered by the Court in similar applications, it has been concluded that the trial period of 12 years is not reasonable.

For the reasons explained above, the Court found a violation of the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution.

7. Decision finding inadmissible the alleged violation of the right to life due to occupational accident

Barış Sarıtaş and Others **(no. 2015/161, 11 June 2018)**

The Facts

Two relatives of the applicants had been working in a construction site, and they lost their lives, together with eight other workers, in the elevator accident at the work place.

The expert report obtained within the scope of the investigation conducted by the Chief Public Prosecutor's Office stated that the executives and technical staff of the company which rented out, installed, and maintained the facade elevator and administrative and technical staff of the project partnership company which was the principle employer and renter of the elevator were primarily negligent in the accident. The report indicated that the occupational health and safety company was secondarily negligent.

The Chief Public Prosecutor's Office issued a decision of non-prosecution in respect of the suspects in the capacity of principle employer. The applicants2 objection to this decision was rejected by the Magistrate Judge's Office.

The Chief Public Prosecutor's Office charged twenty-five persons, including the executives and staff of the elevator company and the occupational health and safety company for recklessly causing deaths of more than one person.

Upon the proceedings, the Assize Court acquitted some of the accused and imposed judicial fine on some others. The appellate review of the case is still pending before the district court.

The Applicants' Allegations

The applicants claimed that the right to life was violated on the ground that an effective criminal investigation was not conducted into the elevator accident in which ten workers had lost their lives.

The Court's Assessment

Considering together Article 17 of the Constitution, safeguarding the right to life, and Article 5 of the Constitution, reading the fundamental aims and duties of the State, in cases of death an effective criminal investigation capable of identifying those responsible and, if necessary, punishing them must be conducted.

However, such investigations must not be limited to the determination of whether a particular person is responsible or not. It must be capable of revealing all aspects of the incident.

Due to the secondary nature of the individual application remedy, the ordinary legal remedies must be exhausted in order for an individual application to be lodged with the Constitutional Court.

In the present case, it is understood that the criminal proceedings against twenty-five persons for their alleged responsibility in the accident and resulting deaths are still continuing. Although the applicants alleged that the Public Prosecutor's Office did not conduct a sufficient or effective investigation into the accident, there is no indication that the ongoing proceedings are not capable to find out the facts and to identify and punish those responsible.

Although the applicants also alleged that the investigation was not effective as a decision of non-prosecution was issued for some suspects, it is always possible during the ongoing proceedings to identify those having responsibility in the accident and to file a criminal case against them.

In the event that the judicial proceedings reveal the responsibilities of persons who were not charged in the case, there is no obstacle to file a criminal case against them.

Regard being had to the ongoing proceedings, the available legal remedies cannot be said to have been exhausted prior resorting to the individual application.

Consequently, the Constitutional Court declared the present application inadmissible for non-exhaustion of legal remedies.

8. Decision finding inadmissible the alleged violation of the right to life due to denial of request for investigation of public officials

Abdulkadir Şimşek and Others **(no. 2014/11868, 12 June 2018)**

The Facts

In the explosions at two different work places within an organized industrial zone, twenty persons including the applicants' relatives lost their lives.

The expert report obtained within the scope of the investigation initiated by the chief public prosecutor's office revealed that the explosions were caused by the industrial tubes used at the workplace; that the tubes previously filled with natural gas were emptied and re-filled with oxygen; and that the explosions took place due to the natural gas leftover within the tubes.

The chief public prosecutor's office ordered separation of the investigation files on the ground that the investigation against the officials of the company from which these tubes had been procured were subject to different investigative procedures than the ones to be conducted against the public officials suspected of having negligence in the incident.

The judgment convicting the company officials and staff are pending before the appellate court.

The chief public prosecutor's office requested permission from the Ministry of Energy and Natural Resources to investigate the relevant officials of the Energy Market Regulatory Authority; from the Ministry of Labour and Social Security to investigate the inspectors; from the Ministry of Science, Industry and Technology to investigate the Provincial Director of Industry and Commerce and the relevant staff of the Directorate; as well as from the Ministry of Environment and Forestry to investigate the concerned inspectors. However, the Ministries did not grant permission for investigation.

Thereafter, without resorting to the appellate procedure, the chief public prosecutor's office ordered discontinuation of the process. Besides, it rendered a decision of non-prosecution in respect of the directors of the organized industrial zone. The applicant's challenge against this decision was dismissed by the Magistrate Judge.

The Applicants' Allegations

The applicants maintained that their right to life was violated on the ground that no permission was granted for initiating an investigation against the public officials alleged to have negligence in the explosion taking place on the same day at two different workplaces located in the industrial zone.

The Court's Assessment

As regards deaths caused intentionally or by ill-treatment, the State is liable to conduct a criminal investigation capable of ensuring identification and punishment of those who are responsible, as required by Article 17 of the Constitution.

However, in cases where there is no intentional breach of the right to life or physical integrity, the positive obligation does not necessarily require a criminal case in every incident. A civil, administrative or even disciplinary remedy, which is accessible for the victims, may be sufficient.

In a state of law, it may be deemed reasonable to require the permission of state authorities for criminal investigations against public officials on the ground they perform their duties on behalf of the State and they are under risk of frequent complaints and investigations concerning their work.

In the present case, the applicants did not claim of an intentional breach of the right to life. Nor is there an impression that the death of their relatives was caused intentionally.

Nevertheless, even though the act is not intentional, an effective criminal investigation must be conducted if the death has resulted from the public authorities' erroneous judgment or fault going beyond mere inattention.

As a result of the examinations, it has been revealed that despite having no license, the company had filled the tubes –which were originally designed for oxygen filling– with natural gas, it then discharged the tubes and re-filled them with oxygen gas, and that therefore, the explosions occurred because of the natural gas leftover within the tubes.

There is no claim or indication as to the ineffectiveness of the pending criminal proceedings for recklessly causing death or wounding against the company officials who had made the tubes filled with natural gas in contravention of the rules and business operations. Similarly, there is no challenge as to the ineffectiveness of the pending action for compensation brought by the applicants before the administrative court.

The explosion was not caused by any defect in the tubes; nor was a technical link established between the explosions and the relevant authorities' failure to timely inspect these work places in respect of occupational health and safety.

Regard being had to the case-file and the cause of explosion as a whole, no conclusion can be reached that the public officials should have foreseen such threat and have failed to take necessary precautions.

For the reasons explained above, the Court declared the applicants' allegation inadmissible for being manifestly ill-founded.

9. Judgment finding no violation of the right to life due to suspension of pronouncement of the judgment in a criminal case on account of injury caused by the police

Umut Tamaç **(no. 2014/13514, 18 July 2018)**

The Facts

A police officer on duty came across the applicant outside the police station.

The officer asked the applicant to go to the police station with him, as certain legal documents were to be delivered to the applicant. Upon this, an

argument broke out between the applicant and the police officer, and the applicant sustained a life-threatening injury by a bullet fired from the police officer's gun.

Following an investigation launched by the Chief Public Prosecutor's Office, a criminal case was initiated before the Assize Court against the police officer and the applicant.

The Assize Court sentenced the police officer to 6 months and 20 days' imprisonment for reckless injury and suspended pronouncement of the judgment. The applicant's appeal to this decision was rejected by the Assize Court.

The Applicant's Allegations

The applicant claimed that his right to a fair trial was violated on the ground that the police officer who had injured him was convicted not for attempted murder but reckless injury. He also maintained that his right to life was violated due to suspension of pronouncement of the judgment.

The Court's Assessment

The applicant's all claims were examined within the scope of the right to life safeguarded by Article 17 of the Constitution.

The procedural positive obligations incumbent on the State requires an independent investigation capable of clarifying the incident resulting in death and leading to the identification of those responsible.

In the present case, the Assize Court held that in the incident where the applicant sustained a life-threatening injury the gun had not been fired intentionally but accidentally. There existed no information or document which indicated that the police officer had had a specific reason to kill or injure the applicant.

As acknowledged by the Assize Court and stated by the majority of witnesses, the applicant had continued his aggressive behaviours during the incident. The police officer had had to use force and firearm, as the applicant had pulled a knife and behaved aggressively. Therefore, it must be accepted that the police officer had resorted to use of force in order to defend himself.

In order for the Constitutional Court to reach a different conclusion than the investigation authorities and courts, there must be convincing reasons to that end. The Constitutional Court concluded that there was no convincing reason in the present case to depart from the ruling of the Assize Court which evaluated, at first hand, the evidence obtained during the investigation and proceedings.

In addition, it cannot be said that the decision on suspension of pronouncement of the judgment had contradicted the available evidence or had been clearly unlawful.

Furthermore, considering that statements of many witnesses and other necessary actions had been taken in order to find out the facts regarding the incident, it has been concluded that the length of the proceedings which lasted approximately 4 years and 3 months was reasonable.

Consequently, the Constitutional Court found no violation of the applicant's right to life safeguarded by Article 17 of the Constitution.

10. Judgment finding a violation of the right to life due to the failure to conduct an effective investigation into the death occurring during the military service

Fatma Bildik and Hasan Bildik **(no. 2014/14995, 19 September 2018)**

The Facts

The applicants' relative, who was performing his military service, threw himself out of the patrol car and died at the hospital where he had been taken.

During the investigation conducted by the military prosecutor's office, it was revealed that the deceased suffering psychological problems had been taken first to police station, where he had been caused to wait for a while, before the hospital. The report issued by the forensic medicine institute indicates that the period during which the deceased waited at the police station did not have any effect on his death.

In the expert report, it is noted that there was negligence on the part of the deceased's immediate superior having failed to ensure his proper

examination and treatment, as well as of the patrol commander having failed to inform the relevant superiors of the deceased's crying, attempts to desert and statements that he would throw himself in front of cars.

The military prosecutor's office rendered a decision of non-prosecution.

The incumbent military court, examining the applicants' challenge to the decision of non-prosecution, revoked the decision and held that an indictment be issued against certain suspects for misconduct in office on account of negligence as well as ordered an extension of investigation against one suspect. At the end of the investigation conducted thereupon, the prosecutor's office once again issued a decision of non-prosecution. The applicants' challenge to this decision was rejected with final effect.

Thereafter, the applicants lodged an individual application with the Court.

It has been observed that in the criminal case filed against certain suspects for misconduct in office due to negligence, an acquittal decision was rendered; however, the appellate procedure is still pending.

Besides, the applicants applied to the Ministry of National Defence and requested redress of the pecuniary and non-pecuniary damages they had sustained. However, the Ministry dismissed their request. Thereafter, the applicants brought an action for compensation before the relevant administrative court which rendered a decision of lack of jurisdiction. The case-file was then sent to the Supreme Military Administrative Court (SMAC).

The SMAC dismissed the action as time-barred. The applicants' request for rectification of the decision was also dismissed by the SMAC. Thereafter, the applicants lodged an individual application with the Court. The two individual applications lodged by the applicants were joined.

The Applicants' Allegations

Maintaining that a decision of non-prosecution had been rendered without an effective investigation, the applicants alleged that the obligation to conduct an effective investigation inherent in the right to life had been violated. They also maintained that the right to access to court within the scope of the right to a fair trial had been violated due to dismissal of their action for compensation as time-barred.

The Court's Assessment

1. Alleged Violation of the Obligation to Conduct an Effective Investigation under the Right to Life

The right to life safeguarded by Article 17 of the Constitution entails both positive and negative obligations for the State.

The negative obligation prohibits the intentional and unlawful taking of life by agents of the State. The positive obligation requires the State to take appropriate steps to safeguard the lives of those within its jurisdiction against risks likely to result from acts of both public authorities and other individuals as well as those of the individual himself.

The procedural aspect of the positive obligations incumbent on the State requires conduct of an independent investigation capable of leading to the clarification of the death in all aspects and identification of those responsible.

In the present case, it has been observed that the investigation process was launched late; that the car and the scene where the incident took place were not secured; and that the relevant authorities failed to give necessary orders and take necessary measures for securing the evidence.

The authorities did not take necessary steps to prevent washing of the relevant car before necessary inquiries were carried out, which rendered impossible the collection of the material evidence –if any– in the car.

Nor did the investigation clarify the questions who had received the materials that had been on the deceased on the day of the incident and why the materials had been found in the garden of the police station.

It has been accordingly concluded that the investigation authorities failed to take action *ex officio* immediately upon being aware of the incident, as well as to collect all evidence capable of leading to clarification of the deceased's death and identification of those responsible.

For the reasons explained above, the Court found a violation of the obligation to conduct an effective investigation within the scope of the right to life safeguarded by Article 17 of the Constitution.

2. Alleged Violation of the Right to Access to Court

The expert report obtained at the investigation stage reveals that there was negligence on the part of certain military officers in the incident. The

applicants accordingly applied to the administrative court within one year following the expert report.

The SMAC took the date when the death had occurred as a basis for the calculation of the period for filing an action but did not make any explanation as to the time when the applicants became aware of the administration's faults in the incident or considered the probability of fault on the part of the administration.

In such cases, those concerned must know the exact cause of death, which plays an important role in determination of the procedure they will follow as well as of the administrative and judicial bodies they will have recourse to.

The applicants, becoming aware of the fact, by being notified of the decision of non-prosecution, that their relative had committed suicide and the administration had had fault in his suicide, applied to the administration within due time as from the notification date.

The authorities considered that the applicants became aware of the damage allegedly sustained as of the date of the deceased's death; and that the period for bringing an action would therefore start running as from this date, which is a strict interpretation of the right to access to court. It is obvious that this interpretation hampered, to an excessive extent, enjoyment of the right to access to court by the applicants.

For the reasons explained above, the Court found a violation of the right to access to court within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

11. Judgment finding a violation of the right to life due to the failure to consider the alleged delay in medical intervention resulting in death

***Aydın Gür* (no. 2015/3640, 30 October 2018)**

The Facts

The applicant stated that doctors at the emergency department, where he took his brother (N.G.) attempting suicide by taking drug at 10.05 p.m., had not sufficiently taken care of him but requested them to wait until their turn as an ordinary patient, as well as had not also intervened with him until he got fainted and fell down.

According to medical records of the hospital, N.G. arrived in the hospital at 10.35 p.m.. Upon medical examinations, he was diagnosed with intoxication and then referred to the university hospital in the province by an ambulance. As revealed by the form issued by the university hospital, N.G. was taken to the hospital at 11.00 p.m. and immediately undergone a medical treatment. However, he developed respiratory arrest. In spite of all medical interventions, he died at 01.10 a.m..

A criminal investigation was initiated into this incident, and the deceased N.G.'s relatives also filed a criminal complaint against the doctors working at the emergency department on that day. The chief public prosecutor's office sent the investigation file to the Governor's Office as the doctors were public officers. The Governor's Office had an examination report issued in respect of the incident and did not accordingly grant permission for investigation.

Upon the challenge against the decision of the Governor's Office, the incumbent regional administrative court revoked the decision, and a criminal case was filed before the relevant magistrate's court. At the end of the proceedings, the court acquitted the doctors. However, the Court of Cassation, examining the appellate request, quashed the first instance decision. The magistrate's court then continued the proceedings and once again ordered the acquittal of the doctors. This decision, which was also appealed, was quashed by the Court of Cassation. Thereafter, the magistrate's court decided to discontinue the proceedings as time-barred. The appellate review of this decision has been still pending.

Besides, having received the letter of the Ministry of Health whereby his request for redress of his pecuniary and non-pecuniary damages was dismissed, the applicant filed an action for compensation; however, the administrative court dismissed the action. The decision was appealed but thereafter upheld by the Council of State. The applicant whose request for rectification of the Council of State's decision had been also dismissed lodged an individual application with the Court.

The Applicant's Allegations

The applicant maintained that the right to life had been violated as his brother in a severe medical condition had died due to the delayed medical intervention.

The Court's Assessment

The right to life safeguarded by Article 17 of the Constitution imposes significant duties on the State. In cases concerning the alleged violation of the right to life, inferior courts are obliged to conduct an examination with due diligence as required by the Constitution.

As regards the complaints concerning delayed medical interventions as in the present case, it must be particularly noted that information and documents obtained through a criminal or administrative investigation are to be taken into consideration by the administrative courts.

In the present case, the authorities, in rendering the decision, failed to consider the half-hour difference between the time of arrival according to the applicant (10.05 p.m.) and the one in the official records (10.35 p.m.) but merely took into consideration the expert report issued on the basis of the hospital's medical records. This led to the failure, on the part of the authorities, to discuss the matter underlying the action for compensation.

In spite of a witness statement in support of the alleged delay in the medical intervention, the administrative court did not make an assessment as to these statements. In addition, in dismissing the proceedings, the first instance court neither demanded the video footage of the hospital's emergency department nor considered whether such an inquiry had been conducted during the criminal investigation.

It has been accordingly revealed that during the action for compensation, the administrative court failed to assess the applicant's main complaints as well as to clarify the incident in depth.

Besides, speedy conduct of investigation or proceedings into medical incidents is extremely important for safety of all individuals receiving medical services.

Regard being had to the facts that the case was not complex in nature and that the applicant had played no role in the prolongation of the proceedings, it has been concluded that the proceedings lasting for over nine years were not conducted with reasonable speed.

For the reasons explained above, the Court found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution.

12. Judgment finding a violation of the right to life due to excessive length of criminal proceedings into a train accident resulting in death

Burcu Demirkaya and Yücel Demirkaya **(no. 2015/1232, 30 October 2018)**

The Facts

In an accident taking place in 2004 in Pamukova district of Sakarya Province where a passenger train travelling from Haydarpaşa (İstanbul) to Ankara went off the rails, 37 persons including the applicant's mother died and 90 persons were injured.

The Sakarya Chief Public Prosecutor's Office (chief public prosecutor's office) initiated an investigation into the accident and accordingly obtained an expert report with a view to clarifying why the incident had taken place as well as to identifying those who were at fault.

In the investigation against the officials of the Directorate General of the Turkish State Railways, the chief public prosecutor's office issued a decision of lack of jurisdiction and sent the investigation file to the Ankara Chief Public Prosecutor's Office. There is no information before the Court concerning the outcome of this investigation.

Besides, the chief public prosecutor's office charged the machinists (first and second machinists) and chief conductor before the assize court, alleging that they had led to an accident on the railway. At the end of the proceedings, the machinists were convicted, whereas the chief conductor was acquitted. After the applicants had appealed the verdict, the Court of Cassation quashed the conviction decision against the accuseds.

During the proceedings conducted upon the quashing judgment, the incumbent court decided to discontinue the proceedings against the accuseds. Upon the appellate review, the decision to discontinue the proceedings was quashed. At the end of the proceedings conducted thereafter, the first machinist was sentenced to imprisonment sentence, whereas pronouncement of the verdict rendered in respect of the second machinist was suspended.

The applicants appealed the verdict and subsequently lodged an individual application with the Court. The relevant criminal chamber of the Court of

Cassation sent the case-file to the chief public prosecutor's office of the Court of Cassation in order to complete the deficiencies. The appellate review of the case has been still pending.

The Applicants' Allegations

The applicants maintained that their right to life was violated due to the authorities' failure to conduct, with reasonable speed, the criminal proceedings into a train accident resulting in the death and injury of many persons.

The Court's Assessment

Positive obligations incumbent on the State within the scope of the right to life have a procedural aspect. As required by the procedural aspect of its obligation to conduct an effective investigation, which is inherent in the right to life, the State is to conduct an effective official investigation capable of leading to identification and –if appropriate– punishment of those responsible for an unnatural death.

In cases where the public authorities failed to take necessary and sufficient measures to eliminate the risks that arise from a dangerous activity, -even if those concerned have resorted to other legal remedies-, a criminal investigation is to be conducted against those who put persons' lives in danger.

Railway transportation entails, by its very nature, certain risks for lives and physical integrity of persons. Therefore, public authorities must take necessary security measures in operating railways as well as take necessary steps, within a reasonable framework, to prevent avoidable deaths and injuries during navigation or at train stations and similar plants.

The impugned accident took place in 2004. The investigation conducted into this accident was completed within a period shorter than two months. The criminal court rendered its first decision in 2008. However, as the decision was not notified to certain persons who were entitled to appeal it, the appellate process with regard to the first quashing judgment was concluded within about 2 years and 6 months, while the one with regard to the second quashing judgment was concluded within about 2 years. The latest decision rendered by the criminal court was dated 24 November 2014, and the proceedings are still pending.

Due to excessive number of persons who died or were injured during the accident, taking statements of the relatives of those who died as well as statements of those injured may take a long time, which may be found reasonable. However, there is no fact or element in the investigation which could justify the prolongation of the proceedings to such an extent and the failure to conclude it yet. Therefore, it cannot be said that the investigation into the death of the applicants' relative was conducted within a reasonable speed.

For the reasons explained above, the Court found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution and awarded compensation to the applicants.

B. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO PROTECT AND DEVELOP THE MATERIAL AND SPIRITUAL ENTITY

1. Judgment finding no violation of right to protection of honour and dignity for not punishing the website administrator for the expressions used in the news

KAOS GL Kültürel Araştırma ve Dayanışma Derneği **(no. 2014/18891, 23 May 2018)**

The Facts

The association of KAOS GL Cultural Research and Solidarity (the applicant) was described as "*the association of aberrant persons*" in in the news of a website on November 6th, 2012.

The lawyer of the applicant association filed a criminal complaint on the ground that the association was insulted and that the content of the news incited people to hatred and hostility. The Chief Public Prosecutor's Office concluded that where was no ground for prosecution. The objection to this decision was also dismissed.

The applicant's lawyer subsequently lodged an individual application with the Constitutional Court for alleged violation of the right to protection of honour and dignity. On 8 May 2014, the Court concluded that there was no violation.

On 18 July 2014, the applicant association filed a complaint against the administrator of the website on the ground that describing the association in the news by using the expression of "*aberrant persons*" constituted the offence of inciting people to hatred and hostility. Taking into consideration that the decision of no ground for prosecution was made upon the investigation conducted into the applicant's complaint and that this final decision barred the investigation of the same matter, the Chief Public Prosecutor's office issued a decision of non-prosecution for the second complaint. The applicant's objection to the decision was dismissed.

The Applicant's Allegations

The applicant association claimed a violation of the right to protection of honour and dignity violated on the ground that the complaint regarding the impugned news which allegedly contained hate speech was concluded with a decision of no ground for prosecution.

The Court's Assessment

The applicant company alleges that the expression of "*aberrant persons*" constituted hate speech against them and homosexual persons the rights of whom they defend.

The meaning of the word "aberrant" is defined as "deviating from the right way" in the dictionary of the Turkish Language Board. Considering the impugned expression independently of what it evokes in the society and of the relevant news as a whole, it appears that it is not such an expression inciting hatred or violence and its literal meaning refers to a situation that is not legitimate according to one's own opinion.

Hate crimes, including hate speech, increasingly pose a serious threat to pluralist democracies in all over the world, and states have positive obligations to take effective measures in this regard.

In this context, it must be underlined that the State's fight against the hate speech targeting sexual orientation, also taking into account its dangerous potential inciting violence, by means of criminal proceedings is as important as the freedom of the press for the functioning of democracy and rule of law. The press, being aware of its impact on the society, must act responsibly in this respect.

Nevertheless, the impugned news cannot be said to constitute a threat of inciting hatred and violence that requires criminal proceedings, as well as the expression complained of cannot be said to have reached the level of hate speech.

Consequently, the Constitutional Court has concluded that the termination of the investigation process in an early stage did not result in violation of the right to protection of honour and dignity safeguarded in Article 17 of the Constitution in the present case.

2. Judgment finding a violation of the right to protect and improve corporeal and spiritual existence due to denial of authorization required for gender reassignment

M.K. **(no. 2015/13077, 12 June 2018)**

The Facts

The applicant, who is a transsexual person, requested to amend her sex in the civil register from female to male. After the two-year follow up by the Department of Mental Health and Disorders, it was reported that the applicant adopted a male sexual identity and that the sex change was appropriate.

The applicant, relying on this report, brought an action before the Civil Court seeking authorization to undergo a gender reassignment surgery. The court dismissed the case on the ground that according to the medical board report the applicant was not permanently sterilized and therefore the conditions for the sex change were not fulfilled. Upon appeal, the court's decision was upheld. The applicant subsequently lodged an individual application with the Constitutional Court.

In the meantime, upon referral by another Civil Court, the Constitutional Court annulled the law requiring sterilization on which the denial of the applicant's request was based.

The applicant's subsequent application to the Civil Court of General Jurisdiction was accepted and the sex change was allowed.

The Applicant's Allegations

The applicant claimed that her right to protect and improve her corporeal and spiritual existence was violated on because the request for gender reassignment authorization was dismissed.

The Court's Assessment

Article 17 of the Constitution protects everyone's right to protect and improve corporeal and spiritual existence.

It was stated in the medical report that despite her female reproductive organ the applicant adopted a male sexual identity and that the sex change was appropriate.

In the present case, the requirement of sterilization before the gender reassignment surgery forced the applicant to abandon her ability to procreate and therefore constituted an interference with her corporeal integrity. The dismissal of the applicant's request by the Civil Court also interfered with her right to gender identity and personal development.

It was also underlined in the medical report that after the gender reassignment surgery, the applicant would have already been deprived of her reproductive ability in both sexes. Despite that, the first instance court did not grant authorization for the applicant to undergo a gender reassignment surgery on the ground that she was not sterilized. There is no doubt that a transsexual person having ability to procreate will permanently loose this ability if she/he undergoes a gender reassignment surgery.

Regard also being had to the fact that the Constitutional Court has annulled the legal provision pertaining to the case, it has been concluded that the interference with the applicant's right to protect and improve her corporeal and spiritual existence was not necessary in a democratic society.

Consequently, the Constitutional Court has found a violation of the applicant's right to protect and improve her corporeal and spiritual existence safeguarded in Article 17 of the Constitution.

3. Judgment finding a violation of the applicant's right to protect and develop her corporeal and spiritual existence due to psychological harassment

Ebru Bilgin **[PA] (no. 2014/7998, 19 July 2018)**

The Facts

The applicant holding office as a veterinarian in a public institution was given a written warning, by the institution director, to *pay due diligence for maintaining peace within the institution.* At a subsequent date, she was subject to disciplinary sanction, namely reprimand, *for acting in breach of the principle of team-work, breaking peace and order at the institution and failing to behave respectfully toward her superiors.* The action for annulment brought by the applicant against the disciplinary sanction was dismissed by the administrative court.

After the completion of the procedures for changing her place of duty, she was then assigned to serve at different units within the same institution. The applicant, who was asked to submit her defence arguments for being absent from work on account of her treatment, submitted her prescription to the administration. However, it was not found sufficient by the administration, and the institution director imposed disciplinary sanctions on her.

Upon the letter sent by the institution director to the relevant Ministry for assignment of the applicant in other units of the Ministry, she was accordingly appointed to the Provincial Directorate under the Governor's Office. The action brought for annulment of this decision was dismissed by the administrative court. She appealed the administrative court's decision; however, her appeal was also dismissed by the Regional Administrative Court.

In the meantime, she submitted petitions to the Institution Directorate, the Prime Ministry Communication Centre (BIMER) as well as to the Ministry and maintained that she had been forced to work under inappropriate conditions, insulted and exposed to psychological harassment by the institution director.

The report issued by the Governor's Office upon the applicant's request for an investigation against the institution director indicated that she was subject to psychological harassment, and accordingly the Governor's Office granted permission for initiating an investigation against the director.

The incumbent chief public prosecutor's office issued an indictment against the director and accused him of misconduct and threatening. However, he was acquitted by the relevant criminal court. The applicant's action for damage was dismissed by the inferior court. Besides, her appeal against the dismissal decision was also rejected by the incumbent court.

The Applicant's Allegations

The applicant maintained that she was unjustly appointed to another institution by the institution she had been holding office; that she was systematically and consistently exposed to psychological harassment and that she was deprived of an opportunity to an effective redress and protection. She accordingly alleged that her right to protect and develop her corporeal and spiritual existence was violated.

The Court's Assessment

As regards acts or omissions which have reached an intolerable level of gravity and severity in respect of the impacts on the lives of employees and thereby pose a threat to their spiritual integrity and which are defined as psychological harassment, there are positive obligations incumbent upon the State under Article 17 of the Constitution.

In the present case, it appears that there is arbitrariness, on the part of the authorities, in frequently initiating an investigation against the applicant, constantly giving her a written warning, frequently asking her to submit her defence arguments as well as in questioning the documents submitted by her in spite of being aware of her health problem.

Although an administrative investigation was conducted in line with the applicant's complaints, and a legal action was brought against the public official alleged to have harassed her psychologically, the administration failed to display due diligence in taking precautions in order to avoid reoccurrence of such behaviours.

In our legal system, it is prescribed that, in case of any damage sustained by individuals due to any omission by public officials in exercising their powers, an action for compensation would be brought against the administration which may then recourse it to the relevant official.

In the present case, there is a neglect of duty attributable to the administration due to its failure to take efficient precautions on time, and the damages sustained by the applicant must be redressed. In this respect, action for compensation is undoubtedly a remedy which would provide redress within the meaning of the right to protect and develop the corporeal and spiritual existence.

It has been observed that the applicant had recourse to effective judicial remedies; however, the dismissal decision rendered at the end of the action for compensation is devoid of sufficient grounds that would protect the safeguards inherent in the right to protect and develop the applicant's corporeal and spiritual existence and redress the damages.

Consequently, the Court has concluded that the positive obligations incumbent upon the public authorities were not fulfilled due to the

failures to take efficient precautions for avoiding similar acts in the form of psychological harassment, to redress the applicant's damages as well as to explain the conclusions reached by the inferior courts with relevant and sufficient grounds.

For the reasons explained above, the Court found a violation of the applicant's right to protect and develop her corporeal and spiritual existence safeguarded by Article 17 of the Constitution.

4. Judgment finding a violation of the right to protect and develop the corporeal and spiritual existence due to permanent disability caused to the infant as a result of medical negligence at birth

Hamdullah Aktaş and Others **[PA] (no. 2015/10945, 19 July 2018)**

The Facts

The infant's parents noticed that their daughter could not use her left arm. The medical examinations revealed that she had sustained a nerve damage during the birth. She is still undergoing a medical treatment at the time of the present case.

The parents brought an action for compensation before the incumbent administrative court and claimed pecuniary and non-pecuniary compensation, maintaining that the nerve damage was caused due to the fault and negligent acts of the medical staff involved in the birth process.

The administrative court dismissed the action on the ground that, no service fault attributable to the defendant administration was found in the report prepared by the Forensic Medicine Institute regarding the disability caused during the birth to the infant's left arm.

The Council of State upheld the administrative court's decision insofar as it concerned the claim for pecuniary damage; but quashed it insofar as it concerned the claim for non-pecuniary damage on the ground that there were deficiency and fault in the proper provision of medical service due to failure to keep the mother's medical records containing various data that was capable of clarifying the incident.

The applicants' request for rectification of the upholding judgment of the Council of State was rejected.

The Applicants' Allegations

The applicants maintained that there were violations of their right to protect and develop the corporeal and spiritual existence due to dismissal of their claim for pecuniary compensation, as well as their right to a fair trial due to non-conclusion of the proceedings within a reasonable time.

The Court's Assessment

An individual's right to protect and develop his corporeal and spiritual existence is safeguarded by Article 17 of the Constitution.

Accordingly, the State is responsible for preventing any interference with individuals' corporeal and spiritual existence, for investigating any interference which could not be prevented, for identifying and prosecuting and/or punishing offenders and, if necessary, for effectively redressing the damages arising therefrom or for holding the responsible persons liable for such damages.

The positive obligation incumbent upon the State also covers the activities conducted in the medical sector. In principle, the main remedy to be resorted to in case of any complaint as to medical negligence is a civil action or an administrative action for compensation that may be applied in order for the establishment of legal responsibility arising therefrom.

In the present case, the inferior court failed to clarify whether the prenatal infant development had been proper according to the medical examinations; whether the mother had been examined by the relevant doctor; and even whether any step had been taken for determination of the birth weight.

The infant, who was born by normal delivery, weighed 5 kilograms. It could not be comprehended why the infant's birth weight was not determined before the birth although the applicant mother had been prenatally hospitalized. The expert report did not contain any information as to whether normal delivery method would had been considered risky if the approximate birth weight of the infant had been known.

As it is possible for patients to change their consent to the delivery method when they are informed of potential risks adequately, the patient's consent may be deemed valid only when the patient has been informed accordingly. In the present case, it has been observed that the applicants were not informed of the potential risks associated by the method of normal delivery. In their decisions, the inferior courts did not discuss as to whether the applicants' consents were obtained after being informed of the process.

In addition, the applicants stated that a doctor did not attend the birth of their daughter, who was delivered by midwives. It is ordinary for births through normal delivery method to take place in the presence of midwives. However, it must be also borne in mind that in case of any emergency or any medical decision to be taken, it is necessary to consult a doctor and seek medical intervention. Accordingly, it is hardly possible to acknowledge that the court's decision, which was rendered on the basis of the expert report indicating that the administration's act was in compliance with medical rules, had relevant and sufficient justification.

It has been observed that the infant's disability could not be detected by the medical staff but subsequently noticed by the applicants upon her discharge from the hospital. The expert report does not contain any explanation as to the impacts of this delay on the infant's treatment process, nor did the inferior courts discuss this matter.

The inferior courts also failed to provide any justification as to why the fault in the medical service occurring as a result of the administration's failure to keep the mother's medical records resulted in only non-pecuniary damage but not in pecuniary damages.

Besides, regard being had to the similar judgments rendered by the Court and the nature and subject matter of the proceedings and the present application, the Court found unreasonable the length of the proceedings lasting for a total of 8 years, 2 months and 21 days.

For the reasons explained above, the Court found violations of the applicants' right to protect and develop the corporeal and spiritual existence safeguarded by Article 17 of the Constitution, as well as their right to a trial within a reasonable time safeguarded by Article 36 of the Constitution.

C. JUDGMENTS/DECISIONS CONCERNING THE PROHIBITION OF TORTURE AND ILL-TREATMENT

1. Judgment finding a violation of the prohibition of ill-treatment due to systematic acts to force students to quit the air force academy

Bayram Tuğrul and Hasan Yıldırım **(no. 2014/5280, 24 May 2018)**

The Facts

The applicant Bayram Tuğrul Yıldırım, while studying at the Air Force Academy (AFA), received disciplinary punishments, and therefore he was dismissed from the academy with the decision of the High Disciplinary Board of the AFA.

The applicant filed a criminal complaint with the Military Prosecutor's Office, alleging that he had systematically been subject to ill-treatment in the AFA. In his petition, the applicant also claimed that he had been subjected to acts amounting to ill-treatment which had no relation with the education, and he gave details of these acts.

In addition, the applicant filed a case with the Supreme Military Administrative Court (SMAC) for annulment of the decision on his dismissal from the AFA. However, he subsequently withdrew the case. Therefore, the SMAC held that there was no ground to decide on the dispute as to its merits. However, although no decision was rendered on the merits of the case due to the applicant's withdrawal, the SMAC submitted its observations on the merits of the case, by virtue of the importance of the application. In its observations, the SMAC stated that most of the applicant's acts that led to his dismissal did not attain the minimum level of severity that might undermine the military discipline to an irreparable extent and that the decision on his dismissal from the AFA must be revoked.

The Military Prosecutor's Office launched an investigation against those responsible and rendered a decision of non-prosecution.

The Military Court of the Provincial Army Command dismissed the applicant's objection to this decision.

The Applicant's Allegations

The applicant claimed that the prohibition of ill-treatment was violated because some military officers and students carried out systematic acts incompatible with human dignity against other students to force them to quit the AFA and resulted in their dismissal with made up disciplinary charges.

The Court's Assessment

Article 17 § 3 of the Constitution stresses that the prohibition of ill-treatment must not be violated regardless of the purpose of authorities or the acts of persons.

The States have a positive obligation to establish effective measures to prevent individuals from being subject to ill-treatment. This obligation requires that in cases where an individual has an arguable claim that s/he has been subject to unlawful treatment by a public official, the State must conduct an effective investigation capable of identifying those responsible and, if necessary, punishing them.

In a case in which similar complaints had been made on similar grounds to the present one, the Constitutional Court held that the prohibition of ill-treatment was violated in terms of procedural obligation.

The case file reveals that some witnesses heard within the scope of the investigation supported the applicant's allegations to a great extent. Similar allegations were also included in the report of the Turkish Grand National Assembly issued prior to the Military Prosecutor's decision of non-prosecution.

The fact that the applicant was given punishment approximately every ten days supports his claim that the acts he was subject to were conducted systematically. The determinations of the Constitutional Court in the –above mentioned– similar case that the FETÖ/PDY organization infiltrated the AFA and the fact that some of the suspects the applicant complained about were dismissed from the public service following the coup attempt of 15 July indicate that the applicant put forward an arguable claim.

It must be find out whether the applicant's use of psychiatric drugs while he was a student and symptoms identified by the psychiatrists following his dismissal were resulted from the alleged acts of ill-treatment or not.

The investigation contained no element demonstrating that an examination was made into allegations as to whether the acts against the applicant had been conducted within an organizational structure and in a widespread manner and whether such acts were also directed towards other students.

Furthermore, there has been no satisfactory explanation as to why the witness statements supporting the applicant's allegations were not taken into consideration. In the case of an alleged ill-treatment in a systematic and organized manner against those outside of a particular group, giving greater weight to the statements of some witnesses who testified against the applicant may have a hindering effect in finding substantive truth.

It has been concluded that even though the applicant made an arguable claim supported by certain evidence in the case file, this claim was not investigated adequately.

Consequently, the Constitutional Court has found a violation of the procedural aspect of the prohibition of ill-treatment safeguarded in Article 17 of the Constitution.

2. Decision finding the allegation of the prohibition of ill-treatment due to prison conditions inadmissible

Mehmet Hanifi Baki **(no. 2017/36197, 27 June 2018)**

The Facts

Following the coup-attempt of 15 July, the applicant was detained on remand for his alleged membership to the Fetullahist Terrorist Organization / Parallel State Structure ("the FETÖ/PDY") and transferred to a penitentiary institution.

Complaining of the inadequacy of the conditions due to high number of inmates in his cell, the applicant filed an application with the Execution Judge and requested the number of inmates to be decreased.

His request was rejected on the basis of excessive number of persons detained on remand following the coup-attempt and insufficient capacity of the penitentiary institution. The applicant's appeal against this decision was also dismissed by the incumbent assize court. Having received the applicant's

individual application, the Constitutional Court demanded exhaustive information from the penitentiary institution.

About four months after his individual application, the applicant was released.

The Applicant's Allegations

The applicant maintained that the prohibition of ill-treatment was breached for being kept in an overcrowded cell.

The Court's Assessment

The complaints concerning the conditions in the penitentiary institution are examined within the scope of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution.

In the present case, the applicant complained of overcrowding in the penitentiary institution and did not submit any other complaint.

Following the armed coup attempt taking place at the night of 15 July 2016, an investigation was initiated against the persons considered to have a link with the FETÖ/PDY, and the number of persons detained on remand thus increased throughout the country within a very short time. Therefore, the number of inmates in the penitentiary institution where the applicant was detained exceeded the prison capacity. However, in the subsequent periods, certain measures –such as increasing the number of bunk beds and wardrobes– were taken in order to avoid insufficient conditions.

Moreover, following the introduction of fresh measures such as mass transfers of inmates and release of some detainees, number of inmates in the applicant's cell was decreased even below the cell capacity.

It has been also observed that the toilet and bathroom in the applicant's cell were compatible to preserve privacy as well as the kitchen and fresh air and communal areas were in conformity with standards.

Regard being had to the conditions of the detention as a whole, it has been concluded that the present case did not attain the minimum threshold required for ill-treatment.

For the reasons explained above, the Court declared inadmissible the alleged violation of the prohibition of ill-treatment for being manifestly ill-founded.

3. Judgment finding a violation of the prohibition of ill-treatment due to injury relating to police force and failure to conduct an effective investigation

Pınar Durko **(no. 2015/16449, 28 June 2018)**

The Facts

A group of university students organized a march in the university campus to protest the attacks carried out by the members of a terrorist organization against the security forces.

Upon a warning by the police officers, the majority of the group dispersed, and a group of students moved towards the faculty where the students with opposing views had previously carried out various activities. In order to prevent a clash between the student groups with opposing views, the police officers asked both groups to disperse.

As a group of students did not disperse and attacked the police officers by throwing stones, the police officers resorted to the use of force. During their interference, the police officers also fired painted rubber balls. As a result, four students including the applicant were injured.

The Chief Public Prosecutor's Office launched an investigation into the incident and took the statements of the police officers and the injured students.

The applicant stated that while she was walking on the road to her classroom; she saw a crowd approaching the building, and due to the rush around she stood motionless with her friend and during that time something hit her left eye, her friend cleaned the paint on her face, her eye was swollen and turned red, and she went to the hospital by her friend's car.

The report issued by the university hospital stated that the injury on the applicant's left eye could not be treated by a simple medical intervention and that whether the lesion caused a loss of function could be determined until after the treatment was completed.

As the others sustained injuries that could be treated by a simple medical intervention and did not file a complaint regarding the incident, the Chief Public Prosecutor's Office issued a decision of non-prosecution with respect

to the unidentified perpetrators. Concerning the file of the applicant's injury, a permanent search warrant was issued.

The permanent search warrant ordered the search of the perpetrator(s) until its expiry and submission of periodical reports of the search results. The police reports submitted to the Prosecutor's Office at certain intervals stated that the perpetrators could not be identified.

Afterwards, the Chief Public Prosecutor's Office sent a writ to the Security Directorate, ordering that the identities and places of duty of the police officers whom had been given guns firing painted rubber balls on the date of incident be reported.

The Security Directorate reported that approximately a thousand and five hundred police officers interfered with the events, however, the official documents relating to the events were not signed by all of them. The Security Directorate sent to the Chief Public Prosecutor's Office the identities and places of duty of the officers who had signed the document. The Chief Public Prosecutor's Office issued a decision of non-prosecution.

Upon the objection of the applicant, the Assize Court revoked the decision of non-prosecution. The Chief Public Prosecutor's Office initiated a criminal case before the Criminal Court against some police officers on the ground that they committed the offence of grievous bodily harm by exceeding the limits of the use of force.

The Criminal Court acquitted the accused as they were not proven guilty. This decision became final as it was not appealed. The Criminal Court filed a criminal complaint for the identification of the real perpetrator(s). The Chief Public Prosecutor's Office launched a new investigation and issued a search warrant to identify and arrest the perpetrators within the statute of limitation time period.

The Applicant's Allegations

The applicant states that she is unable to use one of her eyes as a result of the use of force by the police officers; however, the responsible officer was not identified and the investigation was not completed within the reasonable time. Accordingly, the applicant alleged that her right to a fair trial was violated.

The Court's Assessment

The applicant's allegations relating to the right to a fair trial were considered within the scope of the prohibition of treatment incompatible with human dignity safeguarded in Article 17 of the Constitution.

In its previous judgments, the Constitutional Court held that individual applications would be honoured in cases if no investigation was launched, no progress was made in an investigation, no effective criminal investigation was conducted, or if there was no reasonable expectation that such an investigation would be conducted in the future.

The complaints concerning the prohibition of treatment incompatible with human dignity have been examined separately under the substantial and procedural aspects, regard being had to the State's negative and positive obligations.

1. Alleged Violation of the Substantial Aspect

During interference with public incidents, the police officers are expected to act in a controlled manner and take the necessary measures to ensure that the persons other than those who created the situation requiring interference are not affected. The investigation authorities must *ex officio* prove that the use of force in the incidents that occurred as a result of the direct use of weapons was strictly necessary and proportionate in accordance with Article 17 of the Constitution.

The investigation conducted by the Chief Public Prosecutor's Office did not allow for an assessment as to whether the police officers who fired painted rubber balls during the interference had been trained in this respect and whether the measures that were taken in the planning and control of the operation contained guarantees that would prevent the arbitrary and excessive use of such guns and prevent individuals from the accidents.

Although it has been understood that there was a rush during the incident, the uproar in question does not remove the police officers' obligation to act in a controlled manner and to take the necessary measures to ensure that the persons other than those who created the situation requiring interference are not affected by it.

As a result, it was concluded that the police officers failed to take the necessary measures to prevent the applicant from being affected by the interference and that during the interference they used guns firing painted rubber balls in an uncontrolled manner, namely without setting a target, and caused the applicant to get injured.

Consequently, the Constitutional Court found a violation of the substantial aspect of the prohibition of treatment incompatible with human dignity safeguarded in Article 17 § 3 of the Constitution.

2. Alleged Violation of the Procedural Aspect

In the present case, although it was possible to determine which police officers had been given guns firing painted rubber balls and which police officers had received certificate to use this gun, as well as, it was possible to identify the perpetrator by determining the person near the applicant and taking her/his statement and making her/him identify the relevant police officers, the Chief Public Prosecutor's Office issued a permanent search warrant.

The sole action taken by the Chief Public Prosecutor's Office was to include in the investigation file the police reports issued occasionally to identify the perpetrator. The criminal case initiated by the Chief Public Prosecutor's Office resulted in an acquittal decision, as it had been filed before the perpetrator was identified. A permanent search warrant was also issued within the scope of the investigation that was launched upon a motion filed by the Criminal Court for the identification of the perpetrator(s). However, the investigation could not be concluded although more than a decade has elapsed.

As a result, it cannot be said that the investigation was conducted with reasonable diligence and promptness and that all evidence capable of clarifying the incident and identifying those responsible was collected.

Consequently, the Constitutional Court found a violation of the procedural aspect of the prohibition of treatment incompatible with human dignity safeguarded in Article 17 § 3 of the Constitution.

4. Decision finding inadmissible the alleged violation of the prohibition of ill-treatment due to solitary confinement

Raşit Konya **(no. 2017/26780, 28 June 2018)**

The Facts

Following the coup attempt of 15 July, the applicant was detained on remand and transferred to a penitentiary institution for alleged membership of the Fetullahist Terrorist Organization and/or Parallel State Structure (FETÖ/PDY).

The applicant staying with other inmates (in a multi-occupancy cell) was later placed in a single cell per the order of the Administrative and Monitoring Board of the Penitentiary Institution for security reasons. The applicant's request for being re-placed in a multi-occupancy cell was rejected by the Magistrate Judge. Thereafter, his appeal against this decision was also dismissed by the assize court. On the other hand, as a result of the changing conditions, the applicant was then re-placed in a multi-occupancy cell with other inmates by the order of the Administrative and Monitoring Board.

Upon the individual application lodged by the applicant, the Court demanded exhaustive information from the relevant penitentiary institution.

The Applicant's Allegations

The applicant alleged that the prohibition of ill-treatment was breached as he was placed in a single cell for being a member of a terrorist organization.

The Court's Assessment

The complaints concerning the conditions of the penitentiary institution were examined within the scope of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

The solitary confinement of a detainee or his placement separately from other inmates is not *per se* contrary to Article 17 of the Constitution. Such practices may be resorted to for maintaining disciplinary, for security purposes or with the intent of protecting the detainee from the other inmates. Besides, the measure of single placement may be applied with the aim of preventing the detained person from colluding with outsiders through illegal means to commit crimes.

In the present case, contrary to the allegations the applicant's communication with other inmates was not hindered as he was allowed to take fresh air together with the other inmates every during his detention in the single cell.

Incidents which may be regarded to constitute ill-treatment in penitentiary institutions may appear in different forms. In this respect, conditions of detention in a single cell may appear to be a real problem within the scope of the prohibition of ill-treatment depending on the particular circumstances of a case. However, these conditions must have attained the minimum level of severity, going beyond the unavoidable level of suffering inherent in detention, which would result from the very nature of the complained action. In the instant case, the Court has concluded that the applicant's complaint concerning his detention did not exceed the minimum threshold.

In the order of the Administrative and Monitoring Board on the applicant's placement in a single cell as well as in the court decision dismissing the applicant's appeal, it is explained that in resorting to such practice, the aim is to ensure the applicant's life safety and proper conduct of the ongoing investigations. Therefore, the applicant's allegation that the decisions ordering his placement in a single cell were devoid of relevant and sufficient justification was found to be manifestly ill-found.

For the reasons explained above, the Court declared the applicant's claim manifestly ill-founded.

5. Judgment finding a violation of the prohibition of ill-treatment due to suspension of the pronouncement of the verdict

E.A. **[PA] (no. 2014/19112, 17 May 2018)**

The Facts

The applicant attended a musical event that was held within the scope of a web-site organization. The aim of this web-site is to make easier for its members to get in touch with different countries and cultures. Thereby, a member wishing to get acquainted with a new culture is accommodated in the house of another member living in a different country or city.

During this organization, W.J.L., who is a foreign national, invited the participants including the applicant and G.C., a musician against whom a

criminal complaint was filed, for hosting in her house. W.J.L. assigned two separate rooms to the applicant and G.C. Waking up suddenly in the early hours of the morning, the applicant saw that G.C. was in her room in indecent manner. As found established by the inferior courts, as soon as the applicant perceived that G.C. was touching her body, she screamed, got out of the bed and run to the living room where W.J.L. was. The incident was then reported to the police.

Within the scope of the investigation conducted by the chief public prosecutor's office, statements of the applicant and the host, W.J.L., were taken first. An incident scene investigation report was issued, and the applicant's clothes and bedding materials were secured for a criminal examination. Besides, the incumbent magistrate's court ordered G.C.'s detention on remand.

G.C., who had been released pending trial, was found to have committed the imputed offence at the end of the proceedings before the assize court and sentenced to a punishment at the lowest level. However the assize court suspended the pronouncement of the verdict. Upon the dismissal of his appeal against the assize court's decision, the applicant lodged an individual application.

The Applicant's Allegations

The applicant alleged that the prohibition of ill-treatment was breached due to the suspension of the pronouncement of the verdict at the end of the proceedings with regard to the sexual assault.

The Court's Assessment

In principle, the Constitutional Court does not interfere with the determination of the amount of penalty, which is undoubtedly a matter falling within the discretionary power of the inferior courts. However, use of this power by the inferior courts in a way that would tolerate certain acts would undermine the efficient judicial protection and may impair fundamental rights and freedoms.

In this regard, the incident in the present case is that the applicant awoke while being harassed by a man unknown to her and therefore suffered a trauma. Regard being had to how the incident took place and the trauma suffered by the applicant, it may be concluded that sentencing the offender to a punishment at the lowest level and the suspension of the pronouncement of the verdict have caused the criminal act to go unpunished.

The suspension of the pronouncement of the verdict is not in a form of punishment but merely puts the offender under the threat of being subject to a criminal sanction. As in the present case, the offender may be punished only when he intentionally commits a further offence during the probationary period. Thus, the criminal act may go unpunished. In assessing whether to apply the criminal law institution (the suspension of the pronouncement of the verdict) introduced by the legislator for ensuring re-integration of the offender into the society, the deterring effect of the sanction must also be taken into consideration proportionally with the degree of distress suffered by the victim due to the offence.

The impression caused by the assize court's decision is that the discretionary power was exercised to lessen the consequences of the sexual assault, which is a sensitive issue for the public, instead of making clear that such acts would not be tolerated.

As regards the applicant's allegations of ill-treatment, the Court considered that the suspension of the pronouncement of verdict resulted in the offender's not being subject to an executable punishment and failed to offer a sufficient and efficient redress for the victim.

Considering the severity inherent in the act of sexual assault, it has been concluded that merely putting the offender under the risk of being subject to a criminal sanction has rendered ineffective the deterrent effect of legal sanctions envisaged to protect individuals from ill-treatment.

For the reasons explained above, the Court found a violation of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

6. Judgment finding a violation of the prohibition of treatment incompatible with human dignity for not punishing use of excessive force by a police officer

Elif Aydın Dost **(no. 2014/19954, 12 June 2018)**

The Facts

While protesting university fees, the applicant's finger had been broken due to the law enforcement officers' intervention. The applicant received a report from the forensic medicine institute and filed a criminal complaint with the

Chief Public Prosecutor's office for bringing a criminal case against those who were responsible for the incident. Thereafter, the chief public prosecutor's office brought a criminal case against the law enforcement officer who had used excessive force.

The incumbent criminal court found the law enforcement officer guilty and convicted him. After this conviction was quashed by the Court of Cassation, the criminal court convicted the applicant of intentional battery and suspended the pronouncement of the judgment.

Upon the dismissal of her appeal against the criminal court's decision, the applicant lodged an individual application.

The Applicant's Allegations

The applicant alleged that the prohibition of treatment incompatible with human dignity was violated due to suspension of the pronouncement of the judgment despite the fact that the law enforcement officer had broken her finger and that the officer was found guilty in this respect.

The Court's Assessment

As regards the complaints concerning the prohibition of ill-treatment safeguarded under Article 17 of the Constitution, the negative obligation of the State entails the responsibility not to expose individuals to torture, inhuman or degrading treatment, or to punishment. The positive obligation entails both the responsibility to protect them from such treatments (preventive obligation) and to ensure identification and punishment of those who are responsible through an effective investigation (obligation of investigation).

The Court considers that, in spite of non-existence of any circumstances necessitating use of force, the applicant's wounding caused by a law enforcement officer dispersing the meeting which the applicant had attended by exercising her democratic right falls within the scope of the treatment incompatible with human dignity. Besides, findings of the inferior court indicate that the applicant did nothing which necessitated use of force against her.

In the present case, the requirement that perpetrator must be sentenced to a punishment proportionate to his action was not fulfilled due to

pronouncement of the judgment. Besides, as no disciplinary action was taken against the accused, the applicant was not provided with any chance of redress for her complaint.

Leaving the perpetrators unpunished reduces the deterrent effect which would ensure the prevention of similar actions as well as leads to the non-fulfilment of the positive obligation to protect the individuals' corporeal and spiritual integrity.

For the reasons explained above, the Court found a violation of the prohibition of treatment incompatible with human dignity, which is safeguarded by Article 17 of the Constitution.

7. Decision finding inadmissible the alleged violations of the prohibition of ill-treatment and the principle of equality due to restriction of access to training and rehabilitation activities in the penitentiary institution

İbrahim Kaptan **(no. 2017/30510, 18 July 2018)**

The Facts

After the coup attempt of 15 July 2016, the applicant was detained and placed in the penitentiary institution for membership of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY).

With the decision of the Administrative and Supervisory Board of the Penitentiary Institution, "Provision of Prisoners with Training and Rehabilitation Activities", it was held that those who had been detained within the scope of the investigations into the FETÖ/PDY would not be allowed to participate in the training and rehabilitation activities. It was underlined in the reasoning of the decision that the state of emergency was continuing and that the number of persons detained within the scope of the relevant investigations was high, and that therefore the measure in question was taken in order to prevent any security vulnerability.

The applicant's objection to this decision was dismissed by the Execution Judge. Thereupon, the applicant appealed against the decision of the Execution Judge. The Assize Court dismissed the applicant's appeal. Hence, the applicant lodged an individual application.

The Applicant's Allegations

The applicant maintained that the prohibition of ill-treatment was violated due to restriction of access to training and rehabilitation activities in the penitentiary institution where he was held and that the principle of equality was violated in conjunction with the prohibition of ill-treatment due to imposition of this restriction only with respect to the persons detained within the scope of the investigations into the FETÖ/PDY.

The Court's Assessment

1. Alleged Violation of the Prohibition of Ill-treatment

It must be noted that a treatment must attain a minimum level of severity if it is to fall within the scope of Article 17 of the Constitution. The assessment of this threshold of severity is made in regard of the specific circumstances of the case.

According to the regulation, the applicant shall have the opportunity to enjoy the outdoor yard and do individual exercise there at least 1 hour per day in the penitentiary institution where he is being held. Furthermore, the applicant shall have access to periodical and non-periodical publications on the condition that they do not lead to any inconvenience and shall be provided with the opportunity to obtain newspapers, books and printed publications issued by the official institutions, universities and public professional organizations, as well as, foundations exempted from tax by the Council of Ministers and public interest associations, on the condition that they are not banned by a court decision.

In the present case, the applicant was deprived of training and rehabilitation activities such as access to outdoor and indoor sports halls and to library. The penitentiary institution expressed that this measure was necessary for ensuring the security of prisoners, preventing organizational activities and preventing terrorist organizations from directing prisoners and from giving orders and instructions to them.

In this context, the measure in question was based on acceptable and reasonable grounds such as prevention of offence and maintenance of discipline and security in the penitentiary institution. In addition, the applicant enjoyed the opportunity to walk in the open air at least 1 hour per day and

during this time he could perform sports activities such as exercising. He also had access to any periodical and non-periodical publications, including books and magazines, on the condition that they did not lead to any inconvenience, and he did not face any obstacle preventing him from obtaining information. The temporary measure in question was subsequently lifted with the decision of the Administrative and Supervisory Board.

Considering these issues as a whole, the temporary measure in question that was based on reasonable grounds did not attain a minimum level of severity to fall within the scope of Article 17 of the Constitution, beyond the distress caused by its nature and regarded as an inevitable consequence of detention.

Consequently, the Constitutional Court declared the alleged violation of the prohibition of ill-treatment inadmissible for being manifestly ill-founded.

2. Alleged Violation of the Principle of Equality in conjunction with the Prohibition of Ill-treatment

Regard being had to the reasoning of the decision of the Administrative and Supervisory Board concerning the prevention of those who were detained within the scope of the investigations into the FETÖ/PDY from training and rehabilitation activities in question, it appears that it was aimed to prevent organizational activities, to prevent terrorist organizations from directing prisoners and from giving orders and instructions to them and to ensure the security of the prisoners.

It was also underlined in the reasoning of the decision that the state of emergency was continuing and that the number of persons detained within the scope of the relevant investigations was high, and that therefore the measure in question was taken in order to prevent any security vulnerability.

Considering the complex structure of the FETÖ/PDY as well as the strictness of the organizational relationship thereof and the grounds for the state of emergency, it is apparent that it was probable for the persons detained within the scope of the investigations into the FETÖ/PDY to come together in the same penitentiary institutions and continue their organizational activities. Therefore, it has been concluded that the different treatment in question, which aimed at preventing such a probable situation, was based on objective and reasonable grounds.

In the present case, the applicant enjoyed the opportunity, even if limited, to do exercise and access books, and the measure in question was temporary. As a result, although it is clear that the applicant was treated differently, it has been concluded that the impugned treatment was based on objective and reasonable grounds and that the method employed was proportionate.

Consequently, the Constitutional Court declared the alleged violation of the principle of equality in conjunction with the prohibition of ill-treatment inadmissible for being manifestly ill-founded.

D. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO PERSONAL LIBERTY AND SECURITY

1. Decision on detention of the applicant who is a former Justice of the Constitutional Court

Alparslan Altan **[PA] (no. 2016/15586, 11 January 2018)**

The Facts

On 16 July 2016, following the suppression of the coup attempt of 15 July 2016, the applicant, who was holding office as a justice of the Constitutional Court, was taken into custody within the scope of an investigation initiated by the Ankara Chief Public Prosecutor's Office. Thereupon, by the decision of the Ankara 2nd Magistrate Judge's Office dated 20 July 2016, the applicant's detention was ordered for his alleged membership of an armed terrorist organization.

On 25 October 2017, the Ankara Chief Public Prosecutor's Office issued a motion addressed to the Chief Public Prosecutor's Office of the Court of Cassation for bringing a criminal case against the applicant alleged to be a member of an armed terrorist organization.

The applicant's investigation file is still pending before the Chief Public Prosecutor's Office of the Court of Cassation, and he is still detained on remand.

On the other hand, the Plenary of the Constitutional Court decided, on 4 August 2016, that the applicant be dismissed from office.

The Applicant's Allegations

Maintaining that he was detained on remand despite the lack of criminal suspicion against him and in breach of the safeguards prescribed for his profession; that there was no ground justifying his detention; and that his detention amounted to a disproportionate measure, the applicant alleged that his right to personal liberty and security was breached.

The applicant further claimed that his apprehension was unlawful; that the magistrate judge's offices were contrary to the principle of natural judge and

the principle of independent and impartial tribunal; that he was unlawfully dismissed from profession; that he was ill-treated in custody; and that seizure of his belongings and assets was devoid of legal basis. He also maintained that his fundamental rights and freedoms were violated due to some other practices.

The Court's Assessment

Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, it is provided that individuals may be deprived of liberty under the circumstances stated therein and with due process of law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Existence of strong indication of guilt is acknowledged only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities, having direct access to the parties and evidence, are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case.

In line with these general principles, it must be primarily assessed whether there is a strong indication of guilt on the part of the applicant in the present case.

In the detention order against the applicant, it was stated, referring to the reports in the case file, search and seizure reports and all content of the file, that there was concrete evidence showing the existence of strong suspicion of guilt on the part of the suspects, including the applicant. In their report, the investigation authorities relied on the statements of the anonymous witnesses and the suspects, the content of the conversations between the other persons via "ByLock" and their cell phone signals as the evidence pointing to the applicant's having committed the imputed offence.

The investigation file reveals that the applicant's name was involved and certain issues regarding him was discussed in the content of the conversations between some persons (Ö.İ., S.E. and B.Y.) other than the applicant, via "ByLock". Those conversations took place between Ö.İ., a teacher and the civilian imam within FETO/PDY responsible for the judicial members, S.E., a rapporteur and incumbent of FETO/PDY within the Constitutional Court, and B.Y, a rapporteur and member of the FETÖ/PDY. In this scope, it has been understood; that in the conversations between Ö.İ. and S.E., the applicant was referred to by the code name "Selahattin", that Ö.İ. had a request to be conveyed to the applicant, and he also asked that the communication for the request be made through S.E., that Ö.İ. requested from S.E. to learn from the applicant the user code of the telephone line used by him, that S.E. gave information to Ö.İ. about the use of the telephone line that was stated to

have been sent to the applicant by Ö.İ., and that Ö.İ. and S.E. made remarks about the applicant's dissenting opinion in a judgment of the Constitutional Court in an individual application lodged by a journalist detained on the basis of charges related to the FETÖ/PDY. In the conversations between Ö.İ. and B.Y., Ö.İ. told the date and time when the applicant would come and asked B.Y. to tell the applicant that he would welcome him. Ö.İ. also requested that the applicant would tell one of the justices of the Constitutional Court his opinion as to which candidate(s) would be supported in the election of the deputy president of the Constitutional Court.

Furthermore, it has been determined that the telephone line, which was mentioned during the conversations between Ö.İ. and S.E. via "ByLock" and considered by the investigation authorities to have been sent to the applicant, signalled from the applicant's home address —housing complex of the justices the Constitutional Court— and it also signalled at the places from which the applicant's registered phone line signalled at the same time.

In addition, R.Ü., who held office as a rapporteur in the Constitutional Court, submitted in his statements taken by the investigation authorities as suspect; that considering the applicant's approach in the individual applications where any members of the FETÖ/PDY was a party, as well as considering his relations with the rapporteurs who were members of this organization, he reached the opinion that the applicant was also a member of the FETÖ/PDY, that the applicant consulted Rapporteur S.E. –reported to be the person responsible for the Constitutional Court on behalf of the FETÖ/PDY– on how he should act, that S.E. (according to his own words) contacted the civil person who was the imam responsible for the Constitutional Court (or the high judicial imam) and the applicant acted in accordance with the instructions he received, and that the applicant was referred to by the code name "Selahattin" in the FETÖ/PDY. Besides, one of the anonymous witnesses who held office as a rapporteur in the Constitutional Court stated that the applicant was a member of the FETÖ/PDY and followed-up certain applications lodged with the Constitutional Court. Another anonymous witness stated that from the applicant's social relations, he had reached the opinion that the applicant was a member of the FETÖ/PDY.

Therefore, it appears that the investigation file contained evidence supporting the existence of strong indication of guilt on the part of the applicant.

In the present case, the investigation authorities' considerations as to the existence of the grounds for detention and as to the proportionality of the applicant's detention are not unfounded.

For the reasons explained above, this part of the application must be declared inadmissible for being manifestly ill-founded.

Other Allegations

The Constitutional Court has declared the application inadmissible for non-exhaustion of domestic remedies in so far as it relates to the applicant's allegations that his apprehension was unlawful, that he was dismissed from the office unlawfully, that he was subject to ill-treatment in custody, and that his belongings and assets were seized unlawfully. The Constitutional Court found the rest of the allegations inadmissible on the ground of manifestly ill-founded, including the allegation that magistrate judgeship did not comply with the principle of natural judge and the principle of independent and impartial tribunal.

2. Decision on detention of the applicant who is a journalist (Şahin ALPAY)

Şahin Alpay **[PA] (no. 2016/16092, 11 January 2018)**

The Facts

The applicant is a well-known journalist and author.

On the night of 15 July 2016, Turkey faced a military coup attempt. Therefore, a state of emergency was declared countrywide on 21 July 2016. The public authorities and the investigation authorities stated, relying on facts, that the Fetullahist Terrorist Organization (FETÖ) and/or Parallel State Structure (PDY) was the plotter/perpetrator of the coup attempt.

In this scope, investigations have been conducted against the structures of the FETÖ/PDY in various fields such as education, health, trade, civil society and media in public institutions, and many persons have been taken into custody and detained.

The Istanbul Chief Public Prosecutor's Office initiated an investigation in relation to the media structure of the FETÖ/PDY against forty three

suspects, including the applicant, many of whom were journalists, authors and academicians.

The investigation authorities maintained that notably in the aftermath of the "investigations of 17-25 December", the applicant wrote articles praising the structure and serving to undermine the investigations conducted into the Zaman newspaper, which was operating on behalf of the FETÖ/PDY, in line with the aims of this structure.

On 30 July 2016, the Magistrate Judge's Office ordered the detention of six suspects including the applicant for their alleged membership of a terrorist organization.

In its indictment of 10 April 2017, the Istanbul Chief Public Prosecutor's Office noted that the suspects including the applicant were involved in the media branch of the FETÖ/PDY; and that they committed the imputed offences by fulfilling their roles within the organizational strategy and hierarchy with a view to overthrowing the constitutional order, the Grand National Assembly of Turkey ("the GNAT") and the Government of the Republic of Turkey, which are the general strategy of the organization. The applicant was indicted for attempting to overthrow the constitutional order, the GNAT or prevent it from performing its duties, attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties and committing crime on behalf of a terrorist organization without being a member of it.

The case was pending before the first instance court as of the date when the individual application is examined.

The Applicant's Allegations

The applicant maintained that he was a journalist and working as a columnist in return for royalty fee; that his articles fell into the scope of the freedom of expression and the press, and that he was detained on remand without the submission of any concrete facts as to the grounds thereof. He accordingly alleged that his right to personal liberty and security and his freedoms of expression and the press were violated.

Asserting that his health was at serious risk and was not convenient for prison terms, the applicant also maintained that there was a breach of the prohibition of ill-treatment.

The Court's Assessment

Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

The examination of the Constitutional Court will be limited to the assessment of the lawfulness of the applicant's detention on remand, independently of investigation and criminal procedures against the applicant and the possible results. In addition, the issue as to whether Article 19 § 3 of the Constitution have been violated is to be examined in the specific circumstances of each application.

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, it is provided that individuals may be deprived of liberty under the circumstances set forth therein and with due process of law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Strong indication of guilt is acknowledged only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In every concrete case, it falls in the first place upon the incumbent courts deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review pertains especially to the detention process and the grounds of detention order within the scope of the circumstances of the concrete case.

In line with these general principles, it must be primarily assessed whether there is a strong indication of guilt on the part of the applicant in the present case.

In the detention order, a general assessment was provided for all suspects in respect of the conditions for detention including the strong indication of guilt. In this respect, in concluding that there was strong indication of guilt on the part of the suspects, the following facts were relied on: the FETÖ/PDY's members within the Turkish Armed Forces ("the TAF") attempted to stage the coup, the suspects were publishing articles praising this organization and serving to undermine the investigations into —especially in the aftermath of the investigations of 17-25 December— the Zaman newspaper operating for the FETÖ/PDY. They were also sharing posts via their social media accounts to that end. Thereby, the suspects engaged in propaganda activities in line with the organizational aims. They were aware of the fact the FETÖ/PDY was an armed organization on the grounds that a criminal case had been brought against E.D., editor-in-chief of the same newspaper, for his alleged membership of an armed terrorist organization and that, before the coup attempt, there had been hearsay that this organization would perform an armed insurrection. However, the suspects maintained taking role within and contributing to this organization.

In the detention order, there is no assessment as to which article or social media post of the applicant was considered to fall into this scope. The applicant's articles considered to constitute an offence are indicated in the indictment; however, his social media posts are not specified therein.

Accordingly, the assessment as to whether there was strong indication of guilt on the part of the applicant is limited to merely the applicant's articles which are referred to in the indictment. These articles are the ones titled *"It was a War of Religion", "Between Erdoğan and the West", "Yes, Both Crime and Punishment are Personal", "This Nation is not Empty-Headed", "Solution is a Government without Erdoğan" and "President cannot Stand as an Onlooker".*

The impugned articles were written in late 2013 and early 2014 and discussed the reactions shown by the Government to the "investigations of 17-25 December", which were being conducted at the relevant time.

In his articles, the applicant stated in brief that the Government members whose names were mentioned in these investigations must be brought before the courts, that due to the Government's failure to take necessary steps in this respect, the President or certain persons within the ruling party should take an action, and that the Government's reactions to these investigations were unjustified. He further indicated that in case of revealing the fact that these investigations had been conducted by the members of the FETÖ/PDY in line with an organizational instruction, a legal action must be taken against these members; and that however, it would be unlawful to target everyone being a member of this structure called as the "*hizmet* movement". In these articles, there is no statement indicating that the Government must be overthrown by use of force. On the contrary, the applicant argued that the ruling party had been losing votes and accordingly forecasted that the Government would change by way of elections. In his article written one day before the coup attempt, the applicant also expressed that he was opposed to coup.

The investigation authorities maintain that the articles were written in line with the aims ofy the FETÖ/PDY. In so doing, the investigation authorities relied on the considerations that, given the information known by the public, the applicant should have known that the FETÖ/PDY was an illegal organization which might have engaged in armed insurrection; and that he continued writing articles in the Zaman daily newspaper in spite of the "investigations of 17-25 December" and detention of the editor-in-chief of the same newspaper within the scope of the FETÖ/PDY.

However, the detention order or the indictment does not provide any concrete facts as to the grounds justifying the consideration that the applicant's articles in which he expressed opinions similar to those of a certain section

of the public and leaders of the opposition were written in order to serve for the aims of the FETÖ/PDY. The fact that the applicant had expressed such opinions in his articles published in the Zaman cannot be *per se* considered to be sufficient to reach the conclusion that these articles were written by knowing of, and in line with, the aims of the FETÖ/PDY.

In this respect, it has been concluded that "the strong indication of guilt" could not be sufficiently demonstrated, and the right to personal freedom and security was violated in the present case.

It has been further considered that nor does Article 15 of the Constitution, which prescribes the suspension and restriction of fundamental rights and freedoms in time of a "state of emergency", justify the interference with the applicant's right to personal liberty and security in breach of the safeguards set out in Article 19 § 3 of the Constitution.

For these reasons, it has been concluded that, also taken in conjunction with Article 15 of the Constitution, the applicant's right to personal liberty and security was breached.

Alleged Violation of the Freedom of Expression

The freedom of expression enshrined in Article 26 of the Constitution and the freedom of the press, another form of the freedom of expression which is subject to special safeguards and enshrined in Article 28 of the Constitution, constitutes one of the mandatory pillars of a democratic society and conditions *sine qua non* for the progress of the society and the improvement of each individual.

In spite of their significance in a democratic society, the freedoms of expression and press are not absolute and may be subject to certain restrictions, provided that the safeguards set out in Article 13 of the Constitution are complied with. Unless it complies with the requirements of Article 13 of the Constitution concerning the restriction of fundamental rights and freedoms, an interference with the freedoms of expression and press would be in breach of Articles 26 and 28 of the Constitution in addition to Article 13. Therefore, it must be determined whether the interference in question complies with the requirements of being prescribed by law, relying on one or more justified grounds specified in the relevant provisions of the

Constitution, and not being contrary to the requirements of a democratic society, as well as the principle of proportionality, which are enshrined in Article 13 of the Constitution.

It is obvious that public authorities enjoy a margin of appreciation in assessing the criteria of a democratic society and the principle of proportionality. However, in interfering with the freedoms of expression and press within this margin of appreciation, the public authorities must show "relevant and sufficient" grounds. It is for the Constitutional Court to make the final assessment as to whether an interference to be made within this framework complies with the safeguards enshrined in the Constitution. The Constitutional Court makes such an assessment on the basis of the grounds given by the public authorities and especially the inferior courts.

Regard being had to the questions directed to the applicant by the investigation authorities and the grounds of his detention order, it appears that the applicant is charged principally on account of his articles in the newspaper. Accordingly, it has been revealed that, irrespective of the content of the articles, the applicant's detention also constitutes a breach of the freedoms of expression and press, along with the right to personal liberty and security. As to the alleged violation of the freedoms of expression and press, it has been observed that the interference fulfilled the requirement of being prescribed by law. In addition, the applicant has been detained on remand for allegedly writing articles in line with the aims of the FETÖ/PDY, which has carried out activities against the national security and is the organization behind the coup attempt. Therefore, it has been concluded that the interference with applicant's freedoms of expression and press achieved legitimate aim, depending on the grounds specified in the Constitution.

Having a legal basis and achieving a legitimate aim, however, do not suffice for the interference to comply with the Constitution. For an assessment as to whether the applicant's detention has constituted a breach of the freedoms of expression and press, the present case must be examined also in terms of the requirement of being necessary in a democratic society and the principle of proportionality. The Constitutional Court makes this examination over the detention process and the reasoning of the detention order.

Regard being had to the above-mentioned findings with respect to the lawfulness of the detention and the fact that the main basis for the accusations

against the applicant is the articles, a severe measure such as detention — lacking the lawfulness requirement— cannot be regarded as a necessary and proportionate interference in a democratic society in terms of the freedoms of expression and press.

Moreover, a measure interfering with the freedoms of expression and press must meet a pressing social need and must be a measure of last resort. A measure failing to achieve these requirements cannot be considered to comply with the requirements of a democratic society. It cannot be comprehended, from the circumstances of the present case and reasoning of the detention order, due to which "pressing social need" the applicant's freedoms of expression and press were interfered considering that he expressed opinions similar to those of a certain part of the public at the relevant time.

Besides, in making an assessment as to the requirement of being necessary in a democratic society and proportionality, possible "deterring effect" of the interferences with the freedoms of expression and press on the applicants and generally on the press must also be taken into consideration. In the present case, it is explicit that the applicant's being detained on remand without providing any concrete fact, other than the articles published, may also have a deterrent effect on the freedoms of expression and press.

For these reasons, it has been concluded that resorting to detention measure in respect of the applicant mainly on the basis of his articles and without establishing strong indications of guilt is contrary to the safeguards are set out in Articles 26 and 28 of the Constitution with respect to the freedoms of expression and press.

It has been considered that nor does Article 15 of the Constitution, which prescribes the suspension and restriction of fundamental rights and freedoms in time of a "state of emergency", justify this interference.

For these reasons, it has been held that, also taken in conjunction with Article 15 of the Constitution, the applicant's freedoms of expression and press were violated.

Alleged Violation of the Prohibition of Ill-Treatment

The information and documents provided by the prison authority reveals that the applicant, who has been detained on remand, suffers certain health

problems; however, he is provided with necessary medical examinations and treatments. It has been accordingly concluded that his detention does not amount to ill-treatment in the particular circumstances of the present incident. Therefore, the Constitutional Court declared this complaint inadmissible for being manifestly-ill founded.

3. Decision on detention of the applicant who is a journalist (Mehmet Hasan ALTAN)

Mehmet Hasan Altan **[PA] (no. 2016/23672, 11 January 2018)**

The Facts

The applicant is an academician, as well as a well-known journalist and author.

On the night of 15 July 2016, Turkey faced a military coup attempt. Therefore, a state of emergency was declared countrywide on 21 July 2016. The public authorities and the investigation authorities stated that the FETÖ/PDY was the plotter/perpetrator of the coup attempt.

In this scope, investigations have been conducted against the structures of the FETÖ/PDY in various fields such as education, health, trade, civil society and media in public institutions, and many persons have been taken into custody and detained.

The Istanbul Chief Public Prosecutor's Office initiated an investigation in relation to the media structure of the FETÖ/PDY against seventeen suspects, including the applicant, many of whom were journalists, authors and academicians.

In this scope, the applicant was taken into custody on 10 September 2016 and a search warrant was issued on his house. During the search, a bank card issued by the Bank Asya in the name of the applicant and six pieces of 1 USD banknote –two of them were (F) series– were seized. The applicant was held in custody until 21 September 2016.

On 21 September 2016, the Istanbul Chief Public Prosecutor's Office took the applicant's statement. On 22 September 2016, the Magistrate Judge's Office ordered the applicant's detention on remand for attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties and for membership of a terrorist organization.

The applicant appealed against the detention order and requested the review of his appeal at a hearing. However, the Istanbul 1st Magistrate Judge's Office reviewed the applicant's appeal without hearing and dismissed it with no further right of appeal.

On 12 April 2017, the Istanbul Chief Public Prosecutor's Office indicted the applicant for the offences of attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties, attempting to overthrow the constitutional order and committing crime on behalf of a terrorist organization without being a member of it.

The case against the applicant is still pending before the 26th Chamber of the Istanbul Assize Court. At the hearing of 11 December 2017, the Public prosecutor submitted his opinion on the merits. He requested that the applicant be punished for attempting to overthrow the constitutional order. The applicant is still detained on remand.

The Applicant's Allegations

The applicant maintained that his detention was unlawful and that his right to liberty and security, as well as the freedoms of expression and press, were breached on the ground that the imputed acts fell into the scope of freedoms of expression and press and that there were no grounds for detention. According to the applicant, he was detained for political reasons rather than the reasons set forth in the Constitution.

The applicant also complained that his apprehension was unlawful, that his access to investigation file was restricted, that magistrate judgeship did not conform to the principles of independence and impartiality, that his appeal was reviewed without a hearing and that the prohibition of ill-treatment was violated.

The Court's Assessment

Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

The examination of the Constitutional Court will be limited to the assessment of the lawfulness of the applicant's detention on remand, independently of the conducting of investigation and prosecution against the applicant and

the possible results of the proceedings. In addition, the issue as to whether Article 19 § 3 of the Constitution have been violated is to be examined in the specific circumstances of each application.

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, it is set forth that individuals may be deprived of liberty with due process of law only under the circumstances stated therein. Accordingly, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Strong indication of guilt appears only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In cases where there are serious claims that the imputed acts fall within the scope of the fundamental rights and freedoms, which are indispensable for democratic social order, such as freedom of expression, freedom of the press, freedom of assembly and the rights to elect, to be elected and to carry out political activities, or in cases where such a situation is evident from the circumstances of the concrete case, the judicial authorities resorting to detention must apply a higher scrutiny in determining the existence of strong criminal suspicion.

In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them.

The Constitutional Court's review must be conducted especially over the detention process and the reasoning of detention order by having regard to the circumstances of the concrete case.

In line with these general principles, it must be primarily assessed whether there is a strong indication of guilt on the part of the applicant in the present case.

Referring to the facts that the applicant constantly made statements in the media outlets of the FETÖ/PDY, the perpetrator of the coup attempt of 15 July 2016, and in line with the purposes of this organization, thereby paving the way for the coup attempt, and that he explicitly made a call for coup during his speech on a television programme, the Istanbul 10thMagistrate Judge's Office concluded that there was strong criminal suspicion on the part of the applicant for attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties and for membership of a terrorist organization.

In the present case, the articles and speeches on account of which the applicant has been detained on remand consists of his article titled *"Balyoz'un Anlamı (The Meaning of Sledgehammer)"* that was published in Star, daily newspaper, in 2010,his speech in a program broadcasted on Can Erzincan TV the day before the coup attempt, and his article titled *"Türbülans (Turbulence)"* that was published on his own website on 20 July 2016.

First, it was argued that in his speech titled "*Balyoz'un Anlamı*", the applicant aimed at creating a public opinion in accordance with the aims of the organization by making statements praising the Sledgehammer investigation that was stated by the investigation authorities to have been manipulated with fabricated documents.

The article in question was published in Star, national daily newspaper, in 2010. The investigation authorities could not put forward factual grounds leading them to conclude that the article titled "*Balyoz'un Anlamı*", which had been written a few years before the "17-25 December investigations" of 2013 –during which it was stated that the real purpose of the FETÖ/PDY exposed– and concerned a case that had been at the top of the agenda at the material time, had been written in accordance with the aims of the FETÖ/PDY.

Second, it was argued that in his speech in a programme broadcasted on Can Erzincan TV the day before the coup attempt, the applicant tried to create a public opinion to stage a coup and explicitly made a call for coup by stating "... *There is probably another structure in the Turkish State, which documents and monitors all these developments more than the outside world does. In other words, it is not clear when and how this structure will take its face out of the bag*...". However, the applicant asserted that he did not know that a coup would be made, nor did he make a call for coup, that his abovementioned words were distorted to be regarded as an offence and that the word "structure" in his speech had referred to the State organs.

Regard being had to the content and context of the applicant's words, the words of other speakers, and to the thoughts stated therein as a whole, it is difficult to regard, without hesitation, these words as a call for the coup and to acknowledge that the applicant had uttered them, being aware of the coup attempt to take place the next day, for the purpose of bracing the public for it. Otherwise, meanings beyond the one which may be attributed by an objective observer may be ascribed to the words uttered by the applicant. As a matter of fact, during the speeches delivered through the program, it was forecasted that the Government might be overthrown, at or before the elections to be held two years later, by a new political party which would be established by some of the members of parliament from the ruling part together with another politician. Besides, it must be also borne in mind that the impugned words were uttered through a TV program in a live broadcast, and therefore, it is not possible to re-formulate, change or withdraw the expressions used in such an atmosphere before announcing them to the public. Regard being had to these considerations, the investigation authorities failed to demonstrate the factual basis for the assertion that the applicant had uttered the words in order to pave the way for the coup attempt.

Besides, the applicant was alleged to act in line with the aims of the FETÖ/PDY on account of the article titled "Turbulence", which was published by the applicant on his own web-site on 20 July 2016.

In the article, the applicant expressed his doubts as to whether the coup attempt had been conducted only by the members of the FETÖ/PDY, as well as criticized the measures taken in the aftermath of the coup attempt. Opinions which are different from the public authorities' considerations and those of the majority may be considered to constitute an offence with reference to the aim of the person expressing them only when this aim is demonstrated with concrete facts other than the contents of the expressions. However, the investigation authorities failed to demonstrate the facts which would form the opinion that the applicant had acted in line with the aims of the FETÖ/PDY in writing the article.

In reaching the conclusions that the applicant had acted in line with the aims of the FETÖ/PDY and that he had a link with this organization, the investigation authorities relied on the abstract expression of a witness, one dollar banknote found during the search carried out in the applicant's house, non-inclusion of the applicant in any investigation conducted by the judicial structure of the FETÖ/PDY, his phone conversations —time and content of which are not specified— with certain persons, and his account in the Bank Asya. However, the investigation authorities failed to demonstrate any concrete fact which would refute the applicant's defence submissions —that may be regarded as a reasonable version of events—about the allegations pertaining to banknote, bank account, non-inclusion in an investigation and phone conversation. Nor did the witness, in his statement, provide any information about a concrete action performed by the applicant.

Finally, in his opinion as to the merits, the public prosecutor also relied, as criminal evidence, on certain correspondences exchanged through "Bylock". These correspondences were exchanged among persons other than the applicant. In these correspondences, there are certain expressions with respect to the applicant. However, given the particular circumstances of the case and the content of the expressions used with respect to the applicant, such expressions cannot *per se* considered as a strong indication of guilt.

In this respect, it has been concluded that "the strong indication of guilt" could not be sufficiently demonstrated in the present case.

It has been further considered that nor does Article 15 of the Constitution, which prescribes the suspension and restriction of fundamental rights and freedoms in time of a "state of emergency", justify the interference with the applicant's right to personal liberty and security in breach of the safeguards set out in Article 19 § 3 of the Constitution.

For these reasons, it has been concluded that, also in conjunction with Article 15 of the Constitution, the applicant's right to personal liberty and security was breached.

Alleged Violation of the Freedom of Expression

Freedom of expression enshrined in Article 26 of the Constitution and freedom of the press, another form of the freedom of expression which is subject to special safeguards enshrined in Article 28 of the Constitution, constitutes one of the main pillars of a democratic society and conditions *sine qua non* for the progress of the society and the improvement of individuals.

In spite of their significance in a democratic society, the freedoms of expression and press are not absolute and may be subject to certain restrictions, provided that the safeguards set out in Article 13 of the Constitution are complied with. Unless it complies with the requirements of Article 13 of the Constitution concerning the restriction of fundamental rights and freedoms, an interference with the freedoms of expression and press would be in breach of Articles 26 and 28 of the Constitution in addition to Article 13. Therefore, it must be determined whether an interference complies with the requirements of being prescribed by law, relying on one or more justified grounds specified in the relevant provisions of the Constitution, and not being contrary to the requirements of a democratic society, as well as the principle of proportionality, which are enshrined in Article 13 of the Constitution.

It is obvious that public authorities have a margin of appreciation in respect of the requirement of being compatible with the requirements of a democratic society and the principle of proportionality. However, in interfering with the freedoms of expression and press as a result of the exercise of this discretionary power, the public authorities must show "relevant and sufficient" grounds. It is for the Constitutional Court to make the final assessment as to whether an interference to be made within this scope complies with the safeguards enshrined in the Constitution. The Constitutional Court makes such an

assessment on the basis of the grounds given by the public authorities and especially by the inferior courts.

Regard being had to the questions directed to the applicant by the investigation authorities and the grounds of his detention order, it appears that the applicant is charged principally on account of his articles and speeches. Accordingly, it has been revealed that, irrespective of the content of the articles and the speeches, the applicant's detention also constitutes a breach of the freedoms of expression and press, along with the right to personal liberty and security.

In the present case, it is obvious that the interference is prescribed by law. The applicant has been detained on remand for allegedly writing articles and delivering speeches in line with the aims of the FETÖ/PDY, which has carried out activities against the national security and is the organization behind the coup attempt. Therefore, it has been concluded that the interference with applicant's freedoms of expression and press pursued a legitimate aim in accordance with the grounds specified in the Constitution.

Having a legal basis and achieving a legitimate aim, however, do not suffice for the interference to be in conformity with the Constitution. For an assessment as to whether the applicant's detention has constituted a breach of the freedoms of expression and press, the present case must be examined also in terms of the requirement of being necessary in a democratic society and the principle of proportionality. The Constitutional Court makes this examination over the detention process and the reasoning of the detention order.

Regard being had to the above-mentioned findings with respect to the lawfulness of the detention and the fact that the main basis for the accusations against the applicant is his articles and speeches, a severe measure such as detention, which already has been founded to lack the lawfulness above, cannot be regarded as a necessary and proportionate interference in a democratic society in terms of the freedoms of expression and press.

Moreover, a measure interfering with the freedoms of expression and press must meet a pressing social need and must be a measure of last resort. A measure failing to achieve these requirements cannot be considered to comply with the requirements of a democratic society. It cannot be comprehended, from the circumstances of the present case and reasoning of the detention

order, on what "pressing social need" the applicant's freedoms of expression and press were interfered, considering that the applicant expressed some ideas that were embraced by certain segment of the public. On the same ground, it cannot be concluded that the interference was necessary in a democratic society.

Besides, in making an assessment as to the requirement of being necessary in a democratic society and proportionality, possible "deterring effect" of the interferences with the freedoms of expression and press on the applicants and generally on the media must also be taken into consideration. In the present case, it is explicit that the applicant's being detained on remand without providing any concrete fact, other than the articles published, may also have a deterrent effect on the freedoms of expression and press.

For these reasons, it has been concluded that resorting to detention measure in respect of the applicant mainly on the basis of his articles and speeches and without establishing strong indications of guilt is contrary to the safeguards set out in Articles 26 and 28 of the Constitution with respect to the freedoms of expression and press.

It has been also concluded that nor does Article 15 of the Constitution, which prescribes the suspension and restriction of fundamental rights and freedoms in time of a "state of emergency", justify this interference.

For these reasons, it has been held that, also in conjunction with Article 15 of the Constitution, the applicant's freedoms of expression and press were violated.

Alleged Unlawfulness of the Applicant's Custody

The Constitutional Court declared the applicant's allegation regarding the custodial measures inadmissible for non-exhaustion of available remedies.

Alleged Restriction Imposed on the Access to the Investigation File
The Constitutional Court declared the applicant's allegation under this heading inadmissible as being manifestly ill-founded.

Alleged Contradiction of the Magistrate Judge's Offices with the Requirements of Independent and Impartial Judge

The Constitutional Court declared inadmissible the applicant's allegation as to the independence and impartiality of magistrate judgeship as being manifestly ill-founded.

Allegation that Judicial Review of His Detention was carried out without a Hearing

The Constitutional Court declared inadmissible the applicant's allegation under this heading as being manifestly ill-founded.

Alleged Violation of the Prohibition of Ill-Treatment

The Constitutional Court declared the applicant's allegation under this heading inadmissible for non-exhaustion of available remedies.

4. Decision on detention of the applicant who is a journalist (Turhan GÜNAY)

Turhan Günay **[PA] (no. 2016/50972, 11 January 2018)**

The Facts

The applicant is a journalist and an author.

The Istanbul Chief Public Prosecutor's Office launched an investigation against many people, including the applicant, on the grounds that together with the changes in the Executive Board of the Foundation, the publication policy of the newspaper also changed —in particular, during the period that extended to the coup attempt of 15 July— in contradiction to the founding philosophy of the Foundation and the publications were manipulated against the State. In this scope, especially, with the allegations that the newspaper was trying to influence the agenda in a way that was incompatible with the worldview of the newspaper's readers; that it made news for destructive and divisive manipulations; that it published the statements of the leaders and heads of the terrorist organization making a call for violence; that it legitimized the terrorist organizations; and that it released publications aimed at demonstrating the Republic of Turkey as if it was in liaison with the terrorist organizations, an investigation was launched against the applicant and the other persons.

The Public Prosecutor's Office argued that the applicant, whom it stated to have been a member of the Executive Board of the Company, was held responsible for the news, articles and headlines published in the newspaper after the change of the publication policy of the newspaper.

Upon the detention order of the Magistrate Judge's Office, dated 5 November 2016, seven suspects, including the applicant, were detained on remand for alleged membership of an armed terrorist organization and carrying out activities on behalf of the organization.

On 3 April 2017, the Chief Public Prosecutor's Office indicted the applicant and sixteen other suspects for the offence of aiding and abetting an organization despite not belonging to the structure of that organization, one suspect for alleged membership of an armed terrorist organization, and another suspect for allegedly being a head of an armed terrorist organization.

The case has been pending before the first instance court as of the date when this application is examined.

The Applicant's Allegations

Maintaining that he had no position in the Company or the Foundation, that the indicted acts indeed fell into the scope of the freedoms of expression and press, that there was no strong suspicion of guilt, and that he was detained for political reasons, the applicant alleged that his right to personal liberty and security was violated.

The applicant also claimed that his access to the investigation file was restricted, therefore he could get information on neither the accusations attributed to him nor the grounds for these accusations.

The Court's Assessment

Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

The examination of the Constitutional Court will be limited to the assessment of the lawfulness of the applicant's detention on remand, independently of the investigation and criminal procedure and its possible results. In addition, the issue as to whether Article 19 § 3 of the Constitution have been violated is to be examined in the specific circumstances of each application.

In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, certain circumstances under which individuals may be deprived of liberty are set forth, also provided that the conditions of detention must be prescribed by law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Strong indication of guilt appears only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case.

In line with these general principles, it must be primarily assessed whether there is a strong indication of guilt on the part of the applicant in the present case.

The investigation authorities argued that upon the change of the publication policy of the newspaper, the news, articles and headlines published in the newspaper were manipulated against the State and thereby the purposes of terrorist organizations were served. In this scope, the applicant, who was stated to be a member of the Executive Boards of the Company and the Foundation, was held responsible for the news, articles and headlines.

Accordingly, the applicant was not accused due to an article of him that was published in the newspaper or an article published in a book supplement for which he had taken responsibility. The applicant was held responsible for the headlines, news and articles published in the newspaper, due to his taking part in the management of the Foundation and/or the Company.

However, in his defence during the proceedings, the applicant stated that he had never served on the Executive Board of the Foundation and that he took part in the management of the Company only between 2011 and 2013. In addition, the applicant's name is not included in the lists of the Executive Board of the Foundation that are mentioned in the indictment. Nor is there any information as to the fact that the applicant took part in the Company's management after 2013. The acts for which the applicant has been detained occurred after 2013.

Therefore, it has been concluded that the investigation authorities could not sufficiently demonstrate "a strong indication of guilt" on the part of the applicant.

For the reasons explained above, the applicant's right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution has been violated.

It has been further considered that Article 15 of the Constitution, which prescribes the suspension and restriction of fundamental rights and freedoms in time of a "state of emergency", does not justify the interference with the applicant's right to personal liberty and security that is in breach of the safeguards set out in Article 19 § 3 of the Constitution.

For these reasons, it has been concluded that, also taken in conjunction with Article 15 of the Constitution, the applicant's right to personal liberty and security has been breached.

In addition, although the applicant has been accused in relation to the publications of the newspaper, the Constitutional Court has relied on the fact that the investigation authorities could not reveal the material facts concerning the applicant's influence on the relevant publications, and therefore reached the conclusion that the applicant's right to personal liberty and security has been violated. Accordingly, it has been concluded that it is not appropriate to make an examination in terms of the applicant's freedoms of expression and the press. Such an examination will be made in the relevant individual applications lodged by the applicant's co-accused.

Alleged Restriction Imposed on the Access to the Investigation File

The Constitutional Court declared the applicant's allegation under this heading inadmissible as being manifestly ill-founded.

5. Judgment finding a violation of the right to personal liberty and security due to failure to redress the previously found violation and its consequences

Şahin Alpay (2) **[PA] (no. 2018/3007, 15 March 2018)**

The Facts

After the coup attempt of 15 July 2016, within the scope of an investigation conducted against the media structure of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY) stated to be the organization behind the coup attempt, the applicant was detained on remand for alleged membership of an armed terrorist organization.

In the first individual application lodged by the applicant, the Plenary of the Constitutional Court found on 11 January 2018 a violation of the applicant's right to personal liberty and security, as well as, his freedoms of expression and press.

Regarding the alleged unlawfulness of the applicant's detention on remand, the Court concluded that the investigation authorities could not

sufficiently demonstrate a strong indication that the applicant committed an offence, which was a prerequisite for detention as set forth in Article 19 of the Constitution. In the judgment finding also violations of the applicant's freedoms of expression and press, the Court mainly relied on its determinations as to the alleged unlawfulness of the applicant's detention on remand.

The applicant's requests for release and his appeals to this end were dismissed by the inferior courts. In their decisions, the courts mainly relied on the assessments "that the Constitutional Court cannot assess the evidence or the merits of the case or the issues to be considered in appellate review, nor can it make a substantive review, that making an examination as to the merits of the case results in "usurpation of power", that the violation judgment delivered by overstepping legal mandate cannot be considered to be final nor binding, and consequently, it would not result in the applicant's release, if otherwise, it would contradict the legal principles concerning the courts' independence and mandating that no order or instruction could be given to the courts".

The applicant submitted a request for release following the Constitutional Court's judgment. However, his request was rejected. Therefore, he lodged another individual application on 1 February 2018.

The Applicant's Allegations

The applicant claimed that his right to personal liberty and security, as well as, his some other rights and freedoms were violated due to the inferior courts' failure to implement the judgment of the Constitutional Court.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

According to Article 18 § 3 of the Constitution and Article 45 § 1 of Law no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, every person may apply to the Constitutional Court alleging that the public authorities have violated any one of her/his fundamental rights and freedoms secured under the Constitution which falls into the scope of the European Convention on Human Rights and supplementary protocols thereto, which Turkey is a party to.

In his previous individual application, the applicant had maintained that he had been detained on remand without a strong indication of guilt on the part of him, which had been in breach of Article 19 of the Constitution.

The right to personal liberty and security falls into the common protection area of Article 19 of the Constitution and Article 5 of the European Convention on Human Rights. Therefore, there is no doubt that every person can lodge an individual application with the Constitutional Court for the alleged violation of her/his personal liberty and security due to detention and that the Court must adjudicate such complaints.

In its previous judgment, the Constitutional Court examined the applicant's abovementioned allegation under Article 19 § 3 of the Constitution. It is clearly provided therein, by the phrase "Individuals against whom there is strong evidence of having committed an offence may be arrested...", that one of the constitutional safeguards against detention is the existence of "a strong indication of guilt". Accordingly, it is an obligation for the Constitutional Court to examine whether there exists "a strong indication of guilt" or not.

Essentially, in every concrete case, it falls in the first place upon the incumbent courts deciding detention cases to determine whether the prerequisite for detention, i.e. the strong indication of guilt, exists. However, it is the Constitutional Court's duty to review such determinations of lower courts. The Constitutional Court's review pertains especially to the detention process and the grounds of detention order.

In its previous judgment, the Constitutional Court reviewed the case in accordance with the abovementioned scope and method. Therefore, the Court's review cannot be regarded as "the review of an issue to be respected in terms of legal remedies" or "an assessment as to legitimacy".

Furthermore, as also stated in the previous judgment, the Constitutional Court's review in this respect is limited to the assessment of the lawfulness of the applicant's detention on remand, independently of the possible results of the proceedings. Therefore, the judgment in question cannot be considered to have included an assessment as to the merits of the criminal proceedings against the applicant.

In addition, pursuant to Article 153 § 1 of the Constitution, the judgments of the Constitutional Court are final. According to the sixth paragraph of the

same Article, these judgments shall be binding on the legislative, executive and judicial bodies, administrative authorities, and natural and legal persons. Therefore, there is no doubt that the Constitutional Court's judgment finding a violation with respect to the applicant is final and binding. Accordingly, the Constitutional Court's judgments finding a violation cannot be subject to constitutional or legal review by another authority. The contrary assessments of the inferior courts making a decision about the applicant's requests for release lack any constitutional or legal basis.

Where the Constitutional Court found a violation and ordered the redress of the violation and its consequences in accordance with Article 50 of Law no. 6216, what is expected from the inferior courts is not to assess the scope of duties and powers of the Constitutional Court but to redress the violation and its consequences. This cannot be construed as an order or instruction directed to courts within the meaning of Article 138 of the Constitution but rather the fulfilment of the right of access to a court in a state of law. Indeed, Article 153 of the Constitution explicitly states that the judgments of the Constitutional Courts are binding on judicial authorities as well.

In its previous judgment finding a violation, the Constitutional Court concluded that a strong indication of guilt could not be sufficiently demonstrated by the investigation authorities.

Following the Constitutional Court's such judgments finding a violation, the inferior courts must release the applicant against whom the prerequisite of detention could not be demonstrated. There is no other way to redress the violation and its consequences, save very exceptional cases where "a strong indication of guilt" can be demonstrated on the basis of new facts other than those that had been relied for detention and therefore had neither been assessed in the Constitutional Court's judgment finding a violation. It must be also stressed, however, the margin of appreciation afforded to the inferior courts in this respect is very limited compared to the initial detention order. In such cases, final assessment as to whether "a strong indication of guilt" has been demonstrated or not on the basis of new facts falls upon the Constitutional Court.

In the present case, the inferior courts have not released the applicant following the Constitutional Court's judgment finding a violation, nor have they demonstrated the existence of the abovementioned exceptional case.

Therefore, it is understood that the inferior courts have failed to redress the violation, found by the Constitutional Court with respect to the applicant, as well as its consequences.

In this respect, in the absence of a strong indication of guilt on the part of the applicant, continuation of his detention on remand violates the safeguards provided in Article 19 of the Constitution.

It is concluded that the applicant's right to personal liberty and security has been violated due to non-implementation of the Constitutional Court's judgment on the applicant's detention on remand, in a manner also contradicting the safeguards of the right of access to a court.

The applicant is still detained on remand. Considering the nature of the violation found, there is no other way than releasing the applicant in order to redress the violation and its consequences. Therefore, the judgment must be remanded to the trial court for release of the applicant in order to redress the violation and its consequences.

6. Decision on detention of Erdal Tercan who is a former Justice of the Constitutional Court

Erdal Tercan **[PA] (no. 2016/15637, 12 April 2018)**

The Facts

On 16 July 2016, following the coup attempt of 15 July 2016, the applicant, who was holding office as a Justice of the Constitutional Court, was taken into custody within the scope of an investigation initiated by the Ankara Chief Public Prosecutor's Office. On 20 July 2016, the applicant's detention was ordered for his alleged membership of an armed terrorist organization.

On 25 October 2017, the Ankara Chief Public Prosecutor's Office issued a motion addressed to the Chief Public Prosecutor's Office of the Court of Cassation for bringing a criminal case against the applicant alleged to be a member of an armed terrorist organization.

By the indictment of 16 January 2018 issued by the Chief Public Prosecutor's Office of the Court of Cassation, a criminal case was filed against him before the 9th Criminal Chamber of the Court of Cassation for his alleged membership to an armed terrorist organization.

The case has been pending by the examination date of the individual application, and the applicant is still detained on remand.

The Applicant's Allegations

Maintaining that his detention was unlawful; that his detention exceeded the reasonable time; and that judicial review of his detention were conducted without being brought before a judge/court, the applicant alleged that his right to personal liberty and security was breached.

The applicant further claimed that challenges to his detention were decided by the magistrate judge's offices operating in a closed-circuit manner in contradiction of the tenets of independent and impartial judge, which also allegedly constituted a breach of personal liberty and security.

He also asserted that his presumption of innocence, his right to a fair trial, his right to respect for private life and inviolability of the domicile were impaired.

The Court's Assessment

1. Alleged Unlawfulness of Detention

In brief, the Constitutional Court made the following assessments:

In the detention order issued against the applicant, it is stated that the case file contains concrete evidence indicating existence of strong criminal suspicion of his membership to an armed terrorist organization, namely the FETÖ/PDY. Similarly, in the decision dismissing the applicant's challenge to detention, it is stated that there existed concrete evidence indicating strong criminal suspicion of guilt on the part of the suspects including the applicant.

In the motion issued in respect of the applicant, statements of anonymous witnesses and suspects as well as content of conversations established through ByLock by the other persons are relied on as the evidence pointing to the applicant's having committed the imputed offence. In addition thereto, the applicant's cell phone signals are also cited as evidence in the indictment.

It has been revealed that certain issues regarding the applicant were discussed in the conversations between some persons (Ö.İ., S.E. and B.Y; S.E., B.Y. and R.Ü.) other than the applicant, via ByLock. Relying on several evidence such as the suspects/witnesses' statements and ByLock conversations, the

investigation authorities considered that Ö.İ., who was in fact a teacher, was the civilian imam (head) within FETÖ/PDY responsible for the judicial members; that the rapporteur S.E. was the incumbent of the FETÖ/PDY within the Constitutional Court; and B.Y. and R.Ü. were rapporteurs who were members of the FETÖ/PDY.

In this scope, it has been understood that in the conversations between Ö.İ. and S.E., they made remarks about dissenting opinions in a judgment of the Constitutional Court in an individual application lodged by a journalist detained on the basis of charges related to the FETÖ/PDY. In the conversations between Ö.İ. and B.Y., Ö.İ. requested that A.A., another member of the Constitutional Court, would convey, to the applicant, the former's opinion as to which candidate(s) would be supported in the election of the deputy president of the Constitutional Court.

It has been revealed that in the conversations between S.E. and B.Y., as regards individual applications lodged by two judges detained on the basis of charges related to the FETÖ/PDY, S.E. noted by mentioning of the applicant's code name "Ertan" that the applicant was in the board to examine the application; and that as the applicant wanted to address a question, certain rapporteurs who were reported to have connection with the FETÖ/PDY –and whose code names were mentioned during the conversation– were advised to visit him. In this respect, B.Y. affirmatively replied S.E.'s message. It has been further observed that the conversations between S.E. and R.Ü. are also on the same topic.

In addition, R.Ü., who held office as a rapporteur in the Constitutional Court, submitted in his statements taken by the investigation authorities as suspect that considering the applicant's approach in the individual applications where any members of the FETÖ/PDY was a party, as well as considering his relations with the rapporteurs who were members of this organization, he reached the opinion that the applicant was also a member of the FETÖ/PDY; that the applicant consulted Rapporteur S.E. –reported to be the FETÖ/PDY's incumbent within the Constitutional Court– on how he should act; that S.E. (according to his own words) contacted the civil person who was the imam (head) responsible for the Constitutional Court (or the high judicial imam), and the applicant acted in accordance with the instructions he received; and that the applicant was referred to by the code name "Ertan" in the FETÖ/PDY. R.Ü. also noted that as instructed by the FETÖ/PDY, the applicant expressed

dissenting opinion in the application related to the judges; and that the rapporteurs who were members of the FETÖ/PDY assisted the applicant in drawing up reasoning of his dissenting opinion.

Besides, one of the anonymous witnesses holding office in the Constitutional Court as a rapporteur stated that he reached the conclusion that the applicant, with whom he previously got acquainted, was a member of the FETÖ/PDY given the applicant's social relations. And, the other rapporteur indicated that the applicant was a member of this structure.

Lastly, it has been revealed that on various dates the applicant's cell phone signals were received from the same base station with those of certain persons against whom an investigation is conducted for their alleged position within the FETÖ/PDY as civilian imams; and that on various dates these civilian imams met numerous judges from high courts who were dismissed from office for having connection with the FETÖ/PDY.

Therefore, it appears that the investigation file contains evidence supporting the existence of strong indication of guilt on the part of the applicant.

In the present case, the investigation authorities' considerations as to the existence of the grounds for detention and as to the proportionality of the applicant's detention are not unfounded.

For the reasons explained above, the Constitutional Court declared this part of the application inadmissible for being manifestly ill-founded.

2. Allegation of Unreasonable Length of Detention

Regard being had to the characteristics of the organization of which the applicant is an alleged member; its extent within the judiciary and nature of its activities; the difficulty in conducting such investigations; the fact that findings obtained at every stage may require further inquiries; the necessity, inherent in the investigation conducted against the applicant, of establishing and assessing contents of conversations ascertained, through various means, by each of the others persons considered to have connection with the organization; and existence of evidence, which is hard to obtain, such as matching cell phone signals of many persons covering a long period of time, it has been concluded that due diligence was exercised in conducting both the investigation and prosecution processes.

Besides, given the fact that the grounds in the decisions ordering continuation of the applicant's detention are relevant and sufficient as legitimate reasons for deprivation of the applicant's liberty, his detention period of about one year and nine months is found reasonable.

Accordingly, the Court found no violation of the personal liberty and security within the context of Article 19 § 7 of the Constitution.

3. Allegation that Judicial Review of the Applicant's Detention was Conducted without Being Brought before a Judge/Court

The applicant's continued detention has been ordered by the decisions rendered over the case-file without holding a hearing since 20 July 2016, the date the applicant was detained on remand. During this period, the applicant did not have the opportunity to orally submit, before a judge/court, his claims as to the content or qualification of evidence forming the basis for his detention, his counter-statements as to the considerations and assessments either in favour of or against him as well as requests for his release. Therefore, the applicant's continued detention for a period of 21 months without a hearing is not in conformity with the principles of "equality of arms" and "adversarial proceedings" in an ordinary time.

His continued detention for a period of 21 months on the basis of the decisions rendered over the case-file without holding a hearing and his not being brought before a judge/court during this period is, in ordinary times, in breach of the safeguards enshrined in Article 19 § 8 of the Constitution. However, it must be further assessed whether the applicant's detention period is legitimate within the scope of Article 15 of the Constitution which envisages suspension and restriction of exercise of fundamental rights and freedoms in time of emergency periods.

In this respect, especially whether the interference with the applicant's right to personal liberty and security by conducting the judicial review of his detention without bringing him before a judge/court is within "the extent required by the exigencies of the situation" or not, within the meaning of Article 15 of the Constitution, must be determined.

In a previous judgment, the Constitutional Court concluded that the judicial review of detentions of the applicants, who were detained on remand with the allegation of having committed offences related to the coup attempt,

without a hearing for a period of 8 months and 18 days constituted a measure "proportionate to the exigencies of the situation". The Court based its judgment on many reasons such as the fact that the investigations conducted against many persons who were considered to have been in connection with the FETÖ/PDY were far more difficult and complex than other criminal investigations; that the judicial authorities were to manage a heavy workload which was unforeseeable; that many members of the judiciary were suspended from office for having connection with the FETÖ/PDY; and that the detainees' right of access to a court and their opportunity to appeal against the court decisions were safeguarded in the state of emergency as well.

In the present case, the period during which the applicant was not brought before a judge/court for judicial review of his detention (21 months) was longer than twice of the period examined in the relevant judgment.

As a result of the measures taken in the state of emergency period to increase the number of judges and prosecutors, approximately 6 thousand judges and prosecutors have been appointed to office. Therefore, the gap created as a result of dismissal of judges and prosecutors from office during the state of emergency has been filled by the substantial increase in the number of judges and prosecutors.

Furthermore, almost all of the investigations into the coup attempt have been concluded, and prosecution stage has started with respect to the suspects. In addition, a significant part of the investigations against the persons who were detained on remand within the scope of the investigations into the FETÖ/PDY, although they did not have direct connection with the coup attempt, have been concluded. Further, some of the suspects detained on account of the offences related to the FETÖ/PDY have been released or convicted, thereby ending their detention on remand. Accordingly, it can be said that an important progress has been made in the investigations and cases related to the coup attempt and the FETÖ/PDY.

Therefore, in the assessment of whether the judicial review of the applicant's detention without being brought before a judge/court during approximately 21 months constituted a measure "proportionate to the exigencies of the situation" or not, the changing circumstances of the state of emergency

period, besides the length of detention on remand, must also be taken into account.

Given these circumstances, it has been considered that the judicial review of detentions without bringing the suspects before a judge/court and the continuation of their detention on remand without holding a hearing in the course of investigation and prosecution phases related to the FETÖ/PDY and terrorism can be regarded as a measure required by the exigencies of the situation in the period up to 18 months.

However, it must be noted that this assessment has been made by taking into consideration the circumstances prevailing from the beginning of the state of emergency until today and the changes in this respect. Therefore, this assessment must not be regarded as an open licence allowing investigation and prosecution authorities to conduct the judicial review of detentions over case-documents for a period of 18 months.

Nevertheless, regard being had to the fact that the state of emergency still continues and that a large part of the cases related to the coup attempt and the FETÖ/PDY are pending, the longer detention periods without a hearing compared to non-emergency times cannot be automatically regarded as a measure not required by the exigencies of the situation.

The Court will make an assessment in each application by taking into consideration the circumstances of the case, the period during which the review of detentions was conducted without holding a hearing, and the developments in the state of emergency period.

In the present case, the fact that the applicant, who is detained on remand for alleged membership of an armed terrorist organization (FETÖ/PDY), has not been brought before a judge/court within the scope of the judicial review of his detention for more than 18 months is not regarded as a measure required by the exigencies of the situation.

Therefore, the interference with the applicant's personal liberty and security by the extension of his detention over case-documents without being brought before a judge/court for a period of 21 months, which is in breach of the safeguards provided in Article 19 § 8 of the Constitution, cannot be considered to be justified under Article 15 of the Constitution.

For the reasons explained above, the Constitutional Court has held that the applicant's right to personal liberty and security has been violated due to the judicial review of his detention without being brought before a judge/court.

4. Other Allegations

The Constitutional Court has declared the application inadmissible for being manifestly ill-founded in so far as it is related to the applicant's allegations that his presumption of innocence has been violated and that his right to personal liberty and security has been violated due to his not being able to effectively enjoy his right to appeal against his detention on remand. The Court has also found the applicant's allegations concerning the right to a fair trial, the right to respect for private life, and the right to inviolability of the domicile inadmissible for non-exhaustion of legal remedies.

7. Judgment finding a violation of the right to liberty for being kept at a police station by off-duty police officers

Mehmet Baydan **[PA] (no. 2014/16308, 12 April 2018)**

The Facts

The applicant was summoned to the police station by phone.

He maintained that he had been kept unjustly at the police station for a long period of time. He was informed by the police officers that he was summoned to the police station upon a woman's accusation of harassment and threat. The officers noted that they also summoned the accuser for filing an official complaint; however, she responded that she could not be present at the police station on that day.

Thereafter, the applicant filed a complaint against the officers at the police station. The prosecutor's officer rendered a decision of non-prosecution concerning these officers. The applicant's challenge to this decision was dismissed by the incumbent assize court.

The Applicant's Allegations

The applicant claimed that his personal liberty and security was breached as he was unjustly kept at the police station without a charge or criminal proceedings against him.

The Court's Assessment

An interference with the personal liberty safeguarded by Article 19 of the Constitution requires an actual restriction of a person's freedom of movement. For an interference with the personal liberty and security, a person must be physically kept in a place for a certain period of time which causes discomfort at least.

Article 13 of the Constitution sets forth that fundamental rights and freedoms may be restricted only by law.

In the instant case, the applicant went to the police station upon being summoned. During the period he was at the police station, he was accompanied by three off duty police officers in a place where no video footage could be taken.

According to the task schedule, these police officers were not among the staff who were on duty at the police station on that day and at that hour. Without being duly assigned by the competent authorities, it is not possible for police officers serving within another police unit to undertake a task within the scope of the investigation conducted into the concrete case.

Moreover, there is no fact indicating that the incident was notified to the investigation authorities by the police officers. Nor is there any judicial process initiated at the police station against the applicant during the impugned period. Besides, in the instant case, there is no flagrante delicto situation or any other circumstances that require police officers to take an immediate action.

Accordingly, the applicant was kept, by the off-duty police officers, at the police station for a certain period without an action taken in respect of him. It appears that the applicant's being kept at the police station does not fall into the ambit of any circumstance which, under Article 19 of the Constitution, justifies an interference with the right to personal liberty and security.

For the reasons explained above, the Court found a violation of the personal liberty and security safeguarded by Article 19 of the Constitution.

8. Decision finding inadmissible the alleged violations of the right to personal liberty and the right to stand for election

Kadri Enis Berberoğlu **(no. 2017/27793, 18 July 2018)**

The Facts

An investigation was initiated into the incident where the trucks carrying materials belonging to the National Intelligence Organization had been stopped and searched in two provinces. Under the investigation, certain law enforcement officers and judicial members were detained on remand.

A daily newspaper published news on this matter on two different days and released photos and information about the weapons and ammunition alleged to be in the trucks. Thereupon, the incumbent chief public prosecutor's office initiated an investigation into the offences of obtaining confidential information regarding State security, political and military espionage, disclosing confidential information and making propaganda of terrorist organization.

Accordingly, a criminal action was brought against the journalists, Erdem Gül and Can Dündar, on account of the news relating to the investigation. In light of certain information revealed through the proceedings, the applicant, who had allegedly provided Can Dündar with the images, was placed under investigation.

By the indictment issued by the chief public prosecutor's office, a criminal action was brought against the applicant before the incumbent assize court for the alleged offences of providing confidential information of the State for the purpose of political or military espionage and knowingly and wilfully aiding an armed terrorist organization (FETÖ/PDY).

The assize court convicted the applicant and ordered his detention. His appeal to this decision was dismissed.

The Applicant's Allegations

The applicant maintained that there was a breach of his right to personal liberty and security due to the unlawfulness of the decision ordering his post-trial detention as well as his right to stand for election due to his inability, on account of being detained, to perform his duties as an MP.

The Court's Assessment

1. Alleged Violation of the Right to Personal Liberty and Security

In Article 19 of the Constitution, it is enshrined that everyone has the right to personal liberty and security, and circumstances under which persons may be deprived of liberty are enumerated exhaustively.

Pursuant to this article, one of the circumstances allowing deprivation of liberty is *the execution of penalties and implementation of security measures, which are imposed by courts through sentencing in the form of deprivation of liberty*.

In the present case, the detention status complained of by the applicant is not in the form of a pre-trial detention on the basis of a criminal charge but *detention after conviction, in other words, the execution of penalties and implementation of security measures imposed by courts through sentencing in the form of depriving a person of liberty*. In case of such an alleged violation, the Constitutional Court's task is limited to determining whether or not the person has been deprived of his liberty, partially or completely, under these circumstances.

In many applications of similar nature, the Constitutional Court found manifestly ill-founded and therefore declared inadmissible the alleged violation of the right to personal liberty and security of the persons who have been deprived of liberty through imprisonment or arrest warrant ordered in the sentence following the trial. The Court also found inadmissible, on the same ground, the similar allegations raised by the applicants whose status of being detained continued due to conviction after trial.

On the other hand, regard being had to the case documents with respect to the applicant, it has been observed that the criminal act imputed to the applicant in the motion for lifting his parliamentary immunity, in the indictment, and in the decisions of first instance and district appeal court is essentially same although there exists some differences on the assessment of the legal qualification of the imputed act. In this respect, it cannot be concluded that the imputed act resulted in the applicant's conviction and imprisonment was outside the scope of the exception to the parliamentary immunity introduced by the constitutional amendment.

Besides, the applicant was elected as a member of parliament in the general election held subsequent to the applicant's individual application. As a requirement of the subsidiarity nature of the individual application mechanism, the question as to whether the applicant's election as an MP hinders the continuation of the applicant's post-trial detention must be examined primarily by the inferior courts through the ordinary legal remedies.

The applicant's file contains no information or document indicating that the applicant lodged an individual application with a request to be released for being re-elected as a member of parliament after having exhausted the ordinary legal remedies. Therefore, it is not possible, at this stage, to examine whether the applicant's re-election as an MP constitutes an obstacle to the continuation of the applicant's post-trial detention.

For the reasons explained above, the Court declared this part of the application inadmissible for being manifestly ill-founded.

2. Alleged Violation of the Right to Stand for Election

In the recent judgments rendered by the Constitutional Court, the allegations of the applicants –who were members of the parliament– that their rights to carry out political activities and to stand for election had been violated are examined in conjunction with the right to personal liberty and security.

In cases where detention status was found lawful at the end of the examination conducted, the Court found inadmissible for being manifestly ill-founded the alleged violation of the rights to carry out political activities and to stand for election due to detention measure.

In the present case, the alleged unlawfulness of the applicant's detention order was found inadmissible for being manifestly ill-founded as it falls into the scope of the *execution of penalties and implementation of security measures, which are imposed by courts through sentencing in the form of deprivation of liberty*. Considering the assessments in respect thereof, the Court found no reason to reach a different conclusion with respect to the applicant's allegation that his right to stand for election was also violated on account of his post-trial detention.

For the reasons explained above, also this part of the application was found inadmissible for being manifestly ill-founded.

9. Decision finding inadmissible the alleged violation of the right to personal liberty and security due to unlawfulness of detention on remand and restriction of access to the investigation file

Ali Şeker **(no. 2016/68962, 20 September 2018)**

The Facts

The applicant, who was a teacher, was dismissed from the public service in accordance with the Decree Law no. 672 on Measures Taken with respect to the Public Officials under the State of Emergency.

Within the scope of the investigation launched against the applicant for membership of the Fetullahist Terrorist Organization and/or the Parallel State Structure (FETÖ/PDY), he was brought before the magistrate judge for detention. He was detained on remand for membership of the armed terrorist organization. The applicant's appeal against the decision of the magistrate judge ordering the continuation of his detention on remand was dismissed. The applicant subsequently lodged an individual application.

During the period following the individual application, a case was filed before the assize court with the indictment of the chief public prosecutor's office. The assize court convicted the applicant of aiding the armed terrorist organization knowingly and willingly without being involved in its hierarchical structure and acquitted him of contravening Law no. 6415. The applicant's appeal against his conviction is still pending.

The Applicant's Allegations

The applicant maintained that his right to personal liberty and security was violated due to unlawfulness of his detention on remand and restriction of his access to the investigation file.

The Court's Assessment

1. Alleged Unlawfulness of Detention on Remand

In the present case, it must be discussed whether the facts relied on by the investigation authorities could be regarded as a strong indication that the applicant had committed an offence in relation to the FETÖ/PDY. In this

respect, two facts are of particular importance. The first is that the applicant was a director in Aktif-Sen labour union, and the second is that the applicant had participated in a protest carried out upon the instruction of the labour union.

Considering the characteristics of the FETÖ/PDY, the importance it attached to education, the relationship of Aktif-Sen –which was closed after the coup attempt of July 15th– with this structure, and the events related to the organization, which occurred across the country during the period when the applicant was a director of the labour union, all these can be regarded as a strong indication of guilt on the part of the applicant.

In addition, given the developments occurred in the country during the material period, the fact that the applicant had participated in the demonstrations held to protest certain investigations conducted against the media outlets known to have links with the FETÖ/PDY was regarded as a strong indication that there was an organizational relationship between the applicant and the FETÖ/PDY, which was neither an arbitrary nor an unsubstantial consideration.

In view of all the facts concerning the incident, it was agreed that the applicant's detention on remand was proportionate, the principles stipulated in the law were applied to the case, and the conditional bail would not be a sufficient measure.

2. Alleged Restriction of Access to the Investigation File

In the present case, it was understood that the investigation document had been read to the applicant and his lawyer during the proceedings before the magistrate judge. The incumbent judge also explained the offences imputed to the applicant. Having been informed of the relevant information and documents pertaining to the charges against him and of the grounds relied on therein, the applicant made his verbal defence before the judge in the presence of his lawyer and denied the accusations against him.

Furthermore, the applicant did not submit any complaint as to the restriction of his access to the other documents. Thus, both the applicant and his lawyer had access to the documents pertaining to the accusations against the applicant, as well as to the other information. The main elements forming a

basis for the accusations and the information relied on in the assessment of the lawfulness of his detention were notified to the applicant and his lawyer. The applicant was provided with the opportunity to make his defence in this respect. Considering these circumstances, it cannot be accepted that the applicant could not challenge his detention effectively due to the restriction order applied during the investigation stage that had lasted a few months.

Consequently, the Constitutional Court declared the alleged violation of the applicant's right to personal liberty and security due to unlawfulness of his detention on remand and restriction of his access to the investigation file inadmissible for being manifestly ill-founded.

10. Decision finding inadmissible the alleged violation of the right to personal liberty and security due to the judicial review of detention without a hearing

Salih Sönmez **(no. 2016/25431, 28 November 2018)**

The Facts

The applicant was elected as a member of the Court of Cassation by the Council of Judges and Public Prosecutors ("the CJP") in 2011. On 21 July 2016 he was taken into custody within the scope of an investigation launched by the chief public prosecutor's office after the coup attempt of July 15th.

On 22 July 2016 the Ankara Chief Public Prosecutor's Office indicted the applicant before the magistrate judge. The latter ordered the applicant's detention on remand. Upon the applicant's appeal, the incumbent court ordered the continuation of his detention on remand. The applicant's appeal was again dismissed, and subsequently, on 9 November 2016 he lodged an individual application.

The case is still pending before the Court of Cassation in its capacity as the first instance court and the applicant is detained pending trial.

The Applicant's Allegations

The applicant maintained that the judicial review of his detention on remand was conducted without holding a hearing, and therefore his right to personal liberty and security was violated.

The Court's Assessment

In its decisions concerning the alleged excessive or unreasonable length of pre-trial detention, the Constitutional Court concluded that action for damages envisaged in the Code of Criminal Procedure no. 5271 was an effective legal remedy. Accordingly, in cases of alleged violations of rights as in the present case, the remedies capable of affording redress must primarily be exhausted. Unless a result is achieved, then an individual application can be lodged.

In the present case, it appears that the judicial review of the applicant's detention on remand was conducted over the case-documents without his being brought before a judge/court for a period of 21 months between 22 July 2016 and 5 April 2018. The applicant has been detained pending trial, and he could attend the hearings held at reasonable intervals since the first hearing held on 5 April 2018 before the Court of Cassation.

In one of its recent judgments, the Constitutional Court concluded that the judicial review of detention of the prisoners held for terrorism-related offences or the offences related to the Fetullahist Terrorist Organization and/or the Parallel State Structure (FETÖ/PDY) after the coup attempt without being brought before a judge/court for a period more than 18 months was in breach of the right to personal liberty and security even during the state of emergency period.

As the applicant has already been brought before a judge/court, finding of a violation by the Constitutional Court will not cause the applicant to be brought before a judge/court again, nor will it result in his release. Therefore, the Court may only find a violation as regards the applicant's not having been brought before a judge/court for a period of 21 months, or it may award a certain amount of compensation, if necessary. In case of an unlawfulness to be found as a result of the case to be filed with these allegations, the incumbent court may award compensation in favour of the applicant.

Accordingly, it was concluded that the remedy specified in Article 141 of Law no. 5271 was effective and applicable to the applicant's case and that the examination of the individual application filed without exhaustion of this ordinary legal remedy did not comply with the subsidiary nature of the individual application mechanism.

Consequently, the Constitutional Court declared inadmissible the alleged violation of the applicant's right to personal liberty and security due to the judicial review of his detention on remand without being brought before a judge/court.

E. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Judgment finding a violation of the right to respect for private and family life due to disposal of untreated sewage to a stream

Binali Özkaradeniz and Others **[PA] (no. 2014/4686, 1 February 2018)**

The Facts

The applicants are residing in a village located near a stream in the Susuz district of Kars.

The Kars Governor's Officer carried out an inspection over the sewage system of the district municipality and consequently ascertained that sewage was disposed to the stream without being subject to any treatment.

Thereafter, the district municipality taking into consideration the relevant legislation prepared a "work termination plan" and submitted it to the Governor's Office. However, it is noted in the "Environmental Status Report" issued afterwards by the Provincial Directorate of Environment and Urbanization that no waste water treatment facility was constructed in the region.

Alleging that they were sustaining damage as a result thereof, the applicants brought several actions for compensation against the municipality. However, the administrative court dismissed the actions. The applicants' appellate requests against the administrative court's decision were dismissed by the Council of State.

The Applicants' Allegations

The applicants maintained that their constitutional rights had been breached due to disposal, by the municipality, of untreated sewage to the stream passing by near their village.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

As required by the right to respect for private and family life safeguarded by Article 20 of the Constitution, the public authorities are to prevent disposal

of raw sewage to stream which would adversely affect health. In this respect, it is at the discretion of the public authorities to decide on the measures to be taken. However, it is compulsory to implement the prescribed measures in a reasonable and appropriate manner in order not to cause right violations.

It was ascertained by both the Governor's Office and the inferior courts that disposal, by the municipality, of untreated sewage to the stream passing by near the applicants' village had led to water contamination and that certain measures were to be taken for prevention of such contamination. This constituted an interference with the applicants' right to private and family life.

Considering the relevant legislation, the district municipality prepared "a work termination plan" with regard to the water treatment facility and submitted it to the Governor's Office. However, according to the "Environmental Status Report" issued by the relevant administration, this facility was not put into operation although a certain period of time had elapsed.

In the reasoning of the decisions dismissing the action of the applicants, the inferior courts mainly took into consideration the initiatives for construction of a treatment facility. Regard being had to the fact that, pending the applicants' action for compensation, the relevant municipality failed to eliminate environmental disturbance despite the expiry of the period prescribed in the work termination plan, future construction of the treatment facility cannot be considered sufficient for redress of the non-pecuniary damage that has been already sustained and still being sustained by the applicants.

For these reasons, the Constitutional Court found a violation of the right to respect for private and family life safeguarded by Article 20 of the Constitution.

2. Decision finding inadmissible the alleged violations of the freedom of communication and the right to respect for family life

Bayram Sivri **(no. 2017/34955, 3 July 2018)**

The Facts

After the coup attempt of 15 July 2016, the applicant was detained and placed in a penitentiary institution for alleged membership of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY).

In line with the Decree Law no. 667 on the Measures under the State of Emergency, the Administrative and Supervisory Board of the Penitentiary Institution decided that those who were already detained for the offences specified in the Decree Law and those who were detained for the first time and placed in the penitentiary institution would exercise their right to communicate by telephone once every fifteen days during the state of emergency.

The applicant's objection to this decision was dismissed by the Execution Judge. Besides, his appeal against the decision of the Execution Judge was dismissed by the Assize Court.

The Applicant's Allegations

The applicant maintained that his freedom of communication and right to respect for private life were violated due to the restriction imposed on his telephone communications.

The Court's Assessment

Article 22 of the Constitution enshrines that everyone has the freedom of communication, and privacy of communication is essential. The right to respect for family life is also safeguarded under Article 20 of the Constitution.

In addition, as set out in Article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law and in conformity with the reasons specified in the relevant provisions thereof. Such restrictions cannot be contrary to the requirements of a democratic order of the society and the principle of proportionality.

In the present case, the applicant did not raise any allegation as to the complete hindrance of communication with his family members and relatives. His complaint concerns the restriction of his right to communicate by telephone to a period of ten minutes once every fifteen days.

His complaint is examined under Article 13 of the Constitution which lays out that such restrictions must be prescribed by law, pursue a legitimate aim, and comply with the requirements of the democratic order of the society as well as with the principle of proportionality.

The applicant's right to communicate by telephone was restricted within the framework of a legal provision. Regard being had to a detention for an offence falling into the scope of the Anti-Terror Law, differences among the rights and opportunities afforded to prisoners, by the nature or gravity of their offences, may be deemed justified.

Given the gravity of the offences and specific circumstances of the state of emergency, it has been concluded that the restriction imposed on telephone communications of certain detainees, for the purposes of maintaining public order, safety and discipline of the penitentiary institution, satisfies the requirement of pursuing a legitimate aim.

In the aftermath of the coup attempt of 15 July, a great number of public officers and civilians considered to have a link with the FETÖ/PDY were detained on remand by a court decision, and the European Court of Human Rights also acknowledged that this coup attempt revealed the existence of a public threat posing a risk to the life of the nation.

Regard being had to the extent of the coup attempt threatening the life of the nation and to detention of many persons due to terrorist offences following the coup attempt, it cannot be said that the interference in the present case is not necessary in a democratic society.

Besides, the complained restriction was applied only during the state of emergency. The time granted to the applicant for communication was not restricted. Nor did he raise an allegation that he was deprived of his right to communicate by telephone.

For the reasons explained above, the Constitutional Court declared the alleged violations of the right to respect for family life and the freedom of communication inadmissible for being manifestly ill-founded.

3. Decision finding inadmissible the application for lack of jurisdiction *ratione materiae* as prostitution is not protected under the right to private life

S.K. (B) **(no. 2014/18275, 4 July 2018)**

The Facts

The applicant, who engages in prostitution for a living, lodged a request in order to work in a brothel. The incumbent commission rejected the applicant's

request as the physical conditions in the brothel did not ensure safety of life and property.

Thereupon, the applicant filed an action for annulment before the administrative court. However, the administrative court, which found that the decision of the commission decision complied with the law, dismissed the applicant's action.

However, similar cases against refusal of such requests were accepted by different administrative courts. Those cases eventually became final upon the appellate review of the Council of State.

The impugned first instance court decision was first quashed by the Council of State at the appellate stage. However, as the first instance court reinstated its original decision, the Plenary Session of Administrative Law Chambers of the Council of State upheld the decision.

Thereafter, the applicant filed an individual application with the Constitutional Court.

The Applicant's Allegations

The applicant maintained that, in spite of professionally engaging in prostitution and fulfilling all conditions specified in the relevant legislation, her request to be granted work permit was rejected, which was in breach of the right to respect for private life.

The Court's Assessment

The notion of private life is interpreted quite broadly and not susceptible to exhaustive definition. The legal value which is protected in respect thereof is essentially self-dependence. Particularly, the sexual acts and behaviours in the field of privacy are also encompassed by this notion. However, it cannot be concluded that every kind of sexual acts and behaviours of adults are under the protection of the right to respect for private life.

The preamble of the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others stresses that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with human dignity and endanger the welfare of the community.

Prostitution is not, regardless of whether with or without consent, compatible with the dignity and worth of the human person. At this stage, it is not possible for the act of prostitution to be protected within the framework of personal autonomy.

In spite of providing a sphere whereby everyone may freely establish and develop his own personality, it would be too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world. Therefore, this notion also encompasses the right to develop social relationship with other human beings and the outside world.

Prostitution has deep impacts, in several terms including health, morals and individual rights, not only on those who engage in this act but also on other individuals of the community. It would not be compatible with human dignity to regard the act of prostitution as a profession based on training or competency.

To consider prostitution as a professional activity would result in deeming human body (especially women's body) to become an economic good, which is regarded as a regression in terms of human rights. Besides, taxation of prostitution income or registration of such persons in the social security system are inevitable results of keeping prostitution under control by way of restriction rather than prohibition, as is the case in some countries including Turkey. However, such requirements cannot be construed to regard prostitution as a profession.

It is considered that acts of those who demand prostitution may fall within the limits of sexual life, which is protected under the right to privacy; however, the situation differs for individuals engaging in prostitution as a means of earning money because it then falls into the scope of an economic activity. As the applicant, asserting that she professionally engages in prostitution, has not raised an allegation that her sexual acts and behaviours are within the sphere of her privacy, it has been concluded that her demand cannot be protected within the scope of the right to privacy.

For the reasons explained above, the Court concluded that the act of prostitution was not an issue requiring protection under the right to respect for private life and accordingly declared the application inadmissible for lack of jurisdiction *ratione materiae*.

4. Judgment finding a violation of the right to respect for family life as a result of being assigned in a different district

Nurbani Fikri **(no. 2014/2502, 11 October 2018)**

The Facts

While the applicant had been working in the regional directorate of a public institution as a public official, she was temporarily assigned in the port authority under the same directorate. The applicant requested to return to her previous office three times due to her mother's health problems. Upon these requests of the applicant who worked in the port authority for a certain period of time, the applicant was allowed to return to her previous office.

There, the applicant received a warning due to an incident that took place between her superior and her. One day after this incident, the applicant was again assigned in the same port authority. The incumbent court accepted the case filed by the applicant for cancellation of her assignment and therefore the process was cancelled. While the proceedings were continuing, the applicant's mother died. Upon the appeal of the administration, the Council of State quashed the first instance decision. The court abided by the decision of the Council of State. The applicant's subsequent request for the rectification of the decision, as well as, her appeal were dismissed, therefore she lodged an individual application.

In addition, upon being assigned in the port authority for the second time, the applicant brought an action for compensation against the administration and she was awarded 1,000 Turkish liras (TRY). The administration's appeal was dismissed and the decision became final.

The Applicant's Allegations

The applicant maintained that her right to respect for her family life was violated due to her assignment in a different district.

The Court's Assessment

There must be a reasonable balance between the public interest in the appointment or transfer of public officials and the personal interest of the individual in terms of her/his right to respect for her/his family life. In case of

a failure to strike such a balance, it must not be overlooked that the right to respect for family life will be impaired.

Within the scope of the margin of appreciation exercised for changing the place of duty of the public officials, the positive obligations imposed on the State by the right to respect for family life safeguarded by Article 20 of the Constitution must also be taken into consideration.

As a requirement of the positive obligations imposed on the State by the right to respect for family life, the legal and factual obstacles needed to be eliminated in order to facilitate the applicant to care for her sick mother who had been in need of care. This requirement does not necessarily mean that the applicant's place of duty would never be changed under any circumstances.

At this point, the reasons put forth by the administration and the assessments of the inferior courts are of importance. In their decisions, the inferior courts are expected to take into consideration the gravity of the self-sacrifice on the individual's part and to determine whether a fair balance has been struck between the requirements of the public interest and the protection of the individual's fundamental rights.

One of the reasons for changing the applicant's place of duty was the allegation that her certain behaviours or conducts towards her superior had not been compatible with her position as a public official. The action brought by the applicant for cancellation of her assignment was dismissed by the first instance court. While the applicant's assignment in a different district despite her excuse concerning her mother's health was considered lawful within the scope of the action brought for cancellation of the process, the same process was found unlawful in the action for compensation. However, the inferior court dealing with the applicant's action for cancellation of her assignment made no assessment or explanation regarding the applicant's excuse concerning her mother's health status, nor did it provide sufficient justification as to the alleged violation of the applicant's right to respect for her family life.

In addition, although the applicant submitted during the proceedings of the action for cancellation of her assignment that the action for compensation brought by her had been concluded in her favour, the court made no assessment to that effect in its reasoning.

It was understood that the decision of the inferior court lacked sufficient elements for striking a fail balance between the legal public interest pursued by the assignment process and the applicant's right to respect for her family life. Accordingly, the positive obligations incumbent on the public authorities within the scope of the right to respect for family life were not fulfilled.

In addition, it was concluded that the amount of compensation awarded to the applicant was not sufficient to redress the anguish and distress suffered by her due to her inability to fulfil her obligation to care for her mother.

Consequently, the Constitutional Court found a violation of the applicant's right to respect for her family life safeguarded by Article 20 of the Constitution and awarded compensation to her.

F. JUDGMENTS/DECISIONS CONCERNING THE FREEDOM OF RELIGION AND CONSCIENCE

1. Judgment finding a violation of the freedom of religion due to dismissal from public office for wearing headscarf

B.S. **(no. 2015/8491, 18 July 2018)**

The Facts

The public institution where the applicant was serving as a civil servant (the administration) assigned a negative qualification grade to the applicant through the disciplinary penalties imposed on her for wearing head scarf. The applicant, who continued wearing headscarf, was later dismissed from public office.

In the action brought by the applicant, the incumbent inferior court rendered an annulment decision on the ground that her oral defence submissions had not been taken. Then, the administration filed an appeal against this decision with the Council of State which rendered a decision in favour of the administration. In line with the Council of State's decision, the inferior court dismissed the applicant's action. The applicant's appeal against the dismissal decision as well as request for rectification of the decision were also rejected.

While the court proceedings were ongoing, the procedural deficiencies indicated in the inferior court's decision had been rectified, and the applicant was then again dismissed from office. The action brought by the applicant against this decision was also dismissed by the administrative court.

Upon the appellate process, this decision was upheld by the Council of State. In the meantime, the Law no. 5525 on the *Remission of Certain Disciplinary Penalties Imposed on the Civil Servants and the Other Public Officers* –to which the Council of State made a reference in its dismissal decision– entered into force during the examination of the applicant's request for rectification of the Council of State's decision.

The applicant filed an application with the administration, independently of the previous actions, and requested to be re-appointed to her public office on the basis of the Law no. 5525. However, her request was dismissed by the

administration on the ground that *"it was not entitled to directly employ an officer"*.

The action brought by the applicant against the administration's refusal and the predicate circular relied upon was dismissed by the Council of State. After her appeal and request for rectification of the Council of State's decision had been also dismissed, the applicant lodged an individual application.

In the petition submitted subsequent to her individual application, she indicated that relying on the Law no 5525, she took office in another public institution where she was later retired.

The Applicant's Allegations

The applicant alleged that her freedom of religion was violated as she had been dismissed from public office for wearing a headscarf.

The Court's Assessment

The freedom of religion and conscience, enshrined in Article 24 of the Constitution, safeguards everyone's "freedom to manifest his/her religion and belief", "freedom to change his/her religion and belief", "freedom to have a belief or conviction of his/her choice" and "freedom to have no belief or conviction".

This right safeguarded by Article 24 of the Constitution is *sine qua non* as the freedom of religion is vital for building and maintaining an effective and sound democracy based on rule of law.

Those who are believers of different religions or who have no religion or belief are under the protection of the secular State. As a matter of fact, as defined in the legislative intent of Article 2 of the Constitution, *secularism –which in no circumstances means irreligiousness– allows individuals to have a belief or sect of their own choice, to worship freely as well as prevents them from being subject to discrimination due to their religious belief*. The State is to take necessary measures for providing an environment where the freedom of religion and conscience may be exercised.

In this sense, secularism imposes negative and positive obligations on the State. Negative obligation requires avoiding of any interference with the individuals' freedom of religion unless there are compelling grounds. Positive

obligation entails the duty on the part of the State to eliminate obstacles before the freedom of religion and to provide appropriate environment and opportunities whereby individuals may live in the way they believe.

The argument that it is in breach of the principle of secularism to allow public officers on duty to wear headscarf on religious ground –without taking into consideration the specific circumstances of their public offices– can be in no way accepted. Considering the practices such as wearing headscarf by public officers to manifest religious beliefs as to threaten social unity is not in conformity with democracy and the understanding of pluralist secularism. Indeed, such practices reflect social diversity rather than constituting a threat against it. The applicant was dismissed from public office for wearing headscarf as required by her religion. This sanction constitutes an interference with the applicant's right to manifest her religion.

The assessments to be made in the present case will mainly focus on the question as to whether the grounds established by the inferior courts for their judgments which ultimately led to the interference are in compliance with requisites of a democratic society as to the restriction of the freedom of religion. Any interference with the freedom of religion on a ground failing to fulfil the criteria set by the Constitutional Court would be in breach of Article 24 of the Constitution.

In the present case, the administration and the inferior courts acted on a categorical assumption that the mere wear of headscarf by a public officer disturbed public order. Neither the administrative decision nor the court judgments indicated that the applicant's wearing headscarf was offensive, oppressive, or provocative; or aimed to interfere with others' belief or to compel others to adopt her own belief; or impaired the institutional public service and caused disorder.

The public institutions only determined that the applicant had insisted on wearing her headscarf but did not make an assessment as to the problems caused or likely to be caused by her insistence. Therefore, it could not be comprehended which pressing social need was met, for maintaining the public order, by the interference with the applicant's right to manifest her religion.

In addition, the disciplinary penalty prescribed in the relevant legislation that was in force at that time for wearing a headscarf was in fact the sanction

of reprimand. However, both the administration and the inferior courts unreasonably regarded it as one of the acts requiring dismissal from public office.

Besides, the penalty of dismissal from public office, imposed on the applicant for wearing a headscarf, is the severest disciplinary sanction. It cannot be therefore concluded that the penalty, which entails very heavy burdens, both pecuniary and non-pecuniary, for the applicant is proportionate.

As a result, it could not be established with a relevant and sufficient ground that the impugned interference met a pressing social need and was reasonably proportionate to the legitimate aims for protecting public order. Therefore, the interference is not in compliance with the requirements of a democratic society.

For the reasons explained above, the Court found a violation of the freedom of religion safeguarded by Article 24 of the Constitution.

2. Decision finding inadmissible the alleged violation of the freedom of religion due to denial of request for opening the Hagia Sophia Museum to religious practices one day in a year

Sürekli Vakıflar Tarihi Eserlere ve Çevreye Hizmet Derneği **(no. 2015/14747, 13 September 2018)**

The Facts

The applicant is a legal person; an association serving the purpose of advancing the historical districts and the environment. The request submitted by the applicant for opening the Hagia Sophia Museum to religious practices one day in a year was rejected by the incumbent administration.

The annulment action brought by the applicant against the decision of the administration was dismissed by the administrative court. Upon the applicant's appeal, the Council of State upheld the first instance court's decision. The applicant's request for rectification of the decision was rejected by the same Chamber of the Council of State, the applicant subsequently lodged an individual application.

The Applicant's Allegations

The applicant maintained that its freedom of religion was violated due to rejection of its request for opening the Hagia Sophia Museum to religious service one day in a year.

The Court's Assessment

It is set forth in the Code on Establishment and Rules of Procedures of the Constitutional Court that legal persons of private law can make individual application only on the ground that their rights the capacity of legal personality have been violated.

The applicant alleged that its freedom of religion was violated. However, it has been understood that the legal personality of the applicant was not affected by the public action which allegedly led to a violation.

Consequently, the Constitutional Court declared the alleged violation of the freedom of religion inadmissible for being incompatible *ratione personae.*

3. Judgment finding a violation of the freedom of religion and the right to education for being dismissed from university due to headscarf ban and ordered to repay the scholarship

Sara Akgül **[PA] (no. 2015/269, 22 November 2018)**

The Facts

The applicant studying at the Boğaziçi University received a scholarship on compulsory service from the Ministry of National Education (Ministry) between 2000 and 2005.

When she was a fourth-grade student, the applicant was dismissed from the University for failing to re-register by the decision taken by the Board of Directors of the Faculty of Education of the University.

The applicant facing no problem while attending the University prior to 2004 stated that she was thereafter asked for taking off her headscarf at the University's campus gate where there were also police officers and panzers. She also noted that she could not continue her education as she had not been allowed to attend courses and exams under these conditions by wearing

a headscarf; and that she had been dismissed from the University due to absence. In support of her allegations, she submitted certain documents.

Pursuant to Law no. 5806, enacted on a subsequent date and known to public as the Amnesty Law, the applicant re-enrolled at the University in 2009 and was then graduated in 2012.

By the end of 2012, the Ministry issued an order for re-payment, by the applicant, of the amount of scholarship that she had received. The applicant challenged this order; however, the Ministry dismissed her challenge. She than filed an action for annulment of the order, and the incumbent administrative court annulled the Ministry's order in 2013.

Examining the appeal request of the administration, the regional administrative court quashed the first instance decision and dismissed the action in 2014. The applicant whose request for rectification of the judgment had been also dismissed then lodged an individual application with the Court.

The Applicant's Allegations

The applicant maintained that she had not been allowed to attend courses due to headscarf ban and had been therefore dismissed from the university, as a result of which she had to repay the scholarship she had received. She accordingly alleged that her freedom of religion and right to education had been violated.

The Court's Assessment

1. Alleged Violation of the Freedom of Religion

Freedom of religion is one of the indispensable requirements of a democratic state, as set out in Article 2 of the Constitution. Freedom of religion safeguarded by Article 24 of the Constitution safeguards everyone's *"freedom to manifest his/her religion and belief"*. In a secular political system, individual preferences as to religious issues and life styles formed by these preferences are exempted from the State's interference, but under its protection. In this sense, the principle of secularism is safeguarded by the freedom of religion.

Secularism imposes negative and positive obligations on the State. Negative obligation requires avoiding of any interference with the individuals' freedom of religion unless there are compelling grounds. Positive obligation entails

the duty on the part of the State to eliminate obstacles before the freedom of religion and to provide appropriate environment and opportunities whereby individuals may live in the way they believe.

Article 26 of the Constitution does not introduce any restriction, as to content, on the freedom of expression and dissemination of thought. It is possible to ban the manifestation of religion by wearing headscarf only if there are considerable grounds indicating that other individuals are prevented from enjoying their rights and freedoms.

The documents in the case-file reveal that the headscarf ban started to be enforced at the Boğaziçi University by the beginning of 2000s. There are also several national news indicating that the said ban remained in force at the University until 2009 and was protested several times.

Considering all these developments, the applicant's position during the proceedings before the inferior courts and the first instance court's assessments in her favour as a whole, the Court has concluded that the headscarf ban was imposed on the applicant.

In the present case, the public authorities' acts and actions, which imposed a restriction on the headscarf that the applicant was wearing as a requirement of her religious belief, constitute an interference with her right to manifest her religion.

It must be determined whether the interference complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and complying with requirements of a democratic society.

An interference falling within the scope of Article 24 of the Constitution is accepted to satisfy the condition of lawfulness only when it has a legal basis.

The Court's examination as to the present case reveals that there is no provision of law which imposes a restriction on the applicant's freedom of religion and belief, which prevents, as required by Article 13 of the Constitution, arbitrary acts and actions of the bodies exercising public power and which is accessible, foreseeable and precise to the extent that would facilitate individuals to know the practices in the legal system.

There exists no legal restriction requiring students to continue their university education without wearing a headscarf. Neither the *Leyla Şahin* judgment of the European Court of Human Rights (ECHR) nor the Court's judgments of 1989 and 1991, which the ECHR relied on and which formed a basis for the practice as to students' dressing style in Turkey, cannot be considered as the rules satisfying the condition of lawfulness enshrined in Article 13 of the Constitution, which sets forth that fundamental rights and freedoms may be restricted only by law.

It has been concluded that the interference with the applicant's freedom of religion in the present case where she was prevented from continuing her university education for wearing a headscarf did not satisfy the condition of lawfulness.

For the reasons explained above, the Court found a violation of the freedom of religion safeguarded by Article 24 of the Constitution.

2. Alleged Violation of the Right to Education

Article 42 of the Constitution sets forth that no one may be deprived of the right to education. In its previous judgments, the Court considers that the right to education covers the primary, secondary and higher education, safeguards effective access to educational institutions as well as imposes, on public authorities, a negative duty not to prevent individuals from receiving education.

Principles regulating educational institutions may vary by needs and resources of the society and characteristics specific to different levels of education. Therefore, it must be accepted that the State has a certain degree of discretionary power in regulations and practices to be carried out in this field.

In this scope, the right to education, in its essence, does not preclude recourse to disciplinary measures, including suspension or dismissal from an educational institution, with a view to ensuring compliance with the rules. Disciplinary punishments are undoubtedly a significant part of means that would ensure both students to develop themselves and schools to attain their goals. However, it must be explicitly shown that recourse to such measure is one of the requirements of a democratic society, which must not fall foul of the other rights enshrined in the Constitution.

Given the fact that the right to education guarantees access to educational institutions, the applicant's inability to continue the University constituted an interference with her right to education.

With regard to the interference with the right to property, the Court, considering the violation it has found in respect of the applicant's complaints as to the freedom of religion safeguarded by Article 24 of the Constitution, has concluded that her right to education safeguarded by Article 42 of the Constitution was also violated.

For the reasons explained above, the Court found a violation of the right to education safeguarded by Article 42 of the Constitution.

G. JUDGMENTS/DECISIONS CONCERNING THE FREEDOMS OF EXPRESSION AND THE PRESS

1. Judgment finding a violation of the freedom of expression due to awarding compensation against the applicant criticizing a politician

Eyüp Hanoğlu **(no. 2015/13431, 23 May 2018)**

The Facts

During public debates on abortion, İbrahim Melih Gökçek, the then Mayor of the Ankara Metropolitan Municipality, sent the following private direct message *"Have you undergone several abortions? This is why you cry out so much?"* to a woman through a social media platform, namely Twitter. Then, the woman posted this message through her Twitter account so that every Twitter account holder could see it.

Upon this post, two hashtags *"#UnembarrassedMelihGökçek"* and *"#ShamelessMelih Gökçek"* were started on Twitter. The applicant also posted a tweet with hashtag *"#UnembarrassedMelihGökçek"* through his Twitter account.

Mr. Gökçek (complainant) brought an action for non-pecuniary damages arguing that his personality rights were attacked because the applicant used in his post the term *"unembarrassed"* and it was exposed to his followers in large number.

Finding that the complainant was insulted, the competent court awarded non-pecuniary compensation in his favour. The applicant's appellate request was dismissed by the Court of Cassation as the award was under the amount specified in the relevant Law.

The Applicant's Allegations

The applicant argued that his freedom of expression was breached due to the award of compensation against him on account of his posts that were in the nature of criticism towards a politician.

The Court's Assessment

The Constitutional Court constantly underlines that politicians are to tolerate more criticism as public figures and holders of public power; and that the limits of criticisms towards them are much broader.

As the statement in the present case is directed against a well-known politician, limits of acceptable criticism are wider compared to the ordinary citizens. It follows that the complainant must endure a higher level of criticism than an ordinary citizen is required to endure.

Given the circumstances and background of the concrete case, the applicant's post and the terms used therein had a factual basis. Through his post, the applicant expressed his criticism against the complainant's post.

The first instance court made an assessment of the applicant's post without considering the particular circumstances of the case. Therefore, the grounds relied on in awarding non-pecuniary compensation against the applicant cannot be regarded as relevant and sufficient for interfering with his freedom of expression.

For the reasons explained above, the Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

2. Judgment finding a violation of freedoms of expression and the press due to compensation award on the account of a newspaper column

Mehmet Doğan **[PA] (no. 2014/8875, 7 June 2018)**

The Facts

The applicant, an author of several cultural and literary works and a former member of the Radio and Television Supreme Council, was a columnist of a national newspaper at the material time.

With reference to the statement *"we have involved in certain cases"* by a then-member of the High Council of Judges and Prosecutors ("the HCJP"), the applicant criticized the decisions of the HCJP in his column just before the constitutional referendum of 2010.

Maintaining that certain expressions in the column were of defamatory nature, the then-member of the HCJP (*"the complainant"*) brought an action for non-pecuniary damages against the applicant.

The magistrate's court entered an award against the applicant. The judgment was upheld by the Court of Cassation.

The Applicant's Allegations

The applicant asserted that the complainant's name was mentioned in the newspaper column only once; and that his criticisms were directed at the HCJP based on concrete facts. He accordingly maintained that his freedoms of expression and the press were violated owing to the compensation awarded against him.

The Court's Assessment

Articles 26 and 28 of the Constitution safeguard freedom of expression and freedom of the press.

In a democratic society, the press is entitled to direct criticism towards, and to make comments about, the politicians and public officials. However, such criticisms must not go beyond the extent which would damage the reputation of the individuals concerned.

In the column complained of, the decisions of the HCJP before the referendum were ironically criticized. It has been observed that the applicant made severe criticisms in the column; however, it must be acknowledged that these expressions have made contribution to a discussion of general public interest.

The Court concluded that awarding, by the inferior court, of a compensatory amount of TRY 3,500.00 against the applicant due to the newspaper column was not compatible with the requirements of a democratic society and was therefore in breach of freedoms of expression and the press.

Under these circumstances, it is of legal interest to conduct a re-trial in order to eliminate the consequences of the violation of freedom of expression as well as the freedom of the press. Accordingly, re-trial to be conducted is aimed at removing the violation and the consequences thereof, as per Article 50 of Law no. 6216.

In this respect, the step required to be taken by the inferior courts is first to revoke the court decision leading to the violation and to render a new decision in line with this judgment.

Nevertheless, a re-trial in the present case does not fully redress the damages sustained by the applicant during the proceedings that led to the violation. Besides, as a re-trial has been ordered for the elimination of the violation and its consequences, the judicial process to which the applicant is a party will continue.

Therefore, in order to remove the violation along with all consequences arising therefrom, the Court has found it necessary to award the applicant a net amount of TRY 3,000.00 for non-pecuniary damages due to the violation of the applicant's freedoms of expression and freedom of the press, which could not be redressed by merely finding a violation and ordering a re-trial.

For the reasons explained above, the Court found a violation of freedom of expression and freedom of the press, safeguarded by Articles 26 and 28 of the Constitution respectively, and awarded the applicant a net amount of TRY 3,000.00 in respect of non-pecuniary damage.

3. Decision finding inadmissible the alleged violation of the freedom of expression due to compensation award against a political party leader

Kemal Kılıçdaroğlu (2) **(no. 2015/2850, 18 July 2018)**

The Facts

The applicant, who is the Chairman of the Republican People's Party (CHP), shared some of his claims regarding the Kayseri Metropolitan Municipality with the public in the General Assembly of the Turkish Grand National Assembly, in the group meetings of his party, and in press statements and television programs.

In the case filed by the then-Mayor against these claims of the applicant, the Civil Court of General Jurisdiction ordered compensation award against the applicant. The Court of Cassation upheld the decision. The applicant's request for rectification was dismissed. Thereupon, the applicant lodged an individual application.

The Applicant's Allegations

The applicant claimed that his freedom of expression was violated on the ground that he was imposed compensation for expressing some claims.

The Court's Assessment

According to Law no. 6216 and the Internal Regulations of the Constitutional Court, individual applications must be lodged within thirty days starting from the exhaustion of legal remedies or from the date when the violation is known, if no remedy is available.

In the present case, the period of thirty days started on 14 May 2014 when the applicant became aware of the final decision of the Court of Cassation on dismissal of his request for rectification. However, the applicant lodged an individual application on 16 May 2015, after the expiry of this period.

Consequently, the Constitutional Court found the present application inadmissible for having been lodged out of time.

4. Judgment finding a violation of the freedom of expression due to compensation award against a political party leader

Kemal Kılıçdaroğlu (3) **(no. 2015/1220, 18 July 2018)**

The Facts

The applicant, who is the Chairman of the Republican People's Party (CHP), shared his claims regarding the Kayseri Metropolitan Municipality with the public, relying on the statements by a person alleging that certain municipality officials had received bribe.

Approximately forty lawsuits were brought against the applicant by the persons concerned –including the then-mayor– for non-pecuniary damages.

In the seven lawsuits against the applicant filed by the municipal officials –consultant of the press office, head of the transportation department, two deputy secretary general, one official from the private secretary and two municipal employees– for non-pecuniary losses, the civil court ordered the applicant to pay a total amount of TRY 22,500. This decision was upheld by the Court of Cassation.

The Applicant's Allegations

The applicant maintained that he had not expressed the claimants' names in his speeches, nor did he make any statement which would constitute an attack on the claimants themselves. He accordingly claimed that his freedom of expression was violated.

The Court's Assessment

The freedom of expression is safeguarded by Article 26 of the Constitution.

Expression of thoughts by everyone including opponents through any kind of means, recruiting supporters of thoughts expressed, efforts to realize those thoughts and to persuade others, and tolerating such efforts are, inter alia, requirements of the pluralist democratic order.

The restriction imposed on the freedom of expression must serve the purpose of meeting a pressing social need in a democratic society and must be of exceptional nature.

Regard being had to their positions and functions, the public officials must display a wider degree of tolerance to the criticisms towards them than ordinary citizens.

In the present case, the applicant's claims are a matter of public interest. Investigations in which certain officials of a municipality rendering public service were involved are of course subject to the firm and close scrutiny of the applicant as a political party leader.

The inferior courts' conclusion that the applicant's harsh words were directed to the claimants were not predicated upon the statements of the applicant but upon the investigation mentioned in those statements.

In his speech, the applicant did not specify the claimants' names. The Court considers that the inferior courts' acknowledgement that, in spite of not directly addressing, the applicant's statements had indirectly revealed, or might entail the risk of revealing, the claimants' identities has resulted from an over-interpretation of the statements. To hold otherwise would render public speeches impossible.

It is explicit that certain expressions used by the applicant in his speeches are offending and irritating. However, certain remarks of politicians may

be considered to be a part of political discourse which evidently aims at making polemic, attracting strong reactions as well as strengthening their own supporters.

The inferior courts assessed the applicant's expressions, which might be qualified as excessive in case of being devoid of a factual basis, without taking into consideration the specific circumstances of the case. They found the complained words offensive. However, in doing so, they ignored the links between other expressions within the speech and these words, as well as failed to discuss whether it was necessary for the applicant to use these words during his comments and assessments.

Negative meaning inherent in the applicant's expressions does not invalidate the consideration that the applicant primarily defended his voters' interest and discussed a matter of high public interest. Therefore, it has been concluded that there was no plausible, relevant and sufficient ground justifying the interference with the applicant's freedom of expression.

Particularly, given the fact that any interference with the politicians' freedom of expression may have a deterrent effect on the exercise of this freedom, awarding insignificant compensatory amounts in favour of some claimants does not justify the interference with the applicant's freedom of expression.

It has been concluded that the interference in the present case does not meet a pressing social need and it is not proportionate, which does not in turn comply with the requirements of a democratic social order.

Accordingly, it is of legal interest to conduct a re-trial in the present case in order to remove the consequences of the violation of the freedom of expression. The step required to be taken by the inferior courts is to primarily revoke the court decision giving rise to this violation and then to take a new decision in line with the judgment finding a violation.

Besides, in order to eliminate all consequences of the violation, the applicant must be awarded compensation for his non-pecuniary damages which could not be redressed by only finding a violation and conducting a re-trial.

For the reasons explained above, the Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution and ordered the payment of TRY 20,000 to the applicant for his non-pecuniary damages.

5. Judgment finding a violation of the freedoms of expression and the press due to denial of access to online news

Miyase İlknur and Others **(no. 2015/15242, 18 July 2018)**

The Facts

At the time of the incident, the applicant, Oğuz Güven, was the editor of the website of a national newspaper and the other applicant, journalist Miyase İlknur, was the author of the news which was published on this website and to which access was denied.

In the complained news written by the applicant Miyase İlknur, it was maintained that certain politicians and bureaucrats had purchased dwellings at cost price within the scope of a project undertaken by a company affiliated to a metropolitan municipality.

The governor whose name was cited in the news requested denial of access to the website content alleging that the news did not reflect the truth and constituted an interference with his personal rights. Accordingly, the magistrate judge ordered denial of access to the content of the impugned news. The applicants lodged an individual application with the Constitutional Court after their challenge to the order on denial of access had been dismissed.

The Applicants' Allegations

The applicants maintained that their freedoms of expression and the press were breached on account of the order blocking access to the news published on the website of a national daily newspaper.

The Court's Assessment

The said news concerns the allegation that dwellings were sold to certain bureaucrats and politicians at cost price within scope of the project which was not compatible with the policy of urban transformation.

In the news, name of the complainant, who was the governor of the relevant province at that time, was also cited among those purchasing these dwellings. The news implied a connection between the purchase of the governor and a report prepared by him during his prior service as chief public inspector.

The report had concluded no investigation was necessary to the construction company undertaking the project.

It is obvious that the impugned news pertains to the use of public funds and pursues the aim of informing public opinion. Undoubtedly, publication of certain claims as to the complainant, who was the governor of a province, through the news contributed to a debate of high public interest.

The complainant requested denial of access to the website content, pursuant to Article 9 of Law no. 5651, maintaining that the news did not reflect the truth and harmed his honour and dignity. The magistrate judge, acknowledging his request, relied on the grounds that the news had been in breach of the presumption of innocence and the right to avoid defamation. In the order blocking access, it was indicated that the news exceeded the level of informing public opinion and impaired honour and reputation of the concerned individuals.

An order blocking access to a publication content may be issued at the end of non-adversarial proceedings only in cases where the unlawfulness and interference with the personal rights are apparent prima facie and where urgent redress of damages is necessary.

In the present case, the first instance court failed to demonstrate the need for urgent elimination of the alleged interference with honour and reputation without carrying out adversarial proceedings. Given the contents of the impugned news, it has been also observed that the incident did not reach the severity which would require recourse to the measure of denial of access to content pursuant to the relevant law.

As regards disputes similar to that in the present case, regard must be paid to the existence of applicable and effective criminal and civil remedies, which may present a higher degree of success depending on the particular circumstances of each case. In a civil case, a complainant is always entitled to file a request for denial of access to any content.

As a result, given all conditions of the present case, the grounds relied on in issuing an order for denial of access to a website, pursuant to Article 9 of Law no. 5651, without adversarial proceedings cannot be considered sufficient.

In addition, within the context of the present case, damages suffered by the applicants who were parties of the proceedings giving rise to the violation cannot be redressed only by a retrial. Besides, in a re-trial for redressing the violation and its consequences, the judicial process is still pending in respect of the applicants. In order to redress the violation and all its consequences, as required by the rule of restitution, the applicants must be awarded compensation for their non-pecuniary damages which have resulted from the violation of the freedom of expression and which could not be redressed by merely finding a violation and conducting a re-trial.

For the reasons explained above, the Court found a violation of the freedoms of expression and the press, safeguarded by Articles 26 and 28 of the Constitution, and awarded the applicants compensation for their non-pecuniary damage.

6. Decision finding inadmissible the alleged violation of the freedom of expression due to denial to deliver certain documents to the prisoner

İbrahim Kaptan (2) **(no. 2017/30723, 12 September 2018)**

The Facts

The applicant is currently being held in a penitentiary institution for membership of an armed terrorist organization.

It is set forth in the Law no. 5275 on the Execution of Penalties and Security Measures that the prisoners held for terrorism-related offences may not be delivered the documents received through courier or their relatives, save for the course books sent to the prisoners continuing their education.

Relying on the relevant Law and the letter of the General Directorate of Prisons and Detention Houses, the Administrative and Supervisory Board of the Penitentiary Institution ("the Board") decided that the prisoners held for terrorism-related offences would not be delivered the documents received through courier or their relatives.

The applicant's objection to this decision was dismissed by the execution judge on the ground that the decision had been given in accordance with the laws and regulations. Besides, the applicant's appeal against the decision

of the execution judge was dismissed by the assize court. The applicant subsequently lodged an individual application.

The Applicant's Allegations

The applicant, held in the penitentiary institution, maintained that his freedom of expression was violated due to the prison officers' denial to deliver him the documents, other than course books, received through courier or his relatives.

The Court's Assessment

In the present case, the applicant complained about the prison officers' categorically denying the periodicals or non-periodicals sent to the institution by courier or brought by the prisoners' visitors in order to be delivered to them. According to the data from the Ministry of Justice, at the material time, there were approximately 245.000 detainees and convicts in the penitentiary institutions.

Requiring the administrations of the penitentiary institutions to examine all publications sent to the prisoners before delivery may hinder the administrations from fulfilling their duties properly in order to maintain order and security in the institution as well as to prevent crimes. As a matter of fact, aims such as the prevention of the communication between the members of the terrorist organization or of any order or instruction from the organization are also mentioned in the Board decision.

The applicant has access to periodicals and non-periodicals through the administration of the penitentiary institution, on condition of depositing their price in the deposit account. He is also allowed to use the library in the institution. The applicant did not complain that the system enabling the prisoners to demand publications by depositing their price was not operating properly; that the materials in the library of the institution were inadequate; or that the State failed to fulfil its positive obligations to ensure that the prisoners had access to certain news or opinions. It must be borne in mind that the applicant's complaint did not concern his denial of access to a specific publication or certain information. In the present case, the Constitutional Court concluded that the impugned practice of the penitentiary institution aiming at maintaining the security in the institution and preventing any crimes met a pressing social need and was proportionate.

In the instant case, it is considered that the impugned practice, which is considered to be compatible with the requirements of a democratic society, was clearly not in breach of the applicant's freedom of expression.

Consequently, the Constitutional Court declared the alleged violation of the freedom of expression inadmissible for being manifestly ill-founded.

7. Judgment finding a violation of the freedom of expression due to imposition of a reprimand on account of an unfavourable comment about the administration on the social media

Hulusi Özkan **(no. 2015/18638, 15 November 2018)**

The Facts

At the material time, the applicant who was a police officer, made the comment *"...High-ranking persons! Death is both for you and for us... Allah will already call you to account for this, and here will the Emniyet-Sen..."* under the topic titled *"Mobbing towards the Head of the Emniyet-Sen..."* on a Facebook page created by a number of police officers.

A disciplinary investigation was launched against the applicant on account of his comment and he was given a reprimand by the administration.

The action brought by the applicant for the annulment of the administrative action was dismissed by the administrative court. The regional administrative court, having examined the appeal lodged by the applicant, upheld the administrative court's decision and, subsequently, rejected the applicant's request for rectification of the decision.

The Applicant's Allegations

The applicant, stating that he had shared a comment containing neither an insult nor a criminal element on the social media for once, maintained that his freedom of expression was violated due to imposition of a reprimand.

The Court's Assessment

The hierarchical rules within the Security Directorate ("the directorate"), which is vested with the power to use weapons and similar equipment, as well as the special powers related to judicial actions in addition to the

administrative ones, are naturally stricter than the rules applicable to civil servants. However, this should not be interpreted as that the directorate or the hierarchical superiors cannot be criticized.

Regard being had to the title of the topic on the social media under which the applicant shared a comment and to the expressions used by the applicant, it was observed that the applicant expressed his dissatisfaction and reproach with the management of the directorate without mentioning the name of any executive.

It cannot be said that the applicant's expressions disclosed a secret about the directorate, nor did they attain the severity threshold which would damage the directorate or cause it lose reputation.

The first instance court failed to strike a balance between the applicant's freedom of expression and his obligations to abide by the rules of professional hierarchy, and it also failed to demonstrate the best interest in the applicant's fulfilment of his obligations to abide by the mentioned rules vis-à-vis his freedom of expression. The court confined itself to stating that the impugned expressions were incompatible with the professional ethics. It neither dwelled on the meaning of them nor did it examine the context in which they were used.

The first instance court did not examine the complaint subject of the application in the entirety of the incident, nor did it take into account the particular circumstances of the incident, the issue criticized, the applicant's purpose in expressing his opinion, the manner in which he expressed his opinion, the possible consequences thereof and its effects on the public service or the discipline of the public institution, if any.

The facts put forth though the examination of the applicant's expressions irrespective of the context of the incident and of the entirety of the concrete explanation cannot be regarded as relevant and sufficient. Furthermore, imposition of a reprimand on the applicant due to his expression was not necessary in a democratic society.

Consequently, the Constitutional Court found a violation of the applicant's freedom of expression safeguarded by Article 26 of the Constitution.

H. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES

1. Judgment finding no violation of the right to hold a meeting and demonstration for punishing the act of disseminating terrorist propaganda by concealing the face

Ferhat Üstündağ **(no. 2014/15428, 17 July 2018)**

The Facts

The applicant attended the meeting held by the Democratic Society Party ("DTP") with necessary permissions being obtained.

As noted in the expert's report on the video footage of the incident, the applicant was among the group who were, at the meeting place, holding flags symbolizing terrorist organization and poster of its leader as well as chanting slogans in favour of the terrorist organization. He concealed his face in order not to be identified by the security forces. Thereafter, the incumbent chief public prosecutor's office charged the applicant for making terrorist propaganda, and at the end of his trial by the relevant assize court, he was sentenced to one year's imprisonment. Upon the appellate review, the first instance decision was upheld by the Court of Cassation. Thereupon, the applicant lodged an individual application with the Constitutional Court.

The Applicant's Allegations

The applicant maintained that his being punished for attending a meeting held upon a political party's call was in breach of his right to hold meetings and demonstration marches.

The Court's Assessment

The Court examined whether the applicant's being sentenced to one year's imprisonment for covering his face in order to conceal his identity during the meeting in which a propaganda in favour of the terrorist organization had been disseminated was compatible with the requirements of a democratic society.

By the relevant provision of the Anti-Terror Law no. 3713, the legislator has intended to punish those who have wholly or partially covered their faces

for concealing their identities at meetings and demonstration marches held for terrorist propaganda, as a measure to ensure peaceful meetings and demonstration marches, which is required by the obligations incumbent upon the State under Article 34 of the Constitution. The Court has accordingly concluded that the interference with the applicant's right to hold meetings and demonstration marches satisfied the requirement of being limited by law.

The Court has acknowledged that the applicant's punishment was a part of measures taken for maintaining public order and preventing commission of offences, which are among the grounds specified in Article 34 § 2 of the Constitution, and therefore pursued a legitimate aim.

In light of these findings, the Court first dealt with the question as to whether propaganda of the terrorist organization had been disseminated through the meeting held by the political. The Court then examined whether the applicant's punishment for covering his face during the meeting in order to conceal his identity met a pressing social need, and whether it was proportionate.

Individuals are obliged to conform to certain tasks and responsibilities within the scope of Article 34. Accordingly, it has been observed in the present case that those who had attended the meeting and disseminated propaganda in favour of the terrorist organization by concealing their faces –even if not resorting to any act of violence– acted in breach of the tasks and responsibilities inherent in the right to hold meetings and demonstration marches, and they thereby abused this right. The Court has concluded that the assessment that the meeting became devoid of its peaceful nature in respect of those concealing their identities at the meeting for terrorist propaganda serves the purpose of ensuring effective and legitimate use of fundamental rights.

It has been concluded that the applicant's acts and expressions correspond with the goals or orders of a terrorist organization. Therefore, imposing a punishment on the applicant, who had abused his right to assembly protected under the Constitution, meets an urgent social need.

By punishing the applicant, the authorities have aimed to prevent the acts of violence adopted as a method by the terrorist organization, PKK, as well as to restrain individuals acting in a manner which would lead to continuance

of, and increase in, violence posing a serious threat to the democratic order. Regard being also had to the discretionary power of the public authorities and the courts in balancing various interests, one year's imprisonment imposed on the applicant was found proportionate.

As a result, the interference with the applicant's right to hold meetings and demonstration marches cannot be considered to be incompatible with requirements of a democratic social order.

For the reasons explained above, the Court found no violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

2. Judgment finding a violation of the right to hold meetings and demonstration marches due to suspension of the pronouncement of the judgment

Ali Demirci ve Diğerleri **(no. 2015/16311, 20 September 2018)**

The Facts

The applicants, members of the Organization Board of the demonstration march subject to the present application, organized a demonstration march themed "No to Cyanide", having duly informed the administration.

A group of approximately 500 persons attended this march by holding banners. After the press statement, the group did not disperse despite the warnings and went to another place by car.

An action was brought against the applicants for violating Law no. 2911 on the ground that they did not end their march within the previously designated place and that they did not submit the necessary report to the police pursuant to the mentioned law.

The criminal court of first instance sentenced the applicants to 5 months' imprisonment and suspended the pronouncement of the judgment. The applicants' appeal was dismissed by the assize court, therefore they lodged and individual application.

The Applicants' Allegations

The applicants maintained that the suspension of the pronouncement of the judgment for their participation in the demonstration march was in breach of their right to hold meetings and demonstration marches.

The Court's Assessment

The applicants' being placed on probation for five years with the decision on suspension of the pronouncement of the judgment must be considered as an interference with their right to hold meetings and demonstration marches. Acknowledging that such an interference had a legal basis and pursued the legitimate aim of maintaining the public order, it must be assessed whether it was necessary in a democratic society and was proportionate.

The Constitutional Court does not consider that a duly organized meeting or demonstration march alone justifies an interference with fundamental rights and freedoms. It must be demonstrated by the competent authorities (in police reports, indictments or reasoning of the inferior courts' decisions) that for some specific reasons, an interference with a meeting or demonstration march is necessary in order to maintain the public order.

In cases where the demonstrators do not resort to violence or do not lead to a social disorder, the public authorities must tolerate, to a certain extent, the right to hold meetings and demonstration marches. A peaceful demonstration or press statement must, in principle, not be subject to a threat of criminal sanction.

In this scope, certain procedural shortcomings such as the conduct of a demonstration march out of the designated places or failure to submit or delayed submission of a report indicating that the chairman and members of the Organization Board were present at the meeting place were not alone sufficient to justify that the demonstration was not peaceful. Therefore, imposition of 5 months' imprisonment and suspension of the pronouncement of the judgment against those holding a peaceful meeting and demonstration march which did not involve any acts of violence did not justify the interference.

In the present case, it was not stated in the first instance decision whether the meeting and demonstration march had been peaceful, whether the social

life had been affected by the alleged event and whether it had disturbed the social order. Nor was it mentioned in the relevant decision that the demonstrators had gathered to serve a significant public interest and expressed their opinions in a peaceful manner. The applicants were punished solely on the basis of procedural shortcomings.

The relevant decision that put the applicants under the threat of criminal sanction due to a peaceful demonstration, as a rule, failed to strike a balance between the measures deemed necessary to achieve the legitimate aims and the right to peaceful assembly. Accordingly, the decision on suspension of the pronouncement of the judgment would have a deterrent effect on the applicants' subsequent attempts to organize a meeting and demonstration march or to attend such activities.

In the present case, it was concluded that the placement of the applicants on probation for five years with the decision on suspension of the pronouncement of the judgment had not been necessary to achieve the legitimate aim of maintaining the public order specified in the Constitution.

Consequently, the Constitutional Court found a violation of the applicants' right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

3. Judgment finding a violation of the right to hold meetings and demonstration marches due to prevention of the protest of mine accident

***Sevinç Hocaoğulları* (no. 2015/271, 15 November 2018)**

The Facts

Members of the solidarity platform formed by various democratic mass organizations, (ten persons) including the applicant, wanted to issue a press statement to protest the Soma mine accident where 301 miners lost their lives and to condemn the police intervention in the demonstrations held the day before.

Members of the platform informed the law enforcement officers that they would issue a press statement. Immediately afterwards, the police officers

intervened in the group. The CD images submitted by the applicant revealed that the police officers had surrounded the group and taken them holding by the arms.

The applicant filed a criminal complaint with the chief public prosecutor's office (prosecutor's office) against the police officers for intentional injury, professional misconduct and exceeding the limits of use of force. The prosecutor's office issued a decision of non-prosecution.

The magistrate judge rejected the applicant's objection to the decision of the prosecutor's office with final effect. The magistrate judge also specified that there was no report in the file indicating that the applicant had been injured. Nor was there any information that the applicant had been taken into custody. Subsequently, the applicant lodged an individual application.

The Applicant's Allegations

The applicant maintained that their prevention from issuing a press statement by the police officers was in breach of their right to hold meetings and demonstration marches.

The Court's Assessment

The Constitutional Court examined whether the police intervention in the group of people who had gathered to issue a press statement peacefully or to attend the press statement had been necessary in a democratic society.

The situations in which the meetings and demonstration marches shall be deemed unlawful are listed in Law no. 2911. However, the mere reason that a meeting or a demonstration march was not organized in accordance with the procedure stipulated by the Law is not sufficient for an intervention.

In order to intervene in a group of people who have gathered peacefully, it must be demonstrated by the competent authorities that the public order is at stake or that the group have failed to act in accordance with their rights, duties and responsibilities.

In the present case, also considering that the meeting organized two days after the mine accident was an instant reaction that was necessary, failure to inform the administration in advance cannot be considered alone as constituting a sufficient justification for dispersing the meeting.

There is also no observation that the protest demonstration in question had hindered certain activities, that it had disturbed the public order or that it had weakened the security measures. Despite the lack of such situations, the police officers prevented the applicant and his friends from protesting the mine accident in a peaceful manner and from issuing a press statement. In cases where the demonstrators are not involved in acts of violence, public authorities must tolerate the right to hold meetings and demonstration marches to a certain extent.

In addition, according to the case-law of the Court of Cassation, in cases where an interference with the right to hold meetings and demonstration marches is necessary, the demonstrators must be warned. However, such a warning, which must be given before intervention, must be given by appropriate means, as well as a reasonable time must be allowed after the warning. In the incident, the police had warned the demonstrators to disperse, but intervened almost simultaneously. Thus, the warning had not been given in accordance with the procedure envisaged.

It has been concluded that the alleged intervention did not correspond to a pressing social need, nor did it comply with the requirements of a democratic social order in maintaining the legitimate interest of public order.

Consequently, the Constitutional Court found a violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

4. Judgment finding a violation of the right to hold meetings and demonstration marches due to imposition of disciplinary punishment for attending a press statement

Yılmaz Güneş and Yusuf Karadaş **(no. 2015/10676, 26 December 2018)**

The Facts

The applicants, teachers in a public school, were given reprimand, as a disciplinary punishment, for attending an event themed "*Support for Education in the Mother Tongue*" organized by the union of which they were member.

Upon the rejection of the applicants' objection with the administrative authorities, the union brought actions, on behalf of the applicants, for annulment of the disciplinary punishments. The said actions were dismissed by the administrative court.

The regional administrative court rejected the appeals against the dismissal of the actions, as well as the requests for rectification of the administrative court's decisions.

The Applicants' Allegations

The applicants maintained that they had attended the press statement upon the call of the union by enjoying their democratic rights. However, they were imposed disciplinary punishment as a result of the said activity, which was in breach of their right to hold meetings and demonstration marches.

The Court's Assessment

Right to hold meetings and demonstration marches is exercised collectively and provides those who want to express their thoughts with the opportunity to do so through non-violent methods. This right guarantees the manifestation, protection and dissemination of different thoughts which are requisite for the development of pluralistic societies.

In the present case, the Constitutional Court examined whether the interference with the applicants' right to hold meetings and demonstration marches had actually met a social need and whether the interference had been proportionate to the aim pursued.

Slogans were chanted in favour of the leader of a terrorist organization during the demonstration march and the press statement organized by the union. However, there were no finding that violent acts had been carried out during the said demonstration march and press statement, that the applicants had participated in these acts or that they had been involved in the group chanting slogans.

The applicants were imposed disciplinary punishment merely for their having attended an event where the said slogans had been chanted.

Freedom of assembly of the applicants, who had attended a non-violent event, who had not chanted slogans praising terrorism and who had expressed

their opinions peacefully, must be protected, even if they are public officials.

The fact that during a peaceful demonstration some persons chant slogans praising the leader of a terrorist organization by taking advantage of such a demonstration does not justify any interference with the right of assembly of all those attending the demonstration.

In such cases, public authorities are expected to distinguish between those holding a peaceful assembly and those chanting slogans praising terrorism, rather than to punish them all.

Regard also being had to the fact that the applicants who had not performed any prohibited acts had not been involved in any reprehensive incident, they should not have been imposed even a little punishment.

It was concluded that the punishment imposed on the applicants had not met a pressing social need and that the interference with their rights had not complied with the requirements of the order of a democratic society.

Consequently, the Constitutional Court found a violation of the applicants' right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

I. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO PROPERTY

1. Judgment finding no violation of the right to property for appointing an administrator to the company

Hamdi Akın İpek **(no. 2015/17763, 24 May 2018)**

The Facts

The applicant is one of the co-founders of Koza İpek Holding A.Ş. ("the Holding").

Relying on the reports prepared by the Financial Crimes Investigation Board ("the MASAK") and the security directorates, the chief public prosecutor's office initiated a criminal investigation against the applicant and the other directors of the Holding for alleged offences of managing and propagating a terrorist organization, financing terrorism, and embezzlement.

The expert examination of the financial documents seized during the search carried out at the premises of the companies of the Holding revealed certain accounting fraud and irregularities, unrecorded inflows and money laundering. It was also observed that charitable donations and spending of these companies were not in line with the ordinary course of life, commercial practices and procedures.

On the 20th of October 2015, the chief public prosecutor's office requested the magistrate judge's office to appoint an administrator to the companies of which the applicant was a co-founder and director. In its motion, the chief public prosecutor stated that the benevolence money collected by the Fetullahist Terrorist Organization ("the FETO") and/or the Parallel State Structure ("the PDY") were shown as amounts gained through legitimate business activities operated by these companies and were thereby laundered. It was further indicated that the FETO was funded by the incomes of these companies and that the companies recruited new members for the FETO/PDY by providing donations, scholarship or training to certain persons or institutions. Consequently, the chief public prosecutor noted that if administrations of the companies were maintained as they stand, there existed strong suspicion that the offences of laundering illegal assets and

managing an armed organization would continue to be committed through the activities of the companies.

Having assessed the request of the chief public prosecutor's office, the magistrate judge's office ordered appointment of an administrator to the companies of which the applicant was a director and co-founder. The objection raised by the applicant against this order was dismissed.

After this individual application had been lodged, a criminal case was filed against the applicant for allegedly managing a terrorist organization. Besides, in the indictment issued by the chief public prosecutor's office, he was also charged with financing terrorism, abuse of confidence, contravening the Tax Procedural Law and the Capital Market Law.

The Applicant's Allegations

The applicant alleged that he was deprived from managing of all his assets because an administrator was appointed to his companies without the conditions required by the law; and that his right to property was therefore breached.

The Court's Assessment

As required by Articles 35 and 13 of the Constitution, an interference with the right to property may be constitutional only if it is prescribed by law, pursues public interest and is in compliance with the principle of proportionality.

There is no ambiguity as to the point that the interference with the applicant's right to property is prescribed by law.

The judicial authorities state that the main reason for handing over the applicant's group of companies to an administrator is the existence of strong suspicion that assets acquired through criminal activities have been laundered and terror organization-related crimes have been committed through these companies. It appears that the judicial authorities have reached these conclusions on the basis of certain concrete facts in line with expert and MASAK reports.

It was deemed necessary to assign administrators to this group of companies in order to prevent financing of terrorism and use of incomes obtained

through criminal activities. Accordingly, application of this measure pursues a legitimate aim in the public interest.

It is primarily within the competent public authorities' power to assess which measures are necessary when combating organized crimes. Therefore, administrative bodies have discretion, to a certain extent, in determining measures to be applied.

The applicant maintained that the aim pursed could also be realized by appointing a monitoring administrator. However, the magistrate judge's office considered insufficient the appointment of an administrator for monitoring the decisions of the company management, given the size of the companies in question as well as the scope, gravity and seriousness of the offences alleged to be committed through the companies.

Regard being had to the above-mentioned grounds and discretionary power of the public authorities in this realm, the Constitutional Court found no reason to depart from the assessment made, under the particular circumstances of the present case, as to the appropriateness and necessity of the said interference.

Moreover, regard being had to the amount stated in the indictment to be obtained through criminal activities and to the fact that the inquiry for determining such income would require a certain period of time, it has been decided that the order of the magistrate judge's office to appoint an administrator entails no explicit disproportionality.

Lastly, legal remedies against the complained measures and legal action for damages against the State due to administrators' acts and actions in their official capacity are available to the applicant. Accordingly, given the nature of the complained measure and the safeguards afforded to the applicant against this measure, it has been concluded that the interference in the present case does not impose an excessive and extraordinary personal burden on the applicant.

For the reasons explained above, the Court found no violation of the right to property safeguarded by Article 35 of the Constitution.

2. Judgment finding no violation of the right to property due to the revocation of a licence for unlawful use

Ahmet Bal **(no. 2015/19400, 11 June 2018)**

The Facts

The licence of the pharmacy owned by the applicant was revoked by the Provincial Directorate of Health as a result of the inspections conducted. The revocation decision stated that during the inspections the applicant was not present in the pharmacy and that the pharmacy was not operated by him.

The applicant filed an action for annulment before the administrative court against the revocation. The court dismissed the case on the grounds that the pharmacy was operated collusively and was not actually operated by the applicant.

The applicant appealed. The Council of State upheld the decision and rejected the applicant's rectification request.

The Applicant's Allegations

The applicant claimed that his right to property was violated due to the fact that his pharmacy was closed down as a result of the revocation of the licence.

The Court's Assessment

Article 35 of the Constitution provides that the right to property may be limited by law and for the purpose of public interest. However, Article 13 of the Constitution must be taken into account while interfering with this right. Accordingly, in order for an interference to be in compliance with the Constitution, it must be based on law, serve the public interest and be proportional.

In the case that a pharmacy is operated not by the licence owner but collusively, the revocation of the licence has a legal basis and pursues a legitimate aim. At this point, it must be assessed whether this interference is proportionate or not.

In the present case, the impugned interference was foreseeable, and it resulted from the applicant's fault. The applicant did not submit any concrete

facts as to the careless acts or behaviours of the public officials in the course of interference.

As it is observed that the applicant had left the city where the pharmacy was located without permission and that he admitted having given a power of attorney to another person to operate the pharmacy, the court decisions cannot be said to have been arbitrary.

Considering the importance of the requirement concerning the public health that the profession of pharmacy must be practiced by competent persons, it cannot be said that it was unnecessary to revoke the applicant's licence due the fact that he was not actually operating the pharmacy.

Indeed, the revoke of the licence does not permanently deprive the applicant from practicing the profession; it only imposes a restriction of five years not to operate a pharmacy, it is not categorized as a crime, and the applicant has not suffered any other criminal and administrative sanction.

In this case, when compared to the public interest pursued by the interference, it has been concluded that the interference with the applicant's right to property did not impose an excessive and extra ordinary burden on him and that the fair balance between the public interest and the applicant's right to property was not impaired.

Consequently, the Constitutional Court found no violation of the right to property safeguarded in Article 35 of the Constitution.

3. Judgment finding a violation of the right to property due to the delay in the registration of the vehicle purchased by tender *Ali Rıza Akarsu* (no. 2015/6999, 12 September 2018)

The Facts

The applicant applied to the Security Directorate for registration of the vehicle that he had purchased at the auction performed by the tax office.

The Security Directorate informed the applicant that there was an interim injunction on the vehicle and therefore it cannot be registered. The action for annulment brought by the applicant before the administrative court was accepted, and the vehicle was registered in the name of the applicant.

The applicant this time sought compensation from the administration for the damage he had sustained due to the registration of the vehicle approximately 1 year later. Having received no response to his request, the applicant brought an action for compensation against the Governor's Office before the administrative court.

The administrative court dismissed the applicant's case. Upon the applicant's appeal, the Council of State upheld the decision. The applicant's subsequent request for rectification of the decision was also dismissed by the relevant chamber of the Council of State.

The Applicant's Allegations

The applicant maintained that his right to property was violated on account of his inability to use his car for one year due to the unlawful act of the administration.

The Court's Assessment

The right to property safeguarded by Article 35 of the Constitution provides the individual with the opportunity to use and benefit from his property as he wishes, on condition that he does not prejudice the rights of the others and complies with the restrictions stipulated in the law.

In the present case, the failure to register the vehicle purchased by the applicant in a tender process conducted by the administration was found unlawful by the inferior court.

In accordance with this decision, the subsequent registration of the vehicle did not alone remove the victim status of the applicant. In order for the applicant's victim status to have been removed, the alleged violation should have been redressed promptly and taking into account the period during which the applicant had been unable to enjoy his right.

The applicant had been unable to use his vehicle during approximately one year from the date of his request for registration until the registration process, due to the unlawful administrative act.

It is clear that the applicant, who was a driver engaging in international transport, had purchased the vehicle by trusting the administration, that the vehicle was important for his professional and commercial activities and had

an economic value, and that he was unable to use it due to the fault of the administration and therefore was deprived of any profit.

Despite the finding of a damage, existence of strict circumstances in terms of proving the amount of the compensation resulted in a failure to redress the alleged damage.

As a result, it was found that the failure to register the vehicle purchased by the applicant for approximately one year caused an interference with his right to property and that the damage sustained by him as a result of the alleged interference was not redressed.

Under these circumstances, regard also being had to fact that no compensation was paid to the applicant, an excessive burden was imposed on him due to the alleged interference; the fair balance between the public interest and the protection of the right to property was disturbed to the detriment of the applicant; and the alleged interference was disproportionate.

Consequently, the Constitutional Court found a violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

4. Judgment finding no violation of the right to property due to invalidation of the set-off and deduction of the liquidated receivable for the debts owed to a third person

Türkiye İş Bankası A.Ş. (2) **(no. 2015/7179, 12 September 2019)**

The Facts

The applicant Türkiye İş Bankası A.Ş. ("İş Bankası" or "the bank") and its subsidiaries sold their shares of Türk Dış Ticaret Bankası A.Ş. (Dışbank) to a holding company and received an advanced payment of 75 million dollars.

As a result of the inquiry conducted by the sworn auditors of the banks and the financial inspectors, it was determined that Dışbank sustained losses under the new management and therefore the holding company was removed from management.

İş Bankası, considering that the remaining sale price of the shares of Dışbank would not be paid, annulled the sales agreement it had signed with the holding company and signed a new sales agreement with the holding

company to receive back the shares it had already sold. As a result of this transfer, İş Bankası owed 75 million dollars to the holding company due to the latter's advance payment. The bank did not pay this amount to the holding company.

Upon the bankruptcy of a company within the holding company, the bankruptcy office sent a notification to İş Bankası. The notification stated that the 75 million dollars in question had been transferred from the resources of the bankrupt company and that therefore İş Bankası owed 75 million dollars to the bankrupt's estate. The Savings Deposit Insurance Fund ("the Fund") demanded the amount in question form the applicant with interest.

The applicant filed a case before the Council of State, stating that the price of the shares at the time they had been sold was not equal to their value on the date when they were taken back, that during this period there had been a great decrease in the value and that the amount in question had been subject to set-off and deduction transactions against the warranty debts and the mentioned decrease in the value. The Council of State annulled the Fund's decision. Upon appeal against the decision of the Council of State, the decision was quashed by the Plenary Session of the Chambers for Administrative Cases of the Council of State ("the Plenary Session"). The applicant's request for the rectification of the decision was dismissed. The relevant Chamber of the Council of State complied with the quashing decision. Upon appeal, the Plenary Session upheld the decision.

The Applicant's Allegations

The applicant claimed that its right to property was violated.

The Court's Assessment

There is no doubt that collection from the applicant of the amount which it had subject to set-off and deduction transactions constituted an interference with its right to property.

The transaction in question had a legal basis and served the public interest, the relevant institutions acted in order to redress the public loss and there existed no concrete information or document indicating the contrary. It must therefore be acknowledged that the interference pursued the legitimate aim of public interest.

The public authorities are expected to examine whether there was a proportionality relationship between the aim sought to be achieved by the interference with the applicant's right to property and the means employed.

It is primarily at the discretion of the incumbent public authorities to make an assessment as to the necessary measures in terms of the collection of the liquidated bank receivables within the scope of the regulation and control of the banking sector.

In the present case, there is no reason to depart from the assessments of the public authorities as to the necessity of the interference for the collection of the liquidated bank receivable.

It is clear that the liquidated company owed debts to the applicant company and its subsidiaries. In accordance with the right to property, the applicant is certainly entitled to collect these debts. However, the applicant executed set-off and deduction transactions to discharge the debts it owed to the holding company in the capacity of third person. According to the administration and the inferior courts, this transaction amounts to the use of liquidated bank resources.

In addition, with this transaction, the applicant company could unlawfully collected its receivables, prior to the other creditors. The applicant's allegation that it was already entitled to collect its receivables with priority may be subject to examination by the public authorities. The applicant may also bring an action against the assessments to be made by the public authorities.

It was obvious that the disputed money would be used to cover the debts of the liquidated company. This is stipulated by the legal provisions where it is prescribed that in case of bankruptcy and liquidation, receivables shall be paid from the assets of the debtor in a certain order for the purposes of public interest, and the public authorities have a certain discretion at this point. Accordingly, the applicant was not deprived of its receivable, as well as there existed appropriate legal mechanisms to facilitate its collection of such receivable. Otherwise, the other creditors' interests within the scope of the right to property might be damaged.

In the present case, the applicant failed to demonstrate that the available legal mechanisms were insufficient, nor did it submit any concrete fact indicating

that the public authorities failed to show due diligence in the execution of these mechanisms.

In this case, the interference with the applicant's right to property did not impose an excessive or extraordinary burden on the applicant and the fair balance between the public interest served by the interference and the applicant's right to property was not impaired. Thus, the alleged interference was proportionate.

Consequently, the Constitutional Court found no violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

5. Judgment finding a violation of the right to property due to dismissal of expropriation-related claim

Hüseyin Ünal **(no. 2017/24715, 20 September 2018)**

The Facts

The applicant filed a request with the municipality for the expropriation of his immovable property that had been allocated as a road in the master development plan.

The municipality proposed exchange of the immovable; however, the applicant refused it as the proposed immovables were not equivalent to his immovable. Thereafter, he filed a case against the municipality before the administrative court and claimed the current market value of his immovable.

The administrative court noted that pursuant to the Provisional Article 11 of the Expropriation Law no. 2942, effective as of 7 September 2016, the five-year period for the expropriation of the immovable properties allocated by implementary development plans for public services and governmental agencies would start running as from the date of entry into force of this provision and, therefore, concluded that it could not decide on the merits of the dispute at that stage.

The applicant then appealed the decision; but the regional administrative court found the first instance decision compatible with the procedure and law and therefore dismissed the applicant's appellate request with final effect.

The Applicant's Allegations

The applicant maintained that his right to property was breached for the non-expropriation of his immovable that had been allocated as a road in the city development plan; and he was made to endure another five-year due to the new legal arrangement that took effect after he had filed the case.

The Court's Assessment

It is explicit that development plan implementations and allocation of an immovable as an area for public service within this scope constitute a breach of the right to property. However, it is acknowledged that such interference has a legal basis and pursues a legitimate aim.

Before amending the Provisional Article 11 of Law no. 2942, in cases where the immovable properties that had been allocated by administrations for public use were not expropriated within five years since the ratification of the city development plan, the inferior courts held that the right to property was led to uncertainty, which impaired the fair balance required to be struck between the public interest and the right to property.

The Provisional Article 11 of Law no. 2942 sets forth that, for the immovables which fall into the scope of the Additional Article 1 and use of which has been restricted by law before the entry into force of the Provisional Article 11, the five-year period shall start running as from the date of its entry into force.

Accordingly, the inferior courts stated that, in respect of the immovables use of which had been restricted prior to the entry into force of the Provisional Article 11 added to Law no. 2942, the five-year period granted to the administration would start running as from the entry into force of the law, and they thereby found no ground to decide on the merits of the cases.

The Constitutional Court annulled, on 28 March 2018, the Provisional Article 11 of Law no. 2942, which sets forth that the five-year period prescribed for the expropriation of the immovables allocated by city development plans for public services and governmental agencies shall start running by 7 September 2016, the date the provision took effect.

In the present case, the applicant's immovable has not been expropriated yet in spite of being allocated as a road in the 1/1000 scale revision-implementary

development plan that was approved on 5 February 2004. Nor has the applicant been awarded any compensation.

During this period pending the construction restriction on the applicant's immovable, the applicant was deprived of enjoying his right to property as he was not able to appropriate, use, or benefit from his immovable.

As a result, the failure to expropriate the immovable which had been allocated as a road in the city development plan even though fourteen years had elapsed since the ratification of the implementary development plan has placed an excessive personal burden on the applicant.

Accordingly, it has been concluded that the fair balance required to be struck between the applicant's right to property and the public interest had been upset to detriment of the applicant, and that the interference was not proportionate.

For the reasons explained above, the Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

6. Judgment finding no violation of the right to property due to imposition of an administrative fine contrary to the capital market rules

Mars Sinema Turizm ve Sportif Tesisler İşletmeciliği A.Ş. **(no. 2017/23849, 10 October 2018)**

The Facts

The applicant, a company operating cinema and sports facilities, purchased the majority shares of a company. The holding company exercising control over this company took over the 50 percent shares of the company that exercised control over the applicant. The take-over process was approved by the Competition Authority.

In this scope, three cinemas located in İstanbul, Antalya and İzmir were transferred to another company that undertook to pay a certain amount.

Within the scope of a case filed against the decision of the Competition Authority, the Council of State stayed the execution of the decision in question. The appeal against the decision of the Council of State was accepted by the

Plenary Session of the Chambers for Administrative Cases of the Council of State. As the plaintiff withdrew its case, the Council of State dismissed the relevant case.

Relying on the case, the company taking over the three cinemas brought an action before the commercial court requesting the annulment of the contract due to cheating and the determination of the fact that it was not in debt.

The Capital Markets Board ("the CMB") imposed an administrative fine of 269,500 Turkish liras (TRY) on the company transferring the cinemas, on the ground that it was not announced to the public that a case was filed against the decision of the Competition Authority concerning the capital structure of the company, that stay of execution was decided in the relevant case and that the plaintiff withdrew its case, as well as on the ground that no special circumstance was disclosed concerning the case filed against them. The company that received a fine was merged with the applicant company by the decision of the ordinary general assembly.

The applicant company brought an annulment action before the administrative court against the CMP due to the administrative fine in question. The court dismissed the case. The decision appealed by the applicant was upheld by the Council of State. The applicant's subsequent request for rectification of the decision was also dismissed.

The Applicant's Allegations

The applicant maintained that the administrative fine imposed on it was unlawful and hence in breach of its right to property.

The Court's Assessment

In order for an interference with the right to property to be in conformity with the Constitution, it must be prescribed by law, serve the public interest and be proportionate.

In the present case, the applicant was imposed an administrative fine on the ground that it failed to fulfil the obligation set forth in Law no. 6362. It is seen that the obligation to be fulfilled and the administrative sanction to be imposed as a result of failure to fulfil this obligation are clearly regulated by the relevant legal provisions that are accessible, precise and foreseeable.

It is specified in the law that all information, events and developments that may affect the value of the capital market instruments, their market prices and the investment decisions of the investors shall be disclosed to the public by the parties concerned. Accordingly, it is clear that there was a public interest in imposing a sanction due to failure to fulfil the obligations in question regarding public disclosure within the scope of the regulation of the capital market.

In addition, it must be borne in mind that the State has a wide margin of appreciation in terms of the regulation and imposition of administrative fines. Moreover, in the present case, no judicial or administrative sanction was imposed on the applicant, except for the administrative fine. Nor was any measure taken such as confiscation, expropriation or prevention or restriction of the company's activities temporarily or permanently.

Furthermore, it appeared that the act resulting in an administrative fine against the applicant had been caused by the applicant's fault and that the public authorities cannot be said to have failed to act with due diligence.

Therefore, when the interference with the applicant's right to property was compared with the public interest it had served and when it was observed that the applicant had caused unlawfulness due to its own fault, it was considered that the alleged interference did not impose an excessive burden on the applicant.

Accordingly, it was concluded that the fair balance to be struck between the applicant's right to property and the public interest had not been impaired and the alleged interference had been proportionate.

Consequently, the Constitutional Court found no violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

7. Judgment finding a violation of the right to property due to lengthy enforcement of the provisional attachment

Hesna Funda Baltalı ve Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti. **[PA] (no. 2014/17196, 25 October 2018)**

The Facts

The creditor commenced execution proceedings against the debtors. He then brought an action, against the defendants and the applicants, for annulment

of the acts and actions performed on the ground that the debtor failed to pay the bills he had drawn up.

The case in question concerns the sale of a residence. The plaintiff maintained that after the date when the bill had been drawn, the debtor sold the residence to the applicant Hesna Funda Baltalı's husband for a price far lower than its real value; and that the residence was then donated by him to Hesna Funda Baltalı, who subsequently sold it to the applicant company Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti. where she and her husband were a partner.

The plaintiff requested annulment of these acts as well as sale of the immovable by auction, arguing that its donation and sale had been malicious actions performed in order to preclude him from receiving his receivables. The incumbent court then annulled the acts performed in respect of the impugned immovable and granted the plaintiff authorization to commence compulsory execution proceedings.

Upon the plaintiff's request for levying a provisional attachment on the immovable, the court issued an order for provisional attachment. The applicants challenged this order and requested that the provisional attachment be lifted against a security. The court rejected this request.

Claiming that they had suffered from lengthy enforcement of the provisional attachment, the applicants once again requested the court to lift the order for provisional attachment. The court acknowledged that the proceedings had lasted for a long time but decided not to lift the order.

The Applicants' Allegations

The applicants maintained that their right to property was violated due to lengthy enforcement of the order for provisional attachment.

The Court's Assessment

The allegations that the right to property had been breached for lengthy enforcement of the order for provisional attachment were examined in respect of the applicant Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti..

In case of a measure constituting an interference with the right to property, the public authorities applying the measure are obliged to act in a speedy and meticulous manner.

In the present case, the applicant was not deprived of its property due to levying of a provisional attachment on the immovable by the court. However, due to this measure, the applicant's ability to carry out economic and legal acts and actions with respect to its immovable was restricted to a significant extent. It is explicit that this restriction also has an adverse impact on the value of the immovable.

In the present case, it has been considered that it fell within the discretionary power of the public authorities to levy a provisional attachment to the effect that would restrict the power to perform any acts and actions only in respect of the impugned immovable and with a view to securing the amount receivable. However, it has been observed that the provisional attachment has been in force for over ten years, which is undoubtedly an unreasonable period as a whole.

Although the State has a wide discretionary power, within the framework of its positive obligations, in restricting the performance of legal acts and actions, for a certain period of time, with respect to immovables, imposition of such measures must not place an excessive burden and result in a disproportionate interference.

It has been revealed that the provisional attachment levied on the applicant's immovable for over ten years caused the applicant, whose right to property had been restricted, to sustain an unreasonable damage.

Besides, there is no legal remedy whereby the damage sustained by the applicant due to the prolongation of the measure as a result of the public authorities' fault could be redressed. It has been therefore assessed that the measure placed an excessive and extraordinary burden on the applicant.

It has been accordingly concluded that the positive obligations incumbent on the State with respect to the protection of the applicant's right to property were not fulfilled in a comprehensive and effective manner.

For the reasons explained above, the Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

8. Judgment finding a violation of the right to property due to power transmission line running through the property by confiscation without expropriation

Şevket Karataş **[PA] (no. 2015/12554, 25 October 2018)**

The Facts

A power transmission line was made to run through a part of the property registered in the name of the applicant, without expropriation.

The applicant brought a civil action seeking compensation for the impugned confiscation without expropriation.

The incumbent court requested an expert report on the value of the property. Relying on the expert report and also considering that the value of the property decreased by 5.5 percent, the court awarded the applicant 375,129.98 Turkish liras (TRY) and held that the administration would be granted a permanent easement on the part of the property remaining under the power transmission line and that the relevant part would be registered in the name of the administration.

Upon appeal, the Court of Cassation quashed the first instance court's decision on the ground that the rate of decrease in the value due to easement could not exceed 2.5 percent of the total value of the property. The applicant's request for rectification of the decision was dismissed.

During the proceedings carried out following the quashing judgment, a new expert report was issued and the easement value was calculated as TRY 171,034.92 and it was decided that the administration would be granted a permanent easement on the part of the property remaining under the power transmission line and that the relevant part would be registered in the name of the administration.

The decision was upheld by the Court of Cassation. Besides, the applicant's request for rectification of the decision was dismissed. The applicant subsequently lodged an individual application.

The Applicant's Allegations

The applicant maintained that his right to property was violated due to the power transmission line made to run through a part of the land owned by him, without expropriation.

The Court's Assessment

Confiscation without expropriation provides the administration with the opportunity to enjoy and possess a property without expropriation; however, it deprives the property owner of the constitutional guarantees.

In the present case, as also understood from the proceedings carried out, the administration confiscated the applicant's property without expropriation. This situation, which occurred without following the procedure set out in the Expropriation Law no. 2942 and was contrary the Constitution, was also found established by the court decision.

Although it is set forth in Article 46 of the Constitution that the expropriation price shall be the same with the real value of the property and shall be paid in advance, the requirement of paying in advance shall not be fulfilled by confiscation without expropriation.

According to the Constitution, the main ground relied on in confiscation without expropriation is the public interest. There is no doubt that the expropriation conducted by the administrations and the decision of public interest must be subject to judicial review. As a matter of fact, it is stipulated in Law no. 2942 that the property owners are entitled to bring an annulment action before the administrative court against the expropriation process. Besides, in the procedure of confiscation without expropriation, the property owners are deprived of the opportunity to bring an action against the expropriation process, as well as against the decision of public interest relied on.

In addition, it is specified in Law no. 2942 that in cases where the administrations urgently need a property for the purposes of public interest, the procedure of urgent confiscation may be applied. While it is possible for the administration to apply the ordinary expropriation procedure where it needs a property for the purposes of public interest and to apply the expropriation procedure stipulated in Law no. 2942 in urgent cases, the procedure of confiscation without expropriation cannot be considered legitimate.

Confiscation without expropriation leads to the consideration of a situation, which has been created by the administration in an unconstitutional and unlawful manner, as lawful and provides the administration with the opportunity to benefit from the unlawful action in question. Accordingly,

this practice results in unforeseeable and arbitrary situations in terms of the protection of the right to property. The impugned practice which is clearly devoid of legal guarantees enshrined in the Constitution should not be regarded as an alternative to the expropriation procedure.

In the present case, it was concluded that the confiscation without expropriation complained of by the applicant constituted an interference incompatible with the Constitution and the procedure stipulated in Law no. 2942 and that the interference with the applicant's right to property was unlawful.

In addition, the inferior courts determined the price of the property by requesting expert reports, allowing the applicant to submit his objections at any stage and taking into consideration these objections. Hence, the Constitutional Court considered that the amount of the compensation awarded to the applicant was sufficient to cover his pecuniary damage.

Even though the applicant's pecuniary damage was redressed, it must be borne in mind that the interference with his right to property through confiscation without expropriation that was contrary to the wording of the Constitution and was devoid of legal basis constituted a structural problem.

It must be acknowledged that the right to property safeguarded by the Constitution was violated, therefore, necessary administrative measures must be taken, and a copy of the decision must be sent to the incumbent administration in order to prevent any further similar violations.

Consequently, the Constitutional Court found a violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

9. Judgment finding a violation of the right to property due to levying consumption tax on electricity and coke-oven gas generated by the applicant

İskenderun Demir ve Çelik A.Ş. **[PA] (no. 2015/941, 25 October 2018)**

The Facts

The applicant, a company engaging in steel production, obtains coking coal and coke-oven gas by itself and uses them in the production process.

Due to the applicant's consumption of electricity and coal gas, the Municipality requested it to pay electricity and coal gas consumption taxes in accordance with the Law no. 2464 on Municipal Revenues.

Upon the Municipality's request in question, the applicant submitted declarations to the Municipality on various dates concerning the taxation of electricity and coke-oven gas consumption. The Municipality, in accordance with these declarations, calculated the taxes on electricity and coal gas pertaining to various periods. While some of these amounts were related to electricity consumption, the others were related to coke-oven gas consumption. The applicant paid these amounts to the Municipality on various dates.

The applicant brought actions before the tax court requesting the waiver of its electricity and coal gas consumption tax debts and the reimbursement of the taxes already paid.

The court rejected the cases concerning various periods when the taxes had accrued. Upon the applicant's appeal, the Council of State upheld the first instance court's decision. Besides, the applicant's request for rectification of the decision was dismissed. The applicant subsequently lodged an individual application.

The Applicant's Allegations

The applicant maintained that although the electricity and coke-oven gas it consumed was generated by itself, electricity and coal gas consumption taxes were collected from it, which was in breach of its right to property.

The Court's Assessment

There is no doubt that the applicant paying electricity and coal gas consumption taxes had an economic interest to be protected under Article 35 of the Constitution and that the impugned taxation process constituted an interference with the applicant's right to property.

An interference with the right to property through taxation must, first of all, have a certain, accessible and foreseeable legal basis.

Pursuant to the Tax Procedure Law, for a tax to be levied, the amount over which the tax will be calculated must be specified in law and must be

predictable. Thus, the taxpayer can predict the interference to be made with his right to property. Therefore, the amount (tax base) taken as a basis in order to calculate the tax is one of the main elements of the tax procedure that must be regulated by law.

Electric energy and coal gas sales price is determined as the tax base in Law no. 2464 and the rates to be applied over this base are set forth therein. According to the Law, there must be a sales price for the calculation of the tax payable. In the present case, as the applicant consumed the electricity and coke-oven gas generated by itself, there was no purchase-sale relationship or a sales price which enabled the calculation of the tax base.

It was stated in the judgment of the Council of State that the subject matter of the dispute was related to the matter as to how the tax base would be calculated for the company that consumed the electric energy generated by itself, and it was clearly acknowledged that there was no legal regulation on this matter.

In addition, in the present application, there is neither a supplier nor a distributor. Therefore, the applicant consuming the energy generated by itself cannot be regarded as a tax-payer. Although according to the Law, the tax collection method is based on the tax liability principle, it is unclear how the tax shall be collected in cases where there is no tax-payer. Such an uncertainty as regards the collection method may result in an administrative sanction against the tax-payer, if no declaration is submitted.

If a financial obligation, with all these aspects, is not sufficiently stipulated in the law, it may lead to administrative or judicial practices interfering with the right to property. In the present case, uncertainty as regards the tax base and the tax collection method, as well as, ongoing administrative practices and judicial interpretations on the matter deprive the applicant of the constitutional guarantees enjoyed by the tax-payers, which is in breach of the original purpose of the principle of the lawfulness of taxes.

It has been concluded that as the essential elements of the consumption taxes on the electricity and coal gas generated by the applicant were neither specified in the law nor were they predictable, the interference with the applicant's right to property infringed the principle of legality enshrined in the Constitution.

Consequently, the Constitutional Court found a violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

10. Decision finding inadmissible the alleged violation of the right to property due to the subsequently introduced legal remedy

Murat Emrah Emre **(no. 2018/1275, 30 October 2018)**

The Facts

The development plan covering also the impugned detached property was amended by the decision of the Municipal Council, and accordingly construction and occupancy permits were granted.

However, the said amendment was revoked by the relevant administrative court, and the first instance decision was upheld by the Council of State. As the amendment to the development plan had been revoked, the construction and occupancy permits were also revoked, as a result of which the impugned immovable was sealed.

The applicant applied to the administrative court and requested annulment of the sealing procedure. The court decided to annul the disputed administration process. However, upon the request for appellate review, the regional administrative court lifted the annulment decision of the first instance court and dismissed the case with no right of appeal. In the reasoning of the decision, it is noted that the impugned sealing process was carried out by virtue of the decisions previously rendered by the administrative courts and that the process was not therefore unlawful. Having been notified of the decision, the applicant lodged an individual application with the Court.

The Applicant's Allegations

The applicant maintained that his right to property had been violated due to the revocation of his construction and occupancy permits as well as the decision ordering the sealing and demolishing of his immovable.

The Court's Assessment

In the present case, the decision ordering the sealing and demolishing of the applicant's detached section undoubtedly constitutes an interference with his right to property.

By provisional Article 16 of the Zoning Law no. 3194, which took effect pending the examination of the applicant's individual application, it is set forth that a construction registration certificate will be issued for constructions built before 31 December 2017, upon an application with the Ministry of Environment and Urbanization as well as institutions and organizations authorized by the Ministry, with a view to registering the unauthorized buildings or those constructed contrary to the license and its annexes for disaster preparedness as well as to ensuring zoning peace. The same provision also sets out that the demolishing orders issued pursuant to this Law, and uncollectible administrative fines imposed, with respect to these buildings granted with construction registration certificates will be revoked.

Should a new legal remedy be introduced after lodging an individual application, it is the Court's task to assess whether the said remedy is accessible as well as capable of offering a reasonable prospect of success and providing sufficient redress.

Regard being had to the fact that the subsequently introduced remedy does not impose a heavy financial burden on individuals and facilitates the procedure whereby an application is lodged by offering an opportunity to apply within a reasonable period, it has been considered that the said remedy is accessible.

Considering the application conditions prescribed in Provisional Article 16 of Law no. 3194 as a whole, the Court has concluded that the remedy is objective and reasonable, does not impose a heavy burden on the applicants as well as is capable of providing sufficient redress.

Therefore, regard being had to the applicant's alleged violations, it has been concluded that examination of the individual application lodged without exhaustion of available remedy, which appears to be accessible at first sight as well as to be capable of offering a reasonable prospect of success and providing sufficient redress, will not comply with the subsidiary nature of the individual application mechanism.

For the reasons explained above, the Court found inadmissible the alleged violation of the right to property safeguarded by Article 35 of the Constitution for non-exhaustion of domestic remedies.

11. Judgment finding no violation of the right to property due to the decision to nullify a patent

***Novartis AG* (no. 2015/11867, 14 November 2018)**

The Facts

The applicant is a company of pharmaceutical industry, which operates in several countries over the world. It obtained a patent for a medication used in the treatment of leukaemia and had this patent published in the European Patent Bulletin. The company's request for validation of the European patent in Turkey was also ratified by the Turkish Patent and Trademark Office, and the relevant registration procedure was completed.

Another firm operating in the same industry filed an action before the incumbent civil court for intellectual and industrial property rights and requested nullification of the patent and its removal from the registration list, arguing that the patented item was already present among the patents that had been published in previous years.

The incumbent court obtained an expert report concerning the dispute from a board consisting of two professors who were specialists in the field as well as of one chemical engineer. The board delivered an opinion that the impugned patent had no innovative and state-of-the-art feature. Accordingly, the court decided to nullify the impugned patent and remove it from the list of patent registration.

The applicant company appealed the decision; however, it was upheld by the Court of Cassation. The applicant then requested rectification of the Court of Cassation's judgment, which was also dismissed. Thereafter, the applicant company lodged an individual application with the Court.

The Applicant's Allegations

The applicant maintained that its right to property was violated as its patent had been nullified.

The Court's Assessment

The concept of patent emerged as a result of the need for the protection of inventions including products or procedures created by individuals through

intellectual endeavours. In the Industrial Property Law no. 6769, it is set forth that all technological inventions shall be patented provided that they are new, involve an inventive step and are capable of industrial application.

The same Law also sets out that industrial rights, save for geographical indications and traditional specialities, may be assigned, transferred by inheritance, licensed, put in pledge, supplied as a collateral, attached or be subject to other legal actions. Therefore, patent is undoubtedly a property which has an economic value. Intellectual and industrial property rights fall within the scope of intangible goods and are a matter of the right to property enshrined under Article 35 of the Constitution.

In the present case, the public authorities did not directly interfere with the applicant's right to property. Therefore, an examination as to the positive obligations incumbent on the State with regard to the right to property must be made in the case.

The State's positive obligations entail the liabilities to form an effective legal framework including judicial remedies capable of providing procedural safeguards against the interferences with the right to property as well as to ensure that judicial and administrative authorities would, within this legal framework, take effective and fair decisions in disputes between individuals and private persons.

As required for the protection of the right to property, the State affords patent protection for inventions, considering similar procedures in the world. However, certain conditions are to be satisfied for an invention to obtain patent protection. A patent cannot be granted if these conditions are not satisfied. Accordingly, a granted patent may be nullified if it is subsequently revealed that these conditions have not been satisfied.

It has been accordingly observed that there are clear, accessible and foreseeable provisions of law as well as established case-law justifying the nullity of the patent in the present case. Besides, it has been concluded the applicant was able to effectively avail himself of the procedural safeguards inherent in the obligation to protect the right to property; and that given the findings and grounds specified in their decisions, the relevant courts did not exceed the limits of their discretionary powers.

Lastly, regard being had to the facts that public authorities have a certain degree of discretionary power in deciding which inventions are to be granted patent protection, and that determining such scope has also a significant bearing on the third parties' rights and benefits, it has been concluded that the State's positive obligations with regard to the right to property were fulfilled in the present case where the patent had been nullified for not satisfying the conditions set out in the law.

For the reasons explained above, the Court found no violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

12. Judgment finding no violation of the right to property due to a search carried out in the workplace

Elit Hancı Akaryakıt ve Petrol Ürünleri Gıda İnşaat Sanayi ve Ticaret Ltd. Şti. **(no. 2015/20, 15 November 2018)**

The Facts

A criminal investigation was launched by the chief public prosecutor's office against the suspects running certain petrol stations, on suspicion of smuggling oil within the scope of the activities of a criminal organization.

Hidden fuel tanks were found by the police officers during the searches carried out in a petrol station. It was observed that the national marker level of the samples taken from these tanks was invalid and that the automation in the cash register warning system had been deactivated in order to prevent the illegal fuel mechanism from being revealed.

The applicant company took over the relevant petrol station and started to run it. During the searches and excavations carried out in this petrol station on suspicion of smuggling and selling defective and mixed fuel, pipes belonging to the hidden underground tanks that had previously been subject to a legal action were found, however it was observed that they were inactive and not used. Besides, 1300 litres of diesel oil, the invoice of which could not be submitted, was seized.

The applicant company brought an action for compensation before the assize court, stating that it sustained damage as a result of the searches that

had been carried out disproportionately. The court dismissed the case. Upon the applicant's appeal, the decision was upheld by the Court of Cassation.

In addition, it was stated in the indictment issued by the chief public prosecutor's office that a criminal organization had been formed for selling mixed and smuggled fuel and that the shares of many companies, including the applicant company, had been transferred to third parties just before or during the dates when the searches and seizures were performed. The proceedings against the suspects are still pending before the criminal court of first instance.

The Applicant's Allegations

The applicant maintained that the search alleged to have been carried out disproportionately was in breach of its right to property.

The Court's Assessment

In order for an interference with the right to property to be in conformity with the Constitution, it must be prescribed by law, serve the public interest and be proportionate.

In the present case, searches were carried out in accordance with the decisions of the magistrates' courts based on the provisions of the Code of Criminal Procedure. Therefore, there is no doubt that the interference with the applicant's right to property was lawful.

The search carried out for the purposes of collecting evidence and preventing crimes within the scope of the criminal investigation conducted against the benefit-oriented criminal organization pursued a legitimate aim based on the public interest.

While the applicant company argued that the same conclusion could have been reached by detector scanning instead of excavation during the search, it could not submit any concrete information or document supporting its claim. The public authorities enjoying a wide margin of appreciation in the fight against crime considered that the search was necessary. The applicant failed to prove to the contrary thereof.

In the present case, as a certain amount of fuel the invoice of which could not be submitted was found in the station where hidden fuel tanks had been

found previously, excavations works were needed in order to determine whether there were other hidden tanks and whether the illegal fuel tanks that had been found previously were still active.

Although it was claimed that the alleged search had not been carried out proportionately, it was inevitable that the mentioned search, which had undoubtedly been appropriate and necessary, led to a loss of commercial earning and the inferior courts stressed that the relevant criminal evidence could be revealed only by excavation.

The applicant failed to explain what kind of improper actions, which resulted in extra damage for them, had been conducted. Nor did it submit any concrete information or document in respect thereof.

It was also stressed by the inferior court that the applicant had an opportunity to bring an action for compensation depending on the outcome of the criminal proceedings.

Therefore, when the interference with the applicant's right to property was compared with the public interest it served, it was considered that the alleged interference did not impose an excessive and extraordinary burden on the applicant.

Accordingly, it was concluded that the fair balance to be struck between the applicant's right to property and the public interest had not been impaired and that the alleged interference had been proportionate.

Consequently, the Constitutional Court found no violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

13. Decision finding inadmissible the alleged violation of the right to property due to the depreciation in the retirement bonus

Hikmet Kuleci **(no. 2018/5145, 28 November 2018)**

The Facts

The applicant having served at the Turkish Armed Forces for 31 years retired in 1993. During the period he served for the Turkish Armed Forces, he was covered by the state retirement fund.

He was paid a retirement bonus calculated on the basis of his service period of 30 years pursuant to the provision *"in determination of the retirement bonus to be granted, periods over 30-year actual service periods... shall not be taken into account"* specified in the Law no. 5434 on the State Retirement Fund.

Upon the annulment of the said provision in 2015 by the Constitutional Court, the applicant relying on the Court's annulment decision filed a request with the Social Security Institution (SSI) for also receiving a retirement bonus in return for his service period in excess of 30 years.

Having received no reply to his request, the applicant brought an action for annulment against the SSI before the administrative court which then awarded him a retirement bonus for his service period over 30 years plus legal interest to accrue from the application date.

The applicant appealed the administrative court's decision. However, his appellate request was dismissed. In 2017, the SSI paid, in return for his service period over 30 years, a retirement bonus of 50 Turkish liras (TRY) plus legal interest of TRY 6.55 that were calculated on the basis of the coefficients applicable at the date of his retirement.

The Applicant's Allegations

The applicant maintained that his right to property had been violated due to the depreciation of the retirement bonus paid for his service period over 30 years.

The Court's Assessment

The applicant's unpaid retirement bonus undoubtedly constitutes an asset within the meaning of Article 35 of the Constitution. Payment of this amount after being depreciated as a result of inflation constitutes an interference with his right to property.

With respect to his service period in excess of 30 years, the applicant filed an action for annulment for receiving a retirement bonus by relying on the Court's annulment decision of 2015. However, pending his proceedings, a new regulation was introduced by the provisional article added to Law no. 5434. In line with this legal arrangement, the applicant was paid the said retirement bonus by the administration in August 2017.

In the present case, the reason for non-payment, to the applicant, of a retirement bonus for his service period over 30 years is the legal provision included in the then applicable Law no. 5434 and annulled by the Court in 2015. However, annulment of this provision does not obviously have a retroactive effect. As the annulment decision rendered by the Court has no retroactive effect, the question whether to introduce a retroactive arrangement in this respect falls within the legislator's discretionary power. As a requirement of the principles of legal security and certainty, the administration does not naturally make any payment retroactively unless such an arrangement is made.

A provision of law annulled by the Constitutional Court will cease to have effect as from the date when the annulment decision enters into force; however, acts and actions performed according to this provision shall remain in force. Therefore, making of no retroactive payment by the administration on the basis of the annulment decision, which had no retroactive effect, does not lead to violation of the right to property. However, if the judicial authorities order retroactive payment of such receivable, the relevant amount is to be paid within a reasonable time by the date of entitlement specified in the court decision and without being subject to any depreciation.

The legislator introduced an arrangement in 2017 in respect of the applicant and the retirees in the same position as the applicant and accordingly provided for the payment of retirement bonus for the service periods over 30 years. It is accordingly revealed that pursuant to this legal arrangement, the applicant was entitled to this payment not retroactively but as of 27 January 2017, the date when the law took effect.

In the present case, the amount receivable by the applicant within the scope of his right to property was paid to him, without any depreciation, by the date of his entitlement. The interference was therefore found proportionate as no excessive and extraordinary burden was placed on the applicant.

For the reasons explained above, the Court found inadmissible the alleged violation of the right to property safeguarded by Article 35 of the Constitution for being manifestly ill-founded.

14. Judgment finding no violation of the right to property due to the measure of seizure imposed during the criminal investigation against a bank manager on his spouse's assets

Semra Başaran **(no. 2015/3309, 25 December 2018)**

The Facts

The private bank, where the applicant's husband (H.B.) served as a member of the board of directors and directory general, was transferred to the Savings Deposit Insurance Fund (Fund) which requested a measure of seizure to be imposed on the assets of the persons taking office in the bank management as well as their spouses and children. Accepting the Fund's request, the magistrate's court ordered an interim measure on the assets of these persons including the applicant. Within the scope of the criminal investigation, the applicant's husband H.B. was ordered to pay a judicial fine and sentenced to imprisonment. The conviction decision was upheld by the Court of Cassation.

By the resolution taken by the Board of Fund on 24 December 2003, the Fund sent a payment order to the applicant on 27 January 2004. She then filed an action before the administrative court, on 27 September 2007, against the Fund for the annulment of these acts. The court dismissed the applicant's action.

The administrative court's decision, which was appealed by the applicant, was upheld insofar as it concerned the resolution of the Fund but quashed insofar as it concerned the payment order. Accordingly, the administrative court annulled the impugned act concerning the payment order. The decision appealed by the Fund was upheld by the Council of State, and the Fund's request for rectification of the judgment was also dismissed.

By its letter of 11 October 2013, the Fund decided that the Board would discontinue the execution proceedings initiated against the applicant, by virtue of the Law on Collection Procedure of Public Receivables, as of 3 October 2013 and release the attachments levied within the scope of these execution proceedings.

During the proceedings pending before the assize court, the applicant also requested the court to lift the interim measure on 12 September 2014. Considering that the conviction decision rendered in respect of her husband

became final and that the damage was not covered, the assize court dismissed the applicant's request on 12 November 2014. Upon the rejection of her challenge against the assize court's decision, the applicant lodged an individual application with the Court.

The Applicant's Allegations

The applicant maintained that her right to property had been violated due to imposition of seizure measure imposed on her assets during the criminal investigation conducted against her husband, who was the manager of a bank banned from operating.

The Court's Assessment

The applicant's deprivation of her property, even temporarily, by means of de facto seizure undoubtedly constitutes a breach of her right to property.

The seizure measure imposed in the impugned incident is explicitly convenient for achieving the aim of ensuring probable confiscation of incomes and assets obtained through offences committed via banking system.

Regard being had to the fact that in the present case, the applicant's immovables were not seized de facto but merely an annotation was affixed on title deeds, which is the most appropriate means, the interference cannot be said to be unnecessary. Therefore, the inferior courts' decisions concerning the seizure measure were neither arbitrary nor unpredictable.

Besides, it must be emphasized that public authorities have a discretionary power in implementation of such measures, with a view to preventing and reducing corruptions through banking system which has a significant role in the maintenance of economic life.

The applicant did not raise a complaint that she had not been provided with the opportunity to effectively present her claims and defence submissions against the imposed measure. Nor did she complain that the impugned measure exceeded a reasonable period or was in force for a long period of time that would cause damage beyond the unavoidable level. Besides, as the impugned measure of seizure was applied, by the inferior courts, being limited to the financial interest involved in the case, there is no explicit disproportionality in the present case.

Finally, it must also be borne in mind that Article 141 of the Code of Criminal Procedure provides the applicant with the opportunity to obtain compensation. It has been therefore concluded that as the safeguards inherent in the right to property had been afforded to the applicant, the interference did not place an excessive and extraordinary burden on her.

Accordingly, it has been concluded that the impugned interference did not impair the balance to be struck between the public interest and the applicant's right to property and that it was proportionate.

For the reasons explained above, the Court found no violation of the right to property safeguarded by Article 35 of the Constitution.

15. Judgment finding no violation of the right to property due to transfer of the items obtained by panhandling to the state

Alişen Bağcaçi **(no. 2015/18986, 25 December 2018)**

The Facts

A report was issued by the municipal police, indicating that the applicant alleged to have been selling balloons was panhandling. Therefore, the jewellery and cash found on him were seized.

The municipality imposed an administrative fine on the applicant for panhandling. The seized gold and cash were transferred to the State.

The applicant's appeal against the decision of the municipality was dismissed by the magistrate judge. His appeal against the dismissal decision was also rejected.

The Applicant's Allegations

The applicant claimed that his right to property was violated, stating that he had legally obtained the items which were transferred to the State.

The Court's Assessment

There is no hesitation that the Misdemeanours Law no. 5326, which includes provisions regarding panhandling, was clear, foreseeable and accessible. Thus, the alleged interference with the right to property had a legal basis.

There is no doubt that an interference made in order to ensure deterrence in terms of the fight against misdemeanours and to prevent misdemeanours pursues a legitimate aim in the public interest.

Considering that the public authorities are granted discretion to choose the means to be employed in the fight against misdemeanours and that the said sanction was limited only to the items found on the applicant, there has been no reason to depart from the conclusion of the inferior court as regards the necessity of the interference.

The applicant could appeal twice against the decision ordering such transfer to the State, whereby he could submit his defence and evidence. Thus, the applicant could effectively challenge the interference with his right to property.

The inferior court concluded that the applicant had been found to have been panhandling to make money. In the reasoning of the decision rendered upon the applicant's appeal, it was accepted that the cash and jewellery found on the applicant had been obtained by panhandling. The applicant failed to submit sufficient and concrete evidence proving the contrary, in spite of having sufficient opportunity to do so. Accordingly, the decisions of the inferior courts cannot be said to have been arbitrary or to have included a manifest error of assessment.

As the applicant also failed to submit concrete evidence demonstrating that the items more than those he had obtained by panhandling were seized, the said interference had not been disproportionate.

It was considered that the applicant had been in a position to predict the outcome of the imputed misdemeanour and that the alleged interference had been caused by his own gross fault.

Accordingly, it was concluded that the fair balance to be struck between the applicant's right to property and the public interest served by the interference had not been impaired and that the alleged interference had been proportionate.

Consequently, the Constitutional Court found no violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

J. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO A FAIR TRIAL

1. Judgment finding a violation of the right to a fair trial due to conviction on the basis of unlawful evidence

Orhan Kılıç **[PA] (no. 2014/4704, 1 February 2018)**

The Facts

At the time of incident, M.E. and Ö.Ö. were a police officer at the juvenile department of a district security directorate.

As alleged by these police officers, the applicant introducing himself as Sertif Kılıç asked them whether they needed narcotic drugs. Thereafter, for the purpose of seizing more narcotic drugs, the police officers went to the applicant's residence and seized the drugs found there.

The public prosecutor was informed of the incident eighteen hours after the safe-keeping of drugs seized in the applicant's residence, and an official report was issued with respect thereto. In this report, it is noted that the police officers initially acting as purchasers with the intent of seizing narcotic drugs in large amounts seized precision scales, a large amount of narcotic drugs, cocaine and heroin in various quantities at the applicant's residence.

Upon the public prosecutor's instruction, the subsequent procedures were carried out by other security officers.

A criminal case was filed against the applicant who was consequently convicted of trafficking of drugs or psychotropic substances.

In addition, an investigation was initiated against M.E. and Ö.Ö. for bribery as they had settled with the applicant for not taking a legal action against him. At the end of the proceedings, the police officers were convicted of the imputed offence and sentenced.

Besides, another criminal case was brought against these officers for criminal trespass to a residence and depriving a person of his liberty. At the end of the proceedings, the relevant court suspended the pronouncement of the judgment in terms of the imputed offences.

The Applicant's Allegations

Alleging that he was convicted on the basis of unlawfully obtained evidence, the applicant maintained that his right to a fair trial was breached.

The Court's Assessment

In brief, the Constitutional Court made the following assessments:

Obtaining evidence through legal means in criminal proceedings is regarded as one of the basic principles of a state of law. Accordingly, it is clearly set out in Article 38 § 6 of the Constitution that findings obtained through illegal means cannot be considered as evidence.

In the present case, it is obvious that the search carried out at the applicant's residence is unlawful. As a matter of fact, the police officers conducted this search without a judge's order or public prosecutor's written instruction. Moreover, the public prosecutor on duty was informed of the search a long time thereafter.

As inferred from the relevant court's decision, the applicant was convicted on the basis of evidence obtained through an unlawful search. The substantial and decisive evidence forming the basis of the conviction is precision scale and narcotic drugs seized during the search. The other evidence on which the relevant court relied is the statements of the police officers, who carried out the search and were convicted of bribery, as well as the applicant's confession of his drug addiction. However, the applicant was convicted of drug trafficking. On the other hand, the applicant's allegations and objections concerning the conducted search were not addressed in the conviction decision.

In principle, it is the trial court's power to assess evidence available in a certain case. However, it has been observed that, in the present case, use of evidence obtained through an unlawful search as decisive evidence impaired the fairness of the proceedings when considered as a whole. Therefore, it has been concluded that "unlawfulness" conduct of the search constituted a violation of the applicant's right to a fair trial.

For these reasons, the Constitutional Court found a violation of the right to a fair trial.

2. Judgment finding a violation of the presumption of innocence for being subject to an administrative fine based on an assumption

Ahmet Altuntaş and Others **[PA] (no. 2015/19616, 17 May 2018)**

The Facts

An administrative fine was imposed on the applicants, who were the owners of an agricultural land, for burning of stubble on their land.

Maintaining that there were numerous agricultural lands adjacent to one another; that a fire starting in any land extended to the others due to wind and the fire on their own lands might have broken out in this way, the applicants brought an action before the administrative court for annulment of the administrative fine imposed on them. However, their action was dismissed.

The regional administrative court examined the applicants' appeal and accordingly upheld the decision. The applicants' request for rectification of the judgment was also dismissed by the same regional administrative court.

The Applicants' Allegations

The applicants maintained that those who burned the stubble could not be identified; and that a penalty was imposed on them as the land owners although they had not burned the stubble. They accordingly alleged that there was a breach of the principle that criminal responsibility shall be personal, which is safeguarded by Article 38 of the Constitution.

The Court's Assessment

The presumption of innocence is enshrined in Article 38 of the Constitution as follows: *"No one shall be considered guilty until proven guilty in a court of law"*. Besides, in Article 36 of the Constitution, it is set forth that everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial.

As the accused is presumed innocence as required by the presumption of innocence, a trial should be conducted with a view to reaching a material fact. However, the person charged with an offence cannot be requested to prove his innocence in order to reach this material fact.

However, in administrative sanctions imposed, under the specific circumstances of a concrete case, due to misdemeanours, standards as to presumptions of responsibility may be construed in a more flexible manner, compared to the criminal offences and penalties. However, even in such a case, presumptions of proof must not attain the extent which would infringe the presumption of innocence.

The incumbent court considered the applicants' ownership of the agricultural lands, where stubble was burned, sufficient for imposing an administrative fine on them. In other words, their position as a property owner was shown as a ground for subjecting them to an administrative fine.

As a result of the on-site examination carried out on the lands, no finding to identify the person burning the stubble could be reached. Taking into consideration that the applicants, who are the owners of the lands in question, did not make a report or file a criminal complaint that stubble had been burned on their immovable properties, the incumbent court relied on a presumption of fact that the act of burning stubble had been performed by the applicants. In other words, the burden of proof was not with the claimant but shifted to the applicants in the present case. Thereby, the applicants charged with the act have automatically become guilty. On the other hand, it is not possible to prove the contrary of the court's presumption that that the misdemeanour was committed.

It has been observed that the court extended the scope of the legislation in force in line with the principle of objective responsibility (by acting on the basis of assumptions) and dismissed the applicants' requests. In other words, the court established a link between the imputed act and the applicants by relying not on the concrete facts but on a rebuttable presumption of fact and accordingly found the applicants guilty of the misdemeanour.

It has been concluded that the applicants suffered a significant disadvantage vis-à-vis the administration in terms of self-defence; and that therefore, the presumptions of proof reached the extent which was in breach of the presumption of innocence. Besides, the fact that the applicants were provided with the opportunity to self-defence did not redress the violation of the presumption of innocence.

For the reasons explained above, the Court found a violation of the presumption of innocence safeguarded by Articles 36 § 1 and 38 § 4 of the Constitution.

3. Judgment finding a violation of the right to a fair trial due to different conclusions on the cases arising out of the same facts

Hakan Altıncan **[PA] (no. 2016/13021, 17 May 2018)**

The Facts

The applicant, who is working in a thermal power plant within the Electricity Generation Corporation (EÜAŞ), became a member of a labour union carrying out activities in this field. However, the EÜAŞ, stating that the applicant is not its own staff, returned the applicant's relevant documents which he had submitted for membership.

Many employees, including the applicant, working in the same workplace and under similar conditions brought personal actions on the basis of the collective labour agreement that had been signed with the company and was still in force.

The Labour Court, citing precedent cases that became final after review of the Court of Cassation, accepted the cases on the grounds; that the applicant and the other employees continued working the sub-employers had changed after the service procurement auction; that the work that was subject to the service procurement constituted the main line of business; and that therefore the service procurement between the primary employer and the sub-employer constituted a collusive agreement. These decisions were appealed.

The relevant Chamber of the Court of Cassation conducting the appellate review departed from its previous case-law for the first time and quashed the decision on the ground that according to the relevant provision of law, an allegation of collusion could not be submitted against the defendant. Thereupon, the cases were allocated to two different labour courts. The labour court that had previously accepted the cases reiterated its original decision on the ground that the approach of the relevant Chamber of the Court of Cassation was contrary to its previous case-law. The General Assembly of Civil Chambers of the Court of Cassation (HGK) upheld the decision of the labour court. Hence, the cases were concluded in favour of the employees in the capacity of plaintiffs.

The other labour court complied with the Court of Cassation's judgment and dismissed many cases including that of the applicant. Upon appeal,

the relevant Chamber of the Court of Cassation upheld the decision on the ground that as the first instance court complied with the judgment of the Court of Cassation and the present case was not brought before the HGK, a vested right in the procedure arose in favour of the defendant.

The Applicant's Allegations

The applicant claimed that his right to a fair trial was violated as the case he filed to obtain the receivables as an employee was concluded in a different way from the other cases filed on the basis of the same material fact.

The Court's Assessment

The right to a fair trial safeguarded in Article 36 of the Constitution requires that the principle of the rule of law must be respected in terms of the settlement of disputes. Indeed, the rule of law that is regarded among the characteristics of the Republic is a principle that must be taken into consideration in the interpretation and implementation of all articles of the Constitution.

In cases where the legal rules can be interpreted in different ways, the inferior courts shall decide on the issue. However, conclusion of the cases in different ways which are filed by the persons in the same legal situation and on the basis of same material fact may run counter to the principles of legal certainty and predictability that are among the fundamental elements of the rule of law. Judicial authorities are expected to maintain a certain degree of stability in their decisions in order to maintain the public confidence in the judiciary as a necessity of the mentioned principles.

In the present case, the relevant Chamber of the Court of Cassation adopted a new approach by departing from the manner used to resolve similar disputes. Although the Court of Cassation's departing from its established case-law cannot be considered in itself to constitute a violation of the right to a fair trial, it has been determined that the new approach was not adopted by the other Chambers and the HGK resolving the same disputes, and that therefore the Court of Cassation did not have a consistent and uniform practice in itself.

As a result of different practices of the Court of Cassation not arising out of the contents of the cases, some of litigants in the same situation obtained

favourable results while some others could not. This situation created legal uncertainty. It is concluded that the fairness of the proceedings was impaired because such practice was not predictable for the applicant.

Consequently, the Constitutional Court found a violation of the right to a fair trial safeguarded in Article 36 of the Constitution.

4. Judgment finding a violation of the right to access to a court for failure to ensure the applicants' effective participation in the proceedings

Sema Calgav ve Oya Yamak **(no. 2015/13950, 24 May 2018)**

The Facts

The applicants are among the joint owners of an immovable property.

In the master development and implementary development plans, this immovable property is allocated as an area of petrol station.

Having completed all licensing procedures required by the zoning legislation, the applicants and the co-owners leased out the immovable property to a company which engaged in the business of petroleum products and which would operate a petrol station on the immovable property.

Another company operating a petrol station in the same neighbourhood brought an action before the administrative court against the relevant municipalities and requested annulment of the development plan insofar as it related to the allocation of the immovable property as an area of petrol station. The lease-holder company joined the proceedings as an intervening party, on the part of the defendant administrations.

The incumbent court annulled the impugned development plans. Upon the appeal of the defendant administrations and the intervening party, the Council of State quashed the decision. The plaintiff company requested the rectification of the Council of State's judgment quashing the first instance decision. Thereupon, the relevant chamber of the Council of State examined the request and upheld the first instance decision.

One of the applicants applied to the relevant metropolitan municipality and requested to be informed whether an action for annulment of the

development plan had been brought with regard to her immovable property and, if any, to be informed of the outcome of the proceedings.

In its reply letter, the municipality notified the applicant that the development plans with regard to her immovable property were annulled by virtue of a judicial decision; that therefore, this plot of land was not covered by any development plan; however, the re-planning process had been initiated and was still pending.

The Applicants' Allegations

The applicants maintained that they –as the owners of the immovable– were not notified of the action brought by the third parties against the administration for the annulment of the development plan pertaining to their immovable and were not thereby ensured to join the proceedings. They accordingly alleged that their right to access to a court was violated.

The Court's Assessment

During the proceedings heard in the administrative jurisdiction whereby the lawfulness of an administrative act and action is examined, ensuring not only formal but also effective participation of the claimant or any third party having legal interest in conclusion of the action in the proceedings carries great significance in terms of affording the safeguards inherent in the right to a fair trial.

In the present case, the applicants would be directly affected by the outcome of the proceedings and accordingly have a legal interest in joining the proceedings.

It has been accordingly concluded that due to the inferior courts' failure to perform the procedural obligation as to notice of proceedings, the applicants were deprived of the opportunity to submit their arguments before the court, which imposed an excessive and disproportionate burden on them. Therefore, the interference with the applicants' right to access to a court was found disproportionate.

For the reasons explained above, the Court found a violation of the right to access to a court within the scope of the right to a fair trial, which is safeguarded by Article 36 of the Constitution.

5. Judgment finding a violation of the presumption of innocence for imposing an administrative fine based on an assumption

Taner Koyuncu **(no. 2015/11678, 24 May 2018)**

The Facts

The applicant leased out his own car to a leasing company. This car was then leased out by the leasing company to a third person.

The renter let an unlicensed driver (a person lacking drivers' license) drive the car. Therefore, an administrative fine was imposed also on the car owner via the registration plate of the car, on the basis that the car was allowed to be driven by unlicensed drivers. The request filed with the relevant authority for the revocation of the administrative fine was dismissed.

The Applicant's Allegations

The applicant maintained that the administrative fine was imposed by only taking into account his ownership status and without considering other factors, which was in breach of the presumption of innocence safeguarded by Articles 36 and 38 of the Constitution.

The Court's Assessment

The misdemeanour in the present case is considered to be committed when unlicensed drivers are allowed to drive the car.

In the instant case, the questions as to whether the car owner acted intentionally and allowed the unlicensed driver to drive the car deliberately were not taken into consideration. Nor was any determination made in respect thereof. Therefore, the conclusion was reached on the basis of an assumption.

Besides, it does not seem possible to prove the contrary of the court's presumption that that the misdemeanour was committed. It has been accordingly concluded that the applicant sustained a significant disadvantage, vis-à-vis the administration imposing the administrative fine, in respect of defending himself against the imputed act and proving the contrary; and that therefore, the assumption relied on by the authorities reached the level which is in breach of the presumption of innocence.

For the reasons explained above, the Court found a violation of the presumption of innocence safeguarded by Articles 36 and 38 of the Constitution.

6. Decision finding inadmissible the alleged violation of the right to a fair trial in terms of the requests for retrial for lack of jurisdiction *ratione materiae*

Nihat Akbulak **[PA] (no. 2015/10131, 7 June 2018)**

The Facts

The Chief Public Prosecutor's Office charged the applicant for sexual assault. The Assize Court convicted the applicant as charged. The Court of Cassation upheld the conviction. After the verdict became final, the applicant requested a retrial, alleging that new evidence was found. Upon the rejection of his request, the applicant lodged an individual application.

The Applicant's Allegations

The applicant maintained that although a new and significant evidence was found, his request for retrial was rejected on irrelevant grounds, which was in breach of his right to a fair trial.

The Court's Assessment

Retrial is a legal remedy that is available if an error was discovered in the final judgment delivered at the end of a trial. This remedy ensures that after the verdict delivered at the end of the original criminal proceedings became final, the trial court shall conduct a retrial and deliver a new judgment, provided the conditions set forth in the law are fulfilled.

Pursuant to the Code on Establishment and Rules of Procedures of the Constitutional Court, in order for an individual application to be examined, the right alleged to have been violated by the public authorities must, in addition to being guaranteed by the Constitution, also be enshrined in the European Convention of Human Rights ("the Convention") to which Turkey is a party. The applications concerning the alleged violations of rights which are not under the joint protection of the Constitution and the Convention shall not fall into the scope of individual application.

The European Court of Human Rights ("the ECHR") considers that a person whose sentence has become final and who applies for a retrial is not "charged with a criminal offence" within the meaning of Article 6 of the Convention. Therefore, this Article cannot be applied in terms of the applications for retrial.

In Article 6 of the Convention, the scope of the right to a fair trial is set by stating that the rights and principles of a fair trial shall be applicable in the adjudication of disputes about civil rights and obligations or of any criminal charge. Accordingly, the alleged violation of the right to a fair trial, except for those asserted under the above-mentioned circumstances, cannot be the subject-matter of an individual application, as it is out of the joint protection of the Constitution and the Convention. It is obvious that the requests for retrial in order to redress the violations found by the Constitutional Court and the ECHR, as well as the consequences thereof, must be considered within the scope of the right to fair trial. .

In the present case, the applicant submitted his complaints with regard to a process during which he was not under a criminal charge (he was already convicted). In other words, the applicant's complaint regarding assessment of his demand for retrial under Law No. 5271 relates to the process after the sentence became final, not to a process where the applicant was under a criminal charge. Therefore, the present application did not fall into the scope of the right to a fair trial.

Consequently, the Constitutional Court declared the present application inadmissible for lack of jurisdiction *ratione materiae*.

7. Judgment finding a violation of the principle of equality of arms in judicial proceedings relating to dismissal from the military academy

Batuhan Yılmaz **(no. 2015/6071, 28 June 2018)**

The Facts

While being a cadet in the military academy, the applicant was granted a leave of absence for a total period of five months and a half, for suffering from a psychological disorder, by virtue of medical reports issued on various dates within the same year.

Following his leave, a military hospital diagnosed the applicant with non-organic psychosis and unspecified-chronic psychotic disorder and issued a report where he was found unfit for serving as a cadet.

As the applicant challenged this report, he was referred to another military

hospital which issued another report of the same content with the previous one. Thereupon, the applicant was dismissed from the military academy.

On the other hand, the medical report obtained by the applicant himself from a university hospital stated that *"the person has no psychological problem"*, and another medical report obtained by the applicant himself from a municipal hospital indicated that *"any psychotic disorder has not been diagnosed as a result of the medical examination and tests"*.

The applicant brought an action before the Supreme Military Administrative Court ("the SMAC") for the revoke of his dismissal. He maintained that he was healthy and that would be revealed if he was referred to another medical institution for determination of his psychological state.

Relying on the medical report issued by the military hospital, the SMAC dismissed the applicant's action. Nor did it accept the applicant's request for rectification of the dismissal decision.

The Applicant's Allegations

The applicant maintained that according to the medical reports received from the non-military hospitals, he did not suffer from any psychological disorder; and that although he requested, during the proceedings, to be referred to different medical institutions, he was referred to the same military hospital which had previously issued the unfavourable medical report with respect to him. He accordingly alleged that his right to defence, right to legal remedies as well as the principles of impartiality and equality of arms were infringed.

The Court's Assessment

Pursuant to Article 36 of the Constitution, everyone has the right to litigation either as plaintiff or defendant and the right to a fair hearing. In its various judgments, the Constitutional Court referred to the principle of equality of arms, which is incorporated into the right to a fair hearing through the case-law of the European Court of Human Rights, under Article 36 of the Constitution.

In general, for conducting a fair hearing, the parties must be granted the opportunity to adduce evidence including to have witnesses. The evidence must be examined promptly and the parties must be given the opportunity to effectively participate in proceedings in light of the principle of equality of arms.

In the present case, the question of impartiality of the panel of experts concerns the fact that the military hospital was involved in the dismissal process of the applicant and that it had an opinion on the medical issue of the applicants which resulted in dismissal rather than that the hospital is structured under the administration which is a party to the case.

The military hospital stated its opinion, in the capacity of an expert, on the matter through its report forming a basis for the applicant's dismissal.

It has been observed that the applicant's objections for being examined by other medical institutions were not addressed in the SMAC's judgments. However, the SMAC well has the opportunity to receive medical opinion from not only the hospitals operating within the military structure but also from other medical institutions.

Obtaining the expert report from a panel operating within a military hospital, which previously rendered its opinion during the challenged dismissal process, constitutes a disadvantage for the applicant who requested to be referred to a different medical institution and submitted additional reports indicating that he did not suffer from any mental disorder.

As a consequence, it has been concluded that at the proceedings the applicant was put in a weakened position compared to the administration, which was in breach of the principle of equality of arms.

For the reasons explained above, the Court found a violation of the principle of equality of arms which is one of the safeguards inherent in the right to a fair hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

8. Judgment finding a violation of the right to be informed of the accusation

***Salih Öz* (no. 2015/13327, 17 July 2018)**

The Facts

The Chief Public Prosecutor's Office charged the applicant for incitement to qualified robbery under Article 149 § 1 (c), (f) and (g) of the Turkish Criminal Code ("the TCC") with reference to Article 38 § 1 specified therein.

The Assize Court sentenced the applicant to imprisonment for committing qualified robbery to prison term above the minimum term set in the law, in accordance with Article 149 § 1 (c), (d), (f) and (g) of the TCC.

The applicant appealed against the decision, claiming that he was also convicted under Article 149 § 1 (d) of the TCC for committing robbery in the workplace, even though he was not charged with this offense and he had not been provided with an additional right to defence against this accusation. However, the appeal was rejected and the sentence was upheld by the Court of Cassation.

The Applicant's Allegations

The applicant maintained that although a criminal case had been initiated against him for incitement to qualified robbery, at the end of the proceedings he was punished for committing qualified robbery, and that although there had been a change in the legal qualification and cause of the accusation against him, he was not provided with an opportunity to make his defence in this respect. He, therefore, claimed that his right to defence within the scope of his right to a fair trial was violated.

The Court's Assessment

According to Article 36 of the Constitution, everyone has right to defence and fair trial.

Accused must be provided with the right to defence not only in theory, but also in practice. Therefore, he must be informed of the accusation against him in order to prepare his defence and submit it before the court, and thus to influence the outcome of the proceedings.

It is not possible for a person who has not been informed of the accusation against him to make a proper defence. A trial where the accused has not been informed of the accusation against him cannot be considered as fair.

In the present case, a criminal case was initiated against the applicant for incitement to qualified robbery. The incumbent court convicted the applicant for committing qualified robbery.

Although there was a change in the legal qualification and cause of the accusation against the applicant during the proceedings, he was not informed

of this change and was not granted time to prepare his additional defence, and he was convicted under a provision not stated in the bill of indictment.

Consequently, the Constitutional Court found a violation of the applicant's right to be informed of the accusation against him within the scope of his right to a fair trial safeguarded by Article 36 of the Constitution.

9. Judgment finding a violation of the right to trial by an independent and impartial tribunal for non-compliance with the violation judgment of the ECHR

Abdullah Altun **(no. 2014/2894, 17 July 2018)**

The Facts

The applicant was sentenced to life imprisonment by the State Security Court (the SSC), and the sentence became final upon the appellate review of the Court of Cassation.

The applicant lodged an application with the European Court of Human Rights (the ECHR) stating that he had not been tried by an independent and impartial tribunal due to the sitting of a military judge on the bench of the SSC.

Having found a violation of the right to trial by an independent and impartial court, the ECHR indicated that a re-trial, if requested, would be an appropriate means of the redress of the violation.

The applicant requested a re-trial, relying on the violation judgment rendered by the ECHR. However, the incumbent assize court dismissed this request on the ground that the legal conditions for re-trial were not satisfied.

The applicant appealed the decision dismissing re-trial request relying on the judgment the ECHR finding that his right to trial by an independent and impartial tribunal was breached. Upon the dismissal of his appeal, he lodged an individual application with the Constitutional Court.

The Applicant's Allegations

The applicant maintained that his right to trial by an independent and impartial tribunal was violated as his request for a re-trial on the basis of the ECHR's judgment was dismissed.

The Court's Assessment

The independence and impartiality of tribunals are not explicitly enshrined in Article 36 of the Constitution. However, it is an implicit element of the right to a fair trial under the Court's case-law.

Considering the status of the military judge sitting at the bench of the SSC at the time they were operating, the ECHR concluded that these courts lacked independence and impartiality. Also in many applications lodged against Turkey with respect to the status of the military judge sitting on the bench of these courts, the ECHR found a violation of the right to trial by an independent and impartial court. Following the ECHR's judgments, the SSCs were completely abolished along with the law regarding military judges at the bench of these courts.

In the present case, the question as to whether the violation found by the ECHR and its consequences were redressed by the inferior courts is of importance. The violation found by the ECHR should have been redressed by conducting a re-trial before a court involving no military judge. However, the relevant court refused a re-trial on the ground that presence of a military judge on the bench during the proceedings was only a procedural matter. In fact, in the judgment in the applicant's case, the ECHR considered sitting of a military judge on the bench as a ground giving rise to violation, independently from the outcome of the trial. It was also indicated that, if requested, conducting a re-trial would be an appropriate means for the redress of the violation.

It has been concluded that the violation judgment is a substantial reason for a re-trial and the interpretation of the relevant law otherwise was not compatible with the ECHR's judgment. The request for re-trial was not duly examined in relation to Article 36 of the Constitution. Consequently, the requirements stated in the violation judgment of the ECHR were not fulfilled and, therefore, the violation of the right to trial by an independent and impartial tribunal was not redressed.

For the reasons explained above, the Constitutional Court found a violation of the right to trial by an independent and impartial tribunal safeguarded by Article 36 of the Constitution.

10. Decision finding inadmissible the alleged violation of the right to access to court due to dismissal of the appellate request of the secondary intervener

Akdeniz İnşaat ve Eğitim Hizmetleri A.Ş. **[PA] (no. 2015/2909, 19 July 2018)**

The Facts

The Ministry designated an area in which private persons owned land as a special project site. Master and implementary development plans of this site were accordingly amended.

The applicant company concluded a construction contract with owners of some immovables located within this site in return for land share and thereafter started construction of the housing project.

The municipality filed a case before the administrative court against the Ministry and requested annulment of the amendments to the city development plan. The administrative court ordered stay of execution. The defendant administration appealed the administrative court's decision before the Regional Administration Court. During this period, the construction of housing project undertaken by the applicant company was locked up and sealed and its activities were suspended on the ground of the decision ordering stay of execution.

The applicant company had become aware of the case upon the suspension of its construction works and submitted a petition to the administrative court to join the proceedings, on the side of the defendant administration, as an intervening party. It also requested the Regional Administrative Court to dismiss the case.

The Regional Administrative Court dismissed the defendant administration's appellate request and returned the file to the administrative court. The latter court accepted the applicant company's request for joining the proceedings and also annulled the complained amendments.

Neither the defendant administration nor the complainant municipality appealed the administrative court's decision. However, the applicant company filed an appeal against this decision. The State of Council rejected the applicant company's appellate request, without examining the case-

file, on the grounds that the applicant company was not entitled to make procedural requests contrary to the acts and statements of the party on whose side it joined the proceedings; and that in its capacity as an intervener, the applicant company was not entitled, by itself, to resort to appeal remedy against the will of the defendant administration.

The applicant company requested rectification of the decision rendered by the Council of State and then lodged an individual application pending the examination of its rectification request by the Council of State.

The Applicant's Allegations

The applicant maintained that the understanding and practice allowing no opportunity for the intervener to file an appeal at its own will constituted a breach of the right to access to court.

The Court's Assessment

The right to access to court is an element inherent in the right to legal remedies that is safeguarded by Article 36 of the Constitution. One of the safeguards considered to be falling into the scope of the right to access to court is to provide individuals with the opportunity to file an action against acts having a bearing on their interests as well as to join the proceeding initiated by third parties which has a bearing, by its consequences, on their interests.

However, it cannot be said that the right to a fair hearing embodies a safeguard which would necessitate absolute and unconditional provision of all opportunities and rights afforded to the main party to a secondary intervener. In the present case, the applicant company submitted its objection, pending the examination by the Regional Administrative Court, to the defendant administration's appeal against the decision of the suspension of execution. However, its objection was not taken into consideration as it had not been yet granted the capacity of an intervener at that time.

In the present case, the applicant company submitted its objection, pending the examination by the Regional Administrative Court, to the defendant administration's appeal against the decision of the suspension of execution. However, its objection was not taken into consideration as it had not been yet granted the capacity of an intervener at that time.

Decisions for the suspension of execution do not settle disputes with a final effect, and proceedings still continue to be conducted upon such decisions. Therefore, it is possible at that stage for the applicant company to effectively join the proceedings.

It has been observed that the applicant company was aware of the proceedings which had a bearing, by its consequences, on its rights and interests, it was involved in the dispute and had the opportunity to express its opinions as to the matters concerning the merits of the dispute, and, therefore, it effectively joined the proceedings.

Regard being had to the proceedings as a whole, it has been concluded that the intervention procedure cannot be said to have been rendered ineffective.

In addition, the right to a fair hearing does not afford a safeguard that the intervener may continue proceedings in case the main party to the case, on whose side the intervener joins the case, does not wish to pursue the proceedings. In other words, there exists no constitutional obligation to the effect that the intervener is entitled to appeal the verdict, irrespective of the will of main party to the case.

Accordingly, the dismissal of the applicant company's independent appeal on procedural grounds does not constitute an interference with the constitutional safeguards concerning the right to access to court.

For the reasons explained above, the Court declared the alleged violation of the right to access to court inadmissible for being manifestly ill-founded.

11. Judgment finding a violation of the right to a reasoned decision due to the failure to consider the allegations likely to change outcome of the criminal proceedings

Yılmaz Çelik **[PA] (no. 2014/13117, 19 July 2018)**

The Facts

In 2008, the incumbent chief public prosecutor's office charged the applicant for being a member of an armed terrorist organization (Hizb-ut Tahrir) and making terrorist propaganda.

In his defence submissions, the applicant stated that Hizb-ut Tahrir was not an armed criminal or terrorist organization; and that its aim was to re-establish the Caliphate in the geography of Islam. He further noted that they tried to disseminate ideas of the organization without resorting to violence but particularly through the press.

The assize court (court) convicted the applicant for being a member and making propaganda of the terrorist organization. This decision was appealed before the Court of Cassation which upheld the first instance decision in terms of his membership to the terrorist organization but quashed it in terms of the latter offence. Thereafter, the applicant lodged an individual application with the Court.

A criminal case was filed against the applicant, by the chief public prosecutor's office also in 2009, for establishing or managing an armed terrorist organization. The relevant court convicted him for his membership to the terrorist organization. This decision, which had been appealed, was upheld by the Court of Cassation. Thereafter, the applicant lodged an individual application with the Court.

The applicant's two individual applications were joined as being of the same nature *ratione materiae.*

The Applicant's Allegations

The applicant maintained that he had been sentenced for his membership to Hizb-ut Tahrir, which could not be regarded as a terrorist organization for not promoting violence; and that his substantial requests and arguments had not been taken into consideration during the criminal proceedings. He therefore alleged that his right to a fair trial had been violated.

The Court's Assessment

It is the Constitutional Court's duty to examine whether the inferior courts assessed, to a reasonable extent, the applicant's allegations which were likely to change the outcome of the proceedings.

In cases concerning terrorist organizations, the primary issue required to be taken into consideration is not the ideas adopted by them but the question whether they have resorted to any means of violence with a view to attaining

their aims. The Court expects the inferior courts to make an assessment, in a convincing manner, as to the existence of terrorist organization or relationships between accuseds and organization.

The applicant complaining of the courts' failure to discuss whether Hizb-ut Tahrir was an armed organization or a terrorist organization maintained that opinions and ideas supported by this organization, which had not involved in any violent acts, did not constitute an offence. However, both the inferior court and the Court of Cassation confined themselves, in their decisions, to accepting that Hizb-ut Tahrir was a terrorist organization and did not make an assessment as to the applicant's defence submissions.

According to the reports issued by the security directorate, the organization did not involve in any armed action during the period from 1967 when the first operation was conducted against the organization to 2016 when the last report submitted to Constitutional Court was prepared. The charges raised against the organization during the investigation and proceedings are to make propaganda of the organization, to perform acts and actions for staffing, to print and distribute organizational documents, to broadcast via the internet on behalf of the organization and to hold organizational meetings.

On the other hand, given the definition –"a policy involving force and/or violence"– attributed to terror and terrorism by international documents, comparative law, doctrine and judgments of the Court of Cassation, the inferior courts did not specify in their decisions for which reasons the Hizb-ut Tahrir was regarded as a terrorist organization.

A comprehensive and significant literature on the establishment, structure and world-wide actions of the Hizb-ut Tahrir organization was submitted to the courts. Besides, it is noted in the updated information notes on Hizb-ut Tahrir, which were issued by the security directorate and included in the case-file, that none of the publications of this organization includes any opinion inciting recourse to force and violence as well as any unlawful conduct constituting an offence.

Nevertheless, the courts did not assess, by considering these facts, whether Hizb-ut Tahrir was an organization within the meaning of Law no. 5237 and whether its acts constituted another offence. Besides, the amendments

made to Law no. 3713 were not taken into consideration in the impugned judicial decisions.

As a requirement of the right to a reasoned decision, the applicant may request that legal considerations he raised before the inferior courts be taken into account, which is an aspect of the right to a fair trial.

In the present case, it has been observed that the applicant's allegations likely to change the outcome of the proceedings were neither taken into consideration nor assessed properly. Therefore, the applicant's right to a reasoned decision had been violated.

For the reasons explained above, the Court found a violation of the right to a reasoned decision under the right to a fair trial which is safeguarded by Article 36 of the Constitution.

12. Decision finding inadmissible the alleged violation of the right to a trial within a reasonable time for falling within the jurisdiction of the Compensation Commission under Law no. 6384

Ferat Yüksel **(no. 2014/13828, 12 September 2018)**

The Facts

The applicant lodged an individual application with the Constitutional Court, alleging that his right to a trial within a reasonable time had been breached for the prolongation of the proceedings conducted in respect of him.

Following his individual application, a provisional article was added to Law no. 6384 on the Settlement of Some Applications Lodged with the European Court of Human Rights by means of Paying Compensation, and it was accordingly set forth that any individual application lodged with the Constitutional Court for the alleged prolongation of judicial proceedings and late/incomplete execution or non-execution of court decisions be referred to, and examined by, the Human Rights Compensation Commission of the Ministry of Justice (Commission).

The Applicant's Allegations

The applicant maintained that his right to a trial within a reasonable time had been breached due to the prolongation of the impugned proceedings. He therefore claimed compensation.

The Court's Assessment

As set forth in the Provisional Article 2 added to Law no. 6384, the pending individual applications that were lodged with the Constitutional Court before 31 July 2018 for the alleged failure to conduct a trial within a reasonable time and for non-execution of court decisions shall be examined and concluded by the Commission.

This subsequently-introduced remedy must be assessed separately in terms of its accessibility as well as its capacity to offer a reasonable prospect of success and to provide sufficient redress.

Law no. 6384 provides the applicants with the opportunity to apply to the Commission within three months as from the notification of the Court's inadmissibility decision rendered for the non-exhaustion of domestic remedies. Given the facts that this subsequently-introduced remedy places no financial burden on individuals and offers them the chance of directly making an application within a reasonable time, it has been concluded that it is accessible.

Considering that the structure and rules of procedures of the Commission are determined by the relevant Law and that, in particular, the Commission's decisions are subject to judicial review whereby the safeguards inherent in the right to a fair trial are afforded during the proceedings, the Court found this remedy to be capable of providing a reasonable prospect of success.

The compensatory amount awarded by the Commission is to be paid by the relevant Ministry within three months after the decision became final. Besides, an appeal may be requested against the decision of the Commission.

As a result, it has been concluded that this remedy has the potential to provide sufficient redress as it allows for awarding compensation as well as for providing other forms of redress if the former is not possible.

Given the nature of the alleged violations in the present case, it is necessary for the applicant to lodge an application with the Commission, which is accessible prima facie and capable of presenting a reasonable prospect of success and sufficient redress for the alleged violations. It has been accordingly concluded that the Court's examination of the individual application before exhaustion of the available remedy before the Commission would not be

compatible with the subsidiarity nature of the individual application.

For the reasons explained above, the Court found the individual application inadmissible for non-exhaustion of domestic remedies.

13. Judgment finding a violation of the right to access to court due to imposition of a heavy fine at the end of the case filed for termination of tender

Yıldız Eker **[PA] (no. 2015/18872, 22 November 2018)**

The Facts

The applicant was the wife of A.E.E. who died in 2017. In 2009, A.E.E. issued a bond in the value of 200,000 Turkish Liras (TRY), maturity date of which was 2011, in favour of S.M.. In 2013, the creditor S.M. initiated attachment proceedings pertaining to the bills of exchange at the total amount of TRY 277,908.33 against the applicant's husband. Upon the finalization of the proceedings, the residence owned by the applicant's husband A.E.E. was attached by the creditor S.M..

The applicant lodged a complaint with the incumbent enforcement court, arguing that the immovable could not be attached for being a residence where she lived together with her husband and children. However, the enforcement court rejected her complaint due to lack of capacity to be a party to the proceedings.

As the creditor S.M. claimed sale of the attached immovable, the enforcement office determined the value of the immovable as TRY 3,500,000 according to the expert examination. At the end of the tender made by auction, it was sold to a third part in return for TRY 1,758,000.

Maintaining that sale of the immovable was unlawful, the applicant requested termination (annulment) of the tender. The enforcement court dismissed the case as there was no irregularity in the tender and imposed, on the applicant, an administrative fine (TRY 175,800) amounting to 10% of the tender price TRY 1,758,000 for being recorded as revenue.

The first instance decision was appealed before the Court of Cassation; however, it was upheld. After the applicant's request for rectification of the

judgment had been dismissed, she lodged an individual application with the Court.

The Applicant's Allegations

The applicant maintained that the dismissal of her case for termination of the tender as well as her being sentenced to a fine at the rate of 10% of the tender price were in breach of her right to access to court.

The Court's Assessment

Right to access to court is an element inherent in the right to legal remedies, which is safeguarded by Article 36 of the Constitution. It has been observed that imposition, at the end of the proceedings, of a fine which would place a financial burden on the applicant constituted an interference with her right to access to court in the present case.

In the event that the case filed for termination of the tender is dismissed, imposing a fine at the rate of 10% of the tender price is a convenient means for the protection of the creditor's right to property. A case filed for termination of the tender without any justified basis may lead to procrastination of the compulsory enforcement process which nearly comes to an end. Therefore, the law-maker naturally introduces certain mechanisms as a deterrent measure. However, it must be assessed whether such an interference is proportionate. In making such an assessment, it is considered whether a reasonable balance has been struck between the creditor's interests and that of the applicant requesting termination of the tender.

In this respect, regard must be also paid, inter alia, to the amount of fine imposed and the applicant's ability to pay that amount. In the present case, it must be underlined that the applicant maintained that she had no income for being a housewife; and that the inferior courts did not nevertheless make a determination or assessment in this respect. Besides, given the fact that the debt was very low compared to the price set for the immovable, it must be stressed that it was of great importance for the applicant herself to impede the sale of the immovable.

Although the applicant, arguing that the immovable in question was a matrimonial residence, resorted to judiciary for the stay of execution of the enforcement proceedings, her request was dismissed by the relevant court

for not being a party to the proceedings. Matrimonial residence is subject to a special protection mechanism, by virtue of the Turkish Civil Code no. 4721, as a requirement of the positive obligation to protect family life that is enshrined in the Constitution. It must be also taken into consideration that in filing a case for termination of the tender, the applicant also invoked these safeguards concerning the matrimonial residence.

In addition, the administrative fine prescribed in the Enforcement and Bankruptcy Code no. 2004 is directly applied when the case for termination of tender is dismissed on its merits. No upper limit for the administrative fine to be imposed in this respect is not specified in the Code. Neither are inferior courts provided with any flexibility that would ensure them to take into consideration the particular circumstances of the present case; nor are judges granted with any discretionary power. In respect of the present case, this situation led to imposition of a fine, which was quite high according to the conditions of the country, on the applicant who had no opportunity to bring her claim of matrimonial residence before courts at the previous stages.

Regard being had to all these considerations, it has been concluded that no fair balance was struck between the interest in the protection of the creditor's rights and the applicant's interest in suing for termination of the tender; that the fine placed an extraordinary burden on the applicant; and that therefore, the interference with her right to access to court was disproportionate.

Besides, in the present case, there is no opportunity for a re-trial. Accordingly, the Court considered that with a view to redressing the applicant's pecuniary damages, the letter for collecting fee must be revoked by the relevant court in order to preclude its execution by the relevant tax office, and the decision be remitted to the incumbent court for withdrawal of the letter by the relevant authority.

For the reasons explained above, the Court found a violation of the applicant's right to access to court which falls under the right to a fair trial safeguarded by Article 36 of the Constitution.

K. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO AN EFFECTIVE REMEDY

1. Judgment finding a violation of the right to an effective remedy due to hindering conduct of the public authorities

Yusuf Ahmed Abdelazım Elsayad **(no. 2016/5604, 24 May 2018)**

The Facts

The applicant is a citizen of Arab Republic of Egypt, and he entered Turkey through legal means. The security directorate of the city where the applicant went to receive a report that a group of foreign nationals would be taken across the border of Syria illegally.

Upon the report, the foreign nationals including the applicant were arrested, and thereafter, the incumbent chief public prosecutor's office ordered to hand over these foreigners to the provincial immigration authority which then decided to place the applicant in administrative detention for deportation.

Arguing that he might be subject to ill-treatment in case of being deported to his home country, the applicant sought international protection. He was not deported and thereupon transferred to the foreigners' removal centre ("the removal centre"). The applicant's lawyer applied to the removal centre and requested to meet his client. However, without a response to this request, the applicant was transferred to another removal centre located in another city.

The requests by the applicant's lawyers to meet their clients were rejected by the removal centre where he had been transferred. Thereupon, his lawyers filed a criminal complaint before the chief public prosecutor's office against the director of the relevant removal centre and asserted that the centre did not allow them to meet their clients to preclude them from bringing an action against the order for the applicant's deportation within 15 days.

In the meantime, the applicant was relocated for the third time and transferred to another removal centre. The lawyer met the applicant at this centre and requested from authorities to examine the applicant's case-file for bringing an action for the revocation of the deportation order. The lawyer was informed verbally that he could examine the case-file at a later time.

The lawyer visited a notary office for issuing a power of attorney on behalf of his client; however, the authorities of the removal centre stated that the applicant had neither an identity card nor a passport. Therefore, a power of attorney could not be issued.

Having brought an action before the administrative court for revocation of the deportation order, the applicant asserted that a military coup d'état had taken place in his home country in 2013; that he was put by the new administration on the list of wanted persons due to his political background and position of his father-in-law as an anti-coup, opponent journalist; and that in case of returning to his home country, his life and liberty would be put at jeopardy. The incumbent administrative court dismissed the action as being out of time.

The Applicant's Allegations

The applicant maintained that his right to an effective remedy was breached due to the restriction imposed on his opportunity to have recourse to a competent authority against the deportation order.

The Court's Assessment

Article 40 of the Constitution safeguards the right to request prompt access to the competent authorities (the right to an effective remedy) for everyone whose constitutional rights have been violated.

A foreigner ordered to be deported must be afforded with the opportunity to effectively challenge the order, as required by the obligation to guard against ill-treatment.

Within a short period of time after being placed in administrative detention, the applicant was transferred to three different detention centres located far away from one another. Besides, the applicant's lawyer was not informed of the detention centres to which the applicant was transferred in spite of the written request in this respect. Moreover, there are allegations, which are not unfounded, that the lawyer's requests to meet his client were impeded. It is further alleged that the applicant was not allowed to issue a power of attorney to his lawyer, nor was the lawyer allowed to examine the deportation file.

Regard being had to the applicant's allegations together with the facts in support of these allegations, it has been concluded that the applicant's alleged failure to bring an action before the administrative court within the prescribed period due to the hindering conduct of the public authorities is not unfounded.

On the other hand, in the criminal complaint filed with the chief public prosecutor's office, the applicant expressed his concerns about the expiry of the prescribed period and brought an action within fifteen days following his first meeting with his lawyer. Therefore, it cannot be concluded that the applicant acted without due diligence in bringing an action within the statutory period.

It has been observed that the administrative court confined itself to a formal examination concerning the time limit for taking legal action and did not take the applicant's other related allegations into consideration.

In the present case, it cannot be said that the applicant was afforded with an effective remedy concerning the alleged infringement of prohibition of ill-treatment due to the administrative court's failure to take into consideration the allegations –supported by concrete facts– of the applicant who, for being under the State's protection, is in a disadvantageous position *vis-à-vis* the State in proving the allegations. The applicant must not be deported until the conclusion of the re-trial process in order for redressing the consequences of the infringement.

For the reasons explained above, the Court found a violation of the right to an effective remedy, which is safeguarded by Article 40 of the Constitution, in conjunction with Article 17 of the Constitution.

L. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO EDUCATION

1. Decision finding inadmissible the alleged violation of the right to education due to dismissal from the Air Force Academy through a Decree Law

Melih Sivas **(no. 2016/15634, 28 June 2018)**

The Facts

Following the coup-attempt of 15 July, within the scope of an investigation conducted by the chief public prosecutor's office into the unit of the Fetullahist Terrorist Organization and/or Parallel State Structure (FETÖ/PDY) within the air force academy, the applicant was detained on remand by the order of the Magistrate Judge, on suspicion of having involved in, and provided armed support for, the coup attempt.

Upon rejection by the Magistrate Judge of his appeal against the detention order, the applicant lodged an individual application. Thereafter, a criminal case was filed against the applicant.

At the end of the trial before the assize court pending this Court's examination of the individual application, the applicant was sentenced to life imprisonment for attempting to overthrow the order established by the Turkish Constitution by use of force and violence and intentional killing. The trial has not been concluded yet and is pending before the district court of appeal.

Besides, the applicant was dismissed from the air force academy within the scope of the amendment introduced by the state of emergency decree law to the administrative organization of the military academy.

The Applicant's Allegations

The applicant alleged that there was a breach of his right to personal liberty and security due to the alleged unlawfulness of his detention as well as of his right to education for being dismissed from the air force academy by virtue of the decree law.

The Court's Assessment

1. Alleged Violation of the Right to Personal Liberty and Security

Regard being had to the investigation documents, it appears that the applicant, a cadet in the air force academy, was detained on remand on the basis of the facts that the applicant being armed and fully-equipped had involved in the coup attempt and gave support to the coup plotters; that he had engaged in an armed conflict against the police and civilians as a result of which many civilians and police officers lost their lives or got injured. In the indictment, these facts are substantiated through video footages, ballistic reports and other material evidence.

As regards the investigations into the offences in connection with the FETÖ/PDY, preventive measures other than detention may remain insufficient for the proper collection of evidence and safe conduction of the investigations. In the same vein, the probability of fleeing and tampering with the evidence of the persons having a link with the FETÖ/PDY is much higher than that of the offences committed in ordinary periods.

The offences imputed to the applicant, namely attempting to overthrow the Government of the Republic of Turkey, the constitutional order and the Grand National Assembly of Turkey or to prevent them from performing their duties, are subject to the severest criminal sanctions within the Turkish legal system and therefore involve the risk of fleeing. The detention order was issued by the Magistrate Judge on reasonable grounds such as the applicant's probability of obfuscating, concealing and tampering with the evidence as well as fleeing.

Regard being had to the general conditions prevailing at the time when the detention order was issued, the particular circumstances of the case and the content of the detention order as a whole, the grounds for the applicant's detention had factual basis. Given all the above-mentioned explanations as to the incident, the Court has considered that the detention measure is proportionate. It is explicit that there is no violation in terms of the alleged unlawfulness of the applicant's detention.

For the reasons explained above, the Court found inadmissible the alleged violation of the right to personal liberty and security for being manifestly ill-founded.

2. Alleged Violation of the Right to Education

The applicant's complaints mainly concern the acts made through the decree law issued during the state of emergency. Considering that the relevant decree law was approved by the National Assembly and transformed to law, the Court decided not to proceed with the examination in respect thereof.

In the present case, the applicant's complaint about his inability to continue his education due to being dismissed from the air force academy was examined within the scope of the right to education.

The military academies, which had been operating under the administrative management of the Turkish Armed Forces, were then affiliated to the National Defence University recently established by the legal amendment introduced following the coup attempt of 15 July. It has been observed that this legal arrangement has not brought along a system change which deeply and structurally modified the personnel recruitment process but merely introduced a novelty in the administrative structure of the military academies.

Regard being had to the legal amendment as a whole, it has been revealed that the legislator aimed to re-arrange the military educational activities, which had worsened subsequent to the coup attempt, by bringing the military academies under the administration of civilian authorities. In this respect, it has been concluded that the amendment pursued the legitimate aim of maintaining public order following the coup attempt.

It is a reasonable expectation, for the applicant, to be appointed as a military officer upon being graduated from the air force academy by relying on the legislation which had been previously in force. However, the view that the role undertaken by the military academies during the coup attempt of 15 July has a direct impact on the national security and democratic social order, which was predicated upon by the legislator in making this legal amendment, is also undeniable.

This view was based on the charges that a significant number of military academy cadets were actively involved in, and assigned with certain tasks within, the coup attempt of 15 July. These charges were proven to be well-founded through the judicial and administrative proceedings against the military academy cadets within the scope of several investigations conducted

countrywide as well as the conviction decisions rendered against them at the end of the proceedings. As a matter of fact, the applicant was also convicted. Besides, the State's further sensitivity to this matter is a comprehensible approach on the ground that recruitment of cadets for the military academies is a matter directly related to the State's public safety. Accordingly, it can be in no way concluded that the interference with the applicant's right to education was not necessary for the State.

In fact, the applicant has not been fully deprived of his right to education as the legal arrangement also gives the opportunity of being enrolled to another higher education programme. Given the assurance and opportunities provided for the applicant, the Court has found proportionate the complained interference.

For the reasons explained above, the Court found inadmissible the alleged violation of the right to education, for being manifestly ill-founded.

M. JUDGMENTS/DECISIONS CONCERNING THE RIGHT TO UNION

1. Judgment finding no violation of the right to union membership due to appointment of a teacher, representative of a union, to a different school

İbrahim Çiçek **(no. 2015/19462, 26 December 2018)**

The Facts

The applicant was a secondary school deputy principal in a district, as well as the district representative of an education union at the time of the press statement and demonstration march in question. A disciplinary investigation was opened against the applicant for participating in unauthorized and illegal demonstration, march and press statement. The applicant was appointed by the provincial directorate of national education to a secondary school in another district as a teacher.

The applicant brought an action before the administrative court, requesting the annulment of his appointment. The court dismissed the applicant's case. The applicant's appeal was examined and rejected by the regional administrative court that upheld the administrative court's decision. The applicant's subsequent request for rectification of the decision was also dismissed. Therefore, the applicant lodged an individual application.

The Applicant's Allegations

The applicant maintained that he was discharged from his position as an administrator and was appointed to another school on account of the activities in which he had participated in accordance with the instruction of the union of which he was a member. He accordingly claimed that his right to union membership was violated.

The Court's Assessment

It must be acknowledged that the applicant's having been appointed to another school as well as his having been discharged from his position as an administrator constituted an interference with his right to union membership.

In the present case, a disciplinary investigation had been opened against the applicant who had been deputy principal in a secondary school, on the ground that he had participated in certain activities of a union which, according to him, ordered him to do so, by taking medical examination forms, taking leaves or not going to work without an excuse. As a result, he was discharged from his position as an administrator and was appointed to another school as a teacher. The issue to be examined by the Court is whether the said interference complied with the requirements of a democratic society.

School administrators are responsible for ensuring that education is conducted properly without any interruption and that the teachers start the class on time and perform their duties in accordance with the legislation. It primarily falls to the administrators to prevent the misuse of the opportunities provided by law.

According to the investigation report issued in respect of the applicant, he displayed behaviours contradicting his position as a public official and he caused disturbance in the school where he worked, which especially disturbed the teachers and students. It was therefore recommended that the applicant would be discharged from his position as an administrator.

The report further stated that the applicant's acts were contrary to the provisions of the Law no. 657 on Civil Servants, which were related to political ban and to carrying out activities on behalf of a political party.

Right to union membership also guarantees that members of a union are not imposed sanctions for being a member of the union or for participating in its activities. However, union membership must not necessarily lead the public officials to act contrary to the duties and responsibilities expected of them while enjoying their constitutional rights.

It must be acknowledged that the administration enjoys a wider margin of appreciation in terms of administrative positions than it does in the other types of appointments. In the present case, the activities participated in by the applicant and their characteristics, the requirements of his duty and their reflections in the school where he worked were considered as a whole by the inferior courts which concluded that the change of his place of duty was lawful. In addition, considering the possibility that there was no teacher shortage in the school where the applicant was working, the applicant might

naturally be assigned in another school. Besides, if the applicant worked as a teacher in the same school after being discharged from his position as an administrator, it would probably have negative effects.

As a result, the applicant's having been discharged from his administrative duty and appointed to another position in another place in accordance with the findings of the administration as well the inferior courts' justifications and in conformity with the legislation did not constitute a disproportionate interference with his right to union membership. Hence, the balance between the measures deemed necessary for the proper conduct of education services and the applicant's right to union membership was not disturbed to the detriment of the applicant.

Consequently, the Constitutional Court found no violation of the applicant's right to union membership safeguarded by Article 51 of the Constitution.

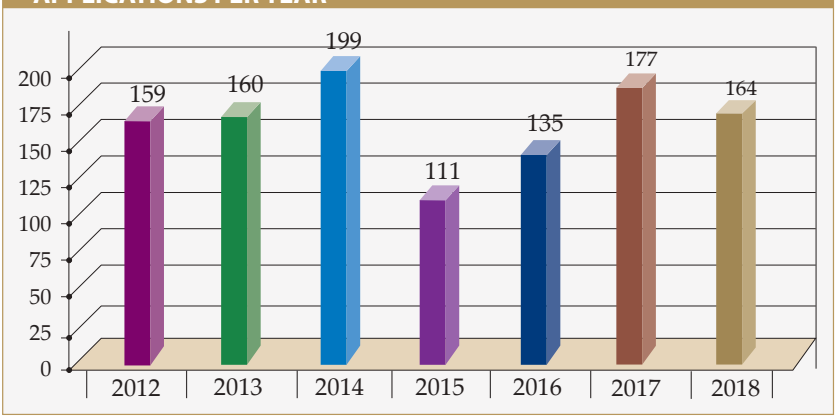
CHAPTER SIX

STATISTICS

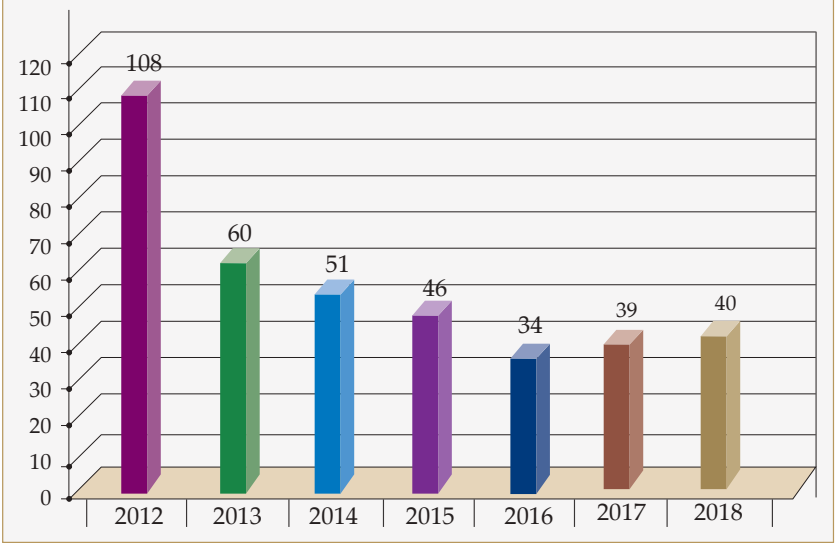
I. STATISTICS ON CONSTITUTIONALITY REVIEW

In 2018, 40 cases were taken over from the previous year 2017.
In 2018 164 abstract and concrete review cases were received.
119 out of total 204 cases were concluded in 2017, 85 of the total were forwarded to 2019.

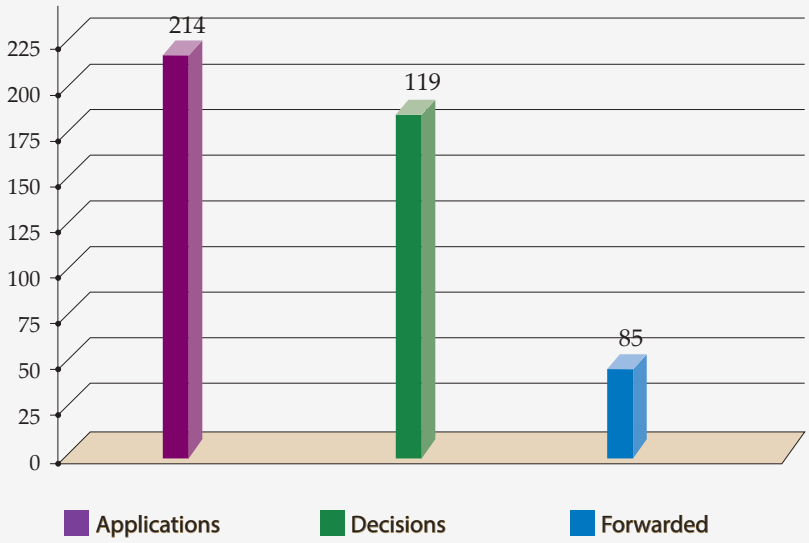
1- NUMBER OF CONSTITUTIONALITY REVIEW (ABSTRACT&CONCRETE) APPLICATIONS PER YEAR



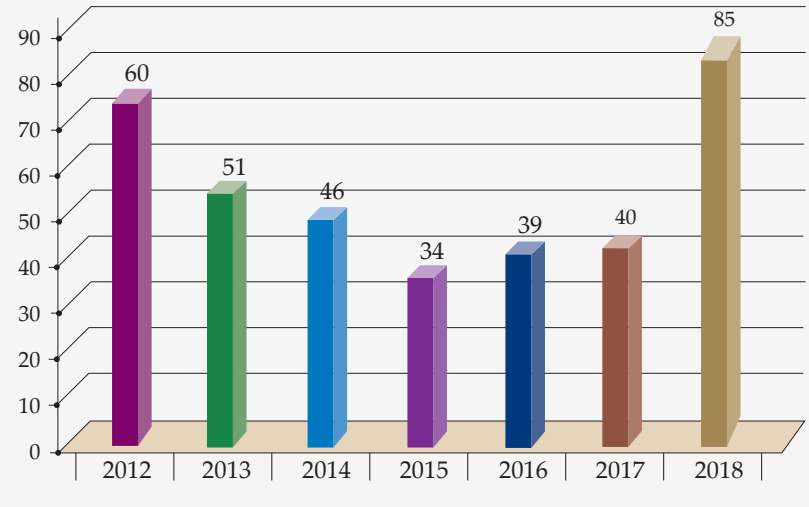
2- NUMBER OF CONSTITUTIONALITY REVIEW (ABSTRACT&CONCRETE) APPLICATIONS FROM PREVIOUS YEARS



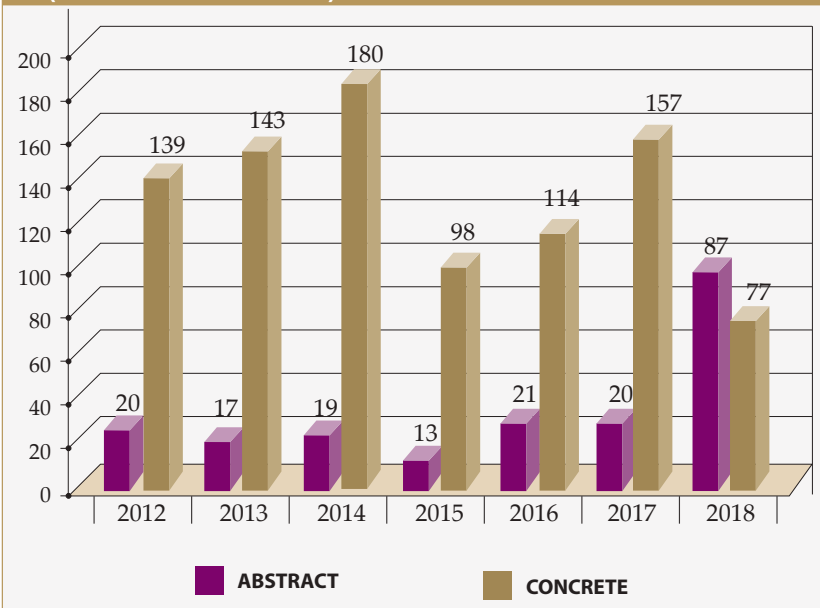
3- TOTAL NUMBER OF CONSTITUTIONALITY REVIEW (ABSTRACT&CONCRETE) APPLICATIONS AND DECISIONS IN 2018



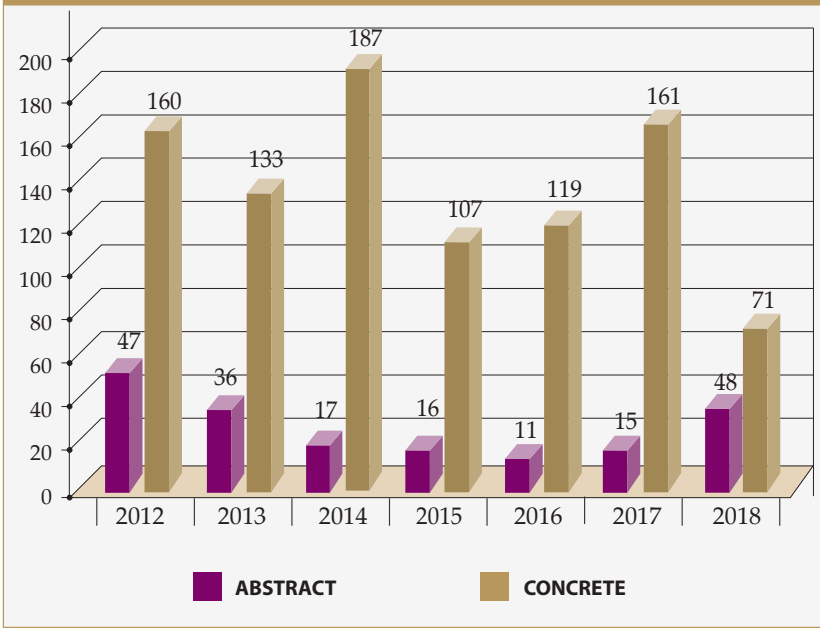
4- NUMBER OF CONSTITUTIONALITY REVIEW (ABSTRACT&CONCRETE) APPLICATIONS FORWARDED TO THE NEXT YEAR



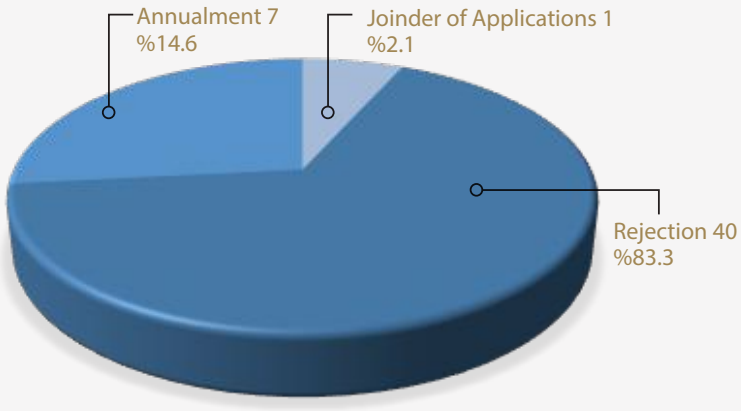
5- DISTRIBUTION OF CONSTITUTIONALITY REVIEW (ABSTRACT&CONCRETE) APPLICATIONS INCOMING PER YEAR



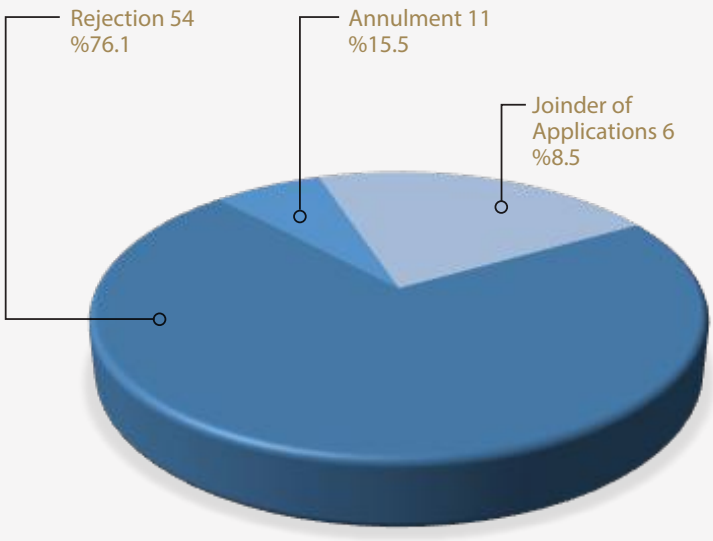
6- DISTRIBUTION OF CONSTITUTIONALITY REVIEW (ABSTRACT&CONCRETE) APPLICATIONS DECIDED PER YEAR



7- DECISIONS IN ABSTRACT REVIEW CASES IN 2018



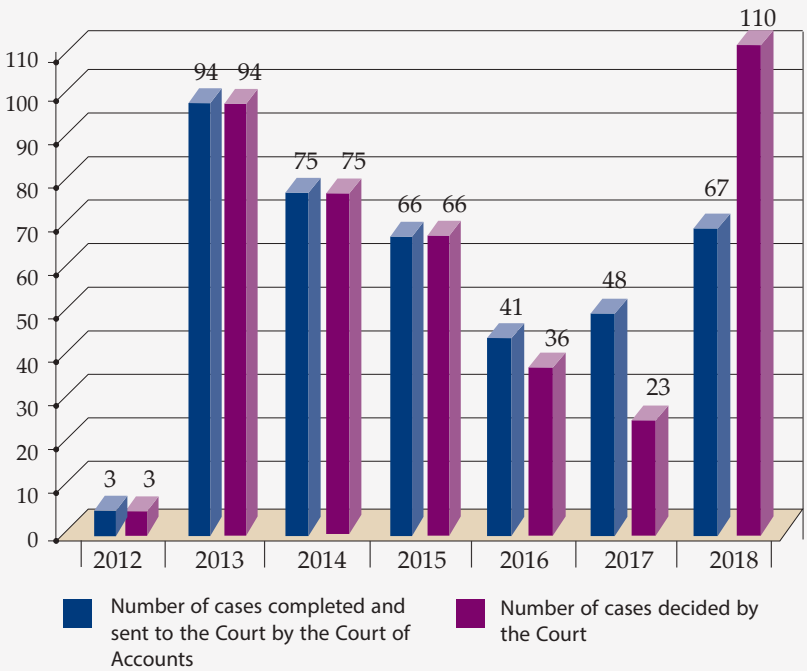
8- DECISIONS IN CONCRETE REVIEW APPLICATIONS IN 2018



II. STATISTICS ON FINANCIAL AUDIT OF POLITICAL PARTIES

In 2018, 67 files concerning the audits of financial reports were completed and sent by the Court of Accounts. The total number of files examined and concluded in this field by the Constitutional Court is 110.

1- POLITICAL PARTY AUDIST FILED AND CONDUCTED PER YEAR



Constitutional Court
of the Republic of Turkey

INDIVIDUAL APPLICATION STATISTICS

(23/9/2012 - 31/12/2018)

Table 1: Number of Received/Decided Applications by Year

	2012	2013	2014	2015	2016	2017	2018	Toplam
Received Applications	1.342 % 1	9.897 % 5	20.578 % 10	20.376 % 10	80.756 % 38	40.530 % 19	38.186 % 18	211.665
Decided Applications*	4 % 0	4.924 % 3	10.926 % 6	15.378 % 9	16.100 % 9	89.653 % 52	35.395 % 21	172.380
Total Ratio	% 0	% 50	% 53	% 75	% 20**	% 221***	% 93	% 81,4

* There may be a little change, compared to the previous statistics, in the examination ratio of the received applications as the file is closed in case of an admissibility decision on administrative grounds and reopened upon the acceptance of the objection to the inadmissibility decision.

** The ratio of the files excluding the applications made within the scope of the Commission for the Examination of Proceedings under the State of Emergency is 85%.

*** The ratio of the received applications is 90% excluding 72.134 files decided to be inadmissible due to non-exhaustion of legal remedies after the establishment of the Commission for the Examination of the Proceedings under the State of Emergency.

Table 2: Number of Pending Individual Applications*

2013	2014	2015	2016	2017	2018
9	148	797	2.665	7.191	28.475
% 0	% 0,4	% 2	% 6,8	% 18,3	% 72,5

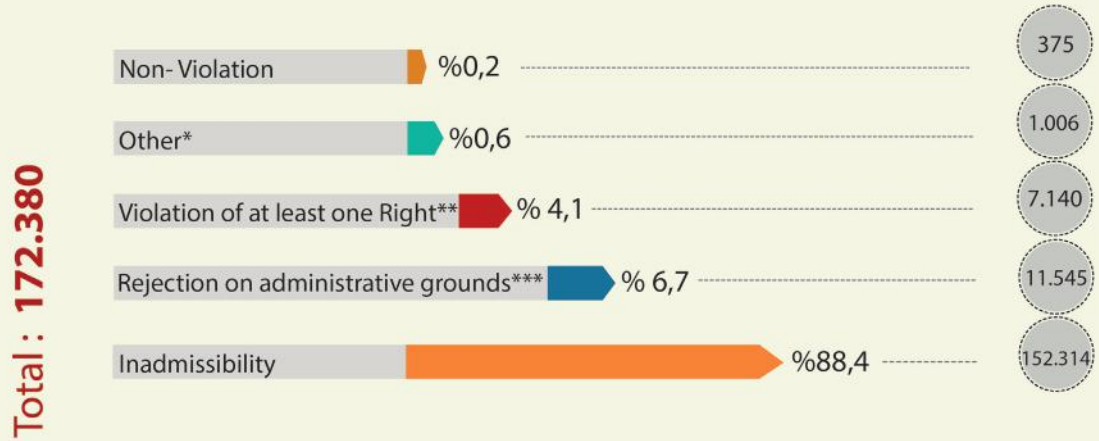
* Showing the number of pending applications as of 31.12.2018

Total Pending Applications : **39.285**

Total Applications : **211.665**

Pending Applications / Total Applications : **%18,6**

Table 3 : Decided Applications per Judgment Type



* Rejection, strike-out, and closing of applications.

** The number of Joindered Application is also included.

*** There may be a little change, compared to the previous statistics, in the examination ratio of the received applications as the file is closed in case of an inadmissibility decision on administrative grounds and reopened upon the acceptance of the objection to the inadmissibility decision.

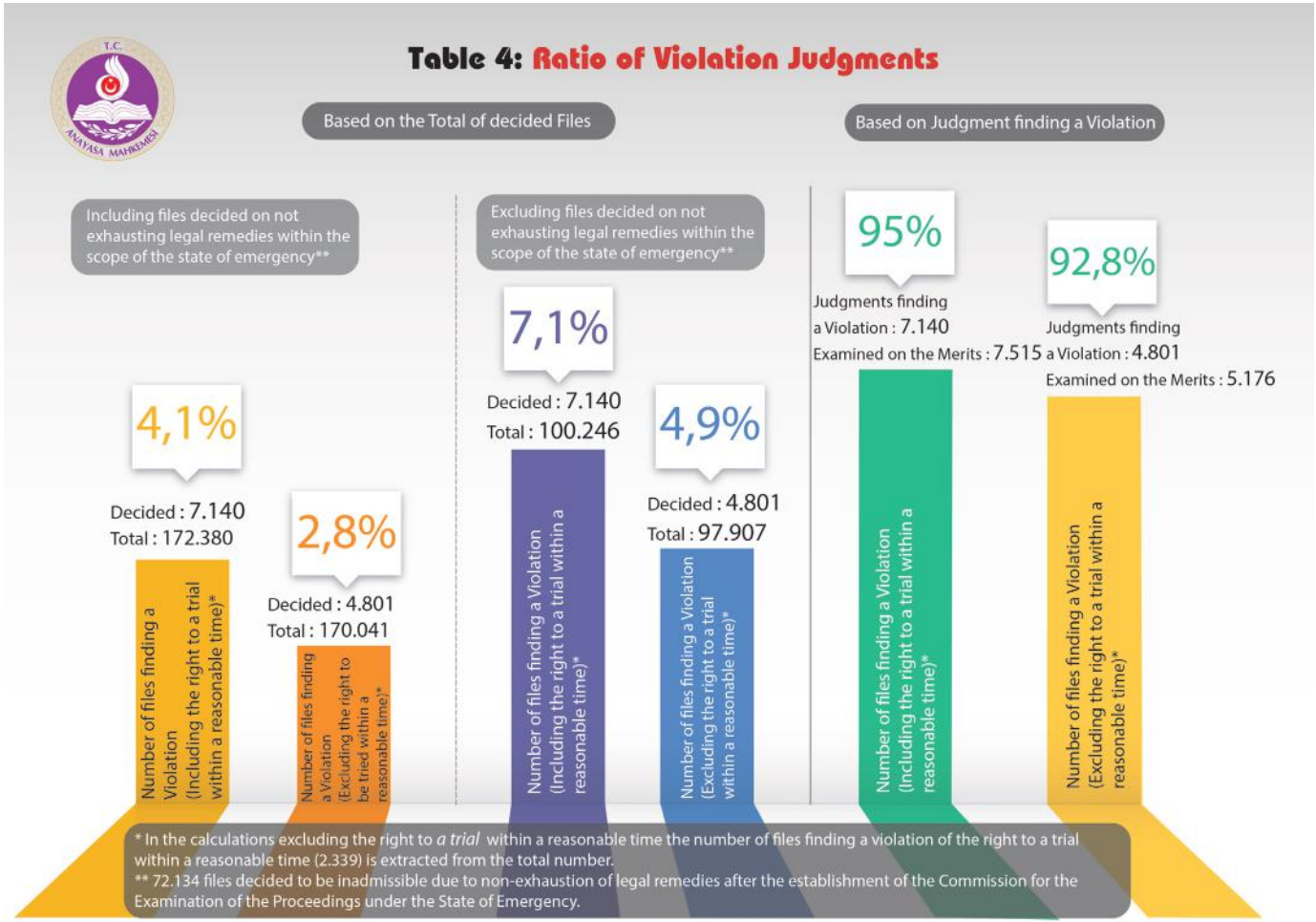


Table 4: Ratio of Violation Judgments
Based on the Total of decided Files
Based on Judgment finding a Violation
Including files decided on not exhausting legal remedies within the scope of the state of emergency**
Excluding files decided on not exhausting legal remedies within the scope of the state of emergency**
4,1%
Decided : 7.140
Total : 172.380
Number of files finding a Violation (Including the right to a trial within a reasonable time)*
2,8%
Decided : 4.801
Total : 170.041
Number of files finding a Violation (Excluding the right to be tried within a reasonable time)*
7,1%
Decided : 7.140
Total : 100.246
Number of files finding a Violation (Including the right to a trial within a reasonable time)*
4,9%
Decided : 4.801
Total : 97.907
Number of files finding a Violation (Excluding the right to a trial within a reasonable time)*
95%
Judgments finding a Violation : 7.140
Examined on the Merits : 7.515
Number of files finding a Violation (Including the right to a trial within a reasonable time)*
92,8%
Judgments finding a Violation : 4.801
Examined on the Merits : 5.176
Number of files finding a Violation (Excluding the right to a trial within a reasonable time)*
* In the calculations excluding the right to *a trial* within a reasonable time the number of files finding a violation of the right to a trial within a reasonable time (2.339) is extracted from the total number.
** 72.134 files decided to be inadmissible due to non-exhaustion of legal remedies after the establishment of the Commission for the Examination of the Proceedings under the State of Emergency.

Table 5: Number of Individual Applications in which at least one right was decided to have been violated (Including the right to a trial within a reasonable time and Joinder of Applications)

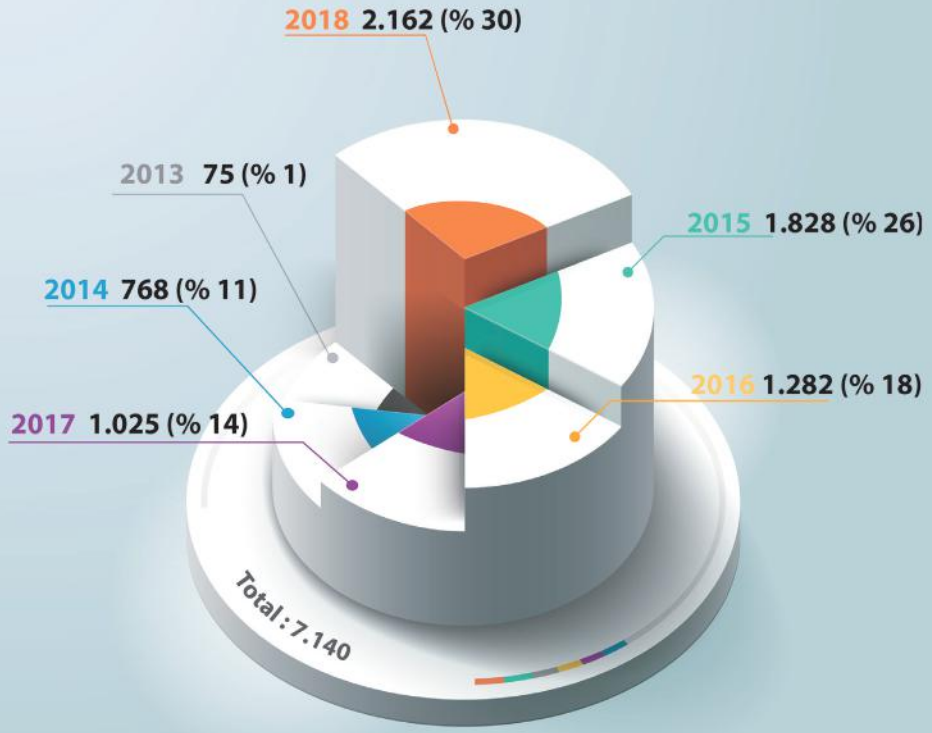
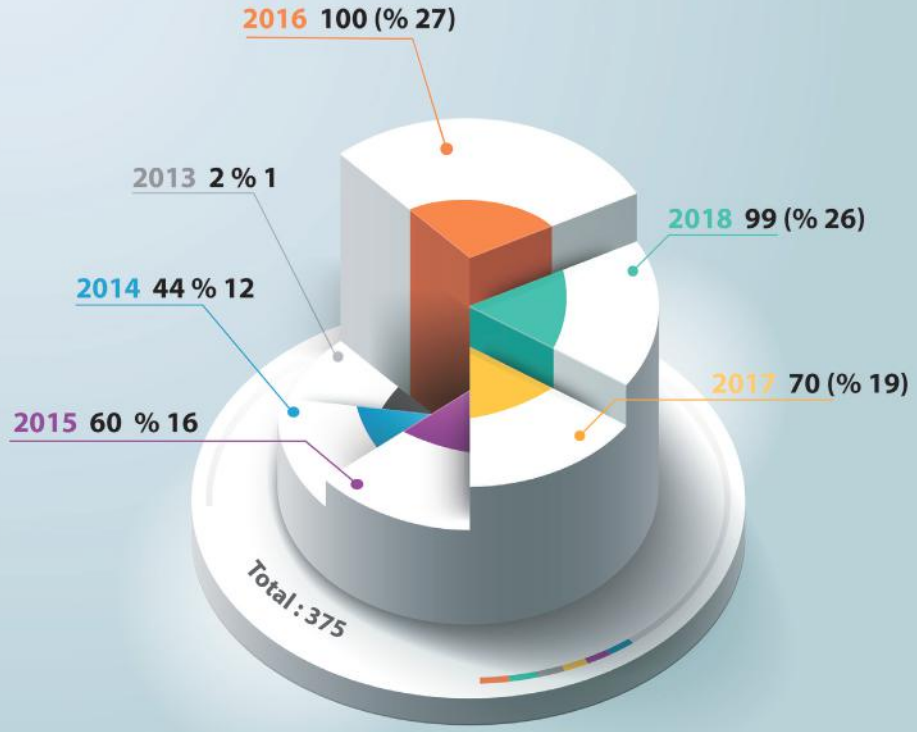
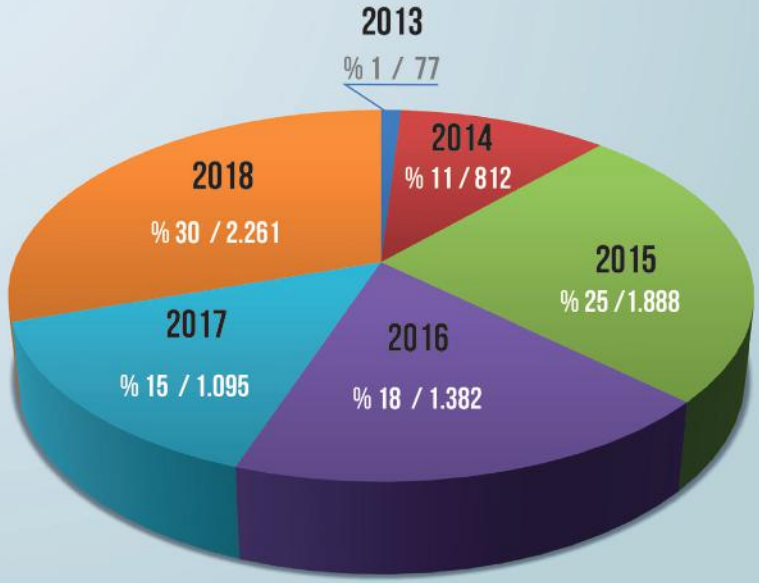


Table 6: Number of Individual Applications in which no violation was found*
(Including th right to a trial within a reasonable time and Joinder of Applications)



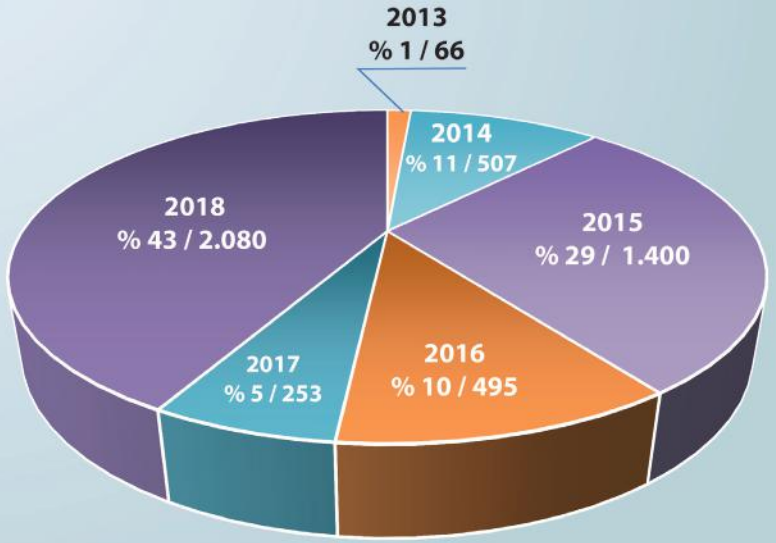
* Files decided to be admissible, but finding no violation in the examination of merits.

Table 7: Number of Individual Applications examined as to the Merits (Including the right to a trial within a reasonable time and Joinder of Applications)



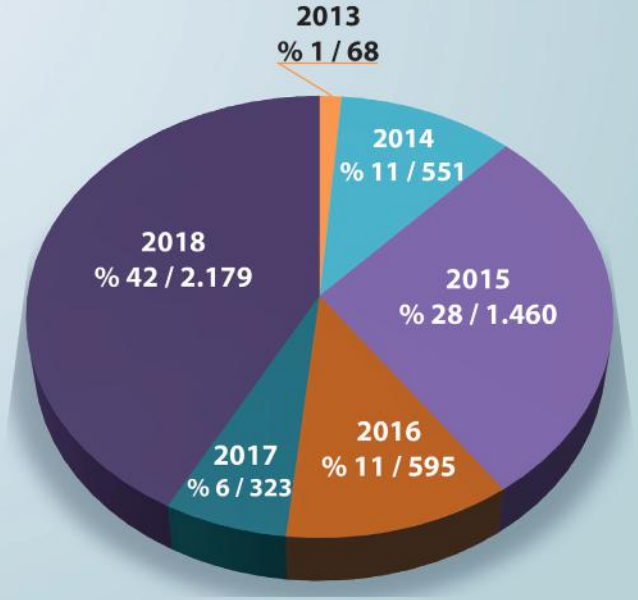
TOTAL : 7.515

Table 8: Number of Individual Applications in which at least one right was decided to have been violated (Excluding the right to a trial within a reasonable time, including Joinder of Application)



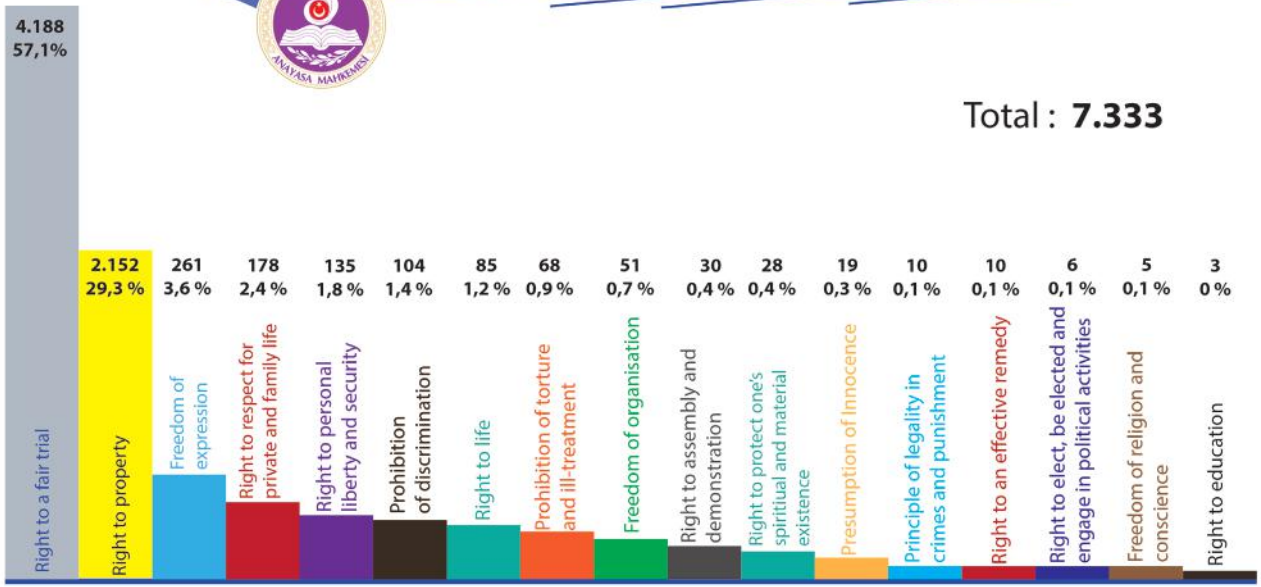
TOTAL : 4.801

Table 9: Number of Individual Applications examined as to the Merits (Excluding the right to a trial within a reasonable time, including Joinder of Applications)



TOTAL : 5.176

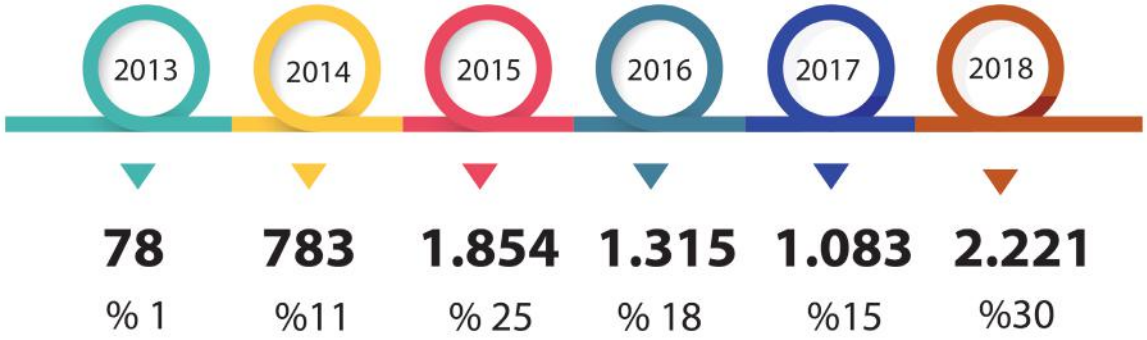
Table 10: Judgments finding a Violation by Rights and Freedoms (Including the right to a trial within a reasonable time and Joinder of Applications)*



* More than one right may be decided to have been violated in one application.

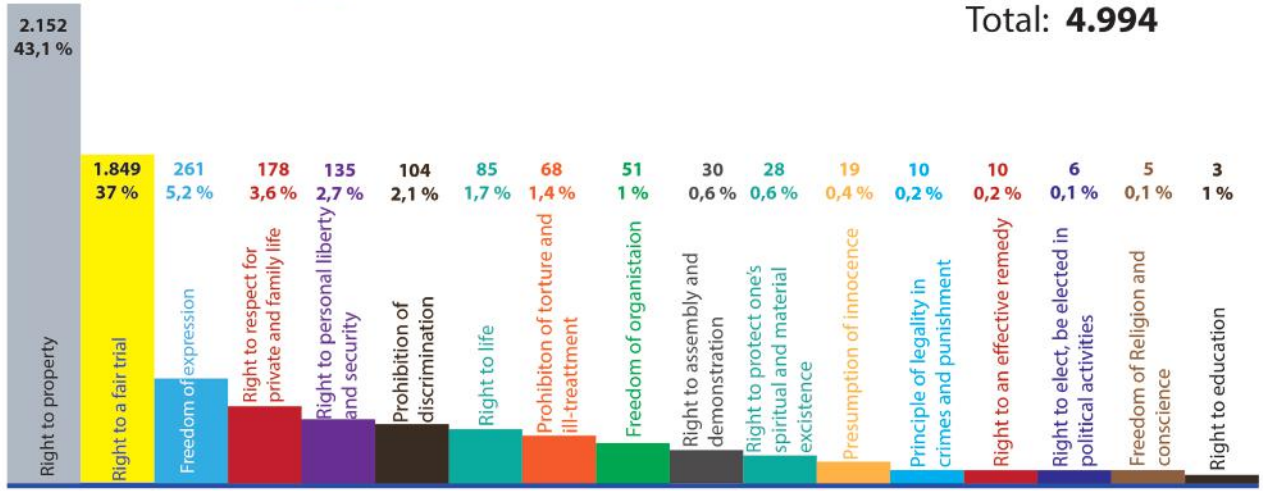
Table 11: Judgments finding a Violation by Years (Based on Rights and freedoms) (Including the rigth to a trial within a reasonable time and Joinder of Applications)*

Total: **7.333**



*More than one right may be decided to have been violated in one application.

Table12: Judgments finding a Violation by Rights and Freedoms (Excluding the right to a trial within a reasonable time, including the Joinder of Applications)*



*More than one right may be decided to have been violated in one application.

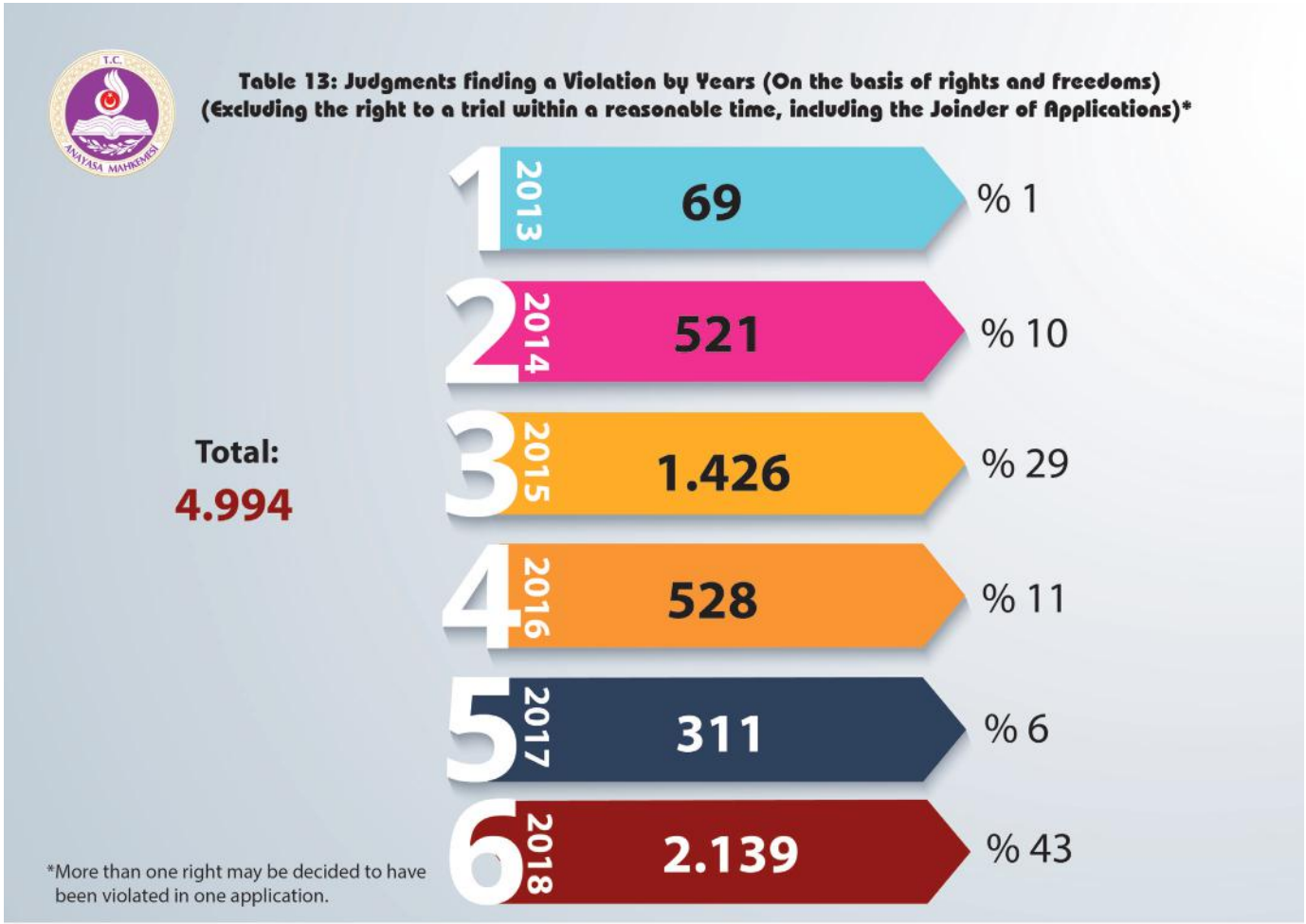


Table 13: Judgments finding a Violation by Years (On the basis of rights and freedoms)
(Excluding the right to a trial within a reasonable time, including the Joinder of Applications)*
Total:
4.994
1 2013 69 % 1
2 2014 521 % 10
3 2015 1.426 % 29
4 2016 528 % 11
5 2017 311 % 6
6 2018 2.139 % 43
*More than one right may be decided to have been violated in one application.

Table 14: Judgments finding a Violation of the Right to a Fair Trial (Including the right to a trial eithin a reasonable time and Joinder of Applications)*

Total: **5.140**

1. **2.966** (%57,7) — Right to a trial within a reasonable time
2. **816** (%15,9) — Principle of equality of arms / principle of adversarial proceedings
3. **558** (%10,9) — Right to a reasoned judgment / decision
4. **531** (%10,3) — Right to a fair hearing
5. **228** (%4,4) — Right of access to a court
6. **15** (%0,3) — Right to call / examine witnesses
7. **14** (%0,3) — Others**
8. **12** (%0,2) — Right to legal assistance

2.339 (% 45,5) — Judgments only finding a violation of the right to a trial within a reasonable time.

*More than one right may be decided to have been violated in one application.

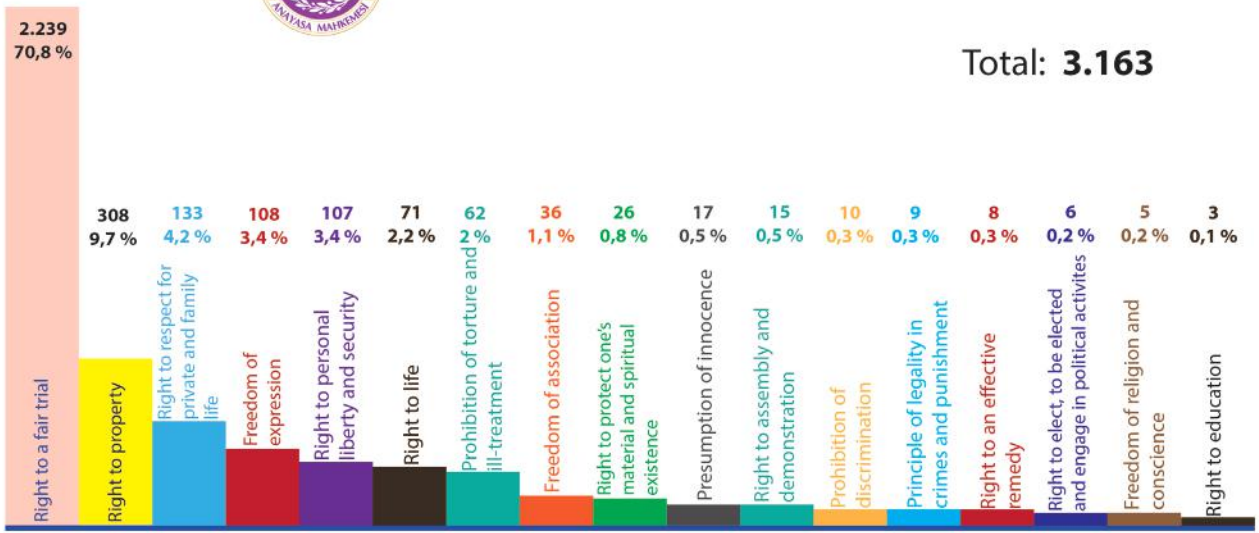
** Others: Right of self - defence, right of effective participation to the trial, right of enforcement of decision etc.

Table 15: Judgments finding a Violation of the Right to a Fair Trial (Based on Guarantees) (Including the right to a trial within a reasonable time and Joinder of Applications)*

Total: **5.140**

*More than one guarantee may be decided to have been violated within the scope of the right to a fair trial.

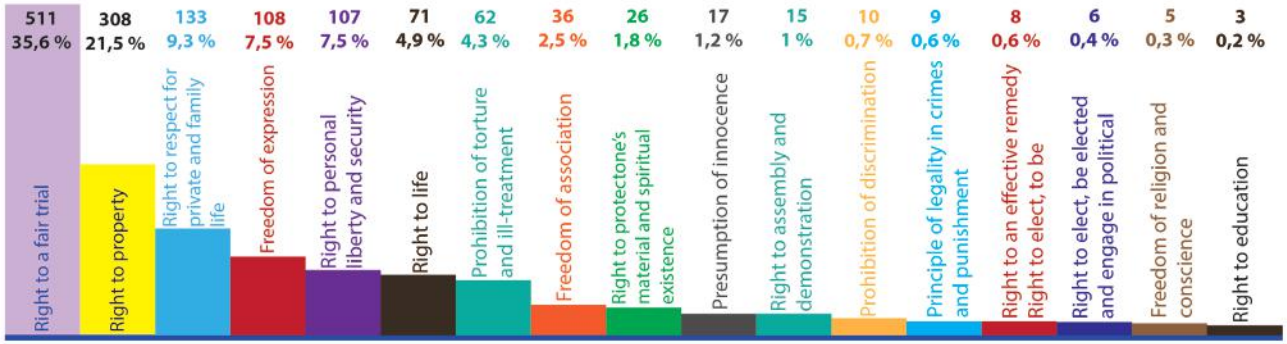
Table 16: Judgments finding a Violation by Rights (Including the right to a trial within a reasonable time and Excluding Joinder of Applications)*



*More than one right may be decided to have been violated in one application. Calculated only with regard to decided files without the consideration of joindered apllications.

Table 17: Judgments finding a Violation by Rights (Including the right to a trial within a reasonable time and Joinder of Applications)*

Total: **1.435**



*More than one right may be decided to have been violated in one application. Calculated only with regard to decided files without the consideration of joindered apllications.