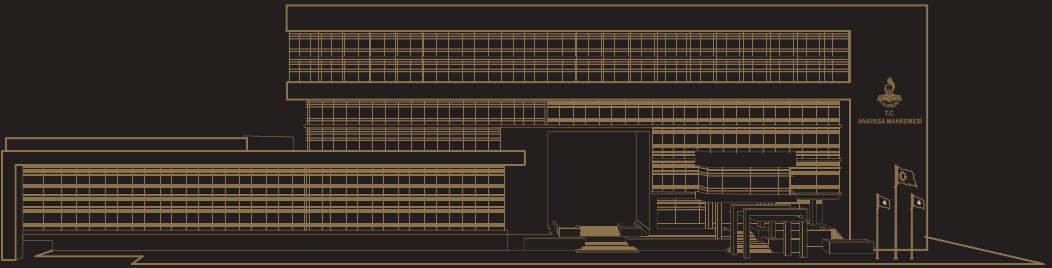




Constitutional Justice in Asia

“Right to Liberty and Security”



**6th Summer School of the Association of
Asian Constitutional Courts and Equivalent Institutions**



Constitutional Justice in Asia

“Right to Liberty and Security”

6th Summer School of the Association of
Asian Constitutional Courts and Equivalent Institutions
17-21 September 2018, Ankara

Organised by
The Centre for Training and Human Resources Development of AACC
The Constitutional Court of the Republic of Turkey



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MESSAGE OF THE PRESIDENT

The Constitutional Court of the Republic of Turkey organized the 6th Summer School Program of Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of “the Right to Liberty and Security” in Ankara and Konya on 16 – 22 September 2018 within the scope of the AACC activities.

We are pleased to host the 6th Summer School of the AACC in Turkey. We believe that the presentations of the participants throughout the Summer School made significant contributions to the field of comparative constitutional justice and reflected legal experiences and practices of the AACC members.

Summer School Programs of the AACC gather the participants in a sincere atmosphere to share their experiences and studies that would contribute to the constitutional justice and rule of law in the Asian continent. These programs also serve for the expansion and strengthening of cooperation among our institutions. I would like to express my contentment in presenting this publication, which collects the papers and presentations of the participants to the Summer School program for the benefit and use of all the members of the AACC.

Taking this opportunity, on behalf our Court and on my own behalf, I would like to extend my sincere thanks to all jurists and legal experts who contributed to this publication.

I hope this book will serve as a useful resource for all.

Prof. Dr. Zühtü ARSLAN

President of Constitutional Court of
the Republic of Turkey



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OPENING ADDRESS

by

**The President of the Constitutional Court of the
Republic of Turkey**

Grand Tribunal Hall, Ankara, 17th September 2018

Distinguished guests,

Esteemed colleagues,

I would like to extend you all my most sincere and respectful greetings.

Today, we have gathered to inaugurate the 6th International Summer School. We are so proud of successfully organizing the summer school events for 6 years. As is known, the Statute of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) was amended in Bali in 2016 to establish a permanent secretariat. One of three-pillar secretariat is the Centre for Training and Human Resources Development, which is established and operated by the Turkish Constitutional Court (“the Court”). Therefore, we have been organizing these events as an activity of this Centre for the last 3 years.

It should be noted immediately that the summer school events with different themes every year are intended for exchanging information and knowledge by and among the constitutional courts and equivalent institutions. These events also contribute to enhancement of relations among these institutions. I am pleased to hereby express that the events organized so far have been highly appreciated by the participants. I would like to also point out with pleasure the broader participation in this year’s event compared to the previous years. The constitutional courts or equivalent institutions from 18 countries including Turkey are being represented today.

Participation of representatives of all member countries of the AACC, except for a few ones, indeed indicates that the event has been serving for its objective. I would like to mention the courts/institutions whose representatives are among us today: We have about 40



participants from Albania, Azerbaijan, Bulgaria, Indonesia, Palestine, Georgia, Montenegro, Kazakhstan, Turkish Republic of Northern Cyprus, Kyrgyzstan, Korea, Kosovo, Malaysia, Mongolia, Tajikistan, Thailand, Ukraine and Turkey.

There are also experts from the European Court of Human Rights ("ECHR") and universities here among us. I would like to hereby thank all participants for their contributions.

Esteemed guests,

Distinguished colleagues,

The question as to how individuals' fundamental rights and freedoms will be protected against the state authority is by far the most common issue discussed since the existence of the State. Friedrich Hayek, a prominent lawyer and philosopher, states that "[t]he effective limitation of power is the most important problem of social order." (F. A. Hayek, *Law, Legislation and Liberty*, Vol. 3, Routledge, 1982, p. 128).

Accordingly, the constitutional jurisdiction has emerged as a reaction to, or as an institution intended for resolving, this issue. In the long term, democracy has appeared to be the most ideal form of government where fundamental rights and freedoms are afforded best protection against the possible degeneration of political power. However, then this question arises: Which democracy? What kind of a democracy is suitable for the protection of fundamental rights? The answer is constitutional democracy which has appeared as an ideal solution in this respect. Indeed, this term is a combination of words comprised of constitutional and democracy. Democracy is followed by an adjective. It is thereby indicated that democracy refers to the form of government not only based upon majority rule but also restricted by the constitution and law. As a matter of fact, a compromise is somewhat ensured between values -such as rule of law and fundamental rights- and governance and will of majority, which is pointed out by the constitutional democracy. In other words, rights and freedoms cannot be safeguarded unless governance by majority rule is restricted by law.

This fact is defined quite well by Alija Izetbegović who based his sense of democracy on the rule of law. In view of Izetbegović, in the absence of supervision by law, the majority rule inevitably turns into



tyrant of majority which has no difference than other forms of tyranny (A. Izetbegović, *Inescapable Questions: Autobiographical Notes*, Islamic Foundation, 2003, p. 68) . In short, constitutional jurisdiction has emerged as the way of protecting fundamental rights and freedoms by restricting political power.

As of today, we may easily say that constitutional jurisdiction operates in two platforms in practice: constitutionality review and constitutional complaint. In this sense, the Turkish Constitutional Court founded in 1962 is a body exercising constitutional jurisdiction, which *inter alia* reviews the constitutionality of laws as well as, following the recent constitutional amendment, the Presidential decrees and which has been, since 2012, adjudicating individual applications lodged on an alleged violation of any fundamental rights and freedoms.

Today, I would like to briefly lay particular emphasis on individual application. As just mentioned in the short introductory film, the Constitutional Court does not indeed have a very deep-rooted history in the field of individual application. In spite of being an institution with 56-year past, its experience on individual application is confined to the last six years. As a matter of course, a period of six years does not suffice for such an important issue to become established and rooted; however, the Court has gained significant accomplishments within this period.

In the light of this experience, we may conclude that individual application has led to two important consequences in respect of the Turkish constitutional justice. First of these consequences is the radical shift taking place in the Turkish Constitutional Court's paradigm with the introduction of individual application. It may be said that the paradigm employed by the Court until 2012 was the ideology-oriented paradigm, which means that the Constitutional Court gave priority not to the protection of fundamental rights and freedoms but to the protection of the State, its basic characteristics and the predominating ideology. Therefore, it is possible to define this paradigm as ideology-oriented.

However, following the introduction of individual application mechanism in 2012, this paradigm has inevitably and naturally undergone a transformation, and thereby led to a shift toward the



paradigm called rights-based. Undoubtedly, this is a generalization. There are of course exceptions in terms of both paradigms. However, I consider that such a generalization is necessary to clarify the significance of the individual application. I depicted it as a natural consequence as the Court has, with the introduction of individual application system, abandoned its previous elitist approach and turned into an institution interacting with the society and dealing with human-right violations suffered by people in their daily lives. This has brought along the obligation to adopt a rights-based approach.

The second transformation, or the second consequence of the individual application is not related to the Court itself but the external circle. It should be clearly indicated that this has resulted from the raise in the protection of human rights and fundamental freedoms in Turkey, which has led to a significant decrease both in the number of applications lodged before the ECHR against Turkey and in the number of violation judgments rendered as a result of these applications. The decrease in these numbers will continue as the violation judgments of the ECHR relate to the applications which were mainly lodged before the introduction of individual application system.

It should be also stressed that the Court has so far concluded 153.000 individual applications out of nearly 200.000 in total. This is a historic success. As you may foresee, a large part of the concluded applications has been dismissed as being inadmissible. Following the Court's decision whereby the individual application was dismissed, individuals are of course entitled to bring their cases before the ECHR; however, the number of such cases where the ECHR found a violation is very few. This also demonstrates us that how delicately and properly the Court has been acting in dealing with individual applications.

Nevertheless, as I have just mentioned, a six-year experience is not sufficient for individual application mechanism to become well-established. In this sense, we have been facing several problems. The most important challenge or test may be the increasing workload. The Court has a severe workload to the extent which could not be observed in any other country adopting and implementing this mechanism. As of today, nearly 43.000 applications are pending before the Court. It is in fact a very high number. Courts which have been exercising



individual application jurisdiction for many years, such as the Federal Constitutional Court of Germany and the Constitutional Court of Spain, receive 3.000-5.000 applications every year. This is an indicator of the heavy workload undertaken by the Turkish Constitutional Court.

It may be even said that the Court unfortunately keeps up with the ECHR in this regard. According to the up-to-date statistics, the total number of applications lodged by 47 countries with the ECHR is nearly 60.000, which was about 54.000 last week. Given the total number of pending cases before the Court, which is nearly 45.000, we can easily observe that this number is close to the number of applications lodged by 47 countries.

As a matter of fact, in spite of all problems and difficulties, individual application mechanism has made great contributions to the improvement of fundamental freedoms in Turkey, thereby being a significant acquisition in this sense. The higher the level of awareness is in this field and the better all public institutions notably judicial organs, lawyers as well as citizens lodging an individual application get acquainted with the mechanism, the more this practice will become deepened and institutionalized in our legal system. Let me also mention that the sole aim pursued by the individual application is not to redress all right violations in the country on an individual basis. Indeed, this is not possible. It is not possible for a tribunal in the scale of a Constitutional Court to do so. Its aim is to eliminate the issues giving rise to human-rights violations, thereby ensuring prevention of further violations, which we define as the objective purpose of the individual application. It will reduce the number of violations through the improvements in the legal order. Therefore, the method to eliminate human-rights violations one by one -like a fight against mosquitoes without draining the swamp- is not applied in individual application mechanism.

Esteemed guests,

In the remaining part of my speech, I would like to focus on the theme of this year's summer school, the right to personal liberty and security. As a matter of fact, this theme is of high importance as the right to personal liberty and security is one of the rights which are



commonly complained of as well as discussed by the Court in the individual application. In this sense, the debate in terms of individual application in Turkey is mainly related to the Court's decisions on detention. In this respect, it will be very useful for us to get information about experiences of different countries, which will also enable us to make self-assessment in the light of the comparative practices.

As is known to all, restriction of a person's physical liberty is a method of reaction or punishment that exists in all legal systems. Nevertheless, that is not the case since the beginning of the history. In his book subtitled "The Birth of the Prison", Michel Foucault, a French philosopher, well explains how the need for prison arose with relevant examples throughout the history. In fact, evolution or transformation is intended for incarceration without inflicting bodily torture and punishing before the public. I would like to read out a stunning paragraph worded at the very beginning of the book in order to demonstrate the progress made in the punishment system. It is a narration of a public execution held in Paris. It starts: *"On 2 March 1757 Damiens the regicide was condemned 'to make the amende honorable before the main door of the Church of Paris', where he was to be taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds'; then, 'in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds."* (M. Foucault, *Discipline and Punish: The Birth of Prison*, Penguin Books, 1977, p. 3).

This is a description of a tortured death penalty executed in a square in Paris in 1757. The book begins with this, and then it excellently describes how the prison was born as well as how the punishment in the form of loss of liberty emerged in the last two hundred years. Of course, this method of punishment with torture on the body was then abandoned, and it left its place to imprisonment aimed at punishing and disciplining the soul rather than the body. In this sense, what



makes the prison sentence an effective punishment method is that the liberty is valuable. As the liberty is valuable, deprivation of it is considered as a severe punishment.

According to Foucault, imprisonment, which means legal deprivation of liberty in the society where freedom is regarded as a value of everyone, emerged as an ideal punishment after the punishments torturing the body. Thus, imprisonment has been regarded as the punishment method adopted in the civilized societies. Of course, the issue does not end here. With the deprivation of liberty through imprisonment, the question of under which conditions such deprivation will occur and what rights those who have been deprived of their liberty will enjoy comes up, which is the real issue.

In this context, the details will of course be explained, but in general terms, let me express the following. Article 19 of the Turkish Constitution, in conformity with Article 5 of the European Convention on Human Rights ("the Convention"), elaborates on the conditions for deprivation of liberty as well the rights of those deprived of their liberty. Presentations will be delivered in this respect and the Court's judgments concerning detention related to Article 15 of the Constitution will be explained in detail.

Here I would like to proceed my speech by mentioning two issues. First, the Turkish Constitutional Court, like the ECHR, gives priority to the applications on detention. Accordingly, it endeavours to adjudicate these applications as soon as possible. In this sense, the criticism against the Court that it has procrastinated the individual applications on detention in spite of having previously concluded them within a shorter period is unacceptable. The judgments rendered at the end of 2013 in respect of two applicants, who were elected as members of parliament while detained on remand, are referred to as "swift" decisions, whereas the violation judgments rendered at the beginning of this year upon the applications of two detained journalists are referred to as "procrastinated" decisions.

It should be noted that these judgments have nothing in common, except finding a violation. In the former case, namely in its judgments of 2013 regarding two members of parliament, the Constitutional Court



found a violation due to their detention periods of approximately 4,5 years. Considering the fact that the applicants were elected as members of parliament, thereby they exercised their rights to stand for election and to represent, the Court found a violation by virtue of the lengthy period of detention.

On the other hand, the judgments regarding two journalists, which were rendered at the beginning of this year, found a violation in the context of unlawfulness. In other words, the impugned detention had been found unlawful as the detention orders and indictments lacked strong indication of guilt.

Of course, we cannot expect the public to be aware of this subtle distinction; however, we consider that lawyers, academics and journalists should know this distinction. As a matter of fact, there is no significant differences between the periods when these individual applications were adjudicated. One of the judgments of 2013 was adjudicated within nearly one year while the other was within over one year. The judgments of 2018 were adjudicated within one year and two months as well as within one year and four months.

Regard being had to the then workload of the Constitutional Court, it will be easily seen that this difference was in favour of the former. During the period when the judgments of 2013 were rendered, the total number of pending applications was about 5.000, 220 of which concerned detention. On the other hand, during the period when the judgments of 2018 were rendered as well as the state of emergency was prevailing, over 5.000 out of approximately 40.000 pending applications in total concerned detention. This situation substantially prevails today. In other words, while the total number of applications was 5.000 at the end of 2013, the number of applications that solely concerned detention during the period when we rendered these judgments was higher than that of pending applications at the end of 2013. Therefore, I consider that such comparisons are needed to be made on a more just basis. As a matter of fact, taking into account these facts and the Turkish Constitutional Court's endeavours to render leading judgments on these matters, the ECHR did not consider the periods of 14 and 16 months as a breach of the Convention.



In brief, the Court has swiftly rendered its leading judgments on detention in spite of its workload brought along by the state of emergency. In the light of the principles set out in these leading judgments, the Court will, within the shortest period, conclude the individual applications on detention lodged by journalists who are detained on remand pending appeal or who have recently been released. Hereby, it should be reminded that prior to the introduction of the individual application mechanism in Turkey, the ECHR concluded the applications regarding the detention of two well-known journalists within more than 3 years. Accordingly, I consider that the Court's adjudication of these applications within such periods as 1 year and 2 months, 1 year and 4 months, and 2 years cannot be regarded as a delay or procrastination.

Lastly, I would like to say a few words about the execution of the violation judgments on detention. In the judgments of 2018 that I have just mentioned, the Court found violations of the right to liberty as well as the freedom of expression in conjunction with the former. It also held that a copy of these judgments be sent to the relevant courts as part of our general practice to redress the violations and their consequences. However, the assize courts in question, interpreting these judgments in a different way, failed to execute these judgments. Accordingly, the applicants again lodged an application with the Court on the ground that the said judgments had not been executed. Thereupon, the Court rendered a second judgment where it specified what the execution of the violation judgments on detention meant in a clear and precise way that everyone could understand.

We can say that the issue of implementation of judgments is not peculiar to the Turkish Constitutional Court. Judgments of the constitutional courts of many countries, as well as those rendered by the ECHR, might not be executed partially or even fully. This is a situation needed to be solved within the legal system. However, both the ECHR and the Court clearly have underlined in their subsequent judgments that it is out of question not to comply with the Courts' judgments. Otherwise, it would be incompatible with the principle of rule of law. In a country where the rule of law prevails, everyone - including the judiciary - must comply with the judgments of the Constitutional Court.



In its judgments regarding the application of these two journalists, the ECHR also has stressed that effectiveness of the individual application is depended upon, *inter alia*, the duly execution of the Court's judgments by the judicial authorities as well as all public institutions. Otherwise, the individual application will no longer be an effective remedy and thus will become dysfunctional. Indeed, in case of a deficiency in the execution of the judgments of a court, its judgments will make no sense. However, I consider this as a road accident within the overall exercise of the individual application, and I hope that such a situation will not occur in the future. On this occasion, I think I have had the opportunity to explain how the Court's judgments will be duly executed.

Esteemed guests,

I would like to end my speech here. I wish that the Summer School event be fruitful and successful. I would like to once again welcome the participants coming from different countries and thank them in advance for their contribution. I would also like to express my gratitude to all distinguished academics and members of the judiciary who will contribute to this Summer School with their presentations.

Lastly, I would like to extend my thanks to everyone who has contributed to the organization of the Summer School. Indeed, such organizations are never as easy as they appear. It requires a great effort in the processes of both planning and organization. I would like to thank those who contributed to the organization of this Summer School on my behalf as well as your behalf. I also wish that the organization be successful, fruitful and beneficial for all courts and institutions. I once again greet you all with my sincere respect. I extend my wishes of health, peace and prosperity to all of you.

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



OPENING SPEECH ON THE SIXTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Esteemed Guests,

First of all, welcome to our country and our Court. I would like to extend you all my most sincere and respectful greetings.

The Constitutional Court of the Republic of Turkey is a member of the Association of Asian Constitutional Courts and Equivalent Institutions ("the AACC") that was established in 2010. The AACC aims at promoting democracy, rule of law and fundamental human rights in Asia by enhancing the exchange of knowledge and experience as regards constitutional justice as well as enriching friendly relations and cooperation among the institutions exercising constitutional jurisdiction. It should be noted that despite being a new formation compared to other institutions operating in the same field, the AACC has made a great progress in terms of institutionalization in a short period of time.

In the 2nd Congress of the AACC held in Istanbul in April 2014, a unanimous decision was taken that the Summer School on the constitutional jurisdiction be organized every year in Turkey. In the 3rd Congress of the AACC held in Indonesia in 2016, it was decided that a Permanent Secretariat of the AACC be established and that a Centre for Training and Human Resources Development, one of the three primary sections of the Secretariat, be established in Turkey. The 6th Summer School to be held between 16 and 22 September 2017 within the scope of the activities of this Centre has started officially this morning with the delivery of the opening speech of Mr. Zühtü Arslan, President of the Turkish Constitutional Court.

The academic programme of the 6th Summer School is planned to be held in Ankara between 17 and 19 September 2018 and the subsequent social and cultural programme is planned to be held in Konya between 20 and 22 September 2018.



The theme of this year's academic programme is the right to liberty and security. Along with the participant delegations, our prominent academics studying in the field of criminal law and a senior jurist from the European Court of Human Rights will make presentations during the programme.

Right to liberty and security is essential in modern democracies. The Turkish Constitution provides very strict guarantees for this right. The situations where the right to liberty can be subject to restrictions is enumerated in Article 19 of the Constitution, and it is specified therein that such restrictions should be prescribed by law. Besides, the restrictions on this right must comply with the criteria set out in Article 13 of the Constitution. The Constitutional Court conducts a strict review of any interference with this right through individual application. The Court has so far found many violations of the right to liberty and security.

In this scope, the academics will provide information on the constitutional and ordinary legislation, as well as judicial practices regarding the right to liberty and security in our country. Furthermore, the rapporteur judges from our Court will elaborate on the Court's case-law on the protection of the right to liberty and security. In addition, a jurist from the European Court of Human Rights will provide information on the relevant international legislation and practices. Lastly, the representatives of participant countries will have the opportunity to share their national experiences in this respect.

During the social-cultural programme, the spiritual and natural beauties of Konya, one of the most important cities of culture and civilization in the world, will be introduced to the participants. As is known, Konya is the city where Mevlana Celaleddin Rumi, the messenger of world peace, whose teachings are accepted by the whole world, lived. Our guests will leave for their countries from Konya.

The presentations to be delivered throughout the programme will be compiled in the book of the 6th Summer School and made available to the participants.

The summer school programmes, which we held with the participation of you in previous years and then received positive



feedbacks and therefore we have organized the sixth one this year, are activities contributing to the institutionalization efforts of our association and creating a sharing environment among the association members.

Ending my speech, I would like to express my belief that the 6th Summer School programme that will continue during a week will contribute to the right to liberty and security as well as to both national and international literature on this subject.

Taking this opportunity, I once again welcome you and I would like to express my gratitude, in particular to our esteemed President Prof. Dr. Zühtü Arslan who has provided his full support to organize the 6th Summer School programme, to you, our distinguished guests, for your participation and contributions as well as to my all colleagues who have made great effort for the organization, and I wish that it will be a successful programme.

Selim ERDEM
Secretary General of the Constitutional
Court of the Republic of Turkey

**REVIEW OF THE LAWFULNESS OF
DETENTION IN THE INDIVIDUAL
APPLICATIONS WITHIN THE SCOPE
OF THE RIGHT TO LIBERTY AND
SECURITY***

Hasan Tahsin GÖKCAN
**CONSTITUTIONAL COURT OF
TURKEY**

* English translation of the original text is provided by the courtesy of the Directorate of International Relations of the Turkish Constitutional Court. It has no binding effect. Please consult the original text or its author if necessary.



REVIEW OF THE LAWFULNESS OF DETENTION IN THE INDIVIDUAL APPLICATIONS WITHIN THE SCOPE OF THE RIGHT TO LIBERTY AND SECURITY

*Hasan Tahsin GÖKCAN**

I. INDIVIDUAL APPLICATION AND DETENTION ORDER IN GENERAL

The right to liberty and security is safeguarded by Article 19 of the Constitution. Individual application is a legal remedy that can be used to redress the grievances of those whose any of personal rights has been violated by an act or action of a public authority. In cases where individuals whose right to liberty and security has been violated could not be set free despite exhausting the available legal remedies, they can avail of the right to individual application.

In one of its judgments, the Turkish Constitutional Court (“the Court”) specified that the right to personal liberty and security was a fundamental right ensuring that the State did not arbitrarily interfere with the individuals’ liberty (see *Erdem Gül and Can Dündar*, no. 2015/18567, 25 February 2016, § 62).

The reference norm to be applied in the review of initial detention orders based on a criminal charge is Article 19 § 3 of the Constitution. Besides, Article 13 of the Constitution provides guarantees regarding the restriction of fundamental rights. As is known, in accordance with Article 13 of the Constitution, fundamental rights may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution. In addition, these restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular

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republic as well as the principle of proportionality. Article 5 § 1 of the European Convention on Human Rights (“the Convention”) also provides the similar guarantees. It should be noted that the Court’s judgments on the right to liberty and security within the scope of constitutionality review are largely in line with those of the European Court of Human Rights (“the ECHR”).

The concept of the examination of detention’s lawfulness is exercised within the scope of the initial detention order. The courts issuing a detention order under Articles 100 and 101 of the Code of Criminal Procedure (“the CCP”). Guarantees that fall under these articles are also in conformity with the Constitutional safeguards. However, the Court, within the scope of constitutionality review, relies on Articles 19 § 3 and 13 of the Constitution in cases where it examines the lawfulness of detention. For example, these matters were emphasized in the judgment of *Halas Aslan* (no. 2014/4994, 16 February 2017, § 53-54) and *Murat Narman* (no. 2012/1137, 2 July 2013, § 43).

In order to lodge an individual application against the initial detention order, the remedy envisaged against the detention must have been exhausted. The remedy to be exhausted against detention orders is the “appeal process”. Where an individual application has been filed without exhausting the said legal remedy, the Court rules on “the inadmissibility for not exhausting the legal remedies”. Where, in spite of exhausting the appeal process, the detention order has not been lifted, an individual application can be filed within 30 days as from becoming aware of the dismissal decision.

On the other hand, where no individual application was filed upon the denial of objection against detention, the individual application can also be filed against the denial decision that is given following the objection filed against the denial of release request filed with the magistrate judge or magistrates’ court at a later date.

The lawfulness of detention is reviewed on the basis of the detention order and the denial grounds that are put forth by the authority that examined the detention order upon objection.



II. CONSTITUTIONAL CRITERIA FOR THE REVIEW OF THE LAWFULNESS OF DETENTION

It has been expressed that the constitutional criteria prescribed in Articles 19 and 13 of the Constitution should be sought in the Court's judgments in order for a detention order to be lawful. Similarly, these criteria are enumerated also in Article 100 et seq. of the CCP.

Pursuant to Articles 19 § 3 and 13 of the Constitution,

1- There must be a *strong suspicion* that a person has committed a crime;

2- There must be the grounds for detention in order to give a detention order;

Grounds for detention are as follows:

- a- Preventing the suspect from fleeing;
- b- Preventing the destroying of or tampering with evidence; or
- c- Other legally prescribed circumstances that obligate the detention.

3- Detention order must be issued by a judge.

4- Detention must be necessary (Article 19 § 3 of the Constitution) and proportionate (Article 13 of the Constitution).

A. Strong Suspicion Criterion: The first guarantee in the protection of personal liberty is the "strong suspicion" criterion. This criterion is the first means of guarantee against the arbitrary interference by the State. From the standpoint of Article 5 of the Convention, this concept is denominated as a "reasonable/plausible suspicion". It is specified in the judgments of the ECHR that the reasonable suspicion involves the existence of information that can convince an impartial observer (see *Erdagöz v. Turkey*, §51). The Court has also construed the strong suspicion concept in a similar way. The Court has expressed that "the existence of concrete facts that involve detention must be put forth in such a manner that convinces an objective observer" (see *Engin Demir*, no. 2013/2947, 17 December 2015, § 66).

The Court points out that the judge of the court of first instance must consider if there is a strong suspicion that the person concerned



has committed the crime. The trial court ordering detention must refer to the evidence, findings or signs in the case file and explain in its reasoning the existence of a strong suspicion.

The judge of a magistrates' court, who reviews the evidence in the case file and can take the suspect's statement, is, of course, more advantageous than the Court with respect to this evaluation. However, the Constitutional Court has been authorized to review the lawfulness of detention through individual application according to the Constitution. The Court conducts such review on the basis of the judge's justification for detention.

B. Existence of grounds for detention: The second element that ensures the lawfulness of detention is the existence of the grounds for detention. The signs that indicate the existence of the risk of fleeing or tampering with evidence must also be referred to in the detention order.

C. Judicial decision: The third guarantee is that the detention is based on a judge's decision. Pursuant to the Code of Criminal Procedure, the detention order must be given by the judge of a magistrates' court at the investigation stage, while by the judges of other criminal courts at the prosecution stage. No problem has been encountered in practice from this aspect.

D. Necessity and proportionality: The fourth guarantee is the necessity and proportionality. The Court advocates that a detention order must be given where there is a necessity for the proper conduct of the investigation as specified Article 19 § 3 (see *Halas Aslan*, no. 2014/4994, 16 February 2017, § 72; *Ayhan Bilgen*, no. 2017/5974, 21 December 2017, § 103). On the other hand, the restriction criteria introduced by Article 13 of the Constitution also constitute a second guarantee that underlines the guarantee of 'necessity'.

As required by Article 13 of the Constitution, a detention order must be given only where it is proportionate and necessary in a democratic society. The principle of proportionality consists of three principles; convenience, necessity, and proportionality.

-Convenience requires that the detention as an interference is convenient for achieving the aim pursued in terms of the impugned investigation;



-Necessity requires that the interference is obligatory in terms of the aim sought to be achieved (in other words, impossibility to achieve the same aim with a moderate interference); and

-Proportionality requires that a reasonable balance is struck between interference with an individual's right through detention and the aim sought to be achieved.

As required by the principle of proportionality that involves the existence of these secondary elements and briefly, there must be a reasonable balance between the gravity of imputed offence and the detention in terms of the severity of punishment. Indeed, the legislator has observed this constitutional requirement. Article 101 § 1 of the CCP prescribes that no detention order can be issued where judicial control suffices.

E. Justification: We can mention justification as the fifth guarantee. The Court requires that a reference is made in the justification of the detention order (or decision on denial of objection) to the existence of the aforesaid guarantees in the relevant case. Because, the way of preventing the arbitrariness is to disclose the factual and legal grounds of the order/decision. The lawfulness of detention is reviewed on the basis of the detention order's justification.

III. RELEVANCE OF CRIMINAL CHARGE WITH AN ACT RELATED TO ANOTHER FUNDAMENTAL RIGHT

On the other hand, where the acts imputed to a detainee have relevance with the indispensable fundamental rights in terms of the democratic order of the society such as freedom of expression and the press, right to union, and right to engage in political activities, it is then accepted that the obligation of due diligence assumed by the authority that gives the detention order further increases (see *Erdem Gül and Can Dündar*, § 72-78; and *Ayhan Bilgen*, § 100). Because, the detention order so given is not only restricting the right to personal liberty, but also another fundamental right and; thus, has a deterrent effect.

By September, 2018, the Court has rendered violation judgments only about five of the larger number of applications filed with the allegation of unlawful detention (*Erdem Gül-Can Dündar*, *Ayhan Bilgen*, *Turhan Günay*, *Mehmet Hasan Altan*, *Şahin Alpay* judgments).



IV. RIGHT TO LIBERTY AND SECURITY DURING STATE OF EMERGENCY

Neither Article 15 of the Convention nor Article 15 of the Constitution enumerates the right to liberty and security among core rights. In case of state of emergency, this right can; wherefore, be restricted “to the extent required by the exigencies of the situation”.

Nevertheless, in a judgment rendered during the state of emergency period, the Court stated:

“The principle of non-arbitrariness of the interference with the individuals’ rights is a fundamental guarantee that needs to be observed also during the periods when extraordinary administration procedures have been adopted. (...) As such, it has been considered that Article 15 of the Constitution does not legitimize any interference, contrary to the Constitutional guarantees, with the applicant’s right to personal liberty and security.” (see Aydın Yavuz and Others, § 347; and Turhan Günay, § 87-89).

By this judgment, the Court has expressed that the detention orders based on unjustified or unlawful grounds would lead to arbitrariness and; therefore, no one could be arbitrarily detained even during the period of state of emergency.

**RELATION BETWEEN LIBERTY
AND SECURITY IN THE
CONTEXT OF THE RIGHT
TO HOLD MEETINGS AND
DEMONSTRATION MARCHES
AND THE FREEDOM OF
MOVEMENT***

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RELATION BETWEEN LIBERTY AND SECURITY IN THE CONTEXT OF THE RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES AND THE FREEDOM OF MOVEMENT

*Prof. Dr. İzzet ÖZGENÇ**

I. OVERVIEW

Human beings have innate and inalienable rights and freedoms. These rights and freedoms are defined and guaranteed under both international legal documents and also under domestic instruments notably the constitutions. Individuals can develop their personalities only if they can enjoy such rights and freedoms.¹

However, none of these rights and freedoms is unlimited. Every right and freedom is subject to a certain restriction. Rights and freedoms may be restricted for certain reasons and in line with certain criteria.

Indeed, security constitutes a reason for restriction of a right and/or a freedom.

In fact, there is no contradiction between freedom and security. Security stems from freedom and it is used as a means to attain freedom. There is a strict relation and a delicate balance between rights/freedoms and security. However, this should not lead to a conclusion that there is a contradiction between the former and the latter.

Individuals ought to exercise their rights and freedoms without any fear and concern. However, the exercise of rights and freedoms should not, in return, lead to any situation causing fear and concern for others.

Right and freedoms can be enjoyed only in a democratic society by ensuring the public safety. As such, rights and freedoms may be

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1 ÖZGENÇ, İzzet, *İnsan Haklarının Felsefi Temeli*, İnsan Hakları, İstanbul, 1995, p. 41 et seq; ÖZGENÇ, İzzet, *İnsan Haklarının Özüne Dönüş*, Yeni Türkiye, May-June 1998, year 4, issue 21, p. 606 et seq.



restricted to the extent required by the democratic order of the society and on the ground of public safety.

In the context of the relation between liberty and security, we will herein focus on the right to hold meetings and demonstration marches and the freedom of movement.

II- RELATION BETWEEN THE RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES AND SECURITY

A. In order for an individual to complete his personality, he ought to freely express his ideas and, beyond merely expressing them individually, to hold demonstrations in order to advocate a common idea and to attract public attention to a given issue. Therefore, **right to hold meetings and demonstration marches** is regarded as one of the requirements of a democratic society.²

The right to hold meetings and demonstration marches is set forth under Article 11 (“Freedom of assembly and association”) of the **European Convention on Human Rights (“the Convention”), which reads as follows:**

“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” (Article 11 § 1).

The European Court of Human Rights (“the ECHR”) has established a case-law to the effect that the alleged violation of the right to assembly and demonstration marches should be examined also in conjunction with Article 10, whereby the freedom of expression is enshrined, as assemblies and demonstrations are indeed specific aspect of the individuals’ freedom of expression.³ Likewise, as a requirement for a democratic society, this right should be interpreted in a broad sense.⁴

The right to hold meetings and demonstration marches is set forth in Article 34 of the **Constitution of the Republic of Turkey (“the Constitution”), which reads as follows:**

“Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.” (Article 34 § 1)

² ECHR, *Friedl v. Austria*, 15225/89, 30 November 1992.

³ ECHR, *Öllinger v. Austria*, 76900/01, 29 June 2006.

⁴ ECHR, *Friedl v. Austria*, 15225/89, 30 November 1992.



"The formalities, conditions, and procedures to be applied in the exercise thereof shall be prescribed by law." (Article 34 § 3).

Based on the above-cited third paragraph, the **Law no. 2911 on Meetings and Demonstration Marches** was enacted and put into force 6 October 1983.

Also according to the Law in question,

"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches, without prior permission, in accordance with the provisions enshrined herein and for certain purposes not considered as an offence in the relevant legislation." (Article 3 § 1).

According to these provisions, a meeting or a demonstration march needs to be "**peaceful/unarmed and non-offensive**" in order to be lawful.

The well-established principles on the freedom of expression set by the ECHR should be taken into account also in the context of the right to hold meetings and demonstration marches. In this sense, the right to hold meetings and demonstration marches also covers the advocating of ideas that are offensive or disturbing and even shocking.⁵ Expression of the ideas that will disturb the society or are not adopted by the majority do not prejudice the peaceful nature of meetings and demonstrations.

A meeting and a demonstration march may be considered peaceful only when the demonstrators have convened with the intention of holding a peaceful demonstration, the demonstration have not called for or incited to violence, and no physical violence have been resorted during the meeting or demonstration march.

In this respect, the right to hold meetings and demonstration marches is not an unlimited right.

B. According to the Convention, *"No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or offence, for the protection of health or morals or for the protection of the rights and freedoms of others."* (Article 11 § 2)

⁵ ECHR, *Prager and Oberschlick v. Austria*, 15974/90, 26 April 1995.



Also according to the Constitution,

“The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commitment of offence, protection of public health and public moral or the rights and freedoms of others.” (Article 34 § 2).

On the basis of these provisions, Law no. 2911 sets forth the procedures and principles applicable to the enjoyment and restriction of the right to hold meetings and demonstration marches.

Accordingly, the right to hold meetings and demonstration marches may be restricted for the purpose of protecting “national security”, public safety or public order, prevention of commitment of offence, and “protection of public health and public morals or the rights and freedoms of others” as prescribed by the law (Article 11 § 2 of the Convention; Article 34 § 2 of the Constitution).

In this respect, the right to organize meetings and demonstration marches may be restricted for the purposes of

- a) national security,
 - b) public order,
 - c) prevention of offences,
 - ç) protection of public health,
 - d) protection of public morals, and
 - e) protection of the rights and freedoms of others;
- and on the grounds of any one of these reasons.⁶

The right to hold meetings and demonstration marches may be restricted *ratione loci* on the grounds of **national security**. Accordingly, a ban may be imposed, through regulatory administrative acts of general nature, on the organization of meetings and demonstration marches in the vicinity of places with strategic importance in terms of national security such as military units and public buildings and facilities.

⁶ In a given case, it must be demonstrated with reasonable grounds that on which reason an assembly or a demonstration march has been restricted (*Emine Yaşar v. Turkey*, 863/04, 9 February 2010).



The right to hold meetings and demonstration marches may be restricted also on the grounds of **public safety**. Accordingly, a meeting or a demonstration march may be prohibited **where widespread violent acts break out or there is such a concrete risk against lives and physical integrity or possessions of people**. It should be noted that not all meetings or demonstration marches but merely a certain meeting or demonstration march may be postponed and even banned on the ground of public safety.

It should be highlighted that neither the Convention nor the Constitution of 1982, which is built upon the former, enumerates public safety among the reasons justifying restriction of a meeting or a demonstration march, instead the purpose of *“prevention of offence”*, *“prevention of commitment of offence”* are put forth. Neither the Convention nor the Constitution does not specify the offences intended to be prevented for imposing a restriction on meetings and demonstration marches. In view of this legal arrangement, a meeting or a demonstration march can be banned; e.g., on the ground of occurrence of a potential terrorist organization propaganda during the relevant event. In our opinion, the right to hold meetings and demonstration marches must not be restricted with an aim to prevent the commitment of offence in an open-ended and abstract manner.

The right to hold meetings and demonstration marches may be restricted for the purpose of maintaining the **public order**. However, this restriction may be imposed only *ratione loci*. Accordingly, thorough a regulatory administrative act, it may be determined in what places of a city meetings and demonstration marches may be held. In making this determination, the locations of strategic buildings and facilities in terms of national security, density of economic and commercial activities, difficulties that can be encountered during the provision of certain public services for individuals, density of pedestrian and vehicle traffic and similar criteria can be taken into account. Similarly, a meeting or a demonstration march can be banned on avenues and squares when people rest and repose; e.g., night-time.

According to both the Convention and the Constitution, the right to hold meetings and demonstration marches may be restricted also **with an aim to protect public health or public morals**.



In fact, restricting a meeting or a demonstration march for the reasons enumerated above aims at **protecting the rights and freedoms of others**. Therefore, the inclusion of the purpose of protecting the rights and freedoms of others in the Convention and the Constitution along with the enumerated grounds for the restriction of a meeting and demonstration march refers, in our opinion, to the pursuit of the said aim when restricting this freedom in the context of concrete cases.

On the other hand, Law no. 2911 enables the postponement and even the prohibition of a **certain meetings and demonstration marches** for the reasons that are prescribed by both the Convention and also the Constitution:

*“A regional governor, provincial governor, or district governor shall be entitled to postpone **a certain assembly** for a maximum period of one month on the grounds of national security, public order, prevention of the commitment of offence, and protection of public health and public morals or **prohibit the same if there is an explicit or imminent threat of offence.**” (Article 17).*

The Law further **authorizes** the regional governor to **postpone all assemblies** to be held in certain provinces or districts (first sentence of the Article 19 § 1). This authority may be also exercised *“on the grounds of national security, public order, prevention of commitment of offence, protection of public health and public morals or the rights and freedoms of others.”*

Likewise, governors are authorized to **ban all meetings** *“if there is an explicit or imminent threat of offence”* (second sentence of the Article 19 § 1).

These provisions are applicable also to **demonstration marches** (Article 20 § 1).

Within the scope of these legal arrangements made for the exercise of the right to hold meetings and demonstration marches, Law no. 2911 does not make any distinction between ordinary period and the state of emergency. According to this legal arrangement, the right to hold meetings and demonstration marches may be restricted for an indefinite period also during an ordinary period. Such a prohibition lacks lawful basis, although it has legal grounds.

Such a prohibition may be possible only in the case of a state of emergency. As a matter of fact, **the Law no. 2935 on State of Emergency**, enacted on 25.10.1983, contains a provisions in this direction:

“To ban, postpone meetings and demonstration marches to be held indoor and outdoor, and to condition them on permission or to determine, assign, and allocate venue and time of meetings and demonstration marches, to monitor, keep under surveillance, or, if required, disperse any permitted meeting,” (Article 11(m)).

III. THE RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES MAY BE RESTRICTED TO THE EXTENT REQUIRED IN A DEMOCRATIC SOCIETY, WHICH REQUIRES THAT THE RESTRICTION HAS RESULTED FROM A “SOCIAL NEED”.

A meeting or a demonstration march may be restricted due to a pressing social need that emerges in a concrete case. For example, a meeting and demonstration march may be postponed to any other non-working day on the grounds that they will lead to a jam in urban traffic, which would cause people to encounter a serious difficulty in transportation.. However, merely the grounds that a meeting or a demonstration would lead to the blocking of certain roads and it may therefore cause delay for people using those roads will not constitute a ground for the restriction of this right and freedom^{7, 8}.

The existence of a probability that an offence may be committed during a meeting and demonstration march only does not constitute a ground for banning a meeting and demonstration march. However, **this right should be subject to a restriction where a concrete risk of widespread violent acts will break out during a meeting and demonstration march beyond the control of public officials**^{9, 10}.

⁷ ECHR, *Ulusoy v. Turkey*, 9049/06, 4 June 2013; *Berladir and Others v. Russia*, 34202/06, 10 July 2012.

⁸ For these considerations, the Constitutional Court annulled certain provisions of Law 2911 whereby the procedures and principles for assemblies and demonstration marches are set out (28.09.2017, E. 2014/101, K. 2017/142).

⁹ ECHR, *İzci v. Turkey*, 42606/05, 23 July 2013.

¹⁰ Where a demonstration march is dispersed by law enforcement officers by using force in consequence of mass damage to the civil vehicles and workplaces, the right guaranteed under Article 11 of the Convention is not deemed to have been violated: ECHR, *Kartal v. Turkey*, 29768/03, 16 December 2008.



However, it should be noted that the individual acts of violence by some of demonstrators during a meeting or demonstration march do not prejudice the peaceful nature of that event. A meeting or a demonstration march will be devoid of its peaceful nature **where widespread violent acts break out or there is such a concrete risk against lives and physical integrity or possessions of people**¹¹.

Under the Turkish law, meetings and demonstration marches are, as a rule, held without obtaining any permission, provided that a former notice is served (Article 34 § 1 of the Constitution; Article 3 § 10 of Law no. 2911). Organization of assemblies and demonstration marches by foreigners is subject to the permit of the Ministry of Interior (Article 3 § 2 of Law no. 2911).

According to the ECHR's case-law, requiring a permit or notice procedure for meetings and demonstration marches under a legislation and also regulating the way in which meetings and demonstration marches are to be held do not per se lead to the violation of this right.¹² However, where the permit or notice system is used only as an obstructive tool, then this right will have been violated.¹³

Where, despite making meetings or demonstration marches conditional on a request for permit or filing of a notice, the masses gather and hold a protest demonstration due to certain events that develop suddenly, the mere failure to satisfy the notice or permit condition will not constitute a reason to use force to disperse the meeting and demonstration¹⁴.

However, the use of force by law enforcement officers within the framework of the procedures and order set forth under Law no. 2911 (Article 24 et seq.) and the Law no. 5681 on the Powers and Duties of the Police (Article 16) to disperse the people gathered, relying on the grounds enumerated under the provisions of the Article 11 § 2 of

11 ECHR, *Ezelin v. France*, 11800/85, 26 April 1991.

12 ECHR, *Andersson v. Sweden*, 12781/87, 13 December 1998.

13 ECHR, *Çiloğlu and Others v. Turkey*, 73333/01, 6 March 2007; *Balçık and Others v. Turkey*, 25/02, 29 November 2007.

14 ECHR, *Cisse v. France*, 51346/99, 9 April 2002; *Ataman v. Turkey*, 74552/01, 5 December 2006; *Çiloğlu and Others v. Turkey*, 73333/01, 6 March 2007; *Bukta and Others v. Hungary*, 25691/04, 17 July 2007; *Balçık and Others v. Turkey*, 25/02, 29 November 2007; *İzci v. Turkey*, 42606/05, 23 July 2013.

the Convention and of the Article 34 § 2 of the Constitution, will not amount to the violation of any right.

Although filing a notice is, in principle, sufficient to enjoy the right to hold meetings and demonstration marches, such a notice requirement is, in practice, operated as a “permit” mechanism. The State of Council’s judgements that are cited below constitute the explicit examples thereof:

Judgement 1: In the case giving rise to the judgement rendered by the 10th Chamber of the **State of Council**, dated **10.6.2015** and numbered E. 2011/8323, K. 2015/2868, the Provincial Organization of a political party in Eskişehir filed an application with the Governor’s Office on 10.5.2010 to make request for launching a petition campaign between the dates of 11.5.2010 and 11.6.2010 on the theme **“Time to call to account those stealing people’s work and bread - I want thieves, plunderers, violators of law to account for.”** The Governor’s Office in Eskişehir “rejected” this application. A lawsuit was filed for the annulment of the rejection act. The Administrative Court of Eskişehir dismissed the lawsuit in question. On the appeal request, the State Council quashed this rejection order on the following grounds:

*“According to Article 11 of the Provincial Administration Law no. 5442, the governor is explicitly assigned and authorized to take necessary measures in the capacity of the superior of law enforcement officers and the security organization for the purpose of preventing offences within the provincial borders. However, the governor may exercise this power where there is an explicit or imminent threat of offence or in order to prevent the acts that explicitly and obviously constitute an offence. **An act, event, or activity the criminal nature of which is not explicit and obvious may not be prevented under an administrative act in legal terms.**”*

*“In the present case, it is obvious that the **texts and pictures, which are prepared by the claimant political party, considered as indispensable elements of the democratic political life and which constitute the subject of the petition campaign, must be taken into account as some statements and assessments falling within the scope of the freedom of expression and that the***



political parties are authorized to protest certain practices of those ruling our country and certain social and political problems that are thought to emerge therefrom, to propagate ideas and opinions on this subject, and to launch petition campaigns and to conduct similar political activities for peaceful purposes so as to form public opinion in this way; consequently, the act in dispute, which is not based on concrete grounds, is unlawful."

For another judgment in the same vein, please see the judgement rendered by 10th Chamber of the **State of Council, which is** dated **10.6.2015** and numbered E. 2011/9742, K. 2015/2870.

Judgement 2: In the case giving rise to the judgement rendered by the 10th Chamber of the **State of Council, which is** dated **11.2.2015** and numbered E. 2011/8848, K. 2015/394, a political party conducting its activities after having been founded according to the Law no. 2820 on Political Parties, filed an application with the district governor's office to request the display within the district borders of a banner of 70x100 sizes with the expressions "**Against the front of moneybag and traitor servants of the US-EU, our working class, the oppressed, civilian/military youth, and Kurdish brothers, come and join the front of the People's Salvation**" thereon between the dates of 22.4.2009 and 30.4.2009. The district governor's office rejected this application. The Administrative Court dismissed the action for annulment of this act. The 10 Chamber of the Council of State quashed this rejection order on the following grounds:

"In the present case, although the defendant administration asserts in its defence statement that during the exhibition of the banners in question to the public opinion, the people could be provoked, negatively react to the banners and those hanging them, the public welfare could be disrupted as a result, and the expressions included in those banners are of such a nature that urges the society to separation and polarization, it has been concluded that the expressions included therein are far from separating and polarizing people, that the activity in question, which is the reflection of multivocality of political parties as an essential part of the pluralist democratic systems, must be considered within the scope of the freedom of expression and that the said



expressions cannot be considered to constitute a ground justifying restriction of the freedom of expression.

In this case, the rejection of the impugned act in the form of hanging a banner, which reflects the multivocality in democratic and pluralist systems within the scope of the claimant political party's freedom of expression, is not found unlawful, and the court order, whereby the action was dismissed, is legally justified."

For another judgement in the same vein, please see the judgement rendered by 10th Chamber of the **State of Council**, which is dated 25.11.2013 and numbered E. 2009/11151, K. 2013/8354.

Judgement 3: In the incident subject-matter of the judgement rendered by the 10th **Chamber of the Council of State** dated 12.9.2013 and numbered E. 2009/16392, K. 2013/6160, the organizational board, which was chaired by the claimant, filed an application with the Tunceli Governor's Office with a request to hold an indoor meeting at an address in the city centre of Tunceli on the theme "**The Worldly and Hereafterly Happiness Reached by Saints and Fathers with Divine Love and Islam, Islamic Mysticism and Happiness Practiced by the Companions of Prophet Muhammad**" where H.A., a writer and the chairperson of "Association of Ottoman Culture", was going to attend as a speaker. This application was refused by the Governor's Office under Article 17 of the Law no. 2911 on Meetings and Demonstration Marches. The Administrative Court dismissed the action brought for the annulment of this act. The 10th Chamber of the Council of State quashed the dismissal decision on the following grounds:

"As the conference in question needs to be considered within the scope of the "freedom to express an idea", which is amongst the fundamental rights and freedoms guaranteed under the Constitution and as it is obvious that the indoor meeting in question cannot be restricted without producing any concrete information and documentation but only on the basis of a presumption without putting forth that there is an obvious, concrete, and imminent risk of the commitment of an offence should the meeting is held according to the provisions of the aforesaid law, the disputed act of the defendant administration to ban the meeting is unlawful."



Judgement 4: In the incident subject-matter of the judgement rendered by the 10th Chamber of the Council of State, which is dated 8.11.2010 and numbered E. 2007/6515, K. 2010/8931, the event “**1st Marmaris Democracy and Culture Fest - Netekim Fest**” to be organized by associations named “78’liler Derneği and Kùltùrlerarası İletişim Derneği” on 12.9.2004 was **banned**, by virtue of the act in dispute, based on the provisions of Article 17 of Law no. 2911 on the grounds that “upon being reported to the defendant District Governor’s Office on 3.9.2004 under the Law no. 2911 by the organizational board, to which the claimant was a member, this event was widely covered by the local and national press and **statements against this event increasing tension were made** by various political parties; that the supporting nongovernmental organizations also made press releases that created **a disturbance** among people; that the public order would be disrupted upon confrontation of the two groups if the event in question was held; that the tourism would be affected; and that there is an explicit and imminent risk of the commitment of offence”. The Administrative Court dismissed the action brought for annulment of the ban in question.

The Chamber quashed this rejection order on the following grounds:

“... no explicit, concrete, and imminent risk that the event if organized would lead to the commitment of an offence has been put forth.

...

Therefore, since the situation in the present case, where no explicit, concrete and imminent risk can be put forth, can only constitute a reason for postponement and since the postponement would enable the achievement of the lawful purpose pursued without infringing upon the very essence of the right and liberty to organize meetings, it is not lawful to imposed a ban on the event”.

IV. RELATION BETWEEN THE FREEDOM OF MOVEMENT AND SECURITY

A. By virtue of the close link between them, the freedoms of movement and residence are laid down together in the same provision (Article 18 of the Constitution of 1961; Article 23 of the Constitution of 1982; Protocol no. 4 of the Convention).

These two freedoms differ in terms of the grounds for their restriction. For example, *“promoting social and economic development, achieving sound and orderly urbanization and protecting public property”* (Article 23 of the Constitution of 1982) are considered as reasons for restriction applicable to the freedom of residence, while they are not deemed to constitute a ground for restriction in terms of the freedom of movement.

We should further note that the exercise of the freedom of movement is generally linked to the exercise of another right and freedom. Therefore, the restriction imposed on the freedom of movement leads, at the same time, to the restriction of rights and freedoms in the fields of labour, education, health, etc...

Under the Constitution of 1961, the freedom of movement was set forth as follows:

“Everyone has the freedom of movement and this freedom may only be restricted by law for the purposes of maintaining the national security and preventing epidemics.” (Article 18 § 1).

Under the Constitution of 1982, this freedom reads out as follows:

“Everyone has the freedom of residence and movement.” (Article 23 § 1)

“... Freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence and prevention of offences.” (Article 23 § 2)¹⁵

According to the Constitution,

“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. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the

¹⁵ Failure to include the “general health” reason among them, unlike the Constitution of 196, has been criticized. Please see GÖZLER, Kemal, *“Anayasa Değişikliğinin Temel Hak ve Hürriyetlerin Sınırlandırılması Bakımından Getirdikleri ve Götürdükleri: Anayasanın 13. Maddesinin Yeni Şekli Hakkında Bir İnceleme”*, Journal of Bar Association of Ankara, Year 59, I. 2001/4, p. 64 et seq.; ARSLAN, Zühtü, *“Temel Hak ve Özgürlüklerin Sınırlanması: Anayasanın 13. Maddesi Üzerine Bazı Düşünceler”*, Anayasa Yargısı, I. 19, 2002, p. 219; SAĞLAM, Fazıl, *“2001 Yılı Anayasa Değişikliğinin Yaratabileceği Bazı Sorunlar ve Bunların Çözüm Olanakları”*, Anayasa Yargısı, I. 19, 2002, p. 254.



society and the secular republic and the principle of proportionality.”
(Article 13 of the Constitution of 1982).

As they are varied in nature, the reasons for restriction are separately set forth for each right and freedom both under international treaties and also under the Constitution.

The right of movement and residence is enshrined in **Additional Protocol no. 4 to the Convention**¹⁶. Article 2 of the Protocol sets forth:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

*3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of **national security or public safety, for the maintenance of order public, for the prevention of offence, for the protection of health or morals, or for the protection of the rights and freedoms of others.***

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

B. The Law no. 2935 on State of Emergency, enacted on 25.10.1983, contains special provisions whereby restrictions are imposed on the freedom of movement and even the freedom of residence.

According to the Law in question, individuals’ entry to, and departure from, a certain settlement area may be restricted “where a state of emergency is declared due to natural disasters a hazardous epidemics” (Article 9 (a)).

¹⁶ Opened for signature on 16.9.1963 in Strasburg, the Protocol in question (ETS no: 46) was signed by Turkey on 19.10.1992. After having been deemed appropriate for ratification under the Law no. 3975 dated 23 February, 1994, the Protocol in question was ratified under the Cabinet of Ministers’ Decree dated 9.6.1994 and numbered 94/5749. The Turkish text of the Protocol was released in the Official Gazette dated 14 July, 1994 and numbered 21990.

However, the Protocol in question did not enter into force in terms of our international obligations, although having become effective in terms of our domestic legislation, yet the ratification documentations have not been delivered to the Secretariat General of the Council of Europe.

Further, where a state of emergency is declared due to *“the appearance of serious indications resulting from widespread acts of violence which are aimed at destroying the free democratic order or fundamental rights and freedoms enshrined in the Constitution, or violent acts causing serious deterioration of public order”*, additional measures may be taken, in terms of the exercise of the freedom of movement, along with the prevention of persons from entering in or departing from a certain settlement area *“with an aim to protect general security, safety and public order and to prevent the spread of acts of violence”*:

*“Imposition of a limited or **full curfew**,”* (Article 11 (a))

“Prohibition of any kind of assembly or procession or movement of vehicles in certain places or within certain hours,” (Article 11 (b))

*“Prohibition of **persons or groups of persons considered to disrupt public order or public security** from entering the concerned region, expulsion of such persons or groups from the region, or imposition of a requirement on them to reside in or enter specified places in the region”* (Article 11 (k))

It should be borne in mind that the provision of this last subparagraph (k) enables the imposition of a restriction on the freedom of movement and even residence **in terms of certain persons**, rather than the people in general¹⁷.

C. Under the **Law on Provincial Administration** dated 10.6.1949 and numbered 5442, Governors are empowered to take *“measures*

17 The **Martial Law no. 1402** of 13.5.1971 (Article 3), which was abolished by the Law no. 7145 enacted on 25.7.2018, also contained similar provisions regarding the restriction of the freedom of movement and the freedom of residence:

“to relocate persons convicted of crimes committed against public order, State forces, personal liberty, and public peace and also homicide or battery against people or are under general security custody or not having a certain domicile in the martial law area or found to be suspicious or carrying out activities injurious to the general security and public order or to ban them from accessing to or domiciling in certain areas in this area and to deport those whose presence is deemed to be harmful to places outside areas where martial law is in force;

Those deported on the grounds that their activities are deemed to be injurious to the general security and public order may be ordered to remain outside the areas where martial law in force for a period determined by the martial law commander not exceeding five years and they may be compelled to reside in a place specified by the Ministry of the Interior.” (Article 3 § d)

“To take necessary measures relating to the control of land, sea and air traffic and to restrict or prohibit for security purposes the entry and exit of transportation vehicles;” (Article 3 § j)

“to impose restrictions on entry into and exit from areas where martial law is in force;” (Article 3 § k).

“to impose partial or complete curfews and, as and when necessary, to introduce appropriate civil defense measures in part or as a whole;” (Article 3 § l).



required to prevent the commitment of offences and to maintain the public order and security" (Article 11 § A).

In this respect,

"Governors have the duty and obligation of also ensuring the peace and security, personal immunity, dispositive security, and preventive law enforcement within the provincial borders. Governors shall take required decisions and measures to that end."
(Article 11 § C)

These provisions do not contain any explicit regulation that empowers governors to place any restriction on persons' freedom of movement and residence. However, governors have been explicitly authorized to restrict persons' freedom of movement following an amendment to the Law on Provincial Administration by virtue of the Law no. 7145 dated 25.7.2018 (Article 1):

"Where the public order or security are disrupted or where there are serious indications in this regard to the extent that would halt or suspend daily life, governors may restrict entry into and exit from certain areas within provinces for certain persons for no longer than fifteen days and may regulate or restrict the movement and assembly of people or circulation of vehicles in certain locations or at certain times..." (Article 11 § C. 2).

D. Our determinations and considerations in the context of freedom and security relation are related **to the freedom of movement**, rather than the freedom of residence.

It will be possible to evaluate the aforesaid statutory provisions in this regard only after clarifying the reasons for restriction on freedom of movement, which are laid down in the Constitution.

According to the Constitution, freedom of movement may be restricted only *"for the purpose of investigation and prosecution of an offence, and prevention of offences"* (Article 23 § 2 of the Constitution of 1982). According to this provision, the Constitution does not enable the imposition of any restriction on the freedom of movement for such reasons as national security, public safety and public order during an ordinary period.

However, in case of a war, mobilization and state of emergency, *“the exercise of fundamental rights and freedoms may be partially or entirely suspended”* (Article 15 § 1). Similarly, the Constitution provides for that *“the manner of restriction and temporary suspension of fundamental rights and freedoms in line with the principles of the Article 15 shall be regulated by law”* in case of a state of emergency (Article 119 § 15).

According to these provisions, the fundamental rights and freedoms and, within this framework, the freedom of movement may be restricted **as and to the extent required by the incidents giving rise to the declaration of state of emergency**. As such, the scope of the freedom of movement may be restricted in a broader sense and *“suspended in part or as a whole”* in case of state of emergency in comparison with the ordinary period.

According to the Constitution, the state of emergency *“may be declared in the event of war, the emergence of a situation necessitating war, mobilization, an uprising, strong rebellious actions against the motherland and the Republic, widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation, emergence of widespread acts of violence aimed at the destruction of the Constitutional order or of fundamental rights and freedoms, serious deterioration of public order because of acts of violence, occurrence of natural disasters, outbreak of dangerous epidemic diseases or emergence of a serious economic crisis.”* (Article 119 § 1).

As such, the freedom of movement may also be restricted on the grounds of **national security, public safety, and public order** in case of state of emergency.

During an ordinary period, the freedom of movement *“may be restricted only for the purpose of investigation and prosecution of an offence, and prevention of offences”*, as prescribed by the Constitution (Article 23 § 2 of the Constitution of 1982). In this respect, the Constitution does not allow for the imposition of any restriction on the freedom of movement for such reasons as national security, public safety and public order during an ordinary period.

However, persons are banned from traveling to certain areas within the framework of the **Law no. 2565 on Military Forbidden Zones**



and Security Zones dated 18.12.1981. Only the **national security** may constitute the reason for restriction that is imposed on the freedom of movement by virtue of such prohibitions. Under these circumstances, it will not be wrong to suggest that the restrictions imposed on the freedom of movement by virtue of the Law in question lack any constitutional ground.

As a matter of fact, although the Constitution does not enumerate public safety and public order among the reasons for a general restriction imposed on the freedom of movement (Article 23 § 2), restrictions may be imposed on the grounds of **public safety** and **public order** for the foreign travel of citizens and domestic travel of foreigners. The provisions of the Passport Law dated 15.7.1950 and numbered 5682 set examples in this respect.

It should be, however, noted that the **Additional Protocol no. 4 to the Convention** enables the imposition of restrictions on the freedom of movement for **national security, public safety and public order** purposes during an ordinary period, despite the Constitution. Furthermore, the freedom of movement may be restricted also for “**protecting ... health and morals**”. As such, **quarantine measures**, for example, may be taken where required by **public health**, and the freedom of movement may be also restricted with an aim to **protect public morals** and thereby to **prevent prostitution**. Different provisions included in the **Public Health Law** dated 24.4.1930 and numbered 1593 set examples in this respect.

E. As mentioned above, according to the Constitution, the freedom of movement may be restricted during an ordinary period only “*for the purpose of investigation and prosecution of an offence, and prevention of offences*” (Article 23 § 2 of the Constitution of 1982).

The restrictions that may be imposed on the freedom of movement **by reason of criminal investigation and prosecution** are embodied within the context of preventive measures in the Code of Criminal Procedure (the CCP). We have not discussed this subject in this paper.

The main topic of our assessment is the scope of restriction that may be imposed on the freedom of movement **with the aim to prevent the commitment of offences**.

From the standpoint of this provision, the Constitution does not allow for the imposition of any restriction on the freedom of movement for such reasons as national security, public safety and public order during an ordinary period.

It should be noted in the first place that the prevention of offence is one of the most important duties of law enforcement officers and civilian authorities, which is called as **preventive law enforcement duty**. They have been authorized to the extent required to satisfy this duty and in order to fulfil this duty. The **Law no. 2559 on the Powers and Duties of the Police** dated 4.7.1934 sets an example in this context.

Within the framework of the preventive law enforcement measures, the law enforcement officers have been empowered to challenge a person and ask her/his identity document without the need for any concrete suspicion (Article 4 § A of the Law no. 2559).

In this respect, the law enforcement officers may prevent persons from traveling to, and staying at, a certain place as an administrative measure in order to avoid any **concrete danger** against persons' lives and physical integrity. As such, persons may be banned from entering into, for example, a zone with a fire, explosion, landslide or flood hazard, or they may be evacuated therefrom by virtue of an administrative order. In such a case, it is aimed to avoid a **concrete danger** against persons' lives and physical integrity. Under an administrative order and depending on the existence of a concrete danger, the freedom of movement and even of residence of persons may be restricted, for the purpose of protecting them against the danger, as long as this danger exists.

Likewise, the freedom of movement of persons may be restricted with the aim to prevent the commitment of offences **where widespread violent acts break out or there is such a concrete risk emerges against lives and physical integrity of persons**. That is because, the relevant restriction must be proportionate in order for the freedom of movement to be restricted in connection with the commitment of offences. In this respect, the freedom of movement should be restricted **where widespread violent acts break out or there is such a concrete risk emerges against lives and physical integrity of persons**, rather



than for the prevention of the commitment of any offence in a broader sense as required by the **principle of proportionality** (Article 13 of the Constitution of 1982). Although various administrative and law enforcement measures can be taken to prevent the commitment of any offence in a broader sense, persons may not be prevented from traveling to and compelled to leave any place in general.

It should be noted that the existence of the following are sought to prevent commitment of offences:

a) a concrete assault risk, which is attributable to others, against life or physical integrity of the person whose movement is restricted;

or

b) a concrete assault risk, attributable to a person whose movement is restricted, against life or physical integrity of others.

According to the **Additional Protocol no. 4 to the Convention**, freedom of movement may also be restricted *“to protect the rights and freedoms of others”*.

Within the scope of the **preventive measures** set forth under the Law no. 6284 dated 8.3.2012 on the **Protection of Family and Prevention of Violence against Women**, the following measures may be ordered and implemented against persons that resort to violence:

“forthwith removal from the communal residence and allocation of the communal residence to the person protected” (Article 5 § 1.b); and

“Prohibition of approaching the persons protected, their residences, schools, or workplaces” (Article 5 § 1.c).

F. By virtue of the regulation made in the Law on Provincial Administration under the Law no. 7145, governors are authorized to restrict persons' freedom of movement *“where there are serious indications that the public order or security are disrupted to the extent that would halt or suspend daily life”*, regardless of the restriction reasons that are enumerated in Article 23 of the Constitution. It should be noted that this legal arrangement does not make the ability to restrict persons' freedom of movement under the order issued by the governor conditional on the existence of a concrete risk against their lives or

physical integrity and, further, does not limit this authorization to the aim of preventing the commitment of offences. The expression in question is ambiguous, uncertain, and is of such a nature that will make it possible to abuse this power to the largest extent.

This arrangement opts to limit the implementation period of the measure by setting a maximum period of 15 days, rather than limiting the same to the existence of a danger since no risk for the emergence of widespread acts of violence against persons' lives or physical integrity is sought to restrict the freedom of movement.

Moreover, governors are **authorized to restrict the freedom of movement** of "*persons suspected of disrupting public order or public safety*", namely of **certain persons** in addition to the authorization of restricting the freedom of movement in general, i.e., any person.

A suspicion raised in the context of an investigation can only be associated to the person's acts committed in the past. However, a prediction is made here regarding the future attitudes and behaviours of a person. As such, we can talk about **the risk of posing a threat** in the relevant context, rather than being a suspicious. The suspicion to be sought in this regard lacks a criterion.

It should be further noted that the power granted under the Law on Provincial Administration can only be exercised by governors. Governors are not public officials that can, by nature of their duty, assess or evaluate persons' "suspicious" status (in fact, the risk of posing a threat) status. Therefore, the authority in question is exercised by governors in appearance and by law enforcement officers in practice.

Governors are authorized under the same regulation to forbid the movement of persons in certain locations or at certain times. This authority can be exercised by determining the banned locations or times, or persons can also be banned in a general sense from traveling to certain places without any time limitation as the conjunction "or" is used in the provision. It should be taken into consideration that the concerned locations are **public places** by nature. Governors may prohibit access to those places, although they are indeed publicly accessible. Actually, this final provision has been included in the Law on Provincial Administration from the Law on State of Emergency.



“Prohibition of any kind of assembly or procession or movement of vehicles in certain places or within certain hours;” (Article 11 § b of the Law no. 2935).

It is crucial to point out that the **Law on Provincial Administration does not authorize Governors to impose curfew**. As a matter of fact, in addition to the power of

“Prohibition of any kind of assembly or procession or movement of vehicles in certain places or within certain hours;” (Art. 11, subpara. b)

the State of Emergency Law 2935 also empowers Governors

*“To impose a limited or **full curfew**;”* (Art. 11, subpara. a)¹⁸.

The subparagraph (b) in question is reiterated in the Law on Provincial Administration, while the subparagraph (b) is omitted.

We should; however, note that *“violation of the **curfew** imposed on the basis of the Law on Provincial Administration”* is enumerated as a reason for arrest in the new paragraph inserted as the fourth paragraph in Article 91 of the CCP 5271 by virtue of the Law 6638 dated 27.3.2015 whereby the Law on Provincial Administration and many other laws were amended (subpara. e).

Nevertheless, we cannot say that no specific measure such as “curfew” is included in the Law on Provincial Administration. We should; however, underline that Governors may take precautionary measures to ban people from leaving their houses in a certain settlement area in order to avoid any concrete danger against, for example, persons’ lives or health. In such a case, persons are not permitted to leave their houses until further notice that the actual danger against their lives or health is eliminated.

In conclusion, with reference to the provisions of paragraph C of Article 11 of the Law on Provincial Administration, we should note that Governors are authorized to restrict the freedom of movement where there is a concrete danger against persons’ lives or health and

¹⁸ a comparable provision was included in the Martial Law too:

“to impose restrictions on entry into and exit from areas where martial law is in force;” (Art. 3, subpara. k)

“to impose partial or complete curfews and, as and when necessary, to introduce appropriate civil defense measures in part or as a whole;” (Art. 3, subpara. l)



on condition of observing the **principle of proportionality**. However, persons' freedom of movement may not be restricted in a general sense for the purpose of preventing the commitment of offences. Because, the principle of proportionality does permit the restriction of freedom of movement in a general sense for the purpose of preventing the commitment of offences. In such cases, this purpose may be achieved by taking other preventive law enforcement measures.

On the other hand, the freedom of movement of persons can be restricted by preventing them from leaving their domiciles as an administrative measure **where widespread violent acts break out or there is such a concrete risk against lives and physical integrity of persons**. It should be noted that the administrative measure to prevent persons from leaving their domiciles may be implemented only being limited to the dangerousness in question and only as long as the danger exists. Furthermore, where a measure is taken to prevent persons from leaving their domiciles, the administration must also take measures so as to satisfy the persons' needs to maintain their lives and health. The process for the exercise of this measure that is taken to avoid the risk of assault against persons' lives or physical integrity must not lead to the loss of persons' lives or deterioration of their health as required by the principle of proportionality.

V. CONCLUSION

We have reached the following conclusions on the basis of our determinations and considerations regarding the freedom of assembly and demonstration march and freedom of movement:

In general, the enjoyment of freedom of assembly and demonstration march may be restricted by virtue of a general administrative action on the grounds of national security or public order.

On the other hand, only a certain assembly or demonstration march may be restricted by reason of public safety.

An assembly or demonstration march which is to be held without satisfying the notification condition or without obtaining the required permit or which is held despite being disallowed should be considered as an unlawful assembly or demonstration march.



Accordingly, an assembly and demonstration march may be unlawful for the following reasons:

- a) for being held without satisfying the requirement to file a notification;
- b) for being held without obtaining the required permit or despite being disallowed; and
- c) due to the place and time that it was held.

It should be noted in the first place that persons wishing to participate in a “**peaceful / /unarmed**” assembly and demonstration march organized may, in legal terms, not be banned from traveling only based on the probability that they may commit an offence during this assembly and demonstration march.

Similarly, it is not lawful to ban an assembly or a demonstration march e.g., due to the probability that it would “turn into a terrorist organization propaganda”. Although other appropriate law enforcement measures may be exclusively taken to prevent any terrorist organization propaganda, the assembly or demonstration march may not be banned.

However, barring persons from carrying the belongings, which are believed to be used in the commitment of offences during that assembly and demonstration march, seizing such belongings as a precaution, and permitting persons to travel only under these circumstances are among the requisites of the preventive law enforcement duty.

On the other hand, it is lawful to prevent participation in an assembly or demonstration march that will be or is held **where widespread violent acts break out or there is such a concrete risk against lives and physical integrity or possession of people.**

A person may, as an administrative measure to be taken by the law-enforcement officers, be banned from traveling to, and staying in, a certain place on the grounds of a danger that is attributable to him –for posing a threat–¹⁹.

¹⁹ On this subject, there is an exemplary arrangement in the **Law 6222 on the Prevention of Violence and Disorder in Sports** dated 31.3.2011:

“Any person that is clearly understood to be under the influence of alcohol or a narcotic drug shall not

In this respect, the persons wishing to go to a certain place, where the organization of any assembly and demonstration march is lawfully prohibited, to assemble and hold a demonstration march may be banned from going that place by the use of preventive law enforcement authority. In such a case, what is of importance is the legal basis on which the prohibition of an assembly or demonstration march is based.

Where an assembly and demonstration march at a certain place or a certain time is prohibited on the basis of a concrete reason that may disrupt the public safety or public order, it should be accepted that such a restriction has a legal basis.

Where the law enforcement officers do not use violence but employ various manipulative methods such as the frequent traffic controls in order to prevent the assembly of persons at a certain place and a certain time although there is no legal obstacle, then the freedom of movement will be deemed to have been unlawfully restricted. This type of practices will amount to depriving a person of his liberty by abuse of power in public office.

Moreover, even when persons that are prohibited from going to a certain place insist on going there, law enforcement officers may not use violence against them unless these persons resort to violence. Practices to the contrary will constitute the offence of wilful and malicious injury by abuse of power in public office (Turkish Penal code, Art. 86 § 3 (d)).

The freedom of movement of persons may be restricted by preventing them from leaving their domiciles as an administrative measure **where widespread violent acts break out or there is such a concrete risk against lives and physical integrity of persons.** It should be noted

be allowed in the sports venue. Any person that has entered in the venues in this condition and that insists on staying therein shall be led out by using force..." (Law 6222, Art. 18, para. 7).

Further,

"General law enforcers and municipal police shall be under the obligation of clearing the area of the persons that hawk, offer for sale, distribute, or make available for distribution (sharp, crushing, wounding, or penetrating objects, explosive, flammable, combustible, or burning agents or narcotic substances or stimulants, alcoholic beverages regardless of the fact if they are essentially banned from carrying or if they constitute a crime) in the vicinity of the sports venue." (Law 6222, Art. 12 § 5)

For more information thereof, please see ÖZGENÇ, İzzet: "Değerlendirme ve Sonuç, in: *Sporda Şiddet ve Düzensizliğin Önlenmesi Kanunu*" (Edited by Cumhur Şahin/İzzet Özgenç/İlhan Üzülmöz; Gazi Üniversitesi Türk Ceza Hukuku Uygulama ve Araştırma Merkezi yayını), 2nd Edition, Ankara, 2012, p. 112, 128.



that the administrative measure to prevent persons from leaving their domiciles may be applied to the extent limited to the dangerousness in question and only as long as the danger exists. Furthermore, where a measure is taken to prevent persons from leaving their domiciles, the administration must also take such measures required for satisfying the persons' to maintain their lives and health. The process during which this measure is applied to avoid the danger of assault against persons' lives or physical integrity must not lead to the loss of persons' lives or deterioration of their health as required by the principle of proportionality.

***DETENTION ORDERS AND
APPLICABILITY OF ARTICLE 5 OF
THE EUROPEAN CONVENTION ON
HUMAN RIGHTS***

***Mahmut Can ŞENYURT
EUROPEAN COURT OF HUMAN
RIGHTS***



DETENTION ORDERS AND APPLICABILITY OF ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Mahmut Can ŞENYURT**

Good afternoon!

My name is Mahmut Can Şenyurt and I am working at the European Court of Human Rights.

Dear participants,

First of all, I would like to greet you on behalf of the European Court of Human Rights, and it is a pleasure for me to address you today, here on behalf of the registry of the European Court of Human Rights.

Today, I am going to address the issue of procedural safeguards or procedural guarantees in relation to detention orders effected under Article 5 of the European Convention. You can see the presentation plan on the slights and it is as follows: first, I would briefly like to talk about the aim and applicability of the provision, then I will focus on the nature of the judicial review and the inherent procedure of guarantees contained therein, lastly, I would like to give you an overview of the Court's interpretation of the speediness requirement within the context of the proceedings reviewing detention.

You can see the draft of Article 5 § 4 on the slight. This article provides for an access to a judicial review in respect of an individual's deprivation of liberty. In other words, this provision gives an individual the ability to test the legality of his/her deprivation of liberty. It is also known as the *habeas corpus* provision of the Convention simply because it gives the detained persons the right to actively seek a judicial review of their detention.

* Legal Expert, European Court of Human Rights



Before going into the merits of my subject I would also like to talk about Article 5 § 4 of the Convention which provides for a similar guarantee. I think it is useful to begin with that because the difference between those two paragraphs can be tricky. The most important difference between Paragraphs 4 and 3 is that Paragraph 3 applies only to the type of detention falling within the ambit of the Article 5 § 1 (c) of the Convention. That is the lawful arrest or detention of a person effected for the purpose of bringing an individual before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. For the sake of practicality, I would simply call it “detention on reasonable suspicion of having committed an offence”.

On the other hand, the safeguard envisaged in the Article 5 § 4 applies to everybody who is detained on one of the grounds listed under Article 5 of the Convention. As you can see, another important difference is that those individuals, who are detained on reasonable suspicion of having committed an offence, are not required to lodge an application to have their detention reviewed under Article 5.

Indeed the Court also held in *Aquilina v. Malta* that Article 5 § 3 of the Convention aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance of the provisions of the Article 5 § 1 (c). The purpose of that safeguard is to protect the individual from arbitrary detention by making sure that the detention is subjected to judicial scrutiny. Generally, this is the initial review of the detention after bringing an individual before a competent judicial authority.

However, unlike Paragraph 3, the review under Paragraph 4 requires, in principle, an individual’s application for review. This does not mean, of course, that automatic periodic judicial review is excluded from Article 5 § 4.

Moving on to the aim and applicability, we could simply say that primary purpose of Article 5 § 4 is to ensure to a person deprived of liberty a speedy judicial review of the lawfulness of the detention, capable of leading to his/her release. Then we can of course, naturally, ask the question; does it only apply to persons deprived



of their liberty? The Court, in that respect, repeatedly held that in principle this right is only applicable to persons who are deprived of their liberty and who have no application for the purposes of obtaining, after release, a declaration that the previous detention or arrest was unlawful.

However, there may be exceptions to that and the guaranty of efficiency of the review should continue to apply, even after release, since a former detainee may well have a legitimate interest in the determination of his/her detention even after having been liberated. For example; a decision on the issue of lawfulness may affect the enforceable right to compensation under Article 5 § 5 of the Convention. A good example of the applicability of Paragraph 4 to a person who was not deprived of his/her liberty was *Oravec v. Croatia* judgment of the European Court of Human Rights. In that case, the investigating judge ordered the release of the applicant from custody and the public prosecutor lodged an objection against that decision. By lodging that appeal, the prosecutors sought to have the first detention order upheld and have the applicant detained again. When that appeal was under consideration by the county court, the applicant was free. So in principle, Article 5 had no application in respect of that individual. However, the Court considered that the outcome of the appeal proceedings was a crucial factor for the individual, irrespective of whether at that precise time the applicant was or was not held in custody.

Another important question is whether the guarantees of Article 5 § 4 is applicable to appeal proceedings. The Court's answer is as follows: *"Although Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction, a State which institutes such a system must, in principle, accord detainees the same guarantees on appeal as at first instance"*. Therefore the Court held that the same also applies in respect of the protection offered by the constitutional courts in the respective countries. So guarantees of the Article 5 § 4 is also applicable to the proceedings before the constitutional courts according to the European Court of Human Rights' case-law.

Another important element that I am going to examine today is the nature of the judicial review required under Article 5 § 4. As you remember, the provision refers to a court. However the case-law of



the European Court shows that the body examining the lawfulness of an arrest or detention does not have to be a court of law of the classic kind. But it must be a body independent of the executive and the parties to the case. Is that enough? The Court answered that question in negative in the *Benjamin and Wilson v. the United Kingdom*, and stated that “such bodies must exhibit the necessary judicial procedures and safeguards appropriate to the kind of declaration of liberty in question”. Furthermore, such a body must have the competence to decide on the lawfulness of the detention and the power to order release, if it is unlawful. Advisory functions or the power to make recommendations are not enough under the judicial review.

However, of course, this does not mean that de review proceedings must end with a release. In fact, it may also lead to another type of deprivation of liberty or another type of formal detention, we may call it. That was the case of *Kuttner v. Austria*. In that case, the review under Article 5 § 4 would not lead to release but to a transfer from a mental institution to an ordinary prison. And the guarantees under Article 5 § 4 were found to be applicable to those proceedings as well.

I would also like to mention that detained persons must have a direct access to a remedy. So the detainees’ access should not be dependent on the discretion or goodwill of the authorities of a State party. Equally important is the fact that a person detained on remand must be able to take proceedings at reasonable intervals. This is, of course, with a view to challenging the lawfulness of his detention. And this principle, the reasonable interval principle, applies both to pre-trial and to the trial stage. You also see on the slight that the Court has continuously reiterated that the nature of detention on remand calls for short intervals. As there is an assumption in the Convention that detention on remand is to be of strictly limited period. In the case of *Asenov and Others v. Bulgaria*, the Bulgarian law in force at the material time only provided for one single occasion to challenge the lawfulness of detention at the trial stage. And on that basis, the Court has found a violation finding that the frequency of that review was not sufficient.

We will come to the issue of reasonable intervals but, for the time being, I would just like to mention the requirement of a re-examination where new facts emerge. In *Raninen v. Finland*, the

Court held that the re-examination of a case may be appropriate where new facts have emerged, which could furnish a separate basis for a fresh decision. For example; in cases of continued detention, the prolongation of the detention in itself and under certain circumstances may fall within that category and justify a re-examination under Article 5 § 4 of the question of release. New material or material that did not exist at all or existed to a very limited extent, when the initial decision on remand was given, can also be considered as requiring re-examination.

Moving on to the scope of review, I think I would like to mention here that the essence of the review under this provision is the examination of the procedural and substantive conditions which are essential for the lawfulness of an individual's deprivation of liberty. Of course the forms of judicial review satisfying the requirements of Article 5 may vary from one domain to another. And it will depend on the type of deprivation of liberty in question. So we don't have a uniform standard that is applicable to all sorts of detention under Article 5. This means that, for example, in the context of detention of a person on unreasonable suspicion, the competent court has to examine not only compliance with the procedural guarantees set out in domestic law but also the reasonableness of the detention and of course the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the detention.

In the event of detention of a person on the basis of unsoundness of mind, the domestic remedy reviewing detention must be able to determine the merits of the question as to whether the mental disorder persisted. Therefore we can conclude that the courts are not under an obligation to examine each and every aspect of an individual's deprivation of liberty but they are required to address the arguments casting doubt on the lawfulness of the deprivation of the liberty in question. For example, in *Nikolova v. Bulgaria*, the failure to consider the applicant's arguments concerning the persistence of a reasonable suspicion against the applicant, resulted in a violation of Article 5 § 4 of the Convention. Similarly, failure to consider the imposition of lenient measures, such as bail, was a source of concern to the Court in *Tymoshenko v. Ukraine* judgment.



Procedural Guarantees

The requirement of procedural guarantees under Article 5 § 4 does not impose, as I've previously mentioned, the uniform and unvarying standards that are applicable irrespective of the context, facts and circumstances. So under Article 5 we don't have one-size-fits-all standards, for every type of detention. Although it is not always necessary that the procedure be attended by the same guarantees as those required under Article 6, that is the fair trial guarantees, for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. That said, however, given the drastic impact of a deprivation of liberty on the fundamental rights of the person concerned, proceedings must meet to the largest extent possible the basic requirement of a fair trial.

I think I should also emphasise that these procedural requirements are the right to an adversarial trial as laid down in the Article 6 of the Convention, which means in a criminal case, both the prosecution and the defence must be given the opportunity to have knowledge and comment on the observations and the evidence adduced by the other party. So, both parties must have sufficient knowledge of the material that is in the case file and they must be able to put forward their comments in relation to the review proceedings of the detention. The principle of adversarial trial may also require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention of the individual. Of course, procedural requirements may also require that the detainee or his representative be given access to documents in the case file, which form the basis of the lawfulness of the prosecution case against the applicant. Lastly, we will come to that and we will examine it in detail.

In the case of persons detained on remand, that is the reasonable suspicion of having committed an offence, the general rule of the European Court of Human Rights is that a hearing is required for reviewing the detention.

Moving on to the equality of arms, I think the best is to try to explain these concepts with two different examples. As you see the

first example is the non-transmittance of the public prosecutors' opinion to the suspect or to the accused. It has been taken in *Altınok v. Turkey* judgement of the Court, where the court reviewing detention consulted the public prosecutor regarding the continued detention of the applicant, of an individual, however it did not transmit the public prosecutor's opinion to that individual for comment. That was a clear violation of the principle of equality of arms and the Court has concluded so.

The second scenario is relating to the cases where neither the detained person nor his lawyer had appeared on appeal but the public prosecutor had been present at the hearings. In those situations the Court concluded that the principle of equality of arms was violated. Similarly, in a case where a defence lawyer had been ordered to leave the court room while the prosecutor stayed in the room and made further submissions in favour of a detention order, the Court held that once again the principle of equality of arms had not been respected despite an oral hearing having been held before the appeal court. So we must assure the presence of both parties with the view to respect the equality of arms principle. If one party is not at the court room or if one party does not have sufficient knowledge of the submissions of the prosecutor then, potentially, we have a problematic situation.

The Court also recognised that the procedural guarantees of Article 5 § 4 of the Convention are respected in circumstances where a detained person was already present at the first instance, which ruled, of course, on his request to be released but then did not appear at the second stage before the appeal proceedings.

In those cases, the Court underlined that the principles of adversarial procedure and equality of arms were not violated because neither of the parties had participated in the proceedings on appeal or because the presence of the detained person's lawyer was sufficient to satisfy these requirements. So even if the applicant or an individual is not present at the second instance court, there is no problem when either the prosecutor is absent or the individual's lawyer is present. In that way, the equality of arms principle has been respected according to the Court's case law.



Another interesting example, where no problem has been found, was the case of *Stephens v. Malta*. In that case, the applicant complained that he had had no right to lodge an appeal against the detention order, whereas the public prosecutor had been able to do so. Observing that the applicant was able to lodge an application for release as often as he wished, the Court noted that he had a remedy which was equivalent to that offered to the prosecution in terms of law and which offered greater safeguards to him. Thus, the Court concluded that the absence of a possibility to lodge an appeal did not alter the balance which is required to persist throughout such proceedings. Consequently, there was no breach of Article 5 § 4 of the Convention.

Another interesting aspect of the procedural guarantees is the access to the case file. Here the gist of the Court's approach to access case file may be summarised as the following: the evidence that is essential to challenge the lawfulness of detention should be disclosed to the applicant or his/her representative. Thus, failure to provide access to documents or evidence, which prevented the applicant from effectively challenging his case or challenging the lawfulness of his/her detention, was considered to have been problematic by the Court.

That being the case, it can also be said from the aforementioned that there is no obligation to disclose all the evidence in the case file to the individual or his/her representative. Which is exactly the case in the case of *Ramishvili and Kokhreidze v. Georgia*. There the applicants were caught red handed taking money from a parliamentarian. There were, subsequently, arrested and detained on suspicion of extortion. And the applicants asked to have access to the video recording of that event. In that case, the denial of access to the video recording posed no problem for the court as that evidence was not considered necessary to challenge the lawfulness of the applicants' detention. Simply because the remaining evidence was sufficient to raise the reasonable suspicion of detention in respect of those applicants and, on that basis, on the basis of the remaining evidence, the applicants were able to challenge the lawfulness of their deprivation of liberty. So this is an interesting example from our case-law.



In *Lietzow v. Germany*, which is a relatively older case, the denial of the court simply acknowledged the need for criminal investigations to be conducted efficiently, which may imply that part of the investigation file or a part of the information contained therein may be kept secret in order to prevent suspects from tampering with evidence and/or undermining the courts of justice. However this legitimate goal cannot be, according to the Court, pursued at the expense of substantial restrictions on the rights of the applicant. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer. And, indeed, clearly the refusal of access to the entire case file has been considered problematic by the Court in *Shishkov v. Bulgaria*.

Another interesting example in relation to the access to the case file was the case of *Gamze Uludağ v. Turkey*. In that case, the applicant's access to the case file was restricted, pursuant to the domestic legal provisions, and the Court attached decisive importance to the fact that when giving statements the applicant was simply asked about her conversations. And the content of those conversations were also transcribed into the record of her statements. Therefore, the applicant was able to know the basis of his/her deprivation of liberty, and she was able, effectively, to challenge the lawfulness of her detention. In that case, the Court has found no violation of Article 5 § 4 of the Convention.

Oral hearing is also an important aspect of the procedural guarantees. As a general rule a hearing is necessary, as I have mentioned earlier, in the case of detention on remand. For other situations, it may be necessary depending on the circumstances of the situation. I would also like to mention that there is no obligation to hold a hearing every time an applicant lodges an application against detention. Another important aspect is that there is no general rule requiring that hearing be public, so it can be held in camera as well. It should be taking place on reasonable intervals both at pre-trial and trial stages, what was considered reasonable by the Court. Maybe I will be able to examine that further and then finish. For example in *Erişen and Others v. Turkey*; the fact that the applicants did not have a



right to appeal before a court during the pre-trial stage, for periods from two months to almost four months after their detention was initially ordered by the judge, that was not compatible and that was found problematic by the Court. During the trial stage, periods of one month and eighteen days to one month and six days or twenty nine days were also found problematic by the Court.

Article 5, as you know, does not contain an explicit requirement of a right to legal assistance in the context of detention proceedings. However, this may be essential where the individual concerned should not only have the opportunity to be heard, but he should also have the effective assistance of his lawyer. What does that mean? Maybe we could give simple examples. For example; the cases of juveniles require legal representation according to the Court. Again, in *Megyeri v. Germany*, the Court held that where a person is confined in a psychiatric institution on the ground of the commission of facts which constitute criminal offences, the applicant, in principle, should have right to a legal representation. There is no obligation to provide free legal aid under Article 5 § 4 for the proceedings reviewing the legality of the detention. Lastly, the meetings between the lawyers and their clients must be confidential.

Thank you very much.

*THE RIGHT TO LIBERTY AND
SECURITY*

*Kaliona NUSHI
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*CONSTITUTIONAL COURT OF
ALBANIA*



THE RIGHT TO LIBERTY AND SECURITY

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I. CONSTITUTIONAL COURT OF ALBANIA – A BRIEF PRESENTATION

It's been 20 years since the date of entry into force of the Albanian Constitution. Numerous political, economic and social developments have occurred in the meantime, which are naturally accompanied with certain developments in the legal framework. The activity of constitutional institutions has been occasionally accompanied by broad or narrow interpretations of constitutional provisions, highlighting the need for their adaptation to the new circumstances. The Constitutional Court has interfered in these situations, by settling constitutional disputes and making the final interpretation of the constitutional norms. Despite its final interpretation, which leaves no room for discussion by the parties, practice has shown that the norm needs more than an interpretation; it should be adapted to the country's political reality. In this sense, the activity of constitutional institutions, especially the constitutional control exercised by the Constitutional Court, during these years has highlighted some of the issues that needed to be reviewed by the constitutional lawmaker.

Since its entry into force in 1998, the Constitution has been revised three times with law no. 9675/2007; law no. 9904/2008 and law no. 88/2012. In the first case, in 2007, the extension of the term of office for elected bodies of local government became from 3 to 4 years. In the second case, in 2008, the most important changes were reflected in the election procedure of the President of the Republic, the government's confidence motion vote and the term of office of the General Prosecutor.

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In the third case, in 2012, an intervention was made to change the immunity regime of some high public officials.

Finally, in 2016, in Albania, a package of constitutional and legal changes was adopted, part of the reform of the justice system. These constitutional amendments establish the basis of an overall and comprehensive legal and institutional reform to improve the justice system in our country. The constitutional, legal and institutional solutions offered through this reform aimed to realize the efficient functioning of the system, the self-regulatory capacity of the system, to strengthen the accountability of judges and the mutual control among the institutions, consolidate the career of judges and prosecutors through evaluation of merit, professional skills and integrity in the exercise of duty.

The constitutional amendments of 2016 also affected the Constitutional Court and these changes were reflected even in its law on organization and functioning. Regarding the organization of the Court, the constitutional provision remained unchanged on the number of the members of the Court – 9 judges; on the formula of its renewal every 3 years to one third and on the continuance in office until the appointment of the successor of the court member, with some exceptions. The previous constitutional norm provided that the President of the Court was appointed by the President of the Republic with the consent of the Assembly for a 3 years term. This procedure is now provided by the organic law of the Court, according to which the President of the Court shall be elected upon secret voting, by the majority vote of all judges of the Constitutional Court, for a period of three years, with the right to only one re-election.

The most important part of these changes was the manner of appointment and election of the constitutional judges, where the old formula of appointment by the President of the Republic with the consent of the Assembly was replaced. Based on article 125 of the Constitution, the new formula provides that three members are appointed by the President of the Republic; three members are elected by the Assembly by no less than three-fifth majority of its members; and three members are elected by the High Court of Justice.



The Constitution has provided that despite the appointment or election organ, all the members shall be selected among the three first ranked candidates by the Justice Appointments Council, which, according to article 149/d of the Constitution, is responsible for verifying the fulfillment of legal requirements and assessment of professional and moral criteria of the candidates and ranks the candidates according to their professional merits.

The purpose of these amendments is to provide the most objective criteria for the selection of candidates for member of the Constitutional Court. The whole process of appointment should be characterized by transparency and publicity (criteria that have been missing up to now) as these elements contribute to the quality of constitutional justice and also to the perception and strengthening of public confidence in the independence of constitutional judges and consequently in the legitimacy of the guarantor of the Constitution.

These constitutional changes didn't affect only the procedure for the appointment and election of the constitutional changes, but also some of its competencies and the subjects that can address to the Court. The most important change regards the individual constitutional complaint. According to the previous constitutional provision, that is Article 131, letter "f" of the Constitution, the Court decided on "*final adjudication of the individual complaints for the violation of their constitutional rights to a fair hearing, after all legal means for the protection of those rights have been exhausted.*"

By the constitutional amendments of 2016, this article was changed as follows: "*The Constitutional Court decides on... final examination of the complaints of individuals against the acts of the public power or judicial acts impairing the fundamental rights and freedoms guaranteed by the Constitution after all effective legal means for the protection of those rights have been exhausted, unless provided otherwise by the Constitution*".

This change has brought a positive development in terms of protecting fundamental rights and freedoms of the individuals. The individual constitutional complaint will replace the partial and not entirely effective complaint that has been implemented since 1998.



By its decisions, focused on the right to a fair trial, the Court has attempted to define this competence by defining and emphasizing the limits of its jurisdiction. Its positions have led to a fair and comprehensive understanding of the notion of the fair trial. The Court has been careful to make an essential distinction between its role as the guarantor of the Constitution and that of giving justice, which appertain to the ordinary jurisdiction courts. It has defined the constitutional standards where a fair or due process should be based on, and then has checked whether these standards have been respected during the process.

The Constitutional Court has made part of its jurisdiction not only the right to a fair trial provided by Article 42 of the Constitution, but also some other constitutional rights provided by other constitutional provisions. Such are the principle of non-declaration of guilt or punishment without a law; the retroactive effect of the favorable criminal law; the presumption of innocence; the defendant's guarantee during the criminal offense; principle of *non bis in idem* etc. Anyway these principle or rights has been checked by the Court only related to the right to a fair trial and as a part of it, which has been often seen as a formal approach rather than substantial, as it has been considered as a non-effective remedy in relation to substantive constitution rights.

The jurisprudence of the Court has been changing and evolving over the years, mostly based on the jurisprudence of the European Court of Human Rights and having regard of the obligations stemming for the Albanian state by the Convention. The Court had to deal with specific situations that needed a more positive approach in the tentative of going through a substantive control of fundamental rights in the process of reviewing the right to a fair trial. In its jurisprudence the Court has in many cases evaluated that the right to a fair trial was violated on the procedural elements but had consequences also in the essence of other constitutional rights of the individuals, and it has been considered that the due process cannot be separated from its essence, that is, the substantive protection of the right.

Since 1998 it has been drawn the thesis according to which the right to a fair trial and its content, should be interpreted in unity with the same principle guaranteed by Article 6 of the Convention, thus a broader interpretation to include other substantive rights provided by



the Albanian Constitution. According to this thesis the control of the Court should include not only judicial decisions or procedural aspects of the administrative or legislative process, but also the content of the normative acts of public authority bodies challenged by the individuals when they violate the rights protected by the Constitution. This approach, although it was possible by the harmonious interpretation of the constitutional was not realized in practice.

The new constitutional provision approved in 2016 represent a re-conceptualization of the individual constitutional complaint. What is also new in the wording of letter “f” of Article 131 of the Constitution is represented by the fact that alleged violations during the judicial process may also extend to the violation of fundamental constitutional rights. For example the right of access to court cannot be treated only as a procedural right, but should be seen also as an essential element for the judicial guarantee of other constitutional rights, which have not been repaired by the ordinary judicial control. In its future jurisprudence the Court will not be limited to procedural violations that have been deeply elaborated over the years, but it should examine the substantial violation of constitutional level that could lead to a violation of the individuals material rights. So if the individual challenge not only the judicial decision but also the law where it is based, he has to argue that the unconstitutionality has come as a result law’s content and not its implementation, as this is the competence of the ordinary courts.

In its future activity the Court will continue to base its decisions on the European Court’s case-law on the interpretation of Convention rights, not only because of the obligations undertaken by the State, but also because of the special place of the European Convention in the domestic legal system. According to the Constitution, in the hierarchy of legal norms, the ratified international agreements are listed after the Constitution and prevail over ordinary laws. Regarding the restriction of the fundamental rights and freedoms, the Constitution has given to the Convention the same position with itself, as it expressly provides that the limitations of rights and freedoms in no case may exceed the limitations provided for in the Convention. This implies that the Constitution may provide for a higher standard of protection of fundamental rights, but in no case it may exceed the minimum protection provided for in the Convention.



Since it is expected an increase of the number of the constitutional complaints to be submitted to the Court, but also the nature of the cases will be more diverse having regard of all fundamental rights guaranteed by the Constitution, the European Court of Human Rights' case-law and its consolidated jurisprudence on the interpretation of the provisions of the Convention represent a strong and secure foundation for the Albanian Constitutional Court to establish a safe protection of the Albanian individuals rights and freedoms.

Further we will present the constitutional provisions guaranteeing the right to liberty and some decisions of the Constitutional Court that we have considered relevant to this topic.

II. The right to liberty and security

The right of the individual to liberty and security can be understood as a unique right and consists in his physical freedom of any kind of restriction that prohibits or restricts him in movement or action. Expressly protected by the Constitution of Albania, the freedom of a person cannot be limited and he cannot be deprived of liberty except in the cases provided by law and by an act issued by the judicial authority based on the legal procedures. The cases of limitation of freedom of the person constitute a constitutional reserve, since they are explicitly provided in a closed list and cannot be changed by law.

The wording of this right in Articles 27 and 28 of the Albanian Constitution is very much the same as sanctioned by Article 5 of the European Convention on Human Rights.

According to Article 27 of the Constitution: *"1. No one can be deprived of liberty except in the case and according to the procedures provided by law. 2. A person may not be limited, except in the following cases: a) when punished with an imprisonment; b) for failing to comply with the lawful orders of the court or with an obligation set by law; c) when there are reasonable doubts that he has committed a criminal offense or to prevent his commission of a criminal offense or his escape after his commission; ç) for the supervision of a minor for purposes of education or for escorting him to an competent body; d) when a person is the carrier of a contagious disease, mentally incompetent and dangerous to society; dh) for illegal entry into state borders or in cases of*



deportation or extradition. 3. No one may be deprived of liberty because of not being able to fulfill a contractual obligation."

According to Article 28 of the Constitution "1. Everyone who has been deprived of liberty has the right to be notified immediately, in a language that he understands, of the reasons for this measure, as well as of the charge charged against him. The person who has been deprived of liberty shall be informed that he has no obligation to make a declaration and shall have the right to communicate immediately with an advocate, and he shall also be given the opportunity to realize his rights. 2. The person who has been deprived of liberty under Article 27 (2) (c) shall be sent within 48 hours before a judge who shall decide on his pretrial detention or release not later than 48 hours from the moment he receives the documents for review. 3. A person in pre-trial detention has the right to appeal to the judge's decision. He has the right to be tried within a reasonable period of time or to be released on bail under law. 4. In all other cases, the person who has been extra-judicially deprived of liberty may address a judge at any time, who shall decide within 48 hours regarding the legality of this action. 5. Any person who has been deprived of liberty under Article 27 shall have the right to humane treatment and respect for his dignity."

The Constitution has provided also the case of limitation of the freedom of the person due to extradition (Article 39/2), which can only be allowed when is explicitly provided in international agreements in which the Republic of Albania has become a party, and only by a judicial decision.

There are some authors that wonder why it should be paid so much attention to the protection of the perpetrators of crimes, rather than paying more attention to the victims of those crimes. Actually the constitutional guarantees are understood as a protection for all the citizens who may be accused for committing a criminal offense. The constitutional provisions aim to defend the persons accused, as long as they have not yet been declared guilty by the court. If these guarantees are not offered, the accused persons will be deprived of many rights. If the accused persons are charged and trialed without being informed on the charge, or having the possibility to defend itself or be defended this would be a very dangerous precedent for the entire society and its



members. This makes us understand why personal freedoms take on constitutional importance.

The constitutional provisions and the guarantees they provide have been reflected and detailed by the provisions of the Criminal Procedure Code. This Code, as well as the Constitution itself, has been part of the changes brought by the justice reform. The dispositions of the Criminal Procedure Code were amended by the law of 2017, and these amendments, beside others, aimed to give the maximum protection to the victims of a criminal offence, recognizing the same rights with the defendant. They introduced a quiet new procedural figure for the Albanian criminal system, the judge of preliminary hearing, providing his competencies and also brought some changes to the competencies of the prosecutors and procedural rules of the criminal proceedings. The new provisions of the Criminal Procedure Code provide for a stronger protection of the rights of the participants in the criminal proceedings, and they represent a more specified legal framework of the competencies, procedures and rules to be followed during the criminal proceedings.

As for the cases of deprivation of liberty, the Criminal Procedure Code establish the rules of procedure that should be followed, procedural time limits, and the competences of the proceeding authorities. The Constitution itself has sanctioned the main standards in these cases, providing not only for cases of restriction of liberty, but also for guaranties and rights of the persons affected by these measures, who should in any case be informed of the reasons that brought the need of the respective measure in a language that he understands. The Constitution has laid down the principle, yet the ordinary laws dispositions provide for measures to be taken and the way the person rights should be respected.

Article 34/a of the Criminal Procedure Code (added by Law No. 35/2017) provides for the rights of the person under investigation or defendant such is: a) be informed in a shortest time possible in a language he understands, on the charge for which he is investigated as well as the grounds of the charges; b) use the language he speaks and understands or to use sign language as well as to be assisted by an interpreter, translator and facilitator in communication if his ability to



speak and hear is limited; c) to remain silent or to introduce his defence freely as well as the right not to respond to certain questions; ç) provide defence by himself or with the help of a defence lawyer elected by him; d) have a defence lawyer provided by the state if the defence lawyer is mandatory or he cannot afford one, pursuant to the provisions of this Code and the legislation into force on legal aid; dh) meet in private and to communicate with a defence lawyer representing him; e) have adequate time and facilities for the preparation of his defence; ë) right to access to the material of the case pursuant to the provisions of this Code; f) submit evidence supporting his defence; g) question witnesses, experts and other defendants during the trial; h) enjoy the other rights provided for in this Code.

Article 34/b of the Code (also added by Law No. 35/2017) provides for the rights of arrested or detained person. According to this disposition the arrested or detained person, in addition to the rights provided for in Article 34/a of the Code, shall be entitled: to have a confidential meeting with his lawyer, before being questioned for the first time; to access the acts, necessary evidence and the grounds for his arrest or detention; to request a family member or another relative to be notified immediately about his arrest; to be promptly provided with the necessary medical care.

This new added dispositions provide for the obligation of the proceeding authority to notify the arrested or detained person about his rights, providing him the letter of the rights in writing, duly signed by him. The letter of the rights is a new concept in this Code and it didn't existed before these changes of 2017. The aim of these provisions is to duly inform the persons involved in a criminal procedure of their rights.

In the case of a person deprived of liberty under Article 27/2/c of the Constitution, so when there are reasonable suspicions that he has committed a criminal offense, Article 28 provides a time limit of 48-hours to be sent before a judge, who shall decide upon his pretrial detention or release not later than 48 hours from the moment he receives the documents for review. In case of failure to comply with this time limit, the person should be released immediately and the measure will lose its power. According to Article 249 of the Code when the decision



is not announced or enforced within the set time limit, the act based on which the coercive precautionary measure has been issued becomes void.

This Article of the Code provides for the specific time limits for the review of such restrictive measures. In the case of personal precautionary measures, even in case of appeal in higher courts it is imperative for the process to be short, as the appeal is intended to verify the legality of the given measure. As in cases of criminal trial regarding the merit of the case, even in such cases, the standards guaranteeing the right to a fair trial should be respected. The criminal procedural provisions also provide for the possibility of revoking or replacing the precautionary personal measure if the conditions and criteria for their enforcement are missing, which are verified by the judge on a case-by-case basis.

Regarding the jurisprudence of the Constitutional Court it should be emphasized that since its previous competence before 2016, regarded only the right to a fair trial, there is no consolidated jurisprudence focused on the right to liberty and security and its constitutional aspect. Even in the context of abstract constitutional control, which is another very important competence of the Court, it has had no occasion to interpret the above constitutional provisions or to verify the compliance with Articles 27 and 28 of the Constitution of ordinary law dispositions. Regarding the individual rights, the Court lately changed its jurisprudence regarding the trial in absentia and the reopening of criminal proceedings, as a consequence of the European Court's judgements about Albania. Even in these cases these cases were decided on the light of the right to a fair trial.

Regarding the judicial decisions for the application of a precautionary measure, the Court initially considered these types of decisions as non-final judgments, stating that they cannot be object of a constitutional complaint since the individual had not a final decision on the essence of the right, a decision about his being guilty or not. In 2011 the Court changed its previous position, evaluating that although preliminary proceedings, such as those relating to the application of a precautionary measure, are normally not considered final for individual rights and obligations, in some cases it should be made an exception when the nature of the decision so requires. It considered that the control of



the alleged violations in relation to these proceedings is part of its jurisdiction. This decision is considered to be a very important one in defining the Court's jurisdiction and in relation to its attempts to enlarge the defense of individual rights.

In 2017, the Court reviewed a complaint challenging the judicial decisions that allowed the extradition of an Albanian citizen in Italy, in order to execute a final criminal decision given in that state and for the execution of a security measure of prison detention. In this case, the first instance court ruled that the admissibility of extradition should be permitted only for the execution of the final decision, but not on security measure, with the argument that there were no guaranties for respecting the right of defence because of the proceedings in absentia.

The appeal court changed the first court's decision by permitting the extradition for all the prosecution requests. The High Court in the counseling chamber ruled that the appeal didn't comply with the admissibility criteria and it should be not admitted.

The applicant claimed by a constitution complaint to the Constitutional Court the violation of the constitutional principle of the application of the favorable criminal law and the principle of specialty under the European Convention on Extradition. By its decision of 2017, the Court analyzed the content of Articles 27 and 29 of the Constitution as well as Article 5 of the European Convention on Human Rights and the case law of the European Court of Human Rights on the guarantees offered by Articles 5 and 6 of the Convention. However, even in this case, the Court examined the applicant's claims in the light of the right of access to court, as an element of the fair trial right.

The Court stated that the principle of the retroactive effect of the favorable criminal law, sanctioned in Article 29 of the Constitution, is a fundamental principle that concerns the essence of a fair criminal process and as such, it is important for respecting the constitutional right to a fair trial. The Court also emphasized its position regarding the competences of the High Court, which due to its position and role as a court of law has the duty and obligation to control the application of material and procedural law by lower courts. Referring to the nature of the constitutional judgments of individual constitutional complaints,



the control of respecting constitutional standards of a fair trial is also a function of ordinary courts, especially of the High Court. Regarding the decisions given by the High Court in the counseling chamber (or closed session) and referring to the nature of the constitutional judgment of individual complaints, the Court has stated that only when there are claims on the violation of the fundamental principles of the judicial process, and when these claims are reflected in the case materials, the decision of the High Court on the admissibility can raise some questions for the respect of a fair trial right.

Based on these standards, in this specific case, the Court decided that the complaints of the applicant were of constitutional nature and were related with the application of constitutional and procedural guarantees and that these violations brought to the worsening of applicants position by violating his right to liberty. The Court considered that the High Court had to examine and pronounce on these complaints because of its controlling role and based on the principle of subsidiary. Consequently, she decided to accept the complaint, to repeal the decision of the High Court and to send the case for reconsideration to the High Court.

Hoping that our presentation was interesting and useful for the purposes of this activity we thank you for your attention!

**THE ROLE OF THE
CONSTITUTIONAL COURT IN
PROTECTING HUMAN RIGHTS
AND FREEDOMS**

Faig AHMEDOV

**CONCEPT OF THE RIGHT TO
FREEDOM AND PERSONAL
INVIOABILITY**

Fidan KHUDIYEVA

**CONSTITUTIONAL COURT OF
AZERBAIJAN**



CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN

THE ROLE OF THE CONSTITUTIONAL COURT IN PROTECTING HUMAN RIGHTS AND FREEDOMS

*Mr. Faig AHMEDOV**

Existing within the framework of increased global risks, modern society values security more and more every year. Under the influence of such factors as terrorism, extremism and international crime, security is becoming increasingly important. By virtue of this, for ensuring security, the governments of many states are ready to refuse even such a value as liberty of person.

The state plays a significant role in safeguarding of people. Due to the fact that the state is responsible for ensuring security of citizens, it also determines to what extent it is worth restricting liberty for security. The mere fact that appearance of the state for security is fraught with the restriction of liberty of person.

Any society strives to be protected and most people place safety and sustainability above individual liberty.

The Preamble to the United Nations Universal Declaration of Human Rights of the General Assembly dated December 10, 1948, states that the foundation of freedom is the recognition of dignity of all members of the human family and of the equal and inalienable rights, including the right to security.

Liberty and security are not mutually exclusive, but complementary, mutually reinforcing concepts. In 1748, in his work *"The Spirit of the Laws"* Charles de Montesquieu wrote: *"Security is the first form of freedom."*

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Approaching to the Constitution of the Republic of Azerbaijan, it can be noted that the right to life, the fundamental human right and freedoms, is the highest value, and the state guarantees the protection of the rights and freedoms of any person.

The concept of the constitutional system of the Republic of Azerbaijan is based on the idea of natural and inalienable rights and freedoms of a man and citizen. On this basis, the Constitution of the Republic of Azerbaijan establishes an integrated system of principles of constitutional system.

Protection of rights and freedoms of person is carried out by the Constitution, which defines and enshrines the principles of these rights and freedoms, establishes a mechanism for their guarantee.

The rights and freedoms of a man and citizen listed in the Constitution of the Republic of Azerbaijan, are applied according to international treaties which the Republic of Azerbaijan is a party to. To respect and protect the rights and freedoms of a man and citizen, enshrined in the Constitution, is the responsibility of the legislative, executive and judicial authorities.

According to the Constitution of the Republic of Azerbaijan, everyone has the right to liberty and security of person. The right to liberty is nothing but liberty itself, that is, the ability to commit any lawful actions. The security of person, which extends to his life, health, honour, dignity, is inextricably linked with it.

Restrictions on this liberty are allowed only by law and only to the extent necessary to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of others, to ensure national defence and state security.

One such restriction is the possibility of detaining a suspect or accused person. One of the conditions was the establishment of such an important guarantee of liberty and personal security as the judicial procedure for arrest, custody and detention.

In Paragraph 1 of Article 41 of the Criminal Code of the Republic of Azerbaijan, punishment is defined as a measure of public enforcement appointed on a decision of court. Punishment shall apply to the



person recognized as guilty in commitment of a crime and consists of the deprivations established by the Criminal Code or restrictions of rights and freedoms of this person.

Punishment is a measure of public enforcement. First of all, punishment is coercion, its purpose and execution is carried out contrary to the will of the convict. Punishment is always imposed on behalf of the state and is public in nature, expresses the official censure of the offender and his actions. Punishment is public enforcement, its purpose and execution is the exclusive prerogative of authorized state bodies.

As a result of amendments to the Constitution by referendum, in order to restore the violated human rights and freedoms, everyone (including the courts and the Commissioner for Human Rights (Ombudsman)) are awarded the right to appeal the regulatory legal acts of the legislative and executive authorities, municipal and judicial acts that violate his rights and freedoms. Thus, the applicants for a constitutional complaint found a more effective mechanism for protecting and restoring their rights, and Constitutional Court was given the opportunity to participate more actively in the regulation of public relations related to human rights. Attention is drawn to the fact that the expression 'everyone' provided for in Paragraph V of Article 130 of the Constitution has fixed the possibility of applying to the Constitutional Court not only for citizens of the Republic of Azerbaijan, but also for foreigners and stateless persons. It should be noted that this approach is inherent in a very progressive and only legal state. During the period of the Constitutional Court's activity, direct complaints are also submitted to our Court by foreign citizens; these complaints are studied within the framework of the powers granted by law, the result is the adoption of relevant decisions.

Analyzing the activities of the Constitutional Court, it should be noted that of the 374 decisions adopted by the Plenum, 347 were aimed at protecting human rights and freedoms.

In one of its decisions, having examined the appeal of the Baku Court of Appeal on the interpretation of the relevant articles of the Criminal Procedure Code, the Constitutional Court established that,



when considering the issue of choosing an arrest as a preventive measure, the court has the right to replace the arrest with house arrest if there is a petition from the defence and if it comes to the decision that there is no need to isolate the accused person from society by way of his detention.

Moreover, the Constitutional Court 'deduced' the principle of proportionality from the rule of law principle. The Plenum of the Constitutional Court noted in its Decision that for the correct interpretation of the legislative norm, it is necessary to take into account the principle of proportionality, which is an integral part of the rule of law. According to the principle of proportionality, measures providing for any interference with the legal status of an individual or legal entity must be proportionate to the legitimate goals pursued by administrative authorities and must be necessary and applicable to achieve this in terms of their content, place, time and scope of persons which are covered.

The principle of proportionality must meet the criteria of conformity, necessity and applicability. According to the conformity criterion, any measure restricting the rights and freedoms of an individual or legal entity must comply with the achievement of the goal envisaged by the administrative body.

Decisions of the Constitutional Court have a significant impact on the constitutional and legal regulation of the development of the state and society, as well as legislation according to constitutional values and principles. The decisions of the Constitutional Court form important legal positions taking into account the foundations of the Constitution, its supremacy and direct force, the provisions of international treaties which the Republic of Azerbaijan is a party to, as well as the principle of priority of human rights and freedoms. Certainly, the great legal force of the Decision of the Constitutional Court extends to all its parts, including legal positions; in some cases, these legal positions acquire independent significance. The strength of the legal positions of the Constitutional Court is equal to the legal force of its decisions and is of a general nature, therefore it applies not only to the circumstance constituting the subject of the constitutional



case, but also, as a source of law, to similar circumstances encountered in law enforcement practice, and in this sense, these decisions act as an important source not only for the courts, but also for law enforcement agencies.

One of the latest decisions adopted by the Plenum of the Constitutional Court is the Decision on Verification of conformity of Article 448.5 of the Criminal Procedure Code of the Republic of Azerbaijan with the Constitution. According to this article, after announcing a court decision to reject the adoption of a preventive measure as an arrest or to extend the term of detention, the prosecutor raises an objection to the court of appeal, at which time the judge temporarily decides to appoint a house arrest or to detain the accused for a term of 7 days.

In this Decision, taking into account the fact that the issues raised in the request of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan are of importance for formation of a single judicial practice and are aimed at ensuring the rights and freedoms of a man and citizen, the Plenum of the Constitutional Court came to the conclusion that this article of the Criminal Procedure Code is inconsistent to the Constitution of the Republic of Azerbaijan.

Thus, constitutional human rights and freedoms need to be protected. The guarantee of their compliance is the norms of the Basic Law, which, according to their content, are implemented in practice.



CONCEPT OF THE RIGHT TO FREEDOM AND PERSONAL INVIOABILITY

*Fidan KHUDIYEVA**

The modern society existing within the increased global risks appreciates safety above and above every year. Under the influence of such factors as terrorism, extremism and the international crime, the ensuring of safety acquires the increasing relevance. Therefore, governments of many states are ready to refuse even such a value as personal freedom for the sake of safety.

The significant role in protection of safety of people is played by the state. As the state is engaged in guarantee of safety of citizens, it also defines in what measure it is worth to restrict freedom for the sake of safety. Emergence of the state in itself for the sake of safety is accompanied by restriction of human freedom.

Any society seeks to be protected and most of people put safety and stability above individual freedom.

According to the Constitution of the Republic of Azerbaijan, everyone, as from the moment of birth, enjoys inviolable and inalienable rights and freedoms. Rights and freedoms shall also include the responsibilities and duties of everyone to the society and to other persons. Abuse of rights is not allowed.

Within understanding of personal inviolability there is also a modern practice of the constitutional justice. The constitutional right on freedom and personal inviolability means that the person can't be imprisoned and taken into custody on an arbitrariness of the power. The right to freedom includes, in particular, the right not to be exposed to restrictions which are connected with application of

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such coercive measures as detention, arrest, taking into custody or imprisonment in all other forms, without the bases provided by the law, the sanction of court or competent officials and also over the established or controlled terms. At the same time being inalienable and belonging to everyone from the birth, the right to freedom can be legally limited at arrest, imprisonment and detention.

Freedom is a fundamental condition of realization of many human rights which all have to use. Its deprivation can have a direct adverse effect on use of many other rights, such as right to inviolability of private life, home, right to freedom of movement. Deprivation of freedom invariably puts the person in an extremely vulnerable position, perhaps, dooming to risk to be subjected to tortures, inhuman and degrading treatments. In this sense personal inviolability as a guarantee from arbitrary restriction of freedom, to a certain extent, is directed to protection of the specified rights.

Personal inviolability is the important social benefit assuming lack of illegal violence or threat of violence over the person and giving confidence, tranquility, possibilities of participation in all spheres of social being.

According to the Constitution of the Republic of Azerbaijan, the right to life – a fundamental human right – and freedom is the supreme value, and the state guarantees protection of the rights and freedoms of everyone. Everyone lawfully present within the territory of the Republic of Azerbaijan may freely move, choose the place of residence and leave the territory of the Republic of Azerbaijan. A citizen of the Republic of Azerbaijan has the right to freely return to his/her country whenever he/she so desires.

The idea of the natural and inalienable rights and freedoms of the person and citizen is the basis for the concept of the constitutional system of the Republic of Azerbaijan. The complete system of the principles of the constitutional system is installed on such basis in the Constitution of the Republic of Azerbaijan.

Protection of the personal rights and freedoms is carried out by the Constitution which defines and establishes the principles of these rights and freedoms, establishes the mechanism of their guaranteeing.



The rights and freedoms of the man and the citizen listed in the Constitution of the Republic of Azerbaijan are applied according to international treaties which participant is the Republic of Azerbaijan. To observe and to protect the rights and freedoms of the man and the citizen enshrined in the Constitution is an obligation of bodies of the legislative, executive and judicial authorities.

In the third Chapter of the II Section of the Constitution of the Republic of Azerbaijan it is specified that the rights to safety (the right for life – fundamental human right) and freedom are the supreme value, and they have to be protected. These provisions of the Basic Law are firm.

According to the Constitution of the Republic of Azerbaijan everyone has the right to freedom and inviolability of private life. Everyone is entitled to protection against unlawful interference with his/her private or family life. The right to freedom is no other than freedom, in other words, an opportunity to make any lawful actions. In indissoluble communication with it there is a personal inviolability of man which extends to his life, health, honor, advantage.

Restrictions of freedom are allowed only by the law and only in that measure which it is necessary for protection of bases of the constitutional system, morality, health, the rights and legitimate interests of other persons, ensuring defense of the country and safety of the state.

The possibility of detention of the suspected or defendant acts as one of such restrictions. Establishment of such important guarantee of freedom and personal inviolability as a legal process of arrest, imprisonment and detention became one of conditions.

In paragraph 1 of Article 41 of the Criminal Code of the Republic of Azerbaijan punishment is defined as the measure of the state coercion appointed according to the court verdict. Punishment is applied to the person found guilty of commission of crime and consists in the deprivation or restriction of the rights and freedoms of this person provided by the Criminal Code.

First of all, punishment is a measure of the state coercion, its appointment and execution is carried out contrary to will of the



convicted. Sentence is always imposed on behalf of the state and has public character, expresses official censure of the criminal and his act. Appointment of punishment and its execution is an exclusive prerogative of the state bodies authorized on that.

Finally, I would like to note that constitutional rights and freedoms of the person need protection. Standards of the Basic Law which according to their contents are implemented in practice, serve as a guarantee of their observance.

***THE RIGHT TO LIBERTY AND
SECURITY THE CONSTITUTIONAL
SECURITY AS A SOURCE OF
PROTECTION OF THE RIGHTS AND
FREEDOMS OF THE INDIVIDUAL***

***Viktoria MINGOVA
CONSTITUTIONAL COURT OF
BULGARIA***



THE RIGHT TO LIBERTY AND SECURITY THE CONSTITUTIONAL SECURITY AS A SOURCE OF PROTECTION OF THE RIGHTS AND FREEDOMS OF THE INDIVIDUAL

*Viktoria MINGOVA**

Distinguished Hosts,

Dear colleagues and participants,

First of all, I would like to thank the Constitutional Court of Turkey and the Association of Asian Constitutional Courts and Equivalent institutions for its kind invitation. I am particularly pleased to be here with you today. I look forward to the results of this esteemed summer school. We are entering an era when constitutional law has become a global matter. The problems that arise in our different countries are similar. And we find similar solutions, even when our history, culture, institutions and legal organisation are different. This is why it is especially important and useful to compare our experience.

The theme of my presentation is “The constitutional security as a source of protection of the rights and freedoms of the individual” in the context of the theme of the 6th Summer School program “The right to liberty and security”.

I. INTRODUCTION

Modern constitutionalism is based on the anthropocentric approach. Dignity of human being is the basic value of State and society. The principle of liberty of the individual clearly results from human dignity. Liberty is inherent in the position of the individual by birth and it's guaranteed by the Constitution. On the other hand the public interest which directly or indirectly serve the human being

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can restrict liberty. However, liberty is the principle and restriction of liberty is the exception which must be legitimized.

Security is a highly important public interest which can conflict with liberty. The question arises to which degree liberty can be restricted for the protection of security. In this regard, it is very important to understand the modern foundations of the constitutional security as a source of the right to liberty and after all, as a source of protection of all the rights and freedoms of the individual.

II. CONSTITUTIONAL SECURITY

Security has been one of the most important political topics throughout the world in the last years. Every new terrorist action is communicated by mass media around the world, threatening and frightening people. These events lead to new political discussions as well as new legal consequences. Thus, security legitimizes various legal measures: fighting against terrorism, waging wars, limiting civil rights, collecting personal data, establishing new ways of international co-operation and so on. An end to these developments is not foreseeable. Security seems to limit constitutional guarantees. The migration and spread of anti-constitutional ideas are part of this process¹. In such conditions, the main constitutional problem faced by a country is to resolve the conflict between the obligation to guarantee the protection of human rights, civil rights and freedoms and the need to protect society as a whole against such threats.

The approach in this paper is designed the other way round: Not security but the Constitution shall be the starting and finishing point. The aim is to develop constitutional criteria to balance and limit the increasing importance of security in the constitutional design.

The Constitution is the backbone of a modern democratic society, reflecting the ideals of the rule of law and respect for fundamental human rights and freedoms.

The current situation of any democratic state in the world is

¹ Kim Lane Scheppele, *The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency*, in: Choudhry (ed.), *The Migration of Constitutional Ideas* 347-373 (2006).

characterized by the search for ways to strengthen constitutional security, conduct a comprehensive research on various aspects of its provision. After all, the constitutional security shall be considered as a necessary condition for safe and sustainable development of the entire social and legal system of the state. Even more, the constitutional security shall be considered as a main principle.

A. The traditional understanding of security

The traditional understanding of security as defence against threats from primarily private actors who deliberately peril the security of constitutional institutions (national security) as well as the constitutional guarantee of fundamental and human rights, like the right to life, as well as the right to respect the physical and informational integrity of people (security of the individual), a certain amount of this kind of security is a prerequisite for all constitutions².

Universal Declaration on Human Rights establishes that everyone has the right to life, liberty and security of person (Article 3), right to social security as a member of society (Article 22) and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

European Convention on Human Rights (ECHR) uses terms “security of person” and “national security”. Article 5 of ECHR introduces a rule that “everyone has the right to liberty and security of person”. The Convention introduces national security as a criterion for limit the right to fair trial, freedom of thought, conscience and religion and freedom of movement.

The Preamble of the Constitution of the Republic of Bulgaria pledges loyalty to the universal human values: liberty, peace, humanism, equality, justice and tolerance. The Constitution holds in the Preamble “as the highest principle the rights, dignity and security of the individual”. In the same part it proclaims “democratic and social state, governed by the rule of law” and that’s why I think Bulgarian constitutional legislator understands security as a

² Dr. Konrad Lachmayer works as research assistant and lecturer at the University of Vienna Law School, Austria.



constitutional principle. The Constitution of the Republic of Bulgaria also uses terms “security”, “national security” and “social security”. Article 30, Para. 1 of Constitution introduces a rule that “Everyone shall have the right to personal liberty and inviolability.” All the rights proclaimed in the Constitution can be restricted only by legislative statute, for protection of national security, public health, and the rights and freedoms of other citizens.

B. *The constitutional principle of “legal security”*

Nowadays the idea of legal security extends its influence in the sense of rule of law, constitutionalism and social state. It has become a “principle inspiring the entire legal system”. Security is formal justice and material justice is liberty.

Contemporary legislator balances duties and freedoms taking into account the principle of legal security. Law-making process organises freedom in society, social security and the stability of the law system. The conception of a generic legislation, unification of the sovereign, codification in law are the normative basis of legal security.

Security as a principle means that the constitutional system (with regard to the constitutional norms, the constitutional jurisdiction and the acting of constitutionally authorized institutions) allocates security a new and stronger constitutional dimension and in this way equal to other constitutional principles. Security also changes within the constitutional context. While the traditional understanding of security was only guaranteed as a minimum requirement of constitutional law and constitution has limited security, the constitutional status of security changes towards an orientation of constitution with security as an important objective. Thus, security becomes a main principle which constitutes the norm and legitimation for the legislator.

Security concerns every aspect of the organisation of society and every fundamental right of citizens. It could be seen from objective point of view in relation with society systems – political system, legal system and even moral system. That’s the reason that under discussions are the notions of international security, regional security and national security. The organisational aspect is the main content of the security in terms of effectiveness. Legal security guarantees



effectiveness of the normative function of the entire legal system – systematisation and stability of legal order.

Law-making process forms the political decisions in legal norms. Effectiveness of legal system depends on the level of implementation of the principles of legislation. On that level legal security contains fulfilment of the obligation to justify legal norm as a part of social and legal system.

III. JUDGMENTS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BULGARIA

The Constitutional Court's interpretative work defines the constitutional principles' substance and the scope, and also the criteria to be met if the legislation is to be seen as consistent with the fundamental constitutional principles.

According to Art. 4, Para. 1: *"The Republic of Bulgaria shall be a law-governed state. It shall be governed by the Constitution and the laws of the country."* The Constitutional Court's jurisprudence clarifies the content, purpose and meaning of this principle and shares the understanding of the state committed to the rule of law as inclusive of the principle of legal security and of the principle of substantive justice.

Three Constitutional Court's decisions are about the interpretation of the principle of the state committed to the rule of law and illustrate the importance of the Constitutional Court's acts for the definition of constitutional principles:

Decision No. 1 of 27 January 2005 on Constitutional Case No. 8/2004

"The Court believes there is no need to enumerate all elements and forms of materialization of the law-governed state which is a dynamic concept and this in turn explains why the modern constitutions do not have a positive law definition. Historically the substance of the concept was formed by ideas and civilization standards for building a society where man will be paramount. In different periods of history that substance was dominated by various components. The result is that the principle of the state committed to the rule of law as a guiding



concept in the modern constitution-governed state has substance that evolved throughout history and a dynamic, value-bound and composite nature."

"Today the European legal area broadly shares the understanding of the state committed to the rule of law as inclusive of the principle of legal security (the formal element) and of the principle of substantive justice (the substantive element). These key characteristics of the state committed to the rule of law materialize as guiding axioms in the different branches of existing legislation. "The sum of formal and substantive elements gives the polyvalent substance of the constitutional principle and highlights its specifics. A state committed to the rule of law stands for the exercise of public power on the basis of the constitution, within the confines of the laws that substantively and formally comply with the constitution and that have been passed to maintain human dignity and to bring about liberty, justice and legal security."

"Competition is possible as is even a conflict between individual components as for any of the components to be applicable guarantees should be provided that the components will be applied. Most frequently such tension is observed between the postulate of legal security and the requirement that justice should prevail, especially in periods of transition and also when dynamic legislation is in place."

Decision No. 2 of 4 February 2014 on Constitutional Case No. 3/2013

The Constitutional Court ruled thus: "The Constitution defines the Bulgarian State as a state committed to the rule of law. Abidance by the Constitution and by the laws is the core of any state committed to the rule of law. The laws shall express the Constitution-proclaimed principles and put forward fair and socially justified solutions within the framework of the matter that they treat. The rule of Art. 4, Para. 1 of the Constitution is the underlying principle of constitutional order and the basis on which all relations within a society are legitimately regulated whereas the concept of the state committed to the rule of law undoubtedly poses the requirement that the bodies and their functions and interrelations should be clearly and precisely defined (Decision No. 17/1997 on Constitutional Case No. 10/1997; Decision No.



13/2010 on Constitutional Case No. 12/2010)."

"The deficiency of the law and the contradictions between its provisions violate the principle that Art. 4, Para. 1 of the Constitution sets forth. This constitutional principle could be complied with only if the provisions of statutory legislation are unambiguous, precise and uncontroversial. Otherwise they would be unfit to regulate the essential relations within society (Decision No. 9/1994 on Constitutional Case No. 11/1994; Decision No. 5/2002 on Constitutional Case No. 5/2002; Decision No. 4/2010 on Constitutional Case No. 1/2010; Decision No. 8/2012 on Constitutional Case No. 16/2011)."

Decision No. 10 of 3 December 2009 on Constitutional Case No. 12/2009

"The Constitutional Court ruled thus: "Naturally the Constitution does not give an exhaustive and systematically knit catalogue of the different aspects that the legislating process in a state committed to the rule of law shall respect. Yet these aspects can be inferred from the logic and the set of principles that the Constitution stands upon. The principle of the state committed to the rule of law makes it binding on the legislating authority to be consistent and predictable and to prevent the passage of pieces of legislation that contradict each other (Decision No. 5/2000 on Constitutional Case No. 4/2000; Decision No. 9/1994 on Constitutional Case No. 11/1994). The pieces of legislation that the legislating authority passes shall guarantee legal security, including the respect for rights that individuals and corporate entities have acquired under the law while the legislating authority shall abstain from amendments that are beneficial to the State but detrimental to the individuals and corporate entities (Decision No. 7/2001 on Constitutional Case No. 1/2001). In a state committed to the rule of law the legislating authority shall draft pieces of legislation that are in tune with the rightful interest (see the Preamble of the Constitution and Decision No. 1/2005 on Constitutional Case No. 8/2004) within the model that the Constitution sets rather than bring in restrictions and privileges incidentally or haphazardly or grant privileges and rights that cannot materialize. And finally, in a state committed to the rule of law such cases must be treated in a way which is one and the same for all rather



than let differentiation in the pieces of legislation on the basis of criteria that are non-inherent to the Constitution."

IV. CONCLUSION

The relevance of security in the constitutional design is changing. The contemporary constitutional developments show a shift from security as a constitutional condition to security as a constitutional principle.

From the point of view of individuals and their rights as citizens (subjective aspect) legal security guarantee human rights in the sense of human and social security. It's more than a fundamental right – it's a human right principle (a security right principle).

Legal security is a principle that generates systematisation and stability of legal order and guarantee human rights in the sense of human and social security through law-making and justice.

However, the establishing of security as a constitutional principle has to meet constitutional minimums of transparency, proportionality, responsibility and effective legal protections. Without the effective guarantee of these aspects constitutional law – within its core ideas – is not sustainable. The internationalization and increasing interrelations of constitutional law within an international constitutional network is a chance and a risk to this constitutional challenge. If "war on terror" is also a "war on ideas"³, it will be important to know, which (constitutional) ideas are more important than others.

3 Dominic McGoldrick, *From '9-11' to the 'Iraq-War 2003'*. International Law in an Age of Complexity 196s (2004).

*THE RIGHT TO LIBERTY AND
SECURITY*

Fawaz SAYEMEH

*THE SUPREME CONSTITUTIONAL
COURT OF PALESTINE*



THE RIGHT TO LIBERTY AND SECURITY

*Fawaz SAYEMEH**

We convey to you a Palestinian Jerusalemite greeting from the steadfast people of the land of the heavenly messages and the homeland of love and land of Al-Aqsa and the Resurrection. As well as from the President of the Supreme Constitutional Court in Palestine, and from its advisers, the secretary-general and staff. We convey to you the warmest greetings and best regards, hoping to host you in Palestine and in the heart of its capital Jerusalem which will be liberated from the Israeli occupation. We extend to the Republic of Turkey, the Turkish Constitutional Court and those in charge of the summer school, many thanks for hosting us and for the wonderful effort in the organization and for the good and warm reception, and we wish you a successful continuation.

The main address of this presentation is **“The right to Liberty and Security”**.

As you all know the Palestinian situation, which is still practically under the longest and ugliest occupation in contemporary history despite international laws and treaties signed decades ago to end it. However, the Israeli entity continues to dominate the law and control the rest of the land for the establishment of illegal and internationally condemned settlements. This has resulted in the separation of the country geographically and turned it into non-connected areas, which makes the movement from one area to another dangerous in addition to obstructions of the occupation of Israeli soldiers. The insecurity from the settlers and the inability to reach one’s own living area in many times cause great difficulties. The occupation controls all the crossings leading to Palestine by land, sea and air in term of living

* Judge of the Supreme Constitutional Court of Palestine.



and security. To the legal point of view, the Palestinian citizens are not governed by a single law, but by mixed laws imposed by successive administrations. There are applicable provisions of Palestine, Turkish and Ottoman laws dating back to before the Palestinian National Authority, which is represented by Israeli military orders, in the field of land and the legal procedure. Further, Egyptian laws in the Gaza Strip and Jordan laws in the West Bank are applicable, and Israeli military orders are imposed by the occupation. Finally, national laws have been enacted since the Palestinian National Authority (PNA) took control of internal affairs in the areas it controls.

Overview of the Supreme Constitutional Court and its law:

The amended Basic Law of 2003 regulates all matters related to the judiciary in terms of the composition of the courts. Article 103 of the law stipulates:

1. A High Constitutional Court shall be established by law to consider:

A) Constitutionality of laws, regulations, and other enacted rules.

B) The interpretation of the Basic Law and legislation.

C) Settlement of jurisdictional disputes which might arise between the judicial entities and the administrative entities having judicial jurisdiction.

2. The law shall specify the method of forming the Supreme Constitutional Court and the procedures to be followed and the consequences of its rulings. In order for the laws to be under constitutional control and clarify the jurisdiction of the Constitutional Court, the Basic Law addressed this in Article 104 of the Constitution, which states *"The Supreme Court shall temporarily assume all duties assigned to administrative courts and to the High Constitutional Court..."* (Until the Constitutional Court is formed). On 17/2/2006, the Supreme Constitutional Court Law No. 3 of 2006 was approved, by virtue of which Article 5 of the present Court was established pursuant to Article 5 thereof, His Excellency the President issued a decree dated 31/3/2016 appointing the President and members of the Constitutional Court since the first formation of the court nearly two and a half years.



An amendment to the Law of the Supreme Constitutional Court was made on 2/10/ 2017 by Decree-Law No. 19 of 2017. The most important competencies of the Court are stipulated in Article 24 of its Law: Constitutional supervision and control on the laws and regulations.

The law also clarifies the constitutional control in Article 27, which stipulates the mechanism of the court's connection with the cases and requests to:

- A. Direct action.
- B. Referral.
- C. Plea of unconstitutionality.
- D. Challenge.

This was a brief overview of the Supreme Constitutional Court.

Returning to the main title **"the right to liberty and security"**, which may be is a simple in words, but the subject I believe is too large to be duly covered here in this session due its enormous importance. The right to liberty and security is one of the most important human rights guaranteed and enshrined in all heavenly laws and religious teachings as well as by international conventions. It has been defined by treaties to which most of the world's States have acceded and which have been concerned and protected by the constitutions and fundamental laws of all the world's nations. Regarding to Palestine, despite its uniqueness regarding security, geographic, social and economic situation, and its control under the Israeli occupation, the Palestinian National Authority, through its legal and legislative institutions, has paid a well-developed attention to the concept of rights, liberties and security. The Basic Law has defined a full chapter in its provisions due to the importance of protecting the citizen from any infringement of his rights, punishing those who violate these rights and even abolishing any measures that harm the rights of the citizen.

Section II of the Basic Law, entitled Public Rights and liberties, contains a set of articles which affirm, embody and protect their rights and provide a safe life. It emphasizes at the outset that the Palestinians are equal before the law and the judiciary, regardless of



race, sex, color, religion, Political opinion or disability. This creates a cohesive society in which Palestinians coexist with Christians and with the Samaritan in a building relation which based on respect and belonging.

Article 10 also states that: *“Basic human rights and liberties shall be protected and respected.”* Personal freedom is a natural right, and it shall be guaranteed that it is unlawful to arrest, restrict the freedom or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. No person shall be subject to any duress or torture, an accused person is considered innocent until proven guilty in a court of law. Punishment shall be personal, and it is unlawful to conduct any medical or scientific experiment on any person without prior legal consent. Article 18 also states that homes shall be inviolable; they may not be subject to surveillance, broken into or searched, except in accordance with a valid judicial order and in accordance with the provisions of the law. Freedom of belief, worship and the performance of religious functions are guaranteed. Article 19 stipulates: Freedom of opinion may not be prejudiced. In addition, Article 21 states that freedom of residence and movement, freedom of economic activity and private property shall be protected. Article 22 stipulate that the right to social, health, disability and retirement insurance shall be regulated by law, maintaining of families of martyrs, prisoners of war and the injured. Every citizen shall have the right to proper housing, and it shall secure housing for those who are without shelter according to Article 23. Article 25 stipulate: Every citizen shall have the right to work, education and to establish unions. One of the most important rights is enshrined in Article 26: to form, establish and join political parties in accordance with the law, to vote, to nominate for election and to hold public office and positions, in accordance with the principle of equal opportunities and freedom of media under the law. Article 30 stipulates that submitting a case to court is a protected and guaranteed right for all people. Each Palestinian shall have the right to seek redress in the judicial system. Laws may not contain any provisions that provide immunity to any administrative decision or action or against judicial review. Article 30 stipulates that an independent commission for human rights shall be established pursuant to a law



that will specify its formation, duties and jurisdiction so as to ensure that any violation of any citizen's rights guaranteed by the Basic Law and other national laws is monitored.

This quick reference to a summary of the rights stipulated in the Basic Law illustrates the legal development sought by the Palestinian National Authority in the field of asserting and protecting the rights of the individual, both in accordance with the Basic Law and legislation.

Wherever there is liberty there is security, and wherever there is security there is liberty. An individual cannot exercise and enjoy his liberty if there is no security through which he can exercise daily life. In addition, the availability of security constitutes a natural and appropriate environment for the enjoyment of liberty and a human sense of rights and liberties. Any human being who lives without his rights, liberties and security, feels alienated within his homeland and his social and political effectiveness are diminished.

Before addressing the role of the Constitutional Court in Palestine, it should be noted that the Palestinian Basic Law (Constitution) constitutes a fundamental guarantee for the protection of the rights and liberties of the Palestinian citizen. This guarantee can only be achieved by the existence of a body that works to protect it, which is either a constitutional court or a constitutional council. The constitution was set to achieve two goals: First, to organize the country's structure, the distribution of competencies among its institutions and the separation of powers. Second, to guarantee the rights and liberties of individuals through compliance with this regulation and distribution. The Constitution is the basic guarantor of the liberties and rights of citizens. The Constitutional Judge plays an important and significant role in protecting the liberties and rights of the citizen, especially the personal liberties such as liberty of movement, right to life and liberty of opinion, etc.

In this regard, we emphasize that the Supreme Constitutional Court in Palestine, despite the fact that it was recently established, has exercised its control through appeals and requests for interpretation in the protection of the right to liberty in its broad concept of individual and community. It issued rulings confirming the protection of



individuals against restriction of their liberties. In the decision of the appeal No. 7/2017, it decided that article 167 and article 170 of the Customs and Excise Act No. 1 of 1962 were unconstitutional. Since the panel consisted of two members of the executive and a judge, the Court ruled that it was contrary to the guarantees of a fair trial which require that the court be composed of judges, which is inhered in the rights of litigants, especially since the adversary was from the executive power.

The appeal decision No. 5/2017 also issued a ruling of unconstitutionality of Article 5/389 of the Penal Code No. 16 of 1960, which stipulates that: *"Whoever is found roaming in or near any property, in any road or public street, in a place adjacent to them, or in any other public place at a time and circumstances which concludes that he exists for an unlawful or improper purpose "* shall be punished by imprisonment for a period not exceeding three months and if repeated, shall be punished by imprisonment for a period not exceeding one year. In dealing with this case, the concern of the Constitutional court was protection of the citizen's right and freedom from the arrest or detention proceedings in the absence of suspicion of guilt based on legal evidence.

In another case relating to the right to equality and non-discrimination and the principle of equal opportunities, the Constitutional Court found Article 10 unconstitutional in its decision to appeal No. 8/2016 due to the amended bar training system because of the lack of the principle of equality between applicants to join the Bar Association and the basis of its decision to protect this right.

The Supreme Constitutional Court also affirmed in its decision of Constitutional Interpretation No. 5/2017 the respect of human rights and fundamental liberties and the consideration of international treaties and conventions on human rights within the ordinary legislations inside Palestine in addition to ordinary procedural requirements for legislation.

REASONABLE TIME IN DETENTION

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* *English translation of the original text is provided by the courtesy of the Directorate of International Relations of the Turkish Constitutional Court. It has no binding effect. Please consult the original text or its author if necessary.*



REASONABLE TIME IN DETENTION

Dr. Hüseyin TURAN*

I. INTRODUCTION

Detention is one of the prevention measures that are envisaged to reveal the material fact and to secure justice in criminal proceedings. The proposed purpose of the detention measure is, in fact, to indicate for what reasons this measure may be applied. Such reasons are set out in the Code of Criminal Procedure no. 5271 ("the CCP").

The right to liberty is amongst the fundamental human rights but may be restricted by virtue of detention measure. Therefore, initial detention and its continuation may be ordered only under the circumstances set forth in the law. These reasons are the risks of fleeing, and altering and destroying evidence. The reasons for continued detention must be demonstrated with the concrete facts. In cases where continued detention is ordered in the absence of such reasons, it is concluded that the detention is unjustified, which constitutes a breach of the right to personal liberty and security.

The individual applications lodged with the Constitutional Court ("the Court") for the complaints of unjustifiable detention orders are examined within the scope of Article 19 § 7 of the Constitution, which reads as follows: "*Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence.*" This article accordingly safeguards that the persons detained within the scope of criminal proceedings are entitled to request the completion of the proceedings within a reasonable time and release during investigation or prosecution¹.

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The right to personal liberty and security set forth in Article 5 § 3 of the European Convention on Human Rights (“the Convention”) is enshrined in Article 19 of the Constitution². When examining the complaints concerning detention beyond a reasonable time or the failure to order discontinuation of detention within a reasonable time, the Court takes into account the case-law established by the European Court of Human Rights (“the ECHR”) within the framework of Article 5 of the Convention where this issue is set forth.

Complaints lodged with the Court within the scope of individual application mechanism with the expressions that *“I have been/was detained for a long period. ...I have been in detention for a period of ... and the decisions ordering the continued detention are not justified and merely contain the repeated abstract and legal terms. My requests for release have always been rejected on the same grounds. The matters specified in my requests for release and set out in my petition for objection have never been addressed in decisions ordering continued detention. The detention orders lack relevant and sufficient reasoning.”* and similar expressions are examined by the Court under the heading of detention beyond a reasonable time or failure to order discontinuation of detention within a reasonable time pursuant to its *Tahir Canan* judgment³.

In cases where the applicant has been released within the scope of the proceedings conducted in respect of him or where the applicant has been convicted or acquitted after having lodged an application on the alleged violation of the right to personal liberty and security due to detention beyond reasonable time, his application is dismissed for non-exhaustion of the legal remedies in accordance with Article 141 of the CCP unless a 1-year period elapses as from the delivery of conviction or acquittal decision even if it is not final yet⁴. In brief, the Court does not make an examination as to the merits in such cases as Article 141 of the CCP sets forth that an action for compensation may

1 Tolga, ŞİRİN, *Özgürlük ve Güvenlik Hakkı, Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi- 1*, Council of Europe, 2018, p. 175.

2 Ulaş, KARAN, *Kişi Özgürlüğü ve Güvenliği Hakkı”, İnsan Hakları Avrupa Sözleşmesi ve Anayasa, Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme* (Edited by Sibel İnceoğlu), Council of Europe Publications, 1st Edition, Ankara 2013, Issue 202. p. 184.

3 *Tahir Canan*, no. 2012/969, 18 September 2013 § 16. For this one and the relevant judgments of the Turkish Constitutional Court, see <https://kararlarbilgibankasi.anayasa.gov.tr/Ara>.

4 *Erkam Abdurrahman Ak*, no. 2014/8515, 28 September 2016, §§ 60-61.

be filed in such cases. As required by the principle of subsidiarity, it is the trial courts to deliver a decision thereon in the first place. The purpose of lodging an individual application with the Court for the complaints of detention beyond a reasonable time is not only to receive compensation, but also and more importantly to ensure the delivery of a decision ordering release. In case of release, both the Court and, also in the actions to be brought under Article 141 of the CCP, the court of first instance will award compensation *ejusdem generis*. Where a trial court does not award compensation or awards compensation at a lower amount in an action which has been brought to that end, then the person concerned may be entitled to lodge another application with the Court on the allegations that the right to personal liberty and security has been violated.

In this presentation, the criteria that the Court uses regarding individual applications in examining the alleged detention beyond a reasonable time are discussed, thereby the ECHR's case-law in this context also being referred to.

II. DETERMINATION OF THE DETENTION PERIOD

In individual application mechanism, in order for the complaints on the allegation that the detention⁵ period has exceeded the reasonable time to be examined, the pre-condition sought in the first place is the timely lodging of the relevant application.⁶ An application must be lodged within 30 days following the dismissal of a request for release by the inferior court. However, where multiple requests were made and refused by the court, an application may be lodged pending the detention. Subsequently, it is important to determine the starting and ending dates of detention with a view to assessing whether the detention period was reasonable.

The detention period refers to the period that elapses between the time of arrest or custody or initial arrest and release or conviction

5 Detention refers to "*The imprisonment of a suspect or accused person by restricting his liberty by the order of a judge where there are facts indicating the existence of a strong criminal suspicion and a reason for detention.*" see Veli Özer, ÖZBEK, *Ceza Muhakemesi Hukuku*, Seçkin, 1st Edition, Ankara, October – 2006. p. 271.

6 For extensive information on the application period, see Hüseyin, TURAN, *Ceza Mahkemelerince Verilen Kararlar Bakımından Bireysel Başvuruda Başvuru Süresi*, Türkiye Adalet Akademisi Dergisi,, April 2014, Issue 17, Year 5, p. 111 et seq.



decision delivered by a court of first instance, which is also inferred from the detention period specified in Article 5 § 3 of the Convention.⁷ In other words, the period taken as a basis to determine whether the detention period is reasonable is the period elapsing from the actual restriction of a person's liberty to the date of the first instance decision as to the merits.⁸ Arrest, custody, or detention processes, which lead to the restriction of liberty, are to be conducted on the basis of a criminal charge. The Court considers the starting date of the detention period as the initial arrest and custody date of the applicant, or where his detention was ordered directly by a court, as the date of his detention. Where an arrest process leads to detention, the period is considered to have started by the time of arrest. The end of the period falls, as a rule, on the date when the person is released actually or when a verdict is delivered by a court of first instance. Where the applicant is still detained at the date when an examination as to the merits for his is conducted, then the detention period is established accordingly. As the applicant is detained "*based on a criminal charge*" between these periods, the reasonableness of the period in detention, is evaluated.⁹

Where, during the first instance proceedings, a court orders continued detention concurrently with its verdict, this decision may be undoubtedly appealed. Where the accused whose continued detention has been ordered appeals the decision and the prescribed time-limit of 30 days between the date of conviction decision and the date of individual application has been exceeded, the Court cannot render an inadmissibility decision for being out of time.¹⁰ An application is deemed to have been lodged in time provided that it is filed within 30 days as from the date when the person concerned becomes aware of the appellate decision; however, this period is not included in the detention period. Therefore, even where a court of first instance issues an order for continued detention along with its verdict, the termination of the detention period is considered as the verdict date, and the detention period does not extend to the conclusion of the appeal process.

7 KARAN, p. 202.

8 Durmuş, TEZCAN/ Mustafa Ruhan, ERDEM/Oğuz, SANCAKDAR, *Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu*, Seçkin, Ankara, 2002, p. 213.

9 Murat Narman, no. 2012/1137, 2 July 2013, § 66.

10 Mehmet Emin Kılıç, no. 2013/5267, 7 March 2013, § 28. TURAN, p. 134-136.

The continued restriction of liberty following the issuance of a conviction decision by the court of first instance is, however, not considered as a detention period. Where a person has been convicted by the first instance decision without being released, then his detention ends as at the date of conviction. That is because, the legal status of a person no more falls within the scope of *"being detained based on a criminal charge"*, but of *"imprisonment by virtue of a court decision"*. In terms of the individual application examination, this is required by the material difference between the reasons for detention and the reasons for ordering conviction. As a matter of fact, it is found established by the conviction decision that the imputed crime was committed by the perpetrator, and accordingly, the accused person is deprived of his liberty and/or sentenced to a fine. In consequence of conviction, the strong criminal suspicion and detention on remand based on a detention reason terminate. From this standpoint, the conviction decision does not necessarily become final. Accordingly, both the ECHR and the Court of Cassation do not qualify the imprisonment subsequent to conviction as detention. The ECHR considers the imprisonment of a suspect subsequent to his conviction by virtue of a first instance decision as *"imprisonment subsequent to conviction"*, namely as the execution of sentence, in accordance with Article 5 § 1 (a) and does not accordingly take this period into account in calculating the detention period.¹¹

In cases where the accused person appeals the conviction decision and he continues to be detained on remand pending appeal, this status does not change. That is because, the deprivation of an accused person of his liberty after having been convicted by a court of first instance then becomes a *"lawful restriction"* pursuant to Article 5 § 1 (a) of the Convention, which continues to be so until the final judgment rendered by the appeal authority. Where the conviction decision is upheld by the appeal court, then the decision becomes final and the accused person continues to be deprived of his liberty. However, where the conviction decision is quashed in consequence of an appellate review, then the accused person is once again considered to be a detainee within the meaning of Article 5 § 3 of the Convention. The period elapsing from the date of quashing judgment and the date when a decision ordering

¹¹ *Korcan Pulatsü*, no. 2012/726, 2 July 2013, § 33.



release is taken or a new verdict is reached during the retrial to be conducted following the quashing judgment will also be included in the detention period which has been already determined prior to the verdict.¹² Following the determination of detention period, the reasonableness of such a period will be assessed.¹³ It is the same also for the proceedings conducted by regional courts of appeal operating since 20 July 2016. If the verdict is not quashed at the end of the review by the regional courts of appeal, the person will then continue to be imprisoned based on a decision. However, the Court has so far not issued a judgment in connection therewith.

Neither the ECHR nor the Court has so far envisaged any upper limit for detention period. Furthermore, no abstract assessment has been made as to the reasonableness of detention period. Avoidance of establishing a certain detention period is a requirement of presumption of innocence. The ECHR does not construe Article 5 § 3 of the Convention, whereby the detainee's right to be tried within reasonable time or released during judicial investigation is guaranteed, as a requirement for setting a certain detention period, but considers the particular circumstances of every concrete case¹⁴. Therefore, the Convention does not require the High Contracting Parties to set a time-limit for detention within their legal systems. If a state has established a maximum time-limit for detention under its own procedural laws, then the period so envisaged must be complied with. Otherwise, in other words, in case of a statutory regulation setting a 4-year time-limit for detention period, any detention period in excess of the prescribed period would be unlawful for failing to satisfy the "lawfulness" requirement. It should be noted that the maximum detention periods determined by law must not be perceived as a blank check by courts. Even a detention period not in excess of the prescribed time-limit may also give rise to violation in some cases.

In this regard, noting that the maximum detention period including the extension periods might be 5 years, with a reference to Article

12 *Solmaz v. Turkey*, no. 27561/02, 16 January 2007. §§ 23, 24.

13 *Savaş Çetinkaya*, no. 2012/1303, 21 November 2013, § 42.

14 *Wemhoff v. Germany*, no. 2122/64, 27 June 1968. Osman, DOĞRU/ Atilla, NALBANT, *Avrupa İnsan Hakları Sözleşmesi Açıklama ve Önemli Kararlar*. 1st Vol., Council of Europe. Ankara 2012. p. 497.

102 § 2 of the CCP which sets forth that in matters falling within the jurisdiction of assize courts, the maximum period of detention shall be 2 years; that the detention period may be extended -if necessary- by indicating the justifications ; however, the period of extension shall not exceed 3 years in total, the Court found a violation of Article 19 § 3 of the Constitution without making any further inquiry.¹⁵ However, one may not claim that the detention period is not long considering that the total period of 5 years prescribed by law has not expired. The detention periods below 5 years may also be considered long. As a matter of fact, the Court has expressed in its judgment that Article 19 § 7 of the Constitution guarantees the reasonableness of detention period and; thus, the upper time-limit set for detention is applicable only to the exceptional cases where the reasonable period has not been exceeded and that this can, by no means, be considered to allow for detention of a person until the expiration of this period. On the contrary, the Court has expressed that a violation of the Constitution may be found in cases where the upper-limit is observed but the reasonable time has been exceeded.¹⁶ As the concepts of the lawful detention period and the reasonableness of a detention period are not of the same nature, they are subject to different legal assessments.

III. JUSTIFICATIONS IN DETENTION ORDERS

The main problem with detention orders is the excessive number of unlawfulness in these orders. This unlawfulness is revealed by the fact that the detention orders and, especially, the decisions ordering continued detention have been found to be unjustified. A significant number of detention orders has been shown to lack justification.¹⁷ It may be of course argued that the detention orders that indeed lack justification are based on a ground; however, such grounds do not go beyond a formal justification. As such grounds are found insufficient in legal terms and made up of formulated expressions and repeated legal terms, such grounds may be considered illusory. However, all circumstances underlying the reasons and conditions of detention are to be indicated one by one in the detention order.

¹⁵ Murat Narman, § 53.

¹⁶ Ramazan Aras, no. 2012/239, 2 July 2013, § 51.

¹⁷ Köksal, BAYRAKTAR, *Ceza Yargılamasının Bitmeyen Derdi Tutuklama*, Güncel Hukuk, January 2014/1-121, Aylık Hukuk Dergisi, p. 7.



In order for a detention order to be issued, there must be a strong indication according to the evidence available at the time when his detention is requested that the person concerned has committed an offence in the capacity of a perpetrator or abettor¹⁸. Accordingly, detention of an accused person may be ordered only in case of a strong suspicion that he has committed an offence, as prescribed by Article 19 § 3 of the Constitution and Article 100 of the CCP worded in line with the former. Strong suspicion means that it is almost certain that the person concerned has committed an offence as a perpetrator or abettor and will, most probably, be tried and convicted.¹⁹ If the law-maker deems the reasonable suspicion sufficient for issuing a detention order, this condition will then be sufficient also for the initial detention order. Reasonable suspicion means the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.²⁰ The Convention also deems it sufficient to have a reasonable suspicion to arrest or detain a person²¹. Therefore, detention of persons in the absence of any fact or information underlying the suspicion; in other words, issuing a detention order against a suspect on the basis of a plain and nonfactual abstract suspicion that he has committed an offence gives rise to a violation of the Article 19 of the Constitution and Article 5 of the Convention.

The judge will, according to the particular circumstances of the concrete case, assess the existence of a suspicion required for issuing a detention order. In the detention order, the reasons pointing out the existence of a strong suspicion must be indicated and associated with the concrete case. For example, detention of a suspect due to *“the facts indicating the existence of strong criminal suspicion the he has founded and managed a terrorist organization; nature of the offence; the available evidence against him; and enumeration of the imputed offence among the ones listed*

18 Nur, CENTEL/Hamide, ZAFER, *Ceza Muhakemesi Hukuku*, Renewed and Reviewed 4th Edition. Beta Bası, October 2006 –Istanbul. p.301.

19 ALDEMİR, Hüsnü, *Yakalama Gözaltına Alma Tutuklama Adli Kontrol, Hürriyeti Kısıtlayan Koruma Tedbirleri*, Seçkin, First Edition, Ankara, October 2012, p. 24.

20 Bahri, ÖZTÜRK/ Mustafa Ruhan, ERDEM, *Uygulamalı Ceza Muhakemesi Hukuku*, 9th Edition. Ankara 2006, p. 211.

21 *Labita v. Italy* [GC], no. 26772/95, 6 April 2000. § 153. DOĞRU/NALBANT, s.389.



in Article 100/3-a of the CCP"²² is deemed sufficient for initial detention in terms of the existence of serious indications that the offence might have been committed.

The strong criminal suspicion sought for resorting to detention measure is one of the conditions *sine qua non* for detention,²³ and the suspicion that the offence has been committed must continue throughout the trial and detention process. The most important intent of detention and continued detention is to prevent the risk of suspect's fleeing and thus, the impossibility of the execution of the conviction decision. Besides, preventing the obfuscation of evidence is amongst the expected outcomes of detention. Another aim of the detention measure is to prevent the attempts of exerting pressure over witnesses, victims, or others. This will enable the discovery of material facts in the criminal proceedings²⁴. The expected aims of detention and continued detention exactly constitute the essential grounds of detention.

A. Risk of fleeing as a reason for the continued detention

Existence of risks of fleeing and hiding on the part of the suspect or the accused person or of the facts that raise doubts of fleeing is considered as a ground for detention in both the CCP and also the case-law of the ECHR. Fleeing means that the suspect intentionally prevents the judicial authorities from summoning him or from obtaining his attendance necessary for the other proceedings.²⁵

While considering the existence of the risk of fleeing, the judge must take into consideration the particular circumstances of the concrete case. Change by the suspect of his domicile with an aim to hide himself after committing an offence, his arrest while running away upon arrival of law enforcement officers at the crime scene, and filing an application for obtaining a passport to go abroad constitute concrete facts indicating the existence of risk of fleeing. Although heavy nature of the sentence prescribed for the charges imputed to the accused person is another factor to be considered in assessing the risk

²² Mehmet Haberal, no. 2012/849, 4 December 2013, § 74-77.

²³ ÖZBEK, p. 277.

²⁴ ÖZBEK, p. 271. Cumhur, ŞAHİN, *Ceza Muhakemesi Hukuku -1*, 9th Edition, Seçkin, Ankara 2018, p. 297.

²⁵ CENTEL/ZAFER, p. 302. ŞAHİN, p. 301.



of fleeing, the ECHR does not accept this factor per se as a justification for the continued detention.²⁶ If the judge orders continued detention on the ground of “*risk of fleeing*”, such concrete facts should be indicated in the decision. Therefore, the risk of fleeing points out a concrete case in itself, rather than an abstract one. Unless supported with facts, evidence and, especially demonstrated in an individualized fashion, the risk of fleeing does not constitute a proper justification. In this sense, the stereotyped statements or explanations where wordings of a legal text are reiterated also imply lack of a justification. An inquiry conducted into 291 case files concerning detention reveals that in 265 out of these files, the acts and incidents underlying the risk of fleeing are not demonstrated, which alone explicitly indicates the extent to which the detention orders can lack justification²⁷.

Where the single ground for the continued detention is the risk of fleeing, the suspect may be released upon request by subjecting to him to certain measures which would ensure his appearance before the court. In this context, this risk of fleeing can be avoided by releasing him on condition bail such as a bail bond or residence at a certain address, frequent reporting to the police, house arrest, and a ban on leaving the country.²⁸

B. Risks of concealment or obfuscation of evidence or exertion of pressure over witnesses as the grounds for continued detention

This risk is contingent especially on the nature and scope of offence. According to the CCP, if the attitudes of a suspect or an accused person give rise to suspicion for the obfuscation, concealment or alteration of evidence or for an attempt to exert pressure over a witness, victim, or another person, it may be said that there is a risk of obfuscation of evidence.²⁹

Obfuscation, concealment and alteration of evidence mean the removal of traces of an offence³⁰. Therefore, by way of detention, the suspect or the accused person may be prevented from ensuring non-

26 *Mansur v. Turkey*, 8 June 1995. no. 319-B. §§ 51-53. DOĞRU/NALBANT, p. 402.

27 BAYRAKTAR, p. 7.

28 *Wemhoff v. Germany*, no. 32819/96, 2 February 2000.

29 Art. 100 § 2 of the CCP.

30 CENTEL/ZAFER, p. 302.

disclosure of a material fact. Thus, the risk of interfering with the judicial process may be eliminated. Any attempt to exert pressure over the persons that will make statements may constitute a reason for detention for amounting to the obfuscation of evidence. Existence of certain concrete facts and strong suspicion resulting therefrom is the mandatory prerequisite to issue a detention order. As long as the material fact has been revealed, all evidence have been gathered, or all evidence have not been obfuscated, the risk of obfuscation of evidence will no longer be in question. The existence of the risk of obfuscation of evidence may only be determined considering the circumstances of a concrete case along with the suspect's personality, attitudes, and living conditions³¹. It may not be evaluated through general reasoning. Issuing a detention order for every offence based on the presumption that the suspect would always want to conceal the material fact will lead to the violation of the personal liberty safeguarded under the Constitution.

C. "Presumption of law" as a ground for detention and continued detention

The existence of the detention grounds is not sought to issue a detention order for certain offences. Existence of a strong criminal suspicion that such crimes were committed is deemed sufficient to issue a detention order.³² In fact, the law-maker considers the strong suspicion as a ground for detention in itself by considering the grounds of detention such as the risk of fleeing or obfuscation of evidence for certain offences that may considerably jeopardize the public order as existing based on the statutory provision that *"a ground for detention may be deemed to exist in case of existence of strong indication that the relevant offences have been committed"*³³.

31 CENTEL/ZAFER, p. 303.

32 CENTEL/ZAFER, p. 303.

33 *"Instead of a large number of detention reasons, the two basic detention reasons have been adopted in accordance with the system introduced by the Law 1412. In terms of the cases where a detention reason can be considered as existing, the system of predicate offenses, whereby the crimes are enumerated one-by-one, has been adopted in lieu of the system introduced by the Law no. 1412 on the basis of an abstract punishment concept. Further, the detention has been ensured to be a protective measure that is actually taken as an exemption by seeking the facts that exhibit existence of strong criminal suspicion in case a detention reason exists".* For the preamble of Article 100 of the Law 5237, please refer to Cumhuriyet, ŞAHİN; Ceza Muhakemesi Kanunu Gazi Şerhi, 1st Edition, Seçkin, Ankara, 2005, p. 295.



The fact that a ground for detention has been envisaged as a presumption in terms of certain offences that are manifestly enumerated in the Law cannot be put forth as a justification to evade from the requirement of demonstrating the existence of concrete facts justifying a detention order. In any event, the term “catalogue” offense is not accepted per se as a justification in decisions ordering continued detention. The ECHR also finds the statutory arrangements, whereby an automatic or compulsory detention is provided for, in breach of Article 5 § 3 of the Convention. Even if the domestic legislation contains a legal presumption that the grounds for detention have already existed, it is still required to demonstrate the existence of concrete facts giving rise to detention. In other words, the justification of detention is, in any case, deemed compulsory for the continuation of detention.³⁴

As to the period of detention, neither Article 5 of the Convention nor Article 19 of the Constitution sets out a general or specific provision. However, the CCP sets a period for maximum/lawful detention. Apart from this, there is no generally prescribed detention period or case-specific detention period that is set out under any law. According to Article 5 § 3 of the Convention and Article 19 § 7 of the Constitution, an accused person detained on remand within the scope of the criminal proceedings is entitled to request to be tried within a reasonable time or, where this is not possible, to be released during investigation or prosecution. These provisions prescribe that detention period must not exceed reasonable time.

The question as to whether the detention period exceeds the reasonable time cannot be assessed within a general framework in an abstract fashion. As such a period will vary depending on a given case's nature, it is compulsory to evaluate such period based on the particular circumstances of each case³⁵. Continuation of detention can be found justified only where there is an actual general interest that outweighs the right to personal liberty and security safeguarded by Article 19 of the Constitution in spite of the presumption of innocence.³⁶ As a matter of fact, the extent of the period to be deemed reasonable cannot

³⁴ *Ilykov v. Bulgaria*, no. 33977/96, 26 July 2001, § 84.

³⁵ *Murat Narman*, § 61.

³⁶ *Labita v. Italy* [GC], no. 26772/95, 6 April 2000, § 119.



always be easily defined. The delicate balance in this sense is to protect a detainee's interest in being set free again and a general interest in the context of the effective criminal justice system³⁷.

Based on the presumption of innocence, the judicial authorities must entirely consider the issues that are in favor of or against a suspect as to whether there is a reasonable ground justifying restriction of liberty in the general interest as well as demonstrate such issues in the detention orders especially in an individualized and concrete fashion. All events that have an impact on the general interest must be dealt with by trial courts and such facts and events must be demonstrated in their decisions on the requests of release. In making assessments as to detention period, the Court and the ECHR consider the justifications specified in the decisions ordering continued detention as well as the facts and events that are set forth in a detainee's petition of release.

As long as the strong criminal suspicion and reason for detention continue to exist for a person that is under lawful detention, his detention on remand must be, in principle, considered reasonable up to a certain period. In view of the ECHR, continued existence of a reasonable criminal suspicion is a requisite for the justification of detention. Detention of a person will be unlawful in the absence of a criminal charge. In this respect, the existence of a reasonable criminal suspicion from the very beginning and its continued existence are important. However, the reasonable criminal suspicion does not suffice upon the expiry of a certain period of time. Detention order may be issued in cases where there is a strong suspicion of guilt as well as for the purposes of preventing fleeing of the accused persons and obfuscation or alteration of evidence. Although such detention reasons may, at the outset, be considered sufficient to justify the continued detention, the decisions granting extension of detention must indicate that the detention grounds continue to exist along with the justifications thereof. Where such merits are found to be "*relevant*" and "*sufficient*", then it must be assessed whether the proceedings were conducted with due diligence.

³⁷ David, HARRIS/ Michael, O'BOYLE/ Colin, WARBRIC, *Law of the European Convention on Human Rights*, Council of Europe, 1st Edition, Ankara 2013, p. 176.



D. Obligation of Due Diligence

The factors such as the complexity of a case, whether or not it relates to organized crimes or the number of suspects/accused persons are taken into consideration in assessing the diligence shown. Regard being had to these factors as a whole, it is assessed whether the detention period is reasonable or not³⁸. The Court concluded that the trial court had failed to show due diligence in ensuring the speedy conclusion of the proceedings where the prosecutor submitted his opinion as to the merits within 1 year and 4 months and the hearings were held at intervals of 3 to 4 months.³⁹

E. Minority

Finally, the extent to which a detainee's personal status is considered is of importance. Minority, having a permanent domicile, regular family life and career, and having no criminal record are amongst the examples of the personal status.⁴⁰

Where a detainee is minor, it is crucial to have considered his minor status in terms of proportionality. The Court delivered a violation judgment by taking into account that fact the minority status of a child applicant was never addressed in the detention order.⁴¹

The rule is to try the suspect without arrest. In the Turkish legal system, the judge is under no obligation to order detention of a suspect even if all of the detention conditions are present. That is because, Article 102 of the CCP sets forth that '*a detention order may be issued*, which indicates that detention is an exceptional measure. The circumstances, status of evidence and etc. of each trial differ from others. Detention of a person in a given case where he is not supposed to be detained, even for a day will amount to a long period. While, in another case, given the nature of the offence, status of evidence, risk of fleeing and etc., a detention may be extended up to five years. As a matter of fact, the ECHR considers even the five-year period appropriate under the Convention should there exist reasonable grounds. Likewise, while finding a violation of Article 19 § 7 of the Constitution due to detention

38 Murat Narman, § 63.

39 Ebubekir Keskin, no. 2014/2430, 29 June 2016, §59.

40 Letellier v. France, 26 June 1991, no. 207, § 51.

41 Furkan Omurtag, no. 2014/18179, 25 October 2017, §§ 87-88.



periods of 2 years and 3 months; 2 years and 5 months; 3 years; or 3 years and 3 months⁴², the Court may deem a detention period of 4 years, 16 months and 15 days reasonable⁴³.

IV. CONCLUSION

Detention is one of the severest preventive measures in terms of its nature and consequences within the framework of penal procedure. In fact, this measure directly relates to the right to personal liberty and security, and the focal point of this right is detention. The detention measure as an option to be applied to the extent required for the security and peace of the community is elaborately set forth under the Convention, and a similar formulation is also embodied in the Constitution. However, it is obvious that, although being an exceptional measure of last resort, detention is, in practice, resorted to frequently and continues for long periods in the absence of justification.

The Constitution, in the first place, and the CCP explicitly set out that every court order shall be reasoned. Despite these statutory regulations, stereotyped statements and restatement of legal provisions demonstrated as justification in detention orders do not accepted as a ground by the Court and the ECHR. Thus, we come to the conclusion that this is a structural problem. This problem can, needless to say, be solved without amending our laws but by using them in line with the purpose and function thereof. To that end, the awareness of judges in their capacity as the law enforcers must be increased and they must be made aware of the relevant case-law of both the ECHR and also the Court, and it is, of course, necessary to develop means and methods to finalize the proceedings within a reasonable time. Since, in certain periods, certain cases take longer periods that give rise to the violation of the right to a trial within a reasonable time, the detention period becomes, naturally, longer. Therefore, it is required to address the law and enforcement in terms of general principles for not only shortening the detention period, but also for establishing the technical and personnel infrastructure that will ensure the shortening of trial periods.

42 *Murat Narman*, § 56. In the similar vein, see *Firas Aslan and Hebat Arslan*, no. 2012/1158, 21 October 2013, §§ 52, 56. *Hanefi Avci*, no. 2013/2814, 18 June 2014, §§ 84, 85.

43 *Serkan Güngör*, no. 2014/20224, 30 October 2018, § 95.



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*DETENTION AS A SOCIAL
ANXIOLYTIC*

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DETENTION AS A SOCIAL ANXIOLYTIC

*Assoc. Prof. Dr. Güneş OKUYUCU ERGÜN**

Today, communities face certain questions that have always existed from past to present in the grip of interests that appear to be conflicting:

-*Habeas corpus* or fight against crime?

-Personal rights and freedoms or social defense requirements?

-A liberal criminal law system that is built on human rights and high values introduced by enlightenment or a repressive/ hostile criminal law approach?

Anxiety is an ordinary mood as a part of life. Individuals and societies can be anxious about many issues and, in the wake of these concerns, they can develop certain attitudes and produce solutions. Thus, they prepare themselves for the problems and overcome these problems faster and easier. And this anxiety represents a normal level of anxiety.

On the other hand, some people have an extreme level of anxiety. They are in a constant and excessive state of restlessness where there is no actual reason or, even where there is a reason, they are in a disproportionate state of anxiety. They keep thinking about the worst probabilities and outcomes; everything will get worse, things will get out of control and they will encounter irreversible calamities. In fact, they generally are aware of the excessiveness of their anxieties but they can, in no way, control their anxieties and calm down. Those having an anxiety disorder can show certain signs as if they were suffering from a physical illness. In consequence of these physical signs, they consult physicians from other branches and seek quite

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different solutions, but fail to find a remedy yet the problem is totally different than they think. Anxiolytic medications are administered to treat this anxiety disorder. However, anxiolytics will not have any definite effect unless and until the underlying problem is solved.

Today, societies, individuals, lawyers, legislators and politicians seem to be entrapped maybe more than ever between the requirements of liberties and human rights and social defense requirements in the face of the prevalence of crimes and, maybe, of their visibility and recognition due to technological developments on the one hand; and organized crimes, the phenomenon of terror crimes and the extraterritorial dimension of the crime on the other hand. Indeed, such a prevalent, intense, and multidimensional aspect that the crime gets does not only increase the sensitivity and anxieties in this regard, but also complicates the fight against crime.

This difficulty gives rise to an excessive state of restlessness, or almost anxiety if we may say so, in fighting against crime and 'criminals' in the society and in practice. It is observed that the detention measure is resorted to abate this state of excessive restlessness as an anxiolytic.

Indeed, the papers have headlines such as '*criminals are set free*', '*criminals have enjoyed impunity*' where a suspect or an accused is released pending trial, and the society shares the same feeling of dissatisfaction and the perception that '*criminals are enjoying impunity*'. It is known that courts can have recourse to detention for various purposes such as mitigation of public reactions, deterrence, compelling to confess and reiteration. According to the detention report released in 2011 by the Union of Turkish Bar Associations, more than half of the imprisoned people consisted of detainees as of March 2010. And this indicates that detention is addressed as penalization in advance by judicial bodies, rather than being considered as a temporary measure.

However, the penal procedure understanding that had prevailed until the age of enlightenment did, as is known, not differentiate the accused and offender and treated the suspect as a criminal from the very beginning and the criminal procedure used to be considered as



a mere process of investigating the evidence to justify condemnation. Thanks to the libertarian understanding introduced by the age of enlightenment, the perception to treat a suspect as a criminal from the very beginning has been quitted, the purpose of the penal procedure has changed, and the aim is now to protect the accused against the arbitrariness of the state government and judges.

Modern penal procedure law aims neither at protecting the society as was the case with the prevailing approach until the age of enlightenment, nor at protecting the individual, i.e. the accused, as is the case with the penal procedure approach developed in the wake of the age of enlightenment. Today's modern penal procedure law strives to guarantee the society's benefits by penalizing criminals strictly, while guaranteeing the accused's rights by preventing the penalization of the innocent. That is to say that the contemporary penal procedure law tries to balance between the social protection requirements and individual protection requirements, which seem conflicting but are actually completing one another. Both the individual and the society have benefits in revealing the truth and in avoiding the penalization of the innocent when penalizing the criminal.

However, the modern penal procedure law does not aim at bringing out the truth no matter what it costs. The truth will be investigated and elicited by lawful means. And there are certain principles to be observed at this point. Beyond doubt, the presumption of innocence is the primary principle among them. Modern criminal law does not consider the accused guilty beforehand, rather, it aims at investigating if she/he is a guilty and then condemning or acquitting her/him according to the outcome thereof. Therefore, no one can be considered guilty until she/he is found guilty under a final judgment, nor can she/he be subject to any criminal law sanction according to the presumption of innocence. The presumption of innocence is a prerequisite for the actual enjoyment of rights granted to the suspect or the accused and for the existence of her/his right to defense and fair trial because, the penal procedure and right of defense can be functional only in a system where the suspect is not assumed guilty beforehand and considered innocent until found guilty under a final



judgment; in other words, where the presumption of innocence applies. The procedure where the suspect is considered guilty beforehand does not represent a modern penal procedure in the meaning attributed thereto today, but refers to the inquisition trial where the accused's guilt was proven in the middle age.

Torture is the leading unlawful method. Stemming from a practice where the accused is not differentiated from the criminal and conflicting with the principle of the lawfulness and proportionality of crimes and penalties and humanistic nature of penalties, torture has, undoubtedly, no place in modern criminal law.

Although the doctrine justifiably advocates that arbitrary detentions for longer periods that are disproportionate in the circumstances of the case turn into advance penalties, such practices represent almost torture with much severer consequences than penalization beforehand.

Because, penalties ought to be lawful, humanistic and proportionate. Penalties are executed after they are pronounced and then upheld against an accused that is definitively found guilty in consequence of a trial process conducted by a court, and their term and conditions are established under the same sentence of condemnation. Whereas, the merits and term of such a practice are ambiguous in the case of unjust/unlawful detention orders and such orders are given in violation of the legally prescribed conditions.

However, modern legal systems refer to detention as a measure to ensure the achievement of penal procedure's goal, rather than a punishment. Detention is a penal procedure measure that is taken to prevent the obfuscation of evidence on the one hand, and to ensure the accused's attendance at hearings on the other hand. By nature, it is a temporary and optional measure.

Temporariness of this measure involves the termination thereof upon extinction of relevant circumstances and the observance of reasonable time. Where detention is not adopted as a temporary measure, it will no more function as a precautionary measure and will be implemented as a penalty. Indeed detention must not exceed the reasonable time period according to Article 5 of the European



Convention on Human Rights. However, the reasonableness of the detention period needs to be separately assessed under the circumstances of each case. Therefore, the concept of “reasonable time” does not refer to a specific period and certainty that are applicable to all circumstances. Thus, maximum detention periods have been set forth based on the uncertainty of the concept of reasonable time. The periods in question should be considered as upper limits in order for the detention periods to be regarded as reasonable. Beyond doubt, the reasonable detention period can be reached prior to the expiration of maximum period depending on the circumstances of the case.

Where it is possible to achieve the goals in another way, those measures should then be taken in lieu of detention. As soon as the obligatory reasons of detention disappear, the detention should be terminated. Furthermore, it should be proportional to the severity of the potential damages and to the level of the occurrence probability thereof.

Thus, a detention failing to satisfy these conditions constitutes an unlawful detention. However, in the societies that continue their old habit of penalizing the accused as an objective of the penal procedure, detention is regarded as an advance penalty and arbitrariness of detention or disproportionality thereof to the circumstances of the case are taken natural, so this unfair detention practice is normalized.

Today, the main problem for detention is the perception whereby it is considered as an advance penalty. As mentioned above, detention is perceived as an advance punishment by various social segments, press and also by judicial bodies, and there are occasions that leave the impression of its implementation that way.

One of the most striking examples of the perception and implementation of detention as an advance penalty is the status referred to as ‘person detained on remand pending appeal’ that is pronounced by the General Assembly of Criminal Chambers based on the ECHR judgments and also adopted by the Constitutional Court. It should be noted that the consideration by the ECHR of the question if the reasonable time of detention has been exceeded as being limited with the period of detention during the accused’s trial



before a court of first instance is based on the meaning ascribed to the concept of “convict”. Article 2 of the Code of Criminal Procedure in force describes “the accused” as the persons under criminal suspicion from the beginning of proceedings until the finalization of a judgment, while defining “proceedings” as the phase starting with the admission of indictment and ending with the finalization of a judgment.

As is seen, the person that is under criminal suspicion throughout the proceedings, which represent the phase until the finalization of a judgment, is referred to as “the accused” under the Code of Criminal Procedure. In other words, the imprisonment judgment pronounced by a court of first instance does not impair the status of being accused unless and until the judgment becomes final. Therefore, the imprisonment judgment pronounced against an accused may not be executed unless the proceedings are over.

In addition, it should be especially noted that the ECHR sets a minimum standard for high contracting parties when establishing the reasonable time (Article 53 of the European Convention on Human Rights). However, the regulations under the Turkish law favor the accused further. Therefore, the enforcement of these regulations that favor the accused is also a requirement of the European Convention on Human Rights. In fact, the ECHR’s judgments that the Convention must be construed in such a manner that it guarantees the practical and effective rights rather than being interpreted in a theoretical and delusive manner and that it complies with the Convention’s spirit rather than limiting or widening the rights and freedoms guaranteed therein further reinforce this matter.

And this is, in essence, a matter of perception and, more importantly, of mentality. This relates to the extent to which the fundamental human rights and freedoms have been adopted and have become an established and common culture of law.

The right to personal liberty is an acquisition gained by mankind in consequence of a struggle that took centuries. Hence, it is the core of modern democratic legal systems as mentioned in all of the international texts on human rights. Therefore, mankind will not



simply give up the personal rights and freedoms that have been finely and patiently formed since Magna Carta. However, it is still sad to witness that the human rights standards, which were set in 1200's, are now a controversial issue.

Of course, there may be certain deficiencies and inadequacies in statutory regulations in terms of detention, as it may be the case with any legal notion. However, there is a famous saying: the worst laws become good ones in the hands of good enforcers, while the best laws become bad ones in the hands of bad enforcers. We must carry on this way with the belief and determinedness that all laws can be turned into good laws.

As concluding remarks;
*"The sweet law of humans
To change water into light,
Dream into reality,
And enemies into brothers.*

*A law old and new
That continues to perfect itself
From the bottom of a child's heart
To supreme reason."*

Paul Eluard

***THE CONSTITUTIONAL COURT
AND HUMAN RIGHTS
ENFORCEMENT IN INDONESIA***

***Fajar LAKSONO
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***CONSTITUTIONAL COURT OF
INDONESIA***



THE CONSTITUTIONAL COURT AND HUMAN RIGHTS ENFORCEMENT IN INDONESIA

*Fajar LAKSONO**

*Haifa Arief LUBIS***

I. INTRODUCTION

A rule of law is strongly connected to constitution. In reflecting the ideals of the rule of law universally, the constitution is positioned as the basis for the governance of a state. Therefore, the constitution is a formal document that contains aspiration, with which the development of the life of the nation's state administration will be led.¹

In this case, Indonesia as a state of law² includes very complete provisions for the protection of human rights, within Article 28A to 28J of the 1945 Constitution. These articles guarantee human rights socially, politically, and culturally.

In practice, this guarantee in the constitution does not always go well as it is only limited to norms that regulate that human rights exist, are recognized, and are protected. Meanwhile, its implementation depends on the availability of institutional infrastructure, mechanisms, and commitments of state officials.³ The Constitutional Court in Indonesia's constitutional system is designed to ensure the upholding of the law and constitution, especially the implementation of articles on human rights.

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1 Strycken A.A.H, in Sri Soemantri, *Prosedur Dan Perubahan Konstitusi [Procedures and Amendments of the Constitution]*, 3rd print., Bandung: Penerbit Alumni, 1986, p. 2.

2 The Republic of Indonesia. *Third Amendment of the Constitution of the State of the Republic of Indonesia Year 1945*, State Gazette No. 13 Year 2006, Article 1 paragraph (3).

3 Saldi Isra, *Peran Mahkamah Konstitusi dalam Penguatan Hak Asasi Manusia di Indonesia [The Role of the Constitutional Court in Strengthening Human Rights in Indonesia]* in *Jurnal Konstitusi*, Vol. 11, No. 3, September 2014, p. 411.



II. DEVELOPMENT OF GLOBAL HUMAN RIGHTS

Human rights are rights that humans have solely because they are human. Human rights are universal; they cannot be revoked (inalienable). This means that no matter how bad someone has acted or how violent someone has behaved, they will not stop being a human and therefore will still have those rights.

Some universal rights or what commonly possessed by every human being include the rights to life, freedom, and security. These rights are possessed by every human regardless of race, ethnicity, culture, religion, color, sex, political opinion, national origin, social status, or any other background.

In its journey, human rights are divided into three phases of development, namely:⁴

First-Generation Human Rights (Right to Freedom)

- a. Civil and political rights;
- b. In essence they protect one's private life and respects individual sovereignty;
- c. They include, among other things, the right to life, bodily integrity, the right to freedom of movement, freedom from oppression, property rights, freedom of thought, religion and belief, freedom to assembly and expression, freedom from arbitrary arrest and detention, freedom from torture, equality before the law, and the right to a fair trial.

Second-Generation Rights (Right to Equality)

- a. Economic, social, and cultural rights;
- b. Emerging from demands that the state provide fulfillment to the basic needs of everyone;
- c. Among them are the right to work and fair wages, social security, education, health, food, housing, land, a healthy environment, and the right to protection of scientific, literary, and artistic production.

4 Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, Unesco Courier, November, 1977, pp. 29-32.



Third-Generation Rights (Right to Kinship)

- a. Group or collective rights;
- b. The creation of a conducive economic and international law;
- c. Among them are the right to development, peace, natural resources, a healthy environment, and participation in cultural heritage.

History proves that human awareness of human rights will increase when there are human rights violations such as slavery, colonialism, and injustice. The struggle for recognition and efforts to advocate for human rights by various nations has been embodied in various conventions, constitutions, legislation, theories, and ideas that have existed.

The development of the history of human rights began with the creation of Magna Charta in 1215 in England. The development of fundamental human rights was subsequently initiated by John Lock, J. J. Rousseau, and several other philosophers. John Lock viewed national society as human will constituted in two forms of contract—*pactum unionis*, the contract between members of the community to form political and state societies, and *pactum subjectionis*, the contract between the people and the authorities to protect the rights of the people, which remain when dealing with power of the ruler. The influence of these philosophers' ideas gave rise to ideas about human rights in several countries—the English Bill of Rights in England in 1689, the Virginia Declaration of Rights in 1776, the American Declaration of Independence in 1776, and Declaration of Des Droit De L'Homme et Du Citoyen in 1789 in France.

Human rights are now recognized worldwide and are universal, covering various elements of human life. Human rights have become a contemporary issue in the world. The United Nations, the forerunner institution that encouraged international recognition of human rights, on December 10, 1948 launched the Universal Declaration of Human Rights. Article 1 of the declaration expressly states:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”



The declaration shows an international moral commitment to human rights. Furthermore, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights become “triggers” to the recognition of human rights as a whole in various parts of the world.

The Universal Declaration of Human Rights is the main reference in the preparation of international human rights treaties at the regional level and even in national constitutions. One of the reasons is that it contains human’s fundamental rights and freedom, which consist of civil rights/fundamental freedoms, politics and economic rights, as well as social and cultural rights.⁵

Fundamental Freedoms/Civil Rights (Articles 3–19)

- a. Right to life, liberty, and security of person;
- b. Right to freedom from slavery;
- c. Right to freedom from torture or cruel, inhuman, or degrading treatment or punishment;
- d. Right to recognition before the law;
- e. Right to equality before the law without any discrimination;
- f. Right to remedy by the competent national tribunals for acts violating one’s fundamental rights;
- g. Right to arbitrary arrest, detention, or exile;
- h. Right to a fair and public hearing by an independent and impartial tribunal;
- i. Right to be presumed innocent until proved guilty according to law in a public trial;
- j. Right to privacy, family, home, and correspondence;
- k. Right to freedom of movement and residence or to leave one’s country and to return to one’s country;
- l. Right to seek and enjoy asylum in other countries from persecution in one’s country;
- m. Right to a nationality;

⁵ *Universal Declaration of Human Rights*



- n. Right of men and women of full age to marry and found a family;
- o. Right to own property;
- p. Right to freedom of thought, conscience, religion, and belief;
- q. Right to freedom of opinion and expression.

Political Rights (Articles 20–21)

- a. Right to freedom of peaceful assembly and association;
- b. Right to take part in the government of one's country, directly or through freely chosen representatives;

Economic, Social, and Cultural Rights (Articles 22–28)

- a. Right to social, economic, and cultural security;
- b. Right to work, just remuneration, and to join trade unions;
- c. Right to rest and holidays;
- d. Right to an adequate standard of living;
- e. Right to education;
- f. Right to freely participate in the cultural life of the community;
- g. Right to social and international order in which the rights and freedoms set forth in the Declaration are recognized.

III. HUMAN RIGHTS DEVELOPMENT IN INDONESIA

The 1998 Reform in Indonesia and the amendments to the 1945 Constitution have positioned human rights as a main foundation in the life of the nation and state. The inclusion of the ten Articles⁶ in Chapter XA of the 1945 Constitution reflects the nation's seriousness in fulfilling human rights as its main legal basis.⁷ One of the reasons for the need of constitutional reform is that the old 1945 Constitution did not have a strict guarantee of human rights.⁸ 26 paragraphs on human rights were then included in the Constitution—21 of which regulate

6 These 10 articles are Articles 28A through 28J of the 1945 Constitution.

7 The views of human rights adopted by Indonesia stem from religious teachings, universal moral values, and the noble values of the national culture.

8 Harun Alrasyid, *Naskah UUD 1945 Sesudah Empat Kali Diubah Oleh MPR [Manuscript of the 1945 Constitution after Four Amendments by MPR]*, 1st print., Jakarta: Penerbit UI, 2000, p. 44.



rights, 2 of which regulate obligations, 2 of which is concerned with the limitation of rights, and 1 of which further regulates the guarantee of the implementation of human rights.⁹

One of the most important rights is equality right despite diversity. Any action violating that provision is an attempt at discrimination. Human rights protection is stated in Article 28G paragraph 1. The provision of Article 28G paragraph (1) reads:

“Every person shall have the right to protection of oneself, family, honor, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.”

In the provisions of the article there are 3 human rights criteria as follows:

1. The right to personal protection, personal and family honor and dignity;
2. The right to protection of property under one's possession, and;
3. The right to be free from the threat of fear to do or not to do something that is a human right.

The provisions on the right of personal freedom and safety are always associated with arrest and detention procedures. In this case, each person has the right to be free from arbitrary arrest and detention (discrimination) and those only be done on the basis of the reasons set out in the legislation.

In Indonesia, there are at least 5 (five) forms of discrimination that often occur and conflict with the provisions of the article. **First**, discrimination against minority groups, **second**, discrimination against indigenous peoples, **third**, discrimination against migrant workers, **fourth**, discrimination against refugees, and **fifth**, discrimination against victims of trafficking.¹⁰

⁹ Saldi Isra, *Op. Cit.*, p. 413.

¹⁰ Saifroedin Bahar, *Konteks Kenegaraan HAM [State Context of Human Rights]*, 1st print, Jakarta: Pustaka Sinar Harapan, 2002, p. 587..



IV. THE CONSTITUTIONAL COURT AND THE FULFILLMENT OF HUMAN RIGHTS

The Constitution as the supreme law was born to protect human rights. The Constitution is an agreement on the basic principles of state administration and the rights of citizens that must be protected.

The Constitutional Court as Protector of the Citizen's Constitutional Rights and Protector of the Human Rights in the Indonesian Constitution became the nation's new hope. The Constitutional Court as protector of human rights is a consequence of the human rights within the constitution. In carrying out its duties, the Constitutional Court has 4 authorities and 1 obligation:

1. The Constitutional Court has the authority to adjudicate at the first and last level, and its decisions are final in reviewing the law against the Constitution;¹¹

2. The Constitutional Court has the authority to decide on authority disputes of state institutions whose authority are granted by the Constitution;¹²

3. The Constitutional Court has the authority to decide on the dissolution of political parties, and;¹³

4. The Constitutional Court has the authority to decide on disputes over general elections results, as well as;¹⁴

5. The Constitutional Court must provide a decision on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President in accordance with the Constitution.¹⁵

The role of the Constitutional Court in reviewing the laws against the Constitution is the modern development of a democratic government system based on the idea of the rule of law, separation

11 Republic of Indonesia, *Third Amendment to the 1945 Constitution of the Republic of Indonesia*, Article 24C paragraph (1).

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 Republic of Indonesia, *Third Amendment to the 1945 Constitution of the Republic of Indonesia*, *Op. Cit.*, Article 24C paragraph (2)..



of power, and protection of fundamental rights.¹⁶ In the concept of constitutional review, one of the main duties of the Constitutional Court is protecting every citizen from power abuse by state institutions that harm fundamental rights guaranteed by the Constitution.¹⁷ Any individual citizen, customary law community, legal entity, or state institution that considers their constitutional rights and/or authority impaired by the law, they may file for a judicial review to the Constitutional Court.¹⁸

In assessing whether there is a loss of constitutional rights and/or authority, the Constitutional Court is guided by the following conditions:¹⁹

1. Constitutional rights and/or authorities granted by the 1945 Constitution;
2. The aforementioned constitutional rights and/or authorities are deemed impaired by the enactment of the law petitioned for review;
3. The constitutional impairment must be specific and actual or at least potential which, pursuant to logical reasoning, can be assured of occurring;
4. Causal relationship between said impairment and enactment of the law petitioned for review;
5. Possibility that with the granting of the petition, the constitutional impairment will not or will no longer occur.

Protection of citizens' rights by the Constitutional Court on the right to security and protection from discrimination can be seen in the following decisions: *first*, Decision No. 4/PUU-V/2007 on the judicial review of Law No. 29 of 2004 on Medical Practice; *second*, Decision No. 18/PUU-V/2007 on the judicial review of Law No. 26 of 2000 on

16 Jimly Asshiddiqie, *Konstitusi Bernegara, Praksisi Kenegaraan Bermartabat dan Demokratis* [National Constitution, Prerequisite for Dignified and Democratic Statehood], 1st print, Malang: Setara Press, 2015, p 293.

17 Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara* [Constitutional Judicial Review Models in Various Countries], Jakarta: Konpress, 2005, pp. 10-11.

18 As of August 31, 2018, the Constitutional Court has received 1,207 requests for judicial review. Of these, 1,167 cases were already decided by the Constitutional Court. <https://mkri.id/index.php?page=web.RekapPUU&menu=5>. Accessed September 4, 2018.

19 Constitutional Court Decision No. 006/PUU-III/2005 on Judicial Review of Indonesian Law No. 32 of 2004 on Regional Government.

Human Rights Courts; and *third*, Decision No. 55/PUU-VIII/2010 on the judicial review of Law No. 18 of 2004 on Plantations.

First, Decision No. 4/PUU-V/2007 reviewed the constitutionality of Article 75 paragraph (1),²⁰ Article 76,²¹ Article 79 letter a²², and Article 79 letter c²³ of Law No. 29 of 2004 on Medical Practice against the 1945 Constitution. The four provisions contain criminal sanctions. The petition was filed because the criminal sanctions were deemed inappropriate and disproportionate to the detriment of the Petitioner in obtaining recognition, guarantee, protection, and legal certainty as well as the right to a sense of security and protection from the threat of fear of doing or not doing something for the benefit of patients.²⁴

With regard to the case, the Court was of the opinion that imprisonment was disproportionate and resulted to feelings of insecurity and fear, while criminal sanctions must consider the humanistic perspective of the law and the code of ethics. The Court's view of criminal sanctions includes the following:²⁵

1. Criminal sanctions should not be used to achieve a goal that can be achieved in other ways that are just as effective but with less suffering and damage;
2. Criminal sanctions should not be used if the side effects are more harmful than the crime;
3. Criminal sanctions must be rational;
4. Criminal sanctions must maintain harmony between order, legitimation, and competence, and;

20 "Every doctor and dentist who intentionally performs medical practice without a registration letter as referred to in Article 29 paragraph (1) shall be sentenced to a maximum of 3 (three) years imprisonment or a maximum fine of Rp100,000,000.00 (one hundred million rupiahs)."

21 "Every doctor or dentist who intentionally conducts performs practice without a medical practice license as referred to in Article 36 shall be sentenced to a maximum of 3 (three) years imprisonment or a maximum fine of Rp100,000,000.00 (one hundred million rupiahs)."

22 "Sentenced to a maximum of 1 (one) year imprisonment or a maximum fine of Rp50,000,000.00 (fifty million rupiahs), every doctor or dentist who: (a). intentionally neglects to display a signboard as referred to in Article 41 paragraph (1)."

23 "Sentenced to a maximum of 1 (one) year imprisonment or a maximum fine of Rp. 50,000,000.00 (fifty million rupiahs), every doctor or dentist who: (c). intentionally neglects to fulfill their obligations referred to in Article 51 letter a, letter b, letter c, letter d, or letter e."

24 Constitutional Court Decision No. 4/PUU-V/2007 on the judicial review of Law No. 29 of 2004 on Medical Practice, p. 25.

25 *Ibid.*, p. 117.



5. Criminal sanctions must maintain equality between social defense, fairness, procedural, and substantive justice.

By considering all that, the Court declared Article 75 paragraph (1) and Article 76 insofar as the phrase “a maximum of 3 (three) years imprisonment or,” Article 79 insofar as the phrase “a maximum of 1 (one) years imprisonment or,” and Article 79 letter c insofar as the phrase “or letter e” of Law Number 29 of 2004 on Medical Practice contrary to the 1945 Constitution and to not have binding legal force.

Second, Decision Number 18/PUU-V/2007 on the judicial review of the Elucidation to Article 43 paragraph (2)²⁶ of Law Number 26 of 2000 on the Court of Human Rights against the 1945 Constitution. The petition was filed because the Petitioner felt disadvantaged and did not have legal certainty because they had been tried by a political power that was not independent not in the context of upholding law and justice but rather to accommodate political interests.²⁷

Regarding the arguments made by the Petitioners, the Court was of the opinion that in recommending the establishment of an ad hoc Human Rights Court, the House of Representatives must pay attention to the results of research and investigation by the authorities so that the House would not second-guess without getting hold of the results of prior research and investigation by the National Commission on Human Rights as researcher and the Attorney General’s Office as investigator.²⁸ In addition, the word “allegation” in the Elucidation to Article 43 paragraph (2) of the Human Rights Court Law can lead to legal uncertainty (*rechtsonzekerheid*) as a result of the interpretation of the word “allegation” that differs from the procedure that should be done.²⁹ Based on these considerations, the Court declared the Elucidation to Article 43 paragraph (2) of Law Number 26 of 2000 on the Human Rights Court contrary to the 1945 Constitution and to not have binding legal force.

26 “In the case of the House of Representatives of the Republic of Indonesia proposing the establishment of an ad hoc human rights court, the House of Representatives of the Republic of Indonesia shall base the alleged gross violations of human rights restricted to a certain locus and tempos delicti that occurred prior to the enactment of this Law.”

27 Constitutional Court Decision No. 18/PUU-V/2007 on the Judicial Review of Law No. 26 of 2000 on the Human Rights Court. pp. 9-10.

28 *Ibid.*, p. 94.

29 *Ibid.*

Third, Decision Number 55/PUU-VIII/2010 on the judicial review of Article 21³⁰ and its elucidation,³¹ Article 47 paragraphs (1)³² and (2)³³ of Law Number 18 of 2004 on Plantations by raising the issue that every effort in defending and fighting for one's rights in the use of plantation land shall be qualified as a crime.³⁴ The provisions in this law were seen to have limited the constitutional rights of the Petitioners to develop themselves in order to fulfill their basic needs as human beings³⁵ and have been proven to create a sense of fear and to eliminate the sense of security of the Petitioners and everyone who is or will fight for and defend their rights as a citizen.³⁶

The Constitutional Court considered "prohibition from taking actions that result in damage to plantations and/or other assets" too broad.³⁷ On the other hand, "use of plantation land without permission" raises new problems because of the variety of land occupation problems without permission. This requires considerations of different circumstances: When did the problem arise?; Is the land occupation a way of obtaining land according to customary law?; Is the land occupation due to the emergency has been authorized by the authorities?; Is the land occupation caused by unclear borders between the areas controlled by the customary law and those controlled by the

30 "Every person is prohibited from performing acts that damage plantations or other assets, using plantation land without permission and/or any other activity that causes impediments to plantation businesses."

31 "What constitute acts that damage plantations are acts that cause damage on plants, among others, logging, forced harvest, or burning so that the plantation cannot function properly."

"What constitutes the use of plantation land without permission is land occupation without the permission of the owner in accordance with the laws and regulations."

"What constitute acts that result in disruption to the plantation business are, among others, those disrupting workers so that they cannot harvest or maintain the plantation properly."

32 "Every person who deliberately violates the prohibition from taking actions that result in damage to plantations and/or other assets, use of plantation land without permission, and/or other actions that result in disruption to the plantation business as referred to in Article 21, shall be sentenced to a maximum imprisonment of 5 (five) years and a maximum fine of Rp5,000,000,000.00 (five billion rupiahs)."

33 "Every person who negligently violates the prohibition to take actions that result in damage to plantations and/or other assets, use of plantation land without permission, and/or other actions that result in disruption to the plantation business as referred to in Article 21, shall be sentenced to a maximum imprisonment of 5 (five) years and a maximum fine of Rp5,000,000,000.00 (five billion rupiahs)."

34 Constitutional Court Decision No. 55/PUU-VIII/2010 on the judicial review of Law No. 18 of 2004 on Plantations, p. 98.

35 *Ibid.*, p. 27.

36 *Ibid.*,

37 *Ibid.*, p. 101.



state?³⁸ So, it is difficult to determine who violates the rules or who will be subjected to criminal sanctions.

The Court believed there was ambiguity that could lead to legal uncertainty, which potentially violate the citizens' constitutional rights of. Thus, the Court declared Article 21 and its Elucidation, as well as Article 47 paragraphs (1) and (2) of Law Number 18 of 2004 on Plantations contrary to the 1945 Constitution and to not have binding legal force.

E. CLOSING

The protection and enforcement of human rights contained in the articles of the 1945 Constitution have made Indonesia a state of law that is based on human rights, in which the state is obliged to protect, promote, enforce, and fulfill human rights.

In order to ensure the implementation of the articles on human rights, the 1945 Constitution has granted the authority of constitutional review to the Constitutional Court. The institution aims to review the constitutionality of laws so that the potentiall of human rights violations in state policies can be avoided and even eliminated.

³⁸ *Ibid.*, p. 102.



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*THE RIGHT TO PERSONAL
FREEDOM*

*Manon BADALIYEV
Natalya KRESS*

*CONSTITUTIONAL COUNCIL OF
KAZAKHISTAN*



THE RIGHT TO PERSONAL FREEDOM

*Manon BADALIYEV**

*Natalya KRESS***

Dear forum participants!

Let me express on behalf of the Constitutional Council and its Office appreciation to organizers for the invitation.

We, Manon Badaliyev and Natalya Kress, have been working in the Constitutional Council of the Republic of Kazakhstan that is not part of the legislative, executive, judicial branches, is autonomous and independent state body, ensuring the supremacy of the Constitution throughout the territory of the Republic.

The Constitutional Council of the Republic of Kazakhstan has served as a mechanism for the protection of the rights and freedoms of people and citizen. The protection of the rights and freedoms of people and citizen has been really carried out via the Constitutional Council's authority.

Most notable that to the Constitutional Council can appeal as a guarantor of the Constitution - the President of the Republic, and representatives of all branches of state power: the legislative power – the Chairmen of Chambers and deputies of the Parliament, the executive power - the Prime Minister, the judiciary power - represented by the courts of the Republic.

Decisions (Normative resolutions) of the Constitutional Council have been based only on the Constitution of the Republic of Kazakhstan, have the legal force of those norms of the Constitution

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on the basis of which they have been adopted (article 5 of the Law of the Republic of Kazakhstan (hereinafter - LRK) dated April 6, 2016 № 480-V LRK «On legal acts»). The decision of the Constitutional Council cannot be overruled by the repeated adoption by the Parliament of a norm recognized as unconstitutional.

The title of presentation: «The right to personal freedom»

The legal positions of the Constitutional Council with regard to the rights and freedoms of people and citizen guaranteed by the Constitution of the Republic of Kazakhstan have been used in presentation.

The only source of state power is the people of Kazakhstan. It is no coincidence. Already during the nationwide referendum held on August 30, 1995, 89.14% of citizens voted for the adoption of the Constitution, confirming that the Basic Law is the «people's Constitution».

The Constitution - the Basic Law, takes precedence over all other legal acts.

Pursuant to 1st paragraph of the article 1 of the Constitution for the Republic of Kazakhstan, «the highest values are a person, his life, rights and freedoms». This demonstrates the priority for the Republic of Kazakhstan is common human values and means that the state does not have a more important task than caring about the people (normative resolutions of the Constitutional Council dated 21 December 2001 №18/2, 13 July 2006 №4, 28 May 2007 №5, 27 February 2008 №2).

«Human rights and freedoms in the Republic of Kazakhstan shall be recognized and guaranteed in accordance with this Constitution. «Human rights and liberties shall belong to everyone by virtue of birth, be recognized as absolute and inalienable, and define the contents and implementation of laws and other regulatory and legal acts» (paragraph 1 and 2 of the article 12 of the Constitution). Recognition of rights and freedoms as absolute means their distribution to every person located on the territory of the Republic of Kazakhstan, regardless of his citizenship to the Republic.



The inalienability of rights and freedoms of people means that established human rights and freedoms cannot be deprived by anyone, including the state, except cases stipulated by the Constitution and adopted on its basis laws (normative resolutions of the Constitutional Council dated 28 October 1996 №6/2, 18 April 2007 №4, 27 February 2008 №2).

According to paragraph 1 of the article 16 of the Constitution, **everyone** shall have the right to personal freedom. This constitutional law has included in an exhaustive list of rights and freedoms that are not subject to limitation in any form or in any cases (paragraph 3 of the article 39 of the Constitution), **except in cases expressly provided by the Constitution itself**. In Resolution dated 1 December 2003 №12, *«On the Official Interpretation of articles 10 and 12 of the Constitution of the Republic of Kazakhstan»*, the Constitutional Council has stated that the Constitution differentiates the legal status of an individual, using the terms «citizen of the Republic of Kazakhstan», «everyone», «foreigners» and «stateless persons». It is understood that when the text of the Constitution refers to «everyone» means citizens of the Republic and persons who do not have citizenship of the Republic; when «citizens of the Republic of Kazakhstan» - only persons associated with citizenship of the state of Kazakhstan. In the Normative Resolution dated 27 February 2008 №2 *«On the verification of the constitutionality of the first and fourth paragraph of the article 361 of the Criminal Code of the Republic of Kazakhstan on the appeal of the Kapshagai Court City of the Almaty Region»* has stated that ... the right to personal freedom is inborn, recognized as absolute and inalienable. They are based on the recognition of freedom of will and stem from autonomy of individual's behavior. Accordingly, a person and a citizen possessing these rights and freedoms due to the naturalness of their origin can dispose of them at their own discretion.

This constitutional provision has been implemented to the national legislation from international law.

Thus, articles 1 and 3 of the Universal Declaration of Human Rights, adopted by Resolution 217 A (III) of the United Nations General Assembly dated 10 December 1948 have stipulated that «all people are born free and equal in dignity and rights», «every



person has the right to life, liberty and security of person». In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society (paragraph 2 of the article 29).

In the International Covenant on Civil and Political Rights, adopted by Resolution 2200A (XXI) of the United Nations General Assembly dated 16 December 1966 (hereinafter - ICCPR), ratified by the Law of the Republic of Kazakhstan dated 28 November 2005 №91-III, also has established that everyone has the right to liberty and personal security. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The constitutional right to personal freedom includes a set of concrete legal authorities exercised in the sphere of **personal** (freedom of choice of place to stay, freedom of movement, freedom of action and other), **political** (freedom of thought, freedom of speech and other), **professional life** (freedom of work, freedom of creativity and other). All these individual freedoms have been enshrined in Section II of the Constitution of the Republic.

Nevertheless, a comprehensive and systematic analysis of all the norms of the Section of the Constitution «Person and Citizen» and paragraphs of article 16 of the Constitution have allowed to conclude that under the term «personal freedom» set forth in paragraph 1 article 16 of the Constitution of the Republic of Kazakhstan should be understood not all personal freedoms guaranteed by the Constitution, but only freedom that implies the right not to be subjected to arbitrary arrest, detention and any other form of isolation and deprivation of freedom of movement

Norms guaranteeing the right to personal freedom have been enshrined in laws, regulating the most diverse types of public relations, and have been contained in criminal, criminal procedure, administrative, civil and other laws, which establish not only guarantees for the protection of this right, but also responsibility for



infringement on him, provides the procedure for compensation for harm caused as a result of such infringement.

In situations involving the right restriction to personal freedom, the particular importance on guarantees of judicial protection that has also been recognized by international treaties and agreements in accordance with everyone arrested or detained under criminal charges must be guaranteed the right to a trial within a reasonable time or the right to release (paragraph 3 article 9 ICCPR), therefore limiting personal freedom for a considerable time outside judicial control has not been allowed.

This position derives from the Constitutional Council's resolution dated 24 January 2007 №1 «On verification of the constitutionality of the first paragraph of the article 109 of the Criminal Procedure Code of the Republic of Kazakhstan on the appeal of the Court West Kazakhstan Region» states that the content of the constitutional norm on the right of everyone to judicial protection of his rights and freedoms also includes the right to judicial appeal of actions and decisions that entailed or could entail the infringement of the rights and freedoms of man and citizen, the right of everyone to appeal in court the actions and decisions of courts and criminal prosecution bodies affecting his constitutional rights and freedoms.

The Constitution in paragraph 2 article 16 enshrined the basic provisions and principles of judicial control over the legality and validity of measures restricting personal freedom.

These measures have been enshrined in **laws** and provide for:

- **mandatory treatment of patients;**
- **type of administrative penalty or criminal punishment;**
- **preventive measure;**
- **measure of procedural enforcement;**
- **interim measure to implement the decision of the competent body of a foreign state on the detention of a person;**
- **measure ensuring the proceedings.**



1. Mandatory treatment of patients (Code «On health of the people and the healthcare system», Law «On compulsory treatment of persons with alcoholism, drug addiction and substance abuse»).

Compulsory treatment - carried out pursuant to a court decision with isolation of patients in specialized organizations in relation to persons:

Tuberculosis persons. The grounds for compulsory treatment of citizens with tuberculosis are their refusal of treatment prescribed by a doctor, as well as unauthorized care and violation of the treatment regime in organizations of primary health care, recorded in medical documentation;

Suffering from mental disorders (diseases). The provision of medical care without the consent of citizens has been allowed in relation to persons:

- 1) have been in a shock, coma, not allowing to express their will;
- 2) suffering from diseases that pose a danger to others;
- 3) suffering from severe mental disorders (diseases);
- 4) suffering from mental disorders (diseases) and committing a socially dangerous act;

have committed criminal offenses, who have been recognized to be in necessity of treatment from alcoholism or drug addiction, as well as substance abuse, persons who have committed an administrative offense and who have been recognized as persons with chronic alcoholism or drug addiction or substance abuse and evading voluntary treatment.

Persons under treatment enjoy all the rights of citizens of the Republic of Kazakhstan with restrictions associated with the necessity to comply with the regime of stay in a specialized organization.

2. Administrative sanction

Administrative arrest (article 50 of the Code of the Republic of Kazakhstan on Administrative Infractions) shall be imposed by a judge in exclusively cases for a term up to thirty days, and for violation of requirements of emergency regime – up to the term of forty-five



days. An administrative arrest cannot be applied to pregnant women and women with children under the age of fourteen, persons under the age of eighteen, to persons with disabilities of groups I and II, as well as women over the age of fifty-eight, men over sixty-three years old and men, who by oneself raise children, not having reached the age of fourteen.

Administrative expulsion of foreign persons or stateless persons beyond the borders of the Republic of Kazakhstan

Administrative expulsion is a forced or controlled by authorized bodies independent departure of foreign persons or stateless persons outside the Republic of Kazakhstan, carried out on the basis of a **court resolution (decision)** for an administrative offense or violation of the law.

A foreign person has been obliged to leave the Republic of Kazakhstan by the time specified in this decision. The execution of the court decision on expulsion from the Republic of Kazakhstan has been carried out through controlled independent departure of the expelled person or forced expulsion of person from the Republic of Kazakhstan. If the person in respect of whom the decision on expulsion has been adopted does not leave the territory of the Republic of Kazakhstan within the time period specified in the decision, he shall be subject to detention and expulsion by force of the sanction of the prosecutor. Detention has been allowed for the period necessary for the expulsion. Its maintenance has been carried out in special institutions of internal affairs bodies in the relevant procedure determined by the Government of the Republic of Kazakhstan.

3. Criminal punishment

Arrest can be applied to a person found guilty of criminal offense. Arrest consists of keeping the convicted person in conditions of lockdown from society. Arrest shall be established for a term of ten to fifty days. The term of detention shall be included in the term of arrest (article 45 of the Penal Code of the Republic of Kazakhstan).

Deprivation of liberty shall be applied to a person found guilty of an offense. Deprivation of liberty shall be in isolation of the convicted person from the society by sending him to the institution of the penal system (article 46 of the PC).



Punishment has been applied in order to restore social justice, as well as to correct the convicted person and to prevent the commission of new criminal offenses by both the convicted person and other persons. Punishment does not aim at causing physical suffering or humiliating human dignity.

4. Preventive measure

Detention in custody shall be applied only with the authorization of a judge and only to a suspect, accused or defendant of a crime for which the law prescribes a penalty of deprivation of liberty for a period exceeding five years and where it is impossible to apply other less stringent preventive measures (article 147 of the Criminal Procedure Code of the Republic of Kazakhstan).

House arrest consists in the isolation of a suspect or accused person from society without holding them in custody, but with the application of restrictions established by a judge in accordance with the procedure established by article 147 of the present Code.

5. Other measures of procedural coercion

Conveyance applied for a period of not more than three hours in order to elucidate the involvement of the person to a criminal offence (Article 129 of the Code of Criminal Procedure of the Republic of Kazakhstan).

Conveying (Article 786 of the CRK AI) forced transmittal of an individual, representative of legal entity, civil servant for the purpose of suppression of the infraction, establishment of identity of the offender, as well as drawing up of a protocol on administrative infraction or issuing restraining order upon impossibility to draw them up at the place of detection of the administrative infraction, if the drawing up of the protocol is compulsory, shall be carried out upon commission of.

Detention of the suspected in committing a criminal offence is a measure of procedural compulsion, applied by the criminal prosecution body to suppress crime and permit the application of a preventive measure in the form of detention in custody or to secure the production of criminal infraction, for which there is a reason to believe that person may escape or commit a more serious offence. The

period of detention of the person, suspected of committing a criminal offence, shall be counted from the moment of actual detention and cannot exceed **seventy-two hours** (article 128 of the CCP RK).

Administrative detention (article 787 of the CRK AI) i.e. short-term restriction of personal freedom of an individual, representative of a legal entity, civil servant for the purpose of suppression of the infraction or ensuring the proceeding, may be carried out by: law-enforcement bodies – at identification of administrative offenses and others.

The Constitutional Council at the Normative Resolution dated 13 April 2012 №2 «On the Official Interpretation of norms of the Constitution on the estimation of constitutional periods» **has clarified** that «detention» in the constitutional legal sense should be understood as a coercive measure, expressed in short-term, cannot exceeded seventy two hours, **restriction of a person's personal freedom** in order to suppress an offense or ensure criminal, civil and administrative proceedings, as well as other measures efficient nature, and carried out by authorized state bodies, officials and other persons on the basis and in the manner prescribed by law.

The start of the detention is the hour to the minute when the restriction on the freedom of the detained person, including freedom of movement - forced detention in a certain place, forced delivery to the bodies of inquiry and investigation (seizure, lockdown in the room, forcing to go somewhere or stay in place and others), as well as any other actions, significantly restrict a person's personal freedom, became real, regardless of whether the detainee was given any procedural status or other formal procedures. The end of this period shall be the expiration of seventy-two hours, calculated continuously from the time of the actual detention.

The constitutional provision «without a sanction of court, a person may be detained for a period cannot exceeded seventy-two hours» means that no later than the indicated time, a court decision on the application of arrest and detention, as well as other measures prescribed by law, shall be made in respect of the detainee, or the detainee is subject to release. The Constitutional Council has noted



that the legislator can also be established **a shorter, within seventy-two hours, periods** for making an appropriate decision.

From this year, the period of citizens' detention without court sanction has been reduced from 72 to 48 hours, and for juvenile - to 24 hours.

A similar approach has been generally accepted and in international human rights acts.

Article 9 of the International Covenant on Civil and Political Rights (adopted by Resolution 2200A (XXI) of the United Nations General Assembly dated 16 December 1966 and ratified by the Law of the Republic of Kazakhstan dated 28 November 2005 №91-III) has stated that «everyone has the right to freedom and personal security. No one shall be subjected to arbitrary arrest or detention».

In the Set of principles for the protection of all persons subjected to any form of detention or imprisonment (approved by Resolution 43/173 dated 9 December 1988 of the United Nations General Assembly), «detainee» means any person deprived of personal freedom not the result of conviction for an offense.

6. Interim measure to implement the decision of the competent body of a foreign state on the detention of a person;

Extradition arrest shall be applied by **a court** with regard to a person sought for the purpose of his extradition to a foreign state **for a period of twelve months** from the moment of his detention, and in relation to a person requested to bring a court verdict to execution, no more than for the period by which he was sentenced to the requesting state;

7. Measure ensuring the proceedings.

Conveyance – forcible conveyance (delivery) of a person to an authorized body, an official person to draw up a protocol, ensure timely and correct consideration of a case, the execution of a decision made and other purposes established by law.

As an executive action, it is aimed at creating conditions for the application of measures for the enforcement of judicial and other



acts requiring the direct participation of the debtor, forcing a person to fulfill the obligations assigned to him, as well as ensuring the application of the liability measures established by law.

In the Normative resolution dated 3 July 2018 №5 «On the verification of the constitutionality of paragraph 5 article 27 of the Law of the Republic of Kazakhstan on enforcement proceedings and the status of enforcement agents on the appeal of the Karaganda Regional Court», the Constitutional Council of the Republic of Kazakhstan has noted that the application in the enforcement proceeding conveyance affects the constitutional rights of person **to personal freedom**, free movement and free choice of residence and others (paragraph 1 article 16, article 21, paragraph 1 article 25 of the Constitution). These rights can be limited in the manner and on the conditions established by the Constitution. According to paragraph 1 article 39 of the Basic Law, the rights and freedoms of people and citizen can be restricted only by laws and only to the extent necessary to protect the constitutional order, public order, human rights and freedoms, health and morality of the population. As the Constitutional Council has repeatedly explained, any legislative restrictions on rights and freedoms of people must be adequate to legally justified aims and meet the requirements of justice, proportionality.

The Constitutional Council has considered that **judicial control** in the procedure for conveyance sanction should not be limited to establishing only formal conditions for its application. In this process, the court's activity has involved a thorough examination of grounds, legality and validity of conveyance application with an investigation of all case circumstances (proper notice, lack of good reason for not appearing, facts evidencing the person's evasion and others).

These restrictions have been consistent with the basic international acts, including Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Optional Protocol to ICCPR and Second Optional Protocol to ICCPR.

The presentation is over, thank you for your attention.

***IMPACT OF THE COMPENSATORY
REMEDY INTRODUCED BY ARTICLE 141
OF THE CODE OF CRIMINAL PROCEDURE
NO. 5271 ON THE CASE-LAW OF THE
CONSTITUTIONAL COURT IN TERMS OF
THE RIGHT TO PERSONAL LIBERTY AND
SECURITY****

Yusuf Enes KAYA
***CONSTITUTIONAL COURT OF
TURKEY***

* English translation of the original text is provided by the courtesy of the Directorate of International Relations of the Turkish Constitutional Court. It has no binding effect. Please consult the original text or its author if necessary.

IMPACT OF THE COMPENSATORY REMEDY INTRODUCED BY ARTICLE 141 OF THE CODE OF CRIMINAL PROCEDURE NO. 5271 ON THE CASE-LAW OF THE CONSTITUTIONAL COURT IN TERMS OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY

Yusuf Enes KAYA*

I. INTRODUCTION

In this paper, we will discuss the impact of the compensatory remedy introduced by Article 141 of the Code of Criminal Procedure no. 5271 ("the CCP") on the case-law of the Constitutional Court in terms of the right to personal liberty and security.

Right to liberty and security represents a right that is at the heart of all political regimes that have proclaimed their submission to the rule of law.¹ Thus, both Article 5 of the European Convention on Human Rights ("the Convention") and Article 19 of the Constitution elaborates the circumstances wherein the personal liberty can be intervened in by exerting public force.

Right to personal liberty and security is not an absolute right. As a matter of fact, it is specified in Article 5 of the Convention that "*Everyone has the right to liberty and security of person*". This provision is followed by the limited exemptions enumerated in paragraph one, provided that the legally prescribed procedures are abided by as set forth by the subsequent paragraphs.

Accordingly, for deprivation of a person of her/his liberty, in the first place, the complete fulfillment of the procedural conditions prescribed by the statutory regulations is required and, further, this process must be implemented in accordance with the current legal rules also in terms of content and merits. Secondly, the deprivation

* Rapporteur Judge, Constitutional Court of the Republic of Turkey.

1 Osman Doğru, Atilla Nalbant, *European Convention on Human Rights, Interpretation and Important Judgments*, Avrupa Konseyi Yayınları, Ankara 2013, V.1, p.366.



process must fall within scope of one of the exemptions enumerated in paragraph one.

Such exemptions are enumerated limitedly and their scope cannot be extended by way of interpretation. Any detention process that does not fall within the scope of any one of the cases enumerated in that paragraph will be unlawful even if permitted under the domestic legislation.

Other paragraphs of Article 5 of the Convention provides certain procedural safeguards for those who are deprived of their liberty through arrest or detention, against arbitrary detention.

Finally, Article 5 § 5 prescribes that the persons who are the victims of a detention process in violation the provisions of Article 5 have a right to compensation.

Although there are slight differences, Article 19 of the Constitution sets forth a considerably similar provision with Article 5 of the Convention.

Thus, it is prescribed in the last paragraph of Article 19 of the Constitution that the State shall compensate the damages to be incurred by the persons that are deprived of their liberty according to the general principles of the compensation law.

In parallel with these provisions, Articles 141 et seq. of the CCP set forth that unlawfully arrested or detained persons are entitled to file lawsuits before assize courts for the damages incurred as well as to claim compensation for any and all pecuniary and non-pecuniary damages.

Article 141 of the CCP relates to the preventive measures. The preventive measures refer to the legal remedies that are taken temporarily by the relevant authorities that are authorized to make a decision within the scope of criminal procedure in cases where any delay is considered inconvenient and that, by their nature, interfere with the fundamental rights and liberties of persons to ensure the conduct of criminal procedure or to prevent the ineffectiveness of final judgments.² Search, seizure, custody, detention, and monitoring

2 Bahri Öztürk, Behiye Eker Kazancı, Sesim Soyer Güleş, "Ceza Muhakemesi Hukukunda Koruma Tedbirleri", Seçkin Yayıncılık, September 2017, p.23.



of communication via means of telecommunication can be adduced.

Although the title of Article 141 of the CCP is “Compensation due to preventive measures”, all of the preventive measures do not justify the claim for damages under Article 141 of the CCP because, Article 141 of the CCP enumerates one-by-one and in a limited number the cases whereby compensation is required in consequence of preventive measures. Accordingly, the persons that are subject to the following during a criminal investigation or prosecution are entitled to claim their pecuniary and non-pecuniary damages from the State:

a) Those having been arrested, detained or kept under detention through a judicial order in violation of the legally prescribed conditions;

b) Those not having been brought before a judge within the legal custody period;

c) Those having been arrested without being informed of their legal rights or, although having been informed, arrested without the fulfilment of her/his request to exercise the relevant rights;

d) Although having been lawfully detained, those not brought before a judge and in respect of whom no judgment has been rendered within a reasonable time;

e) Those in respect of whom a decision of non-prosecution has been rendered or acquitted after being arrested or detained lawfully;

f) Those having been convicted, but spent a longer period under custody or detention than their term of imprisonment or those having been compulsorily sentenced to this penalty despite the legally envisaged penalty for the committed crime is only a fine;

g) Those not having been informed of the grounds for arrest or detention as well as the charges against them in writing or, where this is not possible, orally.

h) Those whose arrest or detention has not been notified to their relatives;

i) Those in respect whom the search warrant has been executed in a disproportionate manner;



j) Those having been subject to the seizure of their belongings and other assets, although the prescribed requirements have not been fulfilled or the necessary measures for their protection have not been taken or whose belongings have been misused or not returned in due time; and

k) (Added by Article 17 of Law no. 6459 dated 11 April 2013) Those having been deprived of the legal remedies against arrest or detention processes.

As we are going to conduct a limited review of the right to personal liberty and security here, we will not address the issue in terms of the preventive measures such as search and seizure related to property or private life.

No compensation shall be paid due to the preventive measures that do not fall within the scope of the cases enumerated in this Article. However, a paragraph has been added to Article 141 by Law 6545. Accordingly, *"Except for the circumstances set forth in paragraph one, compensation claims can be filed only against the State in consequence of the acts done and orders given by judges and public prosecutors, including personal fault, wrongful act, or other circumstances involving liability during the criminal investigation or prosecution."*

In this context, legal remedies can be sought against the State under the provisions pertaining to wrongful acts in accordance with Article 141 § 3 of the CCP against the preventive measures that do not fall within the scope of the circumstances enumerated in Article 141 § 1. However, the acceptable grounds for the action for compensation has, contrary to the Article 141 § 1, been limited with the acts and orders of judges or public prosecutors under Article 141 § 3. Since the acts carried by the law enforcement officers and other public officials are not regulated under this Article, an action for compensation can be filed against the State before the administrative courts.³

The action for compensation on account of preventive measures must be filed within three months as from the service of the decision of non-prosecution or the final judgment on the concerned or, in any

3 Uğur AŞKIN, "Koruma Tedbirleri Nedeniyle Tazminatta Rücu Sorunu" İnönü Üniversitesi Hukuk Fakültesi Dergisi, Vol. 9 No. 2, 2018, p.29

event, within one year as from the date on which the judgment has been final. As these are statutory time-limits, they must necessarily be complied with and can, in no case, be extended. However, the Court of Cassation has ruled that the finalization or conclusion in terms of the merits of the case is not a prerequisite for certain claims. They are discussed below. The Court of Cassation relies on whether the principal order or judgment has been affected and seeks the conclusion of a trial or investigation with a definitive order or judgment in the cases where an assessment to be made can have an impact on the principal order or final judgment.⁴ For example, the judgment must become final in respect of those who have been subject to a decision of non-prosecution or acquitted after having been arrested or detained lawfully.

II. APPROACH OF THE CONSTITUTIONAL COURT TO THE COMPENSATORY REMEDY UNDER ARTICLE 141 OF THE CCP IN THE CONTEXT OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY

A. Overview

Individual application to the Constitutional Court represents a subsidiary legal remedy that can be used where an alleged violation of a right has not been redressed before the inferior courts.⁵ The principle of subsidiarity is the core principle of the individual application. Accordingly, individuals should first bring the alleged violations of their rights falling within the scope of individual application before the judicial and administrative authorities and therefore exhaust these remedies. Where, by the end of such processes, the violation of a right has not been redressed, then an individual application can be filed. As a matter of fact, respecting, protecting, implementing and fulfilling fundamental rights and freedoms are the duties of judicial and administrative bodies in the first place, rather than the Court. Wherefore, ordinary remedies must have been exhausted in order to lodge an application with the Constitutional Court.

⁴ i.e., see the judgments of the 12th Criminal Chamber of the Court of Cassation, dated 28 September 2015 and numbered E.2014/22510, K.2015/13907; and dated 29/9/2015 and numbered E.2015/201, K.2015/13994

⁵ *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 17



However, the remedies that are required to be exhausted must be accessible besides being compensatory and having a reasonable prospect of success in redressing the applicant's complaints.⁶ At this point, it needs to be ascertained whether it is a prerequisite to exhaust the remedy set forth in Article 141 of the CCP.

This remedy guarantees only the compensation of pecuniary and non-pecuniary damages, but does not provide a person with the possibility of being released even where a detention order has been found unlawful. Unless a person is released prior to the review of his individual application, the action brought by the person concerned in connection with this remedy may not be considered effective in terms of an application that is filed with a request of release; wherefore, it is not required to be exhausted.⁷

If, however, a person is released or convicted by the first instance court, and even where a violation is found, such a conclusion does not seem to have a possible impact on the applicant's personal situation. As a matter of fact, since a person's detention is over in such a case, any finding to the effect that the detention has been unlawful as well as a violation judgment to that effect will not per se ensure the release of the person that is deprived her/his freedom, but it will merely lead to the award of compensation in favour of the applicant. Thus, the remedy that is set forth in Article 141 of the CCP, whereby the right to compensation is set forth, will need to be exhausted.

While, in its former judgments, ascertaining the complaints for which the compensatory remedy, set forth by Article 141 of Law 5271, needs to be exhausted as an effective remedy, the Constitutional Court referred to the case-law of the Court of Cassation.⁸ One can suggest that this approach is applicable also in terms of other rights.

However, the Constitutional Court departed from this approach in its judgment in the case of B.T. This judgment does not relate to the

⁶ Ramazan Aras, no. 2012/239, 2 July 2013, § 29.

⁷ Ramazan Aras, § 33.

⁸ Hidayet Karaca [Plenary], no. 2015/144, 14 July 2015, § 60; for the alleged unlawfulness of custody, Günay Dağ and others [Plenary], no. 2013/1631, 17 December 2015, § 145; for the allegation that the detention order was issued in the absence of defense counsel, Adem Gedik, no. 2013/2950, 14 October 2015, § 36; and for the alleged failure to explain the grounds for detention, Deniz Özfirat, no. 2013/7929, 1 December 2015, § 49.

right to personal liberty and security. Therein, the allegation that the detention conditions at the foreigners' removal centre amounted to ill-treatment was found inadmissible since the legal remedies had not been exhausted. The Constitutional Court expressed that the removal centres were controlled by the Ministry of Interior and that the allegedly bad conditions available there could be subject to an action for compensation although there had not been any example indicating the successful conclusion of such an action in practice. Subsequent to this change of approach, the Court ruled on inadmissibility for similar grounds also in its judgment of *Cafer Yıldız*. We will discuss this judgment below. By looking at this case-law, we can say that where a remedy is prescribed by law, then it should certainly be exhausted. We do not need any example indicating that it was successfully implemented in practice. Nor is there any point of reference to put forth that such a remedy will, absolutely, be unsuccessful. We can now review the inadmissibility decisions of the Constitutional Court on the grounds that no remedy was sought under Article 141.

A. Complaints of Unlawful Arrest and Custody Processes and of Non-observance of Legally Prescribed Custody Periods

Article 141 § 1 (a) of the CCP prescribes that those being arrested, detained or kept under detention through a judicial order in violation of the legally prescribed conditions may claim compensation, while the subparagraph (b) thereof provides that those not being brought before a judge within the legal custody period may also claim compensation.

The subparagraph (a) explicitly refers to the claim for compensation in cases of arrest and detention, but makes no regulation regarding the custody measure. However, the judgments of the Court of Cassation cast no doubt on the fact that the custody measure also falls in this scope.

The custody measure is subject to a certain limitation of time. According to Article 91 of the CCP, the custody period shall not be longer than twenty-four hours, except for the obligatory period for referral to the closest judge or court to the place of arrest. The obligatory period for referral to the closest judge or court to the place of arrest shall not be longer than twelve hours. In the case of collectively committed crimes, the public prosecutor may issue written



orders to extend the custody periods for three days, one-day on each occasion, in consequence of the difficulty in gathering the evidence or of the large number of suspects. During the state of emergency, the custody period had been extended to 30 days, but then was reduced to 7 days. This arrangement has not been in force since the expiration of the state of emergency.

As regards the allegations that the legally prescribed custody period had been exceeded, that the arrest or custody had been unlawful or that the length of the custody period had been excessive, although the principal case had not been adjudicated on the date when the individual application was under review, the Constitutional Court concluded that the remedy to claim compensation as set forth by Article 141 of Law no. 5271 had been an effective remedy to be exhausted and therefore found the case inadmissible for non-exhaustion of legal remedies.⁹ The Constitutional Court referred to the judgments of the Court of Cassation while reaching this conclusion. The judgments of the Court of Appeal also favour the opinion that no judgment needs to be delivered on the merits of a case in order to award compensation. The European Court of Human Rights (“the ECHR”) specified in its *Mustafa Avcı v. Turkey* judgment that the remedy set forth in Article 141 of the CCP should be exhausted regarding the complaint for being arrested in breach of the procedural guarantees and unlawful custody.

B. Complaint as regards the Failure to Notify the Grounds for Arrest Subsequent to the Arrest

According to Article 141 § 1 (g), those not having been informed of the grounds for arrest or detention as well as the charges against them in writing or, where this is not possible, orally are entitled to claim compensation.

Thus, the Constitutional Court, in the case of Deniz Özfirat, found inadmissible the alleged failure to notify the grounds for arrest since

⁹ *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, §§ 64-72; *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, §§ 53-64; *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 141-150; *İbrahim Sönmez and Nazmiye Kaya*, no. 2013/3193, 15 October 2015, §§ 34-47; *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, §§ 92-100, *Ahmet Ünal*, no. 2016/17624, 9 May 2018, § 23-26, *Neslihan Aksakal*, no. 2016/42456, 26 December 2017.

the remedy that is set forth in Article 141 of the CCP had not been exhausted. The Court of Cassation's case-law assumes that the merits of the case do not need to be finalized in terms of the claims within this scope.¹⁰ Undoubtedly, this remedy should also be exhausted in case of a failure to notify the grounds for detention.

C. Complaints regarding the Detention Orders Issued in the Absence of a Defense Counsel

According to Article 141 § 1 (c), those being arrested without being informed of their legal rights or, although being informed, arrested without the fulfillment of their request to exercise these rights are entitled to claim compensation. The statutory rights referred to therein are regulated by Article 147 of the CCP. Accordingly,

b) The charges against the accused shall be explained.

c) He shall be notified of his right to appoint a defense counsel, and that he may utilize his legal assistance, and that the defense counsel shall be permitted to be present during the interview or interrogation. Where the accused is not able to retain a defense counsel and he requests a defense counsel, a defence counsel shall be appointed on his behalf by the Bar Association.

d) Without prejudice to Article 95, any one of the relatives chosen by the accused shall be forthwith informed that he has been arrested.

e) He shall be informed of his legal right to refrain from making any statement about the charges against him.

f) He shall be reminded that he is entitled to request the collection of concrete evidence that will absolve him from suspicion and he shall be given an opportunity to invalidate the existing grounds of suspicions against him and to put forth the arguments in his favour.

Therefore, the remedy set forth by Article 141 of the CCP will be applied in case of a failure to remind any one of the aforesaid rights.

As a matter of fact, the Constitutional Court dismissed in its Adem Gedik judgment the allegation of the applicant that he was deprived of his statutory rights as his access to a defense counsel was restricted

¹⁰ *Deniz Özfirat*, no. 2013/7929, 01 December 2015, §§ 52, 53.



during the detention process, on the grounds that the remedy set forth by Article 141 of the CCP had not been exhausted. The Court of Cassation's case-law assumes that the examination on the merits of the case do not need to be concluded in the case of claims within this scope.¹¹

D. Complaints regarding Detention Longer than the Reasonable Time and Maximum Statutory Period

According to Article 141 § 1 (d) of the CCP, *"although having been lawfully detained, those not brought before a judge and in respect of whom no judgment has been rendered within a reasonable time may claim compensation"*.

Pursuant to Article 102 of the CCP, the maximum detention period is 1 year and 6 months for the matters that do not fall within the jurisdiction of assize courts, while it is 5 years for the matters that fall within the jurisdiction of assize courts. Although there are varying doctrinal opinions, the Constitutional Court's case-law favours this opinion.¹² Under the Decree Law dated 15 August 2017 and numbered 964, this period has been extended up to 7 years for the crimes that fall within the scope of the Anti-Terror Law and that are defined in Turkish Penal Code's Part Two, Chapter Four, Sections Four, Five, and Seven. Thereafter, this provision has been enacted through the adoption of the Law dated 1 February 2018.

Under the initial case-law of the Court regarding the applications lodged by reason of detention periods longer than the reasonable time and the legally prescribed maximum period, it was deemed necessary to have exhausted the remedy set forth by Article 141 of the CCP provided that the judgment against an applicant had become final¹³ The ECHR also delivered an inadmissibility decision in the case of *Şefik Demir v. Turkey* on similar grounds since the legal remedies had not been exhausted.

11 Adem Gedik, no. 2013/2950, 14 October 2015, § 36-40) Most recently, the Constitutional Court delivered the same judgment also in the case of Mehmet Sedek Zengin [Plenary] (no. 2015/819, 22 November 2018).

12 Ramazan Aras, § 47

13 Hamit Kaya, 2012/338, 02 July 2013, §§ 32-33; Reşat Ertan, 2013/5700, 15 April 2015, § 29; Mehmet Emin Güneş, 2013/5707, 16 April 2015; § 29; Mecit Gümüş, 2013/9105, 25 June 2015; § 32, Hüseyin Hançer, 2013/8319, 7 January 2016 § 39 and 40; and Ömer Köse, 2014/12036, 16 November 2016, § 34.

Under the case-law of the initial period, it was held in terms of the cases, which related to the allegations of the same nature, but had not been finalized, that exhaustion of the remedy prescribed by Article 141 of the CCP was not required due to the unavailability of a practical example that the legal remedy set forth in Articles 141 and 142 of the Law no. 5271 was effective for the complaints that detention prior to the finalization of a judgment exceeded the reasonable time. Subsequently, the Court of Cassation stated that the finalization of a case was not necessary for such complaints.

In reference to the Court of Cassation's judgments that it is not necessary to wait for the result of a case regarding the complaints for exceeding the reasonable time and the maximum statutory period of detention, the Constitutional Court has ascertained that the compensatory remedy set forth in Article 141 § 1 (d) of the CCP needed to be exhausted and has; thus, amended its case-law. However, this process requires that the concerned person must have been released or a judgment must have been delivered in respect of him at the review date of the application.¹⁴ Where a person is still detained at the review date of the individual application, the compensatory remedy set forth under Article 141 of the CCP needs not to be exhausted.¹⁵ As a matter of fact, the ECHR delivered an inadmissibility decision in the case of *A.Ş. v. Turkey*, having regard to the mentioned case-law of the Court of Cassation, for non-exhaustion of legal remedies.

We need to highlight a matter here. Article 141 § 1 (d) of the CCP prescribes that compensation may be sought only in cases where the accused is detained in accordance with the law. Therefore, where it is concluded that the detention is unlawful, then an inadmissibility decision should not be delivered on the grounds that such a remedy was not exhausted in terms of a complaint concerning the reasonable time.

¹⁴ *Erkam Abdurrahman Ak*, no. 2014/8515, 28 September 2016, §§ 48-62; *İrfan Gerçek*, no. 2014/6500, 29 September 2016, §§ 33-45, *Ahmet Kubilay Tezcan*, no. 2014/3473, 25 January 2018, §§ 24-27; *Ekrem Atıcı*, no. 2014/15609, 8 March 2018, §§ 27-30.

¹⁵ *Burak Döner*, 2012/521, 02 July 2013, § 34; *Ramazan Aras*, 2012/239, 02 July 2013, § 35; *Soner Şengüller*, 2012/899, 09 January 2014, § 35; *Uğur Hoşgören*, 2012/999, 09 January 2014, § 35; *Özgür Görmez*, 2013/843, 03 April 2014, § 31.



E. Complaints concerning Unlawful Detention

Article 141 § 1 (a) of the CCP prescribes that compensation can be claimed by those being arrested, detained or kept under detention in violation of the statutory requirements.

In the case of complaints concerning unlawful detention, applicants generally allege that they were detained without strong criminal suspicion or that the detention order was not proportionate.

When reviewing the lawfulness of detention, the Constitutional Court first examines if the detention has legal grounds, secondly the existence of strong criminal suspicion, thirdly whether the detention pursues a legitimate aim and, finally, whether the detention measure is proportionate.

Under its initial case-law, the Constitutional Court delivered inadmissibility decisions for non-exhaustion of legal remedies where the application concerning detention had been concluded on the date when the individual application was reviewed, stating that an action for compensation should have been taken in accordance with Article 141 § 1 (a).¹⁶

However, in some recent cases, although a final judgment was rendered within the scope of the case, it was not held that the legal remedies had not been exhausted for not applying Article 141 of the CCP, and thus an examination was made on the merits.¹⁷ On the other hand, any decision of acquittal or non-prosecution and the finalization thereof constitutes an exception of this situation. The Constitutional Court delivered inadmissibility decisions on the grounds that the legal remedies had not been exhausted, stating that the persons concerned could receive compensation under subparagraph (e) or (a) of Article 141 (see *Kamil Erdoğan*, 2017/4023, 19 April 2018, §§ 39-42). Finally, a decision concerning the non-exhaustion of legal remedies cannot be delivered in cases where the case, whereby the detention

16 *Hamit Kaya*, 2012/338, 02 July 2013, §§ 32-33; *Reşat Ertan*, 2013/5700, 15 April 2015, § 29; *Mehmet Emin Güneş*, 2013/5707, 16 April 2015; § 29; *Mecit Gümüş*, 2013/9105, 25 June 2015; § 32, *Hüseyin Hançer*, 2013/8319, 7 January 2016, §§ 39 and 40; and *Ömer Köse*, 2014/12036, 16 November 2016, § 34.

17 *Eşref Turunç*, 2014/5963, 20 September 2017; *Feyzi İşbaşaran*, 2014/15929, 21 September 2017; and *Besime Konca* (not yet published).

order was given, has been pending even though the person concerned has been released, on the ground that the legal remedies provided by Article 141 of the CCP have not been exhausted. That is to say that no decision concerning the non-exhaustion of legal remedies can be delivered in such a case as it is the case with the complaints of detention beyond reasonable time. On the other hand, the ECHR ascertained in its judgments of *Lütfiye Zengin v. Turkey* and *Mehmet Hasan Altan* that the remedy set forth by Article 141 of the CCP is not required to be exhausted as the State failed to submit case-law whereby compensation is paid for unlawful detention.

In the light of this recent case-law, it can be said that no inadmissibility decision shall be delivered for non-exhaustion of legal remedies on the sole ground that Article 141 of the CCP has not been applied, even where the conviction of a person has become final. If; however, a final acquittal or non-prosecution decision has been rendered, compensation should be sought in accordance with Article 141 § 1 (e) or (a). However, we consider that in case of acquittal, the provision stipulated in Article 141 § 1 (e) of the CCP is not an effective remedy in terms of the lawfulness of detention. Article 141 § 1 (e) prescribes that there must be a lawful detention in order to be able to claim compensation. Accordingly, where a person is acquitted, compensation is automatically paid without ascertaining if the detention has been lawful. However, in order for a remedy to be regarded as effective, it should be able to find the existing violation as well as redress it.¹⁸ The ECHR dismissed in its *Mergen and Others* judgment the objection that the remedy set forth by Article 141 § 1 (e) should have been exhausted on similar grounds. From this standpoint, we can suggest that Article 141 § 1 (a) is an effective remedy, rather than Article 141 § 1 (e).

F. Complaints concerning the Failure to Communicate the Judgments Delivered Following Detention Reviews as well as to Review Objections Lodged against Detention

Article 141 § 1 (k) provides arrested or detained persons with an opportunity to claim compensation for their any pecuniary and non-pecuniary damages where the legal remedies against the arrest and

¹⁸ *Mergen and Others v. Turkey*, § 36.



detention processes have not been made available to them. The legal remedy in question is the appeal against detention. As for custody, it is the right to lodge an application with the magistrate judge as set forth in Article 91 § 5. Therefore, persons alleging to have been deprived of this right are entitled to bring an action for compensation in accordance with Article 141 § 1 (k) of the CCP.

As a matter of fact, the Constitutional Court delivered in the application of *Cafer Yıldız* an inadmissibility decision as a result of detention reviews, on the grounds that the allegations, which related to the deprivation of the right to appeal against the detention process due to the failure to communicate the judgments or to decide on an appeal against detention, may be examined within the scope of the case to be filed in accordance with Article 141 § 1 (k) of Law no. 5271.

The Constitutional Court expressed that it is advisable to lodge applications with the inferior courts with an aim to operate this remedy, which is of an effective nature to resolve such complaints, and to determine the scope of the statutory arrangement, since there is no reason to put forth that such a legal remedy will absolutely be unsuccessful in the absence of precedent cases evidencing the successful implementation of this compensatory remedy.¹⁹

Alleged Review of Detention without Being Brought Before a Judge/Court

The Constitutional Court has ascertained that the opportunity to claim compensation as set forth by Article 141 of the Law 5271 constitutes an effective remedy to be exhausted although no judgment has been delivered within the scope of the principal case on the review date of the individual application regarding the allegations that the detention reviews had been made without being brought before a judge/court, if the concerned person had been brought before the judge/court (see *Salih Sönmez*, §§ 166-177). However, the period during which the relevant persons has not been brought before a judge should be longer than 18 months in order for an inadmissibility decision to be given based on the fact that the legal remedies have

¹⁹ *Cafer Yıldız*, no. 2014/9308, 9 January 2018, §§ 37-40; and *Yaşar Sağlı*, no. 2014/9311, 24 January 2018, §§ 37-40

not been exhausted. Otherwise, the application will be declared inadmissible as being manifestly ill-founded.

Where, in all of these cases, the legally prescribed period for compensation claims has lapsed on the date when the individual application has been adjudicated (1 year from the finalization date of the case), this compensatory remedy will not be required to be exhausted.²⁰

G. De Facto Detention

De facto detention refers to the detention without any legal grounds; namely, neither an arrest nor custody, or the cases of detention that does not fall within the scope of any one of the constitutional detention cases. Such detention cases are predominantly attributable to the acts of law enforcement officers. So, can we suggest at this point that the legal remedy set forth by Article 141 of the CCP should be exhausted?

We have mentioned above that the legal remedy set forth by Article 141 of the CCP § 141 relates only to the preventive measures. Therefore, we cannot suggest the necessity of taking this legal remedy as no preventive measure is in question here. At this point, Article 141 § 3 of the CCP may come to mind. However, the acceptable grounds for the action for compensation has been limited with the acts and orders of judges or public prosecutors. We consider that action for compensation may be brought before ordinary and administrative courts depending on the public official's personal fault or neglect of duty in connection with de facto detention.

III. APPLICATIONS LODGED SUBSEQUENT TO THE EXHAUSTION OF COMPENSATORY REMEDY

If compensatory claims are in question in this regard, a review should be made under Article 19 § 9 independently from the applicant's legal qualification. If there is a complaint concerning the trial process within the scope of the action for compensation, the review should be made in terms of the right to a fair trial.

²⁰ *Abdullah Akyüz* [Plenary], no. 2013/9352, 2 July 2015, §§ 45-50.



In *Bayram Keleş* judgment, the applicant's allegations that the compensation awarded at the end of the action for compensation as provided by Article 141 had been insufficient were examined under the right to personal liberty and security. In consequence of the examination, the application was dismissed on the grounds that there had not been a manifest disproportion between the amount awarded as compensation, the circumstances of case and the losses incurred by the applicant. Therefore, the scope of the examination in question is limited with the ascertainment if there is a manifest disproportion between the circumstances of case and the amount of compensation.

The last paragraph of Article 5 of the Convention as well as the last paragraph of Article 19 of the Constitution are applicable where any one of the provisions of other paragraphs is violated. In other words, the fact that one of the said rights has been violated must be determined by the Constitutional Court or the domestic judicial bodies directly or substantially in order for the right to compensation to be exercised.²¹ Otherwise, this paragraph will not be applicable.

The trial court may also determine that the applicant was ill-treated in violation of the principles specified in the first eight paragraphs of Article 19 of the Constitution. If the trial court has made this determination, the role of the Constitutional Court is to ascertain if the compensation amount is manifestly disproportionate under the circumstances of the case or if the compensation was paid or not. If the trial court did not make such a determination or refused the compensation claim in this direction, then the Constitutional Court will, first, determine if any one of the eight paragraphs of Article 19 of the Constitution was violated or not and, secondly, the final paragraph of Article 19 was also violated due to the failure to pay compensation. Should the Constitutional Court does not determine any unlawfulness, then the complaint concerning the violation of the last paragraph of Article 19 will also be dismissed due to the lack of jurisdiction.²² Thus, the applicant's allegation that his right to compensation had been violated was dismissed in *Emrah Ergün*²³

²¹ *Wassink v. the Netherlands*, § 38

²² *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 10 September 2018, § 173.

²³ *Emrah Ergün*, no. 2014/4651, 21 February 2018, § 56.



judgment due to the lack of jurisdiction hence the detention was found constitutional.

In *Safkan Aydoğdu*²⁴ judgment, the applicant alleged that his right to liberty and security had been violated in consequence of the dismissal of his compensation claim despite his unlawful deprivation of liberty.

The Constitutional Court dismissed the applicant's complaint for unlawful detention due to the lack of jurisdiction in consequence of the lapse of time since the detention on remand ended prior to 23 September 2012 (the commencement date of the Court's jurisdiction *ratione temporis*). As the Constitutional Court failed to examine whether the applicant's deprivation of liberty had been lawful due to the lack of jurisdiction *ratione temporis*, it expressed the impossibility of its examination of the allegation regarding the violation of the right to compensation that is guaranteed by the last paragraph of Article 19 of the Constitution and; hence, dismissed this complaint due to the lack of jurisdiction *ratione temporis*.

²⁴ *Safkan Aydoğdu*, no. 2014/7498, 5 April 2017.

*THE RIGHT TO LIBERTY AND
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THE RIGHT TO LIBERTY AND SECURITY NORMATIVE FRAMEWORK AND PRACTICE IN MONTENEGRO

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Honorable colleagues,

We cordially thank you for the invitation, which honored us, to participate in this Summer School.

On behalf of the Constitutional Court of Montenegro we would like to express the gratitude to organizers of the Summer School – the Constitutional Court of Republic of Turkey.

Constitutional courts are facing complex and difficult tasks. They have an obligation to interlace the text of the Constitution, its principles and spirit, international documents, to make democratic theory satisfactory into practice, and the ideology of transformation attainable.

Experience of the modern state in functioning of constitutional institutions is authentic, a constitutional legal theory provides different mode of interpretation and attitude of the constitutional court in regard to “values of normative”, on the one hand, and on the other, in regard to “reality”. Hence, in combination of good constitutional solutions, constitutional practice and theoretical knowledge in this field, the Constitutional Court of Montenegro, today, aspires and seeks to establish good standards in the exercise of constitutional control.

Freedom is a fundamental constitutional principle and the central value of constitutionalism. Preserving liberty is the purpose and goal of establishing the state as a political community and the meaning

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and reason for the existence of the Constitution as the highest legal act in the country. The Constitution of Montenegro in the Article 29¹ contains a number of guarantees, which basically consist in ensuring the principle of legality in the work of State organs which are deciding on detention. These guarantees are the followings:

-Deprivation of liberty shall be permitted only for the reasons and in the procedure prescribed by the law;

-Notification of the reasons for the arrest;

-Information that he/she is not obliged to give any statement;

-Right to inform about the deprivation of liberty the person of own choosing of the person deprived of his/her liberty;

-Right to the defense counsel of his/her own choosing present at his interrogation;

-Punishment of unlawful deprivation of liberty.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 5², entitled "The right to liberty

1 Deprivation of liberty in Montenegrin Constitution:

"Everyone shall have the right to personal liberty.

Deprivation of liberty shall be permitted only for the reasons and in the procedure prescribed by the law.

Person deprived of liberty shall be notified immediately of the reasons for the arrest thereof, in own language or in the language he/she understands.

Concurrently, person deprived of liberty shall be informed that he/she is not obliged to give any statement. At the request of the person deprived of his/her liberty, the authority shall immediately inform about the deprivation of liberty the person of own choosing of the person deprived of his/her liberty.

The person deprived of his/her liberty shall have the right to the defense counsel of his/her own choosing present at his interrogation. Unlawful deprivation of liberty shall be punishable"

2 Right to liberty and security of the European Convention on Human Rights: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

and security” contains the prohibition of deprivation of liberty, and also contains specified cases (exceptions) in which is legally allowed to carry out the procedure of deprivation of liberty. These exceptions are exhaustively listed and do not allow a broader interpretation, or pinging other cases, into the term of “permitted deprivation of liberty”. Compared with the guarantees provided in the Constitution of Montenegro, the European Convention in regard to the right of the individual to be informed of the reasons for the arrest uses legal standard “without delay”, while our Constitution recognizes the term “immediately”. In specific cases in case law of the European Court of Human Rights is determined meaning of the shortest time interval means within the standards in the Convention. It is estimated that this is a period of “few hours after the arrest”³. In addition to the timely notification of the reasons for the deprivation of liberty practice raised the issue of the content of notice of the reasons for arrest. Starting from this fact it was concluded that notice of the reasons for arrest cannot be summarized, but “sufficiently precise”.

Prohibition of arbitrary deprivation of liberty is also contained in other international documents (Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, Recommendation Rec (2006) 13 of the Committee of Ministers to member states on the use of remand in custody and safeguards against abuse).

When it comes to custody, it should be noted that detention is a preventive deprivation of liberty which is being undertaken in order to achieve certain objectives of procedural law and refers to a set of rights that belong to Habeas corpus. By its legal nature, detention

2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

3. *Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”.*

3. *Kerr v. UK (decision), apII.no.40451/98, December 7, 1999. Quoted according to: Z.Pažin, Right to liberty and security and European convention detention law, Podgorica 2013, p. 135.*



is a measure that insures presence of a specific person before the competent court in cases where there is reasonable suspicion that he/she has committed a criminal offense. Since this measure is related to fundamental rights of humans, the constitutions lay down the rules in regard to this institute.

The central guarantee that protects the individual against this form of detention is the existence of reasonable doubt that must be assessed in each individual case since its content has not been established by the constitution or by law. However, it can be generally defined as an immediate, direct link between a specific person and a committed crime as a real event in the outside world. Reasonable suspicion must be explained with reference to the facts and the information on which the conclusion of its existence is based.⁴ The sensitivity of the act of detention and retention in custody determined frame of the Constitution to establish the terms and conditions in which they can be effectuated.

In this regard, the provisions of Article 30, paragraph 1. of the Constitution of Montenegro⁵ prescribes (restrictive) conditions which must be cumulatively fulfilled in order to arrested or detained an individual, namely they are:

1. existence of reasonable doubt that person has committed a crime,
2. existence of the decision of the competent court, and
3. if it is necessary to conduct criminal proceedings.

However, even in the case of fulfillment of these three conditions the court is not obliged to adopt the decision, but it must assess

4 Decision of the Constitutional Court of Montenegro, UZ-III no. 603/11, from 12. January 2012.

5 Detention:

"Person suspected with reasonable doubt to have committed a crime may, on the basis of the decision of the competent court, be detained and kept in confinement only if this is necessary for the pre-trial procedure.

Detainee shall be given the justified decision of detention at the time of being placed in detention or no later than within 24 hours from being put in detention.

Detainee shall have the right of appeal against the decision of detention, upon which the court shall decide within 48 hours. The duration of detention shall be reduced to the shortest possible period of time.

Detention by the decision of first-instance court may last up to three months from the day of detention, and by the decision of a higher court, the detention may be extended for additional three months.

If no indictment is raised by time of expiry of those deadlines, the detainee shall be released.

Detention of minors shall not exceed 60 days."



the circumstances of the case and take into account the fact that “deprivation of liberty is the strongest form of liberty restriction.”

Upon detention, a person shall be given the justified decision of detention (at the time of being placed in detention or no later than within 24 hours from being put in detention.), whereby it is desired to fasten up the operation and efficiency of treatment by public authorities that are participating in the criminal proceedings and other institutions helping them, thusly, reducing the space for their arbitrary actions and reinforcing respect for individual freedom as fundamental value of society. In the same direction goes the existence of a right to appeal the decision on custody in which also shall be decided in a short deadline (48 hours).

The Constitution of Montenegro provides an additional guarantee against unjustified detention by establishing that the duration of custody must be reduced to “the shortest possible” necessary time, which in practice depends on the nature of the case. The maximum duration of detention is limited to six months - three months after the decision of the court of first instance and an extension of three months by the decision of the High Court. In case, if no indictment is raised by time of expiration of those deadlines, the detainee shall be released. With the aim to protect the interests of minors their duration of detention is limited up to 60 days.

The Code on Criminal Procedure regulates substantive and procedural assumptions concerning the procedural rights in custody, the duration of detention, and the obligation of justification of a court decision on detention. Institute of detention according to the Code, is a measure of securing the presence of the defendant before the competent judicial authorities to allow criminal proceedings, in the case where there is reasonable suspicion that the person had committed a crime.

The detention, as a measure of procedural coercion of deprivation of personal liberty of the suspect or the accused, on which decides the competent court prior to or during criminal proceedings, under the conditions prescribed by law. In the further course of the new criminal proceedings shall be decided on the extension or termination of custody, which occurs after fulfillment of the prescribed conditions.



The Constitutional Court of Montenegro, in decision U I. no 18/09 of 28 October 2014, found that the provision of Article 175, Paragraph 1, Item 4 of the Code of Criminal Procedure⁶, in the part which states: *“exceptional circumstances exist indicating that liberation would lead to a serious threat to the preservation of public order and peace”* is not in conformity with the Constitution.

In the above mentioned decision of the Constitutional Court of Montenegro has expressed the following standpoint:

“... 9. The disputed part of the provision of Article 175, Paragraph 1, Item 4 of the Code stipulates that the grounds for detention has an extra-procedural character, which indicates that detention may be ordered to protect safety of people or to eliminate threat on preservation of public peace and order, and not to conduct criminal proceedings.

Namely, from the Article 175, Paragraph 1, Item 4, as whole stems that the detention of the person, under that provision, can be ordered after the fulfillment of three cumulative conditions: when there is reasonable suspicion that a person has committed a criminal offense punishable by imprisonment of ten years or a more and which is especially grave due to the manner of commission and consequences and there exist an exceptional circumstances indicating that liberation would lead to a serious threat to the preservation of public order and peace. The disputed part of the provision of Article 175, Paragraph 1, Item 4 of the Code, represent

6 “(1) When reasonable suspicion exists that a certain person had committed a criminal offence, detention may be ordered against that person, if:

1) the persons hide or their identity cannot be established, or if other circumstances exist indicating a risk of flight;

2) circumstances exist that indicate that they would destroy, hide, modify or fabricate evidence or traces of a criminal offence or indicate that they would hinder the procedure by influencing witnesses, accomplices or accessories by virtue of concealment;

3) circumstances exist that indicate that the criminal offence would be repeated or attempted criminal offence completed or that they would commit the criminal offence they threaten to commit;

4); in the case that detention is necessary to allow the procedure of the criminal offence punishable by imprisonment of ten years or a more severe punishment and especially grave due to the manner of commission and consequences;

5) duly summoned defendants obviously evade appearing at the main hearing.

(2) In the case referred to in paragraph 1, item 1 of this Article, detention ordered only because it was not possible to establish the identity of the person shall last until this identity is established. In the case referred to in paragraph 1, item 2 of this Article, detention shall be terminated as soon as evidence because of which detention was ordered are secured. Detention ordered pursuant to paragraph 1, item 5 of this Article may last until the publication of the judgment.”

*a legal basis for detention or continuation of detention in regard to the “elimination of the threat on preservation of public peace and order”. However, that threat (real or potential), do not comprise grounds on which a court in practice, could determine that due to the liberation of the accused, would emerge exceptional circumstances will or may affect the conduct of criminal proceedings or lead to a serious threat to the preservation of public order and peace. The law, in fact does not define “exceptional circumstances” and “a serious threat to the preservation of public peace and order,” or initial risk that competent authorities can justify the order or extension of detention of a person, including the protection of that person or, in other words, what kind of legitimate purpose is achieved with detention of perpetrator of criminal offence, due to threat to the preservation of public order and peace.*9.1. For reasons of contradictions, imprecision and unpredictability in terms of the consequences and risks of arbitrariness, the disputed part of the provision of Article 175, Paragraph 1, Item 4 of the Code, according to the assessment of the Constitutional Court is not in conformity with the provisions of Article 30, paragraph 1 of the Constitution, from which it stems that the court may order detention only if there is reasonable doubt of having committed a crime and only if that measure is necessary for the pre-trial procedure, which exhausted direct effect of that criminal-procedural institute. From the above mentioned, by findings of the Constitutional Court, this disputed legal ground for detention have the character of preventive measure, which does not contain a real threat to public peace and order or, in other words, disputed part of the provision of Article 175, Paragraph 1, Item 4 of the Code is imprecise, unpredictable in terms of the consequences and, therefore, does not meet the criterion of legality as required by the European Court.

In addition, having in mind rights immanent to status of defendants in pre-trial proceedings, the Court’s assessment (and explanation and evaluation of this assessment) about all listed elements, i.e. reasons for detention and its extension must be fundamentally stronger if the detention time is longer. Only such an approach will fulfill request of “relevance, accessibility, predictability and security” of reasons for detention and,



cumulatively, the criterion of legality in accordance with the requirements arising from the Constitution and the Convention.

Therefore, the Constitutional Court finds that disputed part of the provision of Article 175, Paragraph 1, Item 4 of the Code is not in accordance with the provisions of Article 30, paragraph 1 of the Constitution and Article 5, paragraph 1c and paragraph 3 of the European Convention."

This standpoint of the Constitutional Court of Montenegro represented a significant step forward in the protection of human rights and fundamental freedoms guaranteed by the Montenegrin Constitution and the European Convention, and also had a significant impact on the later individual cases in deciding upon the procedure on the constitutional complaints.

When it comes to individual protection of this right it should be noted that the Constitutional Court of Montenegro, in decision No. UŽ-III. 74/09, dated from 2 June 2011, found violation of the applicant's right under Article 30, paragraph 3 of the Constitution of Montenegro, because the High Court in Podgorica, in the procedure on appeal, did not immediately submitted documents to the Appellate Court of Montenegro, although constitutional and legislative provisions prescribe that the courts are obliged to urgently decide on the legality of his detention. In the same time, this is the first decision in which the Constitutional Court had found a violation of the right to liberty and security, if we consider the fact that the institution of the constitutional complaint in the legal system of Montenegro came to life in 2008. Afterwards, the Constitutional Court in a number of cases has found a violation of the constitutional and convention rights, and these violations were mainly related to insufficiently reasoned decisions of the ordinary courts in respect of reasonable doubt about ordering (extending) the detention, as well as the disproportionate assessment of use of alternative measures.

If we take into account the structure of insufficiently reasoned decisions, the most common legal basis for detention was a "risk of flight" and "hinder of the procedure by influencing witnesses, accomplices or accessories", more rarely "repetition of acts". Therefore, courts commonly explained grounds for detention of "risk of flight,"

citing the facts that person is a young, unemployed and unmarried individual, and the fact that in case if the accused is found guilty she/he can expect long prison sentence, while the grounds for detention of “the risk of influencing witnesses” were explained in uncertain way citing that there are particular circumstances indicating that the accused by remaining free would hinder the procedure by influencing witnesses, accomplices or accessories.

Regardless of the fact that the detention could be based on these, the State authorities cannot simply rely on such opinions in the abstract, but should prove that there is a specific factual circumstance indicating the risk of destruction of evidence or bribing witnesses.⁷

The general conclusion is that in the previous period the courts, in its decisions ordering detention, failed to provide concrete and convincing facts that justify detention. This decision usually held stereotypical reasoning which contained mainly the above mentioned legal provisions. Also, it was observed that the facts cited in support of reasoning were not of sufficient quality to justify detention in the particular case.

However, it is evident that by strengthening the capacities of the competent authorities, acquisition of specialized knowledge in this field and following case law of the European Court in Strasbourg, which decisions the Constitutional Court refers to, and more frequent regular courts too, increases the quality of the protection of human rights and fundamental freedoms, in particular the right to liberty and security. Increasingly, decisions on detention order are providing relevant and sufficient reasons, as well as the specific circumstances in favor of justification of detention. On the other hand, the Constitutional Court reiterates the importance and the need to establish alternative measures for ensuring the presence of the accused in the proceedings which would lead to a reduction of, sometimes unnecessary, detention, as well as overcrowding of detention units based on the understanding of the European Court attached to the prohibition of inhumane treatment (article 3. ECHR), in relation to conditions of detention.

⁷ Case of *Trzaska v. Poland* (Application no. 25792/94) Judgment, Strasbourg 11 July 2000, p. 63-66

*THE RIGHT TO LIBERTY AND
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THE RIGHT TO LIBERTY AND SECURITY IN KOREA

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I. THE CONSTITUTION OF THE REPUBLIC OF KOREA ON THE RIGHT TO LIBERTY AND SECURITY

Article 12.

“(1) All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures.

(3) Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search: Provided, That in a case where a criminal suspect is an apprehended flagrante delicto, or where there is danger that a person suspected of committing a crime punishable by imprisonment of three years or more may escape or destroy evidence, investigative authorities may request an ex post facto warrant.

(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act.

(5) No person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel. The family, etc., as designated by Act, of a person arrested or detained

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shall be notified without delay of the reason for and the time and place of the arrest or detention.

(6) Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention."

Article 12 Section 1 of the Constitution stipulates "All citizens shall enjoy personal liberty," and that means 'the restrictions can only be made by law'. The remaining provisions of Article 12 specify the procedures necessary for physical detention – by warrants issued by a judge, right to prompt assistance of counsel, right to be informed before arrest, and right to request the court to review the legality of detention.

The Constitutional Court of Korea (hereinafter "CCK") has emphasized that bodily freedom is the premise to all the basic rights as the most basic right to realize human dignity and value, because no freedom and rights is meaningful without guarantee of bodily freedom.¹

II. MAJOR CONSTITUTIONAL COURT DECISIONS REGARDING FREEDOM OF EXPRESSION AND ASSOCIATION

This chapter introduces three major Constitutional Court's decisions with respect to right to liberty and security. The first decision deals with the principle of detention by warrant and due process of law under Article 12 Section 3. And the second one is about a refugee applicant detained in the waiting room at an airport. The last one is related with involuntary hospitalization.

A. Case on the Restriction on Judge's Discretion in Releasing Defendants of Serious Crimes [4 KCCR 853, 92Hun-Ka8, December 24, 1992]

1. Background of the Case

The Constitutional Court, in this case, ruled that in light of the principle of arrest by warrant and due process of law under Article 12 Section 3 of the Constitution, the continuing effect of an arrest warrant must be determined by an independent judge's judgment and not

¹ Constitutional Court of Korea, 784 KCCR, 21-1(B)2007Hun-Ba25, June 25, 2009.



be swayed by the opinion of the prosecutor. The Court then struck down Article 331 of the Criminal Procedure Act that maintained the effect of the arrest warrant even after acquittal if the prosecutor had demanded serious punishment on the defendant.

Article 331 of the Criminal Procedure Act (Act No. 341 enacted on September 23, 1954) provided that an arrest warrant lost its effect in event of acquittal, judicial exemption of prosecution, exemption from punishment, suspension of sentencing, suspension of punishment, dismissal of the prosecution, or sentence of a fine or minor fine. However, a proviso to the Article made an exception when the prosecutor had demanded a death penalty, a life sentence, or a sentence of imprisonment with or without labor for more than ten years.

Therefore, in such cases, an acquittal in the first trial court and the appellate court could not set the accused free until it was upheld in the Supreme Court. The defendants in this case were prosecuted for assault in robbery and special robbery, and the prosecutor demanded a sentence of imprisonment between seven and ten years.

The trial court, *sua sponte*, requested constitutional review of the proviso of Article 331.

2. Summary of the Decision

The Constitutional Court struck down the proviso of Article 331 of the Criminal Procedure Act after examining the role of a judge in an arrest, as follows.

All people's right to bodily freedom is guaranteed. In the event that it is restricted, due process of law and the general rules of statutory reservation regarding restrictions on fundamental rights demand that the restriction is imposed to the minimum extent necessary. Therefore, a judge or the court, after having issued an arrest warrant, must cancel it, *sua sponte* or upon the party's request, immediately at any stage of criminal procedure whenever they find that the causes of arrest did not exist or no longer exist.

The due process of law, prescribed in Sections 1 and 3 of Article 12 of the Constitution, is an independent constitutional principle. The related principle of arrest by warrant under Article 12 Section 3 of the



Constitution implies that determination by a judge should apply not only to the question of whether to issue a warrant but also to whether its effect should continue. Therefore, the proviso of Article 331 of the Criminal Procedure Act which makes the continuing validity of a warrant depend on a prosecutor's decision, violates the due process of law guaranteed under the Constitution.

A defendant once released on a judge's misjudgment, may become difficult to bring back into custody and under the criminal justice system despite the seriousness of his crime, and the legislative purpose of the proviso is to prevent such situations. However, Article 93 of the Criminal Procedure Act allows the prosecutor to appeal a judge's cancellation of a warrant immediately. Other provisions of the Act also allow the appeals court to re-arrest the defendant if necessary. In light of the existence of these provisions, the proviso in question violates the rule against excessive restriction.

3. Significance of the Decision and Aftermath of the Case

This decision benefited defendants that were living in captivity until the Supreme Court's final decision even after they were acquitted or received suspension of punishment.

Thereafter, the Court reviewed Article 97 Section 3 of the Criminal Procedure Act that established a prosecutor's right to immediate appeal against a judge's decision to release a defendant on bail. Under the provision, the defendant was to be held in confinement for three days after a judge decided to release him on bail, during which the prosecutor could appeal the bail decision. If the prosecutor filed an appeal, the concerned person was detained until the appeal was resolved in his favor. Therefore, the provision gives precedence to the prosecutor between the judge's decision that the defendant do not need to be detained during the trial, and the prosecutor's objection to such decision. This violates the principle of arrest by warrant according to which an independent judge must decide whether to detain or continue detaining the defendant, and restricts the defendant's bodily freedom, violating due process of law and the rule against excessive restriction (93Hun-Ka2, December 23, 1993).

And the Constitutional Court held that Article 101 Section 3 of the Criminal Procedure Act, which allows a public prosecutor to file

an immediate appeal against the court's decision of suspension of execution of defendant's detention, violates the principle of arrest by warrant, due process and the rule against excessive restrictions and thus is in violation of the Constitution (2011hun-Ka36, June 27, 2012).

B. Case on the Right to Meet Counsel of a Refugee Detained for Repatriation at Incheon International Airport [2014Hun-Ma346, May 31, 2018]

1. Background of the Case

In this case, the Court held that the rejection by the head of Incheon Airport Immigration Office of the request to meet with counsel by a refugee detained in the waiting room for repatriation at Incheon International Airport, infringed upon the right to receive assistance of counsel and thus violated the Constitution.

(1) The complainant is a foreigner of Sudanese nationality. Upon arriving at Incheon International Airport on November 20, 2013, the complainant applied for recognition of refugee status, and was detained in a waiting room for repatriation at Incheon International Airport until it was decided whether the request for recognition would be referred for refugee status screening. The respondent, the head of the Incheon Airport Immigration Office, refused to refer the complainant for refugee status screening on November 26, 2013, and the complainant was continuously detained at the waiting room for repatriation at Incheon International Airport.

(2) On November 28, 2013, the complainant filed a lawsuit to annul the decision that deny a referral for refugee status screening, and on December 19, 2013, filed a habeas corpus petition to seek release from confinement. While these two lawsuits were pending, the complainant's counsel requested the respondent to allow a meeting with the complainant on April 25, 2014, but the respondent refused.

(3) The complainant filed this constitutional complaint on April 30, 2014, claiming that the respondent's refusal to allow visitation by a counsel infringed upon the right to receive assistance of counsel as prescribed in the main text of Article 12 Section 4 of the Constitution, and the right to trial.



2. Subject Matter of Review

The subject matter of review in this case is whether the respondent's refusal on April 25, 2014, to the complainant's request to meet with his/her counsel, infringes upon the fundamental rights of the complainant, who is being detained in a waiting room for repatriation at Incheon International Airport after being denied a referral for refugee status screening (hereinafter the respondent's refusal on April 25, 2014, to allow visitation by counsel is referred to as the "disallowance of visitation by counsel").

3. Summary of the Decision

- a. Whether the respondent was the actor that detained the complainant in a waiting room for repatriation

The respondent is the joint decision-maker on the management and operation of the waiting room for repatriation, a detention facility; exercised decisive authority in the commencement and termination of the complainant's detention; shared a portion of the detention costs; and by detaining the complainant enjoyed the administrative benefit of conveniently controlling persons whose entry into the country was denied. Therefore, the respondent is the actor that, in conjunction with the Incheon Airport Airline Operation Council, detained the complainant.

- b. Whether the right to receive assistance of counsel prescribed in the main text of Article 12 Section 4 of the Constitution is immediately guaranteed for persons who have been detained under administrative procedures

Given the language of the main text of Article 12 Section 4 of the Constitution, the structure of the provisions of Article 12 of the Constitution, the nature of the right to assistance of counsel, and the purpose of the Constitution's guarantee of physical freedom, the "detainment" prescribed in the main text of Article 12 Section 4 includes not only detention under judicial proceedings, but also detention by administrative procedures. Therefore, the right to assistance of counsel prescribed in the main text of Article 12 Section 4 of the Constitution is immediately guaranteed for persons who have been detained in the latter case as well.

The Constitutional Court previously delivered a decision to the contrary (2008Hun-Ma430, August 23, 2012), opining that the right to assistance of counsel prescribed in the main text of Article 12 Section 4 of the Constitution intends to guarantee the suspect's or defendant's right to self-defense in criminal proceedings, and should not be applied to procedures for protection or deportation under the Immigration Act. Such decision is to be reversed within the extent to which it conflicts with the decision in this case.

c. Whether the complainant was under detention in the waiting room for repatriation

The waiting room for repatriation at Incheon International Airport is a closed-off space with a steel door for an entrance, and entry into the room is controlled by the Incheon Airport Airline Operation Council. Therefore, the complainant could not leave the waiting room to venture into the transit area, and had no way of communicating with the outside world aside from a payphone. The complainant had been detained in the waiting room for repatriation for approximately five months when the respondent did not allow visitation by counsel, and could not have expected to leave the waiting room at his/her discretion until the lawsuit on the revocation of the decision of denial of the referral for refugee status screening was completed. Since the complainant had already filed a habeas corpus petition to seek release from confinement in the waiting room when the respondent made the disallowance of visitation by counsel, the complainant cannot be deemed to have been staying in the waiting room at will. Therefore, the complainant was being "detained," as prescribed in the main text of Article 12 Section 4 of the Constitution, when the disallowance of visitation by counsel was made.

Considering the specific and practical circumstances faced by the complainant, who had fled persecution in his/her country of citizenship, the complainant's freedom to depart the country is merely an abstract possibility that in reality cannot be realized. Therefore, such notional freedom to depart the country is not an element that should be considered when deciding whether the complainant was being "detained" in the waiting room for repatriation. Even if such possibility is taken into account, the complainant was prohibited from leaving the waiting room to enter the transit area for a long period,



which confirms that the complainant was detained in the waiting room, which was a closed-off area.

- d. Whether the disallowance of visitation by counsel in this case infringed upon the complainant's right to receive assistance of counsel

The disallowance of visitation by counsel in this case restricted the complainant's right to assistance of counsel with no legal ground, and thus infringed upon the complainant's right to assistance of counsel.

Further, it is not likely that allowing the complainant to meet with his/her counsel would interfere with guaranteeing national security, maintaining order or seeking public welfare. The complainant's right to meet with his/her counsel can be properly guaranteed without particularly disrupting national security or order in the transit area if certain measures are taken, for example restricting meeting venues to the minimum extent necessary. Therefore, the disallowance of visitation by counsel in this case cannot be considered a restriction of fundamental rights required for guaranteeing national security, maintenance of order, and public welfare. From this viewpoint, the disallowance of visitation by counsel likewise infringes upon the complainant's right to receive assistance of counsel.

4. Aftermath of the Case

There were views that this decision greatly improved the human rights of refugee applicants who had remained in the blind spot of human rights, because they had not been allowed to attend a trial or receive the assistance of an attorney even after filing a petition while being detained at the airport after denial of entry.

Now the person from Sudan resides in Korea as a refugee, recognized by the Ministry of Justice of Korea.

C. Case on the Involuntary Hospitalization of Mentally Ill Patients[28-2(A) KCCR 276, 2014Hun-Ka9, September 29, 2016]

1. Background of the Case

In this case, the Constitutional Court held that Article 24 Sections 1 and 2 of the Mental Health Act (hereinafter referred to as the "Provisions on Involuntary Hospitalization"), which allow the



involuntary hospitalization of a mentally ill person with the consent of two of his or her legal guardians and a diagnosis by a single neuropsychiatrist, are unconformable with the Constitution.

The petitioner was forcefully hospitalized with the consent of her two children and the diagnosis by a neuropsychiatrist approving her hospitalization. In response, the petitioner filed a petition for habeas corpus under the Habeas Corpus Act with the trial court. While the petition was pending, the petitioner motioned for constitutional review of the provisions on involuntary hospitalization, and the court granted the motion and requested a constitutional review of the provisions.

2. Summary of the Decision

The Constitutional Court held that the Provisions on Involuntary Hospitalization do not conform to the Constitution, for the following reasons.

As the involuntary hospitalization system stipulated in the Provisions on Involuntary Hospitalization restricts the physical freedom of a mentally ill person to a level on par with bodily confinement, it is necessary, in the process of hospitalization, to minimize infringement upon the physical freedom of such person and to prevent any chance of the system being misused or abused. Nonetheless, without prescribing procedures for an independent and neutral third party making the decision as to whether a mentally ill person requires treatment through involuntary hospitalization, the Mental Health Act makes it possible to hospitalize such person against his or her will with the consent of two of his or her legal guardians and a diagnosis by a single neuropsychiatrist. Moreover, the Act makes even long-term involuntary hospitalization possible if legal guardians and a medical institution have the same interests. Considering the aspects stated above, the Provisions on Involuntary Hospitalization fail to exclude the possibility of the system being misused or abused, thereby infringing on the physical freedom of a mentally ill person.

However, if the Court delivers a decision of simple unconstitutionality for the provisions and thus the provisions immediately lose effect, a legal vacuum would occur, making it



impossible to proceed with involuntary hospitalization even where deemed necessary. Therefore, the Court held that the provisions are not conform to the Constitution but are temporarily applicable.

3. Aftermath of the Case

There were cases where the Provisions on Involuntary Hospitalization had been abused, and in a particularly prominent case, two legal guardians forcibly hospitalized a mentally ill person in collusion with a neuropsychiatrist. Before the Court decision was delivered, the Mental Health Act was already wholly amended by Act No. 14224 on May 29, 2016, to the Act on the Improvement of Mental Health and the Support for Welfare Services for Mental Patients (which entered into force on May 30, 2017). Under this Act, procedural measures were prepared, which prevented any chance of the involuntary hospitalization system being misused or abused. More specifically, the Act introduced a diagnosis hospitalization system by strengthening the requirements and procedures for hospitalization by legal guardians; newly established a consent-based hospitalization system; stipulated the establishment of committees for examination as to the legitimacy of admissions to examine whether hospitalization or admission by legal guardians was legitimate; and required diagnoses by at least two neuropsychiatrists from different mental medical institutions in order to determine whether a mentally ill person was in need of continued hospitalization.

III. CONCLUSION

As described above, the CCK has recognized importance of right to liberty and security, and held decisions that protect the right. Recently, the CCK provided protection to not only detention in criminal proceedings but also administrative detention in refugee recognition procedure. Lastly, involuntary hospitalization cases are popular issues and there were some decisions about it over the world. So the decision above was timely and can be helpful to other countries in litigation.

As forums of right to liberty and security continuously evolve, the CCK continues its own role in protecting freedom of the body as the most essential elements of the human rights.

Thank you for listening.

***RIGHT TO LIBERTY AND SECURITY:
A MALAYSIAN PERSPECTIVE***

***Aizatul Akmal bin MAHARANI
Low Wen ZHEN***

FEDERAL COURT OF MALAYSIA



RIGHT TO LIBERTY AND SECURITY: A MALAYSIAN PERSPECTIVE

*Aizatul Akmal bin MAHARANI**

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I. INTRODUCTION

Malaysia is a Federation in South-East Asia, composed of thirteen states and three federal territories. The territory comprises two regions, Peninsular Malaysia and East Malaysia, separated by the South China Sea.

The political system in Malaysia is based on the Westminster system of parliamentary democracy. It is founded on the fundamental principle of separation of powers between the three branches of government: the legislature, the executive, and the judiciary. The head of state, the Yang Di-Pertuan Agong, is a constitutional monarch. Legislative power is divided and shared between the Parliament and various the state legislatures. Executive power is held by the Cabinet led by the Prime Minister.

A member of the Commonwealth of Nations, Malaysia's legal system is based on the common law tradition. The hierarchy of courts is as follows, in descending order:

The superior courts are composed of the Federal Court, the Court of Appeal, and the High Courts;

The subordinate courts are composed of the Sessions Courts and the Magistrates' Courts.

The Federal Court is at the apex of the judicial hierarchy. It has four types of jurisdiction:¹

* Session's Judge of the Federal Court of Malaysia.

** Session Assistant Registrar of the Federal Court of Malaysia.

1 *Kulasingam v Public Prosecutor* [1978] 2 MLJ 243 at 244.



Appellate jurisdiction - to determine appeals from the Court of Appeal and the High Court;²

Exclusive original jurisdiction - to determine Federal-State disputes, and limited cases where the validity of a law is challenged on the ground that it deals with a matter on which the legislature had no power to make laws;³

Referral jurisdiction - to determine constitutional questions referred to it by the High Court;⁴

Advisory jurisdiction - to pronounce opinions on constitutional questions referred to it by the Yang Di-Pertuan Agong.⁵

The Federal Court is not a constitutional court, but the final arbiter on the meaning of constitutional provisions. All courts have the power to interpret the Federal Constitution.⁶

In addition to the civil courts, the Syariah Courts in each state exercise a limited jurisdiction over Muslims in matters concerning Islamic personal and family law. In East Malaysia, Native Courts have jurisdiction over matters of native law and custom. A Special Court was established in 1993 to hear cases involving Rulers, including the Yang Di-Pertuan Agong and the heads of states.

II. FUNDAMENTAL RIGHTS UNDER THE FEDERAL CONSTITUTION

Constitutional supremacy

The Federal Constitution ("the Constitution") is the supreme law of the land in Malaysia. It is the yardstick against which the validity of all legislation and executive action can be tested. Any law passed after independence day which is inconsistent with the Constitution is void to the extent of the inconsistency.⁷

The principle of constitutional supremacy has been emphasized in strong terms by the Federal Court:

2 Federal Constitution, Article 121(2)(a).

3 Federal Constitution, Article 128(1).

4 Federal Constitution, Article 128(2).

5 Federal Constitution, Article 130.

6 *Gin Poh Holdings Sdn Bhd v Government of the State of Penang* [2018] 3 MLJ 417 at [36].

7 Federal Constitution, Article 4(1).



*"The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please."*⁸

One basic concept embodied in the Constitution is that the individual has certain fundamental rights, upon which not even the power of the State may encroach.⁹ A number of rights, including at the foremost the right to liberty of the person, are enumerated and entrenched in Part II of the Constitution under the heading "Fundamental Liberties". These rights, guaranteed by the constitution, are accorded supreme status against any inconsistent laws.

The status of fundamental rights is further protected by the recognition that these rights form part of the basic structure of the Constitution.¹⁰ Features of the basic structure are intrinsic to the very nature of the Constitution, and essential to the political system established thereunder.¹¹ As such, these rights cannot be abrogated or removed by Parliament, not even by an amendment to the Constitution.

Principles of interpretation

The protection given to fundamental rights enshrined in the Constitution is fortified by the way the Constitution is interpreted. It is well-established that the Constitution is *sui generis*, calling for its own principles of interpretation; these principles are not the same as those normally used in interpreting ordinary statutes. As a living piece of legislation, the Constitution must be construed broadly and not pedantically, with less rigidity and more generosity.¹²

The judiciary plays a vital role as the guardian of constitutional rights. It is the solemn duty and of the courts to interpret the fundamental rights provisions in the Constitution to ensure that citizens obtain the full benefit and value of those rights.¹³

8 *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at 113.

9 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at 188.

10 *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at [8].

11 *Indira Gandhi al/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 at [39].

12 *Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at 32.

13 *Palm Oil Research and Development Board Malaysia v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97 at [42]; *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 at [126].



In interpreting the Constitution, the courts are to be guided by the principle of giving full recognition and effect to the fundamental rights.¹⁴ To this end, constitutional guarantees of fundamental rights must be read generously, whereas provisos that limit or derogate from the scope of those rights must be read restrictively.¹⁵ The proper approach in interpreting the fundamental rights provisions in the Constitution was vividly elaborated in the case of *Lee Kwan Woh v Public Prosecutor*:¹⁶

“... the Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II.”

Where the validity of a law or state action is challenged on the basis that it violates fundamental rights, the test to be applied is whether the impugned legislation or action directly affects the fundamental rights, such that its inevitable effect or consequence renders the exercise of those rights ineffective or illusory.¹⁷

Another crucial principle of interpretation is this. One of the fundamental liberties enshrined in Part II of the Constitution is the right to equality. Article 8(1) of the Constitution reads: *“All persons are equal before the law and entitled to the equal protection of the law.”* The guarantee of equality in Article 8(1) is all-pervading, and all other provisions of the Constitution must be interpreted in keeping with it.¹⁸

14 *Dato' Menteri Othman bin Baginda (supra)* at 32, quoting Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319 at 329.

15 *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at [13].

16 *Ibid* at [8].

17 *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697 at 712.

18 *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at [8]; *Badan Peguam Malaysia (supra)* at [86].



Article 8(1) houses the requirement of procedural and substantive fairness, as well as the doctrine of proportionality.¹⁹ Thus, where it is asserted that any fundamental right has been infringed, the court is entitled to strike down the state action on the grounds that it is arbitrary, excessive, or disproportionate to the object sought to be achieved.²⁰

The right to liberty is enshrined in Article 5 of the Constitution. Thus, the protection given to the right to liberty is threefold:

It is guaranteed by a supreme Constitution;

It is entrenched beyond amendment as a feature of the basic structure of the Constitution; and

It is interpreted generously and prismatically, such that it must be given its full effect and cannot be rendered merely illusory.

III. RIGHT TO LIBERTY: GENERAL

Article 5(1) of the Constitution provides:

“Liberty of the person

5 (1) No person shall be deprived of his life or personal liberty save in accordance with law.”

Like other fundamental rights provisions, the practical operation of Article 5 is curtailed by emergency powers and the special powers of the State against subversion, organized violence, and acts prejudicial to the public. These emergency and special powers will be considered later below.

Where the constitutionality of a state action is challenged based on Article 5(1), two separate questions arise for consideration:²¹

whether the specific right alleged to have been violated falls within the scope of “life” or “personal liberty”; and

if so, whether the right has been deprived “in accordance with law”.

Each of these constituent components - “life”, “personal liberty”,

¹⁹ *Dr Mohd Nasir Hashim (supra)* at [8]; *Sivarasa Rasiah (supra)* at [18].

²⁰ *Dr Mohd Nasir Hashim (supra)* at [8]; *Lee Kwan Woh (supra)* at [12].

²¹ *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at [15].



and “in accordance with law” - has been interpreted generously, in line with the principles of constitutional interpretation explained above. It is instructive to examine the content of these components in further detail.

Life

For the purposes of Article 5(1), the expression “life” does not refer to mere existence. It incorporates all facets that are an integral part of life, and matters that affect the quality of life.

The right to life in Article 5(1) has been held to encompass the right to:²²

seek and be engaged in lawful and gainful employment;

receive social benefits;

live in a reasonably healthy and pollution-free environment; and

continue in public service subject to removal for good cause.

Personal liberty

The Article 5 right to “personal liberty” has been understood to mean liberty relating to the person or body of the individual.²³ Thus confined, the right to personal liberty does not include the right to a passport or to travel overseas.²⁴ Neither does it include an unqualified right to behave in a disorderly manner in a public place.²⁵

*Case study: Sivarasa Rasiah v Badan Peguam Malaysia*²⁶

In *Sivarasa Rasiah*, the appellant was an advocate and solicitor and a member of Parliament. He wished to serve as an elected member of the Bar Council, the governing body of the Malaysian Bar. However, section 46A(1) of the Legal Profession Act 1976 disqualified members of Parliament from being members of the Bar Council. The appellant challenged the validity of the said section; one of the grounds advanced was that it violated his right to personal liberty under Article 5(1).

²² *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 at 288.

²³ *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33 at 35.

²⁴ *Ibid.*

²⁵ *Ooi Kean Thong v Public Prosecutor* [2006] 3 MLJ 389 at [45].

²⁶ [2010] 2 MLJ 333.

The Federal Court described the expression “personal liberty” in Article 5 as a compendious term. It includes all the varieties of rights which go to make up the personal liberties of man. While other articles (such as Article 10, which guarantees the freedom of speech, assembly, and association) deal with particular attributes of that freedom, Article 5 takes in and comprises the residue.²⁷

The Federal Court held that “personal liberty” encompasses the right to be a member of a professional body, in this case the Malaysian Bar. Going further, the court held that the right to be a member of the Malaysian Bar includes the right to be elected to and serve on the Bar Council. Gopal Sri Ram JCA (as he then was) reasoned as follows:²⁸

“An advocate solicitor who has been admitted to practise law can only do so if he or she is a member of the Malaysian Bar. In order to be eligible to commence practice, the advocate and solicitor must obtain a practising certificate and pay the subscription and other dues to the Malaysian Bar. He or she may earn his or her livelihood only if he or she is approved for practise in the sense already described. All this is required by the Act and the relevant subsidiary legislation made under it. Hence what the Act confers upon an advocate and solicitor is not a mere privilege; it is a right to earn a livelihood. And it is this right which the personal liberty vested in a member of the Malaysian Bar carries with it. Included in the bundle of rights that form part of the membership of the Malaysian Bar is the legitimate expectation to participate in the Bar Council elections and, if elected, to serve on that body. Accordingly, the legitimate expectation to serve on the Bar Council is also a right protected by the personal liberty clause of art 5(1).”

(emphasis added)

Hence at the first stage of the analysis, the court found that the specific right alleged indeed fell within Article 5. The reasoning adopted illustrates the breadth and flexibility of the expression “personal liberty”.

²⁷ Ibid at [13], quoting with approval the Indian case of *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

²⁸ Ibid at [16].



The appeal was, however, ultimately dismissed; at the second stage of the analysis, the court found that the deprivation of the appellant's right was in accordance with a fair and just law.²⁹

In accordance with law

The provision "save in accordance with law" in Article 5(1) requires that there must be specific and explicit law that provides for the deprivation of life or personal liberty.³⁰

However, it cannot be said that the requirements of Art 5(1) is satisfied as long as the deprivation of life or liberty is carried out in accordance with any law passed, however arbitrary or unfair that law may be. This narrow positivist view was resoundingly rejected by the Privy Council in *Ong Ah Chuan v Public Prosecutor*,³¹ on appeal from the Singapore Court of Appeal. This landmark decision has been adopted by Malaysian courts.³²

Articles 9(1) and 12(1) of the Singapore Constitution are equipollent with Articles 5(1) and 8(1) of the Malaysian Constitution. In *Ong Ah Chuan*, the Privy Council stressed that the use of the word "law" in those articles does not relieve the court of its duty to determine whether the provisions of a law relied upon to justify depriving a person of his life or liberty is inconsistent with the constitution and consequently void. Lord Diplock delivered the celebrated passage below:³³

"In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which

²⁹ Ibid at [33].

³⁰ *In Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372 at 378.

³¹ [1981] 1 MLJ 64 at 70.

³² *Che Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113 at 115.

³³ *Ong Ah Chuan (supra)* [1981] 1 MLJ 64 at 71.



citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery."

(emphasis added)

The word "law" for the purposes of Article 5(1) includes both substantive and procedural law.³⁴ In line with the principle of generous and prismatic construction, the phrase "in accordance with law" has been recognised to embody a variety of rights:

the right of access to justice;³⁵

the right to be subject to procedure which is not arbitrary or unfair;³⁶

the right to a fair trial within a reasonable time by an impartial court established by law;³⁷

the right to be presumed innocent until proven guilty.³⁸

*Case study: Lee Kwan Woh v Public Prosecutor*³⁹

The leading case of Lee Kwan Woh concerned a conviction for drug trafficking, which carried the death penalty. At trial, the judge found that the prosecution had established a *prima facie* case, without first giving the defendant an opportunity to submit that there was no case to answer. The defendant appealed against his conviction, contending that the conduct of the trial judge had violated his right to a fair trial under Article 5.

The methodology of the Federal Court in interpreting "in accordance with law" may be summarised as follows. "Law" is defined non-

34 *Re Tan Boon Liat @ Allen* [1977] 2 MLJ 108 at 114, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at [15].

35 *Sivarasa Rasiiah* (*supra*) at [4].

36 *Tan Tek Seng* (*supra*) at 285.

37 *Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471 at [3], quoting with approval *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242.

38 *Gan Boon Aun* (*supra*) at [14].

39 [2009] 5 MLJ 301.



exhaustively in the Constitution to include written law, common law, and any custom or usage having the force of law in Malaysia.⁴⁰ The common law alluded to is the common law of England.⁴¹ Thus, the expression “law” wherever used in the Constitution does not refer merely to domestic law but also to the rule of law, which is part and parcel of the common law of England.⁴²

The rule of law has both procedural and substantive dimensions. The court held that the rules of natural justice, which is the procedural aspect of the rule of law, are an integral part of Article 5(1). Gopal Sri Ram FCJ stated that the requirement of “in accordance with law” demands both procedural and substantive fairness:⁴³

“Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art 5(1) that a person’s life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case.”

The Federal Court held that the constitutionally guaranteed right of an accused to a fair trial includes his right to make a submission of no case to answer at the close of the prosecution’s case.⁴⁴ The trial judge must invite submissions from the defendant at the close of the prosecution case, and it is then open to the defendant to elect whether or not to make a submission. On the facts of the case, the trial judge erred in failing to do so. Accordingly, the appeal was allowed and the defendant’s conviction was quashed.

The authorities reflect the readiness of the courts to read into the proviso “in accordance with law” a spectrum of rights not expressly mentioned therein, in order to give full effect and recognition to the right to personal liberty. “Law” must refer to a system of law which incorporates fundamental rules of natural justice; if an act is unfair,

⁴⁰ Federal Constitution, Article 160(2).

⁴¹ Section 66 of the Interpretation Acts 1948 and 1967.

⁴² *Lee Kwan Woh (supra)* at [16]; see also *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [14].

⁴³ *Lee Kwan Woh (supra)* at [18].

⁴⁴ *Ibid* at [19].



it would not be “law” for the purposes of Article 5(1) even if it was properly enacted by a competent legislature. In the robust words of two prominent authors:⁴⁵

“Otherwise, the purported protection of the fundamental rights of citizens would be ‘full of sound and fury, signifying nothing’, if such rights can be regulated and curtailed by an ordinary law which flouts natural justice rules.”

IV. RIGHT OF PERSONS DEPRIVED OF LIBERTY

One of the starkest ways in which an individual is deprived of his personal liberty is when he is arrested or detained in connection with an alleged offence. Articles 5(2), (3) and (4) of the Constitution provides specific safeguards for individuals in such situations. The rights guaranteed by Article 5 apply generally to any law in force in the country.

Many of the cases discussed below arose from applications for a writ of habeas corpus in the context of preventive detention laws, made pursuant to the special or emergency powers of the state. These powers and the thorny issue of preventive detention are dealt with in more detail in the next chapter.

Right to habeas corpus

Article 5(2) of the Constitution reads:

“Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.”

Significance

Article 5(2) guarantees the constitutional right of a detained person to apply for a writ of habeas corpus. The writ of habeas corpus has its origins in English law, and has been hallowed as “the great writ of liberty”⁴⁶ and “the highest species of this historic constitutional

⁴⁵ K Y L Tan, L Thio, *Constitutional Law in Malaysia & Singapore*, 3rd ed (Singapore: LexisNexis, 2010) at 747.

⁴⁶ *Abdul Ghani Haroon v Ketua Polis Negara* [2001] 2 MLJ 689 at 696.



remedy".⁴⁷ It is a prerogative writ to secure the liberty of the person by affording means of immediate release from unlawful or unjustifiable detention.⁴⁸ Whenever a person is detained against his will, he or anyone on his behalf is entitled to apply to the High Court to determine whether his detention is lawful or not; unless the detention is shown to be lawful, the court will at once set him free.⁴⁹

The right to apply for a writ of habeas corpus exists at common law independently of any statute.⁵⁰ The power of High Court to issue the writ "for the enforcement of rights conferred by Part II of the Constitution" is expressly confirmed by statute.⁵¹ The High Court may whenever it thinks fit direct any person alleged to be unlawfully detained in custody in Malaysia be set at liberty.⁵²

Test

The test in a petition for a writ of habeas corpus is twofold. Where a person who has been deprived of his liberty challenges the detention, it is for the authority who has detained him to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detainee to show that the power has been exercised mala fide or improperly, or made for a collateral or ulterior purpose.⁵³

The cardinal principle is that every detention is prima facie unlawful and the burden of proof is on the detainer to justify it.⁵⁴ It is for the detaining authority to prove that the relevant constitutional and statutory safeguards are strictly complied with. This principle has been robustly upheld even in the context of preventive detention under emergency laws:

"The liberty of an individual should not be infringed upon even to the slightest extent without proof that the impugned infringement is in accordance with the Constitution and statute. When considering

47 Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia [1975] 2 MLJ 279 at 280.

48 Re Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 at 184.

49 Abdul Ghani Haroon (*supra*) at 696, quoting Lord Denning in his first Hamlyn Lecture.

50 Re Tan Sri Raja Khalid bin Raja Harun (*supra*) at 185.

51 Courts of Judicature Act 1964, section 25(2) read with the Schedule.

52 Criminal Procedure Code, section 365.

53 Re Tan Sri Raja Khalid bin Raja Harun (*supra*) at 186; Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 at 92.

54 Abdul Ghani Haroon (*supra*) at 697.



whether a restraint upon liberty is in accordance with law it is to the evidence furnished by the detaining authority that a court must turn in the usual way. And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection... where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn."⁵⁵

(emphasis added)

The remedy of habeas corpus can only be sought where the person is physically detained, imprisoned, or in custody at the time of the hearing: "*it is the fact of the detention which gives the court its jurisdiction*".⁵⁶ A person is not detained in custody where he is at large on bail⁵⁷ or subjected to a restricted residence order.⁵⁸ Since the only remedy that can be applied for under Article 5(2) of the Constitution is to release the detainee, where the person is no longer in actual detention, "*the writ of habeas corpus becomes nugatory, just as the court cannot sentence a dead man to death*".⁵⁹

*Case study: Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia*⁶⁰

The applicant, Yeap Hock Seng, was arrested and charged on suspicion of murder. After a series of adjournments, the deputy public prosecutor applied to discharge the applicant. However, upon release, the applicant was immediately re-arrested and detained without trial for two years pursuant to the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The applicant contended that his detention under the Ordinance was mala fide, being an attempt to circumvent the ordinary criminal process when his prosecution for murder was abandoned.

⁵⁵ *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia* [2010] 1 MLJ 149 at [6]

⁵⁶ *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* [2004] 1 CLJ 81.

⁵⁷ *Re Onkar Shrian* [1970] 1 MLJ 28.

⁵⁸ *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia* [2006] 1 MLJ 405 at [23].

⁵⁹ *Sejahratul Dursina* (*supra*) at [28].

⁶⁰ [1975] 2 MLJ 279.



The starting point of the High Court was to recognise that detention without trial under the Ordinance “constitutes a serious transgression upon the fundamental right of liberty of the person”, and that habeas corpus is a remedy “for the enforcement of this cherished civil right of personal liberty”. Eusoffe Abdoolcader J explained the nature of habeas corpus in graphic terms:⁶¹

“The grant of habeas corpus is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as certiorari, prohibition and mandamus. It is a writ of right against which no privilege of person or place can be of any avail (R v Pell And Offly 84 ER 720). The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of habeas corpus and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of State ex rel Evans v Broaddus 245 Mo 123 140 that at least in times of peace every human power must give way to the writ of habeas corpus and no prison door is stout enough to stand in its way.”

(emphasis added)

It was held that the existence of alternative remedies did not preclude the applicant from seeking a writ of habeas corpus.⁶²

On the issue of mala fide, the High Court reaffirmed the position that the onus of proof was on the applicant; this onus is “normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention order for mala fides and not mere suspicion.” On the facts of the case, some suspicion based on the mere circumvention of the ordinary legal process was found insufficient in itself to amount to mala fides.⁶³ As such, the court held that the applicant’s detention was lawful.

Right to be informed of grounds of arrest

Article 5(3) of the Constitution embodies two distinct rights:

⁶¹ Ibid at 281.

⁶² Ibid at 282.

⁶³ Ibid at 284.



"Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

Significance

The first is the right of an arrested person to be "informed as soon as may be of the grounds of his arrest". The right is based on the English common law rule enunciated by Lord Simonds in the classic case of *Christie v Leachinsky*.⁶⁴

"Blind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil... Arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it."

The rationale behind the requirement is to accord the arrested person an opportunity to explain any misunderstanding, or call attention to other persons for whom he may have been mistaken, such that "further enquiries may save him from the consequences of false accusation".⁶⁵ If the arrested person is denied this information, "he will not know what his rights and remedies are to challenge his arrest; he would in effect be blind-folded".⁶⁶

So important is the right of a person to be informed of the grounds of his arrest that a complaint of failure to do so, if substantiated, can render his subsequent detention unlawful.⁶⁷ However, the courts may be reluctant to invalidate the arrest if no prejudice is alleged or proven to have been occasioned by the failure.⁶⁸

Extent of information

For the purposes of the first limb of Article 5(3), an arrested person is entitled to be informed of the power by which he is being arrested, and the grounds of his arrest. It is not necessary for the arresting

64 [1947] AC 573 at 592, quoted in *Yit Hon Kit v Minister of Home Affairs, Malaysia* [1988] 2 MLJ 638 at 642.

65 *Christie v Leachinsky* (*supra*) at 586.

66 *Yit Hon Kit* (*supra*) at 642.

67 *Ibid.*

68 *Chong Kim Loy v Timbalan Menteri Dalam Negeri Malaysia* [1989] 3 MLJ 121 at 127.



authority to furnish the information in “full detail” or in “strict legal terminology”, but only “sufficient particulars” in “general terms”. Enough must be made known to the arrested person to enable him to understand why he was arrested, and to give him an opportunity to respond.⁶⁹

For instance, it was held that to inform a person that he was arrested for activities involving drugs, and that it was necessary to detain him in the public interest, was insufficient. The arresting officer ought to have specified that the activities alleged were drug trafficking activities.⁷⁰

The phrase “as soon as may be” in Article 5(3) means the “earliest possible moment”,⁷¹ or “as nearly as is reasonable in the circumstances of the particular case”.⁷² The imprecision of the phrase requires each case to turn upon its own facts.⁷³

By way of illustration, informing a person of the grounds for his detention some hours after the arrest was held to have satisfied the requirement in Article 5(3).⁷⁴ In contrast, a delay of 57 days after the person was arrested was held to be inordinate and impossible to constitute sufficient compliance with the said Article.⁷⁵ The requirement to inform the arrested person of the grounds cannot be complied with retrospective effect; “informing him of the grounds at a later stage is no satisfaction of his fundamental right and is as good as not informing him at all.”⁷⁶

*Case study: Che Hong Yee v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia*⁷⁷

The plaintiff, Che Hong Yee, was arrested by the police under the Restricted Residence Act 1933 and detained between 9.3.2007 - 23.3.2007. The plaintiff was subsequently placed under an order of restricted residence.

⁶⁹ Ibid; *Aminah (supra)* at 92.

⁷⁰ *Chong Kim Loy (supra)* at 127.

⁷¹ Ibid.

⁷² *Aminah (supra)* at 92.

⁷³ *Yit Hon Kit (supra)* at 641.

⁷⁴ *Aminah (supra)* at 93.

⁷⁵ *Yit Hon Kit (supra)* at 641.

⁷⁶ Ibid, quoting Desai J in *Vimal Kishore v The State Of UPAIR* 1956 All 56 at p 62.

⁷⁷ [2008] 7 MLJ 642.

The grounds of the plaintiff's arrest and detention were stated in a separate sheet (known as "lampiran A") attached to the warrant. In that sheet, the plaintiff was granted an opportunity to appeal against his detention to the Deputy Minister of Internal Security within 14 days of receipt. Upon his arrest, the sheet was only shown to him and he was asked to acknowledge receipt of it. However, the sheet was not handed to the plaintiff until 24.3.2007, by which time the appeal period had expired.

The High Court strongly decried the conduct of the police as an unauthorised tactical manoeuvre, an abuse of process, as well as a serious departure from the principles of natural justice and the plaintiff's constitutional right. The transgression to the plaintiff's right is not a trivial or technical matter but has grave consequences:⁷⁸

"As the plaintiff was deprived to challenge the facts and the information supplied to the Deputy Minister and the scope to challenge is on limited grounds, for issuing the first order and as contained in lampiran A and the fact that his personal liberty is restricted without a trial, it is of the highest importance that he is not only informed of his right to appeal but that right must include the right to be effectively heard and he must also be informed of the appeal procedures for putting forward his own case. The right to be heard before being condemned is one of the pillars of individual liberty... the right to know the truth and to be heard is paramount as the right to property and personal rights."

(emphasis added)

The safeguard in Article 5(3) must be followed scrupulously and cannot be treated as dead letters.⁷⁹ Mere administrative convenience cannot override the plaintiff's right to be heard where personal liberty is at stake.⁸⁰ The court concluded that the acts of the police constituted a "serious inexcusable and unforgivable matter", which warranted the immediate quashing of the subsequent order for restricted residence.⁸¹

⁷⁸ Ibid at [14]-[20].

⁷⁹ Ibid at [39]-[40].

⁸⁰ Ibid at [50].

⁸¹ Ibid at [40].



Right to counsel

The second limb of Article 5(3) provides for the right “to consult and be defended by a legal practitioner of his choice”. The language of the Constitution is clear and simple: if an arrested person wishes to consult a legal practitioner of his choice, he is entitled to have the constitutional right granted to him by the authority who has custody of him, and this right must be granted within a reasonable time after his arrest.⁸²

The right to counsel is consistent with detention without trial. If a person detained under special or emergency laws is to be deprived of this fundamental right, the legislature must do so in clear and unequivocal language.⁸³ Where preventive detention laws are silent on the matter, the courts will read into them the safeguards in Articles 5(2) and (3) of the Constitution.⁸⁴

In order for an interview between accused and counsel to be effective, it should not be held within the hearing of any police, having regard to solicitor-client privilege. However, it should be within the sight of the police.⁸⁵

Significantly, the right to counsel differs from the right to be informed of grounds of arrest in that its denial will not have the effect of rendering his detention unlawful. It follows that the writ of habeas corpus, which is founded on the illegality of the detention, is not the proper remedy where the breach of a right to counsel is alleged.⁸⁶

Timing

The right to consult and be defended by a legal practitioner of his choice is a general one, of which pre-trial consultation is merely one manifestation.⁸⁷ The right begins from the day of his arrest.⁸⁸ A person detained in custody pending the completion of police investigations is likewise entitled to the right to counsel. As articulated by the Federal Court:⁸⁹

82 *Lee Mau Seng v Minister for Home Affairs, Singapore* [1971] 2 MLJ 137b at 140.

83 *Ibid* at 141.

84 *Ibid* at 140; *Assa Singh v Mentri Besar, Johore* [1967] 2 MLJ 30 at 33, 41.

85 *Ramli bin Salleh v Inspector Yahya bin Hashim* [1973] 1 MLJ 54 at 56.

86 *Lee Mau Seng* (*ibid*) at 141.

87 *Hashim bin Saud v Yahaya bin Hashim* [1977] 2 MLJ 116 at 118.

88 *Ramli bin Salleh* (*supra*) at 56.

89 *Hashim bin Saud* (*supra*) at 118.



"We therefore did not agree with the proposition of law propounded by the learned judge that the right to counsel could only be exercised after the completion of the period of police investigation under section 117 C.P.C. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognises only the form of criminal justiciable process and ignores its substance."

(emphasis added)

Hence, the action of the police in allowing the accused's lawyer to interview him only upon the expiry of the remand period was held to be unreasonable: *"police must not in any way delay or obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right."*⁹⁰

Balance

At the same time, the right to counsel is not absolute and immediately exercisable after arrest. A balance must be struck between the right of the arrested person to consult his lawyer and the duty of the police to protect the public. The right cannot be exercised to the detriment of police investigation.⁹¹ It is subject to *"certain legitimate restrictions which necessarily arise in the course of police investigations, the main object being to ensure a proper and speedy trial"*. In striking this balance, it is imperative that the right to counsel not be abused by either party: *"for instance, by the police in unreasonably delaying the interview or by counsel in demanding an interview at any time that suits him or by interference with investigation"*.⁹²

The importance of balancing the competing interests of accused and state was underlined by Raja Azlan Shah FJ:⁹³

"We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be

⁹⁰ Ramli bin Salleh (*supra*) at 56.

⁹¹ Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 at 200.

⁹² Ramli bin Salleh (*supra*) at 56.

⁹³ Hashim bin Saud (*supra*) at 118.



confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the State, and not enough is paid to the interests of the State. We have a shocking prevalence of crime, and of crimes of violence, infractions of the plainest requirements of civilised society about which there is no debate. Our capacity to protect life and property itself is in question. There is a manifest failure to secure, through an adequate administration of our criminal laws an appropriate punishment of crimes, the deterrent effects which are in large part the object of these laws. This failure is due in part to the defects in a procedure which favours delay and obstructions to the cause of justice. The chief cause is probably a laxity of public sentiment, the most difficult thing to correct."

(emphasis added)

Thus in one case, the decision of the police to allow the arrested person to be interviewed by his lawyer 6 days after his arrest was held to be reasonable, taking into account the gravity and circumstances of the offence.⁹⁴

*Case study: Mohamad Ezam bin Mohd Noor v Ketua Polis Negara*⁹⁵

In *Mohamad Ezam*, the appellants were all detained without trial for an initial period of 60 days pursuant to the Internal Security Act 1960 (with the exception of one appellant, who was released after 52 days). It was undisputed that they were denied communication with their solicitors and family members during the entirety of that period despite written requests made. In the appellant's application for a writ of habeas corpus, the breach of their right to counsel under Article 5(3) was one of the various grounds raised.

Siti Norma Yaakob FCJ placed emphasis on the standard of conduct expected of the police:⁹⁶

"... it is incumbent upon the police to act promptly and professionally in conducting their investigations into the acts and conduct of the detainees, so that the latter's fundamental rights to

⁹⁴ Ooi Ah Phua (*supra*) at 201.

⁹⁵ [2002] 4 MLJ 449.

⁹⁶ *Ibid.*

consult the counsel of their choice will not become illusory or ineffective. They should not be made to wait indefinitely for the police to complete their investigations before they can have access to their counsel and that too after the expiry of the 60 day period. Whilst I appreciate that a balance must be drawn between the interests of the state on one hand and the interests of the detainees on the other, it is not unreasonable to expect the police to give priority to their investigations so that the rights of the detainees to seek legal representation will not be unnecessarily denied... Denying access during the earlier part of the detentions would have been acceptable to facilitate the police in their investigations but to stretch that denial throughout the duration of the 60 day period makes a mockery of art 5(3)."

(emphasis added)

The Federal Court held that to allow access to counsel only after the expiry of the initial detention period was a clear violation of Article 5(3). It was further observed that the appellants were facing several other charges at the time, and the detentions under the Act were used to deny the appellants the right to give instructions to their counsel to defend them against those charges. In the circumstances, the court found that the denial amounted to mala fide on the part of the police and that the Act was used for a collateral purpose.⁹⁷

The refusal of access to counsel did not render the appellants detention unlawful; habeas corpus could not be issued to secure the appellant's freedom on that ground. Nevertheless, the appellants were found to have successfully established the unlawfulness of their detentions on other grounds, and habeas corpus was issued to release them.⁹⁸

Right to be produced before a magistrate

Article 5(4) of the Constitution provides for the right of an arrested person held in custody for more than 24 hours:

"Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours

⁹⁷ Ibid at 515.

⁹⁸ Ibid at 517.



(excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority..."

The provision does not apply to persons in detention under restricted residence laws. Non-citizens arrested under immigration laws likewise enjoy the right to be produced before a magistrate, but the period of time before he must be so produced is 14 days instead of 24 hours.⁹⁹

Applications for continued detention after the initial period of 24 hours are commonly referred to as remand applications.

Role of the magistrate

Remand applications require the magistrate to undertake a balancing exercise between the right of a personal liberty of an individual who has not been proven guilty of an offence, against the equally important public interest that crimes be investigated and offenders be brought to justice.¹⁰⁰ The applications are not to be taken lightly or as a matter of mere formality.¹⁰¹ The role of the magistrate is not merely routine and cursory: "the liberty of an individual after arrest is at stake and art 5(4) of the Federal Constitution reposes an onerous judicial duty on a magistrate to decide whether a person should be detained or detained further".¹⁰² The importance of the magistrate's role was underscored by Abdul Wahab Patail J in *Re Syed Mohammad bin Syed Isa*.¹⁰³

"The function of the Magistrate in remand applications is to adjudicate and ensure that the demand of law enforcement to detain a person does not override the rights of personal liberty, but that a fair balance is achieved considering seriousness of the offence, the diligence and results of investigation, the need to complete investigation and the necessity to remand the suspect. In seeking to cope with the large number of applications, it must not be forgotten that the cornerstone of justice and its administration is fairness.

⁹⁹ Article 5(4).

¹⁰⁰ *In Re Syed Mohammad bin Syed Isa* [2001] 3 AMR 3769 at 3777; *Hassan bin Marson v Mohd Hady bin Ya'akop* [2018] 7 CLJ 403 at [55].

¹⁰¹ *Ibid* at 3775.

¹⁰² *Re the Detention of R Sivarama* [1996] 3 MLJ 611 at 618.

¹⁰³ [2001] 3 AMR 3769 at 3788.



A remand order is an exercise in balancing the rights of personal liberty against the duty of the police and public interest to bring offenders to justice. Fairness requires considering each application and individual on its own merits. Failure to do so will inevitably compromise justice itself."

Procedure

The procedure for remand applications is regulated by the Criminal Procedure Code. Section 117 provides that the police officer shall immediately produce the accused before the magistrate, if it appears that the investigation cannot be completed within the period of 24 hours and there are grounds for believing that the accusation is well-founded.

The onus is on the detaining authority to satisfy the magistrate that an order to remand the suspect is necessary to complete investigations.¹⁰⁴ This does not mean that a person can be remanded while the police begins and proceeds with the investigation at its own convenient pace. It assumes that investigation has been conducted with reasonable diligence and has produced grounds for believing that the allegation against the suspect is well-founded.¹⁰⁵ These grounds are subject to judicial scrutiny.¹⁰⁶

The necessity of holding a suspect under remand is to prevent him from interfering the investigations or absconding before he is charged.¹⁰⁷ The period of remand ought to be restricted to the necessities of the case.¹⁰⁸

Section 117 of the Criminal Procedure Code enumerates a number of formal and procedural requirements. Since the liberty of the individual is affected, strict compliance with each of these requirements has been held to be mandatory.¹⁰⁹ Among others, the section requires that:

104 Ibid at 3781.

105 Ibid at 3772.

106 *Re the Detention of R Sivarama (supra)* at 619.

107 *In Re Syed Mohammad bin Syed Isa (supra)* at 3772.

108 *Re the Detention of R Sivarama (supra)* at 619.

109 *Hassan bin Marsom (supra)* at [55], [71].



the police must furnish an investigation diary to the magistrate,¹¹⁰ describing the statement of circumstances ascertained through the investigations;¹¹¹

the magistrate must allow representations to be made by the accused or a counsel of his choice;¹¹²

the magistrate must give reasons in determining the remand application.¹¹³

*Case study: Hassan bin Marsom v Mohd Hady bin Ya'akop*¹¹⁴

The respondents were wrongly suspected of committing an offence and arrested by the police. In police custody, the respondents were interrogated, blindfolded, stripped, and physically assaulted. The respondents were produced before a magistrate who granted a first remand order for a period of 7 days, which was subsequently extended by another 7 days. Police investigations eventually revealed that the respondents were not involved in the offence, and they were released without charges. The respondents claimed damages for unlawful detention.

The Federal Court declared that the respondents' detention was unlawful. The remand orders were found to be granted by the magistrate despite clear non-compliance with the statutory requirements, in that no investigation diary recording the progress of the investigations was transmitted to the magistrate. The violation of the respondents' right to liberty was strongly denounced by Balia Yusof Wahi FCJ.¹¹⁵

"The Respondent's liberty in the instant appeal had been encroached and we must intervene and declare that his detention was unlawful. 'The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.'

110 Criminal Procedure Code, sections 117(1), 119.

111 Section 119.

112 Section 117(5).

113 Section 117(7).

114 [2018] 7 CLJ 403.

115 Ibid at [120]-[121].



per Salleh Abas LP in Lim Kiat Siang v. Dato' Seri Dr. Mahathir [1987] CLJ (Rep) 168.

Assault in police custody is a clear violation of the most fundamental liberty guaranteed under the Federal Constitution."

The Federal Court awarded exemplary damages to the respondent, taking into account not only the physical and psychological harm they suffered, but also the need to reflect the sense of public outrage, the importance of the constitutional right, and the gravity of the breach.¹¹⁶

V. LIMITS OF RIGHT TO LIBERTY

The Constitution expressly permits the enactment of laws inconsistent with the right to liberty in Article 5 in certain circumstances, where national security and public order are concerned. Part XI of the Constitution makes provision for "Special Powers against Subversion, Organised Violence, and Acts and Crimes Prejudicial to the Public and Emergency Powers". Broadly speaking, Article 149 deals with special powers to legislate against subversion, whereas Article 150 relates to the proclamation of a state of emergency.

The insertion of this Part can be understood in its historical context. Prior to achieving independence in 1957, Malaya (as Peninsular Malaysia then was) was under the administration of the British colonial government. In June 1948, communist insurgency led the colonial government to declare a state of emergency throughout Malaya. The subversive activities of the communists were found to be dangerous and drawn out.

The approach of the drafters of the Constitution were much coloured by the emergency which was in operation at the time. The drafters recommended the insertion of both emergency powers, as well as special powers against subversion to operate irrespective of any emergency, thereby giving wide powers to Parliament or the Yang Di-Pertuan Agong to enact legislation inconsistent with other parts of the Constitution.¹¹⁷

¹¹⁶ Ibid at [124].

¹¹⁷ A Harding, *Law, Government and the Constitution in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1996) at 153-154; K Y L Tan, L Thio, *Constitutional Law in Malaysia & Singapore*, 3rd ed (Singapore: LexisNexis, 2010) at 180.



Special powers against subversion

Article 149(1) of the Constitution provides:

Legislation against subversion, action prejudicial to public order, etc.

"149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

to procure the alteration, otherwise than by lawful means, of anything by law established; or

which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill."

(emphasis added)

Article 149 enumerates a broad range of situations where Parliament is empowered to legislate inconsistently with certain fundamental rights, including the right to liberty. The effect of this article "*means sanction of encroachments on the rule of law, justified in the national interest*"; in those exceptional circumstances, courts have "*frankly acknowledged that a perfect decision is in most cases an unattainable ideal*".¹¹⁸

The only requirement for Parliament to exercise the extended

¹¹⁸ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 at 141.

legislative powers under Article 149 is to include in the Act a recital to state that an action has been taken or threatened. The purpose of Article 149 is as articulated by the Privy Council in *Teh Cheng Poh v Public Prosecutor*:¹¹⁹

“The Article is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened in the past viz. that action of the kind described ‘has been taken or threatened’. It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed. Clause (2) of the Article provides expressly that the law shall continue in force until repealed or annulled by resolutions of both Houses of Parliament. Their Lordships see no reason for not construing these words literally. The purpose of the Article is to enable Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence.”

(emphasis added)

The most prominent law enacted under Article 149 is the Internal Security Act 1960 (“ISA”). The ISA allows for a person to be arrested without warrant and detained by the police for an initial period of 30 days, and further detained without trial for an indefinite period if the Minister is satisfied that the detention is necessary to prevent him from acting in any manner prejudicial to national security.¹²⁰ The courts have declined to strike down the ISA as invalid or to confine its scope to communist insurgency and subversion only, preferring a “broad and practical approach”. In the words of the Supreme Court (as the Federal Court was once known):¹²¹

“There can be no doubt that the ISA is a special law, however unpopular it may be, passed under the authority of Article 149.”

The ISA was repealed in 2012 and replaced by the Security Offences

119 [1979] 1 MLJ 50.

120 Internal Security Act 1960, section 8.

121 *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293 at 295.



(Special Measures) Act 2012, which also makes provision for preventive detention. Challenges to the validity of detention orders under the ISA will be examined in further detail in the section on “Preventive Detention” below.

Emergency powers

Article 150 of the Constitution provides for the proclamation of emergency. The Article begins by describing the circumstances in which the Yang Di-Pertuan Agong may issue such a proclamation:

Proclamation of emergency

“150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

(2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.”

The word “emergency” in Article 150(1) is not confined to the unlawful use or threat of force. While a state of emergency does not permit of exact definition, *“the natural meaning of the word itself is capable of covering a wide very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government”*.¹²² Whether the emergency is grave and threatens security, so as to fall within Article 150(1), is essentially a matter for executive determination.¹²³

In the past, proclamations for emergency have been declared in the context of communist insurgency,¹²⁴ confrontation from a neighbouring

¹²² *Stephen Kalong Ningkan v Government of Malaysia* [1968] 2 MLJ 238 at 241.

¹²³ *Ibid* at 242.

¹²⁴ 1948-1960.



country,¹²⁵ political dispute and impasse in a state,¹²⁶ racial riots,¹²⁷ and hazardous levels of air pollution.¹²⁸

The monarch has the power to issue different proclamations on different grounds or in different circumstances, even if there are existing proclamations of emergency in operation.¹²⁹ Four of the proclamations since 1964 were not revoked until 2011, resulting in a continuous state of emergency spanning almost half a century.

Effect of Proclamation

The consequences of a proclamation of emergency are far-reaching. While a Proclamation of Emergency is in operation, if Parliament is not in session, the Yang Di-Pertuan Agong has the power to promulgate ordinances having the force of an Act of Parliament, if His Majesty is “satisfied that certain circumstances exist which render it necessary for him to take immediate action”.

Notably, Article 150(6) expressly authorises emergency legislation which is inconsistent with *any* provision of the Constitution:

“Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.”¹³⁰

“The true effect of article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved.”¹³¹ Where a law is declared to be required by reason of the emergency, none of its provisions can be held invalid on account of any inconsistency with the Constitution.

125 1964.

126 1966 in Sarawak, 1977 in Kelantan.

127 1969.

128 2005, 2013.

129 Article 150(2A), (2B).

130 Clause (6A) provides that Article 150(6) does not validate laws inconsistent with constitutional provisions on religion, citizenship, or language.

131 *Eng Keock Cheng v Public Prosecutor* [1966] 1 MLJ 18 at 20.



The nature of legislation promulgated pursuant to Article 149 was explained in vivid terms in *Government of Malaysia v Mahan Singh*:¹³²

“It is the emergency legislation that we are dealing with. The seriousness of the situation which threatened to destroy the unity of the nation should not be overlooked. ... In the present emergency, His Majesty alone could decide what was best for the nation. The situation called for prompt and speedy action to restore law and order. Events had proved that the Director of Operations had acted fairly, honestly and with moderation to bring the situation back to normal. Article 150 gives His Majesty wide powers, so wide that he could in the interest of the nation during an emergency act as he thought fit. This is a most important aspect of the matter. The interest of the nation comes first. This is the law of civil or state necessity which forms part of the common law and which every written constitution of all civilised states takes for granted. The reason underlying the law of necessity was aptly put by Cromwell that ‘if nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make law.’ ...

All acts done by His Majesty and by the Director of Operations in an emergency were dictated by necessity and so long as they were done in good faith the courts could not question them for the simple reason that in an emergency state necessity and interest were of paramount importance over individual rights.”

(emphasis added)

Justiciability

The proclamation of an emergency leaves little room for judicial scrutiny to safeguard fundamental liberties.

The Yang Di-Pertuan Agong is the sole judge of the necessity of proclaiming an emergency and of issuing emergency laws. Neither the proclamation of emergency nor the ordinances promulgated pursuant thereto have been held to be justiciable.¹³³ Once the ordinance recites the statutory formula that His Majesty “is satisfied” that a certain

¹³² [1975] 2 MLJ 155 at 165.

¹³³ The question of whether a proclamation of emergency is justiciable was expressly left open by the Privy Council on two occasions: *Stephen Kalong Ningkan* (supra) at 242; *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 at 53.

state of affairs exists, the recital is conclusive and closes the door to all review.¹³⁴

The termination of a proclamation of Emergency is likewise solely within the province of the executive. A proclamation ceases to have effect only if it is revoked or annulled by resolution in Parliament; it is not for the court to declare that a state of emergency had lapsed due to effluxion of time or change in circumstances.¹³⁵

Additionally, *“the principle that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the executive has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved.”*¹³⁶

A perpetual state of emergency, had the existing proclamations not been recently lifted, would represent a significant qualification to the constitutional protection of the right to liberty in Malaysia. It is little wonder that a commentator, writing in 1996, penned the ominous warning:¹³⁷

“One only has to reflect for a moment on the extent of these powers to realise how amazingly wide they are, amounting to nothing less than the power of virtual suspension of the entire constitutional order during the currency of an emergency proclamation. Taken with the breadth of the power to proclaim an emergency, these provisions contain the possibility of imposition of a totalitarian dictatorship.”

VI. PREVENTIVE DETENTION

Preventive detention is the detention of a person without trial, as opposed to punitive detention where a person is detained after trial in a court of law in which he is proved to have committed an offence punishable under the law.¹³⁸ Any detention order must necessarily result in the deprivation of freedom without trial and constitutes a serious transgression upon the fundamental liberty of a person.¹³⁹ Therein lies the starkest conflict and the most delicate balance between

134 *Public Prosecutor v Ooi Kee Saik* [1971] 2 MLJ 108 at 113, 114.

135 *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66 at 67-69.

136 *Re Application of Tan Boon Liat @ Allen* [1976] 2 MLJ 83 at 84.

137 *Harding (supra)* at 156.

138 *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 at 250.

139 *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449 at 475.



the individual's right to liberty and the state's need to ensure security.

With regard to the special powers of the state to prevent subversion under Article 149 and the emergency powers under Article 150:¹⁴⁰

"The most conspicuous exercise of this power is in the area of detention without trial, which may be considered one of the greatest gaps in the armoury of civil liberties. Detention without trial, which is based on secrecy and suspicion, is contrary to the principles of social justice whereby open trials and proof of guilt are pre-conditions to depriving one of liberty and also anchors of a free society. This fundamental derogation from the rule of law is justified by reference to circumstances of extraordinary need whereby the existing political order is threatened."

Article 151 of the Constitution mitigates the harshness of preventive detention by imposing a number of safeguards:

Restrictions on preventive detention

"151. (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow."

(emphases added)

However, the Article does not require any authority to disclose facts where the disclosure would in its opinion be against the national interest.¹⁴¹

Preventive detention is authorised by the Internal Security Act 1960,

¹⁴⁰ Tan & Thio (*supra*) at 180.

¹⁴¹ Article 150(3).

the Prevention of Crime Act 1959 and the Dangerous Drugs (Special Preventive Measures) Act 1985, all passed under Article 149, and the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (“EO”), an emergency legislation. While the ISA has been repealed and EO is no longer in force in the absence of a state of emergency, the principles established in relation thereto remain relevant in interpreting other statutes providing for preventive detention. The development of case law reflects an increasing willingness on the part of the courts to exercise greater scrutiny over executive detention orders.

Subjective satisfaction

The traditional starting point is the test of subjective satisfaction: where the power of detention is conditional upon the authority being satisfied that certain grounds exist, the authority’s state of mind is a purely subjective condition.¹⁴²

“... it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.”

The subjective satisfaction of the detaining authority (for instance, the Minister of Home Affairs) is not subject to judicial review: *“reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide”*.¹⁴³ The production by the authority of a regular and duly authenticated detention order is sufficient to discharge the onus of proving the legality of the detention.¹⁴⁴

The subjective test has subsequently been understood as a description of judicial attitude: realistically, the court will not be in a position to review the fairness of the authority’s decision-making

142 *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 at 151.

143 *Minister of Home Affairs, Malaysia v Karpal Singh* [1988] 3 MLJ 29 at 32.

144 *Karam Singh (supra)* at 141, 152.



process due to lack of evidence, since the Constitution protects them from disclosing any information.¹⁴⁵

The subjective test appears to preclude judicial scrutiny of the validity of a detention order. However, its application has been qualified in a number of cases.

*Case study: Re Tan Sri Raja Khalid bin Raja Harun*¹⁴⁶

The respondent was the managing director of a consultancy services company, and a director of a bank. The consulting services provided resulted in the bank undertaking massive loans and suffering substantial losses. The police, contending that the respondent's acts caused resentment among the armed forces, arrested and detained the respondent under section 73 of the ISA. Section 73(1) provides that a police officer may arrest any person if the officer has reason to believe that the person acted or is about to act in a manner prejudicial to national security.

The respondent applied for a writ of habeas corpus in the High Court. Having examined the affidavits of the police, the High Court found no evidence that the respondent had acted in a manner prejudicial to national security. Accordingly, the High Court granted the application and ordered the respondent to be released. The police appealed.

The Supreme Court (as the Federal Court then was) began on a conventional note by applying the subjective test: it is for the police officer to decide whether there was "reason to believe" for the purposes of section 73(1), and the court cannot require the officer to prove the sufficiency of the reason for his belief. Nevertheless, Salleh Abas LP considered that the facts warranted a proviso:¹⁴⁷

"... the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest. But if facts are furnished voluntarily, exhaustively and in great detail as in this case for consideration of the court it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion."

¹⁴⁵ *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293.

¹⁴⁶ [1988] 1 MLJ 182.

¹⁴⁷ *Ibid* at 187-188.



In that case, the Supreme Court agreed with the High Court's view that it was "*incredible that losses sustained by a public bank where the depositors also include members of the public at large could result in any organized violence by the soldiers*". The appeal was dismissed. It is clear that the subjective test did not preclude the Supreme Court from examining the reasonableness of the grounds and facts relied upon by the detaining authority.

More recent cases display a shift in favour of an objective test, where the facts and reasons relied upon by the detaining authority are no longer insulated from review but are subject to judicial scrutiny.¹⁴⁸ On this formulation, the question is whether a reasonable authority apprised of the material would objectively be satisfied that the actions of the detainee were (for instance) prejudicial to public order.¹⁴⁹

Mala fide

Executive discretion conferred by statute is not immune from *all* review. The court may inquire whether the purported exercise of a discretion is *ultra vires* for multiple reasons.¹⁵⁰

it was done in bad faith;

the conditions precedent to the exercise of discretion were not fulfilled; or

the executive authority took into consideration irrelevant matters, or failed to take into consideration relevant matters.

Bad faith or *mala fide* does not mean malicious intention. It means that the "*power is exercised for a collateral or ulterior purpose, i.e. for a purpose other than the purpose for which it is professed to have been exercised*".¹⁵¹ A detention order is *mala fide* if it was in fact made for ulterior purposes, being purposes outside the needs of prevention and irrelevant to the object of the legislation.¹⁵² Thus, although:¹⁵³

148 *Mohamad Ezam bin Mohd Noor (supra)* at 479;

149 *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia* [2010] 3 MLJ 307 at [5].

150 *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 at 55.

151 *Mohamad Ezam bin Mohd Noor (supra)* at 470, quoting *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1988] 1 MLJ 468 at 473.

152 *Teh Cheng Poh (supra)* at 54.

153 *Re Application of Tan Boon Liat @ Allen* [1976] 2 MLJ 83 at 84.



"... the front and back doors may be closed to the applicant in that he is shut out from challenging the subjective satisfaction of the Minister, he is not without liberty to attempt to get in through the French windows by asking for a determination of the relevancy of the grounds for his detention in relation to the scope and object of the Ordinance."

*Case study: Mohamad Ezam bin Mohd Noor*¹⁵⁴

The facts of *Mohamad Ezam bin Mohd Noor* most plainly demonstrate this principle. The appellants were arrested and detained under section 73 of the ISA. The press statement issued by the inspector-general of police stated that the appellants were detained because of their involvement in activities affecting national security, including plans to overthrow the government through large-scale street demonstrations and preparations to carry out militant action. During the period of detention, the appellants were interrogated on their political views and activities; no questions were asked on the alleged militant actions. The appellants contended that their detention was mala fide.

The Federal Court recognised that the executive is the sole judge of what national security requires. *"However, although a court will not question the executive's decision as to what national security requires, the court will nevertheless examine whether the executive's decision is in fact based on national security considerations."*¹⁵⁵

On the facts, Chief Justice Mohamed Dzaiddin observed at the outset:

"My first observation is that despite the press statement of the respondent that the appellants were detained because they were a threat to national security, it is surprising to note from the appellants' affidavits that they were not interrogated on the militant actions and neither were they questioned about getting explosives materials and weapons. Clearly, from the affidavits which I highlighted above, the questions that were asked were more on the appellants' political activities and for intelligence gathering. I find that there is much

¹⁵⁴ [2002] 4 MLJ 449.

¹⁵⁵ Ibid at 480.



force in the contention of learned counsel for the appellants that the detentions were for the ulterior purpose and unconnected with national security."

It was further noted that the reply affidavits deposed by the police officers were bare denials, and did not constitute any "*credible rebuttal of the specific averments of the appellants that they were detained because of their political beliefs and not because they were a threat to national security*".¹⁵⁶ The Federal Court held that the detention of the appellants was unlawful for, among other reasons, mala fide on the part of the police.

Strict compliance with statutory requirements

Given the limitations of substantive review in the context of preventive detention, courts have shown a willingness to uphold scrupulously any procedural safeguards in place. It is recalled that the specific rights in Article 5 of the Constitution, such as the right to be informed of the grounds of arrest, are read into preventive detention laws unless such rights are expressly abrogated.¹⁵⁷ In addition, a strict approach is adopted in respect of procedural requirements specified by statute or in the Constitution. Procedural requirements are regarded as mandatory, such that a breach thereof would render the detention invalid.

Detention orders have been struck down on grounds of statutory or procedural non-compliance in the following scenarios:¹⁵⁸

Detainee not detained in the place specified in the order;¹⁵⁹

Service of one copy of the order, where two copies are required by statute;¹⁶⁰

The wrong form was used, prescribing for a different power under different provisions by a different officer;¹⁶¹

Failure of the Advisory Board to consider representations and make

¹⁵⁶ Ibid.

¹⁵⁷ *Lee Mau Seng v Minister for Home Affairs, Singapore* [1971] 2 MLJ 137b at 140; *Assa Singh v Menteri Besar, Johore* [1967] 2 MLJ 30 at 33, 41.

¹⁵⁸ Harding (*supra*) at 222-223.

¹⁵⁹ *Public Prosecutor v Koh Yoke Koon* [1988] 2 MLJ 301

¹⁶⁰ *Puvaneswaram v Menteri Hal Ehwal Dalam Negeri Malaysia* [1991] 3 MLJ 28

¹⁶¹ *Cham Yoon Liang v Menteri Hal Ehwal Dalam Negeri Malaysia* [1989] 3 MLJ 372.



recommendations to the Yang Di-Pertuan Agong within the three-month period prescribed by Article 151(1)(b).¹⁶²

*Case study: Re Datuk James Wong Kim Min*¹⁶³

The respondent was arrested in the state of Sarawak under the Preservation of Public Security Regulations, which were enacted by the Sarawak legislature. He was escorted to and held in the capital, Kuala Lumpur, at the time when the Federal Secretary of Sarawak issued a detention order against him.

The Federal Court agreed with the trial judge that Federal Secretary had no power to detain a person outside Sarawak. In the robust words of Lee Hun Hoe CJ (Borneo):¹⁶⁴

“Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.”

It was emphasised that in matters relating to personal liberty, the role of the courts is not to be taken lightly.¹⁶⁵

“One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty

¹⁶² *Re Application of Tan Boon Liat @ Allen* (supra)

¹⁶³ [1976] 2 MLJ 245.

¹⁶⁴ *Ibid* at 251.

¹⁶⁵ *Ibid*.



of the subject. In fact, Article 5(1) of the Constitution guarantees that 'no person shall be deprived of his.. liberty except in accordance with the law.' If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law."

(emphasis added)

It is fitting to conclude the discussion under this section with this timeless reminder.

VII. CONCLUSION

To some quarters, preventive detention laws are repressive, to some others, they are necessities, albeit evil ones. One fact remains true however, namely, one will not find in the preamble of any of the preventive detention laws discussed in this paper anything to the effect that such law was enacted with the purpose of intentionally stripping individuals, citizens or non-citizens alike, from the right to liberty enshrined in Article 5 (1) of the Federal Constitution without any justifiable reasons.

Since such preventive detention laws, however repressive they may be to certain quarters, are authorised by the Federal Constitution in order to maintain peace and security in the country, transgressions to another guaranteed constitutional right, which is the right to liberty, in the course of giving effect to the provisions on preventive detention in such laws by the relevant authorities is a necessary evil. Despite this, it is not to say that courts should overlook such unfortunate incidents and side with the executive every single time a case of preventive detention is brought before them. The judiciary, in fact, is not indebted to anybody, be they the public or the authorities that hold sway over them, and is under the sole duty to uphold justice according to the established laws of the land.

In cases of preventive detention, both the detainee and the detaining authorities' rights and duties are delineated in the highest law of the land, namely the Federal Constitution. The right to liberty is given to every individual and the right to transgress that liberty is also given to the relevant authority in the Federal Constitution for the sake of



maintaining peace and security. It is the working dynamic of people representing these two opposite polars of constitutional rights, namely the lay citizenry of Malaysia and their legal representatives, who are jealously guarding their liberty and the authorities, such as the police and the Ministry of Home Affairs who are entrusted with maintaining peace, order and security, that gives balance to the right to liberty and the right to ensure peace and security in this country. One cannot be dispensed with for the sake of another; it is unacceptable to provide absolute liberty to the extent that extremists can roam freely among us, and correspondingly, it is also unacceptable to allow the authorities to use these laws on the ground of preserving peace, security and order without any semblance of accountability for their action to a higher body. The role of an impartial judiciary is therefore indispensable in this dynamic relationship as a just and unbiased arbiter that determines where the balance resides in the scale of justice in cases involving the two competing concerns of liberty and security.

***THAI PERSPECTIVES ON THE
RIGHT TO LIBERTY AND SECURITY:
PROVISIONS OF LAW ON ARREST
AND DETENTION, AND THE
RELEVANT ISSUES***

***Sirawat LIPIPANT
Onuma KANCHIANG***

***CONSTITUTIONAL COURT OF
THAILAND***



THAI PERSPECTIVES ON THE RIGHT TO LIBERTY AND SECURITY: PROVISIONS OF LAW ON ARREST AND DETENTION, AND THE RELEVANT ISSUES

*Sirawat Lipipant
Onuma Kanchiang*

I. PART I: THAI LAW AND INTERNATIONALLY LEGAL COMMITMENT

*Sirawat Lipipant**

“The right to liberty and security” is one of the significant fundamental Human Rights recognized among international community as guaranteed in the International Covenant on Civil and Political Rights (ICCPR). It is the right concerning the principle on lawfully arrest and detention, also, the relevant legal procedures, including, the right to compensation. Thailand as a party to ICCPR has attached important to the right to liberty and security as enshrined in its provisions of the Constitution, law, and the relating mechanisms. This presentation will illustrate Thai perspectives on the matter; it will be separated into four sections beginning with the issue on its provisions of the Constitution and law, its implementation of international commitment, and its internal mechanisms.

A. Provisions of the Constitution and the Codes

1. The Constitutional of the Kingdom of Thailand B.E. 2560 (2017)

The rule of law is regarded as a main and fundamental principle in exercising of the sovereignty under the current Constitution. It is stipulated in Section 3 paragraph two of the Constitution that “*The National Assembly, the Council of Ministers, Courts, Independent Organs*

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and State agencies shall perform duties in accordance with the Constitution, laws and the rule of law for the common good of the nation and the happiness of the public at large." Therefore, in exercising of power and performing of duties by all state agencies, they have to perform their authorities according to the Constitution, laws and the rule of law for the common good not to their own interests or arbitrary discretion. This principle applies to every single matter including arrest and detention.

Moreover, Section 26 paragraph one and two also stipulates that *"A person shall enjoy the right and liberty in his or her life and person."* and *"arrest and detention of a person shall not be permitted, except by an order or a warrant issued by the Court or on other grounds as provided by law."* Accordingly, operations of State officials regarding arrest and detention must be performed consistent with the right and liberty as recognized in the mentioned provision of the Constitution.

Additionally, there is also the specific provision of the Constitution recognizing the right to liberty and security of person regarding arrest and detention, i.e., Section 29 paragraph one, two, and three of the Constitution which states that

"No person shall be subject to a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and prescribes a punishment therefore, and the punishment to be imposed on such person shall not be of greater severity than that provided by law in force at the time of the commission of the offence.

A suspect or defendant in a criminal case shall be presumed innocent, and before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict.

Custody or detention of a suspect or a defendant shall only be undertaken as necessary to prevent such person from escaping. ...
."

In this regard, all the relevant law on criminal matters relating to arrest and detention, in particular, the Criminal Code and Criminal



Procedure Code, must be pursuant to the above mentioned provisions by the virtue of the Constitution.

2. Criminal Code and Criminal Procedure Code

The Latin classical criminal term “*nullum crimen, nulla poena sine lege*” (no crime without law) has enshrined in Thai legal system as found in several provisions of Criminal Code and Criminal Procedure Code.

In Criminal Code, which is the general substantive law on criminal principle, offences, and charges in Thailand, the principle regarding the mentioned Latin legal proverb are provided in Section 2.

Section 2 stipulates that “*An act may only be punished if criminal liability had been established and penalty had been determined by the law which is in force at the time of the act. The penalty to be inflicted must be that which had been prescribed by such law. If, according to the subsequent law, the act does not constitute an offence any further, the person having performed such act shall be relieved of the guilt. If a final judgment of conviction has already been rendered, it shall be taken that the convict has never been held guilty by such judgment. If he is incurring any penalty, his penalty shall come to an end.*”

For the Criminal Procedure Code, the major law on arrest and detention procedure, it has been amended several times in order to be more conformity with the Constitution, the rule of law, and the international commitment. The amendments provide guarantees pertaining to a person’s rights in life and in human person, their essential conclusion are as follows:

(a) An arrest by an Administrative Official or a Police Officer shall only be made with a Court arrest warrant, except when the case falls in the category of exemptions under Section 78 (1) - (4) which allow arrests without warrants. Cases of arrests conducted by civilians shall abide by Sections 79, 82 and 117;

(b) Once arrested, the person arrested has the right to know for what charge he/she is being arrested. Upon arrival at the police station, the Administrative Official or Police Officer shall inform the arrested person of the charge and details of the arrest. If there is an



arrest warrant, it shall be shown to the arrested person according to Section 83, paragraph two and Section 84 paragraph one;

(c) Any words given by the arrested person to the Officer as confession at the stage of arrest shall not be heard as evidence in court, according to Section 84, last paragraph;

(d) Detention of an arrested person at a police station can be done, but shall not exceed 48 hours, except for necessary reason which cannot be outweighed. In case of necessity for a detention to be made, a request shall be submitted to the court for permission, and the detention will be granted for a duration specified under Section 87

(e) In case of an unlawful detention or imprisonment, Section 90 provides for the detainee or any person for the benefit of the detainee to submit a petition to the Supreme Court with the power to conduct trials on the charge for which the person is detained to request for a probe on the reason for such detention. Once the petition is received, the Court shall order a one-party probe urgently, and if found that there are substantial grounds, the Court shall summon the officer who made the detention to court. If the officer concerned cannot prove that the inquiry was lawfully conducted, the Court shall order an immediate acquittal;

(f) With respect to remedy to compensate for the damage inflicted on the person unlawfully detained, the Court does not have the power to order according to Section 90 of the Criminal Procedure Code. However, the detainee may press charge against the officer who ordered the detention according to the Civil and Commercial Code Section 420, since the act is regarded as a violation. In the case that such act is conducted by a public, it is regarded as an act of violation from duty performance, according to the Act on Liability for Wrongful Act of Officials, B.E. 2539 (1996), and the detainee can file a case to the Administrative Court against the office to which the officer concerned is attached to force liability from the violation offence;

(g) The Criminal Procedure Code Sections 107, 108, 108/1, 108/2, 109, 110 provide measures mainly pertaining to temporary release, stipulating that demand for security on bail shall not be unreasonably

high. For the Officer or the Court to deny a bail shall be for reasons specified in Section 108/1. In practice, the Court and the Inquiry Officer follow internal regulations specifying a ceiling or maximum amount of bail that one can demand, which depends on the severity of offence as well;

(h) Any search on a person shall not be made except by virtue of law. There is currently a law that contains provision on such matter, namely the Criminal Procedure Code Section 93 which prohibits a search on a person in public places, except by an Administrative Official or a Police Officer when there are substantial grounds to suspect that the person has in his possession things which will be used in committing an offence, or which were obtained from committing offences, or which are unlawful to have in possession.

Furthermore, certain special laws provide that a search on a person or vehicle can be conducted for the purpose of searching for objects that may substantiate evidence. Those laws are, for example, the Money Laundering Control Act, B.E. 2542 (1999), the Act on Measures for Narcotic Prevention and Suppression B.E. 2535 (1992), the Anti-Trafficking in Persons Act B.E. 2551 (2008), and The Computer Crimes Act B.E. 2550 (2007)

B. The implementation of international commitment

Thailand has been a party to International Covenant on Civil and Political Rights (ICCPR) since 1996. Its latest report in compliance with Article 40 of the Covenant is the second Country Report submitted to the Human Rights Committee in 2005.

Guarantees for the implementation of the measures enshrined in Article 9 emphasize control of the limitation of liberties in the movement of human persons and examination of control by the court organs, as well as provision of remedy in cases of wrongful detention. It is apparent that the implementation to comply with the principles under Article 9 are core measures in the amendment of the Criminal Procedure Code and other special laws relating to arrest and detention of suspects or defendants in criminal cases..

After a revision had been made to the Criminal Procedure Code on the part relating to requests for arrest warrants, detention and



appeals under Section 90, a Handbook for judges was published on requests for arrest warrants and search warrants. A memorandum has also been circulated among police officers to raise their understanding about proper procedures in their operation, and a training curriculum has been developed to train police officers with the duties of making arrests and detention at every level of operation.

In the following section would illustrate the relevant mechanisms as provided by the Constitution and the Thai authority.



II. PART II: THE MECHANISMS

Onuma Kanchiang*

A. Office of the compensation for the Injured Person and the Accused in Criminal Case, Rights and Liberties Protection Department, Ministry of Justice of Thailand

Vision

“The Department is the central agency that is responsible for administrating and protecting rights, liberties and human rights in accordance with the international standards and in a sustainable manner.”

Mission

“Promotion and protection of rights and liberties, in accordance with the Constitution of Kingdom of Thailand and human rights principles, through public participation, aiming for harmonization, protection and guarantee of people’s rights and liberties in line with international human rights standards.”

Authorities

Reason for promulgation of this Act: Whereas, the provisions contained in Section 245 and Section 246 of the Constitution of the Kingdom of Thailand B.E.2540 have certified the entitlements to receive assistance from the State of the injured persons resulted from the commission of criminal offences of others; whereas, such injured persons were not involved with the commission of such offences and had no opportunity to receive other injunctive reliefs and such provisions thereof have also certified the entitlements to receive compensation in the event that a person has become an accused in criminal cases and has been taken into custody during trial. In case, it appears that, as per the final judgment of such legal case, the

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matter of fact is admissible and conclusive that the accused did not commit such offence or an act done by the accused is not an offence; therefore, for certification of such entitlements in accordance with the provisions contained in the Constitution of the Kingdom of Thailand, it is necessary to enact this Act.

Rights of the injured person and the Accused in criminal cases

Pursuant to the Damages for the Injured Person and Compensations and Expenses for the Accused in the Criminal Case Act B.E. 2544 and the Amendment Act (No. 2) B.E. 2559

- Rights of Injured person

An innocent person who has been injured as a result of a criminal offence committed by others may request: for the state compensation in the following cases:

- Physically or mentally injured or died as a result of an act of abuse, murder, transferred malice, abortion, rape, indecent act, coercion, restraining, confinement, theft, snatching, extortion, black mail, robbery, gang - robbery and trespassing.
- Grievous bodily harm or death as a result of a negligent act committed by others. - A child, an elderly or a sick person who is incapacitated and abandoned.

- Rights of the accused person

The accused may request for a state compensation and expenses in the following cases:

When the accused has been charged for a criminal offence by a public prosecutor and was taken into custody during the trial but was subsequently (i) found not to have committed the offence and the charge was dropped or (ii) acquitted in a final judgment on the grounds that the accused did not commit the offence.

- What to do

Compile relevant documents. Submit the application for state compensation within 1 year from the date on which the court approves the withdrawal of the case or the date on which the final judgment is issued.



The rights of the accused to receive financial assistance

- Generally

- Compensation for detention at the rate of THB 200 or THB 500 per day.
- Necessary medical expenses - actual amount incurred but not exceeding THB 40,000 and the injuries shall be a direct result of the prosecution.
- Necessary expenses relating to the legal proceeding:
 - (1) Lawyer's fee - actual amount incurred but shall not exceed the limit prescribed in the Annex attached to the Ministerial Regulation.
 - (2) Other expenses incurred during the legal proceeding - actual amount incurred but not exceeding THB 30,000.

- Damages for the loss of earning during the period in which the applicant is unable to resume regular work - calculated using the minimum wage rate applicable to the area in which the applicant's place of work is located, commencing on the date on which the applicant became unable to work as normal.
- Compensation for physical and psychological rehabilitation - actual amount incurred but not exceeding THB 50,000 and the injuries shall be a direct result of the prosecution.

- In the case of Death

- Compensation - in the amount of THB 100,000.
- Funeral expenses - in the amount of THB 20,000.
- Compensation for the loss of dependent's maintenance - in the amount not exceeding THB 40,000.
- Other expenses deemed appropriate by the Committee but not exceeding

THB 40,000.

Any person who has submitted an application for damages, compensation or expenses with false statements shall be subject to imprisonment for a term not exceeding three years or a fine not exceeding THB 60,000 or both.



B. The National Human Rights Commission

Authorities

Under the 1999 National Human Rights Commission Act, the NHRCT shall function with independence and impartiality and has wide-ranging mandates. Among others, major responsibilities include:

to promote the respect for human rights domestically and internationally; to examine acts of human rights violation or those which do not comply with the country's international human rights obligations and propose remedial measures to individuals or organizations concerned; to submit an annual report on the country's human rights situation to the Parliament and the government; to propose to the Parliament and the government revision of laws, rules or regulations, and policy recommendations for the purpose of promoting and protecting human rights; to disseminate information and promote education and research in human rights; to cooperate and coordinate with government agencies, NGOs and other human rights organizations.

The 2007 Constitution has entrusted the NHRCT with increasing mandates:

to submit cases together with opinions to the Constitutional Court or the Administrative Court as the case may be where any provision of laws, rules, regulations or administrative acts is detrimental to human rights and begs the question of constitutionality and legality for the purpose of promoting the respect for human rights; and to file a lawsuit on behalf of a complainant for the purpose of redressing the problem of human rights violation in general.

The National Human Rights Commission of Thailand (NHRCT) began to prepare a report on human rights situation assessment in Thailand in 2017 by reviewing human rights situation in Thailand in 2016 while checking structural problems together with incidents that occurred in 2017. The report is divided into five main sections and comprises of 18 issues.

For assessment, analysis and synthesis, the NHRCT used standard indicators and benchmarks importantly according to



the main human rights treaties and recommendations of the UN Charter-based mechanisms, and human rights principles provided in the Constitution of the Kingdom of Thailand, laws and policies in the country. Results of the assessment of human rights situation in Thailand are presented in summary consisting of three main parts, as: the overview and assessment of human rights situations; problems and obstacles; and recommendations. Their details are as follows:

2.1 Assessment of Rights and Liberties according to the Constitution of the Kingdom of Thailand, B.E. 2560 (2017)

The Constitution of the Kingdom of Thailand, B.E. 2560 (2017), which has been put into effect since the 6th April 2017, recognizes and protects basic human rights of individual persons in Chapter I General Provisions, and in Chapter III, recognizes rights and liberties of the Thai people in addition to the rights and liberties as guaranteed specifically by the provisions in the Constitution, a person shall enjoy the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws, and shall be protected by the Constitution, insofar as the exercise of such rights or liberties does not affect or endanger the security of the State or public order or good morals, and does not violate the rights or liberties of other persons. Reviewing the previous Constitutions, it was found that some rights prescribed the Chapter about rights and liberties were not really put into practices, certain rights and liberties are therefore provided in the Chapter V Duties of the State, so that these rights are put into practices by providing them to be the duty of the State, the people and the community shall have the right to follow up and urge the State to perform such act, as well as to take legal proceedings against a relevant State agency to have it provide the people or community such benefit in accordance with the rules and procedures provided by law. Additions were then made to the Chapter Duties of the State to guarantee that the State must act according to the provisions of the Constitution, so that rights of the people to benefit from the State are really in effect. The Chapter on Duties of the State is an important principle and it is necessary for the State to completely put them in practice appropriately, depending on monetary and financial status of the country. Moreover, there is Chapter XVI on National Reform to



eliminate conflicts and reduce disparity in society by providing that the enactment of the law under paragraph one and the promulgation thereof shall be executed within one hundred and twenty days from the date of promulgation of this Constitution, and the implementation of each area of reform shall commence within one year from the date of promulgation of this Constitution.

Comparing the Constitutions of the Kingdom of Thailand, B.E. 2540 (1997) and B.E. 2550 (2007) with the present one, it was found that although rights had existed before emergence of the State and the State had the duty to respect, protect and fulfil with putting these rights into practices, as efforts were made by the current administration to create various rights, the Constitution of the Kingdom of Thailand B.E. 2560 (2017) therefore has provisions to make rights created by the State more important. Even if the 2017 Constitution has provisions to distribute power and administration to micro level and requires the Council of Ministers to declare its policies to the Parliament in line with the Duty of the State, policies of the State and National Strategies, eligible voters, totaling no less than 10,000 in number, could propose new laws according to the Chapter on Rights and Liberties of the Thai people or the Chapter on Duty of the State. However, to make promotion and protection of human rights a reality and sustainable, it is necessary to have processes to promote and guarantee that the people as the rights holders could really participate in these processes.

2.2 Assessment of situations concerning civil and political rights
There were three main issues:

Torture and Enforced Disappearance

The right not to be subjected to torture and enforced disappearance is right and liberty to life and body that is recognized by the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture (CAT). During 2016-2017, the government advocated drafting of a

Prevention and Suppression of Torture and Forced Disappearance Act, B.E. When the Prevention and Suppression of Torture and



Enforced Disappearance Act was considered by the Ordinary Affairs Committee of the National Legislative Assembly in February 2017, the Committee had a resolution to return this Act to the government for reconsideration as it saw that some amendments should be made. Human rights organisations both in Thailand and abroad all expressed their concern and requested the government to speed up its consideration of the Act.

During 2007-2016, the NHRCT received a total of 102 complaints related to torture. Most of these complaints came from the southern border provinces. In 2017, there were 27 complaints, most of which claimed that security officers were the ones that committed torture while arresting or detaining the people.

However, in 2017, the NHRCT did not receive any complaint related to enforced disappearance. Therefore it could be said that the Council of Ministers' submission of the Prevention and Suppression of Torture and Enforced Disappearance Act to the Ordinary Affairs Committee of the National Legislative Assembly for consideration was an important progressive situation. However, decision by the Ordinary Affairs Committee of the National Legislative Assembly to return the Act to the Council of Ministers to review it disrupted the attempt to solve the structural problems of torture and enforced disappearance; the process for enactment of this legislation was delayed even further. Therefore it was proposed that the State speeds up its actions to make Thai laws consistent with CAT of which Thailand is a state party by enacting the Prevention and Suppression of Torture and Forced Disappearance Act, making torture and forced disappearance a criminal offence, conducting a feasibility study to ratify the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), establishing a mechanism to receive and investigate complaints about torture and enforced disappearance to guarantee or take care that information about torture and enforced disappearance, and training to provide additional knowledge and understanding to law enforcement officers and security officers, so that human rights are fully respected.

Rights in the Justice Process



ICCPR and the Constitution of the Kingdom of Thailand recognize the right in justice process and the State has tried to amend, improve or enact laws and policies, and promote actions taken by state officials to enable every individual person to equally access right in justice process and take into consideration rights of the accused, defendants and detainees. In 2017, the State took actions to reform the justice process. The National Reform Committee on justice process came up with a plan for reforming in 10 areas of justice process. The Correction Act, B.E. 2560 (2017) was enacted to make relevant actions consistent with the universal principles. Concerning temporary release, a project to develop systems for risk assessment and supervision during the temporary release, and another project on temporary release with an electronic monitoring equipment (EM), are also helping accused or defendants to have more opportunities to be released. EM was also used with wrongdoers in the probation system.

However, certain worrisome situations were still found that the government should realize and pay attention to, including death of persons while being detained by state agencies, justice process in the condition that special legislation is being enforced in the case of the National Council for Peace and Order (NCPO)'s Annoucements no. 37/2557, 38/2557 and 50/2557 which result in civilians being subjected to jurisdiction of the military court. Later the NCPO issued Order no. 55/2559 putting civilians who committed such offence to be subjected to the Court of Justice from 12th September 2016 onward. As a result, although this order returned wrongdoings committed after 12th September 2016 to be under jurisdiction of the Court of Justice, for wrongdoings before that date, civilians were still tried in military court. The ICCPR Committee noted that a necessary measure should be used to consider the petition requesting a transfer of cases from the military court for offences committed before 12th September 2016 of which trial was still not completed to civilian court and give an opportunity to civilian defendants in cases that the military court had already given a verdict to appeal.

Freedom of expression, press freedom and freedom for peaceful and unarmed Assembly



As a whole, in 2017, rights and liberties according to the Constitution were controlled by using laws to strictly supervise, check and control. The Computer Crimes Act B.E. 2550 (2007) in particular was used to condemn actions that were considered to be getting false information into the computer system and condemn alleged acts of defamation. Later the government made some amendments and created correct understandings about such actions by improving and proclaiming the Computer Crimes Act (2nd Issue), B.E. 2560 (2017) that did not include an offence of defamation while creating correct understanding about how to enforce this legislation. Concerning freedom of academic expression, NCPO Order no. 3/2558 was used to forbid gatherings of five persons or more and strictly enforced against persons who used this freedom. There were arguments in many incidents, insisting that this right and freedom were not used beyond the limits of law and the Constitution also protected the freedom of academic expression. The press freedom, which was also recognized by the Constitution, on the other hand, was restricted by many NCPO orders and orders of the Head of NCPO, including consideration to enact Protection of Rights and Liberties, Promotion of Ethics and Professional Standards for the Mass Media, B.E. Concerning freedom of peaceful and unarmed assembly, it was found that enforcement of the Public Assembly Act, B.E. 2558 (2015) was unclear how to separate political and non-political assembly, and discretion was used by law enforcers to restrict rather than promote and protect rights as provided by the Constitution.

C. Office of the Ombudsman Thailand

Authorities

The 2009 Organic Law on Ombudsman states mandate of the Ombudsman as follows:

1. Consider and investigate complaints when: -

1.1 A civil servant, member or employee of a government agency, state enterprise, or local government violates the law or exceeds the jurisdiction of his or her authority.

1.2 An action or inaction by civil servant, member or employee of a government agency, state enterprise, or local government causes



harm, damage or injustice to an individual or to the general public, whether or not this action or inaction is within his or her jurisdiction.

1.3 A negligence of duties or malfeasance by the statutory agencies and the Courts excluding the process of lawsuit judgment.

2. If, in the opinion of the Ombudsman, a law, regulation, or action of an individual is in violation of the Constitution, the Ombudsman shall refer the case to either Constitutional Court or an Administrative Court, as appropriate, for further review.

3. Study, assess, and provide recommendations of actions in compliance with the provisions of Constitution as well as matter for consideration in support of Constitutional amendment.

4. Draft the core values of ethical standard and making recommendations or advice in connection with the preparation or revision of the code of ethics of each government agency.

5. Promote ethical awareness to relevant agencies.

6. Conduct an inquiry and disclose to the public in case of any violation of code of ethics.

7. Suggest to the appropriate government agency, state enterprise or local government concerning the suggested procedures and provisions.

8. Prepare an annual report completed with performance, opinion, and recommendations, and submit to the parliament. The report has to be announced in the Government Gazette and open to the public.

Limitation of Powers

Like Ombudsman all over the world, there are some areas that the Thai Ombudsman has no control. They are:

- Ombudsman has no sanction power.
- Ombudsman could only make recommendation.
- In case of agency does not comply with recommendation, the Ombudsman has the power to report to the Minister, Prime Minister, Parliament, and Public.



The Ombudsman shall NOT intervene in

- Policies announced by the Cabinet in Parliament.
- Cases currently under consideration in a court of law or cases in which the court has issued a final ruling.
- Complaints relating to personnel management or disciplinary action.
- Complaints in which the complainant does not comply with the specified rules i.e. anonymous, no address, inflaming language.

Performance

The Ombudsmen have the duties to consider, investigate into and find facts on the complaints of people sustaining trouble from the performance of the duties of officials and state employees at all levels which unjustly causes injuries to the public whether such performance is legitimate under their legal authority or not. In this regard, the Ombudsmen have laid down policies on operations to be complied with by officials of the Office of the Ombudsman to ensure highest efficiency in their performance so that problems relating to people's trouble will be solved and relieved quickly and fairly based on the philosophy as follows: "Lodging complaints is convenient, consideration of complaints is prompt, providing fairness to all parties concerned, operations are transparent and accountable". To solve problems, emphasis is placed on peaceful mediation which means the extension of coordination to create good understanding between people and government employees. In addition, various channels for lodging complaints have also been sought and provided to offer facilitation to the public which include the lodging of complaints by mail, in person to meet an official at the Office, calling the Office toll-free at 1676 throughout the country, internet connection, and the creation of networks for handling of complaints such as the lodging of complaints through the Law Society of Thailand, Attorney General, Village Health Volunteer etc.

The performance of the Ombudsman in solving complainant's problem is aimed to be proactive; fairness oriented, and prompts to both complainants and agencies.



How to make a complaint

1. By telephone

- Hotline 1676 (free and available nationwide) or 0-2141 9100

2. By post

- Please identify the complainant name, address, telephone number (or nearby telephone number), who to complain to, subject of the complaint. Kindly inform us if you wish to remain anonymous to keep your contact information confidential and submit the complaint to:

The Office of the Ombudsman Thailand 5th Floor,
Ratthaprasasanabhakti

Building, The Government Complex Commemorating His Majesty
The King's 80th Birthday

Anniversary, 5th December B.E. 2550 (2007) (briefly "The
Government Complex")

120 Moo 3, Chaengwattana Road, Tungsonghong Sub-District,
Laksi

District, Bangkok 10210

Telephone: 0-2141-9100 or hotline 1676

Fax: 0-2143-8341

3. Through Members of the House of Representatives or Senators

- You can file your complaint through local Members of the House of Representatives or Senators who will submit the complaint to an officer from the Office of the Ombudsman Thailand during the state opening of the National Assembly.

4. Through Networks of the Office of the Ombudsman Thailand

- You can file your complaint through our networks – Lawyers Council of Thailand and its offices and branches throughout Thailand, Office of The Attorney General, its Offices of Peoples' Rights Protection and Legal Aid, and Provincial State Attorney Offices nationwide.

5. By yourself



- You can file or make a complaint by yourself at:

The Office of the Ombudsman Thailand 5th Floor,
Ratthaprasasanabhakti Building, The Government Complex
Commemorating His Majesty The King's 80th Birthday

Anniversary, 5th December B.E. 2550 (2007) (briefly "The
Government Complex")

120 Moo 3, Chaengwattana Road, Tungsonghong Sub-District,
Laksi District, Bangkok

10210 Telephone: 0-2141-9100 or hotline 1676 Fax: 0-2143-8341

Organic Act on Constitutional Court Procedures

Rights and liberties are restricted under this Organic Act for reasons and needs pertaining to the efficient functioning of the Constitutional Court in the interest of the public. The enactment of this Organic Act in conformity with the conditions provided under section 26 Constitutional of the Kingdom of Thailand

Section 46 A person whose right or liberty has been directly infringed and suffered a grievance or loss, or may suffer an unavoidable grievance or loss due to such infringement of right or liberty, shall have the right to submit an application to the court for a ruling under section 7(11). A complaint must first be lodged with the Ombudsman within ninety days of knowledge or presumed knowledge of the infringement of the right or liberty.

***GENERAL REVIEW OF THE RIGHT
TO LIBERTY AND SECURITY OF
PERSON IN GEORGIA***

***Davit GOLIJASHVILI
Tornike OBOLASHVILI***

***CONSTITUTIONAL COURT OF
GEORGIA***



GENERAL REVIEW OF THE RIGHT TO LIBERTY AND SECURITY OF PERSON IN GEORGIA

*Davit GOLIJASHVILI**

*Tornike OBOLASHVILI***

I. GENERAL REMARKS ON THE RIGHT TO LIBERTY AND SECURITY

The right to liberty and security of person is guaranteed under the Article 18 of the Constitution of Georgia.¹ **According to the Article:**

1. Human liberty shall be inviolable.
2. Imprisonment or other restrictions of personal liberty shall be inadmissible without a court decision.
3. A specially authorised official may arrest a person in the cases provided for by law. A detainee or a person whose liberty has been otherwise restricted shall be brought before a court of competent jurisdiction not later than 48 hours. If the court does not adjudicate upon detention or any other kind of liberty restriction within the following 24 hours, the person shall be released forthwith.
5. An arrestee or a detainee shall be made aware of his/her rights and the grounds for liberty restriction upon his/her arrest or detention. An arrestee or a detainee may request the assistance of an advocate upon his/her arrest or detention and the request shall be satisfied.
6. Pre-trial detention period shall not exceed nine months.
7. Violation of the provisions of this article shall be punishable by law. A person arrested or detained unlawfully shall have the right to compensation.

* Senior adviser of the Constitutional Court of Georgia.

** Senior adviser of the Constitutional Court of Georgia.

1 Version of provision that was in force until 16 December, 2018.



Liberty of an individual implies the physical liberty of a person, his/her right to free physical movement, according to his/her will, to be or not to be in any place. The above-mentioned article enshrines the corporal inviolability of an individual, his/her right to personal liberty. It represents one of the cornerstones of the fundamental right and, according to the constitution, is subject to special defence. The Constitution of Georgia contains not only the material norms in order to protect human liberty, but also particular procedural guarantees for detention, imprisonment or any other restrictions. For protecting the personal liberty of an individual and for restricting the state authorities, the Georgian Constitution foresees both formal and material barriers. The first sentence of paragraph 3 of Article 18 in formal terms requires that the arrest of an individual is permissible in the cases determined by law. This is so called “legislative reservation”, which implies that the regulation of the mentioned issue is possible by a legislative act only. Any other normative act that foresees the cases for an arrest of an individual will be unconstitutional in a formal sense. At this time, establishment of rules is the prerogative of legislative authorities, and other branches of the authorities will act in observance of rules and areas determined by the legislative authorities. The legislator is empowered to assess and decide in order to make choice among the many potential ways to achieve the aim; however, it is restrained by the constitutional norms and principles.

The Court plays the vital role in the area of restriction of the physical liberty. According to the constitution, the court, on the one hand, acts as a guarantor for the physical liberty of a person, and on the other hand, as a legitimate body authorized to restrict it.

Beside its paramount importance, it is doubtless that a person’s personal liberty, its inviolability, freedom to act according to his own will is not absolute, unrestricted right. However, it is absolutely protected by illegal, groundless and arbitrary restriction. The legitimate aims for restricting human liberty might be the need to administrate justice, prevent committing a crime and etc. The freedom of a person is such a weighty basic right that interference with it from the part of the State authorities should be considered as *ultima ratio*. Any form of deprivation of liberty is subject to the strictest control

from the part of the Constitutional Court in light of proportionality of the interference. Besides, the more continuous and intense is the interference, the stricter is its assessment when considering of its constitutionality.

II. CASE-LAW ANALYSIS OF THE GEORGIAN CONSTITUTIONAL COURT'S APPROACH TO THE RIGHT TO LIBERTY AND SECURITY

A. Judgment of the Constitutional Court of Georgia “*Citizens of Georgia – Irakli Kemoklidze and David Kharadze v. the Parliament of Georgia*”, 8/10/2014, № 2/4/532,533

The facts

According to the disputed norm² legally incapable patient was hospitalized for voluntary treatment at the request and informed consent of legal representative of patient. The claimants stated that in order to administrate treatment, it requested an informed consent of the legal guardian of the person recognized legally incapable, but side-stepped the will of the person him/himself and his/her mental state was not taking into consideration. If the legal guardian, not the patient, gives informed consent the treatment was declared voluntary. The claimants underlined that the disputed norm were unconstitutional because of the lack of procedural guarantees: in case of inpatient psychiatric care, a person is hospitalized in inpatient institution and he/she is restricted the possibility to have communication with the outer world, in particular, he/she is not allowed to send and receive a letter, use telephone and other communication means and etc. They considered that this kind of restriction of person's liberty needs to be approved by the court and the informed consent of the legal guardian is not enough ground for this.

The judgment of the Constitutional Court of Georgia

The Constitutional Court of Georgia pointed out that in the case, when a person through his/her own will is in defined place, even for indefinite period of time, there will not be interference with

2 Subparagraph "c" of the first paragraph of article 17 of the law of Georgia "On Psychiatric Care"



his/her right of liberty, even in the conditions, when placement of definite location are secured by other persons, if he/she has the right to leave the given territory by his/her own decision. Therefore, the circumstance is decisive, whether or not consent of a guardian should be regarded as the will of hospitalized person. The Constitutional court noted that consciousness of persons with pathologies of “mental illness” class, in some cases, is largely disturbed and they cannot perceive the reality surrounding them. It is absolutely possible, that a person with pathologies of “mental illness” class to have the sufficient ability to demonstrate his/her informed consent. According to the Constitutional Court upon implementation or establishment of measures protecting the interests of a legally incapable adult person, the interests and well-being of this person should be given decisive importance. Therefore, the liberty of an individual could be restricted only due to the special reasons and aims, through strict adherence to formal procedural guarantees. The Constitutional Court of Georgia singled out that under the conditions, when a person is deprived of the ability to fully or partially perceive the importance of restriction applied against him/her and its future consequences, it is of paramount importance to have the court control over restriction of the right of liberty. Furthermore, while a person does not have the right to independently make decision about leaving the institution, it creates unjustified risk that under the circumstances of absence of control from the part of neutral subject, a guardian or medical institution abuse the powers conferred upon them. Furthermore, the Court noted that the Constitution of Georgia allows the possibility that in presence of certain conditions, liberty of a person can be restricted for a period of 48 hours without court decision. In the case under consideration, the Constitutional Court of Georgia held that hospitalization at the medical institution foreseen by the disputed norm could last for a certain period of time, for months or years. Therefore, such restriction of person’s liberty without court decision violates the constitutional standards.



B. Judgment of the Constitutional Court of Georgia “*Citizens of Georgia – Piruz Beriashvili, Revaz Jimsherishvili and the Public Defender of Georgia v. the Parliament of Georgia*”, 29/01/2003, № 2/3/182,185,191

The facts

According to article 146 of the Criminal Procedure Code of Georgia during the 12 hours after bringing an arrested person to the investigative body, a protocol of arrest should have been drafted and legality and reasons of arrest should be verified. After that, the respective body, with the consent of a prosecutor, would adopt a resolution to start a criminal case and declare the person suspect or to release him. Only from this moment did a person have the right provided for suspect and was informed about those rights (e.g. right to silence, guarantee against self-incrimination, right to summon a defender etc.) The claimants considered that the disputed regulation violated the requirements of the Constitution.

The judgment of the Constitutional Court of Georgia

The Constitutional Court noted that a person should be considered arrested from the moment when the law officer restricts his/her liberty guaranteed by the constitution. For this reason, informing an arrested person about his/her rights shall take place immediately upon arrest, demand for the assistance of a defender shall be met in maximally reasonable time. The Constitutional Court explained that the disputed norm created a gap period - 12 hours, when a person was arrested, his/her liberty was restricted but he/she could not fully enjoy the constitutional rights, for instance, right to silence, guarantee against self-incrimination, right to summon a defender etc. Consequently, The Constitutional Court declared the disputed norm unconstitutional due to the unreasonable restriction of fully enjoyment of the right of defence guaranteed by article 18 of the Constitution of Georgia.



C. Judgment of the Constitutional Court of Georgia “*Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia*”, 15/09/2015, № 3/2/646

ISSUE N1: The period of pre-trial detention

The facts

According to the disputed norm the total term of detention of an accused shall not exceed 9 months. After passing the mentioned period an accused shall be released from detention. The period of detention commences from the moment of an arrest of the accused, if arrest was not made from the moment of enforcement of the court ruling on the selection of this restrictive measure, the detention period ends at the moment of delivery of the judgment of the first instance court which heard case on merits. Pursuant to the claimant since the disputed provision does not contain suitable guarantees for avoidance of repetitive imposition of similar restrictive measure against the already detained, it allows the use of detention for more than 9 months. The respondent mentioned that the disputed provision replicates principle equivalent to the one established by paragraph 6 of article 18 of the Constitution and relates the 9 months period to each ongoing criminal case against an accused and there was no violation of the Constitutional requirements.

The judgment of the Constitutional Court of Georgia

The Constitutional Court explained that at a glance the disputed provision prescribes restriction of the duration of detention, with the period same as required by paragraph 6 of article 18 of the Constitution. But despite the formal similarity, the content of the constitutional provision might be different from the one prescribed by the law. The Constitutional Court should assess not only formal compatibility of the disputed provision with the constitutional provision but it also should establish whether the disputed provision content-wise ensures protection of the essence of the constitutional right. The Constitutional Court pointed out that based on article 18 of the Constitution in cases when an accused is detained the state is obliged to ensure delivery of judgment of conviction within the



period of 9 months or release him/her. Hereby, the Constitution considers 9 months period to be somewhat sufficient time for delivery of the judgment against an accused. According to the Constitutional Court of Georgia in the situations when a person is accused of several crimes, interest to use detention in order to avoid obstruction of justice might exist in relation to each case separately. Therefore, article 18 of the Constitution does not intend to establish ceiling of the term of detention period, which will preclude the possibility of the use of detention against an individual during his/her entire life. The purpose of article 18 is to force the state to ensure timely imposition of the court judgment against the accused in cases when detention is used against him/her. The Court declared that the aims of establishment of 9 months maximum detention period is equally applicable in relation to each simultaneous criminal case, in occasions when several accusations are simultaneously served against an individual. Under the conditions when a person is detained paragraph 6 of article 18 of the Constitution equally obliges the state to conduct speedy trial in each case. In terms of the influence on the accused, detention has same effect of restriction, independent from which crime the accusation is imposed for. Therefore, when the interests of administration of justice is ensured under the condition when several accusations are simultaneously served, the aims of establishment of 9 months maximum term of detention are equally directed towards the criminal prosecution of each simultaneous case, independent from which crime the person is detained for. The Court stated that for the purposes of determining the ceiling time allowed for detention prescribed by paragraph 6 of article 18 of the Constitution of Georgia the accused should be considered to be detained, if after presenting this accusation, he/she was factually detained on any other criminal case. In order to determine the ceiling of preliminary detention period on each case under the condition when several accusations are simultaneously served, the period which the accused spent detained even on another criminal case after serving an accusation on this case should be counted as detention period spent on this case. For the above-mentioned reasons, the Constitutional Court upholds the claimant's statement according to which the disputed provision



allows the detention for longer period of time than it is allowed by the Constitution, which violates his right protected under the first and the sixth paragraphs of article 18 of the Constitution.

ISSUE N2: Constitutionality of using detention based on the probable cause

According to the disputed norm the probable cause is the unity of facts and information, which together with circumstances of the criminal case, would satisfy an unbiased person to conclude the possible commission of crime by the individual. The probable cause constitutes evidentiary standard for conducting investigative activities prescribed by the Criminal Procedure Code and for using restrictive measures. Norm prescribes legal ground for using restrictive measures, specifically *“probable cause that an accused will flee, or will not appear at the court hearing, will destroy information important for the criminal case or will commit a new crime”*. Pursuant to the Claimant normative content of disputed norms which enables the use of detention based on the probable cause is incompatible with the constitutional requirement and creates risks for disproportionate restriction of the right to human liberty.

The judgment of the Constitutional Court of Georgia

The Constitutional Court explained that since the use of detention is based only on assumption of commission of crime (which an individual is accused of), as well as possibility to flee, destruct evidences (tamper with witnesses) and the risk of commission of new crime, there is always a possibility for its incorrect use. Therefore, the legislator is obliged to create a regulation which provides the court with clear and unequivocal references on when the detention should be used as a restrictive measure. The court noted that at the same time it would be unreasonable and even impossible to demand from the prosecution party or from the court to verify grounds for accusation and detention based on the strictest evidentiary standard at the initial stage of hearing of the case. The Constitution allows the use of detention; however the legal regulation should be as clearly formulated as possible and should enable the use of detention based on the most objective criteria. Only in such cases it is possible for the



law restricting the human liberty to be considered as proportionate means of restriction of the right. The Constitutional Court mentioned that the disputed provisions unequivocally indicate that in order to adopt the ruling on detention the facts and information based on which an unbiased person would conclude necessity of the use of detention should be presented. Therefore, based on the disputed provisions the judge should decide not based on his/her personal subjective doubts but it is obliged to assess the existence of factual circumstances which objectively refer to, would assure objective person in, necessity of the use of the restrictive measure. According to the Constitutional Court, the use of detention is allowed only in cases when it is the single possible measure for avoidance of possibility to flee by an accused, commission of new crime or destruction of evidences (witness tampering) by him. Therefore, the law allows the use of detention only in the circumstances of extreme necessity, in cases when less restrictive measure cannot ensure the achievement of legitimate aims, hereby, it does not constitute disproportionate restriction of the right to human liberty.

D. Judgment of the Constitutional Court of Georgia “*Citizens of Georgia – Levan Izoria and Davit-Mikheili Shubladze v. the Parliament of Georgia*”, 11/04/2013, № 1/2/503,513

The facts

According to the disputed norms a policeman was authorized to stop a person if there was a reasonable doubt about possible commission of a crime by him. The term for the stop was a reasonable term necessary for proving or excluding reasonable doubt. Pursuant to the Claimants the disputed norms contradict with the constitutional principle of certainty since it did not define for the accomplishment of what police actions a person is stopped. Moreover, the disputed norms fail to define the nature of specific, preventive police actions for the conduct of which a policeman stops a person and “reasonable doubt” is not directly defined by the law. As the Claimants asserts, the stop defined by the disputed norm and the arrest envisaged by the criminal procedure code have similar content, with the distinction that the arrest occurs within the scopes of the judicial control, whereas



the stop, if a person thus stopped does not demand, is left without the judicial control.

The judgment of the Constitutional Court of Georgia

The Constitutional Court pointed out that in order to qualify the disputed norm as an arrest for the purposes of Article 18 of the Constitution, it should satisfy at least one of the criteria: A) it should legally or factually represent criminal prosecution; B) it should be linked with the fact of restriction of his physical liberty and his transfer to or/and his placement in closed (confined) space against the will of an individual; C) the time for restriction of liberty should be sufficiently lengthy as to virtually equal, according to the intensity of restriction, to an arrest foreseen by Article 18 of the Constitution. Moreover, the Constitutional Court explained that the doubt shall be reasonable, and it may rest upon an objective ground, if such doubt is raised by another policeman with relevant authority, in similar circumstances. Also, it is important that a reasonable doubt will not rest such opinions or stereotypes that may cause unjustified interference with the constitutional right. The flexible and not-vague notion of “reasonable doubt” is necessary to strike the balance between, on the one hand, the public interest of fight against a crime and, on the other hand, the necessity to protect an individual from the abuse of authority by a policeman. For these reasons, the disputed law was held as compatible with the Constitution.

**CONSTITUTIONAL COURT OF
TURKEY'S INTERPRETATION
OF TWO RIGHTS: LIBERTY AND
SECURITY OF PERSON AND
FREEDOM OF EXPRESSION**

Taylan BARIN

**CONSTITUTIONAL COURT OF
TURKEY**



CONSTITUTIONAL COURT OF TURKEY'S INTERPRETATION OF TWO RIGHTS: *LIBERTY AND SECURITY OF PERSON AND FREEDOM OF EXPRESSION*

*Dr. Taylan BARIN**

I. LIBERTY AND SECURITY OF PERSON

What is the connection between liberty and security? To some extent liberty requires security. You can't be free if you're constantly made a speech on every corner by people who might take your property, your life, your liberty. Indeed, John Locke in his *Second Treatise of Government* argued that the purpose of government was to create a kind of security for those things that would allow for liberty. Specifically, he argued that the government should provide for the security of life, liberty, and property. Once your life, your liberty, and your property are secure, then you can begin to use your liberty effectively. You can do the things you want in life.

But what if we want the government to secure us against other things besides just those three? There are, after all, lots of risks in the world. Life is full of risks. Suppose we want the government to begin guaranteeing us against other kinds of risks. Risks from terrorism, risks from disease, risks associated with old age, etcetera. Once you begin to think about all the risky behaviours and all the risks that life poses, there are an awful lot of things that a government might have to do.

Well, should we ask the government to protect us against all of those? Here's something to consider: The more security we want, it comes at a price. What is the price? It's not just money, although it is money. It's not just time and energy, it's also our liberty. Because the more things the government protects us against, the more things that we no longer have control over ourselves.

* Ph.D., Rapporteur Judge of the Constitutional Court of the Republic of Turkey.



And we may reach a point, there may be a threshold at which we no longer have really any liberty. If we've asked the government to secure us against all risks, no cost barred, then what we've done effectively is we've handed over all of the authority, all of the discretion over our decisions and our lives to some other entity, to the state.

At that point we have effectively zero liberty. But not only do we not have liberty then, we probably also don't have security, precisely because we are no longer in control of our lives, somebody else is. It reminds us of that famous quote from Benjamin Franklin, "*Any society that would give up a little liberty to gain temporary security will deserve neither and will lose both.*" That contains some important wisdom.

Two human-rights specialized courts, European Court of Human Rights and Turkish Constitutional Court's decisions have balanced two rights.

Related Articles of European Convention on Human Rights and Turkish Constitution Right to Liberty and security

1. Convention

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought



promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The key purpose of article 5th is to prevent arbitrary or unjustified deprivations of liberty (*McKay v. the United Kingdom* [GC], § 30). The right to liberty and security is of the highest importance in a "democratic society" within the meaning of the Convention (*Medvedyev and Others v. France* [GC], § 76; *Ladent v. Poland*, § 45, 18 March 2008).

ECtHR's emphasis on (5-3): Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" and "from which the whole Convention draws its inspiration" (*Brogan and Others v. the United Kingdom*, § 58).

2. Turkish Constitution

III. Personal liberty and security

ARTICLE 19- Everyone has the right to personal liberty and security.

No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law:

(19-4) Individuals against whom there are strong presumptions of guilt may be detained only by order of a judge and for the purposes of preventing their absconding or the destruction or alteration of evidence, or in any other circumstances provided for by law that also necessitate their detention.

No one shall be arrested without an order by a judge."

II. FREEDOM OF EXPRESSION

1. Convention

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart



information and ideas without interference by public authority and regardless of frontiers.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2. Turkish Constitution

Article 26

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.

....

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary..."

Interpretation of Turkish Constitutional Court TCC's Fundamental Principles in two Crucial Decisions

TCC's interpretation can be seen in two leading decisions: individual applications of *Erdem Gül* and *Can Dündar* (App. No: 2015/18567), Individual application lodged by Mehmet H. Altan (no. 2016/23672)

1. Erdem Gül and Can Dündar (App. No: 2015/18567)

The Facts: Some trucks, alleged to have been weapon-laden, were stopped and searched in Hatay province on January 1st 2014 and in Adana. The incidents related to stopping and search of these trucks and the contents and destination of their freight were a matter of debate by the public for a long period of time. In this context, a newspaper named *Aydınlık*, in its issue on January 21st 2014, published a news article alleging that these trucks were carrying weapons and ammunition and a photograph related to such allegations.

Sixteen months after such publication, Can Dündar, one of the applicants, published in daily newspaper *Cumhuriyet*'s issue on May 29th 2015 the photographs and information related to the weapons and ammunitions alleged to have been found on the trucks.

After the publication of the news by Can Dündar, the Chief Public Prosecutor's Office made a press statement on 29/5/2015 and announced that a prosecution has been initiated on the charges of "*providing documents regarding the security of the state, political and military espionage, unlawfully making confidential information public and making propaganda of terrorist organization*". Approximately six months after such announcement the applicants were invited by phone on 26/11/2015 to have their statements taken and they were detained.

The Applicants' Allegations: The applicants claimed that they were deprived of their liberty in an unlawful way, that there is no justification for their detention, that the only grounds for the decision on their detention is the news that they published and that no evidences except for the news articles were adduced against them. Accordingly, they alleged that their right to liberty and security of person and freedom of expression and the press have been violated.

The Court's Assessment

1. On the Admissibility of the Application

The Court stated that the individual application relates to the allegations that the applicants' detention violates freedom of



expression and the press and that the applicants exhausted legal remedies by objecting to the decision on their detention.

2. On the Merits of the Allegations declared Admissible

Firstly, the Constitutional Court states that its review on the merits of the allegations declared admissible is limited to the “lawfulness of detention” and “the effects of detention measure on the freedom of expression and the press” independently of the investigation and prosecution of the applicants and possible outcomes of their trial.

a) Allegations on the Violation of the Right to Liberty and Security of Person

On the other hand, detention measure, which is a severe protection measure, may be considered reasonable only if less severe measures have been considered and found to be insufficient to safeguard the individual’s and public interest. In this context, “strong indication of having committed an offence” is not sufficient on its own to implement detention measure which deprives the individual of his/her liberty. The detention measure must also be “necessary” in the circumstances of the present case.

a) Allegations on the Violation of the Right to Liberty and Security of Person

The main fact grounding the decision for detention of the applicants is that two news articles on stopping and searching the trucks were published in Cumhuriyet newspaper.

The news similar to the ones subject to application were published with photos approximately sixteen months earlier in another newspaper and it is also important that the grounds of detention measure does not specify whether the publication of the similar news later by the applicants continues to pose a threat against national security or not.

Consequently the Constitutional Court ruled, by majority, that the applicant’s right to liberty and security of person guaranteed under Article 19 of the Constitution has been violated as conditions of “strong indication” and “being necessary” required for detention measure were not duly reasoned in the relevant decision.



b) Allegations on the Violation of the Freedom of Expression and the Press

On their detention, no facts are mentioned– except for publishing news in the newspaper– that may constitute a basis for the charges against them. In this context, the detention measure implemented to the applicants, irrespective of the contents of the news, constitutes an interference with the freedom of expression and press

**2. Mehmet H. Altan
(App. no. 2016/23672)**

The articles and speeches on account of which the applicant has been detained on remand consist of the 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.

The Facts

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.

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'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.

The Constitutional Court's Assessment

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.

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.

Assessment

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 Erzinçan TV the day before the coup attempt, and his article titled "*Türbülans (Turbulence)*" that was published on his own website on 20 July 2016.

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*".

It was argued that in his speech in a programme broadcasted on Can Erzinçan 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..."

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.

It has been concluded that "the strong indication of guilt" could not be sufficiently demonstrated in the present case.

III. CONCLUSION

The cases showed that on the right to liberty and security of person and considering that the only fact adduced as basis for the crimes the applicants are charged with was the publishing of the relevant news articles, a severe measure as detention which does not meet the criteria of lawfulness cannot be considered proportionate and necessary in a democratic society.

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.

Liberty and security are trade-offs. The more security we get, the less liberty we're going to have. Actually, security and liberty are not in conflict. Rather, security is necessary for the enjoyment of liberty. We must balance security and liberties.

*THE RIGHT TO LIBERTY AND
SECURITY IN THE LIGHT OF
JUDGMENTS OF THE SUPREME
COURT OF THE TURKISH REPUBLIC
OF NORTHERN CYPRUS*

*Musa AVCIOĞLU
Banu SOYER*

*SUPREME COURT OF THE
TURKISH REPUBLIC OF
NORTHERN CYPRUS*



THE RIGHT TO LIBERTY AND SECURITY IN THE LIGHT OF JUDGMENTS OF THE SUPREME COURT OF THE TURKISH REPUBLIC OF NORTHERN CYPRUS (TRNC)

*Musa AVCIOĞLU**

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Scope:

- A brief information about the Constitution of TRNC.
- Formation and functions of the Supreme Court and the Constitutional Court of the TRNC.
- Legal situation regarding detention and arrest orders in the light of judgments of the Supreme Court of the TRNC.

I. A BRIEF INFORMATION ABOUT THE CONSTITUTION OF TRNC

The Turkish Republic of Northern Cyprus was established on the 15th of November, 1983 and the Constitution of TRNC came into effect after being approved at the referendum and being promulgated in the official gazette on the 7th of May 1985.

The Constitution of TRNC is formed of 8 parts and 164 articles and 13 provisional articles and it can be defined as a rigid constitution.

Article 1 of the Constitution provides that the Turkish Republic of Northern Cyprus is a secular republic based on the principles of democracy, social justice and the supremacy of law.

The doctrine of separation of powers is adopted by the Constitution. Thus, state authority is divided into three traditional powers; legislative power (which is vested in the Assembly of the Republic), executive power (which is carried out and exercised by the

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** Senior District Judge, TRNC.



President of the Republic and the Council of Ministers) and judicial power (which is exercised by independent courts).

Article 7 of the Constitution provides that the Constitution is the supreme law of the Republic. No law or decision of the Assembly, no act or decision of any organ, authority, or person in the Republic exercising power or any administrative function shall be in any way repugnant to or inconsistent with any of the provisions of the Constitution. It is obvious that the Constitution occupies the highest position in the hierarchy of norms.

Article 7 of the Constitution is as follows:

“Supremacy and binding force of the Constitution:

Article 7

(1) Laws shall not be contrary to or inconsistent with the Constitution.

(2) The provisions of the Constitution shall be the fundamental legal principles binding the legislative, executive and judicial organs, the administrative authorities of the State and individuals.”

The title of the 2nd Part of the Constitution is “Fundamental Rights, Liberties and Duties” and Chapter 1 of this part contains general provisions as to the nature of fundamental rights and their protection, the essence and restriction of fundamental rights and liberties and the status of aliens. Chapter 2, 3 and 4 of the Second Part of the Constitution regulates the “rights, liberties and duties of persons”, “social and economic rights, liberties and duties” and “political rights and liberties” respectively.

The human rights provisions in the Constitution are contained in the Second Part which is entitled “Fundamental Rights and Liberties”. The Second Part of the Constitution sets out a broad range of human rights, including the classic civil and political rights, economic and social rights, and obligations and duties for every person. The right to liberty and security of person is one of them and can be found in Article 16 of the Constitution. Article 16 of the Constitution is drafted in accordance with the provisions of Article 5 of the European Convention on Human Rights.



This article forms the basis of the “right to liberty and security” and it shows the conditions and the method of restricting the aforementioned rights. The most important security which is provided by Article 16 is that the right to liberty and security shall not be restricted for any reason other than those mentioned in the article and only by legislation. Furthermore, Article 11 of the Constitution protects the essence of the fundamental rights and liberties by mentioning that fundamental rights and liberties can only be restricted by law without affecting their essence. The aim of Articles 11 and 16 is to ensure that human rights and freedoms are protected against arbitrary restrictions by determining the reasons for the restriction and by ensuring a broad discussion in the Parliament as part of the legislative process.

II. Formation and functions of the Supreme Court and the Constitutional Court of the TRNC:

We would like to give a brief explanation on the structure and functions of the Supreme Court and the Constitutional Court of the TRNC that will help to explain the influence of the judgments of these courts on human rights issues.

Under Article 143 of the Constitution, the Supreme Court of the TRNC is composed of a president and seven judges and the Supreme Court carries out the functions of the Constitutional Court, the Supreme Council, the Court of Appeal and the High Administrative Court.

According to Article 143(3) the Constitutional Court is composed of the president and four judges of the Supreme Court. The Constitutional Court has exclusive jurisdiction to adjudicate finally on all matters prescribed by the provisions of the Constitution, the laws and the Rules of Court.

One of the powers of the Constitutional Court and probably the most important one is to adjudicate on all matters relating to the constitutionality of legislation. Thus, this power of the Constitutional Court is the most important one for the protection of the right to liberty and security. Because, as mentioned before, according to the provisions of the Constitution, fundamental rights and liberties-including the right to liberty and security- can only be restricted by



law, without affecting their essence and only for the specified reasons in the Constitution.

Under these circumstances it would not be wrong to say that, the Constitutional Court of the TRNC and its judgments have a vital role in protecting the right to liberty and security from arbitrary restrictions. However, in practice in our country judgments which concern the right to liberty and security are mostly the judgments of the Court of Appeal.

Article 151(1) defines the Court of Appeal as the highest appellate court in the State. According to the same article, the Court of Appeal has jurisdiction to hear and determine appeals in civil and criminal cases from all district courts. In other words, the Court of Appeal has jurisdiction to hear and determine all appeals from the decisions of criminal courts, whose decisions have effects on the right to liberty and security.

Furthermore, Article 151(3) of the Constitution regulates that the Court of Appeal has exclusive jurisdiction to issue *habeas corpus* orders in order to release those held under unlawful detention.

In practice the right to liberty and security is mostly affected in criminal proceedings, which is exercised by the District Courts and the Assize Courts. Thus, the above-mentioned powers which are given to the Court of Appeal by the Constitution render the judgments of this Court as effective as the judgments of the Constitutional Court in matters with regard to the right to liberty and security of persons. For this reason, we will especially refer to the judgments of the Court of Appeal.

III. Legal situation regarding detention, arrest, remand in custody and bail orders in the light of judgments of the Supreme Court of the TRNC:

The first judgment which we want to refer to is namely *Ertan Birinci v. Attorney General of the TRNC*, *Tekin Birinci v. Attorney General of the TRNC*, *Mehmet Birinci v. Attorney General of the TRNC*¹

The above-mentioned decision was delivered by the Court of Appeal as a result of an appeal filed by three defendants who had

¹ Consolidated Criminal Appeal 1/2001-2/2001-3/2001 D. 2/2001.

been ordered by the Assize Court of Nicosia to be retained in custody until they would be charged.

In this case, the Court of Appeal referred to the principles which were set out in the constitution relating to remands in custody orders and also to the principles relating to detention and arrest orders which can be given before the date of a trial.

The Court of Appeal in its decisions stated that, arresting or detaining a person is directly related to the right to liberty and security, that the conditions relating to the arrest or detention of a person in a country show the degree of civilization in that country and also that in a country which respects human rights an accused can only be arrested or detained when it is necessary to do so and can only remain under arrest or be detained as long as it is necessary.

The Court of Appeal also stated that arresting or detaining a person or keeping a person under arrest or in detention unnecessarily would harm not only that person but the whole country.

The Court of Appeal researched the legal situation in the TRNC with regard to the issues of arrest and detention and referred to Article 16(2)(c) of the Constitution.

Article 16(2)(c) is as follows:

"16(2). No person shall be deprived of his liberty save in the following cases when and as provided by law:

...

(c) the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (...)"

It is obvious that above-mentioned article is parallel to article 5(1) (c) of the European Convention on Human Rights.

By taking Article 16(2)(c) of the Constitution as a starting point the Court of Appeal stressed that, the Constitution of the TRNC is one of the constitutions which aims to protect the right to liberty and



security strongly and the Constitution aims to prevent arbitrary arrest and detention.

The Court of Appeal mentioned that, article 16(6) and 16(7) of the Constitution are the regulations which determine the procedure which has to be followed after arrest of a person. The said regulations are as follows:

“16(6). The person arrested shall, as soon as practicable and in any event not later than 24 hours after his arrest, be brought before a judge, if he is not in the meantime released.

16(7). The judge shall promptly proceed to inquire into the grounds of the arrest in a language understandable by the person arrested and shall, as soon as possible and in any event not later than 3 days from such appearance, either release the person arrested on such terms as he may deem fit or where the investigation into the commission of the offence for which he has been arrested has not been completed remand him in custody. The judge may remand him in custody for a period not exceeding 8 days at any one time. Provided that the total period of such remand or detention in custody shall not exceed 3 months from the date of the arrest; on the expiration of the said period every person or authority having the custody of the person arrested or detained shall forthwith set him free.”

Articles 16(6) and 16(7) of the Constitution are in compliance with the essence of Articles 5(3) and 5(4) of the European Convention on Human Rights.

The Court of Appeal emphasized that these regulations aim to bring some restrictions in order to prevent unreasonable extension of investigations and to prevent the detention of a person for a period that is longer than is necessary.

The Court also analyzed the regulations relating to the detention of persons during the course of a trial.

The related regulations are sections 48 and 157(2) of The Criminal Procedure Law² which came into effect before the approval of the Constitution of the TRNC in 1985.

² Chapter 155.



Section 48 is as follows:

Adjournment and remand in custody:

"48. Every Court may, if it thinks fit, adjourn any case before it and upon such adjournment may, subject to the provisions of subsection (2) of section 157 of this Law, either release the accused on such terms as it may consider reasonable or remand him in custody:

Provided that in a summary trial or a preliminary inquiry, no such remand shall be for more than eight days at any one time, the day following the adjournment being counted as the first day."

Although section 48 refers to section 157(2) which is related to offences punishable by death, this article is no longer applicable as the death penalty has been removed from the criminal code.

The Court of Appeal stated that, according to section 48 of the Criminal Procedure Law judges have a wide discretion to release an accused on such terms as they consider reasonable or remand him in custody when deciding to adjourn the case before them. But the Court of Appeal also stated that this discretion has to be used justly and in accordance with the principles which are set out in Article 16 of the Constitution of the TRNC.

The Court of Appeal held that the courts should take into consideration the following factors while exercising their discretion:

- a. Is the offence a serious offence?
- b. Is there a possibility that the accused may not be present in the Court if he is released?
- c. Is there a possibility that the accused may interfere with the witnesses?
- d. Is there a possibility that the accused may commit another offence if he is released?

Thus, in this judgment the Court of Appeal determined the principles which should be applied while using the wide discretion any power which is given to the Courts by section 48 of the Criminal Procedure Law.



The European Convention on Human Rights had been approved by the Republic of Cyprus which was a common state in 1962. Although the TRNC was established in 1983, it has not been recognized by the Council of Europe as a party to that Convention. However, the Convention is still in force in the TRNC. Therefore the Court of Appeal stated that the rules in the Convention on detention and arrest of a person are applicable in the TRNC.

The Court stated that, the European Convention on Human Rights accepted “reasonableness” as a measure in matters of arrest or detention the meaning of which had to be defined by the European Court of Human Rights.

Therefore, the Court of Appeal has held that the TRNC Courts have to apply the principles set out by the European Convention on Human Rights as well as the interpretations of the European Court of Human Rights with regard to detention and arrest matters which are matters directly affecting the right to liberty and security of a person.

A. Detention and Arrest Orders:

Detention of a person against his will and without lawful arrest is considered both unlawful and a serious interference of a citizen’s constitutional right to liberty. Article 16 of the Constitution lays down that no person shall be deprived of his liberty save in the cases enumerated therein, when and as provided by Law.

Article 16(2) of the Constitution contains an exhaustive list of the situations whereby interference with a person’s right of liberty may be effected. Examples are the detention of a person after conviction by a competent court, the arrest or detention of a person for non-compliance with a lawful order of a court, the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so, the detention of a person to prevent his unauthorised entry into the Republic. If the arrest or detention of a person is made for reasons other than those contained in this section, it will be considered unlawful.



An arrest can only be effected in the manner specified in Article 16(3) of the Constitution. Article 16(3) is as follows:

“Save when and as provided by law in case of a flagrant offence punishable with death or imprisonment, no person shall be arrested save under the authority of a reasoned judicial warrant issued according to the formalities prescribed by law.”

According to Article 16(3), save in the case of a flagrant offence no arrest is possible except with a judicial warrant. The procedure for the issue of a warrant of arrest is regulated by sections 18 and 19 of the Criminal Procedure Law. According to section 18, a judge may issue a warrant of arrest if satisfied by the written submissions of a public officer that there is reasonable suspicion that the person in question has committed the offence or that the detention of the person is reasonably necessary for preventing the commission of further offences or to prevent the escape of the suspect.

A Judge has a discretion to issue a warrant for the arrest of any person if he/she considers that the issue of a warrant is either necessary or desirable. However, no warrant of arrest will be issued in the absence of sworn evidence disclosing the grounds of which the arrest of a person is sought.³ Before a Judge issues a warrant of arrest, he must be satisfied that there are grounds for the arrest or detention of a person in accordance with Article 16(2) of the Constitution and that his/her arrest is either necessary or desirable for the proper investigation of a crime. The decision of the Court dealing with an application for the issue of a warrant of arrest must be reasoned.⁴ A warrant of arrest remains in force until it is executed or until it is cancelled by a judge.⁵

There are instances where an arrest can be made lawfully without the issue of a warrant of arrest. Sections 14 and 15 of the Criminal Procedure Law make it possible for a police officer or a private citizen to make an arrest without a warrant in certain cases. These powers of arrest which are set out in sections 14 and 15 must be applied subject

³ Criminal Procedure Law, section 18(1).

⁴ Article 16(3) of the Constitution.

⁵ Criminal Procedure Law, section 19(4).



to the provisions of Article 16 of the Constitution restricting such a right to cases where a warrant is in force or where the offence is flagrantly committed.

For instance, any police officer or any person may arrest any person whom he suspects upon reasonable grounds of having committed an offence punishable with imprisonment, or who obstructs a police officer in the execution of his duty, or who has escaped or is attempting to escape from lawful custody.

In *Metin Münür v. Attorney General of the TRNC*⁶ case, the Constitutional Court emphasized that the powers of arrest without a warrant must be read and applied subject to the provisions of Article 16 of the Constitution restricting such a right to cases where the offence is flagrantly committed. Thus, the Court held that even in cases where the law permits an arrest to be effected without a warrant of arrest, the fundamental rights of a person to liberty and freedom enshrined in the Constitution are still to be respected. In matters involving the arrest of a citizen, a fair balance must be kept between the need to uphold the basic rights of a citizen on the one hand, and public interest on the other.

According to the Article 16(5) of the Constitution, once arrested, a person must be informed in a language that he understands of the reasons for his arrest and be allowed to have the services of a lawyer.

B. Remand in Custody Orders:

Article 16(6) of the Constitution prescribes that a person arrested must be brought before a judge as soon as it is practical in any event within 24 hours of his arrest.

According to section 24 of the Criminal Procedure Law, a suspect may be remanded in custody for the purpose of facilitating the investigation of the offence by the police, where it is made to appear to a Judge that the investigation of the commission of an offence for which the suspect has been arrested has not been completed, whereupon it shall be lawful for the Judge to remand from time to time such arrested person in the custody of the police. The combined

⁶ Constitutional Court Consolidated Cases 2/90 and 6/90 D. 9/90.

effect of section 24 of the Criminal Procedure Law, and Article 16(7) of the Constitution is to impose upon a judge the duty to explain to a person brought before him the reason for his arrest and the added duty of deciding the fate of a remand application within three days at the latest. The three day period within which the judge must reach his decision is an added safeguard for the protection of the liberty of the suspect, ensuring that a remand application will be disposed of quickly. Remand orders may be renewed for a period not exceeding eight days at any one time as the Court shall think fit. The total period of detention cannot exceed three months from the date of the arrest of a suspect.

The judge does not have to make sure that the crime is committed or that the crime has been committed by the suspect in order to issue an arrest warrant. The judge orders the detention of the suspect if it is established that a crime has been committed, that the person in question has a connection with the crime and the investigation has not been completed.

In *Oğuz Başak v. Attorney General of the TRNC*⁷ case, the accused appealed the order of the Court remanding the suspect which was in line with the prosecutor's request made on the ground that the investigation has not been completed. In its judgement, the Appeal Court examined the powers of the Court to issue an arrest warrant and the right to be remanded suspects in custody in cases where the investigation had not been completed under Article 16 of the Constitution, together with the provisions of the Criminal Procedure Act. The Court of Appeal reviewed previous principles on remand orders and stated that a judge must exercise proper care in balancing the need to protect society with the basic rights of a suspect as enshrined in the Constitution.

It was also held that, the burden is on the police to satisfy the Court that a crime has been committed, that investigation into its circumstances have not been completed and that the remand of the suspect in custody is essential for the purposes of the investigation. This burden becomes progressively higher with every new application

⁷ Criminal Appeal 32/86 D.10/86.



for remand in custody. Also it was held that this suspicion must be genuinely entertained. This is essential to eliminate the possibility of the police authorities abusing their powers to seek the remand of a suspect in custody. Such suspicion must also be reasonable. In determining whether a suspicion is resonable, regard must be had to the circumstances of the case as they appear at the time of arrest and detention. The Judge must also determine whether the suspect is likely to interfere with prosecution witnesses, destroy or hide any incriminating evidence, abscond, or generally interfere with the investigation.

It should be noted that the application has to be made by a police officer not below the rank of an inspector, a provision clearly aiming at avoiding possible abuse of police discretion by members, junior in rank.

A decision of the court to remand a suspect in custody can be the subject of an appeal. This right is granted to the person remanded in custody by virtue of Article 16(8)

In the light of the decisions of Court of Appeal, it is obvious that arrest and remand in custody applications must be determined by observing a balance between the rights of individuals and the necessity of investigating crimes.

C. Bail Orders:

The court exercises a safeguard order to ensure that the suspect will be present at the trial once the investigation has been completed, under Criminal Procedure Law section 23A. After the amendment of the Criminal Procedure Law in 1992, according to new section 23A of the Criminal Procedure Law, the Judge may issue a custody order up to three months against a suspect or accused person until the trial or, can grant bail.

Section 23A is as follows:

“23A. Regardless of whether or not remanded in custody, the Court may, to prevent an accused or defendant, who is alleged to have violated any provisions of a statute, and for which investigation is in process, from absconding, subject to the following provisions grant an order to



(1) remand the accused or the defendant in custody until the case has been heard for a period not exceeding 3 months under any circumstances;

(2) surrender the passport of the accused or the defendant to the police and prohibit leaving the TRNC for a specified period of time;

(3) lodge security or make a cash payment to the Court, Registry for a sum to be determined by the Court, either by the accused or the defendant in person or by any person or persons resident within the TRNC, as deemed fit by the Court or the Registrar;

(4) order that the accused or the defendant resides within a specific location and does not to leave that permitted location

(5) to enter an appearance at a police station specified in the Court order."

In *Melisa Hastan v. Attorney General of the TRNC*⁸ bail conditions were examined. The prosecution office applied to the District Court for a custody order up to three months against suspect until trial and the Judge approved this application. As the result of this order the suspect applied to the Court of Appeal.

It was held that the proper test of whether bail should be granted or refused should be based on whether it is probable that the defendant will appear at his trial. When the prosecutor applies for the suspect to remain in custody, the necessary criteria to be considered are listed as follows:

1. the nature of the accusation
2. the nature of evidence in support of the accusation
3. the severity of the punishment which conviction will entail
4. whether the sureties put forward by the accused are independent, or whether they have been indemnified by the accused.

In *Fatih Durdu v. Attorney General of the TRNC*⁹ case, it was held that if a crime is committed in the TRNC, the presence of the accused at the trial is essential. For this reason, the possibility of the suspect

8 Criminal Appeal 33/2008 D.2/2008.

9 Criminal Appeal 40/2011 D.2/2012.



fleeing must be considered. In the existence of such a possibility the Judge usually gives an order remanding the suspect in custody.

The Court of Appeal stressed that a remand in custody order is an exception to the right to liberty which is protected and regulated by the Article 16 of the Constitution. Thus, where this right is to be limited, especially at the stage, when an accused has not yet been charged, the Judge must examine all the circumstances of the case very carefully before giving this kind of order.

It was also held that if the offense for which the accused has been arrested is a misdemeanour, the Judge should consider alternative bail conditions to release the person arrested on bail instead of issuing a custody order. In *Hakan Karadeniz v. Attorney General of the TRNC*¹⁰ the Court of Appeal emphasized once again that in the case of foreign nationals while deciding the fate of a custody application, the Judge must consider whether the suspect has a permanent connection with the TRNC, the possibility of fleeing abroad, and the difficulties in requesting extradition of suspects.

Despite all the regulations contained in the Constitution for ensuring the freedom and security of persons; if a person is still a victim of unlawful arrest or detention, the Constitution also secures the right to award compensation to such person.

¹⁰ Criminal Appeal 41/2011 D.4/2012.

*THE RIGHT TO LIBERTY AND
SECURITY*

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THE RIGHT TO LIBERTY AND SECURITY

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I. GENERAL REMARKS ON THE RIGHT TO LIBERTY AND SECURITY

A. SCOPE

The Right to Liberty and Security is guaranteed by the provisions of the Constitution of the Republic of Kosovo, namely by Article 29 of the Constitution.

In addition, according to Article 22 of the Constitution of the Republic of Kosovo, the European Convention on Human Rights and additional international instruments which guarantee the Right to Liberty and Security are directly applicable in the legal system of Republic of Kosovo.

1. The Constitution

Article 29 [Right to Liberty and Security]

1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:

(1) Pursuant to a sentence of imprisonment for committing a criminal act;

(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;

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(3) for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;

(4) for the purpose of medical supervision of a person who because of disease represents a danger to society;

(5) for illegal entry into the Republic of Kosovo or pursuant to a lawful order of expulsion or extradition.

2. Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation. The written notice on the reasons of deprivation shall be provided as soon as possible. Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought before the court. Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial.

3. Everyone who is deprived of liberty shall be promptly informed of his/her right not to make any statements, right to defense counsel of her/his choosing, and the right to promptly communicate with a person of his/her choosing.

4. Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful.

5. Everyone who has been detained or arrested in contradiction with the provisions of this article has a right to compensation in a manner provided by law.

6. An individual who is sentenced has the right to challenge the conditions of detention in a manner provided by law."

2. International instruments directly applicable which guarantee the Right to Liberty and Security

From theoretical aspect of international and domestic law system, Kosovo Constitution adopted monism theory which means that human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

Article 22 [Direct Applicability of International Agreements and Instruments]

"(1) Universal Declaration of Human Rights;

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;

(3) International Covenant on Civil and Political Rights and its Protocols;

(4) Council of Europe Framework Convention for the Protection of National Minorities;

(5) Convention on the Elimination of All Forms of Racial Discrimination;

(6) Convention on the Elimination of All Forms of Discrimination against Women;

(7) Convention on the Rights of the Child;

(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment."

The European Convention on Human Rights and Fundamental Freedoms (ECHR) is listed amongst the 8 international HR instruments, which, pursuant to Article 22 of the Kosovo Constitution (KC) entitled "[Direct Applicability of International Agreements and Instruments]", are directly applicable in the Republic of Kosovo and which, in the case of conflict, have priority over provisions of laws and other acts of public institutions.



According to Article 22, the human rights and fundamental freedoms laid down in these international instruments are guaranteed by the Constitution. However, they do not stem from a normal ratification process. In fact, Kosovo has voluntarily embraced them, when inserting them into Article 22 of the Kosovo Constitution.

So, when the Kosovo Constitution was adopted, all human rights laid down in these international human rights instruments became constitutional rights within the Kosovo legal order.

But, in fact, the unilateral application by Kosovo of these human rights has, as such, no consequences for Kosovo. This means that, once Kosovo acts in violation of these rights, it cannot be subject to any international legal mechanism which would be applicable to the State Signatories to such international instruments.

So, in case Kosovo violates the ECHR, the victim cannot submit a complaint to the European Court of Human Rights in Strasbourg. The furthest they can go is the Constitutional Court.

Under Article 22 of the Kosovo Constitution, the Republic of Kosovo has not only accepted that the European Convention is directly applicable within its internal legal order, it has also recognized that, in case of conflict, the ECHR, as much as the other 7 International instruments mentioned in Article 22, is superior to the provisions of laws and other acts of the Kosovo public institutions.

Apart from Article 22, no other Article in the Kosovo Constitution makes direct reference to the Strasbourg Convention per se. Even in its Article 53 entitled "Interpretation of Human Rights Provisions", which obliges the Kosovo Constitutional Court to interpret human rights and freedoms guaranteed by this Constitution consistent with the court decisions of the European Court of Human Rights," the ECHR is not explicitly mentioned.

II. THE CONSTITUTIONAL COURT AND ITS CASE LAW REGARDING THE RIGHT TO LIBERTY AND SECURITY

The Constitutional Court of Republic of Kosovo is the youngest Constitutional Court established in modern history. Even though the Constitution was promulgated in 2008, the Court itself begun its work

in 2009. The Constitutional Court was preceded by the famous and worldwide known Marti Ahtisari plan for final settlement of Kosovo.

Composition of the Court makes 9 judges with mandate of 9 years. Following the neo-liberal Constitutional doctrine and political situation and promulgating one of the most liberal Constitution in Europe, adopted with assistance of international community, for the Constitutional Court itself, we might say as a difference from some countries is multi-ethnic and well-represented in terms of gender

The election, appointment, organization, functioning and other competencies of the Constitutional Court are regulated by the Constitution and Law on Constitutional Court.

The Constitutional Court of the Republic of Kosovo has original jurisdiction in relation to constitutional questions raised by authorized parties in accordance with Article 113 of the Constitution.

Article 113 [Jurisdiction and Authorized Parties]

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the

President or Prime Minister, and of regulations of the Government;

(2) the compatibility with the Constitution of municipal statutes.

3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:

(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;



(2) compatibility with the Constitution of a proposed referendum;

(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;

(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;

(5) questions whether violations of the Constitution occurred during the election of the Assembly.

4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.

5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed.

Thirty (30) or more deputies of the Assembly are authorized to refer the question of

whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.



9. The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.

10. Additional jurisdiction may be determined by law."

The Constitutional Court of Kosovo has subsidiary jurisdiction in relation to individual acts issued by the regular courts and other public authorities within the territory of the Republic of Kosovo which can be raised by the individuals in accordance with paragraph 7 of Article 113 of the Constitution.

Article 113. paragraph 7 of the Constitution:

"7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

The Constitutional Court of the Republic of Kosovo reviews the constitutionality of general acts or sub-constitutional legislation whether they are in conformity with the Constitution and may render decisions on the constitutionality, respectively unconstitutionality of the sub-constitutional legislation under review. When reviewing individual acts rendered by the regular courts or other public authorities, the Constitutional Court concerns itself whether the act under review satisfies the procedural criteria as provided for in the Constitution, and does not by definition and subsidiary jurisdictions concern itself with questions of fact and law insofar their assessment and application leads to a serious breach of fundamental human rights and freedoms or creates a great unconstitutional situation.

B. CASES SELECTED IN THIS PAPER

Specifically, with regard to the Right to Liberty and Security, we will present some of the cases whereby the Applicants alleged violation of Article 29 [**The Right to Liberty and Security**] of the Constitutional Court, in conjunction with Article 5 of the ECHR.

However, to this date the Court has not found violation of the afore-mentioned provision.



The below-mentioned cases illustrate how the Constitutional dealt with the Applicants allegations pertaining to Article 29 of the Constitution, in conjunction with Article 5 of ECHR.

Case KI63/17, Applicant: Lutfi Dervishi

The Applicant filed an appeal with the Court of Appeals against the Decision of the Basic Court which decided to impose a detention on remand against the Applicant for a term of one (one) month. The Court of Appeals rejected as ungrounded the Applicant's appeal and upheld the Decision of the Basic Court. The Supreme Court, upon request for protection of legality filed by the Applicant, rejected as ungrounded the Applicant's request and upheld the Decision of the Basic Court and the Court of Appeals.

The Applicant alleged, before the Constitutional Court, *inter alia* that the Supreme Court by rejecting as ungrounded request for protection of legality, against the Decision of the Basic Court and the Court of Appeals for detention on remand violated the Applicant's rights guaranteed by Article 29 [Right to Liberty and Security], and 31 [Right to a Fair and Impartial Trial] of the Constitution of the Republic of Kosovo. The Court considered that the facts presented by the Applicant did not in any way justify the allegation of a constitutional violation of his right to liberty and security, and that the Applicant did not present any evidence indicating that the proceedings before the regular courts were in any way a violation of his right to fair and impartial trial. Therefore, the Court considers that the Referral is manifestly ill-founded on constitutional basis and declared it inadmissible.

Case KI 126/17, Applicant: A. K.

The Applicant, in a capacity of the driver, hit person A.C., who passed away as a result of the injuries sustained in the traffic accident. The Prosecution indicted the Applicant and the regular courts found him guilty for committing the criminal offence "*endangering public traffic*" and sentenced him to effective imprisonment for a term of one (1) year.

The subject matter of the Referral was the constitutional review of the above-mentioned Judgment of the Supreme Court, which

allegedly violated the Applicant's right to fair and impartial trial as guaranteed by the Constitution and the ECHR. The Applicant requested the Court to order the Supreme Court to render a new Judgment through which it would annul the decisions of the Court of Appeals and of the Basic Court and remand the case for retrial. In addition, the Applicant also requested the Court: i) to impose an interim measure, through which the commencement of the execution of the imprisonment sentence would be suspended until a decision is taken by the Court; and ii) not to disclose the identity of the Applicant because of sensitive family matters.

The Court declared the Referral inadmissible and rejected the Applicant's request for interim measures as ungrounded. The Court considered that the Applicant's Referral did not meet the admissibility requirements because the Referral was manifestly ill-founded on constitutional basis. After reviewing the regular court proceedings, the Court found that the Supreme Court and other lower courts reasoned their decisions and the latter were not in any way unfair or arbitrary. The Applicant's arguments fell into the sphere of legality and were not raised at the constitutional level. The presented facts did not in any way justify the alleged violation and there was lack of substantiation on constitutional level from the Applicant – who bore the burden of proof to convince the Court of the alleged violation.

The Court reiterated the importance of the “fourth instance court” doctrine by emphasizing that it is not its role to deal with errors of facts or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality).

The Court approved as grounded the Applicant's request for non-disclosure of his identity publicly considering that the Applicant provided sufficient reasoning, as required by the Rules and Procedures, as to why his identity should not be disclosed.

Case KI 135/17, Applicant: Borce Petrovski

The Applicant claims that the courts violated his rights to equality before the law, to liberty and security, his rights of accused and right



to fair and impartial trial. The Applicant alleges that the rejection of the request to submit to the (Applicant) the criminal case file translated into the native language is unconstitutional and in violation of Article 6, § 3 (e) of the ECHR.

The Court finds that the Applicant's allegations pertaining to access to prosecution file in his native language have not yet reached a final determination by the regular courts and thus the Applicant's Referral is premature.

The Court has found that the Referral is inadmissible because the Applicant has not exhausted yet all legal remedies.

C. ASSESSMENTS

Based on the above, the Constitutional Court of Kosovo, has dealt with allegations on violation of the Right to Liberty and Security, but has not so far decided on the merits of the cases due to the fact that the Referrals brought by Individuals have not met the admissibility criteria set forth in the Constitution, the Law on the Constitutional Court and the Rules of Procedure.

That concludes my presentation.

Thanking for your interest and patience, I greet you all with my deepest respect.

*RIGHT TO LIBERTY AND SECURITY
IN DECISIONS OF THE
CONSTITUTIONAL COURT OF
UKRAINE*

*Olga SHMYGOVA
Volodymyr KAPUSTIN
CONSTITUTIONAL COURT OF
UKRAINE*



RIGHT TO LIBERTY AND SECURITY IN DECISIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

Olga SHMYGOVA*

I. GENERAL REMARKS CONCERNING GUARANTEES OF RIGHT TO LIBERTY AND SECURITY IN THE CONSTITUTION OF UKRAINE

According to Article 29 of the Constitution of Ukraine, which guarantees the right to liberty and security:

«Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody except under a substantiated court decision and on the grounds and in accordance with the procedure established by law.

In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by court within seventy two hours. The detained person shall be immediately released if a substantiated court decision regarding his detention is not served to them within seventy-two hours.

Every person, arrested or detained, shall be informed without delay of the reasons for his arrest or detention, apprised of his rights, and from the moment of detention, shall be given an opportunity to personally defend himself/herself or to receive legal assistance from a defender.

Every person detained shall have the right to challenge his detention in court at any time.

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Relatives of an arrested or detained person shall be informed immediately of such an arrest or detention.»

In addition, other relevant provisions of the Constitution of Ukraine contain special guarantees of liberty and security for the people's deputies of Ukraine (first, third paragraphs of Article 80), for the President of Ukraine (first paragraph of Article 105), for the judges, including the judges of the Constitutional Court of Ukraine (first, third paragraphs of Article 126, first, third paragraphs of Article 149).

In many of its decisions the Constitutional Court of Ukraine had the opportunity to provide official interpretation of the above-mentioned provisions of the Constitution of Ukraine and to assess compliance with them the relevant provisions of Ukrainian laws and proposed amendments to the Constitution of Ukraine.

Some of these decisions will be presented below. You can find summaries of all these decisions in English on the official website of the Constitutional Court of Ukraine by the link: <http://www.ccu.gov.ua/en/storinka/acts-ccu>

II. PRINCIPLES USED BY THE CONSTITUTIONAL COURT IN THE ADJUDICATION OF CASES CONCERNING RESTRICTIONS OF HUMAN RIGHTS, INCLUDING RIGHT TO LIBERTY AND SECURITY

The Constitutional Court of Ukraine, when resolving the cases under its jurisdiction, takes account of the requirements of the effective international treaties ratified by the Verkhovna Rada of Ukraine, and the practice of interpretation and application of these treaties by international bodies, the jurisdiction of which is recognised by Ukraine, including the European Court of Human Rights.

Since Article 29 of the Constitution of Ukraine corresponds to Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, then according to the principle of friendly attitude to international law, the practice of interpretation and application of the said article of the Convention by the European Court of Human Rights is taken by the Constitutional Court of



Ukraine into account when it considers the cases concerning the right to liberty and security.

Accordingly, the right to liberty and security is understood and applied by the Constitutional Court of Ukraine in the adjudication of cases concerning its restrictions in a very similar way to the European Court of Human Rights.

In particular, the Constitutional Court of Ukraine considers that restrictions of the realisation of constitutional rights and freedoms, including the right to liberty and security, may not be arbitrary and unfair, they have to be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate aim, be conditioned by the public need to achieve this aim, proportionate and reasonable, in case of restriction of the constitutional right or freedom legislator shall introduce such legal regulation which will make it possible to optimally achieve the legitimate aim with minimal interference in the implementation of this right or freedom and not to violate the essential content of such right.

III. DECISIONS ADOPTED BY THE CONSTITUTIONAL COURT IN CASES CONCERNING CONSTITUTIONALITY OF THE PROVISIONS OF LEGISLATION WHICH RESTRICT RIGHT TO LIBERTY AND SECURITY

A. Decision of the Grand Chamber of the Constitutional Court of Ukraine № 1-р/2017 dated November 23, 2017

The facts

The European Court of Human Rights in its decisions very often stated that Ukraine violates Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms as the result of detention of persons without a reasoned court decision in the period after the end of the stage of pre-trial investigation, and before the beginning of the trial, attributing this to imperfection of the Ukrainian legislation.

With the aim to resolve this problem, Ukrainian Parliament Commissioner for Human Rights appealed to the Constitutional Court of Ukraine with a petition to review the constitutionality of the



provision of the third sentence of Article 315.3 of the Code of Criminal Procedure of Ukraine. In accordance with this provision, application of measures to ensure criminal proceedings, selected at the stage of pre-trial investigation, upon the unavailability of relevant petitions of the parties to the criminal proceedings, is considered to be continued at the stage of trial for an indefinite period.

The Court's Decision

By the decision of the Grand Chamber of the Constitutional Court of Ukraine adopted in the present case, the contested provision was declared unconstitutional.

This decision was motivated by the legal positions of the Constitutional Court of Ukraine, in accordance with which, in particular:

- the substantiation for the application of preventive measures related to the restriction of the right to freedom and personal inviolability, in particular home arrest and detention, should be subject to judicial review at specific intervals, periodically, by objective and impartial court for the purpose of examining whether there exist or not the risks which imply application of such preventive measures, including when pre-trial investigation is over, when some risks may have already disappeared;
- the change in the procedural status of a person from a suspect to an accused (defendant) and the beginning of a stage of the judicial proceedings at a court of first instance precludes the automatic continuation of the application of preventive measures chosen by the investigating judge to such a person at the stage of pre-trial investigation as a suspect;
- the preventive measures (home arrest and detention) which restrict the right to freedom and personal inviolability can be applied by the court at a new procedural stage - that of judicial proceedings, in particular during the preparatory court hearing, only pursuant to a substantiated decision of the court; during the preparatory proceedings, the court shall examine the substantiation for the application of a preventive measure

against the accused related to the restriction of his/her right to freedom and personal inviolability and adopt a substantiated decision, regardless of the fact whether the term of validity of the ruling of the investigating judge, issued at the stage of the pre-trial investigation on selection of such a preventive measure has expired;

- the continuation by the court during the preparatory court hearing of the application of measures to ensure criminal proceedings for preventive measures in the form of home arrest and detention in the absence of the petitions submitted by the prosecutor violates the principle of equality of all participants in the trial, as well as the principle of independence and impartiality of the court, as the court takes sides with the prosecution in determining the existence of risks, which affect the need to prolong home arrest or detention at the stage of the judicial proceedings at court of the first instance.

B. Decision of the Constitutional Court of Ukraine № 2-rp/2016 dated June 1, 2016 in the case on judicial control over hospitalisation of disabled persons to psychiatric institution

The facts

Ukrainian Parliament Commissioner for Human Rights appealed to the Constitutional Court of Ukraine with a petition to review the constitutionality of the provision of part one of Article 13 of the Law of Ukraine «On mental health services» in part which foresees that the person recognized as incapacitated is hospitalized in mental health facility upon request or with the consent of his trustee, to the extent that it allows hospitalization of such person in mental health facility upon request or with the consent of his trustee, without judgment adopted following results of verification of validity and necessity of such enforced hospitalization.

The Court's Decision

In the decision adopted in the present case, the Constitutional Court of Ukraine held to declare the contested provision as unconstitutional.



In the reasoning part of the present decision, the Constitutional Court of Ukraine pointed out in particular that the Constitution of Ukraine stipulates that citizens deemed by a court to be incompetent do not have the right to vote (Article 70). In this regard, the said persons are subject to restrictions provided for in Articles 72, 76, 81 and 103 of the Fundamental Law. Thus, in the Constitutional Court's opinion, recognition of a person to be incapable cannot deprive him or her of other constitutional rights and freedoms or restrict them in a manner that undermines their essence. At the same time, the hospitalisation of an incapable person to a psychiatric institution under the conditions of the contested provision is a restriction of the right to freedom and personal inviolability of the person, which the Constitutional Court of Ukraine considers as disproportionate by its nature and consequences.

As the result of consideration of this case, on the basis of analysis of the relevant provisions of the international documents on this matter, the Constitutional Court held, that judicial control over hospitalisation of an incapable person to a psychiatric institution is a necessary guarantee of the protection of his/her rights and freedoms. In its opinion, after independent and impartial consideration of hospitalisation of an incapable person to a psychiatric institution, the court has to adopt a decision about the legitimacy of restricting the constitutional right to freedom and personal inviolability of such person.

C. Decision of the Constitutional Court of Ukraine № 10-rp/2011 dated October 11, 2011 in the case on terms of the administrative arrest

The facts

50 People's Deputies of Ukraine appealed to the Constitutional Court of Ukraine with a petition to review the constitutionality of some provisions of Article 263 of the Code of Administrative Offences and Article 11.1.5 of the Law «On Militia», which concern administrative arrest.

The Court's Decision

In the decision adopted in the present case, the Constitutional Court of Ukraine held to declare some of the contested provisions as



unconstitutional. In particular, as unconstitutional were recognized the provisions of Articles 263.2, 263.3 of the Code of Administrative Offences concerning possibility of administrative arrest of individuals *«for the term of up to 10 days upon the sanction of prosecutor, in case the offenders do not have documents which prove their identity»*.

In the reasoning part of the present decision, the Constitutional Court of Ukraine pointed out, in particular, that the system analysis of the provisions of Article 29 of the Constitution in combination with Article 8 of the Constitution gives grounds to consider that the constitutional requirement concerning the maximum allowed term of detention of a person without reasonable grounds of a court in the criminal procedure, which is stipulated in Article 29.3 of the Fundamental Law, shall be also taken into account while determining the maximum possible term of such restriction in the administrative procedure. That means that the administrative detention of an individual without reasonable grounds of a court may not exceed seventy-two hours.

D. Decision of the Constitutional Court of Ukraine № 17-rp/2010 dated June 29, 2010

The facts

Ukrainian Parliament Commissioner for Human Rights appealed to the Constitutional Court of Ukraine with a petition to review the constitutionality of the provision of paragraph 8 of Article 11.1.5 of the Law «On Militia» № 565-XII dated December 20, 1990, according to which militia has a right to arrest people suspected of vagrancy and to detain them in specially designated premises – for the period up to 30 days under the substantiated court decision. The existence of this right for militia was conditioned by the existence of criminal liability for vagrancy in accordance with the Criminal Code of Ukraine in the 1960 edition. However, the corpus delicti of vagrancy was decriminalized in Ukraine in 1992.

The Court's Decision

In the decision adopted in the present case, the Constitutional Court of Ukraine held to declare the contested provision as unconstitutional.



This decision was motivated, in particular, by the fact that the disputed provision of the Law establishes only the grounds for arrest. The Law does not envisage the content, signs of vagrancy and the procedure, which is accessible enough, clearly worded and provided in its enforcement, i.e. the procedure that would enable to prevent the risk of willful arrest of any person on suspicion of vagrancy while this does not conform to the principle of legal certainty. This principle states that restriction of the fundamental human and citizens' rights and implementation of these restrictions are acceptable only on condition of ensuring predictability of application of the legal norms established by these restrictions. In other words, restriction of any right should be based on the criteria, which provide a person the possibility to distinguish lawful behavior from unlawful behavior, and to foresee legal consequences of his/her behavior.

IV. DECISION OF THE CONSTITUTIONAL COURT REGARDING OFFICIAL INTERPRETATION OF PROVISIONS OF THE CONSTITUTION OF UKRAINE WHICH CONCERN DEPUTY INVIOABILITY

Decision of the Constitutional Court of Ukraine № 9-rp/1999 dated October 27, 1999 in the case on deputy inviolability

The facts

The Ministry of Internal Affairs of Ukraine appealed to the Constitutional Court of Ukraine with a petition to provide official interpretation of the provisions of the third part of Article 80 of the Constitution of Ukraine, according to which People's Deputies of Ukraine shall not be held criminally liable, detained or arrested without the consent of the Verkhovna Rada of Ukraine.

The practical need for such an interpretation was justified by the fact that in March 1998 as People's Deputies of Ukraine were elected several persons, which at that time had been prosecuted, and for whom a preventive measure in the form of detention had been chosen. However, the legislation of Ukraine did not determine whether deputy inviolability applies to such persons and whether it is necessary in this case to obtain the consent of the parliament to prosecute and arrest them.



The Court's Decision

In the decision adopted in the present case, the Constitutional Court of Ukraine held that the above-mentioned provisions of the Constitution of Ukraine should be understood in such a way that, in the event of a person was being charged with a crime and/or arrested prior to his or her election as the People's Deputy of Ukraine, criminal proceedings against such a person after his or her election as the People's Deputy of Ukraine may be continued only with the consent of Parliament to his or her prosecution and/or detention.

V. OPINIONS OF THE CONSTITUTIONAL COURT CONCERNING CONSTITUTIONALITY OF THE AMENDMENTS TO THE CONSTITUTION, WHICH RESTRICT DEPUTY INVIOABILITY

The Constitutional Court has repeatedly examined draft laws on amendments to Article 80 of the Constitution on the restriction of deputy inviolability (see, for example, Opinion of the Constitutional Court of Ukraine № 1-v/2000 dated June 27, 2000, Opinion of the Grand Chamber of the Constitutional Court of Ukraine № 1-v/2018 dated June 6, 2018, Opinion of the Grand Chamber of the Constitutional Court of Ukraine № 2-v/2018 dated June 19, 2018) and concluded that proposed amendments regarding the abolishment of the deputy inviolability concern only special status of the People's Deputies of Ukraine and do not affect the content of the constitutional human and citizen's rights and freedoms (their abolishment or restriction), and therefore, do not contradict the requirements of the Constitution.

At the same time, the Constitutional Court considered appropriate to point out that in deciding on abolishment of deputy inviolability, it is necessary to take into account the state of the political and legal system of Ukraine – its ability, in case of complete absence of the institution of the deputy inviolability, to ensure unimpeded and effective implementation by the People's Deputies of their powers, functioning of the parliament as such, as well as the implementation of the constitutional principle of the division of state power.

Moreover, the Constitutional Court has repeatedly emphasised



that the deputy inviolability is not a personal privilege, an individual right of a People's Deputy, but has a public-law nature; it is aimed at ensuring the People's Deputy from unlawful interference in his/her activities, ensuring the smooth and effective implementation of his/her functions and proper (normal) functioning of the parliament.

VI. GENERAL CONCLUDING REMARKS

By means of this brief presentation, I just tried to give an overview about the decisions of the Constitutional Court of Ukraine, which concern different aspects of the protection of the right to liberty and security. You can find more information about these and its other relevant decisions in English on the official website of the Constitutional Court of Ukraine by the link: <http://www.ccu.gov.ua/en/storinka/acts-ccu>

I hope that this brief presentation will be useful to all persons interested in it.

Thanks all for your patience and attention.

**КОНСТИТУЦИОННОЕ ПРАВОСУДИЕ
КАК ВЫСШАЯ ФОРМА ОБЕСПЕЧЕНИЯ
ПРАВ И СВОБОД ЧЕЛОВЕКА
И ГРАЖДАНИНА: ПРАКТИКА
КОНСТИТУЦИОННОЙ ПАЛАТЫ
ВЕРХОВНОГО СУДА КЫРГЫЗСКОЙ
РЕСПУБЛИКИ ПО ЗАЩИТЕ
ПРАВА НА СВОБОДУ И ЛИЧНУЮ
НЕПРИКОСНОВЕННОСТЬ**

Elanur MUSAEVA

**CONSTITUTIONAL CHAMBER
OF SUPREME COURT OF THE
KYRGYZ REPUBLIC**



**КОНСТИТУЦИОННОЕ ПРАВОСУДИЕ
КАК ВЫСШАЯ ФОРМА ОБЕСПЕЧЕНИЯ ПРАВ И
СВОБОД ЧЕЛОВЕКА И ГРАЖДАНИНА: ПРАКТИКА
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КЫРГЫЗСКОЙ РЕСПУБЛИКИ ПО ЗАЩИТЕ ПРАВА НА
СВОБОДУ И ЛИЧНУЮ НЕПРИКОСНОВЕННОСТЬ**

*Zarina ESANALIEVA**

Уважаемый председательствующий!

Уважаемые коллеги!

Позвольте от имени Аппарата Конституционной палаты Верховного суда Кыргызской Республики поприветствовать участников VI Летней школы конституционализма и выразить благодарность ее организаторам за приглашение и возможность выступить на этом мероприятии.

Я убеждена, что настоящая площадка поможет всем нам обменяться опытом и практикой органов конституционного контроля стран, которые мы представляем.

Уважаемые коллеги!

Как всем нам известно, в начале XIX века, в Соединенных Штатах Америки возникло без закрепления в Конституции то, что позднее стало первой моделью судебного контроля конституционности законов. И так же в начале следующего века, в 1920 году в Европе, точнее в Австрии, появилась не благодаря практике, а благодаря замечательному теоретическому труду венского адвоката Ганса Кельзена другая модель конституционного правосудия, которая по всем пунктам отличалась от первой модели и, в отличие от нее, вызвала большой интерес и была последовательно

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воспринята многими европейскими, а также азиатскими, арабскими и африканскими странами.

Неуклонное его расширение под воздействием политических событий, в конечном счете, подтвердило правоту профессора Мауро Капеллетти¹, справедливо замечавшего, что, если «XIX век был веком парламентов, то XX век является веком конституционных судов». Со своей стороны отмечу в том же ключе, что с распространением конституционной юстиции в мире и с учетом места, которое занимают конституционные суды и эквивалентные институты в различных политических системах, и все более значительной роли, которую они играют в области защиты прав человека, XXI век, скорее всего, будет веком универсализации правовых позиций посредством сближения практики органов конституционной юстиции разных государств.

Сегодня конституционное правосудие – один из элементов, направленных на упрочение демократии. Сам факт его существования дает процессу создания права совершенно иную перспективу. Ведь благодаря факту существования конституционной юстиции *de jure* (де-юре) появляется постоянный ориентир для искомых юридических постановлений в форме всеобщих принципов и ценностей, выраженных конституционными нормами.

Ныне практика конституционных судов ввела в правила интерпретации (толкования) права требование искать в толкуемых правовоположениях содержание, согласующееся насколько это возможно, с конституционными нормами. Похоже, что именно сама ориентация интерпретации (толкования) права в наибольшей степени содействует наличию мышления, руководствующегося конституцией, отказу от узкого, формального или чисто догматического

¹ Мауро Капеллетти (Mauro Cappelletti) — представитель флорентийской правовой школы, ведущий исследователь сравнительного гражданского процессуального права XX века, автор и вдохновитель глобальных исследовательских проектов «Доступ к правосудию» (Access to Justice) и «Фундаментальные процессуальные гарантии сторон» (Fundamental Procedural Guarantees of the Parties).

понимания правовых институтов, средств и инструментов, существование которых не есть самоцель, а должно подчиняться интересам граждан и общего блага.

Роль конституционных судов в определении нормативного содержания основных прав и свобод вряд ли можно переоценить. В большей мере заслуга конституционных судов состоит в том, что общие конституционные положения преобразуются в специфические требования, через которые создаются реальные гарантии свободы.

В Кыргызской Республике идея контроля конституционности всегда была тесно связана с конституционным развитием. Его установление в нынешней форме является результатом трехэтапной эволюции, проходившей с перерывами. Потерпев неудачу в первый раз, а затем, упустив вторую возможность, в конечном итоге орган конституционного контроля смог занять свое место в системе охраны и защиты конституционных прав и свобод граждан.

Конституционная палата Верховного суда Кыргызской Республики – нынешний орган конституционного контроля, наделена всеми атрибутами конституционного суда – судебного органа, наделенного конституционным статусом, специализирующегося нормоконтрольной деятельностью и независимого от системы общих судов. Возможно, наименование органа конституционного контроля нашей страны вводит вас в заблуждение, но его весьма необычное обозначение «Конституционная палата Верховного суда», на мой взгляд, было политическим консенсусом при вынесении на референдум и принятии новой редакции Конституции Кыргызской Республики в 2010 г.

Хотя объем судебной практики Конституционной палаты является небольшим, тем не менее, она внесла положительный вклад в то, чтобы сделать конституционный текст более наглядным, понятным и следовательно, более доступным как для нормотворческих, так и для правоприменительных органов.



Так, путем интерпретации конституционных положений, Конституционной палате удалось закрепить писанные конституционные ценности, основные идеи и гарантии господства права.

При проверке конституционности законов Конституционная палата исходит из необходимости создания законодательного механизма эффективной реализации конституционных прав граждан, укрепления гарантий защиты прав и свобод человека как высшей ценности и цели общества и государства. При этом Конституционная палата, как отмечалось выше, обращает внимание на необходимость развития конституционных ценностей при регулировании конкретных правоотношений, недопустимость непропорционального ограничения прав граждан на законодательном уровне, ориентирует на правильное понимание конституционно-правового смысла норм законов в законотворческом и правоприменительном процессах.

Вынося такие решения, Конституционная палата исходит из конституционных положений о правах и свободах человека и гражданина и необходимости выработки законодательного механизма, обеспечивающего полноту и недвусмысленность конституционно-правового регулирования, и при выявлении правовых пробелов, правовой неопределенности и коллизий отмечает о необходимости их устранения нормотворческими органами.

При этом Конституционная палата действует в пределах своего конституционного статуса, не подменяя законодателя или иной нормотворческий орган, но в некоторой мере выполняет функции «позитивного законодателя» с целью выработки действенных механизмов реализации конституционных прав и свобод граждан.

В практике Конституционной палаты отмечается, что права и свободы человека, с одной стороны, абсолютны, а с другой – Конституция допускает возможность их

определенного ограничения в интересах общего блага при безусловном соблюдении справедливого баланса между интересами личности и интересами общества и государства.

В случае, если законом вводятся ограничения в отношении некоторых прав и свобод граждан, оценивается их соответствие целям, принципам и нормам Конституции, а также соблюдение принципа пропорциональности.

Так, в своем решении от 29 октября 2013 года Конституционная палата обозначила, что любое ограничение должно преследовать конституционно значимые цели и должно быть продиктовано необходимостью защиты конституционно признаваемых ценностей. Далее, интерпретируя положение части 2 статьи 20 Конституции, Конституционная палата указала, что ограничения, не предусмотренные Конституцией и законами, не могут вводиться подзаконными нормативными правовыми актами.

Данная правовая позиция была развита в решении Конституционной палаты от 14 мая 2014 года, согласно которому ограничение прав и свобод человека и гражданина требует соблюдения строго установленных условий: ограничение должно быть представлено в строго определенной правовой форме – форме закона; ограничение может быть допустимо, только если оно служит определенным целям, указанным в части 2 статьи 20 Конституции Кыргызской Республики; ограничение допустимо только в той мере, в какой это необходимо для защиты названных ценностей или достижения обозначенных целей в Конституции.

В последующем другие решения Конституционной палаты были основаны именно на этих конституционно-доктринальных положениях, которые послужили неким путеводителем в обеспечении гарантированных Конституцией Кыргызской Республики прав и свобод граждан.

Уважаемые коллеги!



Прежде чем перейти к практике Конституционной палаты по защите права на свободу и личную неприкосновенность, хотелось бы обратить Ваше внимание на следующее.

В XVII в. классик юридической мысли Чезаре Беккариа писал: «Безопасность и свобода... вот что составляет основу благополучия».

Между тем существуют многочисленные проблемы, связанные с диалектикой безопасности жизни и свободы граждан.

Эти два феномена (явления) всегда были и остаются основными ценностями (доминантой) в человеческой цивилизации и затрагивали умы многочисленных философов, юристов, политиков, руководителей государства, как в древности, так и в современный период.

Политический деятель Бенджамин Франклин (1706–1790 гг.) имел противоположную точку зрения: «Те, кто готовы пожертвовать насущной свободой ради малой толики временной безопасности, не достойны ни свободы, ни безопасности».

Возможно, его утверждение и было правильным в то историческое время, которое не характеризовалось такими глобальными явлениями, как терроризм (в том числе ядерный), экстремизм и др. В преамбуле Всеобщей декларации прав человека, принятой резолюцией 217А (III) Генеральной Ассамблеи ООН от 10 декабря 1948 г., указывается, что основой свободы является признание достоинства, присущего членам человеческой семьи, и равных и неотъемлемых прав, в том числе права на безопасность.

Анализ чрезвычайных ситуаций, произошедших в последнее десятилетие, и их последствий позволяет сделать следующие выводы, касающиеся обозначенной проблемы:

1. В современных условиях, с появлением в XXI в. новых опасностей, угроз, рисков, нужен, как нам представляется, некий общественный договор, согласно которому человек жертвует частью своей свободы в обмен на безопасность.

2. Парадокс современной западной цивилизации заключается в том, что свобода и безопасность индивида все более становятся зависимыми от государства, давление последнего на индивида продолжает нарастать. Перед нами дилемма безопасности индивида и государства, когда разграничение частного и общественного становится затруднительным, что способствует легитимному «отвоеванию» государством плацдарма свободы у индивида. Однако речь не идет о полном отказе от свободы, поскольку отказ от свободы противоречит природе человека.

3. Понятия «свобода» и «безопасность» не взаимоисключающие, а взаимодополняющие, укрепляющие друг друга. Иными словами, свобода, безопасность, порядок – одно и то же с точки зрения защищенности. В 1748 г. Ш. Монтескье в труде «О духе законов» писал: «Безопасность – первая форма свободы». В современных условиях предлагается синтагма – безопасная свобода.

Но между понятиями «безопасность» и «свобода» есть и отличия:

- во-первых, считается, что свобода ближе к либералам. Их парадигма: «сначала нужна свобода, потом – все остальное». Безопасность, напротив, ближе государственнымникам;

- во-вторых, свобода – врожденное свойство человека, в то же время безопасность – это искусственный продукт человеческой деятельности;

- в-третьих, свобода разрешает, безопасность – запрещает;

- в-четвертых, безопасность и свобода – это всегда принуждение.

В связи с этим существует необходимость сбалансировать два потенциально конкурирующих явления или найти золотую середину между неограниченной свободой и гарантированной безопасностью.

Так, статья 20 Конституции, как было указано выше, устанавливает, что в Кыргызской Республике не должны приниматься законы, отменяющие или умаляющие права и свободы человека и гражданина.



Вместе с тем, часть 2 обозначенной статьи гласит, что права и свободы человека и гражданина могут быть ограничены Конституцией и законами в целях защиты:

- национальной безопасности;
- общественного порядка;
- охраны здоровья и нравственности населения;
- защиты прав и свобод других лиц.

Такие ограничения могут быть введены также с учетом особенностей военной или иной государственной службы. Вводимые ограничения должны быть соразмерными указанным целям.

При этом законом не могут устанавливаться ограничения прав и свобод в иных целях и в большей степени, чем это предусмотрено Конституцией. Запрещается также принятие подзаконных нормативных правовых актов, ограничивающих права и свободы человека и гражданина.

Уважаемые коллеги!

Рассмотрение дел в Конституционной палате обусловлено противоречиями в законодательстве, в том числе возникающими по объективным причинам, невозможностью во многих случаях правоприменителями однозначно определить, соответствуют ли нормативные правовые акты Конституции. Так, конституционные права и гарантии их обеспечения не всегда получают в текущем законодательстве необходимое развитие и реализацию на практике. Нередко нормативные правовые акты, принимаемые во исполнение положений Основного закона страны, не только не согласуются с содержанием его норм, но и выходят за пределы предмета допустимого регулирования.

В частности, в решении от 5 марта 2015 года Конституционная палата отметила, что Конституция Кыргызской Республики признает право на свободу и личную неприкосновенность основополагающим правом человека, которое, исходя из признания государством достоинства личности, предопределяет недопустимость

произвольного вмешательства в сферу ее автономии, создает условия как для всестороннего развития человека, так и для демократического устройства общества. Именно поэтому, предусматривая повышенный уровень гарантий права каждого на свободу и личную неприкосновенность, Конституция Кыргызской Республики допускает возможность ограничения данного права лишь в той мере, в какой это необходимо в определенных ею целях, и лишь в установленном законом порядке (часть 2 статьи 20, часть 1 статьи 24).

Между тем, Конституционная палата обратила внимание на то, что Конституция Кыргызской Республики, делегируя законодателю возможность ограничения прав и свобод человека и гражданина, обязует его разработать такой правовой механизм, который обеспечил бы соразмерный баланс интересов между правом каждого на свободу и личную неприкосновенность и обязанностью государства обеспечить посредством правосудия защиту общезначимых конституционных ценностей (статья 20).

При этом государство, исходя из общезначимых конституционных целей, вправе применять ограничения свободы и личной неприкосновенности в отношении лиц, привлекаемых к уголовной ответственности, в порядке, установленном уголовно-процессуальным законодательством, в виде мер пресечения.

При решении вопросов, связанных с содержанием под стражей в качестве меры пресечения, следует иметь в виду, что заключение под стражу является самой строгой мерой пресечения, состоящей в лишении свободы обвиняемого (подсудимого). Ее применение представляет собой самое острое вторжение в сферу прав граждан на свободу и личную неприкосновенность, гарантированных Конституцией Кыргызской Республики прав и свобод человека и гражданина (статья 24). Согласно статье 24 Конституции Кыргызской Республики мера пресечения в виде содержания под стражей допускается только по судебному решению.



Вместе с тем, заключение под стражу как отметила Конституционная палата, носит превентивный характер и может быть применено только к обвиняемому (подсудимому). Сущностью заключения под стражу как меры пресечения является то, что лицо лишается свободы до окончательного решения судом вопроса о его виновности. При этом основной целью становится пресечение возможности обвиняемого (подсудимого) скрыться от дознания, следствия и суда, затруднения в установлении истины по делу, обеспечение исполнения приговора суда.

Конституционная палата также указала, что применение к оправданному лицу такой меры пресечения, как заключение под стражу, при отпадении законных оснований с вынесением оправдательного приговора, является несоразмерным и неоправданным ограничением конституционного права на свободу и личную неприкосновенность. Поскольку оправдательный приговор, согласно части 2 статьи 316 Уголовно-процессуального кодекса Кыргызской Республики, означает признание подсудимого невиновным, суд тем самым констатирует, что обстоятельства, послужившие основаниями для избрания в качестве меры пресечения заключение под стражу, отпали.

В связи с чем, Конституционная палата в своем решении отметила, что оставление под стражей оправданного лица до вступления приговора в законную силу, существенно ограничивает конституционные права и свободы личности, причиняя им вред, возмещение которого в дальнейшем невозможно.

В свете изложенного, Конституционная палата пришла к выводу, что лишение или ограничение конституционного права на свободу и личную неприкосновенность гражданина, признанного невиновным по приговору суда, противоречит Конституции Кыргызской Республики.

Приведенные примеры как нельзя полно и всесторонне подтверждают важность и необходимость существования

самостоятельного органа конституционного контроля в Кыргызской Республике, показывают важную роль, которую играет Конституционная палата в надлежащем обеспечении конституционного права каждого на свободу и личную неприкосновенность, которая порой является единственной инстанцией, способной восстановить конституционные права человека и гражданина, нарушаемые, в том числе и судами общей юрисдикции при применении, соответственно, будучи неконституционных законов. Так, Конституция Кыргызской Республики гласит, что судебные акты, основанные на нормах законов, признанных неконституционными, пересматриваются судом в каждом конкретном случае по жалобам граждан, чьи права и свободы были затронуты (часть 10 статьи 97 Конституции).

Следует также отметить, что Конституция Кыргызской Республики предоставила право каждому оспорить конституционность закона и иного нормативного правового акта, если считает, что ими нарушаются права и свободы, признаваемые Конституцией. Если обратить внимание на практику Конституционной палаты, то можно заметить, что защита конституционных прав и свобод человека и гражданина выходит на первый план, как в количественном, так и в качественном отношениях. Дела по защите основных прав и свобод человека и гражданина в практике Конституционной палаты являются самой многочисленной из категорий дел, рассматриваемых ею при осуществлении своих судебных полномочий. Как показывает статистика, все большее количество граждан обращаются в Конституционную палату за защитой своих конституционных прав и свобод. Доля рассмотренных дел по обращениям граждан в общей практике Конституционной палаты превышает 95 процентов и из года в год увеличивается.

Таким образом, специальный конституционный контроль в Кыргызской Республике остается одним из эффективных средств защиты прав и свобод человека и гражданина,



поскольку, в результате конституционного судопроизводства судебную защиту получают не только лицо, обратившееся в орган конституционного правосудия, но и другие граждане, права которых нарушались или могли бы быть нарушены в будущем.

Благодарю за внимание.

***ПРАВА НА СВОБОДУ И
БЕЗОПАСНОСТЬ***

***Gülchehra HAKIMOVA
CONSTITUTIONAL COURT OF
TAJIKISTAN***

ПРАВА НА СВОБОДУ И БЕЗОПАСНОСТЬ

*Gulchehra HAKIMOVA**

Права на свободу и безопасность одна из важнейших ценностей мировой цивилизации. Свобода и безопасность – это неизменные спутники в жизни государства и общества, равно как и отдельно взятого человека. Пренебрежение к любому из них грозит нестабильностью. Государство мира должны обеспечить права на свободу и безопасность каждому живущему в мире просто в силу того, что он – человек. Они нужны для того, чтобы защитить и сохранить человеческую сущность каждого, чтобы обеспечить каждому человеку на Земле достойную жизнь.

Права на свободу и безопасность – очень сложное и многогранное понятие, ему трудно дать одно единственное определение и однозначное толкование.

Свобода человека прежде всего это самоопределение личности, возможность поступать в соответствии со своей волей без принуждения. . Свободы – это те же права. «каждый человек имеет право на свободы мысли, совести и религии» - признает один из важнейших международных документов Всеобщая декларация прав человека.

Всеобщая декларация прав человека ООН указывает, что: каждый человек имеет право на жизнь, на свободу и на личную неприкосновенность (ст. 3); никто не должен содержаться в рабстве или подневольном состоянии; рабство и работорговля запрещаются во всех их видах (ст. 4); никто не должен подвергаться пыткам или жестоким, бесчеловечным или унижающим его достоинство обращению и наказанию (ст. 5); каждый человек, где бы он ни находился, имеет право на признание его правосубъектности

* Specialist, Constitutional Court of Tajikistan.



(ст. 6); никто не может быть подвергнут произвольному аресту, задержанию или изгнанию (ст. 9); каждый человек для определения его прав и обязанностей и для установления обоснованности предъявляемого ему уголовного обвинения, имеет право, на основе полного равенства, на то, чтобы его дело было рассмотрено согласно и с соблюдением всех требований справедливости независимым и беспристрастным судом (ст. 10); каждый человек, обвиняемый в совершении преступления, имеет право считаться невиновным до тех пор, пока его виновность не будет установлена законным порядком путем гласного судебного разбирательства, при котором ему обеспечиваются все возможности для защиты (ст. 11).

Основные принципы права на свободу и безопасность человека нашли отражение в Конституции Республики Таджикистан и национальном законодательстве. Так согласно статье 5 Конституции Республики Таджикистан, человек, его права и свободы являются высшей ценностью. Жизнь, честь, достоинство и другие естественные права человека неприкосновенны. Права на свободу и безопасность человека и гражданина признаются, соблюдаются и защищаются государством. Выше указанная статья имеет особое значение, так как закрепляет идеи гуманизма, уважения чести и достоинства всех людей, обязанность государства признавать и защищать основные права и свободы. Кроме того, согласно статье 42 Конституции, на территории Таджикистана каждый обязан уважать права, свободы, честь и достоинство других людей.

Статья 17 Конституции Республики Таджикистан отразила принцип равноправия и запрет дискриминации. Согласно данной статье, все равны перед законом и судом. Государство гарантирует права и свободы каждого, независимо от его национальности, расы, пола, языка, вероисповедания, политических убеждений, образования, социального и имущественного положения.

В статье 14 Конституции закреплено положение о том, что права и свободы человека и гражданина осуществляются непосредственно, а их ограничения допускаются только с целью обеспечения прав и свобод других граждан, общественного порядка, защиты конституционного строя и территориальной целостности республики.

Многие базовые принципы прав человека нашли отражение в иных нормативных актах Республики Таджикистан. Например, в Статье 1 Семейного кодекса гласит «... Запрещаются любые формы ограничения прав граждан при вступлении в брак и в семейных отношениях по признакам социальной, расовой, национальной, языковой или религиозной принадлежности». Множество статей Уголовного кодекса также закрепляют принципы прав и свобод человека. Например, в статье 3 Уголовного кодекса прямо указано, что уголовный закон основывается на принципах законности, равенства перед законом, неотвратимости ответственности, справедливости, гуманизма, демократизма. А согласно статье 3 Гражданского кодекса, гражданское законодательство основывается на принципах неприкосновенности собственности, свободы договора, недопустимости произвольного вмешательства кого-либо в частные дела, необходимости беспрепятственного осуществления гражданских прав, обеспечения восстановления нарушенных гражданских прав, их судебной защиты.

Таким образом современное законодательство Республики Таджикистан закрепляет основные принципы прав и свобод человека.

Президент Республики Таджикистан в своем Послании Маджлиси Оли Республики Таджикистан 20 апреля 2011 года, касаясь прав и свобод человека в качестве общепризнанных ценностей, в частности, отметил: « Во всех развитых странах и в цивилизованном мире человек, его права и свободы составляют основополагающий критерий политики государства. Признание высшей ценности человека, его прав и свобод мировым сообществом служит доказательством данной истины»

Свобода изначально по отношению к безопасности первична. Потому, что безопасность- это продукт эмпириокритицизма, то есть познания, собственного опыта. Родившийся ребёнок абсолютно свободен, но чем больше он познаёт окружающий его мир, тем быстрее он усваивает для себя опасности, которые проистекают от его действий и окружающих его предметов.

Накопленные человечеством знания об опасностях, формируют на генном уровне осторожность, оформляющуюся затем в правила,



порядки и кодексы поведения. Каждый человек, в зависимости от своих интересов, устремлённостей определяет для себя не только цели, но и пределы допустимого. Ибо он понимает, что за границами допустимого начинается зона рисков и опасностей. В борьбе желаемого и допустимого и вырабатывается алгоритм поведения, при котором делается выбор: добиться быстро желаемого, рискуя потерять всё, либо постепенно без риска и конфликта осуществить задуманное. Большинство выбирает второй путь. Но, путает всё большее число желающих достичь задуманного, игнорируя опасности, а вместе с ними чужие права, свободы, интересы.

«Безопасность и свобода... вот что составляет основу благополучия» Существуют многочисленные проблемы, связанные с диалектикой безопасности жизни и свободы человека.

Эти два феномена (явления) всегда были и остаются основными ценностями человеческой цивилизации и очевидно, что это взаимосвязанные цели. Любое общество стремится быть защищенным, хочет жить в безопасности, даже ценой частичной потери определенной свободы.

В преамбуле Всеобщей декларации прав человека, принятой резолюцией 217А (III) Генеральной Ассамблеи ООН от 10 декабря 1948 г., указывается, что основой свободы является признание достоинства, присущего членам человеческой семьи, и равных и неотъемлемых прав, в том числе права на безопасность [7].

Понятия «свобода» и «безопасность» не взаимоисключающие, а взаимодополняющие, укрепляющие друг друга. Иными словами, свобода, безопасность, порядок – одно и то же с точки зрения защищенности

Концепты «безопасность» и «свобода» становятся в последнее время популярными и неисчерпаемыми. Это социально-правовые явления, неопределенные и сложные, диалектически связанные между собой. Достаточно обратиться Конституции Республики Таджикистан, где указано, что право на безопасность (право на жизнь – основное право человека) и свободы являются высшей ценностью, и они должны быть защищены.

Но между понятиями «безопасность» и «свобода» есть и отличия:



– во-первых, считается, что свобода ближе к либералам. Их парадигма: «сначала нужна свобода, потом – все остальное». Безопасность, напротив, ближе государственнымникам;

– во-вторых, свобода – врожденное свойство человека, в то же время безопасность – это искусственный продукт человеческой деятельности;

– в-третьих, свобода разрешает, безопасность – запрещает;

– в-четвертых, безопасность и свобода – это всегда принуждение.

В связи с этим существует необходимость сбалансировать два потенциально конкурирующих явления или найти золотую середину между неограниченной свободой и гарантированной безопасностью.

В то же время у этих явлений имеются и общие свойства, черты, закономерности. Попытаемся их обозначить в виде следующих:

– человечество во все времена стремилось к безопасности и свободе. Другими словами, к безопасной и свободной жизни. Это базисные человеческие экзистенциальные потребности, защита которых – обязанность государства. Отсюда идея – формирование безопасной и свободной жизни.

– безопасность и свобода должны быть защищены от преступных посягательств;

– безопасность и свобода – основа человеческого развития, а также общества и государства. Они взаимосвязаны и укрепляют друг друга. Набор конституционных свобод имеет свой смысл и легитимность только как часть системы безопасности.

– разумные и справедливые законы одинаково нужны как для обеспечения безопасности, так и для свободы. Иными словами, безопасность и свобода возможны только в рамках известных, зафиксированных в нормах правил (законов);

– безопасность и свобода неотделимы от ответственности. Свобода всегда рождает риск, опасность, а также ответственность. В свободном обществе не может быть коллективной ответственности, ибо это означает безответственность;



– человек должен быть свободен от опасностей, тогда он безопасен;

– проблема безопасности и свободы традиционно сводится к вопросу абсолютности того и другого. Мы утверждаем, что нет абсолютной свободы, как нет и абсолютной безопасности. И то и другое конкретно и относительно.

В слово «свобода», в самом общем смысле, означает отсутствие ограничений и принуждения, а соотнесенное с идеей воли – возможность поступать, как самому хочется. В этом случае это абсолютная (большая) свобода. Согласимся, что это недостижимый для человека идеал. Уже изначальное представление о свободе общественного человека соотнесено, как уже отмечалось, с законом и ответственностью за его соблюдение и наказанием за его нарушение. Свобода состоит в возможности делать все, что не наносит вреда другому. Таким образом, свобода – это благо. В праве свобода – это закрепленная в Конституции или ином законодательном акте возможность определенного поведения человека. Например, свобода слова, свобода труда, свобода передвижения, свобода собраний и т. д.

В реальной жизни свобода не может быть абсолютной, ничем не связанной и ничем не ограниченной. В.И. Ленин писал: «Жить в обществе и быть свободным от общества нельзя». Абсолютная (заоблачная) свобода означает полное отсутствие связей.

В таком случае возникает вопрос, а нужна ли нам абсолютная свобода? Скорее всего, нет. Это утопия, иллюзия.

Абсолютная свобода ограничивается правами и свободами других членов общества. Она ограничена нравственными отношениями, высшим осознанием законов. Помнению П. Гольбаха, «...подчиняться лишь справедливым законам – это и означает пользоваться самой полной свободой, какой только может пожелать гражданин» Как уже отмечалось, эти явления непосредственно связаны с государством. Через запреты, ограничения государство обеспечивает безопасность и ограничивает свободу граждан. При этом у них есть право выбора. Иными словами, человек благодаря разуму имеет свободу выбора между добром и злом, справедливостью, отклоняясь от зла и склоняясь к добру.

В теории безопасности практически у всех сложилось единое мнение: «абсолютная безопасность» – недостижима. Другая мысль: «Любая погоня за Абсолютом опасна и разрушительна – в первую очередь для тех, кто надеется обеспечить эту самую абсолютную безопасность». Террориста-смертника остановить невозможно. Безопасность в максимальном виде достижима с определенной условностью. Это касается отдельного бункера с усиленной фильтрацией воздуха, водой и едой (на определенное время). Или если хотите полной безопасности – можете сходить в тюрьму. Заключение покормлены, одеты, получают медицинскую помощь и т. д. В колонии строгого режима заключенные в полной безопасности с этой точки зрения. Единственная плата за эту максимальную безопасность – потеря свободы.

И тем не менее при форс-мажорных обстоятельствах, которых в исправительной системе предостаточно, можно потерять и жизнь, даже в абсолютных условиях содержания.

Иногда свободу отождествляют с хаосом, анархией. Надо понимать, что свобода заключается не в хаосе, а в порядке. Порядок – это правила поведения, сложившиеся или установленные где-либо (в нашем случае – в обществе). В гражданском обществе человек обязан соблюдать общественный порядок, основанный на правовых, юридических нормах. Соблюдение общественного порядка приводит к безопасности. Вновь мы видим проникновение, взаимовлияние категорий свободы и безопасности. Иными словами, речь идет о безопасной свободе.

На глобальном уровне противоречия между свободой и безопасностью вообще приобретают катастрофический характер. Свобода передвижения, которая рассматривалась в качестве важнейшего права, а значит свободы, человека, совсем недавно обернулась своей другой стороной. Миллион беженцев с Ближнего Востока и Северной Африки, по каналам не контролируемой эмиграции в благополучную Европу поверг в ужас Европу, породил политический кризис в Евросоюзе, и ослабил безопасность стран, в него входящих. А, ведь, с точки зрения статистики, ничего выходящего за пределы допустимого не произошло. Были времена, когда в Европу в год приезжало в десятки и даже сотни раз больше



туристов. Только в Греции ежегодно отдыхает до 10 млн. человек. Но оказывается, с точки зрения свободы и безопасности разница между туристами и беженцами огромного размера. Одно дело принять на определённых условиях, за плату обеспеченного и законопослушного туриста и совсем другое дело голодный, неустроенный беженец с семьёй, маленькими детьми, без гроша в кармане, о котором известно только то, что он сам о себе рассказал.

Оно и понятно. Современное общество, пожалуй, ничего не знает о том, что путь к свободе и толерантности был тернист. Он устлан трупами тех, кто сопротивлялся свободе и тех, кто боролся за её установление. И когда надо делать выбор между свободой и безопасностью, европеец делает его в пользу последнего. И это вполне оправдано не только для европейца, но и для любого разумного человека. Если принять за аксиому утверждение, что главная свобода – это право на жизнь, а без неё все остальные свободы лишены смысла и ценности, то зависимость свобод от безопасности очевидна и бесспорна. В определённой интерпретации можно и нужно говорить о безопасности, как о необходимом условии и инструменте безопасности. Свобода в любых её проявлениях продукт дорогостоящий. Бесплатной свободы не бывает. Она оплачивается собственным трудом, ограничениями других или насилием над другими. И эта страдающая часть человечества будет постоянно думать над тем, как, какими средствами и способами избавиться от несвободы и её носителей.

Нельзя противопоставлять свободу и безопасность. Одинаково плохо и безопасность против свобод и свободы в ущерб безопасности. Они должны дополнять друг – друга: **Свобода и Безопасность**. Наша единая, общая и неразрывная человеческая цивилизация должна найти такое решение, которое позволит ей пройти к своему светлому будущему

CLOSING SPEECH OF THE SIXTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Greetings to all participants!

This is the last day of the 6th Summer School organised on behalf of the Association of Asian Constitutional Courts and Equivalent Institutions. We will, now, proceed to the social program. I hope that you are satisfied with the works, lectures and presentations done here. These kind of meetings give us, who work in the field of constitutional justice and human rights, the opportunity to gather, to cooperate, share and understand each other. The Turkish Constitutional Court gives utmost importance to the organisation of such events. I hope that these series of events will turn into a global one in the future by hosting more and more participants. We take great pride in organising such events.

All good things come to an end as it is the case with this summer school. Hopefully, this event will lead to further and greater cooperation and collaboration between our colleagues and our institutions. I would like to thank you very much for your participation and hard work.

Thank you very much.

Engin YILDIRIM
Deputy-President of the Constitutional Court
of the Republic of Turkey

6th SUMMER SCHOOL OF THE AACC
16-22 SEPTEMBER 2018
LIST OF PARTICIPANTS

Executive Committee:

CONSTITUTIONAL COURT OF TURKEY	
Name-Surname	Title
Mr. Selim Erdem	Secretary General
Ms. Ayşegül Atalay	Vice Secretary General
Dr. Mücahit Aydın	Rapporteur (Moderator)
Mr. Mustafa Kadir Atasoy	Director of International Relations
Ms. Özlem Talaslı Aydın	Translator-Interpreter
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Ms. Enise Özdemir	Translator-Interpreter
Ms. Özge Elikalfa	Translator-Interpreter
Ms. Safiye Bal Kuzucu	Translator-Interpreter
Mr. Mehmet Akif Eren	Officer

Lecturers:

Name-Surname	Title
Prof. Dr. Engin Yıldırım	Deputy President of the Constitutional Court of Turkey
Mr. Hasan Tahsin Gökcan	Member Judge of the Constitutional Court of Turkey
Mr. Mahmut Can Şenyurt	Jurist at the European Court of Human Rights
Assoc. Prof. Dr. Güneş Okuyucu Ergün	Faculty Member, Faculty of Law, Ankara University
Prof. Dr. İzzet Özgenç	Faculty Member, Faculty of Law, Hacı Bayram Veli University



Participants:

Name-Surname	Participants
1. Ermal Tauzi 2. Kaliona Nushi	Constitutional Court Of Albania
1. Faig Ahmadov 2. Fidan Khudiyeva 3. Arzu Aliyeva	Constitutional Court Of Azerbaijan
1. Viktoria Viktorova Mingova	Constitutional Court of Bulgaria
1. Fajar Laksono 2. Haifa Arief Lubis 3. Budi Hari Wibowo 4. Muchtar Hadi Saputra	Constitutional Court of Indonesia
1. Fawaz F. Sayma 2. Ahmed M. Hannoon	Supreme Constitutional Court of Palestine
1. Slavko Glavatović 2. Milan Yukčević	Constitutional Court of Montenegro
1. Manon Badaliyev 2. Natalya Kress	Constitutional Council of Kazakhstan
1. Elnura Musaeva	Constitutional Chamber of Supreme Court of The Kyrgyz Republic
1. Geonseok Lee 2. Chanju Lee 3. Kyung min Yoo	Constitutional Court of Korea
1. Venera Kabashi 2. Arbana Beqiri Plakolli	Constitutional Court of Kosovo
1. Musa Avcioglu 2. Banu Soyer	Supreme Court of The Turkish Republic of Northern Cyprus
1. Aizatul Akmal Bin Maharani 2. Low Wen Zhen	Federal Court of Malaysia
1. Nilufar Saidova 2. Gulchehra Hakimova	Constitutional Court of Tajikistan
1. Sirawat Lipipant 2. Onuma Kanchiang	Constitutional Court of Thailand



1. Olga Shmygova 2. Volodymyr Kapustin	Constitutional Court of Ukraine
1. Davit Golijashvili 2. Tornike Obolashvili	Constitutional Court of Georgia
1. Munkhzul Orkhon 2. Davaadalai Galbaabadraa	Constitutional Court of Mongolia
1. Dr. Mücahit Aydın (Moderator) 2. Dr. Hüseyin Turan 3. Dr. Taylan Barın 4. Yusuf Enes Kaya	Constitutional Court of the Republic of Turkey

**PHOTOGRAPHS FROM
THE SUMMER SCHOOL**



Prof. Dr. Zühtü ARSLAN, President of the Turkish Constitutional Court



Opening Ceremony, Grand Tribunal Hall of the Turkish Constitutional Court



*Delegation of the Supreme Court of Turkish Republic of Northern Cyprus
Grand Tribunal Hall of the Turkish Constitutional Court*



Delegation of the Federal Court of Malaysia, Grand Tribunal Hall of the Turkish Constitutional Court



Reception Hall of the Turkish Constitutional Court



Delegation of the Constitutional Court of Indonesia, Reception Hall of the Turkish Constitutional Court



Opening Session, Conference Hall



Opening Session, Conference Hall



Hasan Tahsin Gökcan, Member Judge of the Turkish Constitutional Court



Prof. Dr. Izzet Özgenç, Faculty of Law of Hacı Bayram Veli University



Mahmut Can Şenyurt, Legal Expert of the European Court of Human Rights



Kaliona Nushi and Ermal Tauzi, Constitutional Court of Albania



Fidan Khudiyeva, Faig Ahmadov and Arzu Aliyeva, Constitutional Court of Azerbaijan



Viktoria Viktorova Mingova, Constitutional Court of Bulgaria



Fawaz Sayemeh and Ahmed Hannoon, Supreme Constitutional Court of Palestine



Munkhzul Orkhon, Constitutional Court of Mongolia



Second Session, Conference Hall



Dr. Hüseyin Turan, Rapporteur Judge of the Turkish Constitutional Court



Assoc. Prof. Dr. Güneş Okuyucu Ergün, Faculty of Law of Ankara University



Muchtar Hadi Saputra, Haifa Arief Lubis, Fajar Laksono and Budi Hari Wibowo, Constitutional Court of Indonesia



Natalya Kress and Manon Badaliyev, Constitutional Council of Kazakhstan



Yusuf Enes Kaya, Assistant Rapporteur Judge of the Turkish Constitutional Court



Milan Vukčević and Slavko Glavatović, Constitutional Court of Montenegro



Elnura Musaeva, Constitutional Chamber of Supreme Court of Kyrgyzstan



Kyung Min Yoo, Geonseok Lee and Chanju Lee, Constitutional Court of Korea



Low Wen Zhen, Federal Court of Malaysia



Onuma Kanchiang and Sirawat Lipipant, Constitutional Court of Thailand



Tornike Obolashvili and Davit Golijashvili, Constitutional Court of Georgia



Dr. Taylan Barın, Rapporteur Judge of the Turkish Constitutional Court



Musa Avcioğlu and Banu Soyer, Supreme Court of Turkish Republic of Northern Cyprus



Venera Kabashi and Arbana Begri Plakolli, Constitutional Court of Kosovo



Nilufar Saidova and Gülchehra Hakimova, Constitutional Court of Tajikistan



Volodymyr Kapustin and Olga Shmygova, Constitutional Court of Ukraine



Prof. Dr. Engin Yıldırım, Deputy President of the Turkish Constitutional Court



*Selim Erdem, Secretary General of the Turkish Constitutional Court and
Aizatul Akmal Bin Maharani, Federal Court of Malaysia*



Prof. Dr. Engin Yıldırım, Deputy President of the Turkish Constitutional Court and the Delegation of Supreme Constitutional Court of Palestine



Family Photo from the Social Program, Mausoleum of Atatürk



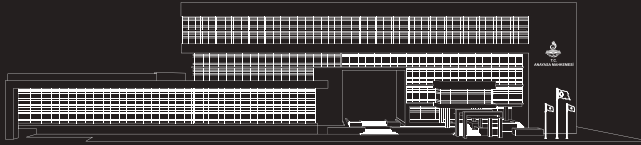
Closing Session of the 6th Summer School, Conference Hall



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6TH SUMMER SCHOOL OF THE ASSOCIATION OF
ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS



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